No. 21-1170

In the
Supreme Court of the United States

LOUIS CIMINELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR RESPONDENT ALAIN KALOYEROS IN SUPPORT OF PETITIONER

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INTRODUCTION

This case was charged and tried on a single theory: the Second Circuit's right-to-control theory of wire fraud. That was the theory on which the government defended the convictions and the court of appeals affirmed. It is the theory on which this Court granted certiorari.

Four years after the convictions, the government now concedes the right-to-control theory of wire fraud "is incorrect." Br. for U.S. ("GB") 24. The government admits that if "the right to make informed decisions about the disposition of one's assets, without more, were treated as "'property' giving rise to wire fraud"—as the Second Circuit held here, Pet. App. 16a-17a—"it would risk expanding the federal fraud statutes beyond property fraud as defined at common law and as Congress would have understood it." GB 25-26.

That is the end of this case. At the close of the government's evidence, the Defendants moved for judgment of acquittal on the ground that the right-to-control theory was invalid. *See* C.A. App. 1377 (Tr. 2015), *id.* at 1392 (Tr. 2078) (reproduced in part, JA 103). The government now concedes that theory is invalid. Without that theory, there was no evidence that the only scheme charged was aimed at property. The Defendants were, and are, entitled to judgment of acquittal.

Rather than confess error, however, the government asks this Court to endorse a new fraudulent-inducement theory of wire fraud that was not charged by the grand jury or argued before the trial jury or court of appeals. Abandoning the idea that

the "right to control assets" is property, GB 24-26, the government says it is going back to "first principles," GB 14, to advance a new and untested theory: that every instance of deceit to induce entry into a transaction where money or traditional property changes hands fits the elements of a "scheme to obtain money or property by means of material misrepresentations." GB 15. The government reduces "intent to defraud" to intent to induce reliance, GB 20 (despite reliance not being an element of criminal fraud, GB 21); and contends its theory reaches even fair-value exchanges, where there is no contemplated economic harm to anyone. *See* GB 17, 23. It does not commit to any firm or meaningful limits on its theory, identifying only a variety of ad hoc factors, including a "context-dependent materiality standard" lifted from a footnote parenthetical in an outlier case (which departs from the well-worn materiality standard this Court established for mail and wire fraud more than twenty years ago). *See* GB 18, 17-18. As for the right-to-control theory, the government re-imagines it as merely a "lens" that may be useful (or not, GB 13, 32), in murky, scantly-explained ways, for "identifying those fraudulent inducements that satisfy the other elements of the fraud statutes—chiefly, materiality." GB 24.

The reply briefs of the Petitioner and Respondents Aiello and Gerardi detail the many problems with the government's new theory. But the first and dispositive problem is that it is not the theory on which Defendants were charged and convicted. The Court may not affirm Defendants' convictions on a theory not charged by the grand jury or presented to the trial jury.

The government's new improvised theory should await consideration in a case where it has been charged, tried, and endorsed by twelve jurors and a court of appeals. Here, where the sole theory on which these Defendants were convicted is concededly invalid, the Defendants are entitled to acquittal.

ARGUMENT

I. The right-to-control theory of wire fraud was the sole theory of conviction

A. This case was charged and tried on the now-disavowed right-to-control theory

The right-to-control theory that the government now concedes "is incorrect," GB 24—namely, that "the right to make informed decisions about the disposition of one's assets" is "'property' giving rise to wire fraud," GB 25, such that "depriving a victim of economically valuable information, without more, ... qualifies as 'obtaining money or property,'" GB 24—was the sole theory under which the Defendants were charged, tried, and convicted.

1. Indictment

The trial indictment, which went to the jury room, charged that the Defendants:

> willfully, and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, would and did transmit and cause to be transmitted by means of wire and radio communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing

> such scheme and artifice, in violation of Title 18, United States Code, Section 1343, ***to wit,*** KALOYEROS, AIELLO, GERARDI, CIMINELLI, and their coconspirators, ***devised a scheme to defraud Fort Schuyler of its right to control its assets,*** and thereby exposed Fort Schuyler to risk of economic harm, by representing to Fort Schuyler that the bidding processes leading to the award of certain significant taxpayer-funded development contracts were fair, open, and competitive, when, in truth and in fact, KALOYEROS and Todd Howe, in collaboration and in concert with AIELLO, GERARDI, and CIMINELLI, used their official positions to secretly tailor the requests for proposals ("RFPs") for those contracts so that companies that were owned, controlled, and managed by AIELLO, GERARDI, and CIMINELLI would be favored to win in the selection process for the contracts, and did transmit and cause to be transmitted interstate email and telephone communications in furtherance of their scheme to defraud.

JA 31-32 (emphasis added).

To state a triable offense, an indictment must go beyond the generic statutory language, and state the facts and circumstances constituting the offense charged. "[F]acts are to be stated; not conclusions of law alone." *United States v. Hess*, 124 U.S. 483, 487-88 (1888). Though "the language of the statute may be used in the general description," it "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense ... with which he is charged." *Id.; accord Russell v. United States*, 369 U.S. 749, 765 (1962).

For a mail (or wire) fraud charge, the "scheme or artifice to defraud must be stated, ... with all such particulars as are essential to constitute the scheme or artifice, and to acquaint [the defendant] with what he must meet on the trial." *Hess*, 124 U.S. at 486. Such notice of the "particular fact[s] with which [the defendant] is charged" is required by the Sixth Amendment's command that the accused "be informed of the nature and cause of the accusation." *United States v. Burr,* 25 Fed. Cas. 55, 170 (C.C. D. Va. 1807).

Here, the only scheme factually specified in the trial indictment (in the "to wit" clause of each charging paragraph[1]), is the scheme "to defraud Fort Schuyler of its right to control its assets." JA 31-32 (Count One, Wire Fraud Conspiracy); *see also* JA 33, 34 (Counts Two and Three, Wire Fraud) (to same effect).

This was not an accident. In August 2017, in response to motions to dismiss arguing the charged scheme did not have property as its object[2] and to the grant of Rule 29 acquittal in a closely-watched case in New York,[3] the government obtained a second

[1] "'To wit' is an expression of limitation which ... makes what follows an essential part of the charged offense." *United States v. Willoughby*, 27 F.3d 263, 266 (7th Cir. 1994); *see Eaton v. Tulsa*, 415 U.S. 699 (1974) (limiting defendant's charged conduct to that contained in the "to wit" clause of the information); *United States v. Chambers*, 408 F.3d 237, 240-41, 246 (5th Cir. 2005) (same).

[2] *See* Dkt. 177 at 11-20; Dkt. 220 at 11-43.

[3] In *United States v. Davis*, No. 13-cr-923 (LAP), 2017 WL 3328240 (S.D.N.Y. Aug. 3, 2017), Judge Preska granted Rule 29

(Continued …)

superseding indictment (the "S2 Indictment") that jettisoned earlier allegations that the contracts were the property at issue,[4] replacing them with the single, express charge (quoted above) that the object of the scheme to defraud was Fort Schuyler's right to control its assets. C.A. App. 276, 295 ¶ 39 (Count One, Wire Fraud Conspiracy); *see also id.* at 296-97 ¶ 41; *id.*at 299 ¶ 45 (Counts Two and Four, Wire Fraud) (to same effect).[5]

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acquittals in a prosecution charging fraud regarding Minority- and Women-Owned Business Enterprise certifications in the construction of One World Trade Center. The court rejected wire fraud charges based on those certifications because the trial evidence showed the misrepresentations were "collateral" to the "essential elements of the bargain," which were the nature and quality of the building construction. *Id.* at 15-17. Because there was no dispute that the Port Authority "received exactly what it paid for," the court ruled there was no fraud. *Id.* at *9, 15-17, 35. The government withdrew its appeal. *United States v. Davis*, No. 17-3190, 2017 WL 6803303 (2d. Cir. Dec. 7, 2017).

Of interest to the government in August 2017, *Davis* ruled that the government's reliance on the right-to-control theory was a constructive amendment of the indictment, because the *Davis* indictment did not charge right-to-control fraud. 2017 WL 3328240, at *31-33.

[4] *See* Dkt. 1 ¶¶ 12, 67, 74 (Complaint); Dkt. 49 ¶¶ 37, 39, 43 (original indictment); Dkt. 162 ¶¶ 39, 41, 44 (first superseding indictment).

[5] At the time of the S2 Indictment, the Percoco and Ciminelli cases had not yet been severed. The trial indictment here (JA 23, Dkt. 780-1, quoted above) consisted of the re-numbered S2 charges that remained against Kaloyeros, Aiello, Gerardi, and Ciminelli by the time they were tried.

2. Order sustaining the indictment

The government obtained the S2 Indictment while Defendants' motions to dismiss the wire fraud charges were still pending. After supplemental briefing, the district court denied those motions, solely on the basis of the "right to control" theory charged in the S2 Indictment. *See* Dkt. 390 at 11-16, *United States v. Percoco*, No. 16-CR-776 (VEC), 2017 WL 6314146, at *6-8 (S.D.N.Y. Dec. 11, 2017).

The court ruled the S2 Indictment "sufficiently alleges money or property as an object of the scheme," because it charged "a scheme to defraud Fort Schuyler of its right to control its assets," and "[t]he 'right to control' theory is well-established in the Second Circuit." *Id.* at 14, 2017 WL 6314146, at *8. It found materiality sufficiently alleged "in the context of right to control," because taking the indictment's allegations as true, "a reasonable juror could determine that the Defendants' misrepresentations deprived Fort Schuyler of material, economically-valuable information." *Id.* at 15, 2017 WL 6314146, at *8.

3. Government letters confirming the theory of prosecution

a. In a letter submitted shortly after the S2 Indictment was filed, while Defendants' motions to dismiss were pending, the government confirmed that it obtained the S2 Indictment to "ma[k]e explicit what had formerly been implicit" in earlier charging documents—"namely, that the defendants defrauded Fort Schuyler of its right to control its assets." Dkt. 336 at 2 (detailing changes in charges).

b. In a pretrial letter opposing defense motions in limine, the government again explained:

> It is clear from the S2 Indictment and the Court's order [denying Defendants' motions to dismiss, Dkt. 390] that the *property interest at issue was Fort Schuyler's right to control its own assets*. That right was taken away from the corporation by the defendants, who made misrepresentations and omissions that deprived Fort Schuyler of material information that would have affected its decision-making.

Dkt. 663 at 25 (C.A. App. 845) (emphasis added).

c. After the court asked the government at the pretrial conference to further clarify its wire fraud theory, the government submitted another letter confirming:

> [T]he Government expects to prove at trial that defendant Alain Kaloyeros steered large, State-funded contracts to his co-conspirators' companies by falsely representing to [Fort Schuyler] that those companies were selected by a competitive [RFP] process.... In doing so, ... Kaloyeros, and his co-conspirators, deprived Fort Schuyler of potentially valuable economic information—that is, information that was relevant to Fort Schuyler's economic decision-making.
>
> ....
>
> [I]t has long been the law of this circuit that the question is not whether the misrepresentation in fact resulted in a higher price or lower quality, but whether the misrepresentation deprived the victim of information necessary to

> determine for itself whether to make an economic decision....

C.A. App. 849, 851-52 (surveying Second Circuit right-to-control cases).

4. Arguments and rulings limiting the scope of the defense

The Defendants sought to put on, in their defense, evidence showing that Fort Schuyler suffered no tangible economic loss, because the developers fully performed the contracts, delivering high-quality buildings, on time and at a reasonable cost. *See* Pet. App. 33a; C.A. App. 997 (Tr. 124); *id.*at 878-83 (offer of proof). The Defendants sought to admit this evidence for a number of related purposes:

- to rebut that there was any scheme to deprive Fort Schuyler of money or property, JA 46 (Tr. 132);
- to show lack of intent to defraud, JA 60 (Tr. 809); C.A. App. 998 (Tr. 127); *id.* at 999 (Tr. 132-33); *id.* at 1002 (Tr. 145); C.A. App. 1128 (Tr. 799-801); C.A. App. 1131 (Tr. 811);
- to show good faith, C.A. App. 1131 (Tr. 811);
- to defend under Second Circuit right-to-control cases which stated that where the putative victim received the full benefit of its bargain, there was no wire fraud, C.A. App. 997-98, 1000;
- to rebut other developers' testimony about potentially lower fees, by showing LPCiminelli's and COR's fees here were reasonable, C.A. App. 1001-02; and

- to meet the anticipated prosecution argument that the Defendants had lied to obtain hundreds of millions of dollars in taxpayer money, by showing what the taxpayers had received for that money, JA 46 (Tr. 143); C.A. App. 1128 (Tr. 801-02).

The trial court, on the government's motion, excluded all such evidence. Pet. App. 33a. The government claimed, and the trial court ruled, that although such evidence might be relevant in a "garden-variety" fraud case, it had no relevance in a "right to control" case, where the only question was whether the Defendants' misrepresentations deprived a victim of "potentially valuable economic information" that the victim would have found valuable in making an informed economic decision.[6]

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[6] The government told the trial court: "[This is] a right to control case. Frankly, it's not relevant whether any particular person at LPCiminelli or COR did a good or bad job. That's not what this case is about.... I can be clear this is a case based on a right to control, not a garden variety." C.A. App. 1130 (Tr. 808).

The trial court ruled: "It's not relevant" whether the building was built at high quality and for a fair price. JA 44; *accord* JA 46 (Tr. 132). Instead, the government had to prove only intent to "deprive [Fort Schuyler] of information ... that was potentially valuable economic information." JA 45 (Tr. 124); *accord* C.A. App. 1436 (Tr. 2344-45) (charge conference). "[I]t is not necessary that a defendant intend that his misrepresentation actually inflict a financial loss.... It suffices that a defendant intend that his misrepresentations induce a counter-party to enter a transaction without the relevant facts necessary to make an informed economic decision." C.A. 997 (Tr. 126) (quoting *United States v. Binday*, 884 F.3d 558, 579 (2d Cir. 2015)); *see also* C.A. App. 1258 (Tr. 1356) (Court: "This is a

(Continued ...)

5. Jury instructions

The court instructed the jury that "property" under the wire fraud statute

> includes intangible interests such as the right to control the use of one's assets. The victim's right to control the use of its assets is injured when it is deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets. In this context, 'potentially valuable economic information' is information that affects the victim's assessment of the benefits or burdens of a transaction, or relates to the quality of goods or services received or the economic risks of the transaction.

JA 41.

6. Summation

In summation, the prosecution argued right-to-control to the jury:

> What you'll hear [in the judge's instructions] is that the fraud in this case has to be designed to deprive Fort Schuyler of potentially valuable economic information. That's another way of saying that you commit this crime, this kind of fraud, when the misrepresentation, the lie, is about something that the victim ... would consider valuable when deciding how to spend its money.

C.A. App. 1471 (Tr. 2513).

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right-to-control case.... [T]he issue is ... did the fraud scheme ... interfere with Fort Schuyler's ability to spend its money.").

Most of the prosecutor's argument about the scheme to defraud here concerned reasons that the misrepresentations were "about potentially valuable economic information[,] [s]omething Fort Schuyler or a victim would want to know when spending millions of dollars." C.A. App. 1472 (Tr. 2514-15).[7]

7. Appeal

In the court of appeals, the government defended the convictions exclusively on right-to-control grounds, arguing the same "informed economic decision" and "potentially valuable economic information" grounds set out in the Second Circuit's opinion (Pet. App. 16a-17a). *See* Br. for U.S., No. 18-2990(L) below, at 118-24, 157-63.

Defending the jury instructions, it further emphasized: "the right to control assets—that is, to transact without being denied potentially valuable information—*is* the property of which the defendants defrauded the victim." *Id.* at 162. This is precisely the theory the government now admits is "incorrect," GB 24, and "beyond property fraud as defined at common law and as Congress would have understood it." GB 26.

[7] *See id.* (Tr. 2515) (arguing "you know that the misrepresentation about a competitive process went to potentially valuable economic information); *id.* (Tr. 2517) ("I'll remind you of one more thing that goes to why this is economically valuable."); *id.* at 1473 ("That's another reason that the misrepresentation here was economically significant for Fort Schuyler and why it would have mattered to them. It would have mattered to anyone to know there was no competition and that it was rigged.").

The Second Circuit likewise affirmed based solely on its right-to-control theory. *See* Pet. App. 16a-17a. Though here the government characterizes these passages as simply "language in the court's opinion[]" that "might suggest," "incorrect[ly]," that "depriving a victim of economically valuable information, without more," qualifies as "money or property," GB 24, the Second Circuit stated plainly that this theory was "well-established in Circuit precedent." Pet. App. 4a n.2.

In its brief to the Second Circuit, the government agreed that the theory, based on deprivation of "potentially valuable economic information relevant to the victim's economic decision-making," was "firmly established beyond dispute." Br. for U.S., No. 18-2990(L) below, at 123-24.

* * *

Far from an inconsistent articulation or a mere suggestion in stray language, GB 24, the right-to-control theory of wire fraud was the exclusive theory of prosecution, represents the established law of the Second Circuit, and is the sole issue over which this Court granted review. That theory is, as the government now admits, "incorrect." *Id.*

B. The government's new fraudulent-inducement theory was not charged, tried, or accepted by the jury here

Having abandoned the right-to-control theory on which this case was tried, affirmed, and on which this Court granted certiorari, the government now asks the Court to affirm on an entirely rewritten theory. Syllogizing from scratch, the government theorizes that:

(1) the consideration provided in any transaction is traditional money or property, GB 14, 15, 24;

(2) any scheme to deceitfully induce entry into any transaction is therefore a "'scheme ... for obtaining money or property by means of' material misrepresentations," GB 11, 15, 16, 26;

(3) "intent to defraud" means only intent to induce reliance (*i.e.*, to induce entry into the transaction), GB 20; and

(4) this theory must be "appropriately limited," GB 23, 25, but the government is vague and noncommittal about how (perhaps "chiefly" through the "materiality" requirement, GB 24).

The government argues all of this is true even if the consideration paid is for fair value received, involving neither contemplated nor actual financial harm. GB 17, 21, 23.

This is a stunning change of position. The government tries to justify it by claiming the Second Circuit's right-to-control jurisprudence has "not always been consistent," GB 14, 24, necessitating a resort to "first principles" (GB 14) rather than a defense of the Second Circuit's statement of its own law (Pet. App. 16a-17a). The government tries to shrug off the opinion under review (along with the many others the government invoked below, *see*, e.g., C. A. App. 849-51) as simply "language ... that is incorrect." GB 24. That is not what the government

told the Second Circuit,[8] and it is not what the district court[9] and the Second Circuit[10] ruled.

The government's new theory is not the theory that was charged and tried here. To dispose of the judgments against these Defendants, that is all that matters.

1. The indictment did not charge a "scheme for obtaining money or property"

The indictment on which Defendants were tried charged only a "scheme to defraud Fort Schuyler of its right to control its assets." JA 31-32, 33, 34; *see* Sec. I.A.1, *supra*. The "scheme to obtain money or property" by fraudulent inducement posited by the government (GB 15) nowhere appears. See JA 31-34; *see also supra* at 4-5 (explaining that language quoting the statute does not state an offense; it is the

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[8] *See* Br. for U.S., 18-2990(L) below, at 123-24 ("[T]he rule that a defendant defrauds a victim of its right to control its assets where the defendant deprives the victim of potentially valuable economic information relevant to the victim's economic decision-making, regardless of whether financial harm materi-alizes, is firmly established beyond dispute.") (quoting more than a page of Second Circuit precedents).

[9] *See* Dkt. 390 at 14, *Percoco*, 2017 WL 6314146, at *8 ("The 'right to control' theory is well-established in the Second Circuit."); C.A. App. 1128-29 (Tr. 802-03) ("When you get to the Supreme Court, they may say, There is no right of control theory, this is cockamamie. But as of right now, the law in the Second Circuit is that this is a viable fraud theory.").

[10] *See* Pet. App. 4a n.2 ("[T]he right-to-control theory of wire fraud is well-established in Circuit precedent.... [W]e need not discuss it further.").

statement of facts and circumstances describing the specific offense charged against the accused that governs).

2. The government insisted its theory was only right-to-control fraud

Instead, the government told the trial court again and again that its prosecution theory was right-to-control fraud, and *only* right-to-control fraud. *See* Secs. I.A.3, I.A.4, *supra*. By doing so, it prevented Defendants from putting on any defense that the contracts were fully performed, at fair and reasonable price, and that Fort Schuyler never lost any money, or was intended to. The government successfully made the trial *only* about whether Fort Schuyler was deprived of information to make an informed economic decision (*see* Sec. I.A.4, *supra*)—the theory it now admits is incorrect. GB 24, 25-26.

This meant specifically that the government did *not* have to show any intent "to rip off Schuyler," or "for Schuyler to lose money on this project." JA 45. The government disclaimed the relevance of whether Fort Schuyler had received the benefit of its bargain, and whether the price was fair:

> THE COURT: ... That's not your theory, is it?
>
> [Gov.]: No, your Honor.

C.A. App. 997 (Tr. 125).

To exclude any evidence of whether Fort Schuyler's bargain had been performed—or whether Defendants had intended for Fort Schuyler to receive anything less fair price and value—the government told the court: "[T]his is a case based on a right to control, *not a garden variety*" fraud case. C.A. App.

1130 (Tr. 808) (emphasis added). The prosecution argued that evidence of bad or good performance "might be relevant in a fraud case if the defendants had represented that they were going to build a building" (*id.*)—the sort of ordinary transaction the government now argues under a fraudulent-inducement theory (GB 24-26). But it continued, "*But that's not this case. As your Honor pointed out, it's a right to control case*." C.A. App. 1130 (Tr. 808) (emphasis added). Meaning, as the trial court observed that everyone understood (*id.*), a case where the sole issue was whether the scheme was to deprive Fort Schuyler of "potentially valuable economic information"—no more and no less. *See* Sec. I.A.4, *supra*.

If the government had charged at trial the theory it tries to substitute now—that the fraud was a traditional fraud to obtain contract revenue—the defense evidence at trial would have been vastly different. Whether there was a "delta between a fair price and the one that was charged," GB 29, would have been a key admissible fact under the government's own theory—a limiting factor ensuring the scheme "meet[s] all of the elements of property fraud," *id.*, rather than an irrelevancy to be kept out at all costs, *see* Sec. I.A.4, *supra*. The evidence would have shown that the projects were "built on time," were "high-quality work," were audited and found to have no inflated costs, and that the developers' fees were commercially reasonable given the demands of the project contracts (C.A. App. 833)—evidence the government fought fiercely to keep out of the right-to-control trial below. *See* Sec. I.A.4, *supra*.

Evidence of whether "defendants contemplated some actual, cognizable harm or injury to their victims," GB 30, also would have been admissible. That would have meant "actual, cognizable harm" to traditional money or property, rather than being defined to mean only deprivation of information, *see* JA 43. Evidence of such intent (or lack thereof) would have been generously admissible, with a low bar for relevance. *See United States v. Litvak*, 808 F.3d 160, 190 (2d Cir. 2015) ("[S]ince good faith may be only inferentially proven, no events or actions which bear even remotely on its probability should be withdrawn from the jury unless the tangential and confusing elements interjected by such evidence clearly outweigh" its relevance.") (citation omitted). That would be a stark contrast to the trial here, where the only intent that mattered was intent to deprive Fort Schuyler of the undisclosed information. *See* JA 43; Sec. I.A.4, *supra.*

II. Defendants are entitled to acquittal

"To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process." *Dunn v. United States*, 442 U.S. 100, 106 (1979); *accord Chiarella v. United States*, 445 U.S. 222, 236 (1980); *McCormick v. United States*, 500 U.S. 257, 270 & n.8 (1991).

The indictment here charged right-to-control fraud. *See* Sec. I.A.1, *supra.* Once specified in the indictment, "the charge must be proved as laid." *United States v. Burr*, 25 Fed. Cas. 55, 170 (C.C. D. Va. 1807). The defendant "can only be convicted on the [scheme] laid in the indictment," and no other. *Id.* at 172. "Might it be otherwise," the specification

of the scheme in the indictment "would be a mischief instead of an advantage to the accused, ... lead[ing] him from the true cause and nature of the accusation, instead of informing him respecting it." *Id.* at 170.

In addition to ensuring fair notice, requiring adherence to the facts charged in the indictment ensures that Defendants may be convicted only on facts found by the grand jury. *Russell*, 369 U.S. at 770, 771 (citing *Stirone v. United States*, 361 U.S. 212, 218 (1960)). It prevents the prosecution from "roam[ing] at large," "shift[ing] its theory of criminality" as necessary in order to rest "the conviction ... on one point and the affirmance ... on another," as the government tries to do here. *Id.* at 766, 768.

Eaton v. Tulsa, 415 U.S. 697 (1974), is instructive. There, a defendant in Tulsa municipal court was charged and convicted of "direct contempt" of court. The information charged him with "direct contempt," in violation of a Tulsa ordinance, "by his insolent behavior during open court and in the presence of the [judge], to wit: by using the language 'chicken-sh**' ...." *Id.* at 697. The Oklahoma Court of Criminal Appeals affirmed.

This Court reversed, concluding "[t]his single isolated usage of street vernacular, not directed at the judge or any officer of the court, cannot constitutionally support the conviction," as it did not "constitute an imminent … threat to the administration of justice." *Id.* at 698 (citation omitted). The Court also found that the Oklahoma Court of Criminal Appeals had gone beyond the language charged in the information, and had ruled that the trial record reflected additional "discourteous responses" to

the judge, for which the judge "*could*" have found defendant in contempt. *Id.*

This Court rejected that reasoning, noting "the question is not upon what evidence the trial judge *could* find petitioner guilty but upon what evidence the trial judge *did* find petitioner guilty." *Id.* The written "Judgment and Sentence" reflected that Eaton had been convicted of the offense charged in the information, and the "single charge of 'insolent behavior' specified in the information was 'to wit: by using the language 'chicken-sh**.'" *Id.* at 699. This Court concluded that the "Court of Criminal Appeals thus denied petitioner constitutional due process in sustaining the trial court by treating the conviction as a conviction upon a charge not made." *Id.*

Similarly, in *Stirone*, the defendant was convicted of interfering with interstate commerce through extortion. The indictment charged him with obstructing the movement in commerce of:

> supplies and materials [sand] ... between various points in the United States and the site of [a certain] plant for the manufacture or mixing of ready mixed concrete, and more particularly, from outside the State of Pennsylvania into the State of Pennsylvania.

361 U.S. at 213-14. The trial court, however, allowed evidence regarding not only sand brought into Pennsylvania, but also "interference with steel shipments from [a] steel plant in Pennsylvania into Michigan and Kentucky." *Id.* at 214. The judge instructed the jury that Stirone could be convicted based either on the shipments of sand into Pennsylvania, or on the basis that concrete from the plant was used for con-

structing a mill which would manufacture steel to be shipped out of Pennsylvania. *Id.*

The district court denied Stirone's motion for arrest of judgment, acquittal, or new trial, and the court of appeals affirmed. *Id.* This Court reversed, ruling that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him," because to do so would allow conviction for conduct not charged by the grand jury. *Id.* at 217 (citing *Ex parte Bain*, 121 U.S. 1 (1887)). Because of the trial court's evidentiary rulings and jury instructions, Stirone may have been "convicted on a charge the grand jury never made against him. This was fatal error." *Id.* at 219.

* * *

Here, Defendants' indictment charged only one scheme: a "scheme to defraud Fort Schuyler of the right to control its assets." *See* Sec. I.A.1, *supra*. That was the only theory that could sustain a conviction. *See Stirone*, 361 U.S. at 217; *Eaton*, 415 U.S. at 698; *Burr*, 25 Fed. Cas. at 170. If that theory is invalid, as the government now concedes, the Court may not affirm the convictions on a new theory charged neither by the grand jury nor to the trial jury. *See Dunn*, 442 U.S. at 100; *Chiarella*, 445 U.S. at 236; *McCormick,* 500 U.S. at 270 & n.8; *Stirone*, 361 U.S. at 217.

At the close of the government's evidence, the Defendants moved for judgment of acquittal, contending that the sole theory charged in the indictment was invalid. *See* C.A. App. 1377 (Tr. 2015), 1392 (Tr. 2078) (reproduced in part, JA 103). The government now concedes that theory is invalid. And

without that theory, the evidence was insufficient to prove an essential element: that the scheme charged in the indictment was aimed at obtaining property. *McNally v. United States*, 483 U.S. 350, 358 (1987).

The Defendants thus were, and are, entitled to judgment of acquittal. *See* Fed. R. Crim. P. 29(a) ("After the government closes its evidence ..., 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."); *Burks v. United States*, 437 U.S. 1, 11 n.5 (1978) (citing Rule 29); *Jackson v. Virginia*, 443 U.S. 307, 314-19 (1979).

The judgment of acquittal is mandatory. *See Jackson*, 443 U.S. at 317 (holding that as a matter of Due Process, the conviction "cannot constitutionally stand"); 2A Charles Alan Wright & Peter Henning, *Fed. Prac. & Proc. (Crim.)* § 462 (4th ed. Apr. 2022 update) (grounding mandate in the rule's text: "the court ... must enter a judgment of acquittal").

"If the District Court had so held in the first instance, as ... it should have done, a judgment of acquittal would have been entered." *Burks*, 437 U.S. at 10-11 (citations omitted).[11] Under *Burks*, it makes "no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient...." *Id.* at 11. Where a reviewing court finds the

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[11] *Accord Willoughby*, 27 F.3d at 267 (where indictment's charge of predicate offense for 18 U.S.C. § 924(c) gun charge read, "to wit: distribution of cocaine," and proof showed only possession with intent to distribute, "Willoughby's motion for a judgment of acquittal should have been granted.").

evidence legally insufficient, "the only 'just' remedy available for that court is the direction of a judgment of acquittal." *Id.* at 18.

So here. Defendants' wire fraud convictions rest on a single theory that the government now concedes is invalid. Defendants moved for judgment of acquittal on that basis at trial, and were entitled to acquittal. It makes no difference that the government's concession comes now, before this Court, rather than at the time in the trial court—Defendants are entitled to the same relief. *See Burks*, 437 U.S. at 11. The "only 'just' remedy ... is the direction of a judgment of acquittal." *Id.* at 18.

Respectfully submitted,

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