No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SCOTT TUCKER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Beverly Van Ness (NY 1409416)
Attorney-at-Law
233 Broadway, Suite 2704
New York, NY 10279
Tel. (212) 274-0402
bvanness.law@gmail.com

Attorney for Petitioner SCOTT TUCKER

QUESTIONS PRESENTED

1. Whether the Court of Appeals has endorsed an inflexible rule that limits evidence of legal advice rendered to the defendant to the very inception of the charged conduct. This rule, which provides an unfair advantage to the government, conflicts with decisions in other circuits.

2. Whether lower courts need guidance from the Supreme Court on a recurring subject as to which different rules have developed: the admissibility of expert testimony that involves matters of law, but does not usurp the district court's role in instructing the jury on the law applicable to the case.

3. Whether there is a need for a uniform mens rea element in racketeering prosecutions for the collection of unlawful debt. At present, there is a conflict among the circuits, and different positions will lead to disparate results, in violation of due process.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Scott Tucker respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit affirming his federal convictions.

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-15a) is reported at United States v. Grote, 961 F. 3d 105 (2d Cir. 2020). The Court's decision denying petitioner's petition for rehearing (Pet. App. 16a) is unreported (Pet. App. 27a), as is the Court's supplemental order (Pet. App. 28a).

JURISDICTIONAL STATEMENT

The Court of Appeals issued its opinion and entered judgment on June 2, 2020 (Pet. App. 1a), and denied petitioner's timely petition for panel rehearing (Pet. App. 16a) on August 20, 2020 (Pet. App. 27a). The Court issued a supplemental order in connection with the rehearing petition on October 22, 2020 (Pet. App. 28a). Pursuant to this Court's order dated March 19, 2020, petitioner's time to file a petition for a writ of certiorari was extended to 150 days from the date of the order denying his petition for panel rehearing.

This Court has jurisdiction under 28 U.S.C. § 1254(1). The District Court had jurisdiction under 18 U.S.C. § 3231. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . deprived of liberty . . . without due process of law.

18 U.S.C. §1962(c) provides, in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. §1961(6) provides, in pertinent part:

> "unlawful debt" means a debt . . . (B) which was incurred in connection with the business of . . . lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

STATEMENT OF THE CASE

A. Proceedings Below

A pay day loan is a short-term unsecured loan, generally for a small amount of money. This case was the first criminal pay day lending prosecution to go to verdict in the country. It was premised on the collection of unlawful debt provision contained in the federal racketeering statute. At the beginning of the charged conspiracy, petitioner Scott Tucker partnered with a bank issuing high-interest pay day loans. The government contended the bank was a front, used to evade state usury laws. It made the same allegation about petitioner's later partnership with three federally-recognized Indian tribes, which were sovereign nations and enjoyed tribal sovereign immunity.

Petitioner maintained that the bank and the tribes were the lender, and that his company serviced the loans. The sole contested issue was his state of mind: whether he had acted "willfully" as to the racketeering counts, and, relatedly, with an intent to defraud as to wire fraud (the money laundering counts rested on the proceeds from the wire fraud).

B. Statement of Relevant Facts

1. The Government's Case and Petitioner's Defense

The indictment alleged that from 1997 through August, 2013, petitioner

Scott Tucker owned and controlled a group of pay day lending businesses that charged usurious interest rates on loans made in many states, including New York. Starting in 2006, co-defendant Timothy Muir acted as counsel (Ind., pars. 1-4). In the early period, beginning in 1997, the loans were made through a Delaware-chartered bank [County Bank], with petitioner "falsely representing" that the bank was the lender so as to "improperly avail" himself "of laws which entitle banks to 'export' the interest rate of their home state, and thereby to avoid usury laws that are more restrictive than those of their home state" (Ind., par.21; T.703).[1]

At trial, the government presented one witness on the County Bank program, Adrian Rubin. A serial felon facing 65 years in prison, Rubin testified that the loans were from petitioner, who effectively rented the Bank's name to avoid usury laws (see Pet. App. 6a-7a). But petitioner called Leonard Goodman, the bank's lawyer, who testified as to his opinion that the loans were bank loans and lawful (T.1928-47, 1976-77, 1988). Another government cooperator (Crystal Grote) also undercut Rubin and lent some support to Goodman's testimony (T.689-90, 703, 820-23).

[1] "T." refers to the trial transcripts, and "GX" and "DX" refer to exhibits introduced by the government and the defense, respectively. "Ind." refers to the indictment filed against the defendants, and "Dkt." refers to the district court docket sheet, with entries identified by number.

Starting in 2003, petitioner allegedly formed "sham relationships" with three federally-recognized Indian tribes, in order to invoke "tribal sovereign immunity" to thwart enforcement of state usury laws (Ind., par. 23; see Pet. App.7a). The loans were administered by a company which became known as CLK Management; in 2008, the name changed to AMG Services (see, e.g., T.725-26, 738). The letters of intent and signed service agreements made clear that the capital to fund the loans and administer the loan program would come from petitioner's company, which would also provide the personnel, equipment and expertise required to market and service the loans. These services would be supplied from petitioner's facility in Kansas. The tribe would bear no financial risk, and would be guaranteed a payment of the greater of $20,000 per month or one percent of the gross collected revenue (see Pet. App.7a).

Each tribe formed a tribal corporation and enacted tribal laws governing interest, loans and debt (see, e.g., DX 729, 1004, 1007, 1008, 1038). Each designated an officer to work with petitioner's service company. The tribe agreed to furnish an office on tribal land and one employee to act as an administrator. Disputes between the parties were to be resolved in tribal court under tribal rules (see, e.g., GX 301, 302). A revocable power of attorney from each tribe was granted to petitioner; the latter authorized him to open, operate and maintain bank

accounts in the name of the tribal corporation set up to engage in the lending business (see GX 202, 303, 802).

The government maintained that petitioner's company was the true lender, since the tribes essentially did nothing: the loan applications were not reviewed, processed or funded on tribal land, and the tribe did not put up any money or take any risk (see Pet. App. 7a). The defense rejoined that the tribes were completely ill-equipped to service the loans. They were located in remote areas, with a woefully inadequate labor pool and poor internet access (see T.1293-95; 1331-32; 1407-08). The service company grew to employ some 1,500 people staffing multiple departments (T.154-56; 827-28; 1258). The volume of loans was tremendous: 4.65 million customers between 2008-2012, the period for which statistics were available (T.1685-87, 1689).

The internet came into being in 2000 or 2001 (T.899), before any of the tribes became involved. By that time, the portfolios had websites and the loans were offered, applied for, accepted, processed and funded almost exclusively by electronic means. There was software to screen applicants and determine if they met the criteria for approval – no person actually "approved" a loan (T.705,728-34). The software, called eCash, was stored on a Nevada server and accessed over the internet (T.1259). However, the tribe did maintain control over the bank

account through which the loan disbursements and repayments flowed, because it could revoke the power of attorney it gave to petitioner at any time. As the defense showed, the Miami Tribe did this at the end of 2012 (see DX 854).

In 2008, CLK (the servicing company in Kansas) was merged into AMG Services, an entity of the Miami Tribe (DX 759). The government contended this was a "sham" and that the business remained in petitioner's hands (see Pet. App. 7a). The defense did not dispute that the loans continued to be serviced by the people in the Kansas facility, or that petitioner was involved – he was an employee of AMG, not its owner.

In 2010, petitioner sued AMG in Kansas state court to compel filing of a certificate of merger with the Secretary of State. The government's own witness, an attorney (Robert Smith), acknowledged that such a filing was necessary to complete a merger of two companies. Smith was retained by petitioner on the matter, and worked with co-defendant Muir. Muir had found a Kansas statute that would permit the district court to direct the state to accept the certificate for filing if AMG did not answer the suit. Smith agreed the statute applied, and filed the papers Muir had prepared. AMG defaulted, and the requested relief was granted (T.1209-31).

During Smith's examination, the defense introduced a government exhibit which explained why AMG refused to file the certificate, why it defaulted, and that the suit was a friendly one. AMG's position was that the merger with CLK was governed by, and valid under, tribal law, and entitled to "full faith and credit" by the State of Kansas. The Tribe would not do anything that would serve as "consent to the jurisdiction over AMG by the State . . . for any reason" (T.1239; GX 2612).

The government contended that this lawsuit, too, was a "sham," based on its view that petitioner owned and controlled AMG (T.3136-37).

The remaining counts charged were intertwined both with those involving the collection of unlawful debt, and with each other. The Truth in Lending Act violations were based on "false and inaccurate information" in the TILA disclosures about the cost of the loan; the wire fraud counts rested on those same alleged lies as well as false statements that the lenders were Indian tribes; and the promotion and concealment money laundering counts were based on the wire fraud (see indictment; government summation: T.3149-54, 3159-60).

2. Additional Facts Relevant to Questions Presented

There was extensive litigation before trial about the parameters of petitioner's advice of counsel defense and discussion of the law by witnesses. As

pertinent here, the court limited reliance on counsel evidence to advice obtained before petitioner began lending through County Bank, and, later, pursuant to the tribal model. The defense objected, since the tribal lending went on for years and the model was not static. That petitioner kept seeking advice, and the model was revised, was evidence that his conduct was not "willful," that is, that he was not aware of the generally unlawful nature of his conduct. Moreover, discussions petitioner had with counsel would be relevant to his state of mind, not strictly tethered to a reliance on counsel defense.[2]

The court disagreed (9/28/17 transcript, p.1614). This foreclosed petitioner from presenting any evidence of ongoing advice he received from Conly Schulte after the tribal loans started, and all legal advice he received from two other attorneys, Lance Morgan and co-defendant Muir. Muir, in turn, was prohibited from discussing legal conversations he had had with other lawyers relevant to his state of mind, which prevented him from providing a fullsome explanation for his belief that the tribal model – as it was set up and later modified – was lawful, and that tribal interest rates, not state usury caps, applied. With limited exceptions, the court also prohibited defense witnesses from explaining the legal basis of their

[2] See, e.g., Dkt. #129, pp.34-35 of 69; #135, pp.19-20 of 28; #190, pp.2-3; #195; #215, pp.4-5; #229, pp.3-4; #234, pp.1-2; #235, pp.1-2; 9/28/17 transcript, pp.1602-03, 1613-14; Dkt. #242.

belief that the conduct was lawful. That such testimony would not be offered for its truth did not matter: it was the court's prerogative to instruct the jury on matters of law.

The court also precluded defendants from calling Gavin Clarkson, an impeccably-credentialed expert on the doctrines of tribal sovereignty and tribal sovereign immunity, and the relationship of these doctrines to a state's efforts to regulate Native American commercial ventures (see Dkt. #190-1, p.4, and Mr. Clarkson's curriculum vitae, id., p.5). Among the noticed topics, to be discussed by the expert and various named attorneys who represented petitioner over the years, including Muir (Dkt. #215-2, p.5), was a tribe's power to conduct business "both on and off Indian lands and reservations with no interference from the states absent express approval by Congress. The experts will note that there are federal laws and a Presidential Executive Order which encourage the investment of private capital into Indian commercial ventures for the purpose of enabling the tribes to achieve economic self-sufficiency" (Dkt. #215-2, p.4).

There would also be testimony that "the concept of using [tribal sovereign immunity] to export interest rates in the same manner that had been done with the banks was the subject of industry seminars and legal opinion letters which validated the model. Such testimony will include the manner in which the

businesses operate through the use of servicing companies to market, fund, and collect loans that are made by a federally-recognized Indian tribe (including arms of such tribes)"; that "there are no current federal laws or regulations which govern short-term consumer loans that are made by Indian tribes working in conjunction with private investors and/or servicers," including "how the profits from these relationships are to be allocated between the tribe and private investors, how the responsibilities for performing the day-to-day activities of the business are to be divided between the tribe and the servicing companies, and how much, if any, autonomy the tribe must exercise in the actual operation of the business" (Dkt. #215-2, pp.4-5).

This testimony would provide context to the defense, to show that the defendants did not "just . . . dream up this idea . . . .; it does have some validity. Our expert [Clarkson] certainly couldn't say this model, what these guys were doing, was legal. He wouldn't say that. He would give some background, like any expert would, to put in context what I would call a secondary expert, the people who gave advice to [petitioner] and his entities" (9/6/17 transcript, p.82). The defendants also noted that although opinion evidence as to matters of law was generally inadmissible, it had been allowed when the subject was a complex one and the testimony would assist the jury (Dkt. #195, p.3). Tribal sovereignty,

sovereign immunity and their application to arms of a tribe comprised such a subject, "impossible to reduce to simple jury instructions devoid of evidentiary background and context" (Dkt. #195, p.4; see also Dkt. #215, pp.4-5).

The court ultimately precluded Mr. Clarkson as a witness, holding that his testimony was "not an appropriate subject for expert testimony" (9/28/17 transcript, pp.1805-06). It circumscribed the attorney witnesses as well.

C. The Direct Appeal to the Court of Appeals

1. The Mens Rea Element for Collection of Unlawful Debt

Petitioner raised numerous issues on appeal to the Second Circuit. One involved a jury instruction that removed the element that petitioner had acted "wilfully," that is, with awareness that the loans were unlawful; the jury was allowed to convict if persuaded simply that petitioner knew the interest rates charged. That he did was not disputed, and co-defendant Muir, in his testimony, expressly admitted he did. This instruction mooted petitioner's defense that he believed in good faith, based on advice of counsel, that the tribal model was lawful and that the tribal interest rates applied to the loans (see Pet. App. 8a).

The Court of Appeals did not decide whether "willfully" was the required mens rea element for the collection of unlawful debt, and whether the challenged instruction was erroneous. It declined to reach the issue because, even assuming it

was, the error did not prejudice petitioner due to the "overwhelming" evidence of his guilt. It did not address petitioner's contention that the instruction was not only wrong but would have confused the jury in relation to other instructions, and found the error was unpreserved for appellate review (Pet. App. 8a-11a) – a claim the government had never made. Petitioner contested this in his petition for panel rehearing (Pet. App. 18a, 20a-25a), but the Court denied the petition (Pet. App. 27a), and issued a supplemental order adhering to its position (Pet. App. 28a).

Although it "express[ed] no view on whether willfulness or awareness of unlawfulness was required for conviction under [the racketeering counts]" (Pet. App. 11a), the Court of Appeals did discuss the need to resolve what mental state was required for a criminal racketeering offense based on the collection of unlawful debt. It noted the Supreme Court's decisions in Elonis v. United States, 575 U.S. 723, 135 S. Ct. 2001, 2011 (2015) and United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994), favoring "a scienter requirement" to avoid criminalizing "otherwise innocent conduct" (Pet. App. 11a; see, generally, Pet. App. 11a-13a).

The Court of Appeals also discussed the variety of state usury laws, with different interest caps and different (or no) state-of-mind elements, and that RICO liability, if predicated on the applicable state law, could also rest solely on a state

civil statute (Pet. App.12a-13a). These issues, the Court noted, "will pose troublesome questions in future cases" (Pet. App. 13a).

2. Preclusion of Advice-of-Counsel Evidence and Expert Testimony

Petitioner challenged the temporal limitation on his advice of counsel defense, which precluded him from presenting evidence about advice he received after the tribal loans began and refinements were made to the tribal model. He similarly challenged the exclusion of Gavin Clarkson as an expert witness. With respect to the latter, the Court of Appeals did not address all aspects of petitioner's proffer, and couched the expert's prospective testimony as limited to "the topic of tribal sovereignty." The Court ruled that Clarkson's testimony would not be probative of petitioner's state of mind because he had not personally advised petitioner, and that his alleged prospective testimony on "the legal issue of the lawfulness of the loans" was not an appropriate subject for an expert witness (Pet. App. 14a).

The advice-of-counsel issue was not addressed in the Court of Appeals' decision. Instead, it was dismissed without reference, along with all the other issues petitioner had raised which were not cited in the opinion, as "frivolous" (Pet. App. 14a). Petitioner asked the Court to reconsider this ruling (Pet. App.

18a, 25a-26a), but his petition for panel rehearing was denied (Pet. App. 27a).

REASONS FOR GRANTING THE PETITION

The Questions Presented in this petition all implicate petitioner's fundamental constitutional right to due process and to present a defense. See Chambers v. Mississippi, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations").

I. The Court of Appeals has endorsed an inflexible rule that limits evidence of legal advice rendered to the defendant to the very inception of the charged conduct. This rule, which provides an unfair advantage to the government, conflicts with decisions in other circuits.

Petitioner was charged with a 16-year conspiracy to collect unlawful debts, ten years' worth of substantive collections of unlawful debt, and related ongoing wire fraud and money laundering offenses. He maintained that he had not acted willfully: "with a purpose to do something that the law forbids," with an "aware[ness] of the generally unlawful nature of his act." He raised an advice-of-counsel defense with respect to the racketeering counts, and a good faith defense to the fraud allegations, as to which the advice petitioner had received was also relevant.

The district court did not permit petitioner to present any legal advice he received after June 2004, when the first tribal loans were made. This severely curtailed the testimony of Conrad Schulte, a lawyer intimately involved with the formation and development of the tribal model. The ruling also precluded advice given by co-defendant Muir, who was hired as counsel to petitioner's servicing company in 2006, and attorney Lance Morgan, who, in 2006, initiated and implemented the merger of petitioner's company into one wholly-owned by the Miami Tribe. In drawing this line, the court invoked a general principle, applicable in a typical reliance-on-counsel case, that only advice given before the charged conduct begins is relevant.

But this was not a typical case. The tribal model was brand new, and petitioner sought to prove that he acted in good faith not only at the inception of the loans, but during the entire course of the charged offenses. He consulted numerous attorneys along the way to advise him on how the innovative business model should be structured and run. The advice was not provided at a specific point of time, for a particular purpose – such as determining the tax consequences of an asset sale. The advice was instead ongoing as the lending operation grew, and as it began to be scrutinized by regulators. Changes were made, such as the merger of petitioner's service company into a newly-formed tribal corporation.

The government contended this merger was itself part of the fraud, and that advice rendered in response to civil lawsuits was only to further a litigation strategy of continuing to hide the identity of the true lender. Indeed, the government was allowed to present whatever proof it had to establish petitioner's guilt, whether it related to 1997 or 2008 or 2013. But for the defense, the court drew a clear, temporal line.

The Court of Appeals endorsed the lower court's ruling, effectively establishing a per se rule that, no matter what the facts and circumstances, legal advice provided after the alleged criminal conduct starts is inadmissible. This rule is not merely inequitable, it is also in tension with decisions in other Circuits. In United States v. Johnson, 139 F.3d 1359, 1366 (11th Cir. 1998), the jury asked during deliberations "whether the 'good faith' defense applies when a defendant acquires new information but continues to follow outdated advice previously obtained from counsel." The court's answer – "good faith reliance upon the advice of counsel requires not only full and complete disclosure of the facts then known but also of material facts or information later acquired" – was deemed correct. See also United States v. Benson, 941 F.2d 598, 614 (7th Cir. 1991) ("[i]f a person is told by his attorney that a contemplated course of action is legal but subsequently discovers the advice is wrong or discovers reasons to doubt the

advice, he cannot hide behind counsel's advice to escape the consequences of his actions"), reaffirmed in United States v. Philpot, 733 F.3d 734, 745 (7th Cir. 2013); United States v. Biller, 2007 U.S. Dist. Lexis 7156, *27-28 (N.D.W.Va. 2007) (same).

Moreover, if the conduct is continuing, there is a continuing obligation to comply with pertinent regulations and laws, as any business does. See Krausz Indus. Ltd. v. Smith-Blair, Inc., 2016 U.S. Dist. Lexis 191859, *18 (E.D.N.C., W. Div. 2016) ("'because infringement is a continuing activity, the requirement to exercise due care and seek and receive advice is a continuing duty. Therefore, once a party asserts the defense of advice of counsel, this opens to inspection the advice received during the entire course of the alleged infringement'" [case cited omitted]); accord TIVO Inc. v. EchoStar Comm. Corp., 2005 U.S.Dist. Lexis 42481, *17 (E.D.Tx., Marshal Div., 2005).

These decisions recognize that, depending on the subject on which legal advice is sought, including its novelty, complexity or evolving nature, an advice-of-counsel defense cannot always be limited to the pre-conduct stage. If the defendant initially acted in good faith, but later became aware that counsel's legal advice was incorrect or might no longer apply, he would have a duty to seek new advice or proceed at his peril. If he did seek new advice and was assured that the

conduct remained legal, or would be if additional steps were taken that he then implemented, his advice of counsel defense should continue to preclude a finding that he had acted willfully or in bad faith. Subsequent events, and subsequent advice received, would be relevant and admissible.

In this case, all of the charges against petitioner were continuing offenses under Second Circuit law.[3] The jury heard evidence supporting his advice of counsel defense at the inception of the lending period, and may well have accepted that defense. But the tribal model did not remain static. It evolved. The government was allowed to cast actions taken after the lending began as further proof of petitioner's unlawful state of mind. Petitioner was not allowed to rebut these allegations by eliciting legal advice he had received after June 2004 that motivated and supported modifications, relevant to whether or not he had continued to act in good faith and not willfully.

II. Lower courts need guidance from the Supreme Court on a recurring subject as to which different rules have developed: the admissibility of expert testimony that involves matters of law, but does not usurp the district court's role in instructing the jury on the law applicable to the case.

[3] See United States v. Rutigliano, 790 F.3d 384, 396 (2d Cir. 2015) (wire fraud); United States v. Moloney, 287 F.3d 236, 241 (2d Cir. 2002) (money laundering as part of ongoing scheme); United States v. Wong, 40 F.3d 1347, 1366 (2d Cir. 1994) (conspiracy generally and substantive RICO).

This case presents an opportunity for the Court to consider the appropriate contours of expert testimony concerning an esoteric subject, which necessarily touches on matters of law. Circuit courts across the country have grappled with such questions, with differing results. Some have blanketly excluded such testimony, others have not. See, e.g., United States v. Tartaglione, 815 Fed. Appx. 648, 650-51 (3d Cir. 2020); Commodores Entm't Corp. v. McClary, 879 F.3d 1114, 1128-29 (11th Cir. 2018); United States v. Coffman, 574 Fed. Appx. 541, 552-53 (6th Cir. 2014); United States v. Offill, 666 F.3d 168, 173-76 (4th Cir. 2011); Waco Int'l, Inc.v. KHK Scaffolding Houston, Inc., 278 F.3d 523, 532-33 (5th Cir. 2002); United States v. Artunoff, 1 F.3d 1112, 1117-18 (10th Cir. 1993); United States v. Bilzerian, 926 F.2d 1285, 1294 (2d Cir. 1991); Peckham v. Cont'l Cas. Ins. Co., 895 F.2d 830, 837 (1st Cir. 1990); Specht v. Jensen, 853 F.2d 805 (10th Cir. 1988) (en banc).

In this case, the court precluded defendants from providing expert testimony on tribal sovereignty, tribal sovereign immunity and the structure of tribal businesses partnered with outside companies not located on tribal lands (so-called "arms of the tribe"). The proffered testimony would include discussion of the allocation of profits and responsibilities for day-to-day operations, and federal laws and policies that encouraged the investment of private capital in Indian

commercial ventures for the purpose of enabling the tribes to achieve economic self-sufficiency. This information would come from an acknowledged expert, who would have provided factual background and context as to a specialized and complex area unknown to the average juror, including the tribe's use of service companies to market, fund and collect loans. It would also be provided by lawyers testifying for the defense, including co-defendant Muir. Their testimony would not purport to prove the legality of the tribal model, but, rather, the defendants' state of mind: their good faith belief that the loans were lawful, which was critical to their defense.

Because of the court's ruling, the attorneys could only assert what they believed, without being able to say why – the why, of course, was crucial to the jury's assessment of their credibility. Further, the defense was deprived of material evidence to rebut the government's contention that the tribal model was merely a "sham," based in part on the fact that it was petitioner who provided the capital for the lending business, and that the tribes took no risk. The government also harped on the alleged inequity of the monetary split, whereby the tribe only received one percent of the gross revenues. Expert evidence that these arrangements were not atypical when tribes partnered with non-Indian companies,

and that tribes did partner with outside companies both on and off tribal lands, was critical to the defense.

In this time of ever more sophisticated, complex, specialized and regulated businesses, with which laymen are unacquainted, this Court should provide guidance on the parameters of expert testimony.

III. There is a need for a uniform mens rea element in racketeering prosecutions for the collection of unlawful debt. At present, there is a conflict among the circuits, and different positions will lead to disparate results, in violation of due process.

The racketeering statute contains no mens rea element. 18 U.S.C. §1962(c). "Unlawful debt" is defined with reference to state or federal usury laws, "where the usurious rate is at least twice the enforceable rate." 18 U.S.C. § 1961(6). There is no federal usury law, so liability for the collection of unlawful debt rests solely on the applicable state usury laws, which can include civil as well as criminal statutes.

Within the past year, this Court has twice been asked to grant certiorari to consider what mental state element should be required for a criminal conviction under RICO's collection of unlawful debt provision. United States v. Neff, 787 Fed. Appx. 81 (3d Cir. 2019), cert. denied, 140 S. Ct. 2674 (April 20, 2020) (petitioner Neff), cert. denied, 207 L. Ed 2d 1097 (June 29, 2020) (petitioner

Hallinan). This was another pay day lending prosecution involving Indian tribes. There, the Third Circuit upheld a jury instruction grounding conviction on knowledge that the interest rate violated the law (necessarily, state law).

In United States v. Aucoin, 964 F.2d 1492, 1498 (5th Cir. 1992), cert. denied, 506 U.S. 1023 (1992), the Fifth Circuit held that a "knowing" violation of state law was sufficient, and in United States v. Pepe, 767 F.32 632,676 (11th Cir. 1984), the 11th Circuit endorsed "knowingly or willfully" as the mens rea required (emphasis added). These were loansharking prosecutions.

In the Second Circuit, in another loansharking case, the Court of Appeals upheld requiring the government to prove the defendants acted "knowingly, wilfully and unlawfully"; the burden could be met "*either* by proving specific knowledge of the interest rates on the usurious loans, *or* by showing the defendants' awareness 'of the generally unlawful nature of the particular loan in question and also that it was the practice of the lenders to make such loans.'" United States v. Biasucci, 786 F.2d 504, 512-13 (2d Cir. 1986). In this case, the Court of Appeals questioned this earlier decision, and discussed at length the problems associated with making federal liability wholly dependent on state usury laws (Pet. App. 11a-13a). Yet the Court of Appeals refused to resolve the issue,

and did so again in United States v. Moseley, 2020 U.S. App. Lexis 34648, *13-17, 980 F.3d 9 (2d Cir. November 3, 2020).

Respectfully, petitioner believes that the Court of Appeals' harmless error holding here is itself error, particularly given that a wealth of material defense evidence was kept from the jury (as discussed in I and II above). Petitioner also disagrees that the issue of the district court's confusing instructions on the required mental state – one of which permitted jurors to convict simply on (undisputed) proof that defendants were aware of the interest rates charged on the loans – was unpreserved for appellate review. In any event, even so, the instructional error seriously prejudiced the defendants.

Thus, petitioner is not seeking an advisory opinion from this Court, but one that will provide clarity in his and countless other racketeering prosecutions. Short-term lending continues, and without a uniform mens rea element that applies in all federal cases, there will be disparate and inequitable results dependent solely on the venue of the prosecution.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Dated: January 18, 2021

Beverly Van Ness

BEVERLY VAN NESS
Attorney-at-Law
Counsel for Petitioner Scott Tucker

APPENDIX

Neutral
As of: July 27, 2020 5:31 PM Z

United States v. Grote

United States Court of Appeals for the Second Circuit

June 12, 2019, Argued; June 2, 2020, Decided

Docket No. 18-181(L), 18-184(CON), 18-1802

Reporter
961 F.3d 105 *; 2020 U.S. App. LEXIS 17330 **

UNITED STATES OF AMERICA, Appellee, v. CRYSTAL **GROTE**, AKA CRYSTAL CRAM, AKA CRYSTAL CRAM-**GROTE**, AKA CRYSTAL STUBBS, Defendant, and TIMOTHY MUIR, SCOTT TUCKER, Defendants-Appellants.

Prior History: Timothy Muir and Scott Tucker appeal from a judgment of conviction entered after a jury trial in the United States District Court for the Southern District of New York (P. Kevin Castel, J.) on fourteen counts including collection of unlawful usurious debt, and conspiracy to do so, wire fraud, and money laundering, arising out of Defendants' operation of a payday lending business. The defense was primarily that the lending business was not subject to state usury laws because it was conducted by Native American tribes and was therefore protected by tribal sovereign immunity. Defendants' primary contention on appeal is that the district court erred in instructing the jury that willfulness—which the parties agreed was the required state of mind for a charge of lending at unlawful usurious rates—can be satisfied merely by the defendants' knowledge of the interest rates charged, even if they believed the lending was lawful. Because defendants made no objection following the charge as generally required by *Fed. R. Crim. P. 30*, and there was no basis to conclude that objection would have been futile, the plain error standard of *Fed. R Crim. P. 52* **[**1]** applies. We conclude the error, if any, was not plain error. We also find no abuse **[**2]** of discretion in the district court's denial of Tucker's application for a stay of the forfeiture order against him..

United States v. Tucker, 2017 U.S. Dist. LEXIS 134265 (S.D.N.Y., Mar. 1, 2017)

Disposition: AFFIRMED.

Core Terms

Tribes, lending, borrowers, tribal, payday, forfeiture, predicated, lender, renewal, conspiracy, unenforceable, automatic, portfolios, willfully, forfeited, indictment, sovereign, racketeering, exceeded, futile, sham, opt, deliberately, customers, knowingly, annual, repaid, novo, box

Case Summary

Overview
HOLDINGS: [1]-Any error by the district court in instructing the jury on the mental state for the RICO counts that willfulness could be satisfied merely by defendants' knowledge of the interest rates charged, even if they believed the lending was lawful, was not plain error because the jury necessarily found in rendering a guilty verdict on the RICO conspiracy count, for which an undisputedly correct willfulness instruction was given as to the "conspiracy" element, that defendants were aware of the unlawfulness of their making loans with interest rates that exceeded the limits permitted by the usury laws, and the evidence of defendants' willfulness was overwhelming; [2]-Defendant's application for a stay of the forfeiture order against him was properly denied because he was unlikely to succeed on the merits of his appeal.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Jury Instructions

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Jury Instructions

Criminal Law & Procedure > Trials > Jury Instructions > Objections

HN1 **Plain Error, Jury Instructions**

Where a claim of error in the district court's instruction to the jury is properly preserved, the appellate court reviews that claim de novo, reversing if, viewing the charge as a whole, there was a prejudicial error. In order to be preserved, an objection to the jury instructions must be made by informing the court of the specific objection and the grounds for the objection before the jury retires to deliberate. Fed. R. Crim. P. 30(d). This objection generally must occur after the instruction is given to the jury, that being the court's clearest opportunity to fix a mistake that might otherwise require retrial. Failure to object in the manner prescribed by the rule, so as to give the district court a clearly framed opportunity to correct an error in the charge, results in forfeiture of de novo review of the error. Where the claim of error in the charge is not properly preserved, it is reviewed instead under the far more exacting standard of plain error, as specified in Fed. R. Crim. P. 52(b). Rule 30(d). Failure to object in accordance with Rule 30(d) precludes appellate review, except as permitted under Rule 52(b).

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Jury Instructions

Criminal Law & Procedure > Trials > Jury Instructions > Objections

HN2 **De Novo Review, Jury Instructions**

The preclusion of de novo appellate review for failing to object following a jury charge is not absolute. If the party that failed to object following the jury charge had previously objected, making its position clear, and it was evident in the circumstances that renewal of the objection would be futile because the court had clearly manifested its intention to reject the objection, the failure to renew the objection as specified in Fed. R. Crim. P. 30(d) does not forfeit de novo review.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Burdens of Proof

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Jury Instructions

HN3 **Plain Error, Burdens of Proof**

When the plain error standard of review applies, the court of appeals may vacate a conviction on account of a challenged jury instruction if the instruction contains (1) error, (2) that is plain, and (3) that affects substantial rights. In addition, the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. In most cases, to affect substantial rights the error must have been prejudicial: It must have affected the outcome of the district court proceedings. Fed. R. Crim. P. 52(b) authorizes the courts of appeals to correct particularly egregious errors and is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result. The burden is on the defendant to demonstrate that these criteria for relief are met.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

HN4 **Racketeer Influenced & Corrupt Organizations Act, Elements**

Racketeer Influenced and Corrupt Organizations Act (RICO) offenses may be predicated on a single instance of collection of unlawful debt, as well as on a pattern of racketeering activity. 18 U.S.C.S. § 1962. While

racketeering activity is generally understood to encompass only criminal offenses, the RICO statute defines unlawful debt to include any debt which is unenforceable under State or Federal law because of the laws relating to usury and which was incurred in connection with the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate. 18 U.S.C.S. § 1961(6) This definition includes debts that would be usurious under the laws of several states, and hence unenforceable, but that would not violate any state criminal usury laws. Thus, the criminal RICO offense of participating in the conduct of an enterprise's affairs through collection of unlawful debt may arguably be predicated on a violation of only civil usury laws.

Banking Law > ... > Banking & Finance > National Banks > Usury Litigation

Real Property Law > Financing > Mortgages & Other Security Instruments > Usury

HN5 **Interest & Usury, Usury Litigation**

Some state civil statutes render debt unlawful and unenforceable solely by reason of the rate of interest charged, without regard to the mental state of the lender or collector. Such statutes provide simply that loans carrying an interest rate above a specified threshold are void and unenforceable. A debt charging interest that exceeds the threshold rate and is incurred in connection with the business of lending money at twice the enforceable rate would thus appear to fit within the definition of unlawful debt under 18 U.S.C.S. § 1961(6), and could thus arguably serve as the predicate for a Racketeer Influenced and Corrupt Organizations Act offense, regardless of what the lender knew or intended.

Banking Law > ... > Banking & Finance > National Banks > Usury Litigation

Real Property Law > Financing > Mortgages & Other Security Instruments > Usury

HN6 **Interest & Usury, Usury Litigation**

New York's civil usury statute provides that the maximum interest rate shall be sixteen per centum per annum. N.Y. Banking Law § 14-a(1); N.Y. Gen. Oblig. Law § 5-501. The New York law also provides that all bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever whereupon or whereby there shall be reserved or taken any greater sum, or greater value, for the loan or forbearance of any money, than is prescribed in § 5-501, shall be void. N.Y. Gen. Oblig. Law § 5-511. Thus, loan contracts with an interest rate exceeding 16% are unenforceable under New York's civil usury law, regardless of the mental state of the lender.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

HN7 **Racketeer Influenced & Corrupt Organizations Act, Elements**

If a defendant may be convicted under the Racketeer Influenced and Corrupt Organizations Act for participation in the making or collecting of a loan merely because a state civil statute renders the loan unenforceable by reason of the interest rate, without any requirement whatsoever as to the defendant's state of mind, in some circumstances this would authorize racketeering convictions where the defendant had not only committed no state law offense, but had done nothing that would offend social mores.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

HN8 **Racketeer Influenced & Corrupt Organizations Act, Elements**

A Racketeer Influenced and Corrupt Organizations Act (RICO) prosecution can be predicated on a single instance of collection of unlawful debt. And what the RICO statute calls an enterprise can be any individual, partnership, corporation, association, or other legal entity, 18 U.S.C.S. § 1961(4), so long as it is engaged in, or its activities affect, interstate commerce, 18 U.S.C.S. § 1962(c). And high interest rates can result from application of reasonable service fees to small debit balances in circumstances that do not partake of the predatory lending practices.

Criminal Law & Procedure > ... > Standards of

Review > Abuse of Discretion > Evidence

HN9[] **Abuse of Discretion, Evidence**

A district court's decision to exclude expert testimony is reviewed for abuse of discretion.

Evidence > ... > Testimony > Expert Witnesses > Criminal Proceedings

Evidence > Admissibility > Expert Witnesses > Ultimate Issue

HN10[] **Expert Witnesses, Criminal Proceedings**

Expert testimony that usurps the role of the trial judge in instructing the jury as to the applicable law by definition does not aid the jury in making a decision, and is therefore inadmissible under Fed. R. Evid. 702.

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN11[] **Substantial Evidence, Sufficiency of Evidence**

On a defendant's challenge to his conviction based on the sufficiency of evidence, the appellate court views the evidence in the light most favorable to the government, drawing all inferences in the government's favor.

Criminal Law & Procedure > Sentencing > Forfeitures > Proceedings

Criminal Law & Procedure > Sentencing > Stays

HN12[] **Forfeitures, Proceedings**

A district court may stay a forfeiture order pending appeal on terms appropriate to ensure that the property remains available pending appellate review. Fed. R. Crim. P. 32.2(d). While neither the Federal Rules nor Second Circuit precedent set out factors that pertain explicitly to stays of forfeiture orders, the court has expressed standards generally governing applications to stay district court orders or proceedings pending appeal as follows: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Criminal Law & Procedure > ... > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > Sentencing > Stays

HN13[] **Standards of Review, Abuse of Discretion**

The appellate court reviews the denial of a stay for abuse of discretion.

Counsel: THOMAS J. BATH, JR., Bath & Edmonds, P.A., Overland Park, KS, for Defendant-Appellant Timothy Muir.[1]

BEVERLY VAN NESS, Law Firm of Beverly Van Ness, New York, NY, for Defendant-Appellant Scott Tucker.

KARL METZNER (Hagan Scotten, Sagar K. Ravi, on the brief), Assistant United States Attorney, for Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, NY, for Appellee.

Judges: Before: LEVAL, POOLER, and PARKER, Circuit Judges.

Opinion by: LEVAL

Opinion

[1] Defendant Muir terminated Mr. Bath as counsel on September 20, 2018, and later submitted a supplemental brief pro se.

[*108] LEVAL, *Circuit Judge*:

Defendants Scott Tucker and Timothy Muir appeal their criminal convictions after a five-week jury trial in the U.S. District Court for the Southern District of **[*109]** New York (P. Kevin Castel, *J.*) on fourteen counts of racketeering, conspiracy, and fraud offenses arising out of the Defendants' operation of an illegal payday lending scheme. The evidence showed that from about 1997 to 2013, the Defendants lent money at interest rates far in excess of those permitted under the laws of New York and other states in which their borrowers resided, and deceived borrowers as to the terms of the loans.

[3]** The indictment included three counts of conducting an enterprise's affairs through the collection of unlawful usurious debt, in violation of the *Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c)* (Counts 2-4); one count of conspiracy to do the same, in violation of *18 U.S.C. § 1962(d)* (Count 1); one count of wire fraud and one count of wire fraud conspiracy, in violation of *18 U.S.C. §§ 1343*, *1349* (Counts 5-6); three counts of money laundering and conspiracy to launder money, in violation of *18 U.S.C. § 1956(a)(1)(A)(i)*, *-(a)(1)(B)(i)*, *-(h)* (Counts 7-9); and five counts of making false statements in disclosures required by the *Truth in Lending Act (TILA)*, in violation of *15 U.S.C. § 1611* (Counts 10-14). The Defendants were convicted on all counts.

At trial, the parties agreed—as they do now—that the requisite mental state for the RICO counts was willfulness. The Defendants defended primarily on the ground that, because the lending business was operated by Native American tribes (the "Tribes"), the loans were not subject to state usury laws, and that even if the loans were unlawful, Defendants had a good faith belief that they were lawful by virtue of the tribal involvement, so that their conduct was not "willful."

The Defendants' principal claim on appeal is that the district court erred in instructing the jury that the Government could satisfy the required state-of-mind element of collection of unlawful debt by proving that the Defendants acted deliberately, "with knowledge of the actual interest rate charged on the loan[s]," App'x at 264-65, notwithstanding any good faith belief that their conduct was lawful. Defendants contend that they could not be properly convicted on the charges **[**4]** of unlawful usurious lending unless they acted willfully, with knowledge that they were acting unlawfully.

We reject this challenge to the Defendants' convictions. Because the Defendants did not preserve their objection in the manner specified by *Rule 30 of the Federal Rules of Criminal Procedure*, the "plain error" standard of *Rule 52* applies. Even assuming that the charge with respect to Counts 2-4 was erroneous, the error did not affect the verdict, and thus Defendants have not satisfied the requirements of "plain error." The jury necessarily found in rendering a guilty verdict on Count 1, for which an undisputedly correct willfulness instruction was given as to the "conspiracy" element, that the Defendants were aware of the unlawfulness of their making loans with interest rates that exceeded the limits permitted by the usury laws. Furthermore, the evidence of the Defendants' willfulness was overwhelming. We therefore find that the standard for a finding of plain error is not satisfied.

Concluding also that the Defendants' other contentions are without merit, we affirm the judgments of conviction on all fourteen counts. Additionally, we find that the district court did not abuse its discretion in denying Tucker's application to stay the **[**5]** execution of the forfeiture order entered against him following his conviction.

BACKGROUND

Payday loans are small loans typically to be repaid on the borrower's next payday. **[*110]** Such loans frequently carry high interest rates. Many states, including New York, have usury laws capping the permissible annual interest rate on such loans, with the highest lawful interest rate varying by state.

From approximately 1997 through 2013, Defendant Tucker owned and operated a payday lending business based in Overland Park, Kansas. Initially, the business offered loans primarily via fax and telephone. In about 2000 it began to solicit payday borrowers over the internet, operating through several different websites which were held out to the public as separate entities, but which were administered from the same building and by the same employees, and were referred to internally as different "portfolios." Muir joined Tucker's business as an in-house attorney in 2005 or 2006. At its peak, the business had over 1,500 employees and 4.5 million customers, and generated more than a billion dollars in yearly revenue.

Tucker's loans were structured in the following manner. On each of the borrower's paydays following **[**6]** the loan disbursement (until the loan was repaid), the

borrower's bank account was automatically debited a $30 "service charge" for each $100 remaining on the loan principal. On each of the first four paydays following disbursement, the loans would "automatically renew," meaning that the service charge would be assessed and no payment would be taken to reduce the outstanding principal balance. On the borrower's fifth payday and on each subsequent payday until the principal was repaid, in addition to the service charge, a "principal payment" of $50 would be taken from the borrower's bank account and applied to reduce the loan principal. According to a chart Tucker used to train his employees, based on this payment structure, a borrower would ultimately pay $975 to repay a $300 loan. Considering the service charges as interest, the resulting annualized interest rate (which varied depending on the frequency of a borrower's paydays) often exceeded 600%.

Borrowers were entitled under the terms of the loans to opt out of the "automatic renewal" process and instead pay the full amount of the principal in addition to the service charge) on their first payday. To opt out of automatic renewal, **[**7]** borrowers were required to notify the lender in writing. A borrower of $300 who elected to opt out would pay a service charge of $90. The interest rates charged on the loans exceeded what was permitted in some states, including New York, even when the loan was repaid on the first payday. And under the default automatic renewal process, the interest rates far exceeded those allowed by the applicable state usury laws. The written terms of the loans were materially misleading as to how the automatic renewal process worked and the borrowers' entitlement to opt out from it. A major source of borrowers' confusion regarding the automatic renewal process was the information in the "TILA Box" displayed in the loan documents. TILA—the Truth in Lending Act—requires lenders to make certain disclosures in a prominently displayed chart or "box" regarding the cost of prospective loans, including the loan amount, finance charge, annualized interest rate, and total amount of expected payments (including the principal). *See generally* 15 U.S.C. § 1638(a). The information listed in the TILA Box on Tucker's loan documents reflected what those costs would be *without* the "automatic renewal" process—that is, what a borrower **[**8]** would pay if she opted out of the automatic renewal process and paid off her entire loan on the first payday. Thus, for a loan of $300, the TILA box listed that the finance charge would be $90 and the total amount of payments (including principal repayment) **[*111]** would be $390. The disclosure was correct for borrowers who opted out of automatic renewal. It did not reveal, however, that under the default payment schedule, the total finance charge on a loan of $300 would be $675 and the total payment would be $975. Nor did it adequately reveal (although setting it forth in small print and hyper-technical language outside the TILA box) that borrowers could decline the option of automatic renewal.

The indictment alleged that Tucker's enterprise charged interest rates well in excess of the maximum rates allowed for payday loans in at least 25 states and Washington, D.C., and that Tucker and Muir willfully conducted the affairs of the enterprise through the collection of unlawful debt. The indictment included four RICO counts: three for participating in the conduct of an enterprise's affairs through the collection of unlawful debt (Counts 2-4), and one for conspiracy to do so (Count 1). Each of **[**9]** the three substantive RICO counts (Counts 2-4) listed five customers, located in various states, as to whom the Defendants were charged with collecting unlawful debts. The district court instructed the jury that, to convict Defendants on Counts 2-4, the jury had to find that Defendants engaged in collecting at least one of the five unlawful debts listed in that count.

The Government's evidence showed that Tucker and Muir used three different "fronts," including the Tribes, to avoid detection of their usurious lending practices or to give those practices the appearance of legality. The first of these alleged fronts was Tucker's business relationship, from 1998 to 2004, with County Bank of Rehoboth Beach, Delaware ("County Bank"). As a nationally chartered bank, County Bank could lawfully lend anywhere in the United States at interest rates that complied with the law of the state in which it was headquartered. County Bank was headquartered in Delaware, which does not set a limit on consumer interest rates. Tucker thus endeavored to give his loans the appearance of legality by making it seem that County Bank was the "lender" and his business was merely the "servicer," while, in fact, he **[**10]** continued to own and operate the loans. He continued to provide the capital for the loans and to administer them through his Kansas office and through websites that he owned and controlled. Tucker's business continued to control loan approval, while County Bank set up a fake "approval process" to give the false impression that it was involved in decision-making. In exchange for what another County Bank "servicer," Adrian Rubin, described as "renting [County Bank's] name," the bank received 5% of the loan interest regardless of whether the loans were actually repaid, and Tucker bore the

entire loss when they were not.

As a second "front" strategy, during and subsequent to the County Bank scheme, Tucker attempted to hide his identity as lender by paying intermediaries to register a number of Nevada shell corporations, for which his loan portfolios served as the "doing business as" aliases. Rubin testified that Tucker used these aliases on certain documentation to make it harder for regulators to identify him as the lender. Tucker also used the Nevada addresses of the shell companies on loan documents to conceal the identity and location of his Kansas business from borrowers. This created **[**11]** problems when borrowers noticed that Tucker's employees called from a phone number with a Kansas area code of 913, which did not match with the company's purported address in Nevada, and asked the employees about the discrepancy. In response, Tucker told his employees to tell borrowers that the business was located in Nevada but that its phone calls were routed through an internet server located in **[*112]** Kansas; he later began to use a "1-800" phone number to avoid this issue.

Starting around 2003, Tucker formed relationships with a number of Native American tribes in order to create the appearance that Tucker's lending portfolios were owned and operated by the Tribes. Under the arrangement, the Tribe would claim to own one or more of the loan portfolios in exchange for one percent of the portfolios' revenues. As with his County Bank arrangement, Tucker continued to provide all the capital for the loans and bear the risk of default, as well as advertise, extend, administer, and collect on the loans from his offices in Overland Park, Kansas. He set up bank accounts in the Tribes' names and routed portfolio revenues to those accounts, but maintained control over the accounts and used them to **[**12]** fund both business expenses and personal expenses including race cars, a private jet, and a mansion in Aspen, Colorado. Tucker also used these accounts to pay the Tribes' one percent share of revenue, which went to other accounts that were in fact owned and controlled by the Tribes. While the Tribes claimed to "own" portfolios, Tucker maintained the ability to transfer "ownership" of a portfolio to a different nominal owner if he found the current nominal owner difficult to work with.

Tucker and Muir engaged in a variety of deceptive strategies to give the false appearance that the Tribes owned and operated the lending business. As with the Nevada shell corporations, the portfolios listed tribal mailing addresses rather than the business's actual location in Overland Park, Kansas. When the Tribes received mail for the lending business, they forwarded it to the Kansas office unopened. To keep up the appearance that the business was located on tribal land, Tucker's employees were instructed that they should never, on pain of termination, reveal the Kansas location to borrowers, and at least two employees were fired for doing so. This deception was taken to theatrical lengths: employees **[**13]** in the Kansas office regularly received weather reports for locations of the tribal reservations, so that they could make accurate small talk with borrowers about the weather in Oklahoma or Nebraska.

Meanwhile, on actual tribal land, Tucker and Muir built and staffed sham business office facilities, designed to make it appear that the Tribes were performing work to administer the loans, while in reality all the loan processing took place in Kansas. The Tribes were given iPads from which tribal officials were to access a website once a day to "approve" large swaths of loans. However, the loans had already been approved by Tucker's employees in the Kansas office, the website did not allow the tribal officials to access the loan applications being "considered," and there was no mechanism for the officials to deny the loans. In addition, the Tribes formed sham corporate boards to run the portfolios, but the boards rarely met, had little understanding of the lending business in Kansas, and exerted no control over it. Tucker and Muir had the tribal officials perform these actions to give the false impression that they were involved in the approval and administration of the loans, while all **[**14]** such meaningful loan administration activity continued to occur at Tucker's business in Overland Park.

Tucker and Muir also arranged a sham transaction in which one of the Tribes purportedly purchased Tucker's loan processing company, CLK Management ("CLK"), which then changed its name to AMG Services ("AMG"). For the purchase of CLK, which made hundreds of millions of dollars in annual revenue, the Tribe ostensibly paid Tucker just over $135,000. However, the money in fact came from an **[*113]** account controlled by Tucker, meaning that Tucker paid himself in order to make it appear that the company had been purchased by the Tribe.

These charades were spectacularly successful, for a time. Tucker's loans attracted scores of complaints from borrowers and several investigations by state authorities. By invoking the Tribes' sovereign immunity, however, Tucker and Muir were able to successfully quash subpoenas from and secure dismissal of state

regulatory enforcement actions. In doing so, Tucker's attorneys submitted false affidavits that materially misrepresented the role of the Tribes in the lending business. In addition, when a borrower complained that the loans were unenforceable under the law **[**15]** of her state, Tucker's employees responded that the loans were enforceable, and the borrower was obligated to pay, because the loan was owned by a Native American tribe.

While at trial Tucker and Muir disputed any intention to deceive, they did not meaningfully dispute that the above described actions took place. Prior to trial, they filed a motion to dismiss the unlawful debt counts, contending in relevant part that the loans did not constitute "unlawful debt" under *18 U.S.C. § 1961(6)* because the loans were authorized under tribal law and were therefore not prohibited by state usury laws. The district court denied the motion, reasoning that, if the allegations in the indictment were true, because the loans were not issued by tribal entities but by businesses controlled entirely by Tucker, and because the Tribes had no meaningful role in the business, principles of tribal sovereign immunity did not apply. At trial, Tucker and Muir argued that even if the loans were unlawful, their conduct was not "willful" because they had a good faith belief, based on advice of counsel regarding principles of tribal sovereign immunity, that their conduct was lawful.

As noted, after a lengthy trial, a jury convicted Tucker **[**16]** and Muir on all fourteen counts. The verdict sheet also posed a special interrogatory, to be answered subsequent to the jury's determination of guilt: "Has the government proven beyond a reasonable doubt that, at the time of collection of any of the loans you found as the basis of a guilty verdict on Counts Two through Four, the lender, in fact, was defendant Scott Tucker or an entity owned or controlled by him?" The jury answered, "Yes."

Additionally, following the Defendants' convictions, the court entered a preliminary forfeiture order against Tucker, including a money judgment in the amount of $3.5 billion and the forfeiture of certain specific property. Tucker moved for a stay of the forfeiture order pending appeal of his conviction, which the district court denied.

The Defendants appeal their convictions, and Tucker appeals from the district court's denial of the stay of forfeiture.

DISCUSSION

On this appeal seeking to set aside their convictions, Defendants' principal contention is that the court gave an erroneous and prejudicial jury instruction as to the mental state element of the usury-based charges. In the court's instruction to the jury on element six of Count 1 (which charged **[**17]** a RICO conspiracy to lend at rates that were usurious under various state laws), and by extension on Counts 2-4 (which charged substantive RICO offenses based on unlawful usurious lending), the court told the jury that the Government could show Defendants "willfully" participated in the conduct of Tucker's enterprise through the collection of unlawful debt if it proved that they "acted deliberately, **[*114]** with knowledge of the actual interest rate charged on the loan[s]." App'x at 264-65.

Defendants contend that this instruction was inconsistent with how willfulness is generally understood in the criminal context, which requires that a defendant be aware of the unlawful nature of the conduct.[2] Moreover, Defendants conceded at trial that they were aware of the interest rates charged on the loans, but argued that they believed in good faith that their conduct was lawful. They contend that the erroneous charge in effect directed a verdict of guilty on Counts 1-4. The Government agrees that it was required to prove willfulness, but it contends that the instruction was correct.

We reject Defendants' challenge. Because Defendants failed to preserve their objection to the instruction in the manner prescribed **[**18]** by *Federal Rule of Criminal Procedure 30*, we review for plain error. Even assuming that the instruction was in error—a question we do not resolve—we find that the error does not satisfy the plain error standard. Taken together with other instructions given by the court to the jury, the instruction now challenged did not affect Defendants' substantial rights, did not "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings," *Johnson v. United States, 520 U.S. 461, 467, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997)*, and did not cause a "miscarriage of

[2] *See Bryan v. United States, 524 U.S. 184, 191-92, 118 S. Ct. 1939, 141 L. Ed. 2d 197 (1998)* ("As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose,'" such that "in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'" (quoting *Ratzlaf v. United States, 510 U.S. 135, 137, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994)*)).

justice," *United States v. Frady, 456 U.S. 152, 163, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982)*. Indeed we conclude, based on the jury's findings under other instructions, that the instruction alleged to have been error had no effect whatsoever on the verdict. Accordingly, reversal is not warranted under the plain error standard. We also reject Defendants' other arguments as without merit.

I. Willfulness Charge

a. Plain Error Review Applies

HN1[] Where a claim of error in the court's instruction to the jury is properly preserved, we review that claim *de novo*, reversing if, "viewing the charge as a whole, there was a prejudicial error." *United States v. Quattrone, 441 F.3d 153, 177 (2d Cir. 2006)*. In order to be preserved, an objection to the jury instructions must be made by "inform[ing] the court of the specific objection and the grounds for the objection before the jury retires **[**19]** to deliberate." *See Fed. R. Crim. P. 30(d)*. This objection generally must occur after the instruction is given to the jury, that being the court's clearest opportunity to fix a mistake that might otherwise require retrial. *See Fogarty v. Near North Ins. Brokerage, Inc., 162 F.3d 74, 79 (2d Cir. 1998)*. Failure to object in the manner prescribed by the rule, so as to give the court a clearly framed opportunity to correct an error in the charge, results in forfeiture of *de novo* review of the error. Where the claim of error in the charge is not properly preserved, it is reviewed instead under the far more exacting standard of *plain error*, as specified in *Rule 52(b)*. *Fed. R. Crim. P. 30(d)*. ("Failure to object in accordance with [*Rule 30(d)*] precludes appellate review, except as permitted under *Rule 52(b)*.").

[*115] ***HN2***[] The preclusion of *de novo* appellate review, however, is not absolute. If the party that failed to object following the jury charge had previously objected, making its position clear, and it was evident in the circumstances that renewal of the objection would be futile because the court had clearly manifested its intention to reject the objection, the failure to renew the objection as specified in *Rule 30(d)* does not forfeit *de novo* review. *See United States v. Rosemond, 841 F.3d 95, 106-07 (2d Cir. 2016)* (a defendant's failure to renew an objection will not forfeit *de novo* review if "taking further **[**20]** exception under the circumstances would have been futile"); *see also United States v. Freeman, 357 F.2d 606, 613 (2d Cir. 1966)* ("Since it is apparent that both Court and counsel were fully cognizant of the issues being raised— and since any further showing would have been an exercise in futility— it is entirely proper that we consider the [issue raised] on appeal."); *cf. Thornley v. Penton Publ'g, Inc., 104 F.3d 26, 30 (2d Cir. 1997)* (holding, in the civil context, in which a similar principle applies, that the futility standard was met where an appellant had "argued its position to the district judge, who rejected it, [and] a further exception after delivery of the charge would have been a mere formality, with no reasonable likelihood of convincing the court to change its mind on the issue").

Although the Defendants had argued their position at a mid-trial charge conference, neither raised an objection to the instruction following the jury charge. App'x at 300. Accordingly, their objection to the willfulness charge is subject to plain error review unless "taking further exception under the circumstances would have been futile." *See Rosemond, 841 F.3d at 107*.

We see no basis for concluding that it would have been futile for Defendants to renew their objection. When the issue was earlier discussed at the charge conference, the court expressed **[**21]** uncertainty as to how to charge on state of mind. App'x at 210-17. The next day, counsel for Muir raised the issue again, arguing that the statement in the proposed charge that the Government could show willfulness by proving that the Defendants "acted deliberately with knowledge of the actual interest rate" was inconsistent with the definition of willfulness and should be removed. *Id.* at 228. After listening to argument on the question, the court thanked counsel and ended the session without giving a conclusive response. *Id.* at 230. Indeed, as Tucker acknowledged in his appellate brief, "The court thanked counsel for her comments but *did not rule on the objections*." Tucker Br. at 38 (emphasis added).

On that record, it cannot be said that the district court had rejected the Defendants' position, making clear that a further objection after delivery of the charge "would have been a mere formality, with no reasonable likelihood of convincing the court to change its mind on the issue." *Thornley, 104 F.3d at 30*. Had the Defendants reasserted their argument after the charge, it is entirely possible that the court would have accepted the argument and given a new instruction on the required state of mind, conserving judicial resources by obviating **[**22]** the need for appeal and potential retrial. Accordingly, we review for plain error.

b. The Error, If Any, Does Not Satisfy the Requirements of "Plain Error"

HN3[] When the plain error standard of review applies, the Court of Appeals may vacate a conviction on account of a challenged jury instruction if the instruction contains "(1) error, (2) that is plain, and (3) that affect[s] substantial rights." United States v. Botti, 711 F.3d 299, 308 ***[*116]*** (2d Cir. 2013) (quoting Johnson v. United States, 520 U.S. 461, 467, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997)). In addition, the error must "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." Johnson, 520 U.S. at 467 (quoting United States v. Olano, 507 U.S. 725, 732, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)). In most cases, to "affect substantial rights" the error "must have been prejudicial: It must have affected the outcome of the district court proceedings." Olano, 507 U.S. at 734. The Supreme Court has cautioned that Rule 52(b) authorizes the Courts of Appeals to correct "particularly egregious errors," and is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." Frady, 456 U.S. at 163 & n.14; *accord* United States v. Young, 470 U.S. 1, 15, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985). The burden is on the defendant to demonstrate that these criteria for relief are met. United States v. Boyland, 862 F.3d 279, 289 (2d Cir. 2017).[3]

We conclude that, even if the challenged instruction was erroneous, the error did not satisfy the requirements of **[**23]** the plain error standard. In instructing the jury as to willfulness in regard to the conspiracy element of Count 1 (the RICO conspiracy count), the court barred the jury from rendering a guilty verdict on that count unless it found beyond a reasonable doubt that **[*117]** the Defendants were aware of the unlawfulness of their lending scheme. The guilty verdict on Count 1 thus demonstrates that the jury was satisfied beyond a reasonable doubt that the Defendants acted with the mental state that Defendants argue was required for Counts 2-4.

In its charge on Count 1, the court instructed the jury on willfulness twice: (1) in the context of element two, that the Defendants "knowingly and willfully joined the conspiracy;" and (2) in the context of element six, that the Defendants "willfully and knowingly agreed to participate . . . in the affairs of the Tucker payday organization through collection of an unlawful debt." The portion of the instruction Defendants now challenge applied only to element six (and was incorporated by reference into the instructions for the substantive RICO counts, Counts 2-4).

As to element two (knowingly and willfully joining the conspiracy), the court instructed the jury **[**24]** that "[w]illfully means to act deliberately and with a purpose to do something that the law forbids," and that to be convicted under Count 1 the Defendants "must have been aware of the generally unlawful nature of [their] act[s]." App'x at 258-59. The jury found the Defendants guilty under Count 1. Therefore, the jury necessarily found that they knew the unlawful nature of the lending they conspired to engage in—the same lending that formed the basis of element six and that was charged as a substantive offense in Counts 2-4. Because the jury found in connection with the conspiracy element that the Defendants were aware of the unlawful nature of their conduct, there is no risk that the jury could have found them guilty on the "collection of an unlawful debt" element of Counts 1-4, involving the loans that were the object of the conspiracy charged in Count 1, without being satisfied beyond a reasonable doubt that the Defendants were aware of the unlawful nature of their conduct.

Furthermore, the Government presented overwhelming evidence that Defendants were aware of the unlawful nature of the loans, in the form of Defendants' extensive efforts to conceal their lending activities and to create a sham **[**25]** illusion that the lending was done by Native American tribes, precisely so that state usury laws would not seem to apply. *See* United States v. Atkins, 869 F.2d 135, 139 (2d Cir. 1989) (finding "specious" defendants' claim that they were unaware that their actions were illegal, in light of the strength of evidence of lies and concealment); *see also* Bryan, 524 U.S. at 189 & n.8 (concluding that willfulness in illegal

[3] In United States v. Viola, 35 F.3d 37, 41-42 (2d Cir. 1994), *abrogated on other grounds by* Salinas v. United States, 522 U.S. 52, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997), this circuit held that where an error results from a supervening decision that alters the applicable law, the burden is on the *government* with respect to the third element of plain error analysis to show that the error was *not* prejudicial. We have repeatedly expressed doubt whether this "modified" version of plain error review survived the Supreme Court's decision in Johnson v. United States, 520 U.S. 461, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997). *See* Boyland, 862 F.3d at 289. We have no occasion to decide that issue here, because the error did not result from a supervening decision, and so, even assuming that *Viola* remains good law, its "modified plain-error" standard would not apply.

firearms sales was satisfied by showing that defendant used "straw purchasers" and shaved off gun serial numbers).

Uncontradicted evidence showed that the Defendants: (1) prohibited employees from revealing the business's Kansas location, and instructed them to falsely claim that they were located on tribal land; (2) caused mail related to the lending business to be sent to the Tribes and then forwarded unopened to the Kansas office, giving a false impression that lending activity occurred on tribal lands; (3) required tribal officials to perform fake loan approvals on designated iPads in order to give the appearance that they were involved in the loan approval process; (4) set up a sham transaction in which AMG, a company controlled by Tucker, "purchased" CLK (using money controlled by Tucker) in order to give the appearance of tribal ownership; and **[**26]** (5) caused attorneys to submit affidavits in state court actions that contained inaccurate descriptions of a purported tribal role in administering the loans. In light of this evidence, we have no doubt that, if the willfulness instruction challenged by Defendants was erroneous, the error did not affect the verdict.

The court's charge did not adversely "affect[] substantial rights," *Botti, 711 F.3d at 308*, "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings," *Johnson, 520 U.S. at 467*, or cause a "miscarriage of justice" in these circumstances, *Frady, 456 U.S. at 163*. Defendants' argument is that the jury should not have been allowed to convict on the substantive unlawful debt counts unless it found that the Defendants were aware of the unlawful nature of their conduct. Taking into account the charge as a whole, the jury did find (based on overwhelming evidence of that fact) that the Defendants were aware of the unlawful nature of the lending scheme.

In reaching this conclusion, we express no view on whether willfulness or awareness of unlawfulness was required for conviction under Counts 2-4. We note, however, that were it not for the fact that the Defendants failed to satisfy the plain error standard, we would face **[**27]** confusing and arguably incompatible precedents regarding the required mental state for a RICO offense involving unlawful debt. One source of the difficulty is that a RICO unlawful debt offense can be predicated on a violation of a state's *civil* usury statute, and that many such civil statutes impose no state of mind requirement at all. Certain applications of RICO in this context are thus in tension with the Supreme Court's recent reaffirmation of a "presumption in favor of a scienter requirement" **[*118]** applicable to "each of the statutory elements that criminalize otherwise innocent conduct." *Elonis v. United States, 575 U.S. 723, 135 S. Ct. 2001, 2011, 192 L. Ed. 2d 1 (2015)* (quoting *United States v. X-Citement Video, Inc., 513 U.S. 64, 72, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994)*). Although we need not, and do not, resolve these issues here, we discuss them briefly in the hope of exposing some of the potential problems.

For starters, our 1986 opinion in *United States v. Biasucci, 786 F.2d 504 (2d Cir. 1986)*, written in the early days of RICO adjudications, ostensibly adopted two incompatible state-of-mind standards. The case, like this one, involved a RICO prosecution for collection of debts that were unlawful under state law. On the one hand, our opinion declared that RICO requires "that the defendant acted knowingly, willfully and unlawfully," *Biasucci, 786 F.2d at 513*—the statement Defendants here rely on for their argument that the Government **[**28]** was required to prove willfulness. At the same time, the *Biasucci* opinion upheld the RICO convictions on the ground that RICO imposes no mental state requirement beyond that required by the predicate state statute. *Biasucci, 786 F.3d at 512*. The issue raised on the appeal was the defendants' contention that the government was required to prove their knowledge of the specific interest rates being charged on the loans they were collecting. We affirmed the convictions on the ground that there was no such requirement under the predicate state statute and therefore no such requirement imposed by RICO. The prosecution was predicated on the defendants' violation of *New York Penal Law § 190.40*. That statute required proof that the defendant knowingly took or received interest at a rate exceeding 25% per annum. It did not, however, require that the defendant know either the precise rate being charged, or that the rate was illegal.[4]

[4] The statute's phrase "knowingly charges . . . any money or other property as interest . . . at a rate exceeding twenty-five per centum per annum," *N.Y. Penal Law § 190.40 (McKinney Supp. 1986)*, might conceivably be read to require knowledge that 25% was the maximum lawful rate—which, combined with the knowledge that the rate charged exceeded 25%, would constitute knowledge of unlawfulness. However, the Court of Appeals had previously made clear in *Freitas v. Geddes S&L Ass'n, 63 N.Y.2d 254, 471 N.E.2d 437, 481 N.Y.S.2d 665 (1984)*, that *§ 190.40* does not require knowledge of the unlawfulness of the act. Although *Freitas* involved a civil usury statute and not *§ 190.40*, the majority characterized the dissent's test—under which "knowingly" requires "knowledge

Accordingly, after stating in dictum that RICO requires proof that the defendant acted willfully, the court upheld the convictions based on a standard that did not require a showing of willfulness or of awareness of the unlawful nature of the conduct.

Apart from its internal inconsistency, the *Biasucci* ***[**29]*** holding that no proof of state of mind is required beyond what is required by the state statute can be difficult to reconcile with the Supreme Court's later insistence in *X-Citement Video* and *Elonis* on a "presumption [in the interpretation **[*119]** of criminal statutes] in favor of a scienter requirement," applicable to "each of the statutory elements that criminalize otherwise innocent conduct." *Elonis, 135 S. Ct. at 2011*. The *Biasucci* formulation would, under certain circumstances, authorize conviction under RICO of a defendant who neither knew the rate of interest charged nor that the rate charged was illegal.

That difficulty is exacerbated if the principle espoused in *Biasucci* (and other cases)—that RICO imposes no knowledge requirement beyond what is imposed by the predicate state law—applies even when the unlawfulness under state law is predicated on a state *civil* statute.

HN4[] RICO offenses may be predicated on a single instance of collection of unlawful debt, as well as on a pattern of racketeering activity. *See 18 U.S.C. § 1962*; *United States v. Giovanelli, 945 F.2d 479, 490 (2d Cir. 1991)*. While "racketeering activity" is generally understood to encompass only criminal offenses, *see Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank, 755 F.2d 239, 247 (2d Cir. 1985)*, the RICO statute defines "unlawful debt" to include any debt "which is *unenforceable* under State or Federal **[**30]** law . . . because of the laws relating to usury" and "which was incurred in connection with . . . the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate." *18 U.S.C. § 1961(6)* (emphasis added). This definition "includes debts that would be usurious under the laws of several states, and hence unenforceable, but that would not violate [any state] *criminal* usury laws." *Durante Bros., 755 F.2d at 247* (emphasis in original). Thus, the criminal RICO offense of participating in the conduct of an enterprise's affairs through collection of unlawful debt may arguably be predicated on a violation of only civil usury laws.

HN5[] Some such state civil statutes render debt unlawful and unenforceable solely by reason of the rate of interest charged, without regard to the mental state of the lender or collector. Such statutes provide simply that loans carrying an interest rate above a specified threshold are void and unenforceable. A debt charging interest that exceeds the threshold rate and is incurred in connection with the business of lending money at twice the enforceable rate would thus appear to fit within the definition of "unlawful debt" under **[**31]** *18 U.S.C. § 1961(6)*, and could thus arguably serve as the predicate for a RICO offense, regardless of what the lender knew or intended.

Indeed, several of the state usury statutes underlying the RICO charges in this case are of precisely this nature. For instance, the payday loan statute in New Hampshire, which was the location of one of the customers named in Count 2, provides: "The annual percentage rate for payday loans shall not exceed 36 percent," *N.H. Rev. Stat. § 399-A:17(I)*, and makes payday loans in excess of 36 percent unenforceable, regardless of mental state, *see id. § 399-A:23(VIII)* ("If charges in excess of those permitted by this chapter shall be charged . . . the contract of loan shall be void and the lender shall have no right to collect or receive any charges, interest, or recompense whatsoever."). ***HN6***[] Similarly, New York's *civil* usury statute, which was specifically listed in the indictment, and which applies to loans listed in all three substantive RICO counts, provides that the maximum interest rate "shall be sixteen per centum per annum." *N.Y. Banking Law § 14-a(1)*; *N.Y. Gen. Oblig. Law § 5-501*. The New York law also provides that "[a]ll bonds, bills, notes, assurances, conveyances, all other contracts or securities **[*120]** whatsoever . . . whereupon or whereby there shall be reserved or **[**32]** taken . . . any greater sum, or greater value, for the loan or forbearance of any money, . . . than is prescribed in *section 5-501*, shall be void." *N.Y. Gen. Oblig. Law § 5-511*. Thus, loan contracts with an interest rate exceeding 16% are unenforceable under New York's

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that the facts exist which constitute the offense, not knowledge of the unlawfulness of the act"—as being "akin to the standard utilized by *[§ 190.40]*." *Freitas, 63 N.Y.2d at 264*; *id. at 267* (Simons, J., dissenting). Similarly, as to the civil statute at issue, the *Freitas* majority noted that "[i]f the note or bond shows a rate of interest higher than the statutory lawful rate, it would be immaterial whether the lender actually intended to violate the law." *Id. at 262*. Thus, while "knowingly" in *§ 190.40* might on its face be read to require awareness of unlawfulness, precedent made clear that "knowingly" was satisfied by knowledge that the interest rate exceeded 25%, regardless of whether the defendant was aware that such rate was unlawful.

civil usury law, regardless of the mental state of the lender.

It is unclear whether the *Biasucci* court would have intended its holding, that "RICO imposes no additional *mens rea* requirement beyond that found in the predicate crimes," *Biasucci, 786 F.2d at 512*, to apply also to criminal RICO charges predicated on *civil* usury statutes such as these. *Biasucci* itself involved a RICO offense that was based solely on New York's *criminal* usury statute. And *Biasucci* consistently refers to the predicate *crimes*, perhaps suggesting that the court did not contemplate that the same rule would apply to RICO offenses based on loans that were unenforceable under state *civil* usury statutes. Moreover, the cases that *Biasucci* relied upon for that rule involved racketeering-based RICO charges predicated on criminal violations of the *Taft-Hartley Act*. *See United States v. Boylan, 620 F.2d 359 (2d Cir. 1980)*; *United States v. Scotto, 641 F.2d 47 (2d Cir. 1980)*. None involved RICO charges based on civil statutes. ***HN7***[↑] If, however, a defendant may be convicted under RICO for participation in the making or collecting **[**33]** of a loan merely because a state civil statute renders the loan unenforceable by reason of the interest rate, without any requirement whatsoever as to the defendant's state of mind, in some circumstances this would authorize racketeering convictions where the defendant had not only committed no state law offense, but had done nothing that would offend social mores.

HN8[↑] As noted above, a RICO prosecution can be predicated on a single instance of collection of unlawful debt. And what the RICO statute calls an "enterprise" can be "any individual, partnership, corporation, association, or other legal entity," *18 U.S.C. § 1961(4)*—so long as it is "engaged in, [or its activities] affect, interstate commerce," *id. § 1962(c)*. And high interest rates can result from application of reasonable service fees to small debit balances in circumstances that do not partake of the predatory lending practices exhibited in this case (or those seen in *Biasucci*). Consider a store that sells goods coming from different states, which allows customers charge accounts and follows a policy for accounts that remain unpaid after four months to impose a modest one-time $ 15 service fee (considered interest under usury laws) and begin charging interest **[**34]** at an unobjectionable rate. An employee who "participates in the conduct" of the business's affairs by overseeing the billing process,[5] say, the credit manager, might face **[*121]** federal criminal liability as a racketeer, although having committed no offense under state law or even acted unreasonably, for mailing a monthly bill that charged the $ 15 fee where the customer's unpaid balance was sufficiently small. If RICO liability requires no proof of state of mind other than what is required to show that the loan is unenforceable under the predicate state statute and this rule applies where unenforceability under state law depends on only the interest rate (without regard to state of mind) or even where, as in *Biasucci*, criminal liability under the state's law does not require awareness of the illegality of the rate, this can produce criminal liability for racketeering for unexceptionable conduct. We have serious doubts that such a rule appropriately "separate[s] wrongful conduct from otherwise innocent conduct." *Elonis, 135 S. Ct. at 2010* (internal quotation marks omitted).

Because, as explained above, the jury necessarily found that the Defendants acted willfully in rendering a guilty verdict **[**35]** on Count 1, and because the evidence of willfulness was overwhelming in any event, the Defendants have not met their burden of showing plain error. While the issues we have discussed will pose troublesome questions in future cases, we have no occasion to resolve those difficulties in this case, and do not purport to do so.

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[5] The statutory requirement that the defendant "conduct or participate . . . in the conduct" of the enterprise's affairs, *18 U.S.C. § 1962(c)*, likely shields the lowest rung of employees from RICO liability. *See Reves v. Ernst & Young, 507 U.S. 170, 179, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993)* (requiring that the defendant have "*some* part in directing the enterprise's affairs" to be liable under *§ 1962(c)* (emphasis in original)); *United States v. Viola, 35 F.3d 37, 41 (2d Cir. 1994)* (finding erroneous under *Reves* a jury instruction that permitted conviction as long as the defendants performed duties that were "necessary and helpful" to the operation of the RICO enterprise). But the Supreme Court in *Reves* clarified that *§ 1962(c)* could extend to "lower rung" participants who participate in the operation of the enterprise, and it declined to decide "how far *§ 1962(c)* extends down the ladder of operation." *Reves, 507 U.S. at 184 & n.9*. We know of no case setting a precise lower bound for the position within the ladder required for *§ 1962(c)* liability, but it is clear that some degree of discretionary authority is sufficient. *See United States v. Diaz, 176 F.3d 52, 92-93 (2d Cir. 1999)* (holding that evidence was sufficient to meet the *Reves* standard because defendants were "on the ladder [of operation], rather than under it" and exercised "discretionary authority" in carrying out instructions). Thus, many "lower rung" employees remain potentially subject to RICO charges for their activities relating to a RICO enterprise.

II. Defendants' Other Arguments Are Without Merit

Defendants also argue (1) the district court erred by excluding the testimony of Defendants' expert witness, attorney Gavin Clarkson, on the topic of tribal sovereign immunity; (2) there was insufficient evidence that Defendants engaged in wire fraud by misleading borrowers to believe that Native American tribes were the true lenders, because Defendants had a good faith belief that the Tribes were in fact the lender; and (3) the loans here did not constitute "unlawful debt" as defined under RICO because, due to principles of tribal sovereign immunity, state usury laws are not "enforceable" against tribal loans. These contentions are without merit.

We reject Defendants' contention that the district court erred by excluding Clarkson's testimony. ***HN9***[↑] A district court's decision to exclude expert testimony is reviewed for abuse **[**36]** of discretion. *Zaremba v. Gen. Motors Corp., 360 F.3d 355, 357 (2d Cir. 2004)*. Regardless of whether Clarkson's testimony was being offered to show that Defendants had an innocent state of mind regarding the legality of their loans, or to show that their lending practices were in fact not illegal, the court committed neither error nor abuse of discretion in excluding it. As to the former issue, Clarkson did not advise the Defendants, and so his proposed testimony would not have been probative of what they understood. ***HN10***[↑] As for the legal issue of the lawfulness of the loans, "[w]e have consistently held . . . that expert testimony that usurps . . . the role of the trial judge in instructing the jury as to the applicable law . . . by definition does not aid the jury in making a decision," and is therefore inadmissible under *Federal Rule of Evidence 702*. *Nimely v. City of New York, 414 F.3d 381, 397 (2d Cir. 2005)* (internal quotation marks and citation omitted).

We also reject Defendants' contention that there was insufficient evidence of wire fraud consisting of misrepresenting the identity of the lender. ***HN11***[↑] On a **[*122]** defendant's challenge to his conviction based on the sufficiency of evidence, "we view the evidence in the light most favorable to the government, drawing all inferences in the government's favor." *United States v. Hawkins, 547 F.3d 66, 70 (2d Cir. 2008)* (internal quotation marks omitted). **[**37]** There was extensive evidence that Defendants were aware that the Tribes were not the true lender, and that they falsely represented this was the case in order to evade state regulators and to convince borrowers to make payments on the unlawful terms they offered. Testimony of multiple witnesses established that the Tribes had no meaningful influence or control over the lending business, but rather served merely as a cover. Defendants made extensive and sometimes extraordinary efforts, described above, to create a false impression that the Tribes were involved in the lending. The evidence was more than sufficient for the jury to conclude that Tucker and Muir knew that the Tribes were not the lender, but falsely represented that they were.

We reject Defendants' argument that the loans were not "unlawful debt" as defined by RICO because, due to principles of tribal sovereign immunity, state usury laws are not enforceable against tribal loans. The district court correctly concluded (in its opinion denying Defendants' motion to dismiss the indictment) based on the facts alleged in the indictment—and subsequently demonstrated at trial—that the Tribes' involvement in the lending business was **[**38]** a sham, so that principles of tribal sovereign immunity had no application to Tucker's non-tribal business. We reject the Defendants' further contentions as frivolous.

III. The District Court Did Not Abuse Its Discretion In Denying Tucker's Application For a Stay of the Forfeiture Order

Tucker also argues that the district court erred in denying his application to stay execution of the forfeiture order against him pending his appeal of the underlying convictions. Following Tucker's conviction, in April 2018 the district court entered a preliminary forfeiture order against him, including a money judgment in the amount of $ 3.5 billion and the forfeiture of certain specific property, including ten cars, two residences, and jewelry. Tucker moved for a stay of the forfeiture order in the district court, arguing he was likely to succeed on the merits of his appeal, that the property at issue would likely increase in value and had intrinsic value to him, and that the government could offset the cost of maintaining the property pending the outcome of his appeal by renting the real property. The district court rejected Tucker's motion, finding that under the factors set out in *United States v. Silver, 203 F. Supp. 3d 370, 385 (S.D.N.Y. 2016)*, Tucker's likelihood **[**39]** of success on appeal was low, and the cost to the government of maintaining the assets would be high. The district court did, however, impose a stay as to the sale of the family residence. Tucker then appealed from the denial of the stay of the forfeiture order.

HN12[] A district court may stay a forfeiture order pending appeal "on terms appropriate to ensure that the property remains available pending appellate review." Fed. R. Crim. P. 32.2(d). While neither the Federal Rules nor this Court's precedent set out factors that pertain explicitly to stays of forfeiture orders, we have expressed standards generally governing applications to stay district court orders or proceedings pending appeal as follows: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the **[*123]** stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." In re World Trade Ctr. Disaster Site Litig., 503 F.3d 167, 170 (2d Cir. 2007) (internal quotation marks and footnote omitted); *see also* United States v. Gelb, 826 F.2d 1175, 1177 (2d Cir. 1987) (applying traditional stay factors in deciding an interlocutory appeal of a pretrial restraining order enjoining the transfer of assets subject **[**40]** to criminal forfeiture). HN13[] We review the denial of a stay for abuse of discretion. *See* Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 856 (2d Cir. 1997).

The district court, like others in our circuit facing similar fact patterns, applied the slightly modified version of the traditional stay factors articulated by the district court in *Silver*: "1) the likelihood of success on appeal; 2) whether the forfeited asset is likely to depreciate over time; 3) the forfeited asset's intrinsic value to defendant (i.e., the availability of substitutes); and 4) the expense of maintaining the forfeited property." Silver, 203 F. Supp. 3d at 385; *see also* United States v. Ngari, 559 F. App'x 259, 272 (5th Cir. 2014) (analyzing denial of stay by considering "(1) the likelihood of success on appeal; (2) whether the forfeited assets will depreciate over time; (3) the forfeited assets' intrinsic value to the defendant; and (4) the expense of maintaining the forfeited property").

Under any such test, we hold that the district court did not abuse its discretion in denying Tucker a stay of the forfeiture order. Tucker was indeed unlikely to succeed on the merits of his appeal. Nothing in the record contradicts the district court's finding that the cost of maintaining the assets was high, and that the property had no intrinsic value for Tucker; nor did the record **[**41]** show that the property was more likely to increase, than decrease, in value.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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18-181 (L)

18-184 (CON)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

CRYSTAL GROTE, AKA CRYSTAL CRAM, AKA CRYSTAL CRAM-GROTE, AKA CRYSTAL STUBBS,

Defendant,

and

TIMOTHY MUIR, SCOTT TUCKER,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR PANEL REHEARING FOR DEFENDANT-APPELLANT SCOTT TUCKER

BEVERLY VAN NESS
Attorney for Defendant-Appellant
Scott Tucker
233 Broadway, Suite 2704
New York, New York 10279
(212) 274-0402

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INTRODUCTION

Scott Tucker petitions for panel rehearing of portions of the Court's decision in United States v. Grote, 961 F.3d 105 (2d Cir. 2020). The Court affirmed his judgment of conviction. By order dated June 18, 2020, the Court extended appellant's time to submit a petition to July 31, 2020.

Tucker seeks rehearing on two points. First, the Court held that what it acknowledged was appellants' "principal claim on appeal" – the district court's charge on the state-of-mind element of counts charging unlawful collection of debt – was not preserved for appellate review. The Court therefore analyzed the claim under the plain error standard, which it held was not satisfied. 961 F.3d at 109, 113-17. Tucker respectfully submits that the Court overlooked a document in his appendix that establishes the issue was preserved, and that the Court should revise its opinion accordingly and analyze the claim de novo.

Second, without discussion, the Court dismissed as "frivolous" Tucker's claim that the district court unfairly limited evidence supporting his advice-of-counsel defense. Id. at 122. Tucker had contended that in the context of this case, where the loans were made pursuant to novel and evolving models, he should have been permitted to present advice received during the course of the years-long lending period. See Tucker's opening brief on appeal, Point II, pp. 57-60; reply brief, Point II, pp. 23-26. Tucker respectfully submits that the Court ignored case law supporting his position, and that it should reconsider and address this issue.

STATEMENT OF THE CASE

Tucker was involved in the payday loan business for many years, first through association with a Delaware bank, and ultimately with federally-recognized Indian tribes. He and co-defendant Timothy Muir were convicted at trial of racketeering (through the collection of unlawful debt), wire fraud, money laundering and Truth in Lending Act violations.

The government maintained that Tucker's relationships with County Bank and the Indian tribes were shams, and that the company in Overland Park, Kansas, which Tucker ran, was the true lender. Representations to the contrary were fraudulent, and the loans violated state usury laws and, as a consequence, the federal RICO statute. Appellant's defense centered on his belief that the Kansas operation serviced the loans, and that the bank, and later the tribal entities formed pursuant to tribal law, were the lenders. Thus, the interest rates charged were lawful under the National Bank Act and validly-enacted tribal ordinances.

There was substantial evidence supporting the defense, even in what we believe was an unfairly truncated record. See Tucker Br., pp. 6-7, 13-15, 21-33.

ARGUMENT

I. The defendants preserved their objection to the charge that, in considering counts associated with the collection of unlawful debt, the jury could find they acted willfully if they were aware of the interest rates charged on the loans – a fact they had conceded.

In its opinion, the Court notes defense objections to the instruction at issue which the district court did not resolve: "After listening to argument on the question, the court thanked counsel and ended the session without giving a conclusive response," citing the defendants' appendix, A. 228. The Court noted that "Tucker acknowledged in his appellate brief" that the court "did not rule on the objections," citing Tucker's opening brief at p. 38. 961 F.3d 105, 115. This was the basis for the Court's view that the error was not preserved, since the district court had not "rejected the defendants' position, making clear that a further objection" would be futile. Id.

We did make the acknowledgment the Court references, but on the same page of Tucker's appellate brief, we noted that "[i]n a final pre-charge letter, defense counsel reiterated the request to delete the challenged language, which was inconsistent with the earlier definition of "willfully" and would confuse the jurors, or at least cabin the language to the element of knowledge," citing A.560-61. But the court gave the objected-to instruction. See Tucker opening brief, p. 38. The final pre-charge letter was filed by ECF on October 11, 2017, after the charge conference that day and before the jurors would be instructed the next day. It began: "On behalf of the defendants, I make the following requests to charge

(using the Court's most recent draft, dated 10/10/17): For those requests the Court denies, I take exception in order to preserve the issue for possible appellate review. All of the requests have previously been made in writing or orally, in court, except for a request to correct a typographical error on p. 24 . . . ." (see A. 559 [emphasis added]). In pertinent part, item 4 states:

> 4. On p. 31, in the spillover paragraph at the top, we ask the Court to delete the last two sentences ("The government can meet its burden on the 'willfully' and 'knowingly' element by proving a defendant acted deliberately with knowledge of the actual interest rate charged on the loan. It may also meet its burden by showing a defendant acted deliberately with an awareness of the generally unlawful nature of the loan and also that it was the practice of the business engaged in lending money to make such loans.").
>
> As I stated today, this definition of "knowingly and willfully" is inconsistent with the definitions of those terms previously given (on p. 25) and will confuse the jurors.

(A.560 [emphasis added]). After additional explication, (A. 560-61), item 4 ends:

> As an alternative (though our first request is to delete the two sentences altogether), we ask the Court to

> tie the language to knowledge only. The third sentence of the spillover paragraph on p. 31 would read, "With respect to this sixth element of Count One, the government can establish a defendant acted "knowingly" by proving either that he had knowledge of the actual interest rate charged on the loan or that he was aware of the generally unlawful nature of the loan." This will not conflict with the definition of "willfully" previously provided and will not confuse the jurors.

(A. 561 [emphasis added]).

We respectfully submit that the final pre-charge letter was more than sufficient to preserve our objection to the instruction at issue (and all other objections set forth in the letter), and that a formal exception after the jury was charged would have been futile. See discussion of futility doctrine, 961 F.3d at 115. The district court had heard our objection more than once, and its basis, and it refused to delete the contested language. We note that the government never suggested in its appellate brief that our claim was unpreserved for appellate review and should be addressed by this Court as plain error.

Accordingly, we ask the Court to amend its opinion to delete its plain error analysis and to review the claim de novo. Plain error review is a "far more exacting standard," and it is the defendant's burden to establish that its criteria have been met. 961 F.3d at 114, 116. The de novo review standard requires the

government to prove that the charge error is harmless beyond a reasonable doubt. See Tucker's opening brief, pp. 53-54.

Our prejudice argument was fully-briefed in this Court and will not be restated here. Suffice it to say that, boiled down to its essence, the jurors were admonished as follows:

1. the second element of Count One required a finding that the defendant intentionally joined the conspiracy, with "intentionally" defined as "knowingly and willfully," with separate definitions given for the latter;

2. the sixth element of Count One required a finding that the defendant "knowingly and willfully" joined the conspiracy, and that this single mens rea element could be proved in one of two ways, one being simply that the defendant knew the actual interest rates charged on the loans [which the defendants had conceded they did]; and

3. the fourth element of Counts Two through Four (substantive RICO counts) – also a single mens rea element – required a finding that the defendant willfully and knowingly engaged in the collection of unlawful debt.

(A. 258-59, 263-65, 267). These instructions, which addressed the defendants' mental state – the only contested issue in the case – were inconsistent and unquestionably confusing.

The Court has concluded that the guilty verdict on Count One, which contained a proper definition of "willfully" as to one element (the definition of

"intentionally") necessarily means the jurors found that the defendants had not believed in good faith that the loans were lawful, and instead had a purpose to do something that the law forbids, aware of the generally unlawful nature of their acts. 961 F. 3d at 116-17. Respectfully, the jurors could as easily have found that since the defendants were aware of the actual interest rates charged, they were guilty of the substantive RICO counts, and that they were therefore, necessarily, guilty of agreeing to violate RICO (the conspiracy count).

The erroneous instruction, in sum, obviated the need to consider the factual basis of the defendants' good faith defense. As noted in our opening brief, the first question the jurors asked during deliberations was to hear co-defendant Muir's testimony "that he knew the interest rates were too high" (see Tucker opening brief, p. 41). The erroneous instruction also abrogated the need to consider Tucker's advice of counsel defense, which was supported by testimony from attorneys Clifford Cohen and Conly Schulte (see Tucker Br., pp. 24-30) and, with respect to the County Bank lending (which also involved the exportation of interest rates), the testimony of Leonard Goodman (id., pp. 22-24). This defense had no relevance other than to his state of mind – whether he believed the loans were lawful notwithstanding his awareness of their high interest rates.

We hope that if the Court considers this issue de novo, it will conclude on the basis of the record as a whole that it and other rulings of the district court impermissibly favored the government and undermined – if not eliminated entirely – the defendants' defense. But even if it does not agree that a new trial is

warranted, the Court should amend its opinion. As it now stands, an unfair plain error burden has been placed on the defendants, which they would have to address when seeking certiorari from the Supreme Court. The plain error holding is an unwarranted obstacle to what is already a difficult challenge in any case, given how few cases the Supreme Court agrees to hear.

II. Tucker's claim that the district court unfairly imposed a date limitation on the legal advice received was not frivolous and should be addressed.

In Tucker's opening brief, pp. 57-58, we acknowledged the general rule that an advice of counsel defense applies to advice sought before the charged conduct begins. However, we cited case law that modifies the rule when the charged conduct is ongoing. See Tucker Br., p. 58; see also United States v. Johnson, 139 F.3d 1359, 1366 (11 Cir. 1998) (defendant sought advise of counsel early in conspiracy period, and although he later acquired new, material information, he continued to follow outdated advice. Court properly instructed that defendant has a continuing duty to disclose such information to counsel for defense to remain viable).

Here, there was evidence that Tucker received advice from numerous attorneys as to the legality of the County Bank lending program and, later, the tribal lending program which had similar aspects. Both programs were novel. There was also evidence that the latter model was revised over time, in part due to scrutiny by regulatory authorities. Yet Tucker's defense could not be updated with evidence that he continued to seek legal advice in a good faith effort to

modify the program so it complied with the law. If the jurors found that the tribal loans were lawful at the inception, but red flags were later raised that Tucker ignored, they were free to convict based on events occurring throughout the decades-long business. The government was permitted to rely on that evidence to secure a conviction, but Ticker was precluded from countering it with proof of ongoing legal advice he received, relevant to his state of mind.

Respectfully, the argument that the district court erred in excluding such evidence is not frivolous as a legal or factual matter. It appears to be a novel issue in this Circuit, but it is not a specious one. We ask the Court to reconsider the issue and address it.

CONCLUSION

For the reasons stated, appellant Tucker respectfully requests panel rehearing and reversal of his convictions.

Dated: New York, New York
July 30, 2020

/s/_____

BEVERLY VAN NESS
Attorney for Appellant
Scott Tucker
233 Broadway, Suite 2704
New York, New York 10279
(212) 274-0402

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of August, two thousand twenty,

Before: Pierre N. Leval,
Rosemary S. Pooler,
Barrington D. Parker,
Circuit Judges.

United States of America,

Appellee,

v.

Crystal Grote, AKA Crystal Cram, AKA Crystal Cram-Grote, AKA Crystal Stubbs,

Defendant,

Timothy Muir, Scott Tucker,

Defendants - Appellants.

ORDER
Docket No. 18-181(L), 18-184(CON)

Scott Tucker having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of October, two thousand twenty.

BEFORE: PIERRE N. LEVAL,
ROSEMARY S. POOLER,
BARRINGTON D. PARKER,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

ORDER

v.

Nos. 18-181-cr(L),
18-184-cr(CON)

CRYSTAL GROTE, AKA CRYSTAL CRAM, AKA CRYSTAL CRAM-GROTE, AKA CRYSTAL STUBBS,

Defendant,

TIMOTHY MUIR, SCOTT TUCKER,

Defendants-Appellants.

Defendants Scott Tucker and Timothy Muir both petition for rehearing of this court's judgment affirming their convictions. Tucker's petition was denied by Order of August 20, 2020. Muir's petition was denied by Order of October 15, 2020. We comment briefly on one contention raised by both defendants.

The defendants assert that this court's opinion affirming their convictions erred in applying the *plain error* standard to their argument relating to the jury charge on willfulness. In ruling that the plain error standard was applicable, we relied in part on the defendants' failure to note their objection *after the charge was given* ("before the jury retires to deliberate"), as required by Fed. R. Crim. P. 30(d). The defendants now argue that this ruling was error because it failed to note

certain occasions on which defense counsel raised concerns about the proposed jury charge on the state-of-mind element, including a letter the defendants submitted to the court just prior to the charge, reiterating the argument they had made at the charge conference.

These additional submissions to the trial judge prior to the charge do not change our analysis. Most of them predated the charge conference discussed in our opinion, pertained to earlier versions of the draft jury charge, and did not raise the "specific [non-frivolous] objection" at issue on appeal, Fed. R. Crim. P. 30(d), namely whether it was error for the district court to instruct the jury that "willfulness" for the purposes of unlawful debt collection could be satisfied by showing that the defendants "acted deliberately, with knowledge of the actual interest rate charged on the loan[s]." Those earlier filings and conference exchanges thus have no bearing on whether that "specific objection" was preserved for appellate review.

The letter submitted by the defendants just prior to the charge, on the other hand, *did* raise the specific argument at issue, but the fact of the reiteration of the argument by letter does not change our conclusion. Our opinion rejected the defendants' contention that objection subsequent to the charge should have been excused on the ground of futility, because the court had expressed no definitive view on the issue. The fact that the defendants submitted a letter just prior to the charge, reiterating the argument, does not change that analysis. The court made no comment whatsoever on the letter. The fact of its submission prior to the charge does not support the defendants' argument that it would have been futile to "inform the court of the specific objection and the grounds" for it following the charge, as required by the rule.

The defendants' other asserted grounds for rehearing are also without merit.

For the Court:

Catherine O'Hagan Wolfe
Clerk of Court