

No. 21-1158

IN THE
Supreme Court of the United States

JOSEPH PERCOCO,
Petitioner,

v.

UNITED STATES,
Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

**JOINT APPENDIX (VOLUME II OF II)
(Pages 455–686)**

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(continued from front cover)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES
OF AMERICA, 16 CR 776 (VEC)

v.

JOSEPH PERCOCO, JURY TRIAL
PETER GALBRAITH
KELLY, JR., STEVEN
AIELLO, JOSEPH
GERARDI, New York, N.Y.
February 23, 2018
9:15 a.m.
Defendants.

----- x

Before:

HON. VALERIE E. CAPRONI,
District Judge

* * *

Q. For what period of time was Mr. Percoco your supervisor?

A. From 2011 until he left in 2014, and then he came back again in 2015.

Q. You say when he left in 2014?

A. Yes.

Q. You're referring to what?

A. He resigned to go work on the campaign.

Q. Now, showing you what's in evidence, I believe, as Syracuse 3832. It's on your screen, but we have paper copies, if that is — judging by your reaction, you might prefer a paper copy. I'm happy to give it to you.

A. OK.

Q. This is on the executive chamber letterhead. That's the executive chamber you referenced being your workplace?

A. Yes.

Q. OK. It is dated April 16, 2014. Do you see that?

A. Correct.

Q. It is addressed Dear Larry?

A. Yes.

Q. Otherwise, it is a mystery who Larry is. Do you know who Larry is?

A. Yes. That would be Larry Schwartz, who was the secretary to the governor.

MR. PODOLSKY: Your Honor, can I confirm this is in evidence? It is not on our list.

THE COURT: I've got it in.

MR. PODOLSKY: Thank you, your Honor.

Q. Larry Schwartz was the secretary to the governor?

A. Correct.

Q. Can you remind us where on the hierarchy the secretary to the governor sits?

A. He sits in the office directly next to the governor. It is not a secretarial position. He is like the chief of staff.

Q. Mr. Schwartz was the secretary to the governor in April of 2014?

A. Yes.

Q. This is a letter signed by Mr. Percoco —

A. Yes.

Q. — is that correct?

Do you recognize his signature?

A. Yes.

Q. And was this a letter of resignation submitted by Mr. Percoco on April 16 of 2014?

A. Yes.

Q. Do you see says, I have completed all of the paperwork and it will be submitted to both you and Terri Brennan — that would be you?

A. That's me, yes.

Q. — by Monday, April 21, 2014.

This was something — this resignation and the

paperwork was something that fell within your job description, is that correct?

A. Yes. I would have created the form, the paperwork, to process the resignation.

Q. OK. It is addressed to Mr. Schwartz. Was it your understanding that Mr. Percoco reported to Mr. Schwartz?

A. Yes.

MR. PODOLSKY: Objection.

THE COURT: Overruled.

Q. If we can go to the second page of the document.

Is this another one of the forms that you processed as part of Mr. Percoco's resignation?

A. This is a form that is prepared by our HR office and it memorializes the action that was taken.

Q. Do you see on the form where — and the date at the top of this is April 21, 2014?

A. That's the effective date of the action.

Q. Do you see on the document at the bottom of what is visible on the screen, it says separation type?

A. Yes.

Q. Can you tell us what that means?

A. That's a resign external. It means that you are leaving the agency and not going to another agency or a state authority.

Q. If we can turn to the third page of this exhibit.

Can you tell us what this is?

A. This is the personnel action request form. This is the one that I create.

Q. When you say you create it, this is a form used by the executive chamber to memorialize personnel actions, is that correct?

MR. PODOLSKY: Objection.

THE COURT: Sustained.

She is your witness now.

Q. When you say you created this form, what did you mean by that?

A. I wrote it. It is my handwriting.

Q. I see. OK. At the bottom of this form under action

A. Um-hmm.

Q. — there are various options and separation is checked.

Do you see that?

A. Yes.

Q. If we can zoom out a bit. Leave of absence is not checked, correct?

A. Correct.

Q. So what's the difference between the two?

A. A separation is when you actually resign state service. A leave of absence is if you're going on a break for either medical or personal reasons and then you're expected to come back.

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Q. So in April of 2014, April 21 to be precise, it was your understanding that Mr. Percoco was separating in the manner that you've just described?

MR. PODOLSKY: Objection.

THE COURT: Sustained.

Q. It was your understanding that Mr. Percoco was going to manage the governor's campaign for re-election?

MR. PODOLSKY: Objection.

THE COURT: Sustained.

Q. What was your understanding of the reason for Mr. Percoco's resignation?

MR. PODOLSKY: Objection.

THE COURT: Overruled.

A. He was leaving to go be the campaign manager.

Q. Was it your understanding that after he served as campaign manager, he would be returning to the executive chamber?

MR. PODOLSKY: Objection.

THE COURT: Sustained.

Q. Did you have a discussion with Mr. Percoco about what his plans were after he served as campaign manager for the campaign?

MR. PODOLSKY: Objection.

THE COURT: Did you have a conversation; yes or no?

THE WITNESS: Not — I don't recall having any kind of conversation like that with him.

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THE COURT: OK.

BY MR. BOHRER:

Q. Did Mr. Percoco indicate to you that it was not his intention to return to the executive chamber after he served as campaign manager for the 2014 campaign?

MR. PODOLSKY: Objection.

THE COURT: Sustained.

Remember that questions aren't evidence.

MR. BOHRER: Your Honor understands the basis on which it is —

THE COURT: Mr. Bohrer, this is your witness. Don't ask leading questions.

BY MR. BOHRER:

Q. Did you have an understanding of Mr. Percoco's intentions in terms of returning to the executive chamber after he served as campaign manager?

MR. PODOLSKY: Objection.

THE COURT: Sustained.

MR. BOHRER: It is offered under 803(3), your Honor.

THE COURT: No.

MR. BOHRER: *Hillmon v. Mutual* —

THE COURT: No. We can argue about it when the jury is not here. The objection is sustained.

BY MR. BOHRER:

Q. Take a look at JPX 554. Do we have a binder?

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THE COURT: 554. 554A is on the screen. Is that what you want?

MR. BOHRER: 554 and 554A.

Q. Do you see that?

A. Yes.

Q. Was it your practice to write letters and verification of employment for employees in the executive chamber?

A. Yes.

Q. Was that a regular practice in the executive chamber?

A. Yes.

Q. Do you recognize 554A as such a document?

A. Yes.

MR. BOHRER: I offer 554A, your Honor.

MR. PODOLSKY: No objection.

THE COURT: 554A-R is actually what you're offering? That's how it is stickered for me.

MR. BOHRER: Yes.

THE COURT: Yes; no?

MR. BOHRER: That's correct.

THE COURT: 554A-R is what you're offering, correct?

MR. BOHRER: Correct.

THE COURT: 554A-R is received.

(Defendant's Exhibit JPX 554A-R received in evidence)

BY MR. BOHRER:

Q. This is a letter signed by you?

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A. Yes.

Q. Dated August 20 of 2014, is that correct?

A. Yes.

Q. And the first sentence of the letter, if you can read it to us?

A. This serves as confirmation that Joseph Percoco was hired as an employee of New York State in December 2006, serving through April 2014.

Q. The April 2014 date was the date we just referenced as the date of Mr. Percoco's resignation, correct?

A. Correct.

Q. Now, you noted here that he served from December 2006 through 2014 April.

Do you recall whether in 2010 Mr. Percoco also served as campaign manager for Andrew Cuomo's campaign?

MR. PODOLSKY: Objection.

THE COURT: Overruled.

A. I — I don't. He wasn't employed by the executive chamber then, so I didn't know what his employment status was.

Q. OK. Now, when Mr. Percoco resigned in April of 2014, did he leave the executive chamber?

A. Yes.

Q. To your understanding, he was serving as campaign manager for Andrew Cuomo's gubernatorial campaign?

A. Yes.

Q. You mentioned before that Mr. Percoco had been your supervisor at various periods of time?

A. Yes.

Q. Was he your supervisor at the time that he resigned in April 2014?

A. Yes.

Q. When he resigned in April of 2014, did you get a new supervisor?

A. Yes.

Q. Who was that?

A. It is a little tricky. Several — my immediate supervisor for time cards and travel was Larry Schwartz, but other people took some of the duties that he was doing. So I reported to Stephanie Benton for certain things and Larry Schwartz for other things. I worked for everybody there, so ...

Q. I didn't want to put you on the spot. That is fair enough.

Did you continue to report to Mr. Percoco in any way once he had resigned?

A. No.

Q. I think you just told us his responsibilities were divvied up among various people to whom you did report?

A. Yes.

Q. What authority, if any, did Mr. Percoco have over chamber employees after he had resigned in April of 2014?

MR. PODOLSKY: Objection.

THE COURT: Sustained.

Q. After Mr. Percoco resigned in 2014 and you were reporting to other people, did you continue to speak to Mr. Percoco?

A. I would have on his personal benefits and things like this letter where he needed employment verification.

Q. OK.

A. That's not unusual.

Q. Did you sometimes consult with Mr. Percoco on transitional matters that would have previously been within his jurisdiction prior to his resignation?

MR. PODOLSKY: Objection.

THE COURT: Sustained.

I don't understand the question.

Q. Well, if there were matters relating to on-boarding new employees?

THE COURT: Are we talking about post April and before December?

MR. BOHRER: Correct.

Q. After his resignation, would you have occasion to speak to him about matters that had once been in his jurisdiction when he was in the executive chamber?

A. I recall once receiving an e-mail that he sent to introduce me to someone after the election who was going to work for the new lieutenant governor, Lieutenant Governor Hochul.

Q. Let's take a look at Government Exhibit 825, which is in

evidence, so maybe we can blow it up so that it is legible.

Have you taken a look at that?

A. Um-hmm.

THE COURT: Um-hmm, does that mean yes?

THE WITNESS: Yes.

Q. We say yes.

A. I'm sorry.

Q. OK. Is that what you're referring to?

A. Yes.

Q. So this would be an example that you recall of the kind of communication you would have with Mr. Percoco after he had resigned his position in the chamber?

MR. PODOLSKY: Objection.

THE COURT: Sustained.

Q. Is this the communication to which you were referring in your testimony just a few minutes ago?

A. Yes.

Q. Were there other examples of similar communications to this one?

A. None that I recall.

Q. What did you understand this communication to be?

A. This was him telling me that the incoming kind of governor wanted to hire this person, so he was looping her and I believe — it is Joanne Fryer — her to us.

This is an introduction, introducing Melissa to us, so that we could get

Page 5406

her information and get her started in the payroll process.

Q. Then looking at the top of the e-mail, you ask a couple of questions of Mr. Percoco.

You were not reporting to him at this point in time, is that correct?

A. No.

Q. So why were you asking these questions?

A. It was my way to get an idea of what level this person was. I didn't know whether she was going to be the secretarial assistant or chief of staff. I didn't know what level she was going to be at.

Q. So you were inquiring for informational purposes?

MR. PODOLSKY: Objection.

A. Correct.

THE COURT: Overruled.

A. Correct.

Q. Now, this is November 10 of 2014.

At this point in time, did you know whether Mr. Percoco was coming back to the executive chamber?

A. I don't recall when I found out he was coming back.

Q. But at some point you did learn that Mr. Percoco was, in fact, returning to the executive chamber?

A. Yes.

Q. And that was in November, perhaps later November, was it, in November of 2014?

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MR. PODOLSKY: Objection.

THE COURT: Sustained.

She just said she doesn't remember when she learned that.

Q. Let me show you JPX 577. Do you see that?

A. Yes.

Q. Easier with a paper copy?

A. No, I can see it.

Q. Does that refresh your recollection about approximate date on which Mr. Percoco was returning to the executive chamber?

A. It does now. November 19th.

MR. PODOLSKY: Objection. That was not the pending question.

THE COURT: That was not the question.

The question was does this refresh your recollection of when you first learned that Mr. Percoco was going to return?

THE WITNESS: It still doesn't tell me what day I learned he was coming back.

THE COURT: OK.

BY MR. BOHRER:

Q. This is an e-mail from you to Mr. Percoco?

A. Correct.

Q. The subject is paperwork, is that correct?

A. Correct.

Q. It relates to matters within your authority in the

Page 5408

executive chamber, is that correct?

A. These are forms that generally go out from the appointments office to start a background check on a new hire.

Q. The forms you're referring to are forms that are referenced as attachments to this e-mail?

A. Correct.

Q. That you sent to Mr. Percoco?

A. Correct.

MR. BOHRER: I would offer JPX 577.

MR. PODOLSKY: I don't object to this, your Honor.

THE COURT: You do not object?

MR. PODOLSKY: I do not object.

THE COURT: Percoco 577 is received.

(Defendant's Exhibit JPX 577 received in evidence)

BY MR. BOHRER:

Q. If we can display that. The e-mail references various attachments, including an appointments questionnaire. Do you see that?

A. Yes.

Q. Now, I think you just testified that these were forms that you would furnish to new hires. Did I hear that correctly?

THE COURT: No. She said normally the appointments office provides them.

Q. These would be documents that would be provided to new hires, is that correct?

A. Yes.

Q. In this situation, did you view Mr. Percoco as a new hire?

A. Yes.

Q. Why was that?

A. Because he was not currently employed by the state and going to be employed by the executive chamber.

Q. Now, the first attachment referenced is an appointments questionnaire. If we can call up JPX 1014, but not the handwritten page that's the first page.

THE COURT: I've got that 1014 is already in evidence.

MR. BOHRER: I believe so, your Honor.

Q. Do you recognize that?

A. I know what it is. I don't recall if I've seen it before.

Q. When you say you recognize what it is, that would be the appointments questionnaire that was an attachment to JPX 577 that we were just looking at before?

MR. PODOLSKY: Objection.

THE COURT: Overruled.

A. Yes.

Q. Is this the type of document that would be filled out by new hires coming into the chamber?

A. Yes.

Q. This was filled out by Mr. Percoco?

A. Yes.

Q. Do you know?

Page 5410

A. It appears so.

THE COURT: Do you know whether he was the one who filled it out or somebody else wrote it out for him?

THE WITNESS: I do not know that.

Q. If we can turn to page six. Do you recognize Mr. Percoco's signature?

MR. PODOLSKY: Objection.

THE COURT: Overruled.

Have you ever seen his signature before?

THE WITNESS: Yes.

Q. Do you recognize it?

A. Yes.

Q. The date here is November 25, 2014, correct?

A. Yes.

Q. Now, if we can show the witness JPX 787R.

Do you recognize this?

A. Yes.

Q. What is it?

A. It's a personal action request form.

Q. Is this a form that is kept in the regular course of executive chamber business?

A. Yes.

MR. BOHRER: I offer 787R.

MR. PODOLSKY: No objection.

THE COURT: 787R is received.

(Defendant's Exhibit JPX 787R received in evidence)

BY MR. BOHRER:

Q. What is this form?

A. This is a form that I would use to start a personnel action.

Q. The date of the form is?

A. December 8, 2014.

Q. The personnel action that you're initiating is what?

A. An appointment.

Q. Of whom?

A. Joseph Percoco.

Q. It is signed by a supervisor?

A. Yes.

Q. Who is that?

A. The supervisor was Larry Schwartz.

Q. The action as indicated on the document is an appointment, correct?

A. Yes.

Q. Now, let's show the witness JPX 793.

Do you recognize this? Take a moment to look at it. It is in your binder. Tab seven, I believe.

A. OK.

Q. Do you recognize that?

A. Yes.

Q. This was an e-mail from you to Mr. Percoco in connection

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with his appointment to the executive chamber at the end of 2014, this e-mail is dated January of 15, is that correct?

A. Correct.

Q. This was in connection with your — was this in connection with your responsibilities to process the paperwork required for Mr. Percoco to receive his appointment in the executive chamber?

A. Yes. It's part of my duties to take care — help them with their health insurance.

MR. BOHRER: I offer JPX 793.

MR. PODOLSKY: Objection.

THE COURT: Sustained.

Q. You say you were helping Mr. Percoco in connection with insurance matters and things of that nature?

A. Yes.

Q. And when he resigned in April of 2014, were some of his — was some of his coverage in terms of insurance and benefits terminated as a result of the resignation?

MR. PODOLSKY: Objection.

THE COURT: Sustained.

Q. Did you help him process paperwork in connection with insurance coverage and benefits?

A. I would have given him guidance. I don't think I helped him process the paperwork.

Q. You furnished him the forms that were required for that

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purpose?

A. Our human resources office sends those to his home.

Q. At your direction?

A. It's part of a process that just happens.

Q. Did you do that in November and December of 2014?

MR. PODOLSKY: Objection.

THE COURT: Sustained.

MR. BOHRER: May I have a moment, your Honor?

THE COURT: Of course.

MR. BOHRER: I have nothing further, your Honor.

THE COURT: Do you have cross?

MR. PODOLSKY: Very short.

THE COURT: OK.

MR. PODOLSKY: Why don't we just quickly pull up Government Exhibit 825.

THE COURT: I think it is just going to be on the screen.

THE WITNESS: OK.

CROSS-EXAMINATION

BY MR. PODOLSKY:

Q. This is the e-mail that Mr. Bohrer showed you a few moments ago?

A. Yes.

Q. You see the second e-mail on the chain is from — that's from Joe Percoco, correct?

Page 5414

A. Correct.

Q. It is to you — well, Melissa Bochenski, Joanne Fryer, and yourself, right?

A. Correct.

Q. Mr. Percoco writes: Terri and Joanne — skip the first sentence — she will be working for the incoming LG Kathy Hochul. Please get her all necessary paperwork and set her on a transition or temp line for a start date of 11/17 please. Let me know if you have any issues. She will work out of Buffalo for now, but she will be based out of the Albany — I think that means office. Do you see that?

A. Yes.

Q. Let's go to your response.

You respond just to Mr. Percoco, right?

A. Yes, it appears so.

Q. You write: Sure. Do you have a salary? Title or generic project assistant, right?

A. Correct.

Q. OK. Let me just ask you a few questions.

You testified that for a period in 2014, Mr. Percoco was working — had officially left the chamber, was working on the campaign, right?

A. Correct.

Q. Re-election campaign.

In fact, he was running that re-election campaign,

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES
OF AMERICA,

16 CR 776 (VEC)

v.

JOSEPH PERCOCO,
PETER GALBRAITH
KELLY, JR., STEVEN
AIELLO, JOSEPH
GERARDI,

JURY TRIAL

New York, N.Y.
February 26, 2018
9:00 a.m.

Defendants.

----- x

Before:

HON. VALERIE E. CAPRONI,

District Judge

* * *

cases, charges are constructed, because it makes it easier for the jury to go count by count, element by element. It's set up that way. So I'm not pulling it out.

That said, if there's something specifically that you want me to add into the charge relative to quid pro quo or official act, let's talk about that.

MR. YAEGER: Yes. All right. Well, first of all, paragraph 67, only someone who is a government official can perform an official act. The substance that we have in 67.

THE COURT: All right. So where is official act? This is page 18, line 4?

MR. YAEGER: Yes, your Honor.

THE COURT: An official act or official action is a decision or action on a specific matter that may be pending or may by law be brought before a public official.

MR. YAEGER: Yes, and then after —

THE COURT: Then two lines down: The decision or action may include using one's official position, blah, blah, blah. Using one's official position to provide advice, etc.

MR. YAEGER: So I would propose that at the tail end of line 6 your Honor would insert the sentence: Only someone who is a government official can perform an official act. And then the next sentence: In order for a government official to perform an official act, that official's action or decision must be made within the specific duties of the official's

position as conferred by the authority of his or her office.

THE COURT: No, I'm definitely not going to say that. I don't even think that's a correct statement of the law.

MR. YAEGER: The next piece is we would request that your Honor would mention pressure or advice and define them, and however your Honor would do it. We have the definitions of pressure and advice in 71 and 72 of our proposed charge.

THE COURT: "Pressure" and "advice" are words that are within the ken of an average juror.

MR. YAEGER: Especially not advice, your Honor, because the Supreme Court specifically defines advice in *McDonnell* in reference to its earlier opinion in *Birdsall* precisely because these words have an ordinary meaning that is not the same as the meaning that they have in this context. It's important to recognize in particular — I'll start with advice. The Supreme Court mentions by citing *McDonnell*, they cite *Birdsall*, they found that in *Birdsall* his advice amounted to official acts where superiors "necessarily rely largely upon the reports and advice of subordinates" in the department who were more directly acquainted with the existing conditions, the record of the offenders, the facts and circumstances of the particular case.

Now, we're not asking for that exact language. We tried to make the language a little bit more user friendly in paragraph 71.

* * *

part of element one. Conspiracy is just an agreement.

THE COURT: Yes.

MR. YAEGER: I think that is misleading. It is a criminal agreement or an unlawful agreement, not just an agreement.

Judge Sand's instructions consistently add that qualifier — 19-3, 19-12, 19-3S. I would just like it to say a conspiracy is a criminal agreement.

THE COURT: No. Denied.

You get to the illegal goal later on. The idea behind two elements is to separate them out and make it clear you need an agreement and you need a goal. I found Sand's conspiracy charge to be incredibly confusing. Sorry. I know he is Sand and I'm not, but I like my formulation better. I think it is clearer and easier for the jury to follow.

MR. YAEGER: I am a traditionalist, your Honor.

THE COURT: Understood.

MR. YAEGER: I have something else on page 22.

THE COURT: Next.

MR. YAEGER: If someone has something before.

THE COURT: Anybody got anything before then?

MR. YAEGER: Page 22, line 21.

THE COURT: Yes.

MR. YAEGER: I don't think it should just be intangible right to Mr. Percoco's honest services. I think it

should be honest services as a public official.

THE COURT: I'm sorry. What do you want to change it to?

MR. YAEGER: I want to add the words as a public official after honest services in 21.

THE COURT: No, because that is actually not the theory and that is not the law. You can owe a public duty and you can — I'm sorry — you can owe honest services if you have a fiduciary duty, even if you're not a public official at the time.

MR. YAEGER: I understand that is not the theory. I do think it is the law. I hear your Honor's ruling.

THE COURT: We disagree.

MR. ISEMAN: Your Honor, we would like to make a request here that temporary custody grouped together with the CPV section of the case in this charge, because they are little bit different theories with respect to — I think we are going to get to the fiduciary issue in a minute. We can have a conference on that.

THE COURT: I'm sorry. You're asking me to charge Counts Four and Five separately?

MR. ISEMAN: Well, what I am asking for is some daylight between us and the CPV side of the case. I understand that you don't want to go through everything again, but I think that I, honestly, don't have a perfect solution except for

* * *

Kelly needed Percoco's power in state government. So Kelly was willing to bribe Percoco and put him on retainer by creating a low-show job for Lisa Percoco that paid her \$7,500 a month. You heard that Kelly went to extraordinary lengths to conceal and to cover up the hiring of Lisa Percoco because the arrangement was so obviously illegal. So what did Percoco agree to do in exchange for \$7,500 per month or 90,000 —

THE COURT: Mr. Zhou, I'm sorry. Now can you get a little closer to the mic. Now you've overcorrected.

MR. ZHOU: No problem, your Honor. Hopefully this does the trick.

— \$90,000 a year. In exchange for those corrupt payments, Percoco agreed to help out CPV with issues that required state action. So he first tried to influence the state's decision on the PPA, but ultimately, he wasn't able to get it done. There were just too many moving parts.

But the PPA wasn't the only thing that Kelly wanted. Kelly got his money's worth because he got Percoco to direct other state officials to approve the reciprocity agreement, the one that CPV needed to build its power plant in New Jersey. And, of course, Percoco never told the other state officials that his wife was being paid almost a hundred thousand dollars a year from CPV.

That's it. That's the CPV story in a nutshell. It is a clear quid pro quo, this for that. Kelly paid Percoco to

take official action on CPV's behalf when opportunities came up, and Percoco delivered. When Percoco could no longer deliver, the bribes stopped.

So let's talk first about the quid. On the CPV scheme, the quid, the bribe payments, that's clear. There is no dispute that Lisa Percoco received more than \$280,000 from CPV from the end of 2012 through the beginning of 2016. She got a steady \$7,500-a-month check from Chris Pitts. These are just some of the checks that she received, so we have put all the checks from Pitts to Lisa Percoco on a single government exhibit. It's the one right here. It's Government Exhibit 1420N. So you'll have this in the jury room, and I encourage you to flip through all the checks that Chris Pitts made out to Lisa Percoco.

Now, to the quo, you also know that the quo in this CPV quid pro quo scheme is also clear. The quo is the official action that Percoco either took or agreed to take. So we'll start with the PPA. Here you know that Percoco tried to get the PPA. You saw the emails. So, for instance, when an energy guy associated with the former Governor Pataki proposed restarting old plants instead of giving a PPA to a new plant, like CPV's new billion-dollar plant, Percoco demanded: I need that guy's name ASAP. That's Government Exhibit 77.

Now, Percoco's activism continued into October 2013, right before the PSC was supposed to choose the winner of the

PPA. We've already looked at the emails where Howe urged Percoco to push on HG, and Percoco reassured

Howe that he was earning his keep: OK. Will get to Herbert, Government Exhibit 85.

We've also talked about what happened with the PSC announcement. After Glaser expressed concerns on the call, the PSC backed away from their top choice for the PPA, that power plant in Queens, the competitor to CPV. That's what the defense witness, Raj Addepalli, told you.

Now, CPV and Kelly, they dodged a bullet on that day when the PSC came out and announced they were still considering submissions. Now, of course, you heard that Percoco ultimately was not able to deliver the PPA. Ultimately, the PSC didn't give a PPA to anyone, but even when Percoco knew it wasn't going to come through, he kept Kelly thinking that he could still influence the process. And you know why Percoco did that, because he needed to keep that ziti flowing.

You saw those emails, like Government Exhibit 113. Kelly was still asking for Percoco, and to string Kelly along, Howe and Percoco set up meetings for Kelly with various state officials. Howe was explicit about his motivation with Percoco: If Kelly gets you on the phone, just listen to him, as I have been trying to keep this alive now. At the end of the line, as time has run out. So a meeting is necessary.

Joe Percoco and Todd Howe needed Kelly to think that

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the PPA was still possible so that Kelly would still pay the payments to Lisa Percoco, payments to Todd Howe. The extortion kept going into 2015 and 2016 when Percoco left state office for good and Kelly got rid of Lisa Percoco.

Now, the PPA was not the only official action that Percoco agreed to take. He also got CPV the reciprocity agreement. So now make sure you look at the timeline that Special Agent Posilkin put together. That's Government Exhibit 1708. You're going to have that timeline with you in the jury room. So I urge you to look at that, as it's devastating evidence of the defendant's guilt.

Now, Kelly asked for a push from above, and all it took was one single email from Percoco to get two other state officials, Howard Glaser and John Regan, to reach out to the environmental agency and tell the commissioner to sign the reciprocity agreement.

Now, you saw that email chain, Government Exhibit 75A. Kelly told Howe that in my last conversation with Jared, he indicated that he could use a "push from above" to get it done as a priority. Jared, that was Jared Snyder, the deputy commissioner at the environmental agency. You saw that Howe forwarded that message to Percoco. So how did Percoco respond? By offering to help. It's right there in black and white: I will check with Martens, the head of the environmental agency. That is powerful proof of Percoco's corrupt promise to use his

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES
OF AMERICA, 16 CR 776 (VEC)

v.

JOSEPH PERCOCO, JURY TRIAL
PETER GALBRAITH
KELLY, JR., STEVEN

AIELLO, JOSEPH
GERARDI, New York, N.Y.
February 28, 2018
9:00 a.m.

Defendants.

----- x

Before:

HON. VALERIE E. CAPRONI,

District Judge

* * *

and Percoco. None. Not even Todd Howe testified in rendering substantial assistance. Not even he testified that Joe agreed to accept money or anything in exchange of value from COR, in exchange for agreeing to perform any official action or official assistance, as this allegation states, whatever that means.

So the government has glossed over this gaping hole in their theory of the case during Mr. Zhou's summation. According to the government, because Joe received money that was sourced from COR, as he understood it from Mr. Howe, that despite the government's effort to suggest otherwise, he disclosed, that there must have been a corrupt agreement.

Now, look, what this was was Joe Percoco on the campaign, not as a public official. A short-term venture for a limited period of time. Not intending to go back to government service, having no ability therefore to perform any official action, given that he had no intention to go back.

Let's see what the evidence shows. We know that Joe did have discussions with Howe in 2014 about this consulting agreement, but not for bribes, for a consulting job while he was on the campaign. Even Howe had to testify to as much.

2093 of the transcript: He asked if there were any clients that might be willing to hire him when he left the governor's office.

Joe contacted me when he was in the governor's office

* * *

2015.

So here again, as I told you with respect to the 2012 claim that the Percocos were desperate financially, in 2014 when Todd Howe, as part of his effort to render substantial assistance, tries to tell us that the motive for Joe seeking the consulting job was financial desperation, I would say to you, as I said in my opening, the Percocos' finances were just fine, thank you.

So Joe's on the campaign in 2014. He is no longer a public official. He is no longer in the executive chamber. But you're going to hear in the judge's charge language about an agent, and that an agent is a person who's authorized to act on behalf of state government. And there's been evidence presented that even when Joe was on the campaign, he may well have fallen into this category. But an agent has to be someone who's authorized to act on behalf of the state government. It's about authority. It's not just someone who's influential or respected. It's not enough to have power, or anything like that, or even be bigger than Phil. What it's about is authority. And the former counsel to the governor, Seth Agata, told you that Mr. Percoco had no authority in the chamber in the summer of 2014. At tab 501, he was asked:

In the summer of '14, Mr. Percoco was no longer in the chamber, he was no longer executive deputy secretary, correct?

No longer had that authority in that position, that's

correct.

In his closing the prosecutor told you yesterday how he felt — Mr. Agata felt Mr. Percoco still spoke for the governor during 2014, but that vague phrase, that he still spoke for the governor, as you might expect he would as his campaign manager, that just is not enough. It's a question of whether he had authority if you listen to the instructions. So we asked on recross-examination:

And you testified on cross you didn't see him as acting with the authority of executive deputy secretary after he resigned, correct?

That's correct.

So Joe knew how the governor felt and thought and he knew the governor well, and he had an especially strong understanding of what the governor thought about union issues and things like that. That's why Agata called him, and that's what Seth Agata said about him. He's the governor's campaign manager. He knows his positions. And that's knowledge, that's not authorization to act on behalf of New York State.

But what else does the government point to here? Well, they say that Joe was seen in the governor's office. Shocking. The campaign manager of the governor's campaign, a man in constant contact with Candidate Cuomo was seen in the office of Governor Cuomo.

The government also points to a desk phone. They

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couldn't find a person who could come in and testify that Joe had the authority to act on behalf of the state, so they point you to a desk phone, and they say that there were phone calls made from his old office desk

phone in the summer of 2014. And you remember Special Agent Giattino was on the stand, and he testified that he had no knowledge or involvement with the state government, the campaign, or any of the issues or characters in the case. He just looked at phone records, and he counted how many outgoing phone calls were made from Joe's old desk phone during the period that Joe had resigned, and he testified that there were 837 calls made. And that was in Government Exhibit 1701. But as we showed you, only a very small number were very likely made by Mr. Percoco. That is JPX 1702. And that lent some perspective to the so-called evidence of whether Mr. Percoco was acting with the authority of the state when he happened to be in a certain location.

Now, here, the government only called one witness who testified about what happened in Joe's old office that summer, and that witness was Mr. Andrew Ball, who we'll all remember now and forever. Mr. Ball told us that he often — you should pardon the expression — squatted in the office next door to Joe's old office and said that during the campaign he saw many people in that office and, in fact, it was a social gathering place. So those people would use the phone. And he was questioned, transcript 4999:

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There was a phone in that office?

Yes.

People would use it?

Yes.

So the government also points to here, in order to make the point that Joe was acting with authority of

the state and never really left the state, they point to Joe's mortgage application in the summer of 2014. And that's where he told — in a letter he made reference to the fact that he could take a job with government if he wanted it; that he was guaranteed a job if he wanted it. And this evidence was presented to you, and this is SYR 3832. That's something else, right. OK.

But you remember the letter in which Joe says, in order to tell the mortgage company that he has employment going forward, that if the governor were to win the election, he was guaranteed a position in state government, which is true, if he wanted it. I think you could conclude from this record, given his history with the governor and his role in government, if he wanted to return, he was virtually guaranteed that position. Did that mean that at the time that letter was submitted in the summer of 2014 it had been established that he was returning with certainty to the government after the election in November? The answer is no, and I think your common sense tells you that. It's not the same thing as having a job. It's a prediction of what will happen in the future with some

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confidence, and it's certainly not the same thing as having authority to act on behalf of New York State.

The exhibit I just showed you was evidence of the fact that he submitted a signed statement that as of April 18, 2014, I shall resign my duties as executive deputy secretary to the governor, says Joe Percoco. That was an accurate statement. That was what virtually everyone who dealt with him knew and

thought. And no one, with the possible exception of Todd Howe, would tell you that it was their expectation in the summer of 2014 that Mr. Percoco would return to government.

You did hear evidence that people said that it made sense to consult with Joe while he was on the campaign and that they spoke with him to get advice and counsel about campaign matters, about overlapping scheduling issues. You heard Linda Lacewell's testimony that on appointment issues, and things like that, there were transitional matters that had to be discussed. And just because they were discussing state government matters didn't mean that Mr. Percoco was a state government official. He was a former state government official with expertise, knowledge, background that was helpful to those serving. Andrew Ball's testimony was to the same effect. Andrew Kennedy's testimony was to the same effect. Transitional matters, areas that he used to advise on, areas in which he once had authority but no longer did.

Now, finally, the government at the end of the case

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put some emails into evidence, not through witnesses, just put them into evidence, and Mr. Zhou yesterday pointed to an email exchange that Joe had with Joe Rabito during the fall of 2014. And they showed you through another special agent a host of emails with state employees who spoke to Joe about their career and their career paths and their prospective employment during the 2014. He's included Joe Rabito, Dan Brown, Peter Colter. None of whom you

saw or heard from here, but there were emails to this effect.

And these were people Joe knew well. If you read the emails — you can call for them — you can see from context. They had a relationship over time. They had a personal relationship. They were reaching out to Joe for advice and counsel in terms of their career paths, and Joe participated in these conversations with them. But this is not evidence of authority that he is granted on behalf of the state, and if it were, you would have heard from Mr. Rabito, Mr. Brown, Mr. Cutler, but you didn't.

MR. ZHOU: Objection.

THE COURT: Sustained.

MR. BOHRER: Now, Mr. Zhou also pointed to an email saying that Joe had spoken to Mr. Kennedy about Mr. Kennedy potentially leaving state government, as if this showed that Joe still possessed the authority of a state government official. Two problems with this. Number one, when

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Mr. Kennedy was on the stand, the government never showed him this email, and so we have to live with the lack of evidence on that. But when he was actually on the stand, Mr. Kennedy said that it was Larry Schwartz, the governor's secretary, who in fact convinced him to stay, not Joe Percoco. So you can listen to the government's discussion of the emails from people they didn't call, but you also have, under the law as it will be given to you, the ability to focus on the lack of evidence that you heard in this courtroom and make your determination on that basis as well, and we would urge you to do that. Not one

witness told you that Joe Percoco had authority over state or chamber matters during the campaign.

All right. Linda Lacewell told you he had no authority over appointments at this time in her testimony at page 579.

Terri Brennan, you may remember her, the head of chamber administration office, told you that Joe had no authority and could not make decisions over personnel, hiring, or pay salaries during the campaign.

Andrew Ball, who testified to working very closely with Joe in the chamber, told you that Joe had no authority over him during those months either. Now, government tried to get Ball to say that Joe was his boss in 2014, and he had to correct him. He said, Are you talking about when he was on the campaign or off it? Because when he was on the campaign, he

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didn't have that authority.

Now, the government went to the lengths of showing you an exhibit, given that they didn't have testimony that supported the theory that Mr. Percoco had authority from New York State while he was on the campaign. They showed you a photograph. That would be Government Exhibit 1328. It was a while ago, but you may remember. And this was a photograph of a November 26, 2014, meeting, a meeting to prepare for a winter storm in Westchester, I believe. It's a day after the appointments questionnaire that we saw earlier in which Mr. Percoco disclosed the payments he received while he was off the campaign which he designated to COR

Development, but it was before he officially returned to state government in December of 2015.

What the government sought to do here — this was when Andrew Kennedy was on the stand. This is a picture of a state employees' meeting several weeks after the election, as I say. And it shows in the background — you see there are people around the table with placards, indicating their participation in a discussion, and in the background you see Mr. Percoco wearing a jacket with a certain patch on it. And I think you can infer from this photograph that here's an instance where Mr. Percoco is not speaking for the governor. And they suggested, the government did, that this was evidence of Mr. Percoco's authority by eliciting the following testimony:

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Q. To be clear, what type of document is this?

A. It looks like an official photo from the governor's office.

And referring to Mr. Percoco's jacket:

Q. So just on this picture, do you see the blue vest that Mr. Percoco's wearing?

Yes.

Do you recognize the symbol on that jacket?

A. I can't make it out, but it looks like a state symbol.

As if that's evidence of authority, but what did he say in cross-examination? Mr. Percoco was in the midst of transition back into government following the 2014 and the following:

“Q. Mr. Percoco was not a participant in this conversation, was he?”

“A. I don’t recall him participating.”

So in the summer of 2014, when Mr. Percoco is having discussions about doing consulting work for which he is ultimately paid by Todd Howe and for which he discloses the source to have been COR at the suggestion of Todd Howe, Mr. Percoco is accused of selling his office when he had no office to sell, when he wasn’t a public official, when he had no intention of returning to public service where he could do the official actions that he is alleged to have agreed to in

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the spring and summer of 2014. So there’s a huge hole in the evidence here, and the charges that claim that Joe was selling his office during this period of time simply don’t hold water.

So that said, let’s look at the evidence that purportedly supports the claim that Joe exerted pressure on and provided advice to certain state officials with the intent that they reverse this adverse decision by ESD. This was on the labor peace agreement.

Now, it is undisputed that in July of 2014 ESD legal reached a preliminary conclusion that an LPA was required if COR used state funds for the Inner Harbor parking lot. That’s Government Exhibit 549. We’ve been through these emails before, and we were through them most recently when we, we the defense which doesn’t have a burden of proof, called Maria Cassidy, deputy legal counsel, to the stand to testify about these matters. And you see here that in July of 2014, ESD had reached a preliminary conclusion that

an LPA was required, and Ms. Cassidy's testimony reflected as much.

You told us that you said your initial opinion was that an LPA was required, is that correct?

A. Yes.

At that time ESD legal advised COR that it should begin negotiations with the labor unions. You saw that in Government Exhibit 531 where Maria Cassidy said this means that the developer needs to contact a local, local union, and

* * *

as to any defendant on any count should not control your decision as to any other defendant in any other count.

As I have instructed you throughout the trial, the indictment alleges two separate schemes: one involving Competitive Power Ventures, or CPV, and one involving COR Development. Mr. Percoco is charged in both schemes. Mr. Kelly is charged only in the alleged CPV scheme, and Mssrs. Aiello and Gerardi are charged only in the alleged COR Development scheme.

Remember that some of the evidence in this case was admitted solely to prove the CPV scheme, and some of the evidence was admitted solely to prove the COR Development scheme. Other evidence was admitted to prove both schemes. The evidence that was admitted solely to prove the COR Development scheme may not be considered against Mr. Kelly, and the evidence that was admitted solely to prove the CPV scheme may not be considered against Mssrs. Aiello and Gerardi.

It is Mr. Percoco's theory of defense that he acted at all times in good faith. With respect to the alleged CPV scheme, Mr. Percoco asserts that the job and wages that CPV gave to Lisa Percoco were given solely to cultivate good will and to nurture a relationship with him and were not part of a quid pro quo for any official action he might take. Mr. Percoco's theory is that none of his conduct relative to CPV amounted to official action.

With respect to the alleged COR Development scheme, it is Mr. Percoco's theory of the defense that he was not a state official, an agent of the government of the state of New York, or a person with any intent to return to state employment when he received payments from COR Development. His further theory is that the payments from COR Development were neither a reward for official action nor part of a quid pro quo for official action.

It is Mr. Kelly's theory of the defense that he acted in good faith at all times. With respect to hiring Lisa Percoco, Mr. Kelly's theory of defense is that he hired her because he wanted to develop CPV Educates and as a favor to his friend, Mr. Percoco, and that Mr. Kelly had approval to do so from New York State and from CPV. Mr. Kelly's theory of defense is that the hiring was not part of a quid pro quo arrangement, that he never sought any official action from Mr. Percoco in exchange for the hiring of his wife, and that he did not understand Mr. Percoco to have the ability to take official action that would benefit CPV.

Mssrs. Aiello and Gerardi's defense is that they hired Mr. Howe as a government relations consultant who would advocate on their behalf to New York State government officials and who would develop business opportunities. Their theory of defense is also that they did not hire or pay Mr. Percoco.

Remember, although the defendants have argued these

theories as defenses, they have no burden to prove anything. The burden of proof always remains with the government.

As I indicated, the order of the counts in the indictment is not important. To that end, my instructions will start with Count Two, and then I will back up to Count One. In Count Two, the government charges Mr. Percoco with extortion under color of official right in connection with the CPV scheme.

As commonly used, the term "extortion" means coercing someone to give up property as the result of threats of force or violence. Extortion under color of official right is a little different. Extortion under color of official right occurs when a person uses his position as a public official to obtain property from another that is not legitimately due to him.

To sustain its burden of proof on Count Two, the government must prove beyond a reasonable doubt:

First, that Mr. Percoco was a public official;

Second, that Mr. Percoco obtained property not legitimately due to him as a public official;

Third, that the property was voluntarily given to Mr. Percoco because of Mr. Percoco's position, that Mr. Percoco knew the property was given because of his official position, and that the property was given as part of a quid pro quo; and

Fourth, that interstate commerce or an item moving in

interstate commerce was delayed, obstructed, or affected in some way or degree.

The first element is that Mr. Percoco was a public official at the time of the offense. The term "public official" means a person who holds an official position within the government. It includes government employees who are neither elected nor appointed, such as assistants, aides or advisers to elected officials.

The second element is that Mr. Percoco obtained property that was not legitimately owed to the public office that he occupied. The term "property" includes money and tangible and intangible things of value that are capable of being transferred or given from one person to another.

The government does not have to prove that the property was given to Mr. Percoco directly or that the property personally benefited Mr. Percoco. It is sufficient for this element that Mr. Percoco obtained the property for himself or for a third party.

The third element is that Mr. Percoco used the authority of his official office to obtain the property and that the property was given at least in part because of Mr. Percoco's official position.

This element requires the existence of a quid pro quo. Quid pro quo is Latin and it means "this for that" or "these for those." To prove a quid pro quo, the government must prove

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that Mr. Percoco obtained the property to which he was not entitled by his public office, knowing that it was given in exchange official acts as the opportunities arose. The government must also prove that the party giving the property was motivated, at least in part, by the expectation that, as a result of the

payment, Mr. Percoco would, as opportunities arose, perform official acts for the benefit of that party and that Mr. Percoco was aware of that party's motivation.

The government does not need to prove that Mr. Percoco could or actually did perform any official act on behalf of the extorted party or that, but for the payment, the state would have made a different decision or taken different action on a particular issue.

It is not necessary that the quid pro quo be stated expressly or explicitly. A quid pro quo can be implied from words and actions, so long as you find, beyond a reasonable doubt, that Mr. Percoco intended there to be a quid pro quo; meaning that he understood that property was being given in exchange for the promise or performance of official action. The "in exchange for" requirement is not satisfied simply because a thing of value is followed by an official act. The thing of value must be given to procure the official act. You may, however, consider the fact that an official act followed a payment in determining whether the payment was made in exchange for the official act.

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This element can be satisfied even if the extorted party initiated the payment and even if the extorted party and Mr. Percoco had a friendly relationship. If you find either to be the case, however, each is a factor that you may consider in deciding whether the extorted party was motivated, at least in part, to give property because of a belief that Mr. Percoco would take official action as opportunities arose in exchange for the property, rather than for some other entirely innocent reason.

The government must prove that the promise or performance of official action was at least part of the motivation for the extorted party to give over the property. To that end, if you find that Mr. Percoco understood that the property at issue was given solely to cultivate good will or to nurture a relationship with the person or entity that gave the property, and not in exchange for the promise or performance of official action, then this element will not have been proven.

I have mentioned several times that this count involves payments in exchange for official action. The natural question then arises, what is official action? An official act or official action is a decision or action on a specific matter that may be pending or may by law be brought before a public official.

An official act must involve a decision, an action, or an agreement to make a decision or to take action. The

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decision or action may include using one's official position to exert pressure on or to order another to perform an official act. It may also include using one's official position to provide advice to another, knowing or intending that such advice will form the basis for an official act by another.

The decision or action must be made on a question or matter that involves a formal exercise of governmental power. That means that the question or matter must be specific, focused, and concrete; for example, the kind of thing you could put on an agenda and then check off as complete. It must be something that may by law be brought before a public official and may, at some time, be pending before a public official.

Excuse me, or may, at some time, be pending before a public official.

In order to be official act, the decision or action must be more than just setting up a meeting, consulting with an individual, organizing an event, or expressing support for an idea. Without more, those activities do not constitute official action. That is not to say that sort of activity is not relevant. Such activity may be evidence of an agreement to take official action or of using one's official position to exert pressure on or to order another to take official action. Such activity could also be evidence of an agreement to provide advice to another, knowing or intending that such advice will form the basis for an official act by someone else. Standing

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alone, however, setting up a meeting, consulting with an individual, organizing an event, or exercising support for an idea does not constitute official action.

You will hear the term "official act" or "official action" throughout my instruction in Counts One through Eight. This definition applies in each of those counts.

The fourth element of Count Two is that Mr. Percoco's actions affected or could affect interstate commerce in some way or degree. For this element, you must determine whether there was an actual or potential effect on commerce between any two or more states or between the state and the District of Columbia. "Commerce between two or more states" just means that items are bought and sold by entities located in different states.

It is not necessary for the government to prove that commerce actually was affected by Mr. Percoco's conduct or that Mr. Percoco intended or anticipated that his actions would affect interstate commerce. It is sufficient for you to find that Mr. Percoco's conduct possibly or potentially could have affected interstate commerce. The government only needs to prove a very slight or subtle actual or potential effect on interstate commerce.

This element is also proven if the natural consequence of Mr. Percoco's actions was an actual or potential effect on interstate commerce.

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If you find that all of the required elements for extortion under color of right have been proven beyond a reasonable doubt with respect to the CPV scheme, then you must find Mr. Percoco guilty of Count Two. On the other hand, if you find that any element has not been proven, then you must find Mr. Percoco not guilty of this charge.

Now let's go back to Count One, which charges Mr. Percoco with conspiracy to commit extortion under color of official right. In order to sustain its burden of proof on this charge, the government must prove the following two elements beyond a reasonable doubt:

First, that the charged conspiracy existed; and

Second, that Mr. Percoco knowingly and intentionally became a member of the conspiracy with the intent to accomplish its unlawful purpose.

The first element is the existence of a conspiracy, the goal of which was to commit extortion under color

of official right. This element has two parts: an agreement and an illegal goal.

Starting with the first part of element one. A conspiracy is just an agreement. To meet its burden of proof on this element, the government must prove that there was an agreement between two or more people to engage in extortion under color of official right.

The government is not required to prove that two or

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more people sat around a table and entered into a solemn pact, orally or in writing, stating that they had formed a conspiracy to violate the law and spelling out who would do what in order to carry out the unlawful project. It is enough if two or more people, in some way or manner, expressly, impliedly, or tacitly came to an understanding to violate the law.

The second part of element one is an illegal goal. The government alleges that the goal of this conspiracy was to commit extortion under color of official right by obtaining property from CPV and COR Development. I instructed you on the elements of extortion under color of official right in connection with Count Two, and those instructions apply to this part of element one. Because Count One charges a conspiracy, the government does not have to prove that anyone actually committed extortion under color of official right. It need only prove that there was an agreement to do so.

If you conclude that the government has established that the charged conspiracy existed, then you must consider whether the government has proven that Mr. Percoco knowingly and intentionally

joined the conspiracy with an awareness of the generally unlawful nature of the conspiracy.

An act is done knowingly and intentionally if it is done deliberately and purposefully, rather than the product of mistake, accident, mere negligence, or some other innocent reason.

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It is not necessary that Mr. Percoco was fully informed of all of the details of the conspiracy or knew all of its participants. He need only have known one other member of the conspiracy and one of its unlawful goals. He could have joined the conspiracy at any time and need not have received any benefit in return.

I want to caution you, however, that mere association or friendship with a conspirator does not make that person a member of the conspiracy, even if he knows that the conspiracy exists. In other words, knowledge and association are not enough. Rather, to satisfy this element, you must find that Mr. Percoco intentionally participated in the conspiracy with the purpose of helping to achieve the unlawful goal.

If you find that all of the required elements of conspiracy to commit extortion under color of official right have been proven beyond a reasonable doubt, then you must find Mr. Percoco guilty on Count One. On the other hand, if you find that any element has not been proven, then you must find Mr. Percoco not guilty of Count One.

If you find Mr. Percoco guilty on Count One, you must specify on your verdict form whether you found that the illegal goal of the conspiracy was to commit extortion under color of official right by obtaining

payments from CPV, COR Development, or both. You may find Mr. Percoco guilty based on either goal or both goals, but you must be unanimous as to at least one

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goal.

Counts Three and Four charge conspiracy to commit honest services wire fraud. Count Three charges Mssrs. Percoco and Kelly with conspiracy relative to the alleged CPV scheme. Count Four charges Mssrs. Percoco, Aiello, and Gerardi with conspiracy relative to the alleged COR Development scheme.

As to Counts Three and Four, the government must prove beyond a reasonable doubt as to each alleged conspiracy:

First, that the charged conspiracy existed; and

Second, that the defendant knowingly and intentionally became a member of the conspiracy with the intent to accomplish its unlawful purpose.

I have just charged you on these elements in connection with Count One, and those instructions apply here as well. The difference between Count One and Counts Three and Four is the goal of the conspiracy. As to Counts Three and Four, the government charges that the goal of the conspiracy was to commit honest services wire fraud.

Honest services wire fraud involves a scheme to defraud the public of its right to a person's honest services. It has four elements:

First, the existence of a scheme to defraud the state of New York and its citizens of their intangible right to Mr. Percoco's honest services;

Second, that the defendant knowingly and willfully

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participated in the scheme to defraud with knowledge of its fraudulent nature and with a specific intent to defraud;

Third, that the scheme involved the payment or receipt of bribes; and

Fourth, that interstate wire communications were used in furtherance of the scheme to defraud.

The first element of honest services wire fraud is a scheme or artifice to defraud the state of New York and its citizens of their intangible right to Mr. Percoco's honest services. This element has two parts: First, that Mr. Percoco owed the public a right to his honest services; and, second, the existence of a scheme to defraud the public of those honest services.

As to the first part of this element, honest services are the duties that a person owes to the public because of a special trust that the public has reposed in the person. When a person obtains a payment in exchange for official action, that person has breached his duty of honest service. That's because, although the person is outwardly purporting to be exercising independent judgment on behalf of the public, in fact, the person's actions have been paid for. Thus, the public is not receiving what it expects and what it is entitled to, namely, its right to the person's honest and faithful services.

While Mr. Percoco was employed by the state, he owed

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the public a duty of honest services by virtue of his official position. A person does not need to have a formal employment relationship with the state in order to owe a duty of public — in order to owe a duty of honest services to the public, however. You may find that Mr. Percoco owed the public a duty of honest services when he was not a state employee if you find that at the time he owed the public a fiduciary duty. To determine whether Mr. Percoco owed the public a fiduciary duty when he was not employed by the state, you must determine, first, whether he dominated and controlled any governmental business and, second, whether people working in the government actually relied on him because of a special relationship he had with the government. Both factors must be present for you to find that he owed the public a fiduciary duty. Mere influence and participation in the processes of government standing alone are not enough to impose a fiduciary duty. Whether Mr. Percoco owed the public a fiduciary duty, and thus a duty of honest services, when he was not a public employee is a question of fact for you to determine. As noted before, however, as a matter of law, he owed the public a duty of honest services while he was employed by the state.

Turning to the second part of this element, a scheme or artifice is simply a plan to accomplish some goal. For ease of reference, I'm just going to use the term "scheme."

A scheme to defraud is a scheme that makes false

representations regarding material facts if the falsity is reasonably calculated to deceive persons of average prudence. A representation is false if it is untrue when made and was known at the time to be untrue by the person making the representation or causing it to be made. A fact is material if the fact is one that would reasonably be expected to be of concern to a reasonable and prudent person in making a decision. Deceitful statements of half-truth or the concealment of material facts may also constitute false representations under the law.

It is not necessary for the government to prove that the state of New York or its citizens actually suffered any pecuniary loss from the scheme. And it is not necessary for the government to prove that the defendants realized any gain from it. It is sufficient for the government to prove that the state of New York and its citizens did not receive the honest and faithful services of Mr. Percoco.

The second element of honest services wire fraud is that the defendant participated in the scheme to defraud knowingly, willfully, and with a specific intent to defraud the state of New York and its citizens of their intangible right to Mr. Percoco's honest services.

As I have previously instructed you, "knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently. "Willfully" means to act purposely, with an

intent to do something the law forbids, that is, with a bad purpose either to disobey or to disregard the law.