APPENDIX

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13443

D.C. Docket No. 1:11-cr-20279-RNS-4

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ISAAC FELDMAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(July 30, 2019)

Before WILLIAM PRYOR, NEWSOM, and BRANCH, Circuit Judges.

WILLIAM PRYOR, Circuit Judge:

This appeal requires us to decide several issues—including an issue of first impression in this Circuit about the Double Jeopardy Clause of the Fifth Amendment—arising from Isaac Feldman's convictions and sentence for

conspiracy to commit wire fraud and conspiracy to commit money laundering. Feldman invested in two Miami Beach nightclubs that hired foreign women to pose as tourists, attract patrons, and persuade them to buy drinks without paying attention to the clubs' exorbitant prices. A grand jury returned an indictment against Feldman and alleged co-conspirators alleging that the nightclubs' activities included regular acts of wire fraud. After a jury convicted the defendants of some counts but acquitted them of others, we reversed their convictions. *See United States v. Takhalov*, 827 F.3d 1307 (11th Cir.), *modified on denial of reh'g*, 838 F.3d 1168 (11th Cir. 2016). After a retrial, a second jury found Feldman guilty of conspiracy to commit wire fraud and conspiracy to commit money laundering. The district court sentenced him to 100 months of imprisonment. Feldman contends that his retrial on an alternate theory of the money-laundering-conspiracy charge—for which the first jury verdict was silent—violated his double-jeopardy rights, that the evidence is insufficient to support his convictions, that the indictment's wire-fraud-conspiracy charge was constructively amended, that literary allusions by prosecutors deprived him of a fair trial, and that his sentence is procedurally and substantively unreasonable. We disagree on each point, and we affirm his convictions and sentence.

I. BACKGROUND

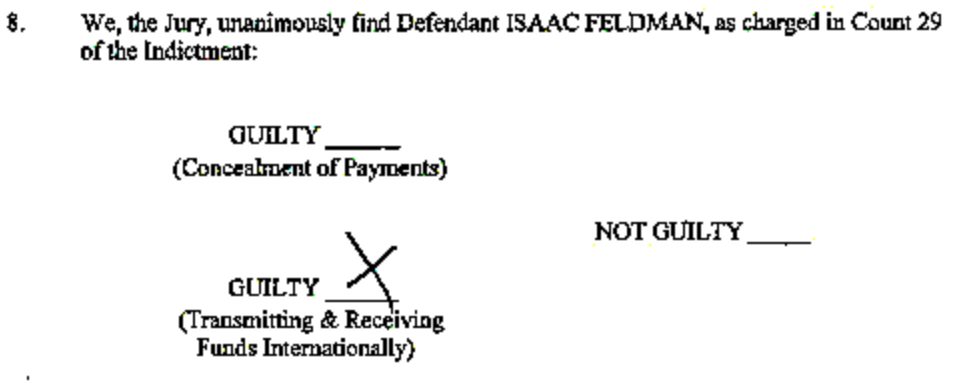
A grand jury indicted Isaac Feldman and several alleged co-conspirators for one count of conspiracy to commit wire fraud, 18 U.S.C. §§ 1343, 1349; one count of conspiracy to commit money laundering, *id.* § 1956(h), both by means of financial transactions to conceal the nature and source of illegal proceeds, *id.* § 1956(a)(1)(B)(i), and by the international transmission of funds to promote unlawful activity, *id.* § 1956(a)(2)(A); and several counts of wire fraud, *id.* § 1343. The charges stemmed from the defendants' involvement in a ring of Miami Beach nightclubs at which customers were parted from their money. The ringleader of the alleged conspiracy was Russian businessman and con artist Alec Simchuk, who became a cooperating witness for the government. Feldman, a Miami Beach–area resident and Russian-speaking naturalized citizen, invested in two clubs with Simchuk, Stars Lounge and VIP Diamond Club.

The clubs operated on a business model that Simchuk had developed in Eastern Europe. The basic hustle was for so-called "B-girls," young women from Eastern Europe who worked for the clubs, to pose as partygoing tourists, trawl Miami Beach for eligible patrons—the ideal targets were well-dressed single men using high-value credit cards—and lure them back to the clubs, where they would be led to spend exorbitant sums on drinks for themselves and the B-girls. The indictment charged a panoply of deceptive or underhanded tactics that the B-girls

and bartenders used to increase the customers' bills and to keep them unaware of the charges they were incurring: for example, hiding menus, ordering drinks without the customers' knowledge, ignoring customers' inquiries about prices, lying about prices, hiding the amount on a receipt when requesting a customer's signature, forging customers' signatures, encouraging customers to drink themselves into a stupor, and serving the B-girls shot glasses filled with water when the customers thought they were ordering vodka shots.

Feldman and several alleged co-conspirators pleaded not guilty, and after a joint trial, a jury found Feldman guilty of conspiracy to commit wire fraud. But the jury found Feldman not guilty of the individual counts of wire fraud with which he was charged. The jury also found Feldman guilty of conspiracy to commit money laundering by the international transmission of funds to promote unlawful activity, 18 U.S.C. § 1956(a)(2)(A), but it expressed no finding about conspiracy to commit money laundering by financial transactions to conceal the nature and source of illegal proceeds, *id.* § 1956(a)(1)(B)(i).

The verdict form provided the jury three options with regard to the money-laundering-conspiracy count: "Guilty (Concealment of Payments)," "Guilty (Transmitting & Receiving Funds Internationally)," and "Not Guilty," arranged as follows:



8. We, the Jury, unanimously find Defendant ISAAC FELDMAN, as charged in Count 29 of the Indictment:

GUILTY _____
(Concealment of Payments)

NOT GUILTY _____

GUILTY X
(Transmitting & Receiving Funds Internationally)

The district court instructed the jury that it could find Feldman guilty under either or both theories, but it had to agree unanimously about any theory it selected. The jury found Feldman guilty of conspiracy to commit money laundering by international transactions and made no other mark, as the image above reflects.

The district court sentenced Feldman to 100 months of imprisonment, which exceeded Feldman's advisory guideline range. The district court determined that an upward variance was warranted based in large part on its finding that Feldman had committed perjury when he testified in his defense.

We reversed Feldman's convictions on the ground that the district court erred when it failed to give a jury instruction requested by the defendants. *See Takhalov*, 827 F.3d at 1312–24. The requested instruction would have informed the jury that the B-girls' concealment of their employment relationship with the clubs was not sufficient to establish fraud. *See id.* at 1311. We held that the district court should have given the requested instruction because it correctly stated the

law, dealt with an important matter raised at the trial, and was not substantially covered by the other instructions. *See id.* at 1315–20. And we held that its denial was not harmless beyond a reasonable doubt because the government had argued that the B-girls' dissembling their employment status was in and of itself an act of fraud, and the jury reasonably could have found that the defendants lacked any other fraudulent intent. *See id.* at 1322–25.

The government redacted the indictment to charge Feldman individually with the wire-fraud and money-laundering conspiracy counts of which the first jury had found him guilty. Feldman again pleaded not guilty, and he proceeded to an individual trial.

At the second trial, the gist of the government's case was that Feldman was an involved investor with significant managerial authority over the clubs' activities and finances. Simchuk, the most important government witness, testified about the clubs' business model, the manner in which the B-girls and bartenders fleeced customers out of their money, and Feldman's knowing participation in the scheme. Several B-girls testified about incidents in the clubs and the extent of their interactions with Feldman. And the government presented evidence that Feldman helped manage the clubs' finances through his sister, Alex Burrlader, and his accountant, Kim Marks. Burrlader, who worked as Feldman's bookkeeper, was a signatory of the Stars Lounge bank account and kept records of the clubs' finances

in her office at Feldman's realty company, including records of "chargebacks," or payments that credit-card companies rescinded after their customers complained that the nightclubs had billed them for unauthorized charges. Marks testified that he had set up a limited-liability company, Ieva Marketing LLC, in the name of B-girl Ieva Koncilo at either Feldman's or Burrlader's request; Simchuk testified that Feldman had managed the creation of the company and that its purpose was to funnel cash payments to the B-girls without having to pay taxes on their earnings.

Feldman did not testify in his own defense as he had at the first trial. He presented a short character-based defense by calling two business associates and his rabbi to testify that he was a naïve and trusting person who would not willingly have joined a fraudulent scheme. Apart from their testimony, Feldman's defense strategy was to try to establish on cross-examination of the government's witnesses that Feldman had no knowledge of any fraud that took place in the nightclubs and that Simchuk's testimony to the contrary was unreliable.

On two occasions, prosecutors made references to the Charles Dickens novel *Oliver Twist* and, in particular, the character Fagin, a street criminal who inducted the title character into his band of juvenile pickpockets. During jury selection, the government used Fagin and the children as an example when it asked prospective jurors whether they understood that the ringleader of a conspiracy is guilty of a crime even if he does not personally steal from the targets and whether they would

be unwilling to credit a co-conspirator's testimony because he was also a criminal. The government returned to the image of Fagin during its rebuttal closing argument:

> I will end with the story of where we began with my colleague . . . . He talked about the story of *Oliver Twist* and how the older man, Fag[i]n, would send out his little orphans onto the street to pick people's pockets. Those guys—Fag[i]n wasn't there on the streets picking their pockets. Oleg Simchuk, Isaac Feldman, weren't there when these credit cards were being processed. But did they know it? Did they benefit from it? Absolutely.

Because much of the evidence at the second trial concerned the B-girls' efforts to induce customers to drink to excess, the district court's instructions to the jury included the following paragraph to distinguish between fraudulent and innocent conduct:

> The law does not excuse a patron from his obligation to pay for beverages or goods just because he became intoxicated voluntarily. Even if the establishment uses attractive women to encourage a patron to purchase and consume increasing amounts of alcoholic beverages, the patron is not a victim of fraud when he becomes intoxicated voluntarily and later regrets the purchases. *But if the establishment forces the patron to consume the alcoholic beverage, or adulterates the beverage, or allows or encourages the patron to become intoxicated with the intent to charge his credit card for purchases he either is unaware of or is too intoxicated to consent to, then such conduct may constitute fraud* [emphasis added].

This instruction was written in part by Feldman's attorney and in part by the district court. At the charge conference, Feldman's counsel asked the district court to give the first part of the instruction. The district court agreed to do so but *sua*

sponte proposed adding the emphasized sentence. Feldman's counsel asked the district court to read the sentence again, the district court did so, and Feldman's attorney said, "All right. I have been overruled by my esteemed colleagues at the defense table and that's fine."

The jury found Feldman guilty of both conspiracy counts, including both money-laundering objects. Using the 2016 edition of the United States Sentencing Guidelines, the district court calculated that Feldman's advisory guideline range was 46 to 57 months of imprisonment based on a total offense level of 23 and a criminal-history category of I. The district court's calculations included an eight-level enhancement based on a loss amount greater than $95,000 but not greater than $150,000, *see* United States Sentencing Guidelines Manual § 2B1.1(b)(1)(E) (Nov. 2016); a two-level enhancement based on a finding that the fraud involved ten or more victims, *see id.* § 2B1.1(b)(2)(A)(i); a two-level obstruction-of-justice enhancement based on the finding that Feldman committed perjury when he testified at the first trial, *see id.* § 3C1.1; and a two-level enhancement for "sophisticated" money laundering based on the use of Ieva Marketing as a shell entity, *see id.* § 2S1.1(b)(3).

Despite Feldman's lower advisory guideline range, the district court again sentenced Feldman to 100 months of imprisonment. The district court explained its view that "a very significant sentence [was] appropriate in light of the scope of this

conspiracy, the significant harm that this crime caused to [the] community and the customers and [the local] tourist industry." It also explained its continued belief that Feldman had committed perjury when he testified at the trial, and it remarked that Feldman "ha[d]n't shown any remorse."

II. STANDARD OF REVIEW

Three standards govern our review of this appeal. First, we review *de novo* an alleged violation of the Double Jeopardy Clause, *United States v. Strickland*, 261 F.3d 1271, 1273 (11th Cir. 2001); the sufficiency of the evidence, *United States v. Calhoon*, 97 F.3d 518, 523 (11th Cir. 1996); an alleged constructive amendment of the indictment, *United States v. Sanders*, 668 F.3d 1298, 1309 n.9 (11th Cir. 2012); and allegations of prosecutorial misconduct, *United States v. Noriega*, 117 F.3d 1206, 1218 (11th Cir. 1997).

Second, we review alleged errors to which no objection was made at trial only for plain error. *See United States v. Gonzalez*, 834 F.3d 1206, 1217 (11th Cir. 2016). "To establish plain error, 'there must be an error that has not been intentionally relinquished or abandoned'; 'the error must be plain—that is to say, clear or obvious'; and 'the error must have affected the defendant's substantial rights,'" which ordinarily requires "'a reasonable probability that, but for the error, the outcome of the proceeding would have been different.'" *United States v. Corbett*, 921 F.3d 1032, 1037 (11th Cir. 2019) (alteration adopted) (quoting

Molina-Martinez v. United States, 136 S. Ct. 1338, 1343 (2016)). "If these conditions are met, we 'should exercise our discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Id.* (alterations adopted) (quoting *Molina-Martinez*, 136 S. Ct. at 1343).

Third, "[w]e review the reasonableness of a sentence for abuse of discretion using a two-step process." *United States v. Cubero*, 754 F.3d 888, 892 (11th Cir. 2014) (quoting *United States v. Turner*, 626 F.3d 566, 573 (11th Cir. 2010)). In the first step, "we look at whether the district court committed any significant procedural error, such as miscalculating the advisory guidelines range, treating the guidelines as mandatory, failing to consider the 18 U.S.C. § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." *Id.* In the second step, "we examine whether the sentence is substantively unreasonable under the totality of the circumstances and in light of the § 3553(a) factors." *Id.* We review the district court's legal interpretation of the Sentencing Guidelines *de novo*. *Id.*

III. DISCUSSION

We divide our discussion in five parts. First, we reject Feldman's argument that double jeopardy barred the concealment-based theory of conspiracy to commit money laundering. Second, we explain that the evidence is sufficient to support

Feldman's convictions. Third, we explain that the wire-fraud-conspiracy count of the indictment was not constructively amended. Fourth, we reject Feldman's argument that the allusions by prosecutors to the character of Fagin from *Oliver Twist* deprived him of due process. Fifth, we explain that Feldman's 100-month sentence is procedurally and substantively reasonable.

A. Double Jeopardy Did Not Bar the Concealment-Based Money-Laundering Theory.

Feldman contends that he was twice put in jeopardy for conspiracy to commit concealment money laundering because the jury at his first trial did not find that he was guilty under that theory of the money-laundering-conspiracy charge. The Double Jeopardy Clause of the Fifth Amendment guarantees that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. "[B]y its terms," the protection of the clause "applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson v. United States*, 468 U.S. 317, 325 (1984).

We have held that when a single count charges two different theories of the offense, a jury's finding that the defendant is not guilty under one theory does not bar retrial under the other theory if the jury fails to reach a verdict about the alternative theory and a mistrial results. *See United States v. Rivera*, 77 F.3d 1348, 1350–52 (11th Cir. 1996). But Feldman's first jury did not find him not guilty of conspiracy to commit concealment money laundering. Instead, it found him guilty

of conspiracy to commit money laundering by international transactions, and it expressed no finding at all about the concealment theory. So *Rivera* does not squarely control this appeal.

Feldman's argument resembles the objection made in *Green v. United States*, 355 U.S. 184 (1957). Green was charged with one count of first-degree felony murder, and the trial court instructed the jury that it could convict him of second-degree malice murder as a lesser included offense. *See id.* at 185–86. The jury found Green guilty of second-degree murder, but its verdict was "silent" with respect to the first-degree charge. *Id.* at 186. After his second-degree-murder conviction was reversed based on the insufficiency of the evidence, he was retried under the original indictment and convicted of first-degree felony murder. *See id.* Green argued that his conviction violated the Double Jeopardy Clause.

The Supreme Court held that Green's retrial on the first-degree charge violated the prohibition against double jeopardy in two ways. *See id.* at 190; *see also Price v. Georgia*, 398 U.S. 323, 328–29 (1970) (discussing *Green*'s two independent rationales). First, the Court held that it could be "assum[ed]" that the first jury had impliedly "acquitted Green of murder in the first degree" because it had convicted him of the second-degree charge instead. *Green*, 355 U.S. at 190–91. Second, the Court held that "the result . . . need not rest alone on th[at]

assumption" because "the jury was dismissed without returning any express verdict on [the first-degree murder] charge and without Green's consent." *Id.* at 190–91.

Despite a superficial resemblance between this appeal and *Green*—namely, that Feldman was found guilty of only one part of a complex count by a jury that remained silent about another part and was later dismissed—a closer examination reveals that neither of its holdings applies to Feldman. The original jury did not impliedly acquit Feldman of any offense when it found him guilty of the only crime charged in the relevant count, conspiracy to commit money laundering, under one of two possible theories of liability. Nor did the dismissal of Feldman's jury before it had "return[ed] any express verdict" on the concealment theory, *id.*, terminate his jeopardy for any offense because Feldman impliedly consented to the jury's dismissal.

The implied-acquittal reasoning that underlies the first holding of *Green* is subject to two conditions not satisfied in this appeal. First, the Court explained that it is "vital" that the two crimes be "distinct and different offense[s]," *id.* at 194 n.14, and we join the many federal and state courts that have declined to infer a partial acquittal "[w]hen a defendant is convicted based on one of two [or more] alternative means of committing a *single* crime," *State v. Ben*, 2015-NMCA-118, ¶ 12, 362 P.3d 180, 183 (emphasis added) (collecting decisions); *see also, e.g.*, *United States ex rel. Jackson v. Follette*, 462 F.2d 1041, 1045–50 (2d Cir. 1972);

State v. Kent, 678 S.E.2d 26, 33 (W. Va. 2009); *State v. Pexa*, 574 N.W.2d 344, 347 (Iowa 1998). Second, we also agree with the courts that "have refused to imply an acquittal unless a conviction of one crime logically excludes guilt of another crime." *Commonwealth v. Carlino*, 865 N.E.2d 767, 774 (Mass. 2007); *see also, e.g.*, *United States v. Ham*, 58 F.3d 78, 85–86 (4th Cir. 1995); *Kennedy v. Washington*, 986 F.2d 1129, 1134 (7th Cir. 1993); *State v. Terwilliger*, 104 A.3d 638, 668 (Conn. 2014); *State v. Torrez*, 2013-NMSC-034, 305 P.3d 944, 948. This limiting principle follows from the very concept of an *implied* acquittal; if a defendant's conviction for one offense is equally consistent with both guilt and innocence of another, then it cannot accurately be said to "imply" anything. The Supreme Court agreed with this logic in *Cichos v. Indiana*, 385 U.S. 76 (1966), which dismissed the writ of certiorari as improvidently granted and quoted approvingly the opinion of the Supreme Court of Indiana that "the principle which states silence is equal to an acquittal" was "inappropriate" when a guilty verdict on one charge did not "logically exclude" a guilty verdict on another charge. *Id.* at 80 (quoting *Cichos v. State*, 208 N.E.2d 685, 688–69 (Ind. 1965)).

Feldman's retrial did not violate the first holding of *Green* because the indictment did not charge Feldman with two distinct money-laundering-conspiracies. It instead charged him with a *single* conspiracy to commit money laundering either by concealment or by international transactions. No matter which

underlying offense the jury found Feldman had conspired to commit—or if it found both—Feldman's conviction would be the same: one count of conspiracy to commit money laundering. Nor did the first jury's finding that Feldman conspired to transmit funds internationally to promote wire fraud logically exclude a finding that the same conspiracy embraced the additional purpose to conceal the proceeds of wire fraud. In this circumstance, we can hardly consider the first jury verdict to imply a partial acquittal.

The second and broader holding of *Green*—that the dismissal of the jury "without returning any express verdict" on the first-degree-felony-murder charge and without the defendant's consent terminated jeopardy, 355 U.S. at 191—also does not govern this appeal because Feldman implicitly consented to the jury's dismissal. This second holding was based on the rule of *Wade v. Hunter*, 336 U.S. 684 (1949), that "a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again," *Green*, 355 U.S. at 188; *see also Wade*, 336 U.S. at 689, barring "unforeseeable circumstances" that require a mistrial, *Wade*, 336 U.S. at 689. Although *Green* did not discuss the "consent" element of this rule in any detail, the question when a defendant consents to a jury's dismissal has often arisen in decisions dealing with mistrials, a line of caselaw based on the same rule that *Green* applied from *Wade*. *See United States v. Jorn*, 400 U.S. 470, 484–85 (1971) (citing *Wade*, 336 U.S. at

689, for the proposition that jeopardy terminates when "the judge, *acting without the defendant's consent*, aborts the proceeding," and explaining that "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution" (emphasis added)); *see also Arizona v. Washington*, 434 U.S. 497, 505 (1978) ("The prosecutor must demonstrate 'manifest necessity' for any mistrial declared *over the objection of the defendant*." (emphasis added)). We agree with the Fourth Circuit that these contexts demand a unified approach, so "[w]e hold that the double jeopardy rules that apply in mistrial situations also apply when a court fails to try a discrete portion of the case before the original jury." *Ham*, 58 F.3d at 83.

To whatever extent the district court might be said to have "fail[ed] to try a discrete portion of [Feldman's] case before the original jury," Feldman impliedly consented to that failure. We have long recognized that a defendant's consent to a mistrial "need [not] be express" but "may always be 'implied from the totality of circumstances.'" *United States v. Puleo*, 817 F.2d 702, 705 (11th Cir. 1987) (quoting *United States v. Goldstein*, 479 F.2d 1061, 1067 (2d Cir. 1973)). At the charge conference during Feldman's first trial, the district court explained its intention to instruct the jury that to return a verdict of guilty on the count of conspiracy to commit money laundering, it needed to find only that the defendants agreed to commit one of the two target offenses. Feldman never voiced any

objection to this instruction. Indeed, during deliberations, when the jury asked the district court to clarify whether it could find the defendants guilty under either money-laundering theory or both, Feldman explicitly agreed that the jury "could find [the defendants] guilty of either, or both," as long as the jurors "unanimously agree[d] on the object that they [were] deciding on." And Feldman never voiced any objection to the jury's dismissal after the verdict. The totality of these circumstances compels the conclusion that Feldman impliedly consented to the dismissal of the original jury without its having made a finding about whether he conspired to commit money laundering under the concealment-based theory. And this conclusion suffices to establish that *Green*'s second holding does not govern this appeal. *See Green*, 355 U.S. at 188, 191; *Puleo*, 817 F.2d at 705. The Double Jeopardy Clause did not bar the concealment-based theory of conspiracy to commit money laundering.

B. Sufficient Evidence Supports Feldman's Convictions.

Feldman contends that the evidence presented at trial was insufficient to support his convictions, but we disagree. "[I]n reviewing the sufficiency of the evidence underlying a conviction, we consider the evidence 'in the light most favorable to the government, with all inferences and credibility choices drawn in the government's favor,'" and our review "inquires only whether a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt."

United States v. Broughton, 689 F.3d 1260, 1276 (11th Cir. 2012) (quoting *United States v. DuBose*, 598 F.3d 726, 729 (11th Cir. 2010)). Sufficient evidence supports Feldman's conviction for conspiracy to commit wire fraud, 18 U.S.C. §§ 1343, 1349, and his conviction for conspiracy to commit money laundering by concealment and international transmission of funds, *id.* § 1956(a)(1)(B)(i), (a)(2)(A), (h).

1. Sufficient Evidence Supports Feldman's Conviction for Conspiracy to Commit Wire Fraud.

To convict Feldman of conspiracy to commit wire fraud, 18 U.S.C. § 1349, the government had to prove "(1) a conspiracy to commit [wire fraud]; (2) knowledge of the conspiracy; and (3) that [Feldman] knowingly and voluntarily joined the conspiracy." *Gonzalez*, 834 F.3d at 1220. The elements of wire fraud are that the defendant "devised or intend[ed] to devise any scheme or artifice to defraud" and that the defendant "transmit[ted] or cause[d] to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice." 18 U.S.C. § 1343; *see also United States v. Hasson*, 333 F.3d 1264, 1270 (11th Cir. 2003). "To prove a conspiracy to commit wire fraud, the government need not demonstrate an agreement specifically to use the interstate wires to further the scheme to defraud; it is enough to prove . . . that the use of the interstate wires in furtherance of the scheme was reasonably

foreseeable," provided the government "prove[s] that the defendant knowingly and voluntarily agreed to . . . a scheme to defraud." *Hasson*, 333 F.3d at 1270. A conspiracy charge under section 1349 "does not require the commission of an overt act." *Gonzalez*, 834 F.3d at 1220.

Feldman admits that the evidence established his agreement to lure customers to the nightclubs using the B-girls, who then used a variety of misleading or deceptive tactics to keep customers from realizing how much they were spending, but he insists that the tactics within the scope of his agreement were not fraudulent under *Takhalov* and that any fraud the B-girls committed was outside of the scope of his agreement. For example, Feldman admits that "B-girls sought to keep customers from pursuing price concerns," but he argues that "[t]here was no evidence . . . that anyone lied to customers about prices" and the bartenders gave customers the drinks they ordered. Feldman also does not dispute that the B-girls committed fraud if they sometimes forged customers' signatures on credit-card receipts, but he points out that even Simchuk testified that such forgeries were not part of the scheme.

We need not review every alleged tactic of the B-girls to conclude that the evidence is sufficient to support Feldman's conviction of this charge. Based on Simchuk's testimony, the jury rationally could have found that Feldman knowingly participated in a scheme to charge customers for drinks they did not order, to lie to

customers about the number and kind of drinks they were being charged for, and to lie to credit-card companies about the drinks patrons had ordered. Simchuk repeatedly testified that once a patron made the mistake of providing his credit card to a bartender, it would "be charged for bottles he didn't order," that "this happen[ed] at Stars Lounge," and that Feldman "was aware of this" and knew "exactly what[] [was] going on there." Simchuk described a particular ruse in which bartenders would tell patrons that they were receiving two bottles of champagne for the price of one but charge them for both after they accepted the "free" bottle, and although he was describing his clubs in Latvia when he testified about this trick, he testified immediately afterward that he brought "exactly the same system" to Miami. Simchuk also testified that the "bartender's job was [to] open up the tab and clean up the credit card." He used the phrase "clean up the credit card" more than once, and, when the government asked him what it meant, he replied, "That's what I mean, run the credit card until it stopped. . . . Just charge it." A rational jury could have inferred from Simchuk's testimony that once a patron provided his credit card to a bartender, it was a foregone conclusion that the club would charge it to the credit limit or to as near the credit limit as possible, no matter how many drinks the patron actually ordered. In Simchuk's words, once a customer ordered even a single drink, "[b]artender went to bar, open up the tab, let the guy sign, that's it, credit card gone."

Simchuk testified about a scheme to commit what qualifies as fraud under any interpretation of the wire-fraud statute, and he testified that Feldman knowingly participated in that scheme. "The jury was entitled to credit his testimony." *United States v. Anderson*, 782 F.2d 908, 913 (11th Cir. 1986). In considering the sufficiency of the evidence, our only task is to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Sufficient evidence supports the jury's finding that Feldman conspired to commit wire fraud.

2. Sufficient Evidence Supports Feldman's Conviction for Conspiracy to Commit Money Laundering.

The jury found that Feldman conspired to commit money laundering in two ways: first, by knowingly "conduct[ing] . . . financial transaction[s]" that "involve[d] the proceeds of specified unlawful activity," that is, wire fraud, and that were "designed . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds," 18 U.S.C. § 1956(a)(1)(B)(i), and, second, by transferring funds internationally "with the intent to promote the carrying on of specified unlawful activity," that is, wire fraud, *id.* § 1956(a)(2)(A). Sufficient evidence supports Feldman's conviction under either theory.

The government presented sufficient evidence to establish that Feldman conspired to conceal the ownership and control of funds that he knew to be the

proceeds of wire fraud. Simchuk testified that Feldman created a limited-liability company, Ieva Marketing LLC, to facilitate paying the B-girls in cash so as to avoid paying taxes on their salaries and commissions. He explained that the purpose of the company, which Feldman understood, was "to avoid showing the IRS or anyone else looking that [Simchuk and Feldman] had B-girls working for [them]." Kim Marks, Feldman's accountant, testified that he filed articles of organization for Ieva Marketing at the request of either Feldman or his sister and bookkeeper, Alex Burrlader. The articles listed Ieva Marketing's address as the office of Feldman's realty company. Based on this evidence and its rational finding that Feldman knowingly joined a scheme to commit wire fraud, the jury rationally could have inferred that Feldman knowingly conspired to conduct financial transactions that involved the proceeds of wire fraud and that were designed to conceal the ownership and control of those proceeds.

The government also presented sufficient evidence to establish that Feldman conspired to promote wire fraud through international transactions. Simchuk testified that Stars Lounge received investment money from and distributed proceeds to investors in Europe, including Simchuk's mother, Eleonora, and his business partner, Andrejs Romanovs. Simchuk testified that these payments were integral to the functioning of the club because, without the distribution of profits, he and Romanovs would have withdrawn from the enterprise. When Stars Lounge

first opened its bank account, the two signatories were Eleonara Simchuk and Burrlader. Simchuk testified that Burrlader's presence on the account was "a part of [the] deal" between him and Feldman because Feldman "want[ed] to make sure [that] he [could] control the bank." Based on this evidence and its rational finding that Feldman knowingly joined a scheme to commit wire fraud, the jury rationally could have inferred that Feldman conspired to transfer funds internationally to promote the wire fraud committed at Stars Lounge.

C. Feldman Can Establish No Reversible Constructive Amendment of the Indictment's Wire-Fraud-Conspiracy Count.

The Fifth Amendment to the Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. This clause does not "permit a defendant to be tried on charges that are not made in the indictment against him" or convicted on theories that the indictment "cannot fairly be read as charging." *Stirone v. United States*, 361 U.S. 212, 217 (1960). The "constructive amendment" of an indictment "'occurs when the essential elements of the offense contained in the indictment are altered'"—for instance, by a faulty jury instruction—"'to broaden the possible bases for conviction beyond what is contained in the indictment.'" *United States v. Madden*, 733 F.3d 1314, 1318 (11th Cir. 2013) (quoting *United States v. Keller*, 916 F.2d 628, 634 (11th Cir. 1990)). "An error of this magnitude is *per se* reversible because it violates the defendant's

constitutional right to be tried solely on the charges returned by the grand jury." *United States v. Johnson*, 713 F.2d 633, 643 (11th Cir. 1983). Constructive amendments should be distinguished from "material variances" between the allegations in the indictment and the proof at trial, which are not reversible *per se*. *See id.* at 643 n.9; *United States v. Salinas*, 654 F.2d 319, 323 (5th Cir. 1981).

Feldman argues that the wire-fraud-conspiracy count of the indictment was constructively amended in three ways: by the government's redaction of the indictment, by the district court's jury instructions, and by the government's arguments at trial. He contends that the grand jury indicted only on the fraud theory that we rejected in *Takhalov*—that the B-girls' concealment of their relationship with the clubs was an act of fraud—so his conviction on any other basis rests on a fraud theory not contemplated by the grand jury. These arguments fail.

First, Feldman contends that the wire-fraud-conspiracy count in the redacted indictment differs from the wire-fraud-conspiracy count in the original indictment "to the point that the prosecution theory diverged from that determined by the grand jury." But the two counts are identical—to the word—in every material respect, so the government's redaction of the indictment cannot have changed the nature of the charge.

Second, Feldman contends that the wire-fraud-conspiracy count was constructively amended by the district court's jury instruction that encouraging customers to drink to overintoxication could be fraud, but the doctrine of invited error bars Feldman from complaining of this instruction. After the district court read its proposed instruction and gave Feldman an opportunity to object, his counsel acquiesced in the instruction, stating, "that's fine." Under our precedent, "when a party agrees with a court's proposed instructions, the doctrine of invited error applies, meaning that review is waived even if plain error would result." *United States v. Frank*, 599 F.3d 1221, 1240 (11th Cir. 2010); *see also United States v. Silvestri*, 409 F.3d 1311, 1337 (11th Cir. 2005) ("When a party responds to a court's proposed jury instructions with the words 'the instruction is acceptable to us,' such action constitutes invited error." (glossing *United States v. Fulford*, 267 F.3d 1241, 1246–47 (11th Cir. 2001))). Feldman cannot obtain reversal based on a jury instruction that he affirmatively accepted, so we need not consider whether the instruction was erroneous.

Finally, Feldman argues that the government's arguments at trial impermissibly broadened the basis for conviction, but this argument fails because the indictment substantially charged every or nearly every potentially fraudulent tactic that the government proved at trial and about which Feldman complains on appeal. To the limited extent that minor discrepancies may exist between the

allegations of the indictment and the corresponding parts of the government's evidence at trial—for instance, one could cavil whether the indictment's allegation that B-girls forged customers' signatures contains the slightly distinct charge, of which evidence was presented at trial, that B-girls sometimes helped guide an intoxicated patron's hand when he was signing a receipt—such details would be grist for a variance argument, not a constructive-amendment argument. *See* 3 Charles Alan Wright et al., *Federal Practice and Procedure* § 516, at 45 (4th ed. 2011) ("The term variance applies when the difference between the indictment and proof is relatively slight, and the term constructive amendment applies when the difference is more significant."). And Feldman has not established that any such minor variances in the government's evidence caused him prejudice. *See Salinas*, 654 F.2d at 323 ("[A] variance in the proof justifies reversal only where the defendant has been prejudiced thereby.").

D. Prosecutorial Allusions to Oliver Twist *Did Not Deprive Feldman of Due Process.*

Feldman, who is Jewish, contends that he was deprived of due process by several comments in which prosecutors drew an analogy between his conduct and that of Fagin, the street criminal in Charles Dickens's *Oliver Twist*, who is also Jewish. To be sure, a prosecutor's exploitation of racial or ethnic animus can deprive a defendant of a fair trial, *see, e.g.*, *United States v. Sanchez*, 482 F.2d 5, 8 (5th Cir. 1973) (reversing a conviction because the prosecutor's argument was

"inflammatory and seriously prejudicial," being "replete with racial and political undertones" that included repeated references to the defendant's "chicannismo [sic]"), but nothing of the kind happened to Feldman.

The government never referred to Fagin's or Feldman's ethnicity, and it is clear from the record that it neither intended to trade nor inadvertently traded on an ethnic stereotype in order to prejudice Feldman. The government first used Fagin as an example when it asked prospective jurors whether they understood that someone who masterminds a crime is guilty even if he employs someone else to commit the crime on his behalf. A few moments later, the government made another fleeting reference to Fagin to inquire whether a prospective juror would be unwilling to credit a witness's testimony just because the witness was himself a criminal. The government referred to Fagin only once more, when, in its rebuttal closing argument, it compared both Feldman and its own witness Simchuk—who, at least as far as the record reflects, is not Jewish—to the Dickensian villain. Feldman did not object to the government's remarks at trial, so we review their propriety only for plain error, *see Gonzalez*, 834 F.3d at 1217, and under that deferential standard, Feldman cannot establish that the prosecutors' brief, anodyne references to a literary character deprived him of a fair trial and caused him substantial prejudice.

E. Feldman Has Established No Reversible Sentencing Error.

Feldman contends that the district court committed both procedural and substantive sentencing errors. He challenges the eight-level loss-amount enhancement, the two-level ten-or-more-victims enhancement, the two-level obstruction-of-justice enhancement, and the two-level sophisticated-money-laundering enhancement. And he argues that his sentence is substantively unreasonable. We disagree and address these issues in turn.

1. The District Court Did Not Clearly Err when It Applied the Loss-Amount and Ten-or-More-Victims Enhancements.

Feldman challenges both his loss-amount and ten-or-more-victims enhancements. The Sentencing Guidelines provide an eight-level enhancement for a loss amount greater than $95,000 but not greater than $150,000. *See* U.S.S.G. § 2B1.1(b)(1)(E). For purposes of this enhancement, "loss is the greater of actual loss"—that is, "the reasonably foreseeable pecuniary harm that resulted from the offense"—and "intended loss"—that is, "the pecuniary harm that the defendant purposely sought to inflict." *Id.* § 2B1.1 cmt. n.3(A)–(A)(ii)(I). Pecuniary harm is "harm that is monetary or that otherwise is readily measurable in money," *id.* § 2B1.1 cmt. n.3(A)(iii), and is reasonably foreseeable if "the defendant knew or, under the circumstances, reasonably should have known," that it "was a potential result of the offense," *id.* § 2B1.1 cmt. n.3(A)(iv). The Guidelines also prescribe a two-level enhancement for an offense that "involved 10 or more

victims." *Id.* § 2B1.1(b)(2)(A)(i). As relevant to this appeal, "'[v]ictim' means any person who sustained any part of the actual loss." *Id.* § 2B1.1 cmt. n.1 (subdivision omitted). Because the application of these two enhancements rested on the same evidence, we discuss them together.

The district court did not clearly err when it found that the loss amount was greater than $95,000 and that the number of victims was at least ten. After the second jury found Feldman guilty, the government prepared a list of 52 alleged victims and their alleged actual losses, which totaled $115,404.60. The government explained that the list identified individuals who "either disputed the charges as fraudulent with their credit card companies, were observed by law enforcement officers being defrauded at VIP or Stars Lounge, or confirmed with the U.S. Attorney's office or the FBI that they were defrauded." At the sentencing hearing, Feldman objected that the government had not established that all of the alleged losses resulted from "actionable fraud." But he conceded that if the district court "[went] with what the government's view is," the government's list reflected "the appropriate amount of money that would be indicated in" the evidence. Based on that concession, the district court needed to infer only that it was more likely than not that someone who disputed a charge as fraudulent or was identified as a fraud victim by law enforcement was indeed a fraud victim, and Feldman has not shown that the district court committed clear error in so inferring.

2. The District Court Did Not Clearly Err in Applying the Obstruction-of-Justice Enhancement Based on Its Finding that Feldman Committed Perjury at His First Trial.

The Guidelines prescribe a two-level enhancement for a "defendant [who] willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense," U.S.S.G. § 3C1.1, which includes a defendant's attempt to escape conviction by perjury, *see id.* § 3C1.1 cmt. n.4(B); *see also United States v. Dunnigan*, 507 U.S. 87, 92–94 (1993). To apply the enhancement based on a defendant's false testimony, "a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, [by] perjury." *Dunnigan*, 507 U.S. at 95. That is, the district court must make findings sufficient to establish that the defendant gave "false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *Id.* at 94.

Feldman argues that the findings by the district court were too "generalized," but he overstates its procedural burden. In *Dunnigan*, the Supreme Court explained that "it is *preferable* for a district court to address each element of the alleged perjury in a separate and clear finding," but it "is sufficient" when "the court makes a finding . . . that encompasses all of the factual predicates for a

finding of perjury." *Id.* at 95 (emphasis added). And we have explained that "a remand is not necessary" when "the record clearly reflects the basis for [an] enhancement and supports it." *United States v. Taylor*, 88 F.3d 938, 944 (11th Cir. 1996). At Feldman's first sentencing hearing, the district court stated its finding, "based upon [the] the close attention that [the district court] paid throughout the eleven weeks of the trial, that Mr. Feldman perjured himself on numerous occasions." And the district court found at the second sentencing hearing that Feldman had "commit[ted] specific acts of perjury" "for the same reasons [the district court] articulated at the time of the first sentencing." These findings were adequate as long as the record clearly reflects that the district court found willfulness, falsity, and materiality and that a sufficient basis supports each element. *See Dunnigan*, 507 U.S. at 94–95; *Taylor*, 88 F.3d at 944.

The record reflects that the district court found that Feldman's testimony was perjured because it believed that Simchuk's testimony, which contradicted Feldman's on several material points, was "truthful[]." To give one of many examples, Simchuk testified at the first trial that he explained to Feldman how Ieva Marketing would work as the cash funnel for the B-girls and that he should arrange to create the company once Koncilo had arrived in the United States. To make sure that Feldman understood the company's function, Simchuk testified that he made Feldman explain to Burrlader exactly how Ieva Marketing was supposed to work.

By contrast, Feldman denied under oath that "Simchuk asked [him] to set up a separate company to see to it that the promoters [that is, the B-girls] got paid." Instead, he testified that he referred Koncilo to his accountant to set up a company only because she had asked him to do so.

When a government witness's testimony about material facts "directly contradict[s]" that of the defendant, the district court may credit the government witness's testimony and find that the defendant's was perjured. *United States v. Dobbs*, 11 F.3d 152, 155 (11th Cir. 1994). The district court did so, and we cannot say that it clearly erred in believing Simchuk over Feldman.

3. The District Court Did Not Err when It Applied the Sophisticated-Money-Laundering Enhancement.

The Guidelines prescribe a two-level enhancement for a money-laundering offense that "involved sophisticated laundering." U.S.S.G. § 2S1.1(b)(3). "'[S]ophisticated laundering' means complex or intricate offense conduct pertaining to the execution or concealment of the 18 U.S.C. § 1956 offense"; it "typically involves the use of fictitious entities; shell corporations; two or more levels (i.e., layering) of transactions, transportation, transfers, or transmissions, involving criminally derived funds that were intended to appear legitimate; or offshore financial accounts." *Id.* § 2S1.1 cmt. n.5(A) (subdivisions omitted).

The district court did not err when it applied this enhancement based on Feldman's use of Ieva Marketing as a cash funnel for the B-girls' salaries and

commissions. Feldman contends that a single-member, publicly registered limited-liability company providing only one layer of insulation for the clubs' transactions is too simple a means of laundering to qualify for the enhancement, but we have affirmed sophisticated-means enhancements for schemes that were no more complex. *See United States v. Campbell*, 491 F.3d 1306, 1315–16 (11th Cir. 2007) (defendant used campaign accounts and other people's credit cards to conceal cash expenditures); *United States v. Barakat*, 130 F.3d 1448, 1457 (11th Cir. 1997) (defendant concealed funds in an attorney's trust account). And Feldman's offense conduct falls within the application note's description of sophisticated money laundering involving "two or more levels (i.e., layering) of transactions." U.S.S.G. § 2S1.1 cmt. n.5(A)(iii).

4. We Need Not Consider the Substantive Reasonableness of Feldman's Sentence.

Feldman argues that his above-guideline sentence is substantively unreasonable, but we disagree. The district court considered the statutory sentencing factors, *see* 18 U.S.C. § 3553(a), and concluded that "a very significant sentence is appropriate in light of the scope of this conspiracy [and] the significant harm that this crime caused to [the] community and the customers and [the] tourist industry." The district court drew attention to Feldman's perjury, stating that "we have to have a system of justice that imposes serious consequences to people who do that." And the district court found that Feldman "ha[d]n't shown any remorse."

The factual findings supporting the reasoning of the district court are not clearly erroneous. As we have already explained, the district court did not clearly err when it found that Feldman had perjured himself. Nor did it clearly err when it found that Feldman was not remorseful. True, at the first sentencing hearing, Feldman stated that he "t[ook] full responsibility" for his "bad judgment to get in this business," and his attorney stated at the second sentencing hearing that Feldman "fe[lt] ashamed of himself." But Feldman always insisted that he "never intended . . . to cheat or to defraud anybody." The district court reasonably interpreted these equivocal expressions of shame to mean that Feldman refused to admit that "[he] kn[e]w [he] did something wrong." Feldman argues that he "did as much as he could to express remorse without effectively waiving his right to pursue substantial appellate claims," but this suggestion is unpersuasive. Feldman could have expressed that he felt bad about what happened to the nightclubs' customers—who, at a minimum, were lured to the nightclubs by deception and led to spend outrageous sums of money on alcohol the price of which they were discouraged from ascertaining until it was too late—even while arguing that what befell them did not satisfy the statutory definition of fraud, that he did not know about it, or both. He never did so. The district court did not clearly err in finding that Feldman failed to exhibit remorse.

Findings that a defendant lacks remorse and committed perjury to escape conviction are a valid basis for an upward variance. *See United States v. Mateos*, 623 F.3d 1350, 1367 (11th Cir. 2010) (affirming 360-month sentence, an upward variance from the guideline range of 216 to 262 months, based in part on the "significant" factors that the defendant lacked remorse and that she committed perjury). Feldman argues that a district court must find "extraordinary circumstances" before varying upward based on perjury from a guideline range that already incorporates an obstruction-of-justice enhancement, but no such requirement exists. *See id.* at 1368–69 (affirming upward variance based in part on perjury even though the obstruction-of-justice enhancement was applied). On the contrary, a defendant's perjury at trial speaks directly to important sentencing factors—including the "characteristics of the defendant," "respect for the law," and the ability of the criminal-justice system "to afford adequate deterrence to criminal conduct," 18 U.S.C. § 3553(a)(1), (a)(2)(A)–(B)—"and it is within [the district] court's discretion to decide how much weight to give each of the § 3553 factors." *Mateos*, 623 F.3d at 1369. "Giving that decision the deference it is due, we cannot say that [Feldman's] sentence is outside the range of reasonable sentences, or that the district court committed a clear error of judgment in imposing it." *Id.*

IV. CONCLUSION

We **AFFIRM** Feldman's convictions and sentence.

WILLIAM PRYOR, Circuit Judge, concurring:

Obviously, I join the panel opinion in full. I write separately to express some concerns about our puzzling opinion in *United States v. Takhalov*, 827 F.3d 1307 (11th Cir.), *modified on denial of reh'g*, 838 F.3d 1168 (11th Cir. 2016). In *Takhalov*, we held that the district court committed reversible error when it failed to instruct the jury that the defendants' "[f]ailure to disclose the financial arrangement between the B-girls and the Bar, in and of itself, [was] not sufficient to convict" them of wire fraud. *Id.* at 1311 (first alteration in original). But our opinion sends mixed signals about precisely what we thought the proposed instruction meant in context, and it endorsed a narrow construction of the phrase "scheme or artifice to defraud," 18 U.S.C. § 1343, that is difficult to understand. That statutory phrase incorporates the "well-settled," traditional common-law meaning of "actionable 'fraud.'" *Neder v. United States*, 527 U.S. 1, 22 (1999). Our conclusion in *Takhalov* that it "refers only to those schemes in which a defendant lies about the nature of the bargain itself," "primar[il]y" by misrepresenting "the price" or "the characteristics of the good," 827 F.3d at 1314, has no obvious basis in the common law of fraud. Indeed, depending on how our opinion is interpreted, its analysis may well be at odds with both the common law and binding precedent. In future prosecutions under the federal criminal-fraud

statutes, the bench and bar should exercise due care in interpreting our opinion in *Takhalov* and determining its precedential value.

The Supreme Court has made clear that the statutory phrase "scheme or artifice to defraud"—a staple of the federal criminal-fraud statutes, *see, e.g.*, 18 U.S.C. § 1341 (mail fraud); *id.* § 1344 (bank fraud)—incorporates the traditional common-law meaning of fraud. "[W]hen Congress enacted the [various] fraud . . . statutes, actionable 'fraud' had a well-settled meaning at common law." *Neder*, 527 U.S. at 22. And "we must *presume*" "that Congress intend[ed] to incorporate [that] well-settled meaning." *Id.* at 23; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 53, at 320 (2012) ("A statute that uses a common-law term, without defining it, adopts its common-law meaning."). After all, "[w]hen a statutory term is 'obviously transplanted from another legal source,' it 'brings the old soil with it.'" *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (some internal quotation marks omitted) (quoting indirectly Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). And few legal terms, if any, have deeper common-law roots than "fraud" and its derivatives. *See generally* 2 Matthew Bacon, *A New Abridgment of the Law* 593–612 (1736); *see also Weiss v. United States*, 122 F.2d 675, 681 (5th Cir. 1941) (observing that fraud "is as old as falsehood and as versable as human ingenuity").

Although common-law authorities state the elements of actionable fraud in slightly different ways, all agree on the following "fairly exact meaning":

> [A] false representation of a material fact made by one who knew that it was false or in some cases . . . when he knew that he had not information sufficient to warrant his belief in the truth of such statement, made to one who did not know that it was false, with intent to deceive such person and to influence his action, which did deceive such person and influence his action to his damage.

1 William Herbert Page, *The Law of Contracts* § 217, at 320–21 (2d ed. 1920) [hereinafter *Page on Contracts*]; *see also* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 105, at 728 (5th ed. 1984) [hereinafter *Prosser and Keeton on Torts*]; *Restatement (Second) of Contracts* § 162 (1981); *Restatement (Second) of Torts* §§ 525–26 (1977); 2 James Fitzjames Stephen, *A History of the Criminal Law of England* 121–22 (1883); 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 192, at 201 (1836). This set of elements defines fraud both when it is used as a sword, as in the tort claim of deceit, *see Restatement (Second) of Torts* § 525, and when it is used as a shield, for instance, to avoid a contract, *see Restatement (Second) of Contracts* § 164. *See* 37 Am. Jur. 2d *Fraud and Deceit* § 368, at 408 (2013) ("The essentials of actionable fraud are generally the same for setting it up as a defense as for asserting it as the basis of an action for damages." (footnotes omitted)); 1 *Page on Contracts* § 217, at 321 (explaining that "'fraud' . . . has substantially the same elements" in contract as in tort).

Consistent with this common-law definition, the words "to defraud" in the federal fraud statutes "signify the deprivation of something of value by trick, deceit, chicane or overreaching"; in other words, "[t]hey refer . . . to wronging one in his property rights by dishonest methods or schemes." *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924). Indeed, the only way in which the phrase "scheme or artifice to defraud" differs from actionable fraud at common law follows from the phrase itself: because the statutes address "the 'scheme to defraud,' rather than the completed fraud, the elements of [actual] reliance and damage would clearly be inconsistent with the statutes Congress enacted." *Neder*, 527 U.S. at 25. That is, whether a defendant has schemed to defraud—and so violated the fraud statutes—does not depend on the success of his scheme or its consequences. *See United States v. Brown*, 79 F.3d 1550, 1557 n.12 (11th Cir. 1996), *overruled on other grounds by United States v. Svete*, 556 F.3d 1157 (11th Cir. 2009) (en banc). In this respect, the statutes punish frauds that would not have been "actionable" at common law. *See United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932) (Hand, J.) ("Civilly of course the action would fail without proof of damage, but that has no application to criminal liability."); *see also Pasley v. Freeman* (1789) 100 Eng. Rep. 450, 453 (KB) (opinion of Buller, J.) ("Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies."). But as far as the scheme itself is concerned—

that is, the acts that the defendant intends to perform and the consequences he intends to result from them—the word "defraud" retains its "well-settled" common-law meaning. *Neder*, 527 U.S. at 22; *see also Svete*, 556 F.3d at 1162–65 (drawing on common-law sources to hold that a representation need not be objectively reliable to satisfy the materiality element of the phrase "scheme or artifice to defraud").

Takhalov is difficult to square with this common-law backdrop. To be sure, the bottom-line *holdings* of *Takhalov* are straightforward enough. We held that the district court reversibly erred when it declined the defendants' request for the following jury instruction: "Failure to disclose the financial arrangement between the B-girls and the Bar, in and of itself, is not sufficient to convict a defendant of any offense." 827 F.3d at 1311 (alterations omitted or adopted). That is, we held that the instruction was "a correct statement of the law," *id.* at 1315–16; that it dealt with a critical matter raised at the trial, *see id.* at 1316–17; that it was not substantially covered by the district court's other instructions to the jury about the elements of wire fraud, *see id.* at 1317–20; and that the failure of the district court to give the instruction was not harmless beyond a reasonable doubt, *id.* at 1320–25.

Although the holdings of *Takhalov* may be easy to understand, its reasoning is less so. Before examining the opinion, consider the jury instruction itself. On its face, the proposition that "[f]ailure to disclose the financial arrangement between

the B-girls and the Bar, in and of itself, is not sufficient to convict a defendant of any offense" is obviously correct. After all, a mere "failure to disclose" information is typically insufficient to satisfy even the misrepresentation element of fraud. For nondisclosure to be equivalent to a misrepresentation, it must be coupled with special circumstances, such as a confidential relationship between the parties or a course of affirmative representations making the omission misleading, that justify the imposition of a duty to disclose. *See Prosser and Keeton on Torts* § 106, at 737–40; 37 Am. Jur. 2d *Fraud and Deceit* § 194, at 235–37. And even when it is tantamount to a misrepresentation, a failure to disclose is *never* "in and of itself" sufficient to prove a scheme to defraud; the misrepresentation must also be material, made with scienter, and intended to induce detrimental reliance.

But our opinion in *Takhalov* reads as if we equated the requested jury instruction with one about the insufficiency of affirmative misrepresentations concededly made with the intent to influence customers, and it appears to equivocate about what precisely we thought the defendants had intended. At first glance, many passages in the opinion suggest that we understood the instruction to mean that the defendants would not have schemed to defraud if the *only* way they intended the concealment of the B-girls' employment status to affect customers was by influencing them *merely to set foot in* the nightclubs. *See, e.g.*, 827 F.3d at 1310–11 (narrating that the defendants "tricked men to come into the defendants'

clubs" and "admitted that they knew the B-girls concealed their relationship with the clubs to persuade the men to go to the clubs"); *id.* at 1311 (narrating that the defendants "knew the B-girls were posing as tourists to get the men to come to the clubs with them"); *id.* (referring to "the lies that the B-girls used to get the men to come into the clubs in the first place"); *id.* at 1316 & n.8 (referring to the B-girls' "tricking the victims into coming to the bar[s]" and "tricking the victims into entering the bar[s]"); *id.* at 1318 (describing the defendants' defense theory as being that they "intended to deceive the victims in only one way—by tricking them into coming to the bars"); *id.* at 1319 ("[A] scheme to trick patrons to come into a bar—without more—is not wire fraud."). Were that all the instruction meant, it would again be obviously correct. To trick someone into merely crossing the threshold of a commercial establishment is a way of influencing his behavior by deceit, but it does not—by itself—"wrong[] [him] in his property rights," *Hammerschmidt*, 265 U.S. at 188. Until a transaction occurs, no property rights have been affected.

Despite the many passages that support this narrow reading of the instruction, other passages suggest that we took it to mean something more: that the defendants would not have schemed to defraud even if they intended the concealment of the B-girls' employment status to affect customers *both* by inducing them to set foot in the clubs *and* by inducing them to buy drinks once

they were there. *See Takhalov*, 827 F.3d at 1310 (paraphrasing the instruction: "that [the jurors] must acquit if they found that the defendants had tricked the victims into entering a transaction but nevertheless gave [them] exactly what they asked for and charged them exactly what they agreed to pay"); *id.* at 1316 (paraphrasing the instruction: "that [the jurors] could convict only if they found that the defendants had schemed to lie about the quality or price of the goods sold to the victims"). Indeed, this interpretation seems necessary to explain what appears to be an important part of our discussion.

In Part II.A.1 of our opinion, we discussed the meaning of the phrase "scheme or artifice to defraud." *See id.* at 1312–15. We reasoned that "a schemer who tricks someone to enter into a transaction has not 'schemed to defraud' so long as he does not intend to harm the person he intends to trick." *Id.* at 1313. We pursued this train of thought through a series of hypotheticals in each of which a party intended to bring about a transaction, *see id.* at 1313–14, and from which we drew the following conclusions:

> Thus, a "scheme to defraud," as that phrase is used in the wire-fraud statute, refers only to those schemes in which a defendant lies about the nature of the bargain itself. That lie can take two primary forms: the defendant might lie about the price (*e.g.*, if he promises that a good costs $10 when it in fact costs $20) or he might lie about the characteristics of the good (*e.g.*, if he promises that a gemstone is a diamond when it is in fact a cubic zirconium). In each case, the defendant has lied about the nature of the bargain and thus in both cases the defendant has committed wire fraud. But if a defendant lies about something else—*e.g.*, if he says that he is the long-lost cousin of a

> prospective buyer—then he has not lied about the nature of the bargain, has not "schemed to defraud," and cannot be convicted of wire fraud on the basis of that lie alone.

Id. at 1314. In other words, we concluded, "even if a defendant lies, and even if the victim made a purchase because of that lie, a wire-fraud case must end in an acquittal if the jury nevertheless believes that the alleged victims received 'exactly what they paid for.'" *Id.* at 1315 (quoting *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007)). And we identified this interpretation with a line of caselaw from the Second Circuit, *see id.* at 1314–15 (citing *Shellef*, 507 F.3d 82; *United States v. Starr*, 816 F.2d 94 (2d Cir. 1987); *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970)), that appears to have originated in concerns about materiality, *see Regent Office*, 421 F.2d at 1182 (reversing the defendants' convictions because "the falsity of their representations was not shown to be capable of affecting the customer's understanding of the bargain nor of influencing his assessment of the value of the bargain to him").

Our analysis is difficult to ground in the common law of fraud. To begin with, our failure to discuss the common law makes it hard to be sure precisely which traditional fraud elements, if any, we thought we were interpreting. Even so, making sense of *Takhalov* requires that we at least attempt to relate its conclusions in Part II.A.1 to some aspect of the traditional legal definition of fraud. The proposition that the phrase "scheme or artifice to defraud" contains some limitation

with absolutely no roots in the common-law definition of actionable fraud is a nonstarter. After all, we must presume that "Congress intend[ed] to incorporate the well-settled meaning of the common-law terms it use[d]" "'unless the statute otherwise dictates.'" *Neder*, 527 U.S. at 23 (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)). And our opinion in *Takhalov* does not so much as suggest that its analysis follows from some peculiarity of the wire-fraud statute that "dictates" a narrower interpretation of "defraud" than the common law would warrant. On the contrary, we believed that our discussion "follow[ed] as a matter of logic" from the word "defraud" itself. 827 F.3d at 1315; *see also id.* at 1313–14 (interpreting the word "defraud"). So, for Part II.A.1 of *Takhalov* to make sense, it must mean that one or more of the traditional elements restrict the common-law meaning of fraud "to those schemes in which a [party] lies about the nature of the bargain itself," "primar[il]y" by "l[ying] about the price" or "about the characteristics of the good." *Id.* at 1314.

The trouble is that none of the traditional fraud elements is a natural fit with our discussion in Part II.A.1. The most basic two elements, misrepresentation and scienter, are prima facie implausible candidates to be the subject of our analysis. To be sure, as I have discussed, the jury instruction that the defendants requested easily *could* be read to highlight the important difference between mere nondisclosure and potentially actionable misrepresentation. But in Part II.A.1, our

analysis of the phrase "scheme or artifice to defraud" assumed the existence of "a scheme *to deceive*," *id.* at 1313, and a defendant who "ha[d] lied," *id.* at 1314. The evident point of our discussion was to distinguish between those deliberate misrepresentations that may constitute a scheme to defraud—"lies about the nature of the bargain"—from those deliberate misrepresentations that cannot constitute such a scheme—"lies about something else." *Id.* It seems unlikely that we were considering what constitutes a deliberate misrepresentation in the first place.

It also seems unlikely that we were discussing the requirement that the defendant intend to influence the victim into relinquishing some property right. True, as I have explained, much of our opinion suggests that the defendants may have intended the customers to rely on the B-girls' concealment of their employment status *only* in deciding to *visit* the clubs and not necessarily in deciding to *order drinks* once they were there. But our analysis in Part II.A.1 undermines this suggestion. Our statement about "a schemer who tricks someone to enter into a transaction"—who, we reasoned, "has not 'schemed to defraud' so long as he does not intend to harm the person he intends to trick"—is most naturally read to refer to a schemer who *intends* to bring about a transaction by means of deceit. *Id.* at 1313. In the same vein, a salesman who "says that he is the long-lost cousin of a prospective buyer" presumably does so because he thinks it will facilitate a sale. *Id.* at 1314. But we stated that the salesman "cannot be

convicted of wire fraud on the basis of that lie alone," implying that some other element of fraud must be lacking. *Id.*

So the two most plausible ways of translating our conclusion that a "scheme or artifice to defraud" requires a misrepresentation "about the nature of the bargain itself" into common-law terms concern the elements of injury and materiality. On the injury-based reading, the thesis of Part II.A.1 is that the harm of having been tricked into a transaction, while still understanding its essential terms, is not an injury that would make fraud actionable at common law; that is, a fraudulent inducement does not "wrong[] [the victim] in his property rights," *Hammerschmidt*, 265 U.S. at 188, in the sense required for a successful fraud claim or a conviction under a criminal-fraud statute. Alternatively, on the materiality-based reading, Part II.A.1 means that a lie about something other than "the nature of the bargain" is necessarily immaterial or, put another way, that to enter a transaction in reliance on such a lie is necessarily unreasonable or unjustifiable. *See Svete*, 556 F.3d at 1164 ("As both the modern and ancient authorities on the common law cited by the [*Neder*] Court explain, materiality was understood to be a component of reasonable reliance at common law." (collecting authorities)).

Although each of these interpretations of Part II.A.1 has some plausibility, they are plausible for different reasons, and the strength of each is the other's weakness. The injury-based reading is plausible to the extent that it seems to match

our *reasoning*. After all, we began with the premise that "to *defraud*, one must intend to use deception to cause some injury" or, put another way, "intend to harm the person [one] intends to trick." *Takhalov*, 827 F.3d at 1313. But the injury-based reading makes less sense of our *conclusion*, which distinguished fraudulent from nonfraudulent lies based, not on their *consequences*, but on their *subject matter*. *See id.* at 1314 (distinguishing fraudulent lies "about the price" or "the characteristics of the good" from nonfraudulent "lies about something else"). Conversely, the materiality-based reading makes better sense of our conclusion—distinguishing lies based on their subject matter is what the materiality element has always done, *see Prosser and Keeton on Torts* § 108, at 753–54—but it finds little if any direct support in the reasoning of Part II.A.1. Indeed, to make matters more confusing, elsewhere in the opinion we seem to have taken it for granted that "the B-girls' relationship to the clubs" was "a material fact." *Takhalov*, 827 F.3d at 1323. *But see id.* at 1311–12 (arguably suggesting that the jury instruction concerned materiality).

Whichever reading one prefers, the overriding problem is that both the injury-based reading and the materiality-based reading are incompatible with the common law and with binding precedent. So-called "fraud in the inducement"—that is, fraud about a collateral but still material matter that persuades a victim to enter a transaction he would otherwise have avoided—has long been considered a

species of actionable fraud. Nor is materiality limited to the "nature of the bargain" representations we discussed in *Takhalov*. I address these problems in turn.

The common law has traditionally distinguished between two kinds of fraud: "fraud in the factum" and "fraud in the inducement." *See, e.g.*, *Lovato v. Catron*, 1915-NMSC-021, ¶ 7, 148 P. 490, 492. "Fraud in the factum" refers to fraud that deceives the victim about the nature of the act or transaction—for example, "the sort of fraud that procures a party's signature to an instrument without knowledge of its true nature or contents." *Langley v. Fed. Deposit Ins. Corp.*, 484 U.S. 86, 93 (1987). By contrast, "[f]raud in the inducement exists where the defrauded party understands the identity of the adversary party, the consideration, the subject-matter, and the terms of the contract, and he is willing to enter into [it]; but his willingness so to enter is caused by a fraudulent misrepresentation . . . as to a material fact." 1 *Page on Contracts* § 281, at 435. Although fraud in the factum and in the inducement have different legal consequences—most significantly, fraud in the factum "makes the underlying contract *void ab initio*, whereas . . . fraud in the inducement only makes [it] voidable," *Solymar Invs., Ltd. v. Banco Santander S.A.*, 672 F.3d 981, 994 n.13 (11th Cir. 2012) (citation omitted)—jurists have never hesitated to call both by the name of "fraud."

Fraud in the inducement fits squarely within the "well-settled meaning" of "actionable 'fraud.'" *Neder*, 527 U.S. at 22. It can support a claim for damages.

See 37 Am. Jur. 2d *Fraud and Deceit* §§ 2, 270, at 28, 316; *see also Gregg v. U.S. Indus., Inc.*, 715 F.2d 1522, 1541 (11th Cir. 1983) (applying Florida law). And it can serve as a defense to a claim. *See* 37 Am. Jur. 2d *Fraud and Deceit* § 368, at 407 ("Fraud in either the inducement or the factum . . . may be established as a defense to a claim prosecuted by the person guilty of fraud."); 1 *Page on Contracts* § 341, at 544–45 & n.2 (collecting decisions); *see also Wagner v. Nat'l Life Ins. Co.*, 90 F. 395, 404 (6th Cir. 1898).

So, if our analysis in *Takhalov* means that the federal fraud statutes punish only fraud-in-the-factum schemes, not schemes to commit fraud in the inducement, it is at odds with the common law. That fraud in the inducement has traditionally been actionable reflects the law's judgment that a person is "entitled to determine on what basis, for what reason, and under what circumstances [he] want[s] to give away" his property. *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958). As Judge Learned Hand explained nearly a century ago, "[a] man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value." *Rowe*, 56 F.2d at 749. "[H]e has suffered a wrong; he has lost his chance to bargain with the facts before him." *Id.* The Supreme Court has since confirmed Judge Hand's wisdom. *See Shaw v. United States*, 137 S. Ct. 462, 467 (2016) (quoting and endorsing *Rowe*, 56 F.2d at 749).

Unsurprisingly, this reading of *Takhalov* is also at odds with our precedent. To be sure, we have never expressly held that the phrase "scheme and artifice to defraud" covers fraud in the inducement as well as fraud in the factum—the argument that it covers only the latter has never been made or at least not in those terms—but our precedents reflect a clear understanding that it covers both. Take, for instance, *United States v. Dynalectric Co.*, 859 F.2d 1559 (11th Cir. 1988), in which we held that an indictment charging a bid-rigging scheme for government contracts stated a "scheme or artifice to defraud," *see id.* at 1572, and that the evidence supported the convictions of the schemers, *see id.* at 1574–76. The defendants submitted fraudulent bids, which the government relied on when it selected the lowest bidder. *See id.* at 1562. But the defendants did not deceive the government about the cost of the lowest bid or the work that the winning bidder would complete. *See id.* The gravamen of the scheme to defraud, in other words, was not any misrepresentation about "the price" or "the characteristics of" the bargained-for work. *Takhalov*, 827 F.3d at 1314. Instead, it was a set of "lies about something else," *id.*—namely, that the bids were the product of competition, not collusion—intended to trick the government into entering a contract that otherwise it either would have avoided or would have negotiated on different terms.

Part II.A.1 of *Takhalov* fares no better if interpreted as a commentary on materiality. It is hornbook law that the test of materiality "cannot be stated in the

form of any definite rule, but must depend upon the circumstances of the transaction itself." *Prosser and Keeton on Torts* § 108, at 753. In the circumstances of a particular transaction, a misrepresentation is material either if a reasonable person would consider it important to his choice of action or if its maker knows that its recipient would likely do so. *See Neder*, 527 U.S. at 22 n.5 (quoting *Restatement (Second) of Torts* § 538(2)); *Svete*, 556 F.3d at 1164 (same); *accord Restatement (Second) of Contracts* § 162(2); *Prosser and Keaton on Torts* § 108, at 753–54; 1 *Page on Contracts* § 308, at 481–82 ("[I]t is usually held that [material representations] are all representations which . . . tend to induce the party to whom they are made, to enter into the contract."); 1 Story, *Commentaries on Equity Jurisprudence* § 195, at 204 (equating materiality with "inducement or motive to the act or omission of the other party").

Nothing about the common-law test limits materiality to misrepresentations about "the price," "the characteristics of the good," or even "the nature of the bargain itself." *Takhalov*, 827 F.3d at 1314. The phrasing of the test by the authorities suggests as much, the actionability of fraud in the inducement implies it, and a couple of common-law examples confirm it. If a parent declines to enroll his child at a school unless her classmates from a previous school have also enrolled there, the school's misrepresentation to the parent that they have done so is material, even though it does not concern the price of tuition or the

characteristics of the instruction. *Brown v. Search*, 111 N.W. 210, 211 (Wis. 1907). And if a vendor of portraits lies to a prospective buyer that members of the buyer's family have seen the portraits and like them, that lie too is material, notwithstanding that the buyer knows the price and characteristics of the goods. *Washington Post Co. v. Sorrells*, 68 S.E. 337, 337 (Ga. Ct. App. 1910).

The common-law courts that decided *Brown*, *Sorrells*, and many similar cases, *see Prosser and Keeton on Torts* § 108, at 753–54 & nn.45–60, also would not have held that a seller's pretense "that he is the long-lost cousin of a prospective buyer" cannot be material as a matter of law, *Takahlov*, 827 F.3d at 1314. On the contrary, it has long been established that "the identity of an individual" may be a material fact, provided—as always—either that it would be likely to influence a reasonable person or that the maker of the statement knows it would be likely to influence the recipient. *Prosser and Keeton on Torts* § 108, at 753; *see also* 1 *Page on Contracts* § 260, at 390 ("Such identity is material where the personality of the adversary party is a factor in inducing the one party to enter into the contract . . . ."). And our binding circuit precedent agrees. *See Walker v. Galt*, 171 F.2d 613, 614 (5th Cir. 1948) ("[F]raud may be predicated upon misrepresentations as to the identity of the purchaser . . . , where the vendor would not have entered into the contract had he known the true identity of the purchaser." (quoting 55 Am. Jur. *Vendor and Purchaser* § 96 (1946))); *see also United States*

v. Bent, 707 F.2d 1190, 1193 (11th Cir. 1983) ("We are bound by decisions of the former Fifth Circuit rendered prior to October 1, 1981, and by decisions of Unit B of the former Fifth Circuit rendered after that date." (citation omitted)). In short, if our discussion in Part II.A.1 of *Takhalov* interpreted the materiality element of actionable fraud, it is at odds with the traditional understanding of materiality and with the understanding reflected in our precedent.

So, on examination, the two most plausible ways of translating the analysis of Part II.A.1 into the language of the common law turn out to be doctrinal dead ends. Where does this leave us in our attempt to make sense of *Takhalov*? The connection between the jury instruction requested by the defendants, on the one hand, and the reasoning that occupies much of our opinion, on the other, is less than transparent. And the connection between that reasoning and the preexisting jurisprudence of fraud is even more obscure. To my mind, all that is clear is that the *Takhalov* panel held that the district court should have given the jury instruction and that its failure to do so was reversible error. The rationale for that decision remains an enigma.

In the light of these concerns, I encourage the bench and bar to evaluate carefully the precedential value of *Takhalov* in future prosecutions under the fraud statutes and, in doing so, to keep three principles in mind. First, the binding force of a precedent is limited to its holding, and "regardless of what a court says in its

opinion, the decision can *hold* nothing beyond the facts of that case." *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010) (emphasis added) (collecting decisions); *see also United States v. Johnson*, 921 F.3d 991, 1003 (11th Cir. 2019) (en banc); *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1500 & n.7 (11th Cir. 1993) (Edmondson, J., concurring in the judgment). Second, the holding of any panel decision must be construed, "if at all possible," in a manner that maintains the harmony of our precedents. *United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993). Third, even the holding of a panel decision is not binding precedent if it contradicts the holdings of earlier panel precedents or intervening decisions of the Supreme Court. *See United States v. Dailey*, 24 F.3d 1323, 1327 (11th Cir. 1994); *see also* Bryan A. Garner et al., *The Law of Judicial Precedent* § 36, at 304 (2016).

Notwithstanding my concerns about the reasoning of *Takhalov*, I do not mean to imply doubt about the correctness of its result. Perhaps the B-girls' representations about their employment status were immaterial to the customers' drink orders for some more precise reason than that they were not "about the price" or "the characteristics of the [drinks]." *Takhalov*, 827 F.3d at 1314. Or perhaps some other element of common-law fraud was lacking. In the last analysis—that is to say, in the light of our precedents and all that we know about the well-settled legal meaning of the word "defraud"—it may even be that *Takhalov* is best

understood to rest on the distinction between misrepresentation and mere nondisclosure or on the hypothesis that the defendants intended for the B-girls' concealment of their employment status to influence customers *only* by getting them in the door, not by inducing them to order drinks. True, either of those interpretations would render most of Part II.A.1 dicta. But a reading that makes dicta of large swaths of *Takhalov* is preferable to one that cannot be squared with preexisting doctrine. *See Hogan*, 986 F.2d at 1369 (We are "obligated, if at all possible, to distill from apparently conflicting prior panel decisions a basis of reconciliation and to apply that reconciled rule.").

In any event, we need not crack the riddle of *Takhalov* to resolve this appeal, and I express no ultimate opinion about its solution. But our analysis could have been much clearer had we only anchored it in the common-law meaning of the term Congress used when it enacted the federal criminal-fraud statutes.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13443-CC

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

ISAAC FELDMAN,

Defendant - Appellant.

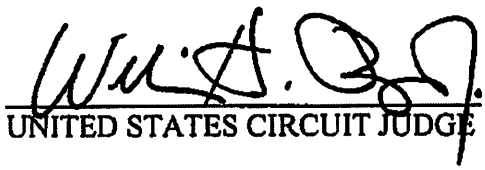
Appeal from the United States District Court
for the Southern District of Florida

BEFORE: WILLIAM PRYOR, NEWSOM and BRANCH, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Appellant Isaac Feldman is DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

ORD-41

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-12385

D.C. Docket No. 1:11-cr-20279-RNS-2

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALBERT TAKHALOV,
ISAAC FELDMAN,
STANISLAV PAVLENKO,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(July 11, 2016)

Before ED CARNES, Chief Judge, MARTIN, Circuit Judge, and THAPAR,[*] District Judge.

THAPAR, District Judge:

The wire-fraud statute, 18 U.S.C. § 1343 does not enact as federal law the Ninth Commandment given to Moses on Sinai.[1] For § 1343 forbids only schemes to *defraud*, not schemes to do other wicked things, *e.g.*, schemes to lie, trick, or otherwise deceive. The difference, of course, is that deceiving does not always involve harming another person; defrauding does. That a defendant merely "induce[d] [the victim] to enter into [a] transaction" that he otherwise would have avoided is therefore "insufficient" to show wire fraud. *See United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987).

Here, the defendants feared that the jury might convict them of wire fraud based on "fraudulent inducements" alone. Hence they asked the district court to give the jurors the following instruction: that they must acquit if they found that the defendants had tricked the victims into entering a transaction but nevertheless gave the victims exactly what they asked for and charged them exactly what they agreed to pay. The district court refused to give that instruction, and the jury ultimately convicted the

[*]Honorable Amul R. Thapar, United States District Judge for the Eastern District of Kentucky, sitting by designation.

[1] *See* Exodus 20:16 ("Thou shalt not bear false witness against thy neighbor.") (KJV).

defendants of wire fraud and other crimes, most of which were predicated on the wire-fraud convictions. The question presented in this appeal is whether the district court abused its discretion when it refused to give the requested instruction.

I.

A.

During the defendants' trial, the parties disagreed about much of what happened in the clubs the defendants owned. But they did agree on one thing: that the defendants had tricked men to come into the defendants' clubs. The government presented evidence that the defendants had hired Eastern European women—known as "Bar Girls" or "B-girls"—to pose as tourists, locate visiting businessmen, and lure them into the defendants' bars and nightclubs. [DE 1121 at 39]. And the defendants did not seriously dispute that evidence: they admitted that they knew the B-girls concealed their relationship with the clubs to persuade the men to go to the clubs. Indeed, the defendants testified that they believed this scheme was a perfectly legitimate business model. [*Id.* at 59–60, 99].

The parties' stories diverged, however, as to what happened after the men entered the clubs. In the government's story, the defendants' scheme began with the B-Girls' lies but went far beyond that. Once inside the clubs,

employees would pour vodka in the men's beer to get them drunker, misrepresent the prices of drinks, hide menus, cover up prices, and even forge the men's signatures on credit-card receipts. [*Id.* at 40–42].

The defendants' story, on the other hand, began and ended with the B-girls. Yes, they admitted they knew the B-girls were posing as tourists to get the men to come to the clubs with them. From there, though, they proceeded to mount what one might call the *Casablanca* defense, arguing that they were "shocked, shocked" to learn that fraud was taking place within their South-Beach versions of Rick's *Café Américain*.[2] As for the swindling going on inside the clubs—the lying about prices, the forging of signatures, and so on—the defendants said that they knew nothing about it. Instead, the defendants testified, they were merely investors in the clubs—or in charge of the credit-card transactions—but were not involved in the day-to-day workings of the clubs. [*See id.* at 60, 69–70, 86, 103]. In the defendants' story, none of these allegedly swindled men were truly victims: they knowingly entered the clubs, bought bottles of liquor, and drank them with

[2] *See generally Casablanca* (Warner Brothers 1942) ("Rick: How can you close [up my bar]? On what grounds? Captain Renault: I'm shocked, shocked to find that gambling is going on in here! Croupier: Your winnings, sir.")

their female companions. Thus, in the defendants' view, these men got what they paid for—nothing more, nothing less. [*See id.* at 62, 100–102].

B.

In addition to the factual dispute about what happened after the men came into the clubs, the parties also disagreed about the legal significance of the lies that the B-Girls used to get the men to come into the clubs in the first place. In the government's view, the jury could convict the defendants of wire fraud based on those lies alone. [*See* DE 1121 at 39–40; R. 1154 at 63]. The defendants argued just the opposite—that "just because they have [used promoters to persuade men to come back to the respective establishments] does not constitute fraud with regard to the wire fraud or conspiracy to commit these frauds." [DE 1152 at 285].

At the close of evidence, the defendants asked for a jury instruction to support this theory. Specifically, they asked the court to instruct the jury that "[f]ailure to disclose the financial arrangement between the B-girls and the Bar, in and of itself, is not sufficient to convict a defendant of any offense[.]" [DE 921 at 1]. The court denied that theory-of-the-defense instruction, however, because the court did not believe it was "an accurate statement of the law." [DE 1152 at 285, 289].

During closing argument, the government argued exactly what the defendants had expected it would argue: that the B-girls' concealment of their bar-affiliation to the men were material misrepresentations sufficient to constitute fraud. [DE 1154 at 63 ("The first lie was by the girls to get them to come to the clubs by not telling them that they work for the clubs and got a percentage and this was material. This was important because, as even the defendant's own witness told you, had they known that these women worked for the clubs they likely wouldn't have even gone.")]. When defense counsel stood up to make their closing arguments, they did so in front of a jury that had just heard that the B-girls' lies were material and had never received an instruction to the contrary. Perhaps for this reason, defense counsel focused their efforts elsewhere, arguing that there was not enough evidence to connect the defendants to the other fraudulent activities at the clubs. Specifically, the defendants argued that they were not involved in the alleged fraud that took place within the clubs, [*id.* at 147–48, 183, 191, 214–15], and that they did not believe they were doing anything illegal. [*Id.* at 147–48, 170–71, 201–02]. Following closing arguments, the jury convicted the defendants on several counts, including multiple counts of wire fraud and money laundering. [D.E. 954; D.E. 956; D.E. 957]. This appeal followed.

II.

We review for an abuse of discretion a district court's refusal to give a requested jury instruction. *United States v. Dohan*, 508 F.3d 989, 993 (11th Cir. 2007).

A.

To show that the district court abused its discretion when it refused to give a proposed jury instruction, a defendant must first show that the requested instruction was a correct statement of the law. *United States v. Eckhardt*, 466 F.3d 938, 947–48 (11th Cir. 2006). "We review the legal correctness of a [requested] jury instruction de novo." *Fid. Interior Const., Inc. v. Se. Carpenters Reg'l Council of United Bhd. of Carpenters & Joiners of Am.*, 675 F.3d 1250, 1259 (11th Cir. 2012).

1.

The law in question here is the wire-fraud statute, which makes criminal any "scheme or artifice to defraud."[3] 18 U.S.C. § 1343. The statute itself, however, does not explain what constitutes such a scheme or artifice. *United States v. Bradley*, 644 F.3d 1213, 1240 (11th Cir. 2011).

[3] The statute also includes a jurisdictional provision, namely that the schemer must transmit the fraudulent statements "by means of wire, radio, or television communication in interstate or foreign commerce." 18 U.S.C. § 1343. That provision is not relevant to this appeal.

Thus, the meaning of the phrase "scheme to defraud" has been "judicially defined." *United States v. Pendergraft*, 297 F.3d 1198, 1208 (11th Cir. 2002). And that definition is a broad one, "broad[er] . . . than the common law definition of fraud." *Id.* It is a "reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society." *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958).

"[D]espite its breadth," however, "the judicial definition" of a "scheme to defraud" has some limits. *Bradley*, 644 F.3d at 1240. The most important limit is obvious from the statute itself: the scheme must be a scheme to defraud rather than to do something other than defraud. For Congress could have made criminal any "scheme" *simpliciter*, but chose not to do so. The first question presented in this case, then, is what the word "defraud" means.

To answer that question, we turn first to the dictionaries. For "[t]he ordinary-meaning rule is the most fundamental semantic rule of interpretation." Antonin Scalia & Bryan A. Garner, *Reading Law* 69 (2012). And "to determine the common usage or ordinary meaning of a term, [we] often turn to dictionary definitions for guidance." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1223 (11th Cir. 2001); *see also Stein v.*

Paradigm Mirasol, LLC, 586 F.3d 849, 854 (11th Cir. 2009) (noting that "[a] term that is undefined in a statute carries its ordinary meaning" and turning first to the dictionary to determine that meaning). *Black's* defines the word "defraud" as "[t]o cause injury or loss to (a person or organization) by deceit." *Black's Law Dictionary* 516 (10th ed. 2014.). *Webster's* says much the same. *Webster's Third New International Dictionary* 593 (2002) (defining the word "defraud" as "to take or withhold from (one) some possession, right, or interest by calculated misstatement or perversion of truth, trickery, or other deception").

These definitions make clear that there is a difference between deceiving and defrauding: to *defraud*, one must intend to use deception to cause some injury; but one can *deceive* without intending to harm at all. *See Black's* at 492 (defining the word "deception" as "[t]he act of deliberately causing someone to believe that something is true when the actor knows it to be false"); *Webster's* at 585 (defining the word "deception" as "the act of deceiving, cheating, hoodwinking, misleading, or deluding"). Thus, deceiving is a necessary condition of defrauding but not a sufficient one. Put another way, one who defrauds always deceives, but one can deceive without defrauding.

For this reason, the law in the Eleventh Circuit makes clear that a defendant "schemes to defraud" only if he schemes to "depriv[e] [someone] of something of value by trick, deceit, chicane, or overreaching." *Bradley*, 644 F.3d at 1240. But if a defendant does not intend to harm the victim—"to obtain, by deceptive means, something to which [the defendant] is not entitled"—then he has not intended to defraud the victim. *Id.*

From that conclusion, a corollary follows: a schemer who tricks someone to enter into a transaction has not "schemed to defraud" so long as he does not intend to harm the person he intends to trick. And this is so even if the transaction would not have occurred but for the trick. For if there is no intent to harm, there can only be a scheme *to deceive*, but not one *to defraud*.

Consider the following two scenarios. In the first, a man wants to exchange a dollar into four quarters without going to the bank. He calls his neighbor on his cell phone and says that his child is very ill. His neighbor runs over, and when she arrives he asks her to make change for him. She agrees; the quarters pass to the man; the dollar passes to the woman; and they part ways. She later learns that the child was just fine all along. The second scenario is identical to the first, except that instead of giving the woman a true dollar, he gives her a counterfeit one.

The first scenario is not wire fraud; the second one is.[4] Although the transaction would not have occurred but-for the lie in the first scenario—the woman would have remained home except for the phony sickness—the man nevertheless did not intend to "depriv[e] [the woman] of something of value by trick, deceit, [and so on]." *Bradley*, 644 F.3d at 1240. But in the second scenario he did intend to do so.

More specifically, the difference between the scenarios is that, in the first scenario, the man did not lie about the nature of the bargain: he promised to give the woman a true dollar in exchange for the quarters, and he did just that. In the second, he lied about the nature of the bargain: he promised to give her a true dollar but gave her a fake one instead.

Now imagine another, more common scenario: a young woman asks a rich businessman to buy her a drink at Bob's Bar. The businessman buys the drink, and afterwards the young woman decides to leave. Did the man get what he bargained for? Yes. He received his drink, and he had the opportunity to buy a young woman a drink. Does it change things if the woman is Bob's sister and he paid her to recruit customers? No; regardless

[4] This assumes, of course, that the man's cell-phone signal travels across state lines, thus constituting a "wire, radio, or television communication in interstate or foreign commerce." 18 U.S.C. § 1343.

of Bob's relationship with the woman, the businessman got exactly what he bargained for. If, on the other hand, Bob promised to pour the man a glass of Pappy Van Winkle[5] but gave him a slug of Old Crow[6] instead, well, that would be fraud. Why? Because the misrepresentation goes to the value of the bargain.

Thus, a "scheme to defraud," as that phrase is used in the wire-fraud statute, refers only to those schemes in which a defendant lies about the nature of the bargain itself. That lie can take two primary forms: the defendant might lie about the price (*e.g.*, if he promises that a good costs $10 when it in fact costs $20) or he might lie about the characteristics of the good (*e.g.*, if he promises that a gemstone is a diamond when it is in fact a cubic zirconium). In each case, the defendant has lied about the nature of the bargain and thus in both cases the defendant has committed wire fraud. But if a defendant lies about something else—*e.g.*, if he says that he is the long-lost cousin of a prospective buyer—then he has not lied about the

[5] "Pappy's," as it is often called, is a particularly rare bourbon varietal: nearly impossible to find, and nearly impossible to afford when one finds it.

[6] Although Old Crow has a venerable pedigree—reportedly the go-to drink of Mark Twain, Ulysses S. Grant, Hunter Thompson, and Henry Clay—it is not Kentucky's most-expensive liquor. Its "deluxe" version, "Old Crow Reserve," retails for approximately $15 per bottle.

nature of the bargain, has not "schemed to defraud," and cannot be convicted of wire fraud on the basis of that lie alone.

The Second Circuit has interpreted the wire-fraud statute in precisely this way. Their cases have "drawn a fine line between schemes that do no more than cause their victims to enter into transactions that they would otherwise avoid—which do not violate the mail or wire fraud statutes—and schemes that depend for their completion on a misrepresentation of an essential element of the bargain—which do violate the mail and wire fraud statutes." *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007); *see also United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987) ("Misrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution. Instead, the deceit must be coupled with a contemplated harm to the victim [that] affect[s] the very nature of the bargain itself. Such harm is apparent where there exists a discrepancy between benefits reasonably anticipated because of the misleading representations and the actual benefits which the defendant delivered, or intended to deliver.") (internal quotation marks omitted); *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1182 (2d Cir. 1970) ("[W]e conclude that the defendants intended to deceive their customers but they did not intend to defraud them, because the falsity of their representations was not shown to be capable of affecting the

customer's understanding of the bargain nor of influencing his assessment of the value of the bargain to him, and thus no injury was shown to flow from the deception.").

Moreover, the Second Circuit's interpretation of the wire-fraud statute is not a parochial interpretation of an ambiguous provision of federal law. Their interpretation follows as a matter of logic from Congress's decision to use the phrase "scheme to defraud" rather than "scheme" or "scheme to deceive." We therefore adopt that interpretation as our own. A jury cannot convict a defendant of wire fraud, then, based on "misrepresentations amounting only to a deceit." *Shellef*, 507 F.3d at 108. Thus, even if a defendant lies, and even if the victim made a purchase because of that lie, a wire-fraud case must end in an acquittal if the jury nevertheless believes that the alleged victims "received exactly what they paid for." *Id.*

2.

Here, the defendants asked the district court to instruct the jury that "[f]ailure to disclose the financial arrangement between the B-girls and the Bar, in and of itself, is not sufficient to convict a defendant of any offense[.]" R. 921 at 1; *see also* R. 1152 at 285 ("So [Pavlenko's] theory of defense is just because [the defendants used the B-girls to lure men into the clubs without disclosing their financial arrangement] does not constitute

fraud with regard to the wire fraud or conspiracy to commit these frauds."). If the jury believed that the defendants had deceived the victims only about the B-girls' pay arrangement, then the jury would likewise believe that the defendants' misrepresentations "amount[ed] only to deceit" and that the victims "received exactly what they paid for." *Shellef*, 507 F.3d at 108. Thus, "failure to disclose the financial arrangement between the B-girls and the Bar" was not "in and of itself" sufficient to convict the defendants of wire fraud. The defendants' requested instruction therefore seems like a correct statement of the law.

The government responds in a few ways. First, it argues that the Second Circuit cases have not "been applied in this Circuit." United States Br. at 43. True, but neither have we rejected the Second Circuit's interpretation; we simply have never considered the question they answered. And the "law" at issue is the proper interpretation of the federal statute itself, not some common-law creature unique to the Second Circuit. After all, the defendants' argument is not that the Eleventh Circuit is bound by the opinions of the Second Circuit. The argument is that the Second Circuit's interpretation of the statute is *the right interpretation*. Thus, the defendants

argue, their proposed jury instruction was a correct statement of "the law," *i.e.*, the statute. We have already explained why we agree.[7]

Second, the government argues that the proposed instruction "was incorrect legally, because it proposed to tell the jury that [the] defendants' conduct was outside the reach of the wire fraud statute." United States Br. at 54. No, it did not. It proposed only to tell the jury what portion of the defendants' conduct could be criminal under the statute and what portion could not.

Third, the government argues that "Pavlenko's instruction was incorrect in its portrayal of the charges" because the government "never described the [defendants'] scheme" as one "to have attractive women induce patrons to purchase and consume alcoholic beverages under the

[7] The government argues in passing that the Second Circuit's holding in *Regent* "conflicts directly" with our holding in *United States v. Svete*, 556 F.3d 1157 (11th Cir. 2009) (en banc). United States Br. at 39. We disagree. In *Regent*, the Second Circuit held that a jury may convict a defendant of wire fraud only if the defendant lied about the nature of the bargain itself. *See Regent*, 421 F.2d at 1182. In *Svete*, by contrast, we held that a jury may convict a defendant of wire fraud even if the scheme in question would not have deceived a person of at least ordinary prudence. *See Svete*, 556 F.3d at 1165. There—like in *Regent*, and like here—the defendants had made false statements to induce the victims into entering into a transaction. *Id.* at 1160. But there—*un*like in *Regent* and *un*like here—those false statements were about the nature of the bargain. *Id.* (noting that the defendants' sales agents had made false statements about, among other things, "the risks associated with the [victims'] investments"). *Svete* is therefore distinguishable from *Regent*—and from this case. The Eleventh Circuit simply has not addressed—in *Svete* or elsewhere—the precise question that the Second Circuit considered in *Regent* and that is presented here.

illusion that the patron may later persuade the women to have sexual relations." United States Br. at 55. Fair enough. But the question at hand is a purely legal one: whether the defendants' proposed instruction was a correct statement of the law. And the government's characterization of the defendants' scheme has no bearing on the answer to that question.

Finally, the government argues that the instruction "was incorrect in its depiction of the facts" because "[t]he evidence showed convincingly that the conspirators . . . intoxicated patrons without their knowledge or knowing consent, forcing liquor onto patrons, adulterating beverages, and physically pouring it down victims' throats in some instances." United States Br. at 55–56. Again, fair enough. But, again, totally irrelevant. What "the evidence showed"—even "showed convincingly"—simply has no bearing on whether the defendants' proposed instruction was a correct statement of the law.

In sum, the defendants asked the district court to tell the jurors that they could convict only if they found that the defendants had schemed to lie about the quality or price of the goods sold to the victims. And § 1343, which we interpret de novo, requires the jury to make just such a finding before convicting a defendant of wire fraud. Thus, the proposed instruction was a correct statement of the law.

B.

To show an abuse of discretion, however, a defendant must show more than just that the requested instruction was a correct statement of the law. He must also show that the instruction dealt with a sufficiently important point raised during trial. *Eckhardt*, 466 F.3d at 947–48.

Here, the defendants' case theory seemed to go as follows: yes, we knew that the B-girls were tricking the victims into coming to the bar by posing as tourists, but we nevertheless did not commit wire fraud because we gave the victims exactly what they ordered—*i.e.*, absurdly expensive drinks at the bar—and thus any lies about the B-girls' employment status did not misrepresent the value of the bargain.[8] The government's position was that, although there was evidence that the defendants did far more than just trick the victims into coming to the bar, the jury could convict based on that trickery alone.

Given the positions that the government and defendants took during trial, the defendants' proposed instruction—that "[f]ailure to disclose the

[8] The government of course argued that, in addition to tricking the victims into entering the bar, the defendants also charged them exorbitant drink-prices that the menus nowhere advertised. But all that shows is that the defendants' case theory required the jury to find that the defendants did not monkey with the prices. And that is a perfectly valid defense theory.

financial arrangement between the B-girls and the Bar, in and of itself, is not sufficient to convict a defendant of any offense"—certainly "dealt with some point in the trial so important that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense." *Eckhardt*, 466 F.3d at 947–48. After all, if the jurors believed that they could convict based only on the B-girls' failure "to disclose the financial arrangement between the B-girls and the Bar," then the defense's theory would have collapsed entirely.

C.

Finally, to show that the district court abused its discretion by refusing to give a proposed instruction, a defendant must show that the proposed instruction "was not substantially covered by a charge actually given." *Eckhardt*, 466 F.3d at 948. Here, the district court gave the jury an instruction as to the elements of the offense that in relevant part provided:

> A defendant can be found guilty of [wire fraud] only if all of the following facts are proved beyond a reasonable doubt: 1. The defendant knowingly devised or participated in a scheme to defraud or to obtain money by false pretenses, representations or promises. 2. The false pretenses, representations or promises were about a material fact. 3. The defendant acted with the intent to defraud and; 4. The defendant transmitted or caused to be transmitted by wire some communication in interstate commerce to help carry out the scheme to defraud.

> The term "scheme to defraud" includes any plan or course of action *intended to deceive or cheat someone out of money or property* by using false or fraudulent pretenses, representations or promises.
>
> A "material fact" is an important fact that a reasonable person would use to decide whether to do or not do something. A fact is material if it has the capacity or natural tendency to influence a person's decision. It does not matter whether the decision-maker actually relied on the statement or knew or should have known that the statement was false.
>
> The intent to defraud is the specific intent to deceive or cheat someone, usually for personal financial gain or to cause financial loss to someone else.

R. 1154 at 25–26 (emphasis added). Nowhere in that instruction—or anywhere else—did the district court tell the jurors that "[f]ailure to disclose the financial arrangement between the B-girls and the Bar, in and of itself, is not sufficient to convict a defendant of any offense[.]" Nor did the district court say anything like that. Thus, it would seem that the district court's instructions did not "substantially cover" the defendants' requested instruction.

In response, the government argues that the district court's "good-faith instruction" was enough. Specifically the government points out that the court told the jury that:

> Good faith is a complete defense to a charge that requires intent to defraud. A defendant is not required to prove good faith. The Government must prove intent to defraud beyond a

> reasonable doubt. An honestly held belief or an honestly formed belief cannot be fraudulent intent even if the opinion or belief is mistaken. Similarly, evidence of a mistake in judgment, an error in management, or carelessness cannot establish fraudulent intent. [The defense is not applicable if] the defendant or other coconspirator, with the defendant's knowledge, knowingly made false or fraudulent representations to others with the specific intent to deceive them.

R. 1154 at 37–38. That instruction, the government argues, "substantially covered" the defendants' requested one.

The government's argument simply misunderstands the defendants' case theory. They did not argue that they lacked the specific intent to deceive the victims; indeed they admitted that they fervently hoped to do just that. The defendants instead argued that they had intended to deceive the victims in only one way—by tricking them into coming to the bars—and that such a deception was not wire fraud. Put another way, the defendants did not dispute that they lacked specific-enough intent; they argued that what they specifically intended to do was not a crime. The district court's good-faith instruction concerned only what it meant for the defendants to have a specific intent to deceive. It said nothing about what kind of deception could constitute wire fraud. Thus, the good-faith instruction did not "substantially cover" the defendants' requested instruction.

One might also argue (though the government does not) that the district court's definition of "scheme to defraud" substantially covered the proposed instruction. This is a more difficult argument to answer. After all, the court told the jurors that they could convict only if they found that the defendants intended to "deceive or cheat someone out of money or property." And if someone is lured to a bar under false pretenses but nevertheless gets precisely what he pays for, he has hardly been "deceive[d] or cheat[ed] out of money or property." Thus, under the given instructions, it would have been hard for the jury to convict if they found only that the defendants lured the victims into the bar under false pretenses. To the contrary, to convict under the given instructions, the jury would have needed to find—as a matter of logic—that the defendants cheated the victims out of money or property, *e.g.*, by running up fake bills on the victims' credit cards and charging absurd drink prices that the menus nowhere advertised.

The question before us, however, is not whether the proposed instruction was "logically entailed" by the given instruction, but whether it was "substantially covered"; and those are meaningfully different concepts. After all, the average juror is not Mr. Spock. If he were, then a trial-court judge's job would be much easier. He could instruct the jury in broad strokes—instructing only as to the bare elements of the crime, perhaps—and

be confident that the jury would deduce all of the finer-grained implications that must logically follow. As it stands, however, the vast majority of American juries are composed exclusively of humans. And humans, unlike Vulcans, sometimes need a bit more guidance as to exactly what the court's instructions logically entail.

For that reason, this case is distinguishable from other Eleventh Circuit cases holding that a given instruction substantially covered a requested one—even the two cases that are most difficult for the defendants, *Martinelli* and *Hill*. The difference between those cases on the one hand, and this case on the other, is the size of the logical leap that a juror would need to make to get from the instruction the court gave to the instruction the defendant requested.

In *Martinelli*, the court instructed the jury that the defendant was guilty of money laundering only if he knew that the money was derived from felonious activities. The defendant in turn asked the court to instruct the jury that the defendant was not guilty if he thought the money-producing business was a legitimate one. *United States v. Martinelli*, 454 F.3d 1300, 1315–16 (11th Cir. 2006). Thus, to get from the given instruction to the requested one, the jury needed to infer only one thing: that "legitimate

businesses" do not engage in "felonious activities." We have no doubt that a juror can bridge that logical gap all on her own.

Similarly, in *Hill*, the court instructed the jury that the defendant was guilty of credit-application fraud only if he made false statements to the bank knowingly and willfully. The defendant asked the court to instruct the jury that he was not guilty if he believed the statements were true. *United States v. Hill*, 643 F.3d 807, 852–54 (11th Cir. 2011). Thus, to get from the given instruction to the requested one, the jury needed to infer only one thing: that a person cannot lie "knowingly and willfully" if he speaks what is in his view the truth. That inference, too, hardly requires Holmesian feats of deduction.[9]

In contrast, the court here instructed the jury that the defendants were guilty of wire fraud only if they intended to "deceive or cheat someone out of money or property." The defendants asked the court to instruct the jury that they were not guilty if they merely used lies to lure the victims into an otherwise-legitimate transaction. To get from the given instruction to the requested one, the jury needed to make the following inference: that a person is not "deceived or cheated out of money or property" if he gets exactly what

[9] Sherlock or Oliver Wendell: either Holmes will do here.

he paid for even though he is deceived into paying in the first place. Suffice it to say that, if a juror is going to make that kind of logical inference, he is probably going to need some guidance from the district court.

Indeed, the government still refuses to make that inference without some judicial "guidance." The prosecution repeatedly argued below that the B-Girls' lies about their employment status was enough to convict the defendants of wire fraud. *See, e.g.*, R. 663 at 3–4; R. 1121 at 39–40; R. 1154 at 63. And even before this court, the government argues that "[t]here is no reason that deceiving victims about the girls' relationship to the clubs would not be enough to sustain a wire-fraud conviction[.]" United States Br. at 39. Although the government's argument might be a reason to hold that the defendants' requested instruction was not a "correct statement of a law"—an argument that we rejected above—it also shows that the given instructions did not "substantially cover" the requested one. After all, if even the government's attorneys did not believe that the court was instructing the jury that "deceiving victims about the girls' relationship to the clubs would not be enough to sustain a wire-fraud conviction," then why would a jury composed exclusively of lay people?

In sum, a district court does not need to tell a jury that proceeds from a felony are not proceeds from a legitimate business. Nor does a court need

to tell a jury that a person does not lie willfully if he thinks he is telling the truth. The jurors will figure those things out on their own. But a court *does* need to tell a jury that a scheme to trick patrons to come into a bar—without more—is not wire fraud. That is not the sort of thing that we can expect jurors to simply infer. The district court's elements-of-the-crime instruction therefore did not "substantially cover" the defendants' requested instruction.

D.

We recognize that the district court presided over a complex criminal trial that took many months to complete. And the court did an admirable job in overseeing those proceedings. Indeed, we commend the court, whose evidentiary and other legal rulings were, in our view, nearly flawless. Nevertheless, the district court refused to give a jury instruction that was a correct statement of the law, was critical to the defense's case theory, and was not substantially covered by other instructions. Thus, as a matter of law, the district court abused its discretion by refusing to give that instruction. The question, then becomes whether this error requires reversal or whether it was instead harmless.

III.

A.

This would have been an easy case to decide during the Kennedy administration. Under the Supreme Court's NASA-era jurisprudence, the rules were clear with respect to botched jury instructions. If a trial judge gave two instructions—and one turned out to be improper—then the appellate court would reverse the conviction so long as "it [wa]s impossible to say under which [instruction] the conviction was obtained." *Stromberg v. California*, 283 U.S. 359, 368 (1931); *see also Yates v. United States*, 354 U.S. 298, 311–12 (1975). Under that test, the defendants here would surely be entitled to a new trial. After all, the district court provided the jury with multiple paths by which they could arrive at a guilty verdict. One of those paths—as we have explained above—was an impermissible one. It is of course "impossible to say" which path the jury proceeded down. And thus it is likewise "impossible to say" whether the jury would have nevertheless arrived at the same destination—a conviction—if the trial court had restricted the jury to the proper route.

Things are harder now. In 1967, the Supreme Court announced its decision in *Chapman v. California*, 386 U.S. 18 (1967), which held that even constitutional errors might, in certain situations, still be harmless ones.

"In a series of post-*Chapman* cases," the Court "concluded that various forms of [jury-instruction] error[s] are not structural"—*i.e.*, they do not automatically require reversal, no questions asked—but are instead "subject to harmless-error review." *Hedgpeth v. Pulido*, 555 U.S. 57, 60 (2008). And although those cases "did not arise in the context of a jury instructed on multiple theories of guilt, one of which is improper," the Court made clear that the same harmless-error standard would apply in cases, like the one here, in which a jury could have convicted based on an erroneous instruction. *Id.* at 61.

That standard was framed most clearly—and most recently—in *Neder v. United States*, 527 U.S. 1 (1999). There, the government indicted a man named Ellis Neder for tax fraud. "According to the Government, Neder failed to report more than $1 million in income in 1985 and more than $4 million in income for 1986, both amounts reflecting profits Neder obtained from [various] fraudulent[ly] [obtained] real estate loans." *Id.* at 6. He was therefore indicted for two counts of filing a false income tax return, in violation of 26 U.S.C. § 7206(1). *Id.* To convict Neder of violating that section of the Internal Revenue Code, the government needed to prove that he had willfully "ma[de] and subscrib[ed]" a "return, statement, or other document, which contains or is verified by a written declaration that it is

made under the penalties of perjury, and which he does not believe to be true and correct as to *every material matter*." 26 U.S.C. § 7206(1) (emphasis added).

Encouraged by then-existing circuit precedent, the district court glossed over this "every material matter" language and instructed the jury that it "need not consider the materiality of any false statements even though that language [was] used in the indictment." *Neder*, 527 U.S. at 6 (internal quotation marks omitted). "The question of materiality, the [district] court instructed, 'is not a question for the jury to decide.'" *Id.* By the time the case arrived at the Supreme Court, the parties agreed that the district court had made a mistake when it gave that instruction. *Id.* at 8. After all, the statute did not forbid a taxpayer from making *any* false statements on his tax return; it forbade him only from making *material* false statements.

The question before the Court was what to do about the error. "Unlike such defects as the complete deprivation of counsel or trial before a biased judge," the Court held, "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair[.]" *Id.* at 9. The Court then imported the *Chapman* standard and thus framed the harmless-error standard—at a high level of generality—as follows: the question is whether "it appears beyond a reasonable doubt that the error

complained of did not contribute to the verdict obtained." *Id.* at 15 (internal quotation marks omitted).

In addition to this general rule—framed, as it were, as a wide-angle shot—the *Neder* Court also zoomed in to give additional guidance as to exactly when an error would be harmless beyond a reasonable doubt. Specifically, the Court held that the question was "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element," *id.* at 19—*i.e.*, whether a properly instructed jury could have "reasonably f[ound]" the defendant not guilty, *id.* at 16. If not, the Court held, then a jury-instruction error is harmless. Answering this question as to Neder himself, the Court held that "no jury could reasonably find that Neder's failure to support [some $5 million] of income on his tax returns was not 'a material matter.'" *Id.* And thus the Court concluded that it was "beyond cavil" that "the error 'did not contribute to the verdict obtained.'" *Id.* at 17 (quoting *Chapman*, 386 U.S. at 24).

The general question presented in this case is therefore as follows: whether "it appears beyond a reasonable doubt that the [faulty jury instruction] did not contribute to the verdict obtained." *See id.* at 15 (internal quotation marks omitted). The more specific question is this: does "the record contain[] evidence that could rationally lead" a jury to find that

the defendants lacked the intent to defraud? *See id.* at 19. If so, the defendants are entitled to a new trial. If not, the failure to give the requested instruction was harmless. *Id.*

B.

1.

Here, the record contains sufficient evidence such that, had the requested instruction been given, a rational jury could find that the defendants lacked the intent to defraud on almost all of the wire-fraud counts. At trial, the defendants each testified that they were aware that the B-girls concealed their relationship to the clubs. *See* D.E. 1147 at 187 (Pavlenko testimony); D.E. 1149 at 95 (Feldman testimony); D.E. 1151 at 34, 38, 88, 213 (Takhalov testimony).[10] However, they each also testified that they did not intend to defraud any customers and that they were not aware of any (other) illicit activity by the B-girls. *See, e.g.*, D.E. 1146 at

[10] The government argues that the defendants denied knowing that the B-girls concealed their relationship to the clubs. Even if this were true, a jury is not bound either to believe or not believe a witness's testimony as a whole. Rather, juries can find one part of a witness's testimony credible while not believing another part of the testimony. *See, e.g.*, *Elwet v. United States*, 231 F.2d 928, 934 (9th Cir. 1956) ("The jury may conclude a witness is not telling the truth as to one point, is mistaken as to another, but is truthful and accurate as to a third."). So the jury could choose not to believe the defendants about knowing the B-girls concealed their relationships to the clubs, but still believe the defendants when they testified that they knew nothing about hiding prices, lying about prices, spiking drinks, etc.

119–20 (Pavlenko testimony); D.E. 1147 at 31–32 (same); D.E. 1149 at 44–47, 109, 181, 184, 223–24 (Feldman testimony); D.E. 1151 at 38–39, 143, 184 (Takhalov testimony). Had the requested instruction been given, a rational jury certainly could have chosen to believe the defendants' testimony that they did not intend to defraud customers. And in fact, the record suggests the jury did believe the defendants, at least in part—the jury acquitted the defendants on the majority of the counts in the indictment. D.E. 954; D.E. 956; D.E. 957; *see United States v. Thomson*, 473 F.3d 1137, 1142 (11th Cir. 2006) ("The jury gets to make any credibility choices, and we will assume they made them all in the way that supports the verdict."). Regardless of the verdict, though, "[i]t is not for us to decide which witnesses we find more believable—credibility choices lie within the province of the jury." *United States v. Johnson*, 713 F.2d 654, 661 (11th Cir. 1983) (internal quotation marks omitted). As such, the defendants' testimony provided sufficient evidence for a rational jury to find that the defendants lacked the intent to defraud.

The government makes four arguments in response.[11] First, the government explains that the defendants' fraud scheme had many components, and the government never told the jury to convict the defendants solely on their failure to disclose the B-girls' relationship to the clubs. True. But regardless of whether the government *told* the jury convict on this basis, the jury still could have convicted the defendants on the wire fraud counts solely on this basis. To convict the defendants of wire fraud, the jury had to find, in part, that (1) the defendants "knowingly devised or participated in a scheme to defraud or to obtain money by false pretenses, representations or promises," and (2) these "false pretenses, representations or promises were about a material fact." D.E. 1154 at 25 (jury instructions). In the government's closing, the government argued that the concealment of the B-girls' relationship to the clubs was a "material" misrepresentation. *Id.* at 63. As such, even if the jury did not believe that the defendants made any other material misrepresentations, the jury still could have convicted the defendants because the government proved that the defendants made false representations about a material fact: the B-girls' relationship to the clubs.

[11] The government also claims that district court's instructions as a whole show that the absence of the proposed instruction was harmless. The Court addressed this argument in full in Part II of this opinion, *supra*.

Second, the government argues that it presented "overwhelming evidence" that the defendants were guilty of wire fraud beyond their failure to disclose the B-girls' relationship. While this may be correct, it does not change the outcome here. The question is not whether the jury could still have *convicted* the defendants if the instruction had been given. The question is whether the jury could have *acquitted* them. And the evidence against the defendants here was not so overwhelming that an acquittal would have been irrational.

Third, the government asserts that "if the jury was truly under the 'mistaken' impression that simply concealing the girls' relationship to the clubs was sufficient to convict, there would have been no acquittals whatsoever on the substantive fraud counts." United States Supp. Br. at 11. It is true that the jury acquitted the defendants on some of the substantive fraud counts. This does not mean that the jury did not have the 'mistaken impression' that concealing the girls' relationship to the club was, on its own, fraud. Maybe the jury did not believe the government proved the defendants' involvement in those counts, or maybe the jury reached inconsistent verdicts. Regardless, the Court will not read into the split verdict to determine whether or not the jury believed the concealment of the B-girls' relationship was sufficient to prove fraud. *See United States v.*

Powell, 469 U.S. 57, 64–65 (1984) ("[W]here truly inconsistent verdicts have been reached, the most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." (internal quotations omitted)).

Fourth, the government states that the defendants did not argue their proposed defense theory—that the concealment of the B-girls' relationship did not constitute fraud—in closing. Thus, the government claims, we cannot find that the jury convicted the defendants solely on the concealment of the B-girls' relationship to the clubs. But the government does not point the Court to a single case that requires a defendant to raise a defense theory in closing arguments after that the trial court rejected that theory. And, even if such a case existed, the government's logic is flawed. Imagine that the defendants had argued in closing that the concealment of the B-girls' relationship did not constitute fraud. Without an instruction supporting the defendants' theory, the jury was not required to believe this theory. Instead, the jury could believe what the government argued in its closing: that the concealment was material and the defendants acted with the intent to deceive or cheat the victims. Thus, even if the defendants had argued their theory in

closing, the jury still could have convicted the defendants of fraud based on the concealment of the B-girls' relationship.

The government has not presented the court with sufficient evidence showing the trial court's error was harmless as to the wire-fraud counts and conspiracy-to-commit-wire-fraud counts.[12] And it is the government's burden to demonstrate that the error was harmless. *United States v. Robison*, 505 F.3d 1208, 1222–23 (11th Cir. 2007). The defendants' convictions with respect to those counts are therefore reversed.

2.

The defendants also argue that their convictions on the money-laundering counts, Count 29 and Count 39, should be reversed because the missing instruction tainted these counts as well. [Pavlenko Initial Brief at 24.] Count 29 charged all three defendants with conspiracy to violate two provisions of the money-laundering statute: money laundering by concealment and money laundering by international promotion. D.E. 953 at 20–21.[13] Count 39 also charged Takhalov with conspiracy to commit money laundering by concealment. *Id.* at 32–33. Although money laundering by

[12] The defendants were convicted of wire-fraud-related Counts 1, 6–8, 13, 18–21, 30, 34–35, and 37.

[13] The jury convicted Takhalov of money laundering by concealment, and Pavlenko and Feldman of money laundering by international promotion. D.E. 954; D.E. 956; D.E. 957.

concealment and money laundering by international promotion involve different elements, both offenses criminalize transactions that promote an underlying criminal activity. 18 U.S.C. § 1956(a). But to prove either offense, the government does not have to prove that the defendant committed the underlying criminal activity. *Id.*; *see also United States v. Martinelli*, 454 F.3d 1300, 1311 (11th Cir. 2006). Instead, for money laundering by concealment, the government has to prove that the defendant knew: (1) that the proceeds of the transaction involved proceeds of an unlawful activity, and (2) that the transaction was designed to conceal some aspect of those proceeds. 18 U.S.C. § 1956(a)(1). And for money laundering by international promotion, the government has to prove that the defendant engaged in the transaction "with the intent to promote the carrying on of [a] specified unlawful activity." *Id.* § 1956(a)(2)(A).

Here, the government charged two specified unlawful activities: wire fraud, in violation of 18 U.S.C. § 1343, and misuse of a visa document, in violation of 18 U.S.C. § 1546. D.E. 953 at 21, 33.[14] The first problem for the government is that it did not provide us any evidence to show that the

[14] The defendants do not challenge the validity of the "misuse of a visa document" activity, so this was a proper theory of prosecution. They do, however, challenge the validity of the money-laundering counts based on wire fraud.

jury would have convicted the defendants of money laundering based on misuse of a visa document. *Chapman*, 38 U.S. at 828 (Harmless-error analysis puts "the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of [the] erroneously obtained judgment."); *United States v. Fern*, 155 F.3d 1318, 1327 (11th Cir. 1998) ("Here, the government's burden, more precisely stated, is to show that the guilty verdict against [the defendant] was 'surely unattributable' to the incorrect jury instruction[.]"). And the Court's review of the record does not reveal sufficient evidence for such a finding. In fact, in the government's opening statement—a roadmap of the government's case—the government did not mention anything about money laundering related to misuse of a visa document. *See* D.E. 1121. Instead, the government expressly tied the money-laundering counts only to wire fraud, stating that the defendants engaged in money laundering "because the wire fraud was being concealed." *Id.* at 51. This brings us to the second problem: we cannot be sure that a properly instructed jury would have found that the specified unlawful activity of wire fraud actually occurred. *See supra* Part III.B.1. And, without that, we cannot conclude beyond a reasonable doubt that the jury would have convicted the defendants of money laundering. *See United States v. Neder*, 197 F.3d 1122, 1129 (11th Cir. 1999) ("[T]he government

must show that the evidence [of the proper theory of guilt] is so overwhelming . . . that no rational jury, properly instructed . . ., could have acquitted [the defendants] on that count."). As such, the defendants' convictions for conspiracy to commit money laundering, Count 29 and Count 39, must be reversed.

IV.

The remaining conviction against Takhalov, Count 38 for conspiracy to defraud the United States Department of Homeland Security, remains because it was unrelated to wire fraud. D.E. 953 at 30–32. Finding no other errors that would justify reversal on Count 38, we reverse on all but Count 38, and remand to the district court for further proceedings consistent with this opinion.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-12385

D.C. Docket No. 1:11-cr-20279-RNS-2

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALBERT TAKHALOV,
ISAAC FELDMAN,
STANISLAV PAVLENKO,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(October 3, 2016)

Before ED CARNES, Chief Judge, MARTIN, Circuit Judge, and THAPAR,[*] District Judge.

PER CURIAM:

In July 2016, this Court reversed all of Stanislav Pavlenko's wire-fraud convictions—except one. *See* Op. at 41 (July 11, 2016). That was his conviction for Count 21 of the indictment, which charged Pavlenko with lying in an email to American Express ("AMEX"). [DE 953 at 15]. Though the district judge erred in failing to provide the defense's requested fraud instruction, the Court found that error harmless as to Count 21. *See* Op. at 36–37.

Both Pavlenko and the government have moved for panel rehearing. They bring the same argument—that Count 21 should not be an outlier—but from opposite directions. Pavlenko argues that, since the error was not harmless as to the other counts, it was not harmless as to Count 21. *See* Pavlenko Pet. for Reh'g at 2–6 (Aug. 1, 2016). The government argues that, since the error was harmless as to Count 21, it was harmless as to the other counts, too. *See* Government Pet. for Reh'g at 5–10 (Aug. 1, 2016).

We need not address the harmless-error issue, however, because Pavlenko also argues that the government failed to give the jury sufficient evidence to convict him under Count 21, and we are now convinced that argument has merit. *See* Pavlenko Pet. for Reh'g at 6–13; *see also* Pavlenko Initial Br. at 40 (Sept. 26, 2014).

When a convicted defendant challenges the sufficiency of the evidence, we look at the evidence "in the light most favorable to the verdict." *United States v. Hasson*, 333 F.3d

[*]Honorable Amul R. Thapar, United States District Judge for the Eastern District of Kentucky, sitting by designation.

1264, 1270 (11th Cir. 2003). And we will affirm the verdict "if a reasonable juror could conclude that the evidence establishes guilt beyond a reasonable doubt." *Id*.

In Count 21, the government indicted Pavlenko for an email he sent to AMEX on April 21, 2010. [DE 953 at 15]. To sustain a wire-fraud conviction, that email must have furthered a fraud scheme, *i.e.*, tricked AMEX into parting with money it would not otherwise have let go. *See* Op. at 7–14. Here, the scheme allegedly worked like this: a B-girl lured a man into Pavlenko's bar, where the man proceeded to use his AMEX card. Looking back on the encounter from the clearer light of day, the customer decided he had been defrauded and contested the charge with AMEX. On April 19, 2010, however, AMEX determined that the charge was not fraudulent and sent its customer a letter saying so. *See* [DE Doc. 1142 at 67, 85, 88 (citing Defense Exh. SP 50)]. On April 21, for whatever reason, Pavlenko sent AMEX an email covering up his relation with the B-girl. But by then, he had nothing left to gain: AMEX had already upheld the charge. In doing so, AMEX did not—and, of course, could not—rely on the April 21 email. [*Id*. at 88]. And since AMEX had already approved the charge, no reasonable juror could have concluded that Pavlenko defrauded AMEX of that money through the April 21 email, which was the sole basis for Count 21.

This is not to say the government had no evidence that Pavlenko defrauded AMEX. The April 19 letter shows that AMEX considered "documented company records"—specifically, some documents and a photo that Pavlenko emailed to AMEX on April 16—in determining that the charge was not fraudulent. [*Id*.]. The government could have indicted Pavlenko for the April 16 email. But it didn't. The government also could have argued that the April 21 email constituted "fraud after the fact." *See United States v. Ross*, 131 F.3d 970,

980 (11th Cir. 1997) (noting that a defendant can commit wire fraud by concealing the illegality of the transaction after it occurred). But the government didn't. *See, e.g.*, *United States v. Elkins*, 885 F.2d 775, 782 (11th Cir. 1989) ("This Court cannot affirm a criminal conviction based on a theory not contained in the indictment or not presented to the jury." (internal citation omitted)).

After considering both petitions for rehearing, we revise our opinion filed on July 11, 2016, and published at 827 F.3d 1307, in the following respects:

We reverse Pavlenko's conviction as to Count 21 because the government failed to provide sufficient evidence to support the charge, and we remand to the district judge for further proceedings.

The first and second full paragraphs of page 1323 are deleted. The word "however," in the sentence spanning pages 1323–24, is deleted.

The final sentence of the opinion is deleted, and the following sentence is substituted in its place:

> Finding no other errors that would justify reversal on Count 38, we reverse on all but Count 38, and remand to the district court for further proceedings consistent with this opinion.

In all other respects, the petitions for rehearing are DENIED.

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA

v.

ISAAC FELDMAN

JUDGMENT IN A CRIMINAL CASE

Case Number: **11-20279-CR-SCOLA(s)-4**

USM Number: **95135-004**

Counsel For Defendant: Richard K. Houlihan, Esquire
Counsel For The United States:
AUSA Richard Gregorie and AUSA Michael Thakur
Court Reporter: Carleen Horenkamp

The defendant was found guilty on counts 1 and 29 of the superseding indictment.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 1349	Conspiracy to commit wire fraud.	November 2010	1
18 U.S.C. § 1956(h)	Conspiracy to commit money laundering.	November 2010	29

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: 7/14/2017

_____
ROBERT N. SCOLA, Jr.
United States District Judge

Date: 7/18/2017

DEFENDANT: **ISAAC FELDMAN**
CASE NUMBER: **11-20279-CR-SCOLA-4**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **100 months**. The term consists of 100 months as to each of Counts 1 and 29, to run concurrently.

The court makes the following recommendations to the Bureau of Prisons: defendant be designated to a facility in or as near to South Florida as possible.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **ISAAC FELDMAN**
CASE NUMBER: **11-20279-CR-SCOLA-4**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **three years**. This term consists of three years as to each of Counts 1 and 29, to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **ISAAC FELDMAN**
CASE NUMBER: **11-20279-CR-SCOLA-4**

SPECIAL CONDITIONS OF SUPERVISION

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

Mental Health Treatment - The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

DEFENDANT: **ISAAC FELDMAN**
CASE NUMBER: **11-20279-CR-SCOLA-4**

CRIMINAL MONETARY PENALTIES[1]

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$200.00	$0.00	$15,498.05

The defendant must make restitution (including community restitution) to the attached list of payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE
Clerk, U.S. Courts[2]		$15,498.05	

Restitution with Imprisonment - It is further ordered that the defendant shall pay joint and several restitution in the amount of $**15,498.05**, with the co-defendants in this case. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of $25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

[1] Defendant shall receive credit for any prior payments he has made toward the criminal monetary penalties.

[2] Clerk, U.S. Courts, shall forward the restitution payments to the victim(s) in this case.

DEFENDANT: **ISAAC FELDMAN**
CASE NUMBER: **11-20279-CR-SCOLA-4**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $200.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Joint and Several Restitution:

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	**TOTAL AMOUNT**	**JOINT AND SEVERAL AMOUNT**
Isaac Feldman shall pay joint and several restitution with the co-defendants in this case, 11-20279-CR-SCOLA		$15,498.05

Restitution is owed jointly and severally by the defendant and co-defendants in the above case.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.