APPENDIX

APPENDIX A:

SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED SEPTEMBER 30, 2020
(*United States v. Little,* 828 Fed.Appx. 34 (2d Cir. 2020))

18-3622 (L)
United States v. Little

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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 30th day of September, two thousand twenty.

PRESENT:

DENNIS JACOBS,
GERARD E. LYNCH,
MICHAEL H. PARK,
Circuit Judges.

United States of America,

Appellee,

v.

No. 18-3622-cr
No. 19-445-cr

Michael J. Little, AKA Sealed Defendant 1,

Defendant-Appellant.

FOR DEFENDANT-APPELLANT: ROBERT A. CULP, Law Office of Robert A. Culp, Garrison, NY *for* Michael J. Little

FOR APPELLEE: DINA MCLEOD, Assistant United States Attorney (Christopher J. DiMase, Andrew S. Dember, Anna M. Skotko, Assistant United States Attorneys, *on the brief*), *for* Audrey Strauss, Acting United States Attorney for the Southern District of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Castel, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**, except that the order of restitution is **AFFIRMED IN PART**, **VACATED IN PART**, and **REMANDED** for further proceedings.

Michael J. Little appeals from the judgment of conviction on nineteen counts arising from a scheme to conceal assets from the Internal Revenue Service. After the death of Harry Seggerman in 2001, Little and a foreign associate gathered millions of dollars held in Seggerman's undisclosed offshore accounts and placed them in a Swiss trust called Lixam Proviso. Little then helped transfer the Lixam assets under the guise of gifts or loans to Seggerman's surviving spouse and children. He was paid about half-a-million dollars for his role.

In connection with that scheme, Little was charged and found guilty on one count of corruptly impeding the administration of the IRS, 26 U.S.C. § 7212(a); one count of conspiracy to defraud the United States, 18 U.S.C. § 371; and ten counts of willfully assisting in the filing of false Forms 3520 (Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts), 26 U.S.C. § 7206(2). Little was also convicted on additional counts relating to his failure to file his own tax returns or Report of Foreign Bank and Financial Accounts ("FBAR"). He was sentenced to twenty months' imprisonment and a one-year term of supervised release. He was further ordered to pay $4,352,889.71 to the United States in restitution, an order from which he also now appeals. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

1. Constructive Amendment of the Indictment

Little first argues that discrepancies between the indictment and the jury instructions on the conspiracy count rise to the level of a constructive amendment of the indictment and thereby violate the Fifth Amendment's Grand Jury Clause. Although the indictment described the third object of the conspiracy as assisting the preparation of fraudulent Forms 1040 (income tax returns) or Forms 706 (estate tax return), the jury instructions stated that "the third object is going to be charged separately in Counts Ten through Nineteen," the counts for assisting the preparation of fraudulent Forms 3520. The district court further directed the jurors that they "should apply the instructions for Counts Ten through Nineteen when considering whether the government proved this third object of the conspiracy."

Because Little raises his claim of constructive amendment for the first time on appeal, we review it for plain error. *See United States v. Bastian*, 770 F.3d 212, 219 (2d Cir. 2014). "To prevail on a constructive amendment claim, a defendant must demonstrate that 'the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify *essential elements* of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment.'" *United States v. D'Amelio*, 683 F.3d 412, 416 (2d Cir. 2012) (citation omitted). It is neither clear nor obvious that there was a discrepancy between the indictment and the jury instructions. The jury instructions described the third object of the conspiracy as "aiding and assisting in the preparation and filing of false tax returns," *i.e.*, a violation of 26 U.S.C. § 7206(2). The same statutory provision that criminalizes aid in filing a false 1040 also criminalizes aid in filing a false 3520. The references to Counts Ten through Nineteen thus could be understood to incorporate that instruction's description of the elements of a § 7206(2) violation rather than the conduct

described in that instruction. We therefore conclude that the district court did not commit plain error in its jury instructions regarding the third object of the conspiracy.

Little also presses a claim of constructive amendment of the indictment with respect to Count Eight, which charges willful failure to file an FBAR disclosing his interest in a foreign financial account, "*to wit*, at least one foreign bank, securities, and other financial account at Barclay's Bank, located in Guernsey, Channel Islands." Little contends that the government constructively amended the indictment by offering proof of a second foreign account in the United Kingdom, an account mentioned in the jury instructions. Such a discrepancy, however, does not rise to the level of constructive amendment because "to wit" clauses do not modify essential elements of the offense. *See D'Amelio*, 683 F.3d at 422.

2. Sufficiency of the Evidence of Willfulness

Several of the tax counts on which Little was convicted require that the government prove a willful state of mind. Little contends that there was insufficient evidence that he willfully failed to file tax returns, failed to file an FBAR, or assisted in the filing of fraudulent Forms 3520. "The test for sufficiency is whether, as to a given count, a 'rational trier of fact could have found the defendant guilty beyond a reasonable doubt.'" *United States v. Persico*, 645 F.3d 85, 104 (2d Cir. 2011) (citation omitted). "In challenging the sufficiency of the evidence, the defendant faces an uphill battle, and bears a very heavy burden, because the evidence must be viewed in the light most favorable to the Government, with all reasonable inferences drawn in favor of the verdict." *United States v. Crowley*, 318 F.3d 401, 407 (2d Cir. 2003) (citations and internal quotation marks omitted).

Because "willfulness under the tax laws requires 'a voluntary, intentional violation of a known legal duty,'" we must first verify that there was a legal duty before we consider whether

sufficient evidence supports a willful violation. *United States v. Bok*, 156 F.3d 157, 165 (2d Cir. 1998) (quoting *Cheek v. United States*, 498 U.S. 192, 200–01 (1991)). First, Little was under a duty to file an annual income tax return during the charged years of 2005 to 2010. This is because he was a lawful permanent resident who had not had his resident status "revoked," "administratively or judicially determined to have been abandoned" or, after 2008, otherwise demonstrated to the Secretary that he should be "treated as a resident of a foreign country under the provisions of a tax treaty." 26 U.S.C. § 7701(b)(6); *see also* 26 U.S.C. § 7701(b)(1)(A)(i); 26 C.F.R. §§ 1.6012-1, 301.7701(b)-1(b). Second, Little was a "resident alien" or "person subject to the jurisdiction of the United States" with an obligation to file an FBAR. 31 C.F.R. § 1010.350(a), (b)(2); 31 C.F.R. § 103.24 (2007). Finally, Little had a duty not to assist in the filing of a fraudulent Form 3520; but whether the forms at issue were in fact fraudulent is a question for the jury. *See United States v. Perez*, 565 F.2d 1227, 1233–34 (2d Cir. 1977).

We conclude that substantial evidence supports the jury verdict on each of the challenged counts. In a nutshell, Little contends that he merely misunderstood the byzantine tax code. But Little is a British-trained barrister admitted to the New York Bar with a quarter-century of experience in complex international financial transactions who, for much of his life, has claimed German domicile for tax purposes. A reasonable juror could easily conclude that the failures of such a sophisticated professional to report his income to the IRS, including compensation from the Seggerman family, and to report foreign bank accounts into which his compensation was funneled, were willful acts. *See United States v. MacKenzie*, 777 F.2d 811, 818 (2d Cir. 1985) (permitting the inference of "knowledge of the law" from the "[d]efendants' backgrounds," including education). Similarly, Little's sophistication supports a conclusion that he was willfully misleading the Seggerman family's accountants when he informed them that the transfers from

Lixam Proviso were merely "gifts from a kind benefactor from overseas" and not distributions.

For these reasons, we conclude that the evidence of willfulness was sufficient to support the verdict.

3. Jury Instructions

Little did not object to the jury instructions, so we review them for plain error. *See United States v. Vilar*, 729 F.3d 62, 70 (2d Cir. 2013).

First, Little challenges the "conscious avoidance" instructions on the failure to file return counts, the failure to file FBAR count, and the conspiracy count; and second, that the district court's instructions as to willfulness erroneously converted the standard into a reasonableness standard. Conscious avoidance instructions are permissible only when the defendant mounts a defense that he lacked "some specific aspect of knowledge required for conviction" and "a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." *United States v. Coplan*, 703 F.3d 46, 89 (2d Cir. 2012) (citation and internal quotation marks omitted). Here, each predicate is met: Little defended himself by claiming ignorance of his obligations under the Tax Code and, because of Little's legal education and the relative straightforwardness of his obligations, a reasonable juror could conclude that Little was aware of a high probability that his actions were unlawful.

Second, Little challenges the willfulness instruction. He contends that the permission the district court gave the jury to "consider whether the defendant's belief was actually reasonable as a factor in deciding whether he held the belief in good faith" converted the jury charge into a reasonableness instruction. But Little misreads the instruction by ignoring the context. The preceding sentence unambiguously rejects a reasonableness standard, warning the jury that "if you

find that the defendant honestly believed that he was not required to file a return, even if that belief was unreasonable or irrational, then you should find him not guilty." In context, the instruction does not run contrary to the statutory mens rea. Rather, the instruction strictly limits considerations of the defendant's reasonableness (or lack thereof) to whether it raises the inference of willfulness, a "factor" expressly approved by the Supreme Court. *See Cheek*, 498 U.S. at 203–04 ("[T]he more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will . . . find that the [g]overnment has carried its burden of proving knowledge.")

For these reasons, we conclude that the jury instructions were proper.

4. Joinder

Little next argues that the counts of failure to file were improperly joined in the indictment. "Tax counts can properly be joined with non-tax counts where it is shown that the tax offenses arose directly from the other offenses charged. The most direct link possible between non-tax crimes and tax fraud is that funds derived from non-tax violations either are or produce the unreported income." *United States v. Turoff*, 853 F.2d 1037, 1043 (2d Cir. 1988) (cleaned up). Little's contention is that the failure-to-file counts had nothing directly to do with the broader Seggerman conspiracy.

But the indictment and record belie that contention. Little was charged with failure to file tax returns for the years in which he received payments from the Seggermans for his role in the scheme. Moreover, Little received such income, in part, through the bank account for which he failed to file an FBAR. We therefore conclude that the charges were properly joined and the district court appropriately exercised its discretion when it denied Little's motion to sever.

5. Restitution Order

Finally, the district court did err in its restitution order. For convictions of offenses defined

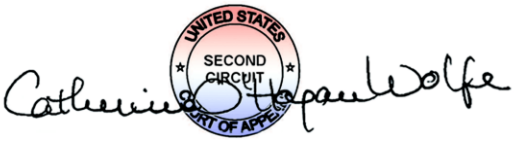
in Title 26 of the United States Code, courts lack the statutory authority to order restitution that begins immediately upon judgment. *See United States v. Adams*, 955 F.3d 238, 250 (2d Cir. 2020) (citing 18 U.S.C. §§ 3663(a), 3663A). Hence, the $134,449.71 ordered as restitution for Little's failure to file tax returns in violation of 26 U.S.C. § 7203 is *ultra vires*. While we have sometimes, in similar cases, exercised our power to modify a judgment to impose restitution as a condition of supervised release, *see Adams*, 955 F.3d at 250–51, we decline to do so here. The district court calculated Little's restitution obligation by applying the 20% rate provided for in Section 2T1.1(c)(2)(a) of the Sentencing Guidelines to Little's earnings between 2005 and 2010. Since then, however, the governments of the United States and the United Kingdom have apparently agreed that the United States may tax Little's business income only up to September 2008. Accordingly, we conclude that the proper course under these circumstances is to vacate that part of the restitution order relating to Little's failure to file tax returns and remand this case for the district court to assess in the first instance what effect, if any, this agreement might have on the amount of restitution owed to the United States. The balance of the restitution order—the $4,218,140.00 for which Little is one of the jointly and severally liable coconspirators—is affirmed.[1]

We have considered the remainder of Little's arguments and find them to be without merit. For the foregoing reasons, we **AFFIRM** the judgment of conviction, except for the order of

[1] We reject Little's argument that this restitution obligation must be apportioned among the coconspirators. The decision whether to apportion or hold the coconspirators jointly and severally liable is committed to the discretion of the trial court. *See United States v. Nucci*, 364 F.3d 419, 422 (2d Cir. 2004) (citing 18 U.S.C. § 3664(h)).

restitution, which we **AFFIRM IN PART** and **VACATE IN PART** and **REMAND** for further proceedings.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



APPENDIX B:

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DENYING DEFENDANT'S MOTION TO DISMISS, DATED MAY 3, 2017
(*United States v. Little,* 2017 WL 1743837 (S.D.N.Y. 2017))

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

12-cr-647 (PKC)

-against-

MEMORANDUM
AND ORDER

MICHAEL LITTLE,

Defendant.
----------x

CASTEL, U.S.D.J.

Defendant Michael Little moves for partial dismissal of the Second Superseding Indictment on the grounds that his prosecution for failure to file individual income tax returns and Reports of Foreign Bank and Financial Accounts ("FBARs") would deprive him of due process of law in violation of the Fifth Amendment to the United States Constitution. Little asserts that at the time of the events charged in the indictment he was a U.K. citizen and a lawful permanent resident of the U.S. He argues that the statutes and regulations requiring U.K. citizens with permanent residence status under U.S. immigration law to file U.S. income tax returns and FBARs, when read in conjunction with the U.S./U.K. Tax Treaty (the "Treaty"), are ambiguous, such that a person of ordinary intelligence lacks notice as to what constitutes compliance with the law. The Court finds that none of the relevant statutes or regulations, whether read in isolation or together, or in conjunction with the Treaty, are so ambiguous that they could properly be found unconstitutionally vague as applied to the charged conduct. Defendant's motion for partial dismissal of the indictment is thus denied.

BACKGROUND

A grand jury returned a nineteen count Second Superseding Indictment against defendant Little, filed on March 18, 2013, charging him with willful failure to file individual

income tax returns and FBARs, as well various crimes arising out of his alleged assistance of Harry G. A. Seggerman's heirs in a scheme to avoid the taxes due on their inheritance held in undeclared offshore accounts. (Dkt. No. 48.) Little first raised his due process arguments in a letter to the Court dated February 9, 2017. (Dkt. No. 230.) The Court directed the government to respond. (Dkt. No. 231.) The government responded on March 2, 2016, (Dkt. No. 234), Little replied on March 21, 2017, (Dkt. No. 239), and supplemented this submission on April 10, 2017, (Dkt. No. 244.)

DISCUSSION

Defendant Little moves to dismiss Counts One through Eight of the Second Superseding Indictment on the grounds that the statutes and regulations requiring him to file individual income tax returns and FBARs, as well as those attaching criminal liability to such failure, are unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment.

I. Void for Vagueness Standard.

"As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." United States v. Rybicki, 354 F.3d 124, 129 (2d Cir. 2003) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)). Because the First Amendment is not implicated, the Court assesses Little's challenge as applied, i.e., "in light of the specific facts of the case at hand and not with regard to the statute's facial validity." Id. (quoting United States v. Nadi, 996 F.2d 548, 550 (2d Cir. 1993)). Courts examine as-applied vagueness claims in two steps: "a court must first determine whether the statute gives the person of ordinary intelligence a reasonable

opportunity to know what is prohibited and then consider whether the law provides explicit standards for those who apply it." Rubin v. Garvin, 544 F.3d 461, 468 (2d Cir. 2008) (quoting Farrell v. Burke, 449 F.3d 470, 486 (2d Cir. 2006)). The "novelty" of a prosecution does not bolster a vagueness challenge, for the lack of a prior "litigated fact pattern" that is "precisely" on point is "immaterial." United States v. Kinzler, 55 F.3d 70, 74 (2d Cir. 1995).

"A scienter requirement may mitigate a law's vagueness, especially where the defendant alleges inadequate notice." Rubin, 544 F.3d at 467 (citing Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982)). Where "the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law." United States v. Tannenbaum, 934 F.2d 8, 12 (2d Cir. 1991) (quoting Screws v. United States, 325 U.S. 91, 102 (1945) (plurality opinion)) (Bank Secrecy Act provision requiring reporting by financial institutions not void for vagueness when applied to an individual because the Act defined financial institutions to include "[a] person who engages as a business in dealing in or exchanging currency" and defendant knew he was "committing a wrongful act.")

The Court must conduct separate inquiries into the underlying statutes and regulations and then into the statutes imposing criminal penalties for certain types of violations of these statutes and regulations. First, the Court finds that the U.S. statutes and regulations that require alien lawful permanent residents (green card holders) to either (a) file a tax return and pay taxes on worldwide income, or (b) file a tax return reporting worldwide income and indicate that he or she is taking a particular protection under the Treaty, are not unconstitutionally vague as applied. Second, the Court finds that the statutes providing for criminal sanctions against

individuals who violate these obligations are not vague as applied to alien lawful permanent residents.

II. U.S. Tax and Reporting Obligations for Alien Lawful Permanent Residents.

An alien individual who is a lawful permanent resident of the United States is treated as a resident of the United States for tax payment and reporting purposes. 26 U.S.C. § 7701(b)(1)(A). This treatment applies regardless of whether the individual is physically present in the U.S. or not. An individual is a lawful permanent resident of the U.S. if the individual has been lawfully accorded the privilege of residing permanently in the U.S. as an immigrant in accordance with the immigration laws, as long as this status has not been revoked or administratively or judicially determined to have been abandoned. 26 U.S.C. § 7701(b)(6). In 2008 Congress amended 26 U.S.C. § 7701(b)(6) to add the following language:

> An individual shall cease to be treated as a lawful permanent resident of the United States if such individual commences to be treated as a resident of a foreign country under the provisions of a tax treaty between the United States and the foreign country, does not waive the benefits of such treaty applicable to residents of the foreign country, and notifies the Secretary of the commencement of such treatment.

26 U.S.C. § 7701(b)(6)(B).

Under 26 U.S.C. § 6012 and 26 C.F.R. § 1.6012-1, a U.S. resident is required to file an income tax return each year on a Form 1040.

An individual who is a U.S. resident as well as a resident of a foreign country is a dual resident. If the U.S. is party to a tax treaty with the foreign country of which the dual resident is also a resident, then that treaty will determine the residency status of that resident.

The U.S. is party to a tax treaty with the U.K.: the Convention between the Government of the United States of America and the Government of the United Kingdom of

Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains, effective July 24, 2001. The residence provisions of the Treaty, or "tie breaker rules," dictate that, for the purposes of the taxation of worldwide income, when an individual is a dual resident of the U.S. and U.K.:

> a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);
> b) if the State in which he has his centre of vital interests cannot be determined, or if he does not have a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;
> c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;
> d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall endeavour to settle the question by mutual agreement.

Treaty, art. IV, § 4. Explicitly excluded from this treatment are taxes due to either State by "any person who is liable to tax in that State in respect only of income from sources in that State or of profits attributable to a permanent establishment in that State." Id. at art. IV, § 1.

A dual resident of the U.S. and the U.K. may claim benefits under the Treaty and be treated as a nonresident alien for the purposes of computing his U.S. federal income tax liability. To receive such treatment, the individual must file a Form 1040NR:

> An alien individual . . . who determines his or her U.S. tax liability as if he or she were a nonresident alien shall make a return on Form 1040NR on or before the date prescribed by law (including extensions) for making an income tax return as a nonresident. The individual shall prepare a return and compute his or her tax liability as a nonresident alien. The individual shall attach a statement (in the form required in paragraph (c) of this section) to the Form 1040NR. The Form 1040NR and the attached statement,

> shall be filed with the Internal Revenue Service Center, Philadelphia, PA 19255.

26 C.F.R. § 301.7701(b)-7(b). The individual must also file as an attachment to his or her Form 1040NR a completed Form 8833 (Treaty-Based Return Position Disclosure). 26 C.F.R. § 301.7701(b)-7(c).

The filing of this Treaty-Based Return Position Disclosure is also mandated as part of a separate and independent reporting obligation pursuant to 26 U.S.C. § 6114:

> (a) Each taxpayer who, with respect to any tax imposed by this title, takes the position that a treaty of the United States overrules (or otherwise modifies) an internal revenue law of the United States shall disclose (in such manner as the Secretary may prescribe) such position—
>
> (1) on the return of tax for such tax (or any statement attached to such return), or
>
> (2) if no return of tax is required to be filed, in such form as the Secretary may prescribe.

Thus, the filing of Form 8833 satisfies the reporting requirements of both 26 C.F.R. § 301.7701(b)-7(b) and 26 U.S.C. § 6114 with respect to disclosing that the filing individual is taking a Treaty position. See 26 C.F.R. § 301.7701(b)-7(d).

For further clarification regarding filing requirements, 26 C.F.R. § 301.7701(b)-7(e) sets forth examples to illustrate the application of these rules and the tax and reporting obligations of individuals who do or do not take a Treaty position.

III. The Tax and Reporting Obligations Applicable to Alien Permanent Residents are not Void as Applied.

A. Failure to File Tax Returns.

Little argues that the 2008 amendment to 26 U.S.C. § 7701(b)(6), when read in conjunction with the Treaty, created an ambiguity regarding a permanent resident's tax and reporting obligations. (Def.'s Reply in Supp. of Mot. to Dismiss, March 21, 2017, Dkt. No. 239

("D.'s Reply") at 2.) He argues that this amendment brought the law into compliance with the Treaty, which states:

> An individual who is a United States citizen or an alien admitted to the United States for permanent residence (a 'green card' holder) is a resident of the United States only if the individual has a substantial presence, permanent home or habitual abode in the United States and if that individual is not a resident of a State other than the United Kingdom for the purposes of a double taxation convention between that State and the United Kingdom.

Treaty, art. 4 § 2. Little argues that because he was only temporarily in the U.S. between 2005-2008, this language from the Treaty would lead a person of ordinary intelligence to believe that he was not a resident of the U.S. for tax purposes. (D.'s Reply at 2.) Little also argues that the Court should not interpret any subsequently passed legislation or regulation as having modified the Treaty, citing TWA v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) ("A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."). (D.'s Reply at 3.)

Little cites several more provisions of the Treaty that he claims are inconsistent with the above described tax and reporting obligations imposed by U.S. statutes and regulations, arguing that an alien lawful permanent resident of ordinary intelligence would be unclear as to what was needed to comply with the law. He cites, among other portions of the Treaty, Article 25, which states:

> Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith that is more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, particularly with respect to taxation on worldwide income, are or may be subjected.

Treaty, art. 25, § 1.

Little appears to interpret this language to mean that a U.K. national cannot be subject to any requirement in the U.S. that is more burdensome than that which that person would be subject to in the U.K. (D.'s Reply at 4.) Little's interpretation is erroneous. A plain reading of the forgoing language is that a U.K. national cannot be subject to requirements in the U.S. that are more burdensome than those that U.S. nationals are subject to within the U.S. Thus, Little's contention that failure to file tax returns in the U.K. is not a criminal offence is irrelevant.

Little goes on to argue that even under U.S. law the penalty for failing to disclose a Treaty position is a financial penalty, not the denial of Treaty benefits, citing 26 U.S.C. § 6712 (imposing a $1,000 penalty for failure to comply with 26 U.S.C. § 6114). (Id. at 3.) He further argues that failure to disclose that one is taking a Treaty position does not prohibit one from doing so, citing Pekar v. Commissioner, 113 T.C. 158, 161 n.5 (1999) ("A taxpayer who fails in a material way to disclose one or more positions taken for a taxable year is subject to a separate penalty for each failure to disclose a position. However, there is no indication that this failure estops a taxpayer from taking such a position.") (internal citations omitted).

Little also cites language in Articles 3, 5, 7, and 26 of the Treaty, which he argues exempt the income he made working in the U.S. from taxation by the U.S. (D.'s Reply at 4.)

Little's arguments lack merit. Based on the above cited statutes and regulations, an alien lawful permanent resident of ordinary intelligence would know that he or she needed to either (a) file a tax return and pay taxes on worldwide income, or (b) file a tax return reporting worldwide income and indicate that he or she is taking a particular protection under the Treaty. An individual's obligation to pay taxes on either his income earned while in the U.S., or his

worldwide income, is irrelevant to his or her obligation to disclose such income and report it pursuant to the above discussed statutes and regulations.

The U.S. statutes and regulations giving rise to these obligations are thus not void as applied to the conduct with which Little is charged in the Second Superseding Indictment. Dicta in a decades-old Tax Court case does not render the obligations imposed on Little by these statutes and regulations unconstitutionally vague.

Little's argument that the failure to take a Treaty position can result only in a financial penalty also lacks merit. 26 U.S.C. § 6712(c) expressly states that "[t]he penalty imposed by this section shall be in addition to any other penalty imposed by law."

Little also contends that he was informed by Her Majesty's Revenue and Customs that he was a U.K. tax resident pursuant to the Treaty and thus not required to file U.S. tax returns. (Def.'s February 9, 2017 Letter, Dkt. No. 230 at 2.)

Advice of counsel is an affirmative defense that must be based in fact and raised at trial by the defendant, who must prove that he "(1) 'honestly and in good faith' sought the advice of counsel; (2) 'fully and honestly la[id] all the facts before his counsel'; and (3) 'in good faith and honestly follow[ed]' counsel's advice, believing it to be correct and intending that his acts be lawful. United States v. Colasuonno, 697 F.3d 164, 181 (2d Cir. 2012) (quoting Williamson v. United States, 207 U.S. 425, 453 (1908)) (alternations in original). It remains to be determined whether information from a U.K. tax official can qualify as advice of counsel.

Under the present circumstances, no advice that Little may have received from U.K. tax authorities affects the void for vagueness analysis of his duty to file U.S. tax returns.

B. Failure to File FBARs.

Both Little and the Government agree that the Treaty does not affect any individual's obligation to file FBARs and that the 2007 and 2008 FBAR forms provided that FBARs were to be filed by "citizen[s] or resident[s] of the United States, or a person in and doing business in the United States." (Gov.'s Opp. to Mot. to Dismiss, March 2, 2017, Dkt. No. 234 ("Gov.'s Opp.") at 11; D.'s Reply at 4.) However, Little contends that IRS announcements 2009-51 and 2010-51 suspended the requirement for a person "in and doing business in the United States" to file and FBAR. (D.'s Reply at 4.) Internal Revenue Bulletin: 2009-51, "Temporary Suspension of FBAR filing Requirements for Persons who are not Citizens, Residents, or Domestic Entities," June 22, 2009, stated:

> [A]ll persons may rely on the definition of 'United States person' found in the instructions for the prior version of the FBAR (the July 2000 version) to determine whether they have an obligation to file an FBAR. The definition of 'United States person' from the prior version is as follows: . . . The term 'United States person' means (1) a citizen or resident of the United States, (2) a domestic partnership, (3) a domestic corporation, or (4) a domestic estate or trust.

Prior to February 24, 2011, the FBAR regulations did not define the term "U.S. resident." Internal Revenue Manual 4.26.16.3.1.2(1). "For FBARs required to be filed June 30, 2011 or later, 31 C.F.R. § 1010.350(b) defines 'United States resident' using the definition of resident alien in IRC 7701(b)," which includes green card holders such as Little. Internal Revenue Manual 4.26.16.3.1.2(2)(1).

For FBARs due before the June 22, 2009 announcement, there does not appear to be any ambiguity regarding the duty to file for persons 'in and doing business in the United States.' Even before the term 'United States resident' was defined by FBAR regulations, it appears likely that an alien lawful permanent resident of ordinary intelligence not 'in or doing

business in' the U.S. would have understood themselves to be under an obligation to file an FBAR based on the definition of 'United States resident' in other parts of the U.S. code and regulations. To the extent that there was any ambiguity regarding this duty, that ambiguity is remedied for the purposes of this void for vagueness analysis by the fact that criminal penalties only apply to a failure to file an FBAR if such failure to file was willful, as will be discussed below.

IV. The Relevant Criminal Statutes as Applied are not Void for Vagueness.

Little argues that Counts One through Eight of the Second Superseding Indictment must be dismissed pursuant to the void for vagueness doctrine of the Due Process Clause of the Fifth Amendment. Count One of the Second Superseding Indictment charges Little with Obstructing and Impeding the Due Administration of Internal Revenue Laws in violation of 26 U.S.C. § 7212(a); Counts Two through Seven charge Little with Failure to File Individual Income Tax Returns for Tax Years 2005-2010 in violation of 26 U.S.C. § 7203; Count Eight charges Little with Willful Failure to File Reports of Foreign Bank and Financial Accounts in violation of 31 U.S.C. § 5322(a). Because a person of ordinary intelligence would understand that these statutes impose criminal penalties on persons engaging in the conduct in which Little is alleged to have engaged, these statutes are not void for vagueness as applied to Little.

26 U.S.C. § 7212(a) makes it unlawful to "corruptly . . . obstruct[] or impede[], or endeavor[] to obstruct or impede, the due administration of" the Internal Revenue Code. 26 U.S.C. § 7212(a). "To act or endeavor 'corruptly,' within the meaning of this section, means to act or endeavor 'with the intent to secure an unlawful advantage or benefit either for one's self or for another.'" United States v. Parse, 789 F.3d 83, 121 (2d Cir. 2015) (quoting United States v. Kelly, 147 F.3d 172, 177 (2d. Cir. 1998)).

Count One, paragraph nine of the Second Superseding Indictment alleges that Little took six separate actions, in addition to failing to file FBARs and tax returns, that violated Section 7212(a) in connection with the alleged scheme to avoid the taxes due on the Seggerman heirs' inheritance, and the government represents it intends to rely on those actions rather than on the failure to file tax returns or FBARs. (Gov.'s Opp. at 14-15.) A person of ordinary intelligence would understand that conduct of the type alleged in paragraph nine would expose an individual to criminal penalties for obstruction under the meaning of section 7212(a). Thus, there is no void for vagueness issue with respect to Little's prosecution for obstruction of the internal revenue laws.

26 U.S.C. § 7203 makes it unlawful for "[a]ny person required under [Title 26] to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, [to] willfully fail[] to pay such estimated tax or tax, make such return, keep such records, or supply such information . . . ." In Section 7203 and other statues prohibiting tax evasion, "the word 'willfully' . . . generally connotes a voluntary, intentional violation of a known legal duty." United States v. Bishop, 412 U.S. 346, 360 (1973). The Supreme Court has "formulated the requirement of willfulness as bad faith or evil intent, or evil motive and want of justification in view of all the financial circumstances of the taxpayer, or knowledge that the taxpayer should have reported more income than he did." Id. (internal citations and quotation marks omitted).

31 U.S.C. 5322(a) makes it unlawful to "willfully violat[e]" 31 U.S.C. §§ 5311 et seq., "or a regulation prescribed or order issued" thereunder, including 31 C.F.R. § 1010.350, which requires certain individuals to file FBARs. Thus, to be convicted under Section 5322(a) for violating the requirement to file an FBAR, a defendant must know of his duty to file but

intentionally fail to do so anyway. See United States v. Sturman, 951 F.2d 1466, 1476 (6th Cir. 1991) (defining "willfulness" in prosecution for failure to file records and reports of foreign financial agency transactions as the "voluntary, intentional violation of a known legal duty"); United States v. Eisenstein, 731 F.2d 1540, 1543 (11th Cir. 1984) ("[A]s it is used in the currency reporting statute, the term *willful* require[s] proof of the defendant's knowledge of the reporting requirement and his specific intent to commit the crime.") (internal quotation marks omitted) (alterations and emphasis in original); United States v. Granda, 565 F.2d 922, 925-26 (5th Cir. 1978) ("[T]he terms knowing and willful require proof of the defendant's knowledge of the reporting requirement and his specific intent to commit the crime. Congress, by adding these terms, took this regulatory statute out of the ranks of strict liability type crimes."); United States v. San Juan, 545 F.2d 314, 318 (2d Cir. 1976) ("Without proof of any knowledge of, or notice to, Mrs. San Juan of the reporting requirements, a jury could not determine beyond a reasonable doubt that she had the requisite willful intent.").

Thus, conviction pursuant to each of these statutes requires the government to prove beyond a reasonable doubt that Little acted willfully with respect to the failure to file tax returns and FBARs, and corruptly with respect to the obstruction of the internal revenue laws. As described above, the presence of this scienter requirement undercuts any due process void for vagueness challenge. Because a conviction may only be obtained only if the government proves, beyond a reasonable doubt, that the defendant knew he was legally required to file tax returns or file an FBAR, and so knowing, intentionally did not do so with the knowledge that he was violating the law, he cannot complain that he could be convicted for actions that he did not realize were unlawful. See, e.g., 3 L. Sand, et al., Modern Federal Jury Instructions, Criminal Inst. 50B-11 at 50B-16 (2013) ("A willful violation of this reporting requirement can only occur

if the government proves beyond a reasonable doubt that the defendant knew of the reporting requirement and that the defendant acted with the specific intent to violate that requirement.")

CONCLUSION

Neither the legal obligation for alien lawful permanent residents of the U.S. to file tax returns or FBARs, nor the statutes criminalizing such failure, nor the statute prohibiting the obstruction of the internal revenue laws, are vague as applied to Little's alleged conduct. A person of ordinary intelligence would know if his or her actions conformed to law. Defendant's motion to dismiss Counts One through Eight of the Second Superseding Indictment is DENIED. The Clerk of the Court is directed to terminate the motion (Dkt. No. 239.)

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
May 3, 2017

APPENDIX C:

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DENYING DEFENDANT'S MOTION TO RECONSIDER, DATED JUNE 23, 2017
(*United States v. Little,* 12-cr-0647 (PKC)(S.D.N.Y. June 23, 2017))

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA,

12-cr-647 (PKC)

-against-

MEMORANDUM
AND ORDER

MICHAEL LITTLE,

Defendant.
----------x
CASTEL, U.S.D.J.

Defendant Michael Little has moved for reconsideration of this Court's May 3, 2017 Memorandum and Order (the "Order") denying defendant's motion to partially dismiss the Second Superseding Indictment on the grounds that his prosecution would deprive him of due process of law in violation of the Fifth Amendment to the United States Constitution. Little primarily takes issue with three lines in the Court's Order, in which the Court interpreted language in art. IV, § 1 of the U.S./U.K. Tax treaty to exclude from the residence provisions, or "tie breaker rules" of the treaty any taxes due to either State by "any person who is liable to tax in that State in respect only of income from sources in that State or of profits attributable to a permanent establishment in that State." (Def.'s Mot. for Recon., May 17, 2017, Dkt. 256 at 2.)

The Court need not revisit this interpretation, as it is immaterial to the inquiry into whether Little's prosecution deprives him of due process. As discussed in the Order, regardless of any duty to pay U.S. income taxes, nothing in the treaty negates Little's legal obligation to file U.S. income tax returns and Reports of Foreign Bank and Financial Accounts. An alien lawful permanent resident of ordinary intelligence would understand his filing obligations and thus the statutes and regulations criminalizing the failure to file do not contravene the Due Process Clause

of the Fifth Amendment. Further, the scienter requirements of each of the challenged criminal statutes negate any possible due process challenge.

The Court has considered Little's remaining arguments and found them to be without merit.

Defendant's motion for reconsideration (Dkt. 256) is DENIED.

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
June 23, 2017

APPENDIX D:

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DENYING DEFENDANT'S POSTTRIAL MOTIONS, DATED NOVEMBER 1, 2018
(*United States v. Little,* 2018 WL 5668874 (S.D.N.Y. 2018))

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA,

S2 12-cr-647 (PKC)

-against-

OPINION AND ORDER

MICHAEL LITTLE,

Defendant.
----------x

CASTEL, U.S.D.J.

Defendant Michael Little was charged with nineteen counts of tax crimes in a Superseding Indictment S2 12 Cr. 647 (PKC) (the "Indictment"). These charges related to Little's role in assisting the heirs to Harry Seggerman's multimillion-dollar estate evade paying taxes on their inheritances from 2001 to 2010 and Little's failure to file documents reporting his own income from 2005 to 2010.

For his alleged involvement in assisting the Seggerman family evade taxes, Count One charged the defendant with obstructing and impeding the due administration of the internal revenue laws in violation of 26 U.S.C. § 7212(a), Count Nine charged him with conspiracy to defraud the United States in violation of 18 U.S.C. § 371, and Counts Ten through Nineteen charged him with aiding and assisting the preparation of false IRS Forms 3520 in violation of 26 U.S.C. § 7206(2) and 18 U.S.C. § 2. Counts Two through Seven charged him with failing to file individual income tax returns from 2005 to 2010 in violation of 26 U.S.C. § 7203. Finally, Count Eight charged the defendant with failing to file reports of foreign bank and financial accounts ("FBARs") in violation of 31 U.S.C. §§ 5314, 5322(a); 18 U.S.C. § 2; and 31 C.F.R. §§ 103.24, 103.27(c)&(d), 103.59(b).

Following an approximate three-week jury trial, defendant was convicted on all nineteen counts of the Indictment. Defendant now moves for a judgment of acquittal on all counts under Rule 29, Fed. R. Crim. P., or, in the alternative, for a new trial under Rule 33, Fed R. Crim. P. For the following reasons, the motions are denied.

I. Defendant's Rule 29 Motion for Judgment of Acquittal

Defendant asserts that, based on the evidence presented at trial, no reasonable jury could have found him guilty on any Count charged. Accordingly, he requests a judgment of acquittal on all nineteen counts. Upon review and consideration of all the evidence, this Court holds that the government's proof was sufficient to sustain a conviction on all counts.

A. Legal Standard

Rule 29(a), Fed. R. Crim. P., provides that "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." A defendant who wishes to challenge the sufficiency of the evidence supporting his conviction under Rule 29 "bears a heavy burden." United States v. Abdulle, 564 F.3d 119, 125 (2d Cir. 2009) (citation omitted). In reviewing such a motion, the court must view the evidence "in its totality and in the light most favorable to the government." Id. at 125 (citation omitted). Moreover, the court must "defer[] to the jury's evaluation of the credibility of the witnesses, its choices between permissible inferences, and its assessment of the weight of the evidence." United States v. Jones, 482 F.3d 60, 68 (2d Cir. 2006); see also United States v. Florez, 447 F.3d 145, 156 (2d Cir. 2006) ("We will not attempt to second-guess a jury's credibility determination on a sufficiency challenge."). The court must deny the motion if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Aguilar, 585 F.3d 652, 656 (2d Cir. 2009) (quoting Jackson v. Virginia,

443 U.S. 307, 319 (1979)). Furthermore, the government is not required to "negate every theory of innocence." United States v. Autuori, 212 F.3d 105, 114 (2d Cir. 2000). Where the court "concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, [the court] must let the jury decide the matter." Id. (alteration in original).

B. Discussion

i. Count One, Count Nine, and Counts Ten Through Nineteen

1. The Government's Evidence

The evidence put forth by the government with respect to Counts One, Nine, and Ten through Nineteen is summarized as follows. Harry Seggerman died in May of 2001, leaving behind a multimillion-dollar inheritance—much of it in offshore accounts—to his wife, Anne Seggerman, and his five children. Of these children, Yvonne, Henry, Suzanne, and John Seggerman testified at trial. Anne was an executor for Harry's estate, but did not report the undeclared offshore assets to the IRS as required by Unites States law. (Tr. 187-90). The Seggerman children testified that Little and Dr. Walter Müllhaupt, a Swiss attorney, assisted the family in funneling these assets into the United States in a manner that avoided IRS detection. (Tr. 172, 221-23, 491, 535, 761-62, 1634-35, 1666-67).

This assistance began in 2001. Yvonne testified that on August 8, 2001, she, Henry, Suzanne, and Anne met with Little and Müllhaupt at the Four Seasons hotel in Manhattan to discuss the offshore assets (the "Four Seasons meeting"). (Tr. at 194-95). Yvonne also testified regarding a handout used at the meeting that discussed the two funds that were part of the Seggermans' inheritance, what the Court will refer to as the "Cetura Funds" and "Gulworthy Holdings." (Tr. 202, GX-102). Anne and the children divided the Cetura Funds, while Anne alone inherited Gulworthy Holdings. (Tr. 204, GX-105, DX-103). According to Yvonne,

Müllhaupt explained at the meeting that Anne's portion of both funds would be moved to a trust in Switzerland, that Anne would be named beneficiary, and that Müllhaupt and Little would act as trustees. (Tr. at 208-10).

Bank records and Little's own testimony show that a trust, Lixam Provisio ("Lixam"), was thereafter established in Switzerland, naming Anne as the beneficiary, and Little and Müllhaupt as trustees. (Tr. 1866, GX-1506T). The records showed that the balance in the trust was $6.6 million as of October 16, 2001. (GX-1506T at 144). Two Seggerman children testified that Anne's share of the inheritance was about $6.5 million. (Tr. at 204, 224, 1636). The bank records also showed that funds from Lixam flowed into Steiner Productions ("Steiner"), a corporate entity in the United States, controlled by Anne. (GXs-1500, 1502A-B, 1503A-C, 1504, 1505, 1506).

Yvonne also testified that in January 2002, Little asked her to become a one-percent owner in Steiner because he needed someone to file tax returns on Steiner's behalf, who was unlikely to "draw any attention to themselves because they're gainfully employed and least likely to draw IRS scrutiny." (GX-111, Tr. 249-50; Tr. 252). This testimony was corroborated by contemporaneous notes that she took during that conversation. (GX-111). In recruiting Yvonne, defendant explained to her that money coming into Steiner from Lixam would be documented as loans and assured her that his accountant Bob Gordon would make the tax returns look legitimate. (GX-111, Tr. at 286-87). From 2001 to 2010, over $3 million flowed from Lixam to Steiner in this manner. (Tr. 1397-98, 2036). Little charged fees in excess of half-a-million dollars for his services managing Lixam. (See GX-112; GX-402).

In July 2010, the IRS began investigating Anne's foreign bank and financial accounts. (GX-554, Tr. 1040-41). Thereafter, Little began working with attorneys Doug Stein

and Joseph Bainton to provide legal assistance to Anne. Stein's testimony revealed that Little contacted Bainton to help him represent Anne with respect to the IRS investigation. (Tr. 1036-37). Shortly thereafter, Bainton contacted Stein. (Id.)

James Cosgrove, an accountant at the Dworken Hillman accounting firm ("Dworken") testified that Little contacted his firm in August 2010 seeking assistance in preparing Forms 3520 on behalf of Anne. (Tr. at 1282-88, 1362-66, GXs-1200, 1204). These forms are used to report transactions with foreign trusts and receipts of foreign gifts to the IRS. Together, Stein and Cosgrove testified about the representations that Little and Bainton made regarding Anne's unreported funds during this period. The government presented numerous letters, emails, and notes from phone calls to corroborate their testimony. (e.g. GX-535). Specifically, they testified that Little and Bainton told them and their associates on numerous occasions that the funds flowing from Lixam to Anne were "pure gift[s]" from Müllhaupt. (Tr. 1108, 1401, 1036-1038, 1044-45, 1056-57, 1062-63, 1067-73, 1362-65, 1369, 1391-94; GXs-325, 1230). Bainton also informed them that the funds were not previously reported because of the incompetence of Anne's accountant, Bob Gordon. (Tr. 1053). Based on the representations, Cosgrove and his associates prepared Forms 3520 on behalf of Anne for the years 2001 through 2010, stating that the funds transferred from Steiner to Anne were gifts. (Tr. at 1400-01). These forms were thereafter filed with the IRS. (Tr. at 125-34; GXs-1608-1627).

2. Count One: Obstruction

Count One charged the defendant with a violation of 26 U.S.C. § 7212(a). Section 7212(a) makes it unlawful to "corruptly . . . obstruct[] or impede[] the due administration" of the Internal Revenue Code. 26 U.S.C. § 7212(a). On this Count, the defendant argues in general terms that the government failed to present "any evidence [he] acted

corruptly to secure an unlawful advantage for [him]self, and failed to prove [he] knowingly and deliberately engaged in an affirmative act to obstruct a foreseeable tax-related proceeding."

A defendant violates § 7212(a) if he (1) endeavors to obstruct or impede the due administration of a pending or reasonably foreseeable tax-related proceeding and (2) acts corruptly in doing so. See Marinello v. United States, 138 S. Ct. 1101, 1109–10 (2018); United States v. Parse, 789 F.3d 83, 121 (2d Cir. 2015). To "endeavor" to obstruct or impede the due administration of a proceeding is to knowingly and deliberately act or make an effort that has a reasonable tendency to obstruct or impede a proceeding. See United States v. Kelly, 147 F.3d 172, 176–77 (2d Cir. 1998). Examples of qualifying proceedings include investigations, audits, or "other targeted administrative action." Marinello, 138 S. Ct. at 1109. To act "corruptly" is to act with the "intent to secure an unlawful advantage or benefit either for one's self or for another." Parse, 789 F.3d at 121 (quoting Kelly, 147 F.3d at 177).

The government presented sufficient evidence of each element of this offense. First, the evidence was sufficient to establish that Little "endeavored" to obstruct or impede a pending tax-related proceeding, namely the IRS investigation into Anne Seggerman. See Marinello, 138 S. Ct. at 1109 (listing an "investigation" as a qualifying "proceeding" under § 7212(a)). It was reasonable to infer that Little, as a trustee of Lixam, knew that the payments from Lixam to Anne constituted trust payments, not gifts. Nonetheless, corroborated testimony from Stein and Cosgrove showed that, after Little learned of the IRS investigation, he repeatedly informed Stein and the accountants at Dworken that the unreported funds Anne received from Steiner were "gifts" from Müllhaupt. Based on this evidence, the jury was free to infer that, by seeking to secure false Forms 3520, the defendant "knowingly and deliberately" attempted to impede the pending IRS investigation. Additionally, the jury was free to infer that Little acted

"corruptly" in securing these Forms 3520. Specifically, the jury could reasonably conclude that Little's motive for misrepresenting Anne's funds as "gifts" was to evade criminal penalty for his and Anne's unlawful tax activities. Such evasion surely constitutes an "unlawful advantage or benefit" for both himself and Anne.

3. Count Nine: Conspiracy

Count Nine charged the defendant with conspiracy to defraud the United States in violation of 18 U.S.C. 371. Specifically, it alleged that the defendant conspired to defraud the IRS by impeding its ability to ascertain and collect income and estate taxes.[1] Defendant Little argues that a judgment of acquittal is warranted on Count Nine because the government "improperly conflated distinct and separate funds detailed in the Cetura Agreement and Gullworthy [sic] Agreement."

"To sustain a conspiracy conviction, the Government must present some evidence from which it can reasonably be inferred that the person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it." United States v. Coplan, 703 F.3d 46, 62 (2d Cir. 2012) (quoting United States v. Rodriguez, 392 F.3d 539, 545 (2d Cir. 2004)). As discussed, in deciding a Rule 29 motion, courts must avoid usurping the jury's role as the ultimate judge of the evidence. This deference is "especially important" in the conspiracy context "because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the

[1] The Indictment also alleged two other possible objects of the conspiracy: subscribing to tax returns that were materially false, and aiding and assisting in the preparation of materially false tax returns. This Court will only address the alleged conspiracy to defraud the IRS because defendant's Rule 29 motion raises an issue that relates only to that object, and this Court holds that the evidence was sufficient with respect to that object. See United States v. Coplan, 703 F.3d 46, 62–63 (2d Cir. 2012) (quoting Griffin v. United States, 502 U.S. 46, 56–57 (1991)) ("[When] a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged.").

precision of a surgeon's scalpel." United States v. Anderson, 747 F.3d 51, 72–73 (2d Cir. 2014) (quoting United States v. Pitre, 960 F.2d 1112, 1121 (2d Cir. 1992)). A "defendant's mere presence at the scene of a crime, his general knowledge of criminal activity, or his simple association with others engaged in a crime" do not alone establish conspiracy liability. Id. at 61. However, a defendant's "presence may establish his membership in the conspiracy if all of the circumstances considered together show that by his presence he meant to advance the goals of that conspiracy." United States v. Abelis, 146 F.3d 73, 80 (2d Cir. 1998). If a conspiracy is shown to exist, "it does not take overwhelming proof to link additional defendants to it." United States v. Desimone, 119 F.3d 217, 223 (2d Cir. 1997).

The government's evidence at trial was sufficient to sustain a finding that Little conspired to defraud the IRS by impeding its ability to ascertain and collect income and estate taxes. Specifically, based on Yvonne Seggerman's testimony, the jury could reasonably infer that Little knew of a plan to funnel Anne Seggerman's inherited offshore assets into the United States without properly reporting it to the IRS or paying taxes on it. That testimony established that Little was present at the Four Seasons meeting, during which Müllhaupt described a plan to establish a Swiss trust for Anne's benefit and appoint himself and Little as trustees. The government's evidence also showed that the Lixam trust was eventually established in Switzerland and that Little agreed to be a trustee, which supports the inference that Little knowingly participated in the plan discussed at the meeting. Yvonne's corroborated testimony regarding a conversation she had with Little about the significance of Steiner Productions is further evidence that Little knowingly participated. She testified that Little asked her to become a one-percent owner in Steiner because she was "least likely to draw IRS scrutiny" and assured

her that his accountant would make the Steiner's tax returns look "legitimate" by documenting the money flowing from Lixam into Steiner as "loans."

Defendant's argument that the government "improperly conflated" the Cetura Funds and Gulworthy Holdings is without merit. Defendant essentially argues that the jury should have accepted his version of the events rather than the government's. His argument at trial and in his Rule 29 motion was that the funds in Gulworthy Holdings were a pre-death gift from Harry to Anne, and as such, they were not taxable as part of Harry's estate. Though the Cetura Funds were taxable, he argues that he played no role in hiding those funds from the IRS. The jury was free to reject this version of events because there was sufficient evidence to find that the funds in Gulworthy Holdings were part of Harry's estate. This evidence included testimony from Yvonne and Henry Seggerman as well as notations on the Gulworthy agreement itself and the account opening records for the Lixam trust.[2] (Tr. at 228, 735, DX-103 at 2, GX-1506T at 92).

4. Counts Ten Through Nineteen: False Filing of Forms 3520

Counts Ten through Nineteen charged the defendant with aiding and assisting in the preparation of false IRS Forms 3520 in violation of 26 U.S.C. § 7206(2) and 18 U.S.C. § 2. Under Section 7206(2), it is unlawful to "[w]illfully aid[] or assist[] in, or procure[], counsel[] or advise[] the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return . . . , which is fraudulent or is false as to any material matter[.]" A defendant violates this provision when (1) the defendant aids, assists, procures, counsels, advises, or causes the preparation and presentation of a tax return, (2) the return is

[2] The Gulworthy agreement, signed by Little, stated that Harry Seggerman "one day prior to his death, conveyed to Michael J. Little his last will and intention that Gulworthy and its assets should be exclusively for the benefit of Anne during her lifetime." (DX-103 at 2). The Lixam account documents noted that the source of the funds in Lixam was "Inheritance to wife (housewife)." (GX-1506T at 92).

fraudulent or false as to a material matter, and (3) the act of the defendant is willful. United States v. Klausner, 80 F.3d 55, 59 (2d Cir. 1996) (citing United States v. Perez, 565 F.2d 1227, 1233–34 (2d Cir. 1977)).

Defendant argues that no reasonable jury could have found him guilty of Counts Ten through Nineteen because the government "failed to prove that [he] did not honestly and in good faith seek the advice of competent lawyers" in preparing Forms 3520, which ultimately reported the funds received by Anne Seggerman from Lixam as foreign "gifts." Essentially, he argues that the evidence was insufficient with respect to the third element—willfullness—because the government failed to disprove his advice of counsel defense. This claim is meritless. An advice of counsel defense is an affirmative defense. As such, the burden is on the defendant to prove the elements of the defense, not on the government to disprove the defense. A successful advice of counsel defense requires the defendant to prove that he (1) honestly and in good faith sought the advice of counsel, (2) fully and honestly laid all the facts before his counsel, and (3) honestly and in good faith followed his counsel's advice, believing it to be correct and intending that his acts be lawful. United States v. Colasuonno, 697 F.3d 164, 181 (2d Cir. 2012).

The government's evidence was sufficient to support the jury's rejection of this defense. As discussed, the government presented evidence to show that the funds distributed to Anne from Lixam constituted Anne's inheritance from her late husband, that Lixam constituted a trust for the benefit of Anne, and that Little was a trustee of Lixam. Further, Doug Stein testified that when Little sought advice from Joseph Bainton and Stein regarding the preparation of Forms 3520, Little represented to them that the funds flowing from Lixam to Anne constituted a "gift" from Müllhaupt. From this evidence, the jury was free to infer that the funds flowing from

Lixam were not a gift from Müllhaupt, that Little knew these funds were not a gift, and that Little lied to his attorneys about the nature of the funds in Lixam in order to obtain their help in preparing false Forms 3520, unlawfully reporting Anne's assets as "gifts," rather than trust payments. As such, the jury was well within reason in determining that Little (1) did not seek advice from counsel honestly and in good faith, (2) did not fully and honestly disclose to his attorneys all of the facts, and (3) did not honestly and in good faith follow his counsel's advice intending that his acts be lawful. The jury's rejection of Little's advice of counsel defense and its finding of guilt on these Counts is, therefore, properly supported by the evidence.

ii. Counts Two Through Seven: Failure to File Tax Returns from 2005 Through 2010

Counts Two through Seven charged the defendant with willfully failing to file individual income tax returns from 2005 through 2010 in violation of 26 U.S.C. § 7203. Defendant does not dispute that he failed to file the required returns in these years. He disputes only the sufficiency of the government's evidence that his failure to file was willful.

"In the tax fraud context, willfulness is established when the government shows (1) 'the law imposed a duty on the defendant'; (2) 'the defendant knew of [that] duty'; and (3) '[the defendant] voluntarily and intentionally violated that duty.'" United States v. Gilmartin, 684 F. App'x 8, 11 (2d Cir. 2017) (summary order). The government bears the burden of showing that a failure to file is willful, but may meet that burden solely with circumstantial evidence. See id. For instance, the law permits a jury to infer willfulness based on "the defendant's prior taxpaying record" or "educational background." Id. (listing the defendant's "advanced education level" and "history of filing valid tax returns" as support for an inference of willfulness).

This Court holds that the government presented sufficient evidence of willfulness at trial. At trial, Little testified to his "prior taxpaying record," stating that he had previously filed nine or ten tax returns when he lived and worked in New York in the 1970s and 80s. (Tr. 1920). An IRS employee testified that Little submitted requests to the IRS for extensions to file tax returns in 2008 and 2009. (Tr. at 152-58). Further, the government presented evidence that Little was both well-educated and financially sophisticated. Specifically, the jury heard testimony that Little had a law degree from the United Kingdom, was admitted to practice as a barrister in Britain and an attorney in New York, had worked in the finance industry on Wall Street and in London for twenty-five years, had run his own businesses, had worked closely with trust companies and banks in a number of countries, and had previously claimed domicile in foreign jurisdictions to obtain tax advantages. (Tr. 1915-21, 1952-57, 2055, 2062-65). Based on this evidence, the jury was free to infer that the defendant knew of his tax obligations, but chose not to file. Thus, there is sufficient evidence that defendant acted willfully in failing to file returns from 2005 through 2010.

iii. Count Eight: Failure to File FBARs from 2007 Through 2010

Count Eight charged the defendant with willfully failing to file a Report of Foreign Bank and Financial Accounts ("FBAR") with the IRS in violation of 31 U.S.C. §§ 5314, 5322(a); 18 U.S.C. § 2; and 31 C.F.R. §§ 103.24, 103.27(c)&(d), 103.59(b). On this Count, defendant again asserts that the government failed to present sufficient evidence of willfulness. He also asserts that the government did not establish that he was subject to FBAR filing requirements because the government presented "no evidence that [he] was living in the US and had not planned to permanently leave the US" from "2008 onwards."

The government's evidence was sufficient to sustain a guilty finding on Count Eight. Regarding willfulness, for the same reasons discussed with respect to Counts Two through Seven, this Court holds that the government presented sufficient evidence to show that defendant's failure to file FBARs was willful.

Regarding defendant's claim that the government presented "no evidence that [he] was living in the US and had not planned to permanently leave the US.," the defendant refers to the 2008 amendment to the FBAR definitions, which states "[t]he plain meaning of the term 'resident' (in this context, someone who is living in the U.S. and not planning to permanently leave the U.S.) should be used for FBAR examination purposes." Internal Revenue Manual 4.26.16.3.1.1. As this Court properly instructed, the jury was free to return a guilty verdict on Count Eight if it found that the defendant willfully failed to file an FBAR for any one of the years charged (2007, 2008, 2009, or 2010). Even assuming that defendant's assertion is true—that the government presented no evidence that he was a resident of the United States for FBAR purposes starting in 2008—a reasonable jury could still have found him guilty on Count Eight if it found that defendant lived in the United States without the intention to permanently leave the United States in 2007 or 2008. At trial, Little admitted that he was present in the United States for over 300 days in 2007 and 2008. (Tr. at 1926). The jury also heard testimony that Little primarily lived and worked in New York during 2007 and 2008. (Tr. at 927-34, 1885, 1925-26). Based on this evidence, the jury could logically conclude that Little was "living in the U.S. and not planning to permanently leave the U.S." in either 2007 or 2008 and thus subject to FBAR filing requirements for one of those years.

II. Defendant's Rule 33 Motion for a New Trial

A. Legal Standard

Rule 33, Fed R. Crim. P., provides that, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." The defendant bears the burden of showing that a new trial is warranted. United States v. Sasso, 59 F.3d 341, 350 (2d Cir. 1995). Generally, a court "has broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29." United States v. Ferguson, 246 F.3d 129, 134 (2d Cir. 2001). For instance, "[i]n deciding whether to grant a motion for a new trial, the judge is not required to view the evidence in the light most favorable to the prosecution." United States v. Levy, 594 F. Supp. 2d 427, 435 (S.D.N.Y. 2009) (internal quotation marks omitted). Instead, "the court is entitled to weigh the evidence and in so doing evaluate for itself the credibility of the witnesses." United States v. Robinson, 430 F.3d 537, 543 (2d Cir. 2005) (internal quotation marks omitted). At the same time, however, "the court may not wholly usurp the jury's role. It is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment." Id. (internal quotation marks omitted). Indeed, a court's discretion to grant a new trial "should be exercised sparingly." United States v. Sanchez, 969 F.2d 1409, 1414 (2d Cir. 1992). Further, in the Second Circuit, "[m]otions for a new trial are disfavored." United States v. Gambino, 59 F.3d 353, 364 (2d Cir. 1995). Such motions should be granted only "in the most extraordinary circumstances." United States v. Locascio, 6 F.3d 924, 949 (2d Cir. 1993). "The ultimate test is whether letting a guilty verdict stand would be a manifest injustice . . . . There must be a real concern that an innocent person may have been convicted." United States v. Canova, 412 F.3d 331, 349 (2d Cir. 2005) (internal quotation marks omitted).

B. Discussion

The defendant presents four reasons that a new trial is warranted. First, he requests a new trial based on newly discovered evidence of perjury by two trial witnesses. Second, he presents newly discovered evidence that the funds in Gulworthy Holdings did not belong to Harry Seggerman. Third, he asserts that the government presented privileged communications to the grand jury. Lastly, he asserts that the jury's verdict was "contrary to the weight of the evidence." On the last claim, the defendant incorporates the issues he raised in his Rule 29 motion. Considering these reasons in totality, this Court holds that defendant has not made the requisite showing of "extraordinary circumstances" that would warrant a new trial. His request for a new trial is, therefore, denied.

i. Newly Discovered Evidence of Perjury

Defendant takes issue with the trial testimony of two witnesses. First, he claims that Yvonne Seggerman perjured herself at trial because "an Excel spreadsheet . . . allegedly representing Harry Seggerman's combined offshore holdings[,] was not passed out at the Four Seasons meeting by Dr. Müllhaupt or [the defendant]" and Yvonne testified to the contrary. Second, the defendant claims that Doug Stein committed perjury when Stein "den[ied] sending" an email that Stein apparently sent to Saul Bienenfeld, defendant's retained standby counsel at the time.[3] Regarding Stein's alleged perjury, defendant has presented to the court what he purports is "newly discovered evidence" of an affidavit signed by Bienenfeld confirming that Stein sent this email.

[3] The email read, in pertinent part, as follows: "[A]s it pertains to the 3520 I will detail that based on the information given to me that there was [sic] trust offshore for the benefit of Ann that a 3520 should have been filed. That a 3520 must be filed when a US beneficiary receives a distribution from an offshore trust. I made that recommendation, reviewed 3520s prepared by an accounting firm and suggested language for all parties to use." (DX-512).

A defendant requesting a new trial based on newly discovered evidence must show that (1) "the evidence could not with due diligence have been discovered before or during trial," (2) "that the evidence is material, not cumulative," and (3) "that admission of the evidence would probably lead to an acquittal." United States v. Owen, 500 F.3d 83, 87 (2d Cir. 2007) (quoting United States v. Alessi, 638 F.2d 466, 479 (2d Cir. 1980)). Evidence "known by the defendant prior to trial, but [that] became newly available after trial" does not constitute "newly discovered evidence." Id. at 89; see also United States v. Muja, 365 F. App'x 245, 246 (2d Cir. 2010) (summary order) (holding that an affidavit from a co-conspirator describing how the co-conspirator met the defendant did not constitute "newly discovered evidence" because the defendant was aware of how the two met during trial). If the newly discovered evidence is evidence of perjury, the defendant must further show that "the witness in fact committed perjury." United States v. White, 972 F.2d 16, 20 (2d Cir. 1992).

No new trial is warranted based on Yvonne or Stein's testimony because Yvonne's testimony does not constitute newly discovered evidence, and there is no evidence that Stein's testimony was false. The defendant heard Yvonne testify at trial that either the defendant or Müllhaupt distributed a handout at the Four Seasons meeting, which discussed the Cetura Funds and Gulworthy Holdings. (Tr. at 201-02). If that testimony was false, defendant, like the defendant in Muja, was aware of its falsity at the time of trial. See Muja, 365 F. App'x at 246. As such, defendant's post-trial assertion that this testimony was perjured does not constitute "newly discovered evidence."

Regarding Stein's allegedly perjured testimony, even assuming that the Bienenfeld affidavit constitutes "newly discovered evidence" under Owen, there is no evidence that Stein "in fact committed perjury." See White, 972 F.2d at 20. At trial, Stein testified that he

did not "recall" sending the subject email, but he acknowledged that the email appeared to have been sent from his email address. (Tr. at 1128-30). Thus, assuming Stein did send the email, his statement that he did not "recall" sending the email does not amount to a denial and thus cannot amount to perjury.

ii. Newly Discovered Evidence Regarding the Source of the Funds in Gulworthy Holdings

Defendant asserts that, after trial, he discovered the date of a fax sent by Harry Seggerman relating to the origin of the funds in Gulworthy Holdings. This date, he argues, creates "reasonable doubt as to the veracity of Henry Seggerman's characterization of Gullworthy's [sic] balances being the product of [Harry Seggerman's] hard work." Essentially, defendant argues, had the jury known the date of this fax, it would have concluded that the funds in Gulworthy Holdings did not wholly belong to Harry Seggerman.

Whatever the date of the fax shows, this date does not constitute "newly discovered evidence" warranting a new trial under Owen. As defendant concedes, the government disclosed this fax to defendant during discovery. (Doc. 432). The date is visible in the upper left hand corner of the fax. (Doc. 432-3, p. 14). Though slightly cut off, the date is still readily discernable. Even if the defendant were unable to immediately discern the date, it cannot be said that the date "could not with due diligence have been discovered before or during trial." See Owen, 500 F.3d at 87.

iii. Attorney-Client Privileged Communications Presented During Grand Jury Proceedings

Defendant claims that Joseph Bainton falsely testified before the grand jury that defendant was not his client, thereby allowing the prosecutor to present privileged

communications to the grand jury, which resulted in defendant's indictment on Counts Ten through Nineteen. Defendant sought dismissal of Counts Ten through Nineteen on this ground on two previous occasions. Both requests for dismissal were denied. (Docs. 78, 151). At trial, Bainton testified that the defendant was, in fact, his client. (Tr. 1590). The defendant now seeks a new trial on Counts Ten through Nineteen based on the presentation of the allegedly privileged communications during the grand jury proceeding.

Generally, once a jury finds a defendant guilty at trial, "any error in the grand jury proceeding connected with the charging decision [is] harmless beyond a reasonable doubt." United States v. Mechanik, 475 U.S. 66, 70 (1986). Such error becomes harmless after a trial because "a petit jury's verdict of guilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge the defendants with the offenses for which they were convicted." Id. at 67 (declining to grant a new trial based on a violation of Rule 6(d), Fed. R. Crim. P., at the grand jury proceeding); United States v. Warner, 498 F.3d 666, 702 (7th Cir. 2007) (denying a new trial pursuant to Mechanik when the error during grand jury proceedings was the introduction of attorney-client privileged information). Under these circumstances, granting a new trial would "do nothing to correct an error in the indictment." Warner, 498 F.3d at 702. An exception to this rule exists when the trial does not "cure[] th[e] error." See Lafler v. Cooper, 566 U.S. 156, 166 (2012) (discussing, as examples, cases where either women or African Americans were deliberately excluded from the grand jury that issued the indictment). In such a case, a new trial may be warranted. Id.

In this case, no new trial is warranted based on the government's presentation of alleged attorney-client privileged communications to the grand jury. Even if the communications between Bainton and defendant were privileged, any error in presenting that

testimony to the grand jury was cured by the subsequent trial, during which the jury found the defendant guilty beyond a reasonable doubt on all counts. The Court sees no reason to deviate from the general rule set forth in Mechanik, especially when, as here, the defendant himself elicited testimony during trial regarding communications between him and Bainton to support his advice-of-counsel defense.

iv. Weight of the Evidence

Defendant's third ground for a new trial is that the jury's verdict was against the weight of the evidence. He rests this claim on the same concerns raised in his Rule 29 motion. Though this Court has broader discretion to grant a Rule 33 motion than a Rule 29 motion, this case is not so "extraordinary" that the Court must step in to prevent "manifest injustice." As discussed above, the evidence that the government presented at trial was sufficient to sustain a jury verdict of Guilty on all nineteen Counts of the Indictment. This Court has considered the concerns raised by defendant in his Rule 29 motion in the context of his Rule 33 motion and sees no reason to disturb the jury's verdict.

CONCLUSION

The Court has considered all of the defendant's arguments, including those not expressly addressed herein, and find them to be without merit. For the reasons set forth above, defendant Little's motions for a judgment of acquittal under Rule 29 and for a new trial under Rule 33 are DENIED. The Clerk is respectfully directed to terminate the following motions: Docs 388, 389 and 432.

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
November 1, 2018

APPENDIX E:

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DENYING DEFENDANT'S MOTION TO RECONSIDER, DATED NOVEMBER 14, 2018 (*United States v. Little,* 2018 WL 5961291, (S.D.N.Y. 2018))

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA,

S2 12-cr-647 (PKC)

-against-

OPINION AND ORDER

MICHAEL LITTLE,

Defendant.
----------x

CASTEL, U.S.D.J.

Defendant Michael Little was convicted of all nineteen counts of a Superseding Indictment S2 12 Cr. 647 (PKC) (the "Indictment"). On May 1, 2018, Little filed motions for a judgment of acquittal on all counts under Rule 29, Fed. R. Crim. P., or, in the alternative, for a new trial under Rule 33, Fed R. Crim. P. (Doc. 388, 389, 432). This Court denied the motions in an Opinion and Order of November 1, 2018 (the "Order"). (Doc. 436). Little now moves for reconsideration of the Order. (Doc. 444). His motion for reconsideration is denied.

Local Rule 6.3 permits a party to seek reconsideration of an order determining a motion within fourteen days of entry. Rule 6.3, S.D. & E.D.N.Y. Local R. "In order to prevail, the moving party 'must demonstrate that the Court overlooked controlling decisions or factual matters that were put before the Court on the underlying motion.'" Lichtenberg v. Besicorp Grp. Inc., 28 F. App'x 73, 75 (2d Cir. 2002) (summary order) (quoting Fulani v. Brady, 149 F.R.D. 501, 503 (S.D.N.Y. 1993), aff'd sub nom. Fulani v. Bentsen, 35 F.3d 49 (2d Cir. 1994)).

The Court assumes familiarity with this action and the November 1, 2018 Order. As his first ground for reconsideration, Little asserts that in the Order, the Court overlooked Second Circuit precedent relevant to his advice of counsel defense. Little asserted this defense in

relation to Counts Ten through Nineteen of the Indictment, which charged him with willfully aiding and assisting in the preparation of false IRS Forms 3520 in violation of 26 U.S.C. § 7206(2) and 18 U.S.C. § 2. Little argues that, pursuant to United States v. Scully, 877 F.3d 464 (2d Cir. 2017), the government had the burden of "disproving" his advice of counsel defense and this Court should have included in its jury instructions a "final reminder" that "the prosecution carried the burden of proof of disproving defendant's advice of counsel defense." Relatedly, he argues that "the Court erred in holding Defendant had the burden of proof to affirmatively prove his advice of counsel defense" in its Order. This first ground for reconsideration is meritless.

In Scully, the Second Circuit advised the following:

> In a fraud case . . . the advice-of-counsel defense is not an affirmative defense that defeats liability even if the jury accepts the government's allegations as true. Rather, the claimed advice of counsel is evidence that, if believed, can raise a reasonable doubt in the minds of the jurors about whether the government has proved the required element of the offense that the defendant had an "unlawful intent." . . . The government must carry its burden to prove . . . intent to defraud, and that burden does not diminish because [a defendant] raise[s] an advice-of-counsel defense. Accordingly, the district court must advise the jury in unambiguous terms that the government at all times bears the burden of proving beyond a reasonable doubt that the defendant had the state of mind required for conviction on a given charge."

877 F.3d at 476. During the trial for this action, the Court correctly instructed the jury with respect to Counts Ten through Nineteen of the Indictment that the government had the burden of proving each element of the offense beyond a reasonable doubt, including the element of willful intent.[1]

[1] With respect to Counts Ten through Nineteen, the Court instructed the jury as follows: "In order to prove the defendant guilty of aiding or assisting in the filing of a false tax return, the government must prove each of the following elements beyond a reasonable doubt: First, that the defendant advised or assisted in the preparation of a tax return that was subsequently filed; Second, that the return was false or fraudulent as to any material matter; Third, that the defendant acted willfully." (Tr. 2187 (emphasis added)).

The Court's instruction regarding Little's advice of counsel defense was also consistent with Scully. Under Scully, once there are sufficient facts in the record to support an advice of counsel defense, "it is for the government to carry its burden of proving fraudulent intent beyond a reasonable doubt and for the jury to decide whether that burden was met." Id. at 476-77. The Scully court advised that it might be "potentially confusing to instruct the jury that the defendant 'has the burden of producing evidence to support the defense' or must 'satisfy' the elements of the defense, or that it is the jury's job to determine whether the defense was 'established.'" Id. Consistent with the Second Circuit's guidance, this Court charged the jury as follows:

> You've heard evidence that defendant received legal advice from lawyers, and you may consider that evidence in deciding whether the defendant acted willfully and with knowledge. However, the mere consultation with a lawyer is not a defense to criminal conduct.
>
> In considering whether the defendant acted willfully and with knowledge as to Counts Ten through Nineteen, you must consider whether, before taking action, the defendant honestly and in good faith sought the advice of a competent lawyer as to what he may lawfully do. This means that he sought and obtained legal advice regarding a proposed course of conduct before proceeding with that course of conduct. You must also consider whether the defendant fully and honestly presented all relevant facts to the lawyer, and whether he honestly followed such advice in good faith, relying on it and believing it to be correct. In short, you should consider whether, in seeking and obtaining advice from lawyers, the defendant intended for his acts to be lawful. If he did so, a defendant cannot be convicted of a crime that requires willful and unlawful intent, even if the advice received was incorrect.
>
> On the other hand, no defendant can willfully and knowingly violate the law and excuse himself from the consequences of his conduct by asserting that he followed the advice of a lawyer. Whether the defendant acted in good faith for the purpose of seeking guidance as to the specific acts in this case before engaging in those acts, whether he made a full and complete presentation of the facts to his lawyer, and whether he acted substantially in accordance with the advice received, are questions for you to determine.

(Tr. 2189-90). The language of this Court's charge is substantively the same as the language suggested by the Scully court.[2] See id. at 477–78. The Court's instructions on Counts Ten through Nineteen were, therefore, proper.

To the extent that the Court's Order implied that a defendant who asserts an advice of counsel defense thereby bears the burden of proof with respect to the "willfulness" element of his charged offense, rather than the burden of production with respect to his asserted defense, such is not the law. As this Court instructed on Counts Ten through Nineteen, "[i]n order to prove the defendant guilty of aiding or assisting in the filing of a false tax return, the government must prove each . . . element[] beyond a reasonable doubt," including willfulness. (Tr. 2187). Regardless, this Court's factual analysis in the Order with respect to Little's motion for a judgment of acquittal on Counts Ten through Nineteen remains unchanged. In his motion for acquittal, Little argued that the government's evidence was insufficient with respect to the element of willfulness. This Court discussed the relevant evidence and determined that the

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[2] The Scully court recommended two sample instructions. One of the samples read as follows:

> You have heard evidence that the defendant received advice from a lawyer and you may consider that evidence in deciding whether the defendant acted willfully and with knowledge.
>
> The mere fact that the defendant may have received legal advice does not, in itself, necessarily constitute a complete defense. Instead, you must ask yourselves whether the defendant honestly and in good faith sought the advice of a competent lawyer as to what he may lawfully do; whether he fully and honestly laid all the facts before his lawyer; and whether in good faith he honestly followed such advice, relying on it and believing it to be correct. In short you should consider whether, in seeking and obtaining advice from a lawyer, the defendant intended that his acts shall be lawful. If he did so, it is the law that a defendant cannot be convicted of a crime that involves willful and unlawful intent, even if such advice were an inaccurate construction of the law.
>
> On the other hand, no man can willfully and knowingly violate the law and excuse himself from the consequences of his conduct by pleading that he followed the advice of his lawyer.
>
> Whether the defendant acted in good faith for the purpose of seeking guidance as to the specific acts in this case, and whether he made a full and complete report to his lawyer, and whether he acted substantially in accordance with the advice received, are questions for you to determine.

Scully, 877 F.3d at 477–78.

evidence was sufficient. United States v. Little, No. S2 12-cr-647 (PKC), 2018 WL 5668874, at *5 (S.D.N.Y. Nov. 1, 2018). That determination stands undisturbed.[3]

As his second ground for reconsideration, Little asserts that this Court overlooked "newly discovered evidence," mentioned in his reply brief, which undermines his conviction on Count Nine for conspiracy to defraud the United States in violation of 18 U.S.C. § 371. In Little's words, this evidence "concern[ed] a chance meeting I had with a close personal friend of Suzanne Seggerman on May 20, 2018. NG has known Suzanne since 1990 and worked with her husband Michael Meyer in Kosovo. He attended their wedding. He told me, in the presence of my daughter's godfather: [she had gotten out of her tax problems by] 'blame[ing] it on the lawyer'. NG's words were: 'she blamed it on the lawyer.'" Little argues that testimony by NG regarding a telephone conversation NG had with Suzanne, where Suzanne allegedly admitted to "blam[ing]" Little, would have undermined Little's conviction on Count Nine. To the extent that Little requests a judgment of acquittal on Count Nine, this subsequently discovered evidence does not change the fact that the government presented sufficient evidence at trial to sustain a conviction on Count Nine.[4] As such, a judgment of acquittal is not warranted. See Rule 29(a), Fed. R. Crim. P. ("[T]he court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.").

To the extent that Little requests a new trial based on this evidence, a new trial is not warranted because it is not clear that letting Little's guilty verdict stand would be a "manifest injustice" in light of this evidence. See United States v. Canova, 412 F.3d 331, 349 (2d Cir.

[3] In support of his motion, Little asserts that "the Government failed to carry its burden of proof in disproving [his] advice of counsel defense because it made no attempt to address whether or not Bainton's legal advice to [him] was sound"—this alleged legal advice being that "trust payments were to be [legally] characterized as gifts." In reaffirming that the government presented sufficient evidence on willfulness, the Court has implicitly considered this argument and found it to be contradicted by ample evidence in the record.

[4] This Court discussed the evidence relating to Count Nine and its sufficiency in its Order. See Little, 2018 WL 5668874, at *4.

2005). In particular, the admission of this evidence would not "probably lead to an acquittal." See United States v. Owen, 500 F.3d 83, 87 (2d Cir. 2007) (citation omitted) (holding that a defendant requesting a new trial based on newly discovered evidence must show that (1) "the evidence could not with due diligence have been discovered before or during trial," (2) "the evidence is material, not cumulative," and (3) "admission of the evidence would probably lead to an acquittal"). The government presented significant evidence at trial that Little was a party to the conspiracy alleged in Count Nine. Moreover, even assuming NG's potential testimony to be true, Suzanne's statement that she got out of her "tax problems" by "blam[ing]" Little does not require the inference that Little did not knowingly participate in the conspiracy. Thus, this Court cannot say that the admission of NG's testimony, which likely amounts to hearsay, "probably" would have led to Little's acquittal. As such, a new trial is not warranted.

CONCLUSION

For the foregoing reasons, defendant Little's motion for reconsideration is DENIED. The Clerk is directed to terminate the motion, (Doc. 444).

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
November 14, 2018

APPENDIX F:

ORDER OF THE COURT OF APPEALS, DATED NOVEMBER 19, 2020, DENYING THE PETITION FOR REHEARING OR REHEARING *EN BANC* (*United States v. Little,* 18-3622; 19-445 (2d Cir. November 19, 2020))

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 19th day of November, two thousand twenty.

United States of America,

Appellee,

v.

Michael J. Little, AKA Sealed Defendant 1,

Defendant - Appellant.

ORDER

Docket Nos: 18-3622, 19-445

Appellant, Michael J. Little, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk