

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1604

UNITED STATES OF AMERICA

v.

JAMES DAVIS,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2:15-cr-00138-001)
District Judge: Hon. Wendy Beetlestone

Submitted under Third Circuit L.A.R. 34.1(a)
December 15, 2020

Before: GREENAWAY, JR., SHWARTZ, and FUENTES, Circuit Judges.

(Filed: January 5, 2021)

OPINION*

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

SHWARTZ, Circuit Judge.

James Davis appeals his convictions for honest services wire fraud and conspiracy, arguing that the Government did not prove that Davis's campaign contributions to the Philadelphia Sheriff were part of an "explicit" quid pro quo. He also challenges his sentence, claiming that the Government failed to show exactly how much of his business flowed from his corrupt bargain. Because there was sufficient evidence from which a reasonable jury could find an explicit quid pro quo, we will affirm Davis's convictions. Moreover, because the Government need not prove the exact amount of business Davis received as a result of his bribes, we will also affirm his sentence.

I

Davis owned Reach Communications Specialists, Inc. ("Reach"), an advertising company, and RCS Searchers, Inc. ("RCS"), a title search and deed preparation business. Since 1989, Reach published property foreclosure notices for the Philadelphia Sheriff's Office. RCS conducted title searches and prepared deeds for those properties. This arrangement yielded Davis's businesses millions of dollars.

To secure that business, Davis bribed John Green, the elected Sheriff of Philadelphia, with a stream of benefits, which took the form of non-campaign and campaign contributions. For example, Green told Davis he had found a house that he wanted. Davis then bought and repaired that home, allowed Green to live there rent-free, then sold it to Green at a loss of over \$39,000. In addition, Davis gave Green \$62,000 to purchase his Florida retirement home. For the closing, Davis wired \$258,151.32 directly to the title company. Although Green repaid Davis for the wire transfer, as well as an

additional \$2,100, Green still netted more than \$70,000 in cash from Davis during their relationship. Davis also provided Green and his family other benefits. For example, Davis hired Green’s wife to work at one of his companies, paying her over \$89,000 between 2004 and 2010.

Davis also provided Green campaign benefits. For instance, Green initially did not want to seek re-election in 2007, but Davis and others persuaded him to run. According to Janet Pina, Green’s former chief deputy, Davis encouraged Green to run because Davis wanted to “maintain [his] contracts” with the Sheriff’s Office. J.A. 776. Similarly, Barbara Deeley, Green’s chief deputy after Pina, testified that “Mr. Davis was worried about his company, and, you know, a new sheriff coming in.” J.A. 1237. Harold James, a close friend of Green, also testified that Davis wanted Green to run because “he was doing work for him.” J.A. 2559.

Green told Davis and Deeley that they would have to do “all of the work” for the campaign. J.A. 1239. When Deeley told Davis that she could not handle the work alone, Davis told her not to worry about it and worked on “almost everything” with Deeley. J.A. 1239-40. In fact, when Green needed more money and advertising to fend off a well-funded primary opponent, Davis helped with both. To that end, Reach provided over \$148,000 in unreported campaign advertising services, without charge, and Davis instructed Deeley to falsely report the services on the Campaign Finance Report (“CFR”) as a \$30,000 debt, as well as to record false expenditures on the CFRs, including more than \$12,000 in payments to Reach.

Davis also contributed cash. Throughout the campaign, Deeley kept Green apprised of the finances, and when the campaign needed money, Green told Deeley to “talk to Davis.” J.A. 1278. Davis “always came through.” App. 1272. When the 2007 campaign was running out of money, Deeley approached Davis for help, and he told her not to worry and thereafter deposited \$50,000 into the campaign’s account. This contribution was above the campaign contribution limits, and Davis instructed Deeley not to record the deposit on the CFR. When the campaign needed more than \$12,000 to attend a charity event and purchase a related advertisement, Green again told Deeley to “go talk to Davis.” J.A. 1284-85. Davis again paid the amount but hid the contribution by making the check payable to Deeley and falsely indicating that it was to pay her for a summer home rental. Deeley in turn deposited the check and provided the funds to the campaign from her account. Davis again instructed Deeley not to record the payment on the CFR. Davis also used his daughter to funnel funds to the campaign. Specifically, he directed his daughter to donate \$2,500 to the campaign, the maximum allowable contribution under the 2007 campaign finance limits, and then repaid her.

In exchange for these noncampaign and campaign benefits, Green funneled lucrative Sheriff’s Office business to Davis’s companies. With Green’s approval, from 2002 to 2010, Reach received over \$22 million for Sheriff’s Office advertising work and RCS received over \$12 million for performing real estate services for Sheriff’s Office

sales. This business constituted about ninety percent of Davis's approximately \$1.9 million in net income from 2004 to 2010.¹

Davis sought continued access to the Sheriff's Office when Green considered retiring. Among other things, Davis paid for Harold James and Jewell Williams, a candidate to replace Green, to fly to Florida to meet with him and Green to discuss who would replace Green when he retired. James believed that Davis facilitated the meeting to safeguard his business with the Sheriff's Office upon Green's retirement.

Like Davis, Green tried to conceal their arrangement. Green knew that he was supposed to provide written contracts for professional services to the City Law Department for its review, but he only began to put contracts in writing in 2003, and did so only after a City Controller's audit report criticized his practice of using oral agreements. Even after Green began using written contracts, the contracts with Davis's companies did not include all the services that Davis provided to the Sheriff's Office. Green further sought to conceal his relationship with Davis by failing to disclose the gifts and loans from Davis on his City of Philadelphia Statement of Financial Interest forms.

Following trial, a jury found Davis guilty of conspiracy to commit honest services wire fraud and to obtain property under color of official right in violation of 18 U.S.C.

¹ Davis also influenced who else got Sheriff's Office work. For instance, Andrew Miller owned a company that issued title insurance policies and distributed funds from tax lien and delinquent sales for the Sheriff's Office. Miller sought to obtain the more lucrative mortgage foreclosure work. To get that business, Miller met with Green and Davis. Similarly, Jacqueline Roberts owned a title agency and met with Green and Davis before securing some of her work with the Sheriff's Office.

§ 371 honest services wire fraud in violation of 18 U.S.C. §§ 1343, 1346, 1349; two counts of filing a false tax return in violation of 26 U.S.C. § 7206(1); and three counts of willful failure to file a tax return in violation of 26 U.S.C. § 7203. Based on Davis's Criminal History Category I, and the approximately \$1.7 million in benefits Davis received from the Sheriff's Office in return for the multiple bribes to Green, his total offense level was thirty-four, resulting in a Sentencing Guidelines range of 151 to 188 months. The District Court varied downward and sentenced Davis to 121 months' imprisonment, ordered him to make a \$872,395.83 tax payment, and entered a \$1,718,540 million forfeiture judgment. Davis appeals.

II²

A³

The jury found that Davis committed honest services wire fraud and conspiracy to do so by, among other things, using campaign contributions to bribe Green.⁴ Davis contends that there was insufficient evidence upon which the jury could conclude that an explicit quid pro quo existed. We disagree.

When reviewing a sufficiency of the evidence challenge, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any

² The District Court had subject matter jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

³ We review sufficiency challenges de novo. See United States v. Bruce, 405 F.3d 145, 149 (3d Cir. 2005).

⁴ The jury also heard evidence about non-campaign payments, but Davis only challenges the finding that the campaign contributions constituted illegal quid pro quos.

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis omitted).⁵

Here, the jury found that Davis bribed Green with, among other things, campaign contributions. In a political system based upon private campaign contributions, care must be taken to ensure that a donor is not prosecuted based on only “proof of a campaign donation followed by an act favorable to the donor.” United States v. Siegelman, 640 F.3d 1159, 1170 (11th Cir. 2011). Rather, a campaign contribution becomes an illegal bribe “only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.”⁶ McCormick v. United States, 500 U.S. 257, 273 (1991).⁷

Davis asserts that the words “express” and “explicit” mean the same thing, but he is incorrect. See, e.g., Siegelman, 640 F.3d at 1171 (rejecting argument that explicit in McCormick means express); United States v. Blandford, 33 F.3d 685, 696 (6th Cir. 1994) (observing “that by ‘explicit’ McCormick did not mean ‘express’”); United States v.

⁵ The Government argues that Davis tries to embed a waived challenge to the jury instructions in his sufficiency argument. The District Court instructed the jury that if it relied on campaign contributions to convict Green, “[t]he agreement must be explicit, but there is no requirement that it be express.” App. 5903, 5915. Davis does not challenge the accuracy of the instruction. Furthermore, our review of a sufficiency challenge is based upon the elements of the offense, and not how those elements are described in the instructions. See Musacchio v. United States, 136 S. Ct. 709, 715 (2016).

⁶ The parties do not dispute that Green awarding Davis Sheriff’s Office contracts constitutes an official act.

⁷ No party disputes that McCormick’s reasoning extends to honest services wire fraud, and we will assume that it does. See, e.g., United States v. Ring, 706 F.3d 460, 466 (D.C. Cir. 2013); Siegelman, 640 F.3d at 1170.

Carpenter, 961 F.2d 824, 827 (9th Cir. 1992) (holding that the “explicitness requirement” of McCormick does not require an official to “specifically state[] that he will exchange official action for a contribution”). “Express” refers to something that is “declared in terms; set forth in words . . . and not left to inference.” Blandford, 33 F.3d at 696 n.13 (emphasis omitted) (quoting Express, Black’s Law Dictionary 580 (6th ed. 1990)). “Explicit,” on the other hand, means “[n]ot obscure or ambiguous, having no disguised meaning or reservation. Clear in understanding.” Id. (alteration in original) (emphasis omitted) (quoting Explicit, Black’s Law Dictionary 579 (6th ed. 1990)). Thus, an explicit arrangement need not be “memorialized in a writing” or spoken aloud. Siegelman, 640 F.3d at 1171. “To hold otherwise . . . would allow defendants to escape criminal liability through ‘knowing winks and nods.’” Id. (quoting Evans v. United States, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring)). Indeed, “a quid pro quo with the attendant corrupt motive can be inferred from an ongoing course of conduct,” or “implied from [the parties’] words and actions.” Evans, 504 U.S. at 274 (Kennedy, J., concurring) (italics omitted). Thus, “direct and circumstantial evidence,” including the context of the arrangement, may be used to prove that there was a “clear and unambiguous” promise of official action in exchange for payment. Carpenter, 961 F.2d at 827; cf. United States v. Allen, 10 F.3d 405, 411 (7th Cir. 1993) (“Vague expectations of some future benefit should not be sufficient to make a payment a bribe.”). Therefore, whether based on direct or circumstantial evidence, the “Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.” Evans, 504 U.S. at 268.

Here, there is sufficient evidence from which the jury could have concluded that Davis and Green entered into a corrupt bargain. On one side of that bargain, Davis provided Green with a “stream of benefits.” See United States v. Wright, 665 F.3d 560, 568 (3d Cir. 2012) (“[Bribery] does not require that each quid, or item of value, be linked to a specific quo, or official act. Rather, a bribe may come in the form of a ‘stream of benefits.’” (emphasis omitted) (quoting United States v. Bryant, 655 F.3d 232, 240-41 (3d Cir. 2011))). For instance, during the 2007 campaign, Davis contributed more than \$65,000 in cash and over \$148,000 in free advertising services. These contributions came within the context of a larger stream of benefits that Davis provided to Green, including arranging to provide Green a renovated house at a loss, giving Green significant funds for Green’s retirement home, and supplying cash. Davis provided these benefits in return for an explicit benefit: to receive multi-million-dollar contracts from the Sheriff’s Office. Green had the power to award Sheriff’s Office business and gave Davis over \$35 million of it between 2002 and 2010. Continuity of this business was critical to Davis as a significant amount of his companies’ work came from the Sheriff’s Office, and this flow of steady and lucrative work provided strong motivation for Davis to encourage Green to continue to serve as Sheriff in 2007. Witnesses testified that this was indeed the reason why Davis wanted Green to run and why he had a strong interest in Green’s eventual successor.

The pair also sought to conceal the scope of their relationship, which provides a basis to infer that they understood that they had made a corrupt bargain. Davis’s work for the Sheriff’s Office was based on an oral agreement which was reduced to writing

only after an audit disclosed its existence. Even after the agreements were reduced to writing, they failed to disclose the full scope of the work Davis's companies performed and the fees they received. Similarly, Green did not disclose on his City Financial Interest forms the gifts, loans, and funds Davis provided. Furthermore, Davis ensured that the CFRs failed to disclose or falsely reported the funds he provided to Green's campaign. These acts of concealment provided the jury with a basis to conclude that Davis and Green fully understood that Davis would provide Green with benefits in the form of campaign contributions and Davis would receive millions of dollars in Sheriff's Office work, and that neither wanted their arrangement to be known. See United States v. Terry, 707 F.3d 607, 615 (6th Cir. 2013) ("[T]he government never presented a formal agreement between Russo and Terry stating that Russo's gifts would control Terry's actions. But . . . there was ample evidence for the jury to infer that an agreement nonetheless existed between the two men."). Because there was sufficient evidence upon which the jury could find that an explicit quid pro quo existed, we will affirm its conspiracy and honest services fraud verdicts.⁸

B⁹

⁸ Because the evidence supported the conspiracy and honest services wire fraud convictions, there was no spillover from any allegedly invalid convictions that could have tainted Davis's convictions for tax fraud and failure to pay taxes, and thus we will affirm those as well.

⁹ We review interpretation of the Sentencing Guidelines de novo and factual findings for clear error. United States v. Grier, 475 F.3d 556, 570 (3d Cir. 2007) (en banc).

Davis also challenges the calculation of his Sentencing Guidelines offense level.

When a defendant is convicted of a bribery-related offense, the offense level may be increased based on “the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest.” U.S.S.G. § 2C1.1(b)(2). The ““benefit received’ under § 2C1.1(b)(2) is the net value, minus direct costs, accruing to the entity on whose behalf the defendant paid the bribe.” United States v. Lianidis, 599 F.3d 273, 275 (3d Cir. 2010). Direct costs are those “that can be specifically identified as costs of performing a contract.” Id. at 281 (quoting United States v. Landers, 68 F.3d 882, 884 n.2 (5th Cir. 1995)).

The Probation Office calculated Davis’s “total profit/net income” for the period of 2004 to 2010 based on his reported profit from Reach/RCS and his net income from Reach as determined by the IRS, resulting in a figure of \$1,909,489. It then considered that ninety percent of that business came from contracts with the Sheriff’s Office and found \$1,718,540.10 as the value Davis received. That benefit resulted in a sixteen-level increase in Davis’s offense level. See U.S.S.G. § 2B1.1(b)(1).

Davis argues the District Court erred in calculating his offense level under the Sentencing Guidelines because it considered all the funds from his business with the Sheriff’s Office from 2002 to 2010, rather than determining exactly how much of that business was “in return for” his bribes. According to Davis, at least some of that business resulted from his existing relationship with Green, not the bribes.

“[T]he threshold for establishing a causal connection” under § 2C1.1(b)(2) “is low.” United States v. McNair, 605 F.3d 1152, 1230 (11th Cir. 2010) (collecting cases). “To show that the bribes benefited the people paying them . . . it is enough for the government to show that the bribes facilitated the . . . operations.” United States v. Sapoznik, 161 F.3d 1117, 1119 (7th Cir. 1998).

The bribe scheme facilitated Davis’s businesses. Davis provided Green benefits for years, and, during that time, Davis received millions of dollars of Sheriff’s Office business. Even if Davis’s initial business with the Sheriff’s Office occurred before the bribery scheme took root, the evidence revealed that Green thereafter received a stream of benefits, Davis received more and more business, and the pair sought to conceal their arrangement. When Davis grew concerned that this pipeline for work would dry up if Green were no longer the Sheriff, he actively persuaded Green to run for reelection and provided funds and services to ensure Green was reelected. When Green ultimately decided to retire, Davis sought to play a role in identifying Green’s successor to ensure that he continued to receive Sheriff’s Office business. Thus, the District Court correctly determined that the benefits Davis received were in return for the benefits he gave to Green.

The District Court also assigned a conservative net value to the benefits Davis received. Davis’s companies earned \$35 million from the work performed for the Sheriff’s Office. To assign a value, the Court used the amount received during the year in which Reach received the lowest percentage of its income from the Sheriff’s Office, and considered that ninety percent of Davis’s business came from that Office. This

calculation was tethered to the record and hence was not clear error. See Sapoznik, 161 F.3d at 1118-19 (rejecting argument that “the government failed to show how much of [the bribers’ gambling revenue] was actually due to [the defendant’s] bribe-induced efforts to protect the illegal gambling” as “too speculative an inquiry to force on the sentencing process”). Thus, Davis’s sentencing challenge lacks merit.

III

For these reasons, we will affirm the judgment of conviction.

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- For Publication -

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

v.

JAMES DAVIS

**CRIMINAL ACTION
NO. 15-138-1**

OPINION

After a twenty-five day trial, Defendant James Davis was found guilty of: (i) conspiracy to commit honest services fraud under 18 U.S.C. § 371; and, (ii) honest services fraud under 18 U.S.C. §§ 1343, 1346, and 1349. The Government alleged that he provided a stream of benefits, including campaign contributions and personal payments to the then-Sheriff of Philadelphia, John Green, in exchange for lucrative services contracts from the Philadelphia Sheriff's Office. Davis has moved for acquittal pursuant to Rule 29 of the Federal Rule of Criminal Procedure or, in the alternative, for a new trial pursuant to Rule 33 on both counts. For the reasons set forth below, Davis's motions shall be denied.

I. LEGAL STANDARD UNDER RULE 29¹

“A judgment of acquittal is appropriate under Federal Rule of Criminal Procedure 29 if, after reviewing the record in a light most favorable to the prosecution, we determine that no rational jury could have found proof of guilt beyond a reasonable doubt.” *United States v. Willis*, 844 F.3d 155, 164 n.21 (3d Cir. 2016). “The prosecution may bear this burden entirely through circumstantial evidence.” *United States v. Bobb*, 471 F.3d 491, 494 (3d Cir. 2006). The evidence is reviewed “as a whole, not in isolation. . . .” *United States v. Caraballo-Rodriguez*,

¹ The analysis here and in the following sections principally addresses Davis's sufficiency challenge. A separate section will discuss his Rule 33 motion.

726 F.3d 418, 430 (3d Cir. 2013) (en banc) (quoting *United States v. Boria*, 592 F.3d 476, 480 (3d Cir. 2010)).

II. BACKGROUND

Davis is a Philadelphia businessman who owns Reach Communications Specialists, Inc. (“Reach”) and RCS Searchers, Inc. (“RCS”). Davis’s, co-defendant, John Green, was elected Sheriff of Philadelphia for the first time in 1988 and held the office until his retirement in December 2010. Since at least 2003, Reach was “the advertising agency of record for the Philadelphia Sheriff’s Office,” publishing notices of the Office’s property foreclosure sales in various newspapers. RCS, on the other hand, conducted title searches and prepared deeds for distressed properties that would be sold at the Sheriff’s sales.

i. Stream of Benefits

The crux of the Superseding Indictment was that Davis bribed Green with a “stream of benefits” in exchange for Reach and RCS receiving lucrative Sheriff’s Office contracts, involving substantial and increasing amounts of money, from around 2002 to 2010. Indeed, a forensic investigator who examined Sheriff’s Office financial records found that an “overwhelming percentage of the fees that the Sheriff was paying . . . went to or through RCS and Reach.” At trial, the Government adduced evidence of a “stream of personal benefits” that encompassed a wide range of activity, such as Davis:

- selling Green a newly renovated home at a discounted rate;
- providing Green with free rent and utilities at that home before it was sold;
- retaining Green’s wife as a subcontractor and paying her company \$232,000 over the years;
- providing Green with a \$258,151.21 interest-free loan to purchase a retirement home in Florida;

- making additional payments of at least \$66,000 to Green, some of which was not repaid and none of which had an interest rate or a re-payment schedule; and
- making hidden and indirect payments of at least \$65,100 towards Green's re-election campaigns.

ii. The 2010 Annual Campaign Finance Report Wire Transmission

For the honest services fraud count at issue, the Government asserted that Davis attempted to conceal the extent of his financial support for Green: Specifically, that in early 2011, Davis caused a wire transfer that furthered the bribery scheme – an interstate electronic filing of Green's 2010 Annual Campaign Finance Report that fraudulently understated the actual amount of financial assistance Davis provided during Green's re-election run in 2007.

Evidence adduced at trial showed that although Davis gave Green over \$60,000 in 2007, Davis told a Sheriff's Office employee to underreport that number as \$30,000. That falsified number was carried forward as an outstanding campaign debt in subsequently filed campaign finance reports, including the electronic version of the 2010 Annual Campaign Finance Report.

In her testimony, Barbara Deeley – a management-level employee at the Sheriff's Office who helped with Green's re-election campaign – provided details related to this false Annual Campaign Finance Report.² According to Deeley, when the re-election campaign was low on funds in early May 2007 and Deeley brought it to Green's attention, he replied, "Talk to Davis." After she discussed the matter with Davis, Davis caused \$50,000 to be transferred into the campaign's bank account.³ When Deeley asked Davis about reporting this sum on a handwritten version of the campaign finance reports, Davis told her not to "worry about it" and not to list the

² Deeley served as Chief of Staff, Chief Deputy, and Acting Sheriff at different points in time from 1995 to 2011.

³ The \$50,000 was funded by Davis's nephew, Darnell Lloyd. However, Lloyd himself did not directly contribute the \$50,000 to Green's re-election campaign. Rather, Davis told Lloyd of a real estate investment opportunity that required a \$50,000 payment. Lloyd then made that payment, assuming that it would be used to fund the real estate opportunity. Instead Davis paid it into the campaign.

number on the physical report. Months later, Davis contributed an additional \$12,600 to Green's re-election campaign, and again told Deeley not to report it.⁴ Instead, at Davis's behest, Deeley only recorded \$30,000's worth of unpaid debt to Reach in the handwritten 2007 Annual Campaign Finance Report. In other words, Davis directed Deeley to misstate the amount of financial assistance that he actually provided to Green's re-election campaign on a formal document. Once the false campaign debt was listed on the 2007 Annual Campaign Finance Report it was re-listed on all subsequent reports.

Each of those reports, in turn, had to be submitted electronically to Philadelphia's Board of Ethics – a fact that Davis was aware of, according to Reach employee Yvonne Cornell, who helped prepare the electronic version of the reports. For example, in filing the January 2008 report, Cornell read Deeley's handwritten 2007 Annual Campaign Finance Report then carried over the false \$30,000 debt to Reach into the electronic version of the 2008 report. Although Cornell did not recall electronically filing the 2010 Annual Campaign Finance Report, the parties agree that this form was electronically filed by interstate wire. Because Davis knew that the Board of Ethics required electronic filings, the Government contends that it was reasonably foreseeable that the fraudulent \$30,000 debt that Davis initially told Deeley to write into the 2007 Annual Campaign Finance Report would carry over to the 2010 Annual Campaign Finance Report – the wire transmission supporting Davis's honest services fraud verdict.

Based on the above and other evidence presented at trial, the jury found Davis guilty of conspiracy to commit honest services fraud and substantive honest services fraud.

⁴ According to Deeley, Davis did not directly contribute this amount into the campaign's bank account because "he did not want it to look like he was giving all of that money to the campaign. . ." Instead, Deeley deposited the \$12,600 after Davis wrote her a \$12,600 check for renting her "summer condo." As Deeley testified, she did not rent Davis a summer home, nor did she even own one.

III. RULE 29 DISCUSSION

A. Honest Services Fraud

“To prove wire fraud, the Government must establish ‘(1) the defendant’s knowing and willful participation in a scheme or artifice to defraud, (2) with the specific intent to defraud, and (3) the use of . . . interstate wire communications in furtherance of the scheme.’” *See United States v. Andrews*, 681 F.3d 509, 518 (3d Cir. 2012). The phrase “scheme or artifice to defraud” is defined to include “a scheme or artifice to deprive another of the intangible right of honest services.” 18 U.S.C. § 1346; *Andrews*, 681 F.3d at 518. As interpreted by the Supreme Court, Section 1346 criminalizes only “fraudulent schemes to deprive another of honest services through bribes or kickbacks.” *Id.* (quoting *Skilling v. United States*, 561 U.S. 358, 404 (2010)). Davis mainly advances two grounds in seeking acquittal, arguing that there was insufficient evidence of (i) a bribery scheme; and (ii) a knowing wire transmission in furtherance of that bribery scheme. Neither ground warrants acquittal for his honest services fraud verdict.

i. Bribery Scheme

If, as here, the Government’s theory of bribery is based on a public official’s receipt of campaign contributions, the contributions are illegal “only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.”⁵ *McCormick v. United States*, 500 U.S. 257, 273 (1991). Davis contends that there is insufficient evidence in support of an “explicit” bribery scheme – in legal parlance, a “*quid pro quo*” – with Green, who was a public official at the relevant times of the Superseding Indictment. *See United*

⁵ This Court has already found that *McCormick*’s requirement of an “explicit promise or undertaking” applies to honest services fraud. *See United States v. Davis*, 2018 U.S. Dist. LEXIS 22049, at *15 (E.D. Pa. 2018); *see also United States v. Siegelman*, 640 F.3d 1159, 1170 (11th Cir. 2011) (“While the Supreme Court has not yet considered whether the federal funds bribery, conspiracy or honest services mail fraud statutes require a similar ‘explicit promise,’ the Seventh Circuit Court of Appeals has observed that extortion and bribery are but ‘different sides of the same coin.’” (citing *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993)).

States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404-05 (1999) (“[F]or bribery there must be a *quid quo pro* – a specific intent to give or receive something of value *in exchange* for any official act.”); *United States v. Kemp*, 500 F.3d 257, 281 (3d Cir. 2007) (same).

Although the Supreme Court has not delineated the contours of what an “explicit” promise is and what it is not, Justice Kennedy, in a concurring opinion in *Evans v. United States*, opined that a *quid pro quo* need not be stated in “express terms, for otherwise the law’s effect could be frustrated by knowing winks and nods.” 504 U.S. 255, 274 (1992) (Kennedy, J., concurring). Thus, a *quid pro quo* can be based on inference: “The inducement from the official is criminal if it is express or if it is implied from his words and actions, so long as he intends it to be so and the payor so interprets it.” *Id.* This formulation of a *quid pro quo* for bribery schemes has since been adopted by the Third Circuit. *United States v. Wright*, 665 F.3d 560, 569 (3d Cir. 2012); *see also United States v. Garrido*, 713 F.3d 985, 997 (9th Cir. 2013) (“Section 1346 honest services convictions on a bribery theory . . . require at least an implied *quid pro quo*.”).

Viewed in the light most favorable to the Government, the evidence is sufficient to show that Davis participated in a *quid pro quo* and tried to conceal it through Green’s 2010 Annual Campaign Finance Report. *See id.* (“Parties to a bribery scheme rarely reduce their intent to words, but the law does not require that.”).

1. Benefits to Green

It is settled law in the Third Circuit that bribes may come in the form of a “stream of benefits.” *United States v. Ciavarella*, 716 F.3d 705, 730 (3d Cir. 2013); *Wright*, 665 F.3d at 568 (quoting *United States v. Bryant*, 655 F.3d 232, 240-41 (3d Cir. 2011)); *Kemp*, 500 F.3d at 282. This form of bribery “does not require that each *quid*, or item of value, be linked to a specific *quo*, or official act.” *Ciavarella*, 716 F.3d at 730 (quoting *Wright*, 665 F.3d at 568). In

other words, the Government was not required to peg every benefit that Davis gave to an official act by Green in determining whether Davis participated in a bribery scheme. Given that Davis, among other things, (a) sold Green a newly renovated home at a discounted rate; (b) provided Green with an interest-free loan of over \$250,000 so that he could purchase a retirement home; and (c) gave several loans to Green that have not yet been repaid, a rational juror could conclude that Davis conferred a “stream of benefits” on Green to encourage Green to have the Sheriff’s Office enter into contracts with Reach and RCS – in other words, that Davis bribed Green so that Reach and RCS could keep and grow its business with the Sheriff’s Office.

Davis nevertheless contends that the Government’s stream of benefits theory is inconsistent with *McCormick* insofar as the Government relies on Davis’s campaign contributions for his conviction. As the Third Circuit has cautioned, “[c]ampaign contribution cases present special problems because persons who hope that their interests will receive favorable treatment from elected officials legitimately may make campaign contributions to those officials.” *United States v. Bradley*, 173 F.3d 225, 231 n.1 (3d Cir. 1999) (citing *McCormick*, 500 U.S. at 272-73). Thus, according to Davis, because the Government failed to tether each campaign contribution to an official act by Green, Davis must be acquitted of honest services fraud.

But, even in the context of campaign contributions, the stream of benefits theory of bribery survives *McCormick*. As an initial matter, Davis cites no case law which holds that the stream of benefits theory is at odds with *McCormick*’s requirement of an “explicit promise” made by a public official. Although post-*McCormick* case law in the Third Circuit has not directly addressed whether campaign contributions can be properly regarded as a benefit under a stream of benefits theory, Supreme Court and Third Circuit precedent suggest that it can. In

Evans, for instance, the Supreme Court “permitted a jury to convict a state legislator who attempted to claim the payment he received was a campaign contribution.” *United States v. Terry*, 707 F.3d 607, 613 (6th Cir. 2013) (discussing *Evans*, 504 U.S. at 257-59). And in *Kemp*, the Third Circuit, upholding the validity of a stream of benefits instruction, held that “[w]hile the form and number of gifts may vary, the gifts still constitute a bribe as long as the essential intent . . . exists.” 500 F.3d at 282. Hence, an improper gift can masquerade in the “form” of a campaign contribution. *See id.* It follows, then, that if a single campaign contribution standing by itself can be considered a bribe, it remains a bribe when it is otherwise part of a stream of non-campaign related bribes.

To the extent Davis suggests that the jury mistakenly assumed that his campaign contributions were *ipso facto* a bribe because it was grouped together with other benefits shown at trial, the Court delivered jury instructions dispelling that notion.⁶ And while Davis correctly maintains that he has a First Amendment right to make campaign contributions, that does not, under *McCormick*, give him a concomitant right to use those contributions to acquire lucrative contracts from the Sheriff’s Office.⁷ *See Terry*, 707 F.3d at 614 (“Whatever else *McCormick* may mean, it does not give an elected judge the First Amendment right to sell a case so long as the buyer has not picked out *which* case at the time of sale.”).

What’s more, other circuits have held that campaign contributions can constitute an

⁶ As the Court explained, “with respect to campaign contributions, the solicitation or acceptance by an elected official of a campaign contribution does not, in itself, constitute a federal crime, even if the donor has business pending before the official, and even if the contribution is made shortly before or after the official acts favorable to the donor. Instead, with respect to campaign contributions, the Government must prove that the contributions were offered, made, or accepted in return for an explicit promise or undertaking by the official to perform or not to perform an official act. The agreement must be explicit, but there is no requirement that it be express.”

⁷ For this reason, Davis’s contention that the jury’s guilty verdict must be set aside because it may have been based on an impermissible ground – criminalizing his constitutional right to make campaign contributions – fails as well.

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improper benefit when financial favors to a public official are at issue.⁸ As the Sixth Circuit has explained, “[t]hat a bribe doubles as a campaign contribution does not by itself insulate it from scrutiny.” *Id.* at 613. And, “[t]he agreement between the public official and the person offering the bribe need not spell out which payments control which particular official acts.” *Id.* at 612. Instead, “it is sufficient if the public official understood that he or she was expected to exercise some influence on the payor’s behalf as opportunities arose.” *Id.* (quoting *United States v. Abbey*, 560 F.3d 513, 518 (6th Cir. 2009)); *see also United States v. Ganim*, 510 F.3d 134, 145 (2d Cir. 2007) (holding that benefits to public official need not be “directly linked to a particular act at the time of agreement,” even when defendant argued that the gifts were received as a part of “legitimate lobbying activity”). In a Fifth Circuit case involving two state judges who “argued that the loan guarantees they received were made in the context of their electoral campaigns and thus required special protection,” the court concluded that the payments were bribes. *Terry*, 707 F.3d at 613 (discussing *United States v. Whitfield*, 590 F.3d 325, 353 (5th Cir. 2009)). Indeed, as the Fifth Circuit observed, the “overwhelming weight of authority . . . supports the conclusion that the law does not require” the Government to identify a “particular case” that was influenced by a bribe. *Whitfield*, 590 F.3d at 353.

More to the point, the Ninth Circuit held that the “explicitness requirement” of *McCormick* does not require that a public official “specifically state[] that he will exchange official action for a contribution.” *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992). “To read *McCormick* as imposing such a requirement would allow officials to escape liability . . . with winks and nods, even when the evidence as a whole proves that there has been a meeting of the minds to exchange official action for money.” *Id.*

⁸ In contrast to the Third Circuit, the other circuits do not refer to this theory of bribery as “stream of benefits.”

In sum, the Government presented evidence showing the myriad financial benefits that Davis conferred upon Green in exchange for Reach and RCS's continued business with the Sheriff's Office. For bribery prosecutions, “[courts] rely on the good sense of jurors . . . to distinguish intent from knowledge or recklessness where the direct evidence is necessarily scanty.” *Wright*, 665 F.3d at 569; *Terry*, 707 F.3d at 612 (“As most bribery agreements will be oral and informal, the question is one of inferences taken from what the participants say, mean and do, all matters that juries are fully equipped to assess.”); *see also McDonnell v. United States*, 136 S. Ct. 2355, 2371 (2016) (“It is up to the jury, under the facts of the case, to determine whether the public official agreed to perform an ‘official act’ at the time of the alleged *quid pro quo*.”). At bottom, there was sufficient evidence for a rational juror to find a bribery scheme beyond a reasonable doubt.

2. Green's Official Acts

On the other end, Davis benefitted from Green’s “official acts.” For purposes of bribery, an “official act” is “any decision or action on a ‘question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.’” *McDonnell*, 136 S. Ct. at 2367 (quoting 18 U.S.C. § 201(a)(3)). An official act requires two parts. First, “the Government must identify a ‘question, matter, cause, suit, proceeding or controversy’ that ‘may at any time be pending’ or ‘may by law be brought’ before a public official,” which involves a “formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee.” *Id.* at 2369; *United States v. Fattah*, -- F.3d --, 2018 WL 3764543, at *25 (3d Cir. 2018). Second, “the Government must prove that the public official made a decision or took an action ‘on’ that

question, matter, cause, suit, proceeding, or controversy, or agreed to do so.” *McDonnell*, 136 S. Ct. at 2368; *Fattah*, 2018 WL 3764543, at *25. Green’s official act of awarding contracts to Davis’s companies meets both requirements.

Awarding Davis’s companies lucrative contracts for advertising the Sheriff’s sales was a determination made by a municipal agency.⁹ Supreme Court and Third Circuit precedent confirm this conclusion. *See McDonnell*, 136 S. Ct. at 2374 (holding that an agency’s allocation of grant money by a state commission qualifies as an “official act”); *United States v. Repak*, 852 F.3d 230, 253 (3d Cir. 2017) (holding that a decision by the Johnstown Redevelopment Authority, a governmental agency, to award money to contractors was “undoubtedly” a “formal exercise of governmental power”); *see also United States v. Boyland*, 862 F.3d 279, 291 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 938 (2018) (holding that “City or State approvals” necessary to award demolition contracts “require the formal exercise of governmental power.”); *United States v. Pomrenke*, 198 F. Supp.3d 648, 701 (W.D. Va. 2016) (holding that “[t]he award of a contract by a public entity is ‘a formal exercise of governmental power,’ similar in nature to ‘a lawsuit, hearing, or administrative determination.’”) (quoting *McDonnell*, 136 S. Ct. at 2368).

And awarding these contracts was a matter “pending” before Green in his capacity as a public official. *See McDonnell*, 136 S. Ct. at 2369 (holding that the word “pending” “suggest[s] something that is relatively circumscribed – the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete.”); *Repak*, 852 F.3d at 253 (concluding that the award of contracts by the redevelopment authority is something that is “pending” under

⁹ Though Davis argues that Green’s decision to run for re-election is not an “official act” under *McDonnell*, this misses the mark; the exercise of governmental power, as alleged in the Superseding Indictment and proven at trial, was awarding contracts to Davis’s companies for his advertising services.

McDonnell).¹⁰

Green also made a “decision” on the matter of awarding contracts to Reach and RCS for Sheriff’s sales. *See McDonnell*, 136 S. Ct. at 2368. As two longtime Sheriff’s office employees testified, Green decided the vendors to use for the foreclosure sales, the amount of work they could perform, and the fees they could charge. Indeed, Green’s blessing was needed for all vendors who wished to do business with the Sheriff’s Office. Green exercised that decision-making power by making Reach and RCS the Sheriff’s Office’s “primary vendors” which, as such, received an “overwhelming percentage” of the fees paid out for the Sheriff’s sales.

ii. Knowing Transmission of the Wire Communication

Davis alternatively contends that there is insufficient evidence to show that he “knowingly caused” an interstate wire transmission.¹¹ *See Andrews*, 681 F.3d at 529. Specifically, Davis argues that “the trial record contains no evidence indicating who filed” the 2010 Annual Campaign Finance Report. According to Davis, the Reach employee who completed this report, Cornell, was unable to recall if she had prepared or filed any campaign finance report in 2010.

Honest services fraud based on a wire transmission “does not require that the defendant himself sent the communication or that he intended that interstate wire communications would be used.” *See id.* Instead, it is sufficient if Davis here “knowingly caused” the use of the wire communication. *Id.* (citing *United States v. Bentz*, 21 F.3d 37, 40 (3d Cir. 1994)). If he “does an act with the knowledge” that the use of the wire communication will “follow in the ordinary

¹⁰ In contrast, “matters described at a high level of generality – for example, ‘[e]conomic development,’ ‘justice,’ and ‘national security’ – are not sufficiently ‘focused and concrete.’” *Fattah*, 2018 WL 3764543, at *25 (quoting *McDonnell*, 136 S. Ct. at 2369).

¹¹ The parties stipulated that the wire transmission crossed state lines, going from Texas to Pennsylvania.

course of business, or where such use can reasonably be foreseen, even though not actually intended,” then Davis caused the wire to be used. *See id.* (quoting *Pereira v. United States*, 347 U.S. 1, 8-9 (1954)).

A rational juror could find that Davis’s wire transmission of the 2010 Annual Campaign Finance Report was reasonably foreseeable based on the following pieces of testimony presented during trial:

- Davis directed Deeley to underestimate the amount of actual debt owed to Reach in hard-copy versions of the 2007 Annual Campaign Finance Report;
- Davis asked Cornell, who relied on Deeley’s handwritten 2007 Annual Campaign Finance Report, to complete the electronic versions;
- Davis generally knew that the Annual Campaign Finance Reports, including the one from 2010, had to be submitted electronically to Philadelphia’s Board of Ethics;
- Cornell previously filed an electronic Campaign Finance Filing Form with Philadelphia’s Department of Records in 2008 and included the false \$30,000 debt that was carried over from the handwritten 2007 Annual Campaign Finance Report; and
- Somebody filed an electronic 2010 Annual Campaign Finance Report including the false \$30,000 debt.

On these facts, Government satisfied the causation requirement for honest services wire fraud.

Although Davis notes that Cornell did not recall preparing or filing an electronic version of the 2010 Annual Campaign Finance Report, this is beside the point because the identity of the filer is not at issue. Rather, the crucial point is that, given the facts above, it was reasonably foreseeable that Davis’s fraud – the understated debt amount he told Deeley to put into the handwritten Annual Campaign Finance Report, which was subsequently entered into the electronic version by one of his own employees – would be transmitted via wire. *See Andrews*, 681 F.3d at 529. In sum, the record supports the jury’s verdict for honest services fraud.

B. Conspiracy

Conspiracy requires the following three elements: “(1) the existence of an agreement to achieve an unlawful objective; (2) the defendant’s knowing and voluntary participation in the conspiracy; and (3) the commission of an overt act in furtherance of the conspiracy.” *United States v. Rigas*, 605 F.3d 194, 206 (3d Cir. 2010) (en banc) (internal quotation marks omitted). The jury found Davis guilty of conspiracy to deprive Philadelphia and its citizens of their intangible right to the honest services of Green as Sheriff. Davis, however, contends that: (i) the conspiracy count fails under the statute of limitations and (ii) there was insufficient evidence of a conspiratorial agreement. Neither reason is persuasive.

i. Statute of Limitations

Davis asserts that the statute of limitations bars the conspiracy count because the Government adduced no evidence of a timely overt act. The statute of limitations for conspiracy is five years after an indictment is returned by a grand jury and filed. 18 U.S.C. 3282(a); *United States v. Oliva*, 46 F.3d 320, 324 (3d Cir. 1995). Given the filing date of the Superseding Indictment, the Government was required to prove an overt act in furtherance of the conspiracy that post-dated December 15, 2010. See *United States v. Davis*, 2018 U.S. Dist. LEXIS 22049, at *6 (E.D. Pa. 2018).

To determine if there is a timely overt act, the “crucial question” at the outset is the “scope of the conspiratorial agreement.” *United States v. Bornman*, 559 F.3d 150, 153 (3d Cir. 2009) (quoting *Grunewald v. United States*, 353 U.S. 391, 396 (1957)). That is because the scope “determines both the duration, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy.” *Id.* As alleged in the Superseding Indictment and argued by the Government at trial, the scope of this conspiracy was a *quid pro quo*: in exchange for a stream of benefits, Green awarded Davis lucrative contracts. Thus, the inquiry is

whether there was sufficient evidence of an overt act which occurred after December 15, 2010 that falls within the scope of the *quid pro quo* – the stream of benefits that Davis conferred upon Green for the Reach and RCS contracts.

The Government produced evidence of numerous overt acts that occurred after December 15, 2010 related to the *quid pro quo*.¹² These include:

- The Sheriff’s Office’s two separate payments to Reach in December 29, 2010 for advertising services in the amounts of \$28,803.37 and \$34,356.05;¹³
- Davis’s wire transmission of \$258,151.32 from his personal bank account to Green’s title agency on December 20, 2010, and Green’s repayment of that amount in March 2011 without any interest;
- The 2010 Annual Campaign Finance Report transmitted in January 2011 by wire, falsely reporting that Green’s campaign owed \$30,000 to Reach; and
- Davis’s \$10,000 loan to Green in September 2011 that was never repaid.¹⁴

Davis’s reply briefing does not otherwise explain how the \$258,151.32 interest-free loan by Davis, its repayment by Green, or the fraudulent 2010 Annual Campaign Finance Report wire falls outside the scope of the *quid pro quo*.

¹² Not all overt acts alleged in the Superseding Indictment will be addressed because “the government is not required either to prove all the overt acts to a conspiracy to a conspiracy or all the facts supporting the overt act.” *See United States v. Kapp*, 781 F.2d 1008, 1012 (3d Cir. 1986). Rather, “[i]t is sufficient that the government prove a single overt act in furtherance of the conspiracy.” *Id.*

¹³ Davis argues that the two checks cannot be overt acts for the conspiracy count because the jury acquitted him of two honest services fraud counts based on these payments. This argument fails. In evaluating sufficiency challenges to convictions, the “review should be independent of the jury’s determination that evidence on another count was insufficient.” *United States v. Powell*, 469 U.S. 57, 67 (1984); *see also United States v. Salahuddin*, 765 F.3d 329, 349 (3d Cir. 2014) (“[T]he jury’s acquittal on the attempt count is irrelevant to our review of the sufficiency of the evidence on the conspiracy count.”). Thus, the jury’s decision to acquit Davis of two honest services fraud counts has no bearing on the sufficiency of evidence for his conspiracy count.

¹⁴ Davis argues that the \$10,000 loan cannot be an overt act because it was made nine months after Green retired from the Sheriff’s Office. But that argument was already addressed and rejected in Davis’s motion to dismiss. *See Davis*, 2018 U.S. Dist. LEXIS 22049, at *10 (noting that the receipt of expected profits in an economically motivate conspiracy is an overt act) (citing *United States v. Vasquez-Uribe*, 426 F. App’x 131, 134 (3d Cir. 2011)); *see also id.* n.3 (collecting cases from different circuits holding the same). A rational juror could conclude that the \$10,000 unpaid loan was a kickback from Davis to Green for awarding contracts to Reach and RCS.

ii. Agreement

That there was an agreement, in which Davis was a party, to defraud Philadelphia and its citizens of Green's honest services is supported by the evidence. Courts must give "close scrutiny" to sufficiency of the evidence challenges to conspiracy convictions because "slight evidence" of a defendant's connection to a conspiracy will not do. *United States v. Brodie*, 403 F.3d 123, 134 (3d Cir. 2005). A conspiracy conviction may, however, be established entirely by circumstantial evidence. *Id.*; *United States v. Smith*, 293 F.3d 473, 477 (3d Cir. 2002) ("The existence of a conspiracy can be inferred from evidence of related facts and circumstances from which it appears as a reasonable and logical inference, that the activities of the participants . . . could not have been carried on except as the result of a preconceived scheme or common understanding.") (internal quotation marks omitted). This was the case here.

Based on the (a) various benefits Davis conferred upon Green that are discussed above and (b) the business that Reach and RCS enjoyed at the Sheriff's Office, a rational juror could conclude that Davis and Green had a "preconceived scheme or common understanding" of the *quid pro quo* that deprived Philadelphia and its citizens of Green's honest services. *See id.* Thus, the jury's verdict for conspiracy stands.

IV. RULE 33 DISCUSSION

Rule 33 of the Federal Rules of Criminal Procedure provides that "the court may vacate any judgment and grant a new trial if the interest of justice so requires." "A district court can order a new trial on the ground that the jury's verdict is contrary to the weight of the evidence only if it 'believes that there is a serious danger that a miscarriage of justice has occurred – that is, that an innocent person has been convicted.'" *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002) (quoting *United States v. Santos*, 20 F.3d 280, 285 (7th Cir. 1994)) (internal quotation marks omitted). In evaluating a Rule 33 motion, the court "does not view the evidence

favorably to the Government, but instead exercises its own judgment in assessing the

Government's case.” *Id.*

Exercising its own judgment, the Court concludes that the “interest of justice” does not require a new trial or acquittal of the guilty verdicts. Fed. R. Crim. P. 33. Besides reiterating his sufficiency challenge and re-incorporating objections made during trial, Davis offers no other argument of how a “miscarriage of justice has occurred.” *See Johnson*, 302 F.3d at 150. The jury’s verdicts were otherwise consistent with the weight of the evidence.

An order follows.

BY THE COURT:

/S/WENDY BEETLESTONE, J.

Date: September 12, 2018

WENDY BEETLESTONE, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1604

UNITED STATES OF AMERICA

v.

JAMES DAVIS,
Appellant

(D.C. No. 2:15-cr-00138-001)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and *FUENTES, Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

*Hon. Julio M. Fuentes vote is limited to panel rehearing only.

BY THE COURT,

s/Patty Shwartz
Circuit Judge

Dated: February 9, 2021
PDB/cc: All Counsel of Record