No. 22-

IN THE

Supreme Court of the United States

SCOTT ALLINSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court's decision in *United States v. Evans*, 504 U.S. 255 (1992) modified the explicit *quid pro quo* standard required by *United States v. McCormick*, 500 U.S. 257 (1991), or whether, as the majority of circuits have held, *McCormick* and *Evans* establish two different tests applicable to two different situations: *Evans* applying only outside of the campaign contribution context, permitting the jury to imply a *quid pro quo* agreement; and *McCormick* applying to charges based solely on campaign contributions.

Whether the narrow definition of "official action" articulated by this Court in *McDonnell v. United States*, 136 S.Ct. 2355 (2016) encompasses the mere hope or expectation by an individual that a public official will take some action to refer them a legal contract – particularly where the defendant does not know what action(s) the public official may take and the public official has no authority over the contract, thus requiring the government to prove the public official exerted or intended to exert pressure over another public official. *Id*. at 2370-71.

PARTIES TO THE PROCEEDINGS

Petitioner, who was an Appellant in the Third Circuit, is Scott Allinson. Respondent, who was the Appellee in the Third Circuit, is the United States.

RELATED CASES

All related proceedings include the following:

- *United States v. Hickey,* No. 5-17-cr-00390-3, U.S. District Court for the Eastern District of Pennsylvania. Judgment entered May 15, 2018.

- *United States v, Allinson*, No. 19-3806, U.S. Court of Appeals for the Third Circuit. Judgment entered March 3, 2022.

- *United States v. Allinson,* No. 5-17-cr-00390-02, U.S. District Court for the Eastern District of Pennsylvania. Judgment entered November 19, 2019.

- *United States v. Pawlowski*, No. 18-3390, U.S. Court of Appeals for the Third Circuit. Judgment entered March 4, 2022.

- *United States v. Pawlowski*, No. 5-17-cr-00390-1, U.S. District Court for the Eastern District of Pennsylvania. Judgment entered November 20, 2018.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Page

Page

Statutes and Other Authorites

INTRODUCTION

As recently pronounced by this Court, "[t]he First Amendment has its fullest and most urgent application precisely to the conduct of campaign political office.'" *Federal Election Comm'n v. Ted Cruz for Senate, et al.,* 596 U.S. ___ (May 16, 2022)(internal quotations omitted). Reaffirming that the government must proceed by "scalpel," not "meat axe" when pursuing criminal charges premised upon the payment of campaign contributions. *McDonnell v. United States* (*"U.S."),* 136 S. Ct. 2355, 2372-73(2016)(citing *U.S. v. Sun Diamond Growers of Cal.*, 526 U.S. 398 (1999)). In light of the unique threat to political speech implicated by these cases, this Court has constrained corruption charges in two fundamental ways – by narrowly defining the *pro* and *quo* elements, and by tightening the link the government must prove between the two.

The Panel contravened bedrock constitutional law in several ways. Its decision represents a leap backwards from the more than three-decade trend to narrow the scope of federal corruption law, cautioning prosecutors not to impose "standards of…good government" on "local and state officials" precipitating both the *McCormick* and *McDonnell* decisions. *U.S. v. McNally*, 483 U.S. 350 (1987); *see also Kelly v. U.S.*, 140 S.Ct. 1565 (2020); *McDonnell, supra*; *McCutcheon v. Federal Election Comm'n*, 572 U.S. 185 (2014); *Skilling v. U.S.*, 561 U.S. 358 (2010). Second, the Panel incorrectly applied the *McCormick* and *Evans* decisions distinguishing between the explicit and implicit *quid pro quo* ("**QPQ**") standards. Third, the Panel's application of *McDonnell* is incorrect as a matter of law with respect to the definition of what constitutes an

"official act" based upon the exertion of pressure by one public official upon another. *Supra* at 2367-68.

Correct application of *McCormick* and *McDonnell* eviscerates the case against Petitioner. Scott Allinson, an attorney, was convicted upon the theory that he caused others to make campaign contributions for "legal contracts awarded" to his firm. Pet.App.A.19A His codefendant, the former mayor of Allentown, Edwin Pawlowski, took no official action on his behalf and Allinson never made or caused others to make the contributions relied upon by the Panel to affirm his conviction. Every witness and document confirmed that there was no link, let alone an "explicit" link, between the prospect of legal work and the payment of the campaign contributions made by others. The lower courts allowed the government to steamroll Allinson (and overwhelm the jury) with evidence of political donations and legal work received by the law firm that were not the basis of any criminal allegations, and to argue that the jury could infer from these constitutionally protected activities evidence of corruption. Thus, the jury was permitted to convict Allinson under the lesser and inapplicable "implicit QPQ" standard and, worse, upon activity constituting free speech under the First Amendment.

Every relevant consideration favors granting certiorari. There is a distinct and longstanding circuit split on the proper application of the *McCormick-Evans* issue. The Second, Third, Fourth, Fifth, and Ninth Circuits have held that *McCormick* establishes a separate and significantly more onerous standard than *Evans*, premised upon the First Amendment implications of criminal charges based solely upon campaign contributions.

Whereas, the Sixth, Seventh and Eleventh Circuits endorse the minority view that *Evans* modified the *McCormick* standard. These courts permit the jury to imply a QPQ from circumstantial evidence in both the campaign and non-campaign contexts.

Moreover, the Panel's incorrect application of *McDonnell*, if sustained, would criminalize common conduct inherent in this nation's privately funded electoral system. Certiorari is also necessary to prevent the regulation of political speech by prosecutors. Indeed, "those who govern should be the ***last*** people to help decide who ***should*** govern." *McCutcheon*, 572 U.S. at 192 (emphasis in original).

OPINIONS BELOW

The opinion under review in this petition affirming Petitioner's conviction (Pet.App.A.1a-24a) is reported at *United States v. Allinson*, 27 4th 913 (3d Cir. Mar. 3, 2022)("Panel").

The decision denying rehearing *en banc* without opinion (Pet.App.F.147a-148a) is unreported and may be found at *United States v. Allinson*, No. 19-3806 (3d Cir. June 6, 2022).

The decision entering judgment against codefendant Edwin Pawlowski (Pet.App.B.25a-88a) is reported at 351 F.Supp.3d 846 (E.D.Pa. 2018).

The Memorandum denying Petitioner's oral motion for judgment of acquittal and motion for new trial (Pet. App.C.89a-127a) is reported at 2018 WL 3618257 (E.D.Pa. 2018).

The Order ruling on pre-trial motions on behalf of Petitioner and codefendant Pawlowski (Pet.App.D.128a-132a) is unreported and may be found at *United States v. Pawlowski*, et al., No. 5-17-cr-00390.

The Order denying Petitioner's pre-trial motions to dismiss (Pet.App.E.133a-146a) is unreported and may be found at *United States v. Allinson*, et al., No. 5-17-cr-00390.

JURISDICTION

The Third Circuit issued its opinion and entered judgment on March 3, 2022, and denied a petition for rehearing on June 6, 2022. Pet.App.E.147a. This Court has jurisdiction under 28 U.S.C. § 1254(1). On August 2, 2022, this Court granted an extension of time to file petition for Certiorari by thirty (30) days.

PROVISIONS INVOLVED

The relevant statutory and constitutional provisions (18 U.S.C. §§ 371, 666; U.S. Const. Amend. I) are reproduced at Pet.App.G.149a-152a.

STATEMENT

"There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon*, *supra* at 191. The proceedings below deprived Scott Allinson of this most basic right. Allinson was charged with two counts, federal programs bribery (18 U.S.C. § 666) and conspiracy (18 U.S.C. § 371). The government accused Allinson of causing five other

individuals to make campaign contributions to Pawlowski in exchange for "legal contracts awarded to [Norris]." Pet. App.A.19A. The jury convicted Allinson on both counts. Pet.App.C.100A.

The Third Circuit granted release pending appeal. The Third Circuit affirmed the convictions on March 3, 2022. Pet.App.E.147a. The court then denied a timely petition for rehearing on Pet.App.E.147a.

The United States District Court for the Eastern District of Pennsylvania ("USDC") had jurisdiction under 18 U.S.C. § 3231. The Third Circuit had jurisdiction under 28 U.S.C. § 1291.

a. Scott Allinson and Norris McLaughlin

Scott Allinson is a lifelong resident of Northeastern Pennsylvania. After attending law school, he returned to Allentown, Pennsylvania, where he began working at Norris McLaughlin ("Norris"). Allinson dedicated his life to his family and clients, remaining in Allentown and with Norris for his entire legal career.

Norris was one of the premier firms in the Allentown area, handling matters for individuals and businesses, primarily in the Lehigh County. Matthew Sorrentino, one of the firm's founders, was the Chairman during Allinson's tenure. EP.App.Vol.X.002298.[1] Allinson specialized in the

1. References to the appendices filed with the Third Circuit are referenced herein as EP.App.Vol. (appendices of codefendant Pawlowski) and App.Vol. (appendices of Petitioner Allinson). The citations to these underlying appendices are limited to undisputed

area of economic development, working with businesses in the area in a variety of legal matters and working to increase economic opportunities in the region. EP.App. Vol.X.002303-04. In this capacity, he met Michael Fleck, a consultant for various Allentown businesses, including some of Allinson's clients. Fleck ran a consulting company which operated to "facilitate meetings between either elected officials or prospective elected officials soliciting or seeking donations with vendors that hoped to be rewarded with contracts." EP.App.Vol.VI.001274. Fleck later became the campaign manager for Pawlowski. Pet.App.B.28A.

b. The Prosecution

The Indictment set forth a sprawling "pay-to-play" conspiracy accusing numerous named and unnamed individuals of making bribes to Pawlowski in exchange for City contracts in seven, unrelated "schemes." Pet. App.A.13A-14A. The government accused Allinson of conspiring with Pawlowski, Fleck, Sam Ruchlewisz (Fleck's employee), and others, by making or causing other attorneys at Norris to make contributions in exchange for "legal work awarded to [Norris]". Pet.App.A.18A. The indictment listed a number of nominal campaign contributions from Allinson to Pawlowski dating back to 2012, none of which were charged as part of a *quid pro quo* substantiating the charges against him.[2] App.Vol.II.0119.

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facts in order to comply with this Court's strong discouragement of petitions for certiorari arising from factual disputes. *See* Sup. Ct.R.10.

2. The parties stipulated that a conviction under 18 U.S.C. § 666 requires proof of an explicit *quid pro quo* exchange of campaign contributions for an official act, as defined in *McCormick* and *McDonnell*.

Allinson moved *in limine* to exclude reference to these campaign contributions arguing, *inter alia*, that their admission violated *McCormick* and the First Amendment. Pet.App.D.131a-132a. The USDC denied this motion.

The record was flooded with evidence of lawful campaign contributions and the receipt of legal work by numerous professional constituents in Allentown. The government admitted thousands of pages of exhibits outlining the historical City work performed by firms, including Norris, dating back to 2006, and contributions from those firms to Pawlowski. *See* App.Vol.III.0683 (Govt. Ex. I-11 at trial).

It was undisputed that the historical work handled by Norris had nothing to do with the charges against Allinson. *See* Pet.App.C.99a; *see also* EP.App.Vol. IX.002185-86; EP.App.Vol.IX.001969 (testimony of City Solicitors). The government nevertheless argued that this work was evidence of Pawlowski "funneling work" to Norris, improperly inviting the jury to imply a QPQ from these lawful contributions. *See, e.g.,* App.Vol.VI.2494 (summation). The Indictment also listed Allinson's nominal contributions totaling $1,350 dating back to 2011. In year 2014-2015, Allinson's contribution totaled $250, which government witness Celeste Dee testified represented the purchase of a single ticket at the lowest sponsorship option available to a fundraising event. EP.App.Vol.VIII.001858.

The evidence against Allinson consisted primarily of surreptitious recordings by Fleck and Ruchlewisz, Pawlowski's political consultants, who, unbeknownst to Allinson, were cooperating with the Federal Bureau of

Investigation. Pet.App.3A.[3] Fleck and Ruchlewisz would arrange meetings with Allinson during which they baited him with the prospect of legal referrals, and, specifically, a Solicitorship with the Allentown Parking Authority ("Solicitorship"), while at the same time soliciting campaign contributions. While Allinson engaged in these conversations with the undercover cooperators, he consistently refused to make the campaign contributions solicited. Indeed, the record established that Allinson was a nominal contributor to Pawlowski and received no legal work from the City at any point.

Despite solicitations for $2,500, $10,000 and $12,500 by Fleck and Ruchlewisz, Allinson contributed a mere $250 to the mayor's fund in the years 2014-2015. Pet. App.6A. As part of the sting operation, Ruchlewisz characterized this nominal amount as an "installment" on behalf of Allinson when speaking to Pawlowski but, in the hundreds of hours of recorded conversations admitted by the government, Allinson never once characterized this nominal ticket price as an "installment" or in any manner whatsoever. *See* Pet.App.B.27a. The Panel relied upon the $250 ticket purchase and the unpaid $2,500 and $10,000 solicitations as evidence of a *quid pro quo* exchange, without acknowledging the undisputed proof of record presented by government witnesses that Allinson never made the solicited contributions or that the so-called "installment" constituted the purchase of the cheapest ticket available to a singular event.

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3. Ruchlewisz and Fleck were approached by government agents in June 2014 and March 2015, respectively. Government agents threatened them with prosecution for a fraudulent scheme in which they were incriminated that undercover agents had discovered through a sting operation unrelated to Pawlowski or Allinson. EP.App.Vol.VII.001545.

Allinson's conviction was premised almost entirely upon the statements he made in conversations with Fleck and Ruchlewisz. Pet.App.5A; Pet.App.10A. The recordings including examples of Allinson complaining about the lack of historical referrals of work from the City, expressing his desire for future referrals of work and referencing his ability to fundraise for Pawlowski. *Id.* Notwithstanding the unsavory, or sometimes offensive, nature of these conversations, none of the recordings included evidence linking a specific campaign contribution to an official action by the mayor. Further, there was an evidentiary disconnect between Allinson's conversations with Fleck and Ruchlewisz and the payment of the campaign contributions ultimately made by other Norris attorneys. Every Norris attorney who contributed testified that Allinson had zero role in their individual campaign contribution made to Pawlowski, that they never discussed the contributions with Allinson, and – importantly – to their personal, constitutionally protected bases for supporting the candidate of their choice. Pet. AppC.99A-100A.

Fleck and Ruchlewisz berated Allinson for his refusal to acquiesce to their demands. Consistent with Allinson's documented refusal to conspire with them, when Ruchlewisz suggested that "we succeeded in our mission...$12,500 from Scotty," Fleck responded "No, we don't know about that." *Id.* They complained *ad nauseum* about Allinson's refusal to contribute, i.e., "Fucking Scotty. He's gotta be stupid. He can't just say 'yes, I'll give you the fucking money.'" App.Vol.VII.2881-87. "[Allinson] never gives any money to anybody. Last year he didn't give any money to anybody." *Id.*; "I'm going to beat the crap out of Scott ...I'm gonna pound the shit out of him...I'm

gonna pound this guy. It's horrible." App.Vol.VII.3004. "I don't really want to kick his ass. I'm hoping this goes better than kicking his ass[.]" *See id.* at 2888.

Allinson attended one meeting with Pawlowski, Fleck, Matthew Sorrentino (one of Norris' founders), and Lisa Rossi (a Fleck employee). Pet.AppC.98A. This was the only meeting of record that both Allinson and Pawlowski attended. Pawlowski made a pitch during the meeting setting forth why he would be a strong candidate for Senate and sought a $25,000 contribution from the firm. *Id.* No promise or discussion of referrals for legal work were made at the meeting. After the meeting, in a recorded conversation with Ruchlewisz, Allinson characterized the $25,000 as a large request to a firm that is not receiving work from the City. Pet.App.C.97a. Ruchlewisz responded that could change. *Id.* Notwithstanding this offensive discourse, the record contained no evidence that Allinson took action to influence Norris attorneys, or anyone, to contribute to Pawlowski. *See* Pet.App.C.116a.

Sorrentino testified that, during the meeting, he told Pawlowski that he thought the firm could make the contribution. As they were leaving the meeting, Sorrentino testified that Allinson asked him if he thought the firm would contribute, and Sorrentino said he thought it was "doable." Pet.AppC.98A. Allinson had no further conversations with Sorrentino or any other Norris attorney who ultimately contributed to Pawlowski's senatorial race. *See id.*; *see also* Pet.AppC.99A-100A.

Notably, the government's original theory of the *quid pro quo* was that, at the May 20th meeting, the mayor promised future "legal contract trust work" to Norris

(referring to a potential legal matter referred to as the "Trexler Trust"). Pet.App.C.99a-100a. The undercover recording of this meeting demonstrated unequivocally that no such reference or promise was made. Pet.App.C.100a, 108a. Government witnesses testified in unison that the Trexler Trust was never assigned to Norris or Allinson. *See id*. Ultimately, the USDC properly excluded this theory of prosecution. *See id.*

With the Trexler Trust theory dismissed, the government shifted gears to the Solicitorship theory, arguing that Pawlowski intended to steer the Solicitorship to Norris, identifying Allinson as the originating attorney. The evidence of this theory came in through one live witness, Ruchlewisz, and through recordings in which he and/or Fleck raised the Solicitorship while urging Allinson to contribute, on one hand, and pressing Pawlowski to refer the Solicitorship to Norris, on the other. None of the recordings pre-dating Ruchlewisz's cooperation referenced any promise of legal work to Norris, let alone the Solicitorship. Even after Ruchlewisz raised the Solicitorship, there was no proof linking a specific contribution in exchange for the Solicitorship. Every time they brought up the Solicitorship when baiting Allinson to contribute, ***Allinson never acquiesced. He never contributed any amount solicited by Fleck and Ruchlewisz***.

The recordings established what action Pawlowski contemplated with respect to the Solicitorship. Pawlowski stated that it would be a "heavy lift" and "that he does not control [the Board]…all I can do is talk to them." *See* Pet.App.A.7a; *see also* App.Vol.VII.3035. In that same conversation, Pawlowski stated that the current APA

solicitor, Dan McCarthy, "checked out a long time ago," was not liked by the City Controller and possessed a conflict of interest between the APA and a second full-time position McCarthy held with the administration of Tom Muller, a Lehigh County Executive. *Id.* Fleck recommended that Pawlowski call Muller and point out the conflict of interest from the overlapping positions since it may prompt Muller to raise the issue with McCarthy, potentially resulting in McCarthy's resignation from the APA, thereby opening the position for Pawlowski to recommend Norris. *See* App.Vol.VII.3035 (admitting trial exhibit); A.Supp.App.0110-11 (transcript).

The only testimony introduced as to what action Pawlowski intended to do in the event McCarthy chose to resign consisted of a singular question in the direct examination of Ruchlewisz. Government counsel asked "[d]id the Mayor indicate to you whether he was going to ***suggest*** [Norris] as the Solicitor of the Parking Authority?" to which the witness responded: "He did, and he was." App.Vol.VII.2992.

The record contains no other evidence pertaining to the Solicitorship – no witness testimony or exhibits pertaining to the APA Board, McCarthy, Muller, or any proof remotely pertaining to the assignment of the Solicitorship or any exertion of pressure or abuse of Pawlowski's authority as mayor over any public official to accomplish the same. Pawlowski did not communicate with Muller, McCarthy never resigned and neither Norris or Allinson received the Solicitorship or any other legal contract.

ARGUMENT FOR ALLOWANCE OF WRIT

A. There Is A Circuit Conflict On The Explicit Quid Pro Quo Standard

The majority of courts treat *McCormick* and *Evans* as setting two distinct standards: *McCormick* as setting the standard for campaign contribution cases requiring an explicit *quid pro quo* and *Evans* as setting the lesser standard for things of value other than campaign contributions. As recognized by the USDC below, "the Third Circuit has suggested 'explicit' may be equated to 'express,' but has not squarely addressed the issue." Pet. App.E.140a (citing *U.S. v. Antico*, 275 F.3d 245, 260 (3d Cir. 2001)). The Second Circuit requires proof of an "express" promise to establish a QPQ under *McCormick*. *See U.S. v. Ganim*, 510 F.3d 134, 143 (2d Cir. 2007)(Sotomayer, J.).

On the other hand, the minority of courts interpret *Evans* as modifying the *McCormick* standard and permitting an implicit *quid pro quo* in both campaign and non-campaign contributions cases. Prior to the Decision in this case, Third Circuit precedence was firmly rooted with the majority. *See U.S. v. Fountain*, 792 F.3d 310, 315-16 (3d Cir. 2015)(distinguishing between the separate standards set forth in *Evans* and *McCormick*); *U.S. v. Salahuddin*, 765 F.3d 329, 343-44 (3d Cir. 2014) (distinguishing between the *Evans* standard applicable to non-campaign contribution charges and the *McCormick* standard applicable in the campaign context); *U.S. v. Donna*, 366 F. App'x 450 (3d Cir. 2010)(applying *Evans* and finding that a *quid pro quo* may only be implied when the 'gift' is ***not*** a campaign contribution).

Majority: *McCormick* requires that the government prove an explicit *quid pro quo* agreement when the charged *quo* is a campaign contribution(s) as opposed to other things of value. An explicit *quid pro quo* arrangement requires the government to prove that the official asserted that his official conduct will be controlled by the terms of the promise or undertaking. *McCormick*, *supra*. The *quid pro quo* must be direct, overt, clear and unambiguous, leaving no uncertainty about the specific terms of the bargain, and that those terms must be understood by the parties at the time the contribution is made.[4] *McCutcheon*, *supra*; *McCormick*, *supra*; *Antico*, *supra* at 256; *Ganim*, *supra* at 143; *U.S. v. Bradley*, 173 F.3d 225, 231 & n.1 (3d Cir. 1999); *U.S. v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992). In order to meet the explicitness requirement, the government must prove beyond a reasonable doubt that the payment of the campaign contribution is tied to a specific official act, or, in other words, that there is a clear link between *quid* and *quo*. *McCormick*, *supra*; *Antico*, *supra*.[5]

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4. The parties below stipulated that the "stream of benefits" theory of bribery was ***not*** available to the charges against Allinson involving ***solely*** campaign contributions, consistent with the exacting requirement of *McCormick* requiring an overt link with a direct nexus between the *quid* and the *quo* understood by the parties at the time the alleged bribe is paid. *See* App.Vol.II.0074 (Dckt. No. 122).

5. *See*, *e.g.*, *U.S. v. Salahuddin*, 765 F.3d 329 (3d Cir. 2014) (distinguishing between the *McCormick* and *Evans* standard, characterizing the implicit *quid pro quo* standard from *Evans* as applying only outside of the campaign contribution context and requiring only that "the Government…show that a public official has obtained a payment to which he was not entitled, knowing the payment was made in return for official acts."); *U.S. v. Ring*, 706 F.3d 460 (D.C. Cir. 2013)(same); *U.S. v. Kincaid-Chauncey*,

Minority: In stark contrast, the minority view espoused by the Sixth, Seventh and Eleventh Circuits holds that *Evans* modified *McCormick* as opposed to establishing a distinct, lesser standard. *See, e.g., U.S. v. Terry*, 707 F.3d 607, 613 (6th Cir. 2013)(finding that *Evans* modified *McCormick* and the same standard applies to both campaign contributions and non-campaign contributions); *U.S. v. Siegeleman*, 640 F.3d 1159, 1172 (11th Cir. 2011)(same); *U.S. v. Giles*, 246 F.3d 966, 971-72 (7th Cir. 2001)(applying the *Evans* standard to a campaign contribution case).

In *Evans*, an undercover agent paid a $7,000 cash bribe and a separate campaign contribution for $1,000 to a County Commissioner in Dekalb County, Georgia. 504 U.S. at 257. The pertinent issue before the Court in *Evans* was not whether the Government was required to prove an explicit *quid pro quo* tied to a specific official act in a campaign contribution case, an issue resolved by the Court only a year before in *McCormick*. Rather, it was whether "the public official completes the offense at the time when he or she receives payment in return for an agreement to perform ***specific official acts***." *Id.* at 268 (emphasis supplied). The Court concluded that fulfillment of the *quid pro quo* was not necessary for a Hobbs Act conviction. *Id.* Thus, *Evans* left intact the standard set by *McCormick. See id.*

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556 F.3d 923 (9th Cir. 2009)(same); *U.S. v. Ganim*, 510 F.3d 134, 143 (2d Cir. 2007)(Sotomayer, J.)(same); *U.S. v. Taylor*, 993 F.2d 382 (4th Cir. 1993)(finding that *McCormick* and *Evans* establish two different tests applicable to two different situations, with the latter applying only outside of the campaign contribution context).

Justice Kennedy's concurrence in *Evans* more directly confronted the *quid pro quo* issue and opined that it need not be stated in "express terms." *Id.* at 274 (Kennedy, J. concurring). As a result of the arguable variation in *Evans* from the holding of *McCormick*, a split arose in the circuits – with the vast majority of courts, including the Third Circuit, agreeing that *McCormick* controls campaign contribution cases and *Evans* established a separate, lesser standard applicable only to non-campaign contribution cases.

Justice Stevens, writing for the Court in *Evans*, references *McCormick* only once and in passing, further undermining the position that this decision modified or lessened its burden under *McCormick*. The primary issue before the *Evans* Court and on which cert was granted was "the question whether an affirmative act of inducement by a public official such as a demand, is an element of the offense of extortion 'under color of official right' prohibited by the Hobbs Act[.]" 504 U.S. at 256.

This Court should grant certiorari to clear up the confusion on whether a QPQ agreement may be implied from circumstantial evidence in a case involving campaign contributions or, as the majority holds, it may not. *See Kincaid-Chauncey*, *supra* (relying upon *Evans* and finding that only where the thing of value is ***not*** a campaign contribution may an agreement be implied from the official's words and actions)(emphasis supplied). Petitioner respectfully submits that to meet the exacting demands of this Court's First Amendment jurisprudence, the majority view should be adopted. *Accord Ganim, supra.*

Applying the majority view, Allinson's conviction should be vacated. The Indictment failed to allege an

explicit *quid pro quo* (that survived Rule 29) and the undisputed proof of record pertaining to the Norris attorneys' campaign contributions could not be linked to any influence by Allinson, his conversations with Fleck and Ruchlewisz or any belief that Pawlowski intended to take official action in return for the same.

B. The Panel Conflicts with *McCormick*

From the outset of the prosecution, the government tried to evade the heightened standard imposed by *McCormick*. First, in pre-trial motions, then again in proposed jury instructions – arguing that the *quid pro quo* with respect to the campaign contribution-related charges could be implicit. After numerous hearings and pleadings on the subject, the USDC rejected this argument. The government then resurrected the implicit QPQ standard in its closing remarks, contrary to the law of the case and to the majority interpretation of the *McCormick-Evans* distinction. Government counsel argued:

> Bribery happens with a wink and a nod and sometimes a few words, an understanding between two people, we all know what's happening here. You're giving me this, I'm giving you that.

Pet.App.A.20a. Allinson timely objected to this blatant disregard for the law of the case and self-serving mischaracterization of the law.

Such comments are improper if they misstate the law or otherwise inject prejudicial error into the case. *See U.S. v. Brown*, 765 F.3d 278, 296 (3d Cir. 2014); see also Wright

et al., *Fed. Rules of Crim. Proc.* § 588 (4th ed. 2011). Courts are therefore required to review prosecutorial comments on a case-by-case basis, in the context of the entire trial, and to reverse when the defendant has been prejudiced. *See U.S. v. Young*, 470 U.S. 1, 11-12 (1985). This language went to the heart of the legal issue in the case, lifting the "wink and a nod" language directly from *Evans*. Finding otherwise would render meaningless *McCormick*'s requirement that the QPQ be explicit and would negate the First Amendment safeguards precipitating the mandate of *McCormick*.

The Panel's treatment of the government's misstatement of the law is emblematic of how Allinson's conviction is irreconcilable with *McCormick*. Specifically, the Panel found:

> [T]he Government's statement is consistent with the law, which recognizes that bribery can occur through "knowing winks and nods." *See Evans* []. Nowhere in its summation did the Government use the term "implicit" or suggest that "a wink and a nod" would, standing alone, be sufficient to convict.

Pet.App.A.21a (internal citation omitted).

This interpretation significantly departs from the majority view that draws a bright line between the "wink and a nod" standard and the more exacting requirement of an explicit QPQ agreement. As set forth above, this blended approach has been applied only in the minority of circuits and never before by this Court. This argument invited the jury to ***infer an explicit agreement*** – an

impossible task by virtue of the definition of these two opposite terms – "implicit" versus "explicit".

Pre-trial, the government made an identical argument in an effort to insert the following language into the jury instructions:

> A defendant's intent to exchange official acts for contributions could be based upon his words, conduct, acts and all the surrounding circumstances disclosed by the evidence and the rational and logical inferences that may be drawn from them.

App.Vol.II.0070. The government lifted this language directly from a Sixth Circuit case, *Terry*, 707 F.3d at 613, that applied the minority view that *Evans* modified the *McCormick* standard and which is directly at odds with the well-established law of the Third Circuit distinguishing *McCormick* as the standard for campaign contribution cases and *Evans* as the lesser standard for non-campaign contribution cases. The USDC correctly omitted this language from the jury instructions pertaining to the counts involving only campaign contributions. *See* A.Supp. App.001-107 (final jury instructions). The government's closing argument and Panel's endorsement of the same effectively re-inserted this incorrect instruction that had been excluded specifically because of its conflict with *McCormick*.

The prejudice stemming from this gross understatement of the government's burden as to the essential QPQ element was acute. Over the course of the six-week trial, the government bombarded the jury with

enormous sums of political donations flowing historically to Pawlowski's campaigns on one hand, and City contracts to firms on the other – none of which related in any way to Allinson or could serve as permissible basis for his conviction. *See* App.Vol.III.0683. Moreover, because the USDC erred in its denial of Allinson's motion to dismiss and motion to sever from the conspiracy count, the jury was also overwhelmed with evidence of the "wink and a nod" corruption pertaining to the many counts against Pawlowski not involving Allinson ***or*** campaign contributions. To then invoke at closing the very phrase used in common parlance and federal jurisprudence to convey an "implicit" understanding between individuals virtually guaranteed that the jury would imply a corrupt agreement between Allinson and Pawlowski and constituted reversible error fatal to Allinson's conviction.

Departures from well-settled corruption law permeated the record that, in the aggregate, deprived Allinson of the First Amendment protections *McCormick* meant to preserve. The grand jury that approved the Indictment had no evidence before it of the only specific QPQ charged (Trexler, *supra*), and, worse, was misinformed by the charge drafted by the government. The USDC incorrectly denied Allinson's motion to dismiss on these grounds, which precipitated the exact prejudice and harm the Constitution aims to avoid, forcing Allinson to defend against charges not properly brought by a grand jury, and against an ever-changing theory of the "*quo*"[6] that was not charged as part of an explicit QPQ

6. The Panel's rejection of the variance argument as to Count 19 also conflicts with *McCormick*. The charging language identified work previously awarded to Norris, consistent with the

as required by *McCormick*. Notably, the USDC denied Petitioner's Motion to Dismiss for failure to allege an explicit *quid pro quo* as required by *McCormick* solely upon the Trexler Trust related allegations that it later dismissed pursuant to Fed.R.Crim.29. Pet.App.E.142a-143a; Pet.App.C.180a (finding that the Trexler Trust could not serve as an "official act from which Allinson's bribery conviction can be sustained because none of the government's witnesses, recordings, or exhibits connected Allinson to the Trexler Trust work).

The Panel found that the government improperly pled the conspiracy charge in Count One, citing the government's admission that the case consisted of "several 'different schemes,' rather than a single overarching enterprise." Pet.App.A.15a-16a. The Panel erred, however, in concluding that Allinson was not prejudiced by this variance. The Panel relied on the government's compartmentalization of evidence to sustain the conspiracy conviction. The Panel overlooked the uniquely acute prejudice arising from this improperly pled conspiracy count, resulting in a conviction irreconcilable with federal law demanding the utmost caution and restraint in a prosecution premised upon First Amendment protected activities.

The record, at most, proved that Allinson had an expectation or hope of favorable treatment, specifically

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government's original theory based upon the Trexler litigation that was excluded pursuant to Rule 29. Allinson centered his defense at trial on this charging language only to be convicted of a bribery based upon the hypothetical prospect of the Solicitorship at some future date. No other allegation satisfied the explicit QPQ mandate of *McCormick*.

with respect to the recommendation that he serve as the contact person for the potential referral of the Solicitorship. However, the exchange of money for "'ingratiation and access is not corruption[,]' at all; indeed, the exchange is so essential to the foundation of democracy that it is protected by the First Amendment." *U.S. v. McDonnell*, 64 F.Supp. 3d 783 (E.D.Va. 2014)(citing *McCutcheon v. FEC*, 134 S.Ct. 1434, 1441 (2014)).

This prosecution failed the mandate of *McCormick* demanding the utmost restraint and caution when attempting to criminalize political activity protected by the First Amendment and warrants certiorari review by this Court.

C. The Panel Conflicts with *McDonnell*

i. *McDonnell*'s Definition of Official Action

The law defining what conduct constitutes an "official act" is well-established. This Court has defined a two-step test for determining whether *McDonnell* is satisfied: the government must (1) identify a "question, matter, cause, suit, proceeding or controversy" ("Matter") that "may at any time be pending" or "may by law be brought" before a public official; and (2) prove that the public official made a "decision" or took "an action" on the identified Matter, or "exerted pressure" on another public official to take such an action. *See U.S. v. Fattah*, 902 F.3d 197, 237-38 (3d Cir. 2018). Arranging or hosting meetings, events, contacting or calling other government officials, making introductions, etc., without more, are ***not*** official acts. *McDonnell*, *supra*; *Sun-Diamond Growers of California*, *supra* at 405-06.

McDonnell's facts were egregious: "In total, the Williams gave the McDonnell's over $175,000 in gifts and loans." *Supra* at 2364. In return, then Governor McDonnell helped Williams secure the state-sponsored study needed for FDA approval of a product that would be very lucrative to his business, including *inter alia*, arranging meetings with relevant public officials, hosting and attending events at the Governor's mansion designed to encourage the studies, and granting private access to the Governor's mansion to promote the studies. *Id.* The Court concluded that pursuing state-sponsored research for a certain product satisfied the first prong as it constituted a Matter. But, the dispositive inquiry was whether the actions taken by McDonnell amounted to official action. By holding that they did not, this Court created space in which public officials may act to benefit anyone for any reason, including that the beneficiary is a constituent, an important firm or a wealthy and generous friend so long as the action does not qualify as "official." *Id.* at 2372-75.

ii. As a matter of law, Pawlowski's contemplated action on behalf of Allinson did not constitute "official action" as required by *McDonnell*.

Pawlowski was not accused of taking official action on behalf of Allinson, but, rather, of intending to exert pressure upon another official to do so. *McDonnell* narrowly circumscribed the type of outreach to another official that would pass muster, referring to a public official who "uses his official position to provide advice[,]" "knowing or intending that such advice will form the basis for an 'official ac[t]'" by that second official. *Id.* at 2371. 136 S. Ct. at 2370. This language should be construed

narrowly. The Court did not elaborate upon this indirect form of official action, but derived it from the earlier decision in *U.S. v. Birdsall*, 233 U.S. 223, 229 (1914), which is instructive. There, the advice supplied was "contrary to the truth" and on a formal, well-established standard governing the clemency decision. 233 U.S. at 229. This is far narrower than the record as to whether Pawlowski's contemplated action amounted to "official action" under *McDonnell*, involving making a phone call to a public official who had no oversight or authority over the alleged Matter and conveying publicly available, truthful information not related to Pawlowksi's governmental authority as mayor.

Of particular significance here, the evidence with respect to the "official act" theory were undisputed at trial and, thus, does not present a question of fact that may otherwise weigh against certiorari review. The actions Pawlowski contemplated to ***influence*** a certain outcome (the hypothetical resignation of McCarthy) did not rise to the level of ***exertion of pressure***. The only testimony introduced on this issue consisted of a singular question posed by government counsel to Ruchlewisz. Government counsel asked "[d]id the Mayor indicate to you whether he was going to ***suggest*** [Norris] as the Solicitor of the Parking Authority?" to which the witness responded: "He did, and he was." *See supra* at pp. 11-12.

McDonnell required the Panel to answer the question whether the course of action involving Pawlowski contacting Muller and raising McCarthy's conflict of interest constituted official action, but it failed to do so. Proper application of *McDonnell* resolves that question with a resounding NO. *Accord U.S. v. Jefferson*, 289 F.

Supp. 3d 717, 738-40 (E.D. Va. 2017)(finding that a promise by a public official to "make sure" that a joint venture application was approved did not constitute an official act absent sufficient evidence of the exertion of pressure to achieve that result). The hypothetical discussion with Muller did not implicate any form of official action–whether on the part of Pawlowski or Muller. Merely passing along information about McCarthy's conflicting posts and then speculating that McCarthy may resign from the APA was not a matter within Pawlowski's or Muller's official capacities. The government did not present any other evidence about Muller, McCarthy or the APA. There are no facts in this exchange or anywhere else in the record from which the jury could conclude that Pawlowski intended to pressure Muller into firing McCarthy, demanding his resignation from the APA or otherwise exerting pressure to perform an official act. In fact, the opposite is true. These undisputed facts of record place this case squarely within the zone of conduct explicitly excluded from prosecution in *McDonnell*. *McDonnell*, *supra*; *see also Sun-Diamond Growers of California*, *supra*.

The Panel's analysis was incorrect as a matter of law. It incorrectly found that statements by Allinson expressing hope, or, at worst, an expectation, that Pawlowski would take action to refer the Solicitorship to Norris as evidence that those actions would be unlawful under *McDonnell*. As set forth above, *McDonnell* created a broad zone of conduct within which public officials may take a variety of actions on behalf of a constituent that do not rise to official action where they do not entail an abuse of his particular governmental authority. None of the recordings in which Fleck and/or Ruchlewisz raise the potential Solicitorship with Allinson reference what Pawlowski intended to do to allegedly steer the Solicitorship to Norris.

The record in this case does not require speculation. The Panel failed to evaluate the dispositive, unrefuted evidence as to what specific action Pawlowski contemplated taking with respect to the Solicitorship, concluding incorrectly that the his discussions about ways that he might be able to "suggest" Norris receive the Solicitorship were enough to satisfy *McDonnell*. *See supra* at pp. 11-12. As set forth above, the singular government witness questioned about what the mayor considered doing on behalf of Allinson/ Norris, merely testified that the mayor would "suggest" Norris receive the Solicitorship – and, even that suggestion depended upon a speculative series of events over which Pawlowski had no control and Allinson had no knowledge. *See id.* (referring to the Muller-McCarthy discussion between Fleck and Pawlowski).

In this way, the Panel fell into the trap that *McDonnell* cautioned against – criminalizing "tawdry" or "distasteful" conduct as opposed to "comporting with…the precedence of this Court" demanding that the government satisfy the more exacting definition of official action. *McDonnell, supra* at 2372. As *McDonnell* and its progeny make clear, many actions by a public official on behalf of a constituent do not constitute an abuse of power required for criminal prosecution. *See, e.g., U.S. v. Silver,* 864 F.3d 102 (2d Cir. 2017)(vacating a legislator's bribery conviction based upon the public official's strong opposition of a methadone clinic on behalf of the payor of the alleged bribes); *U.S. v. Fattah*, 914 F.3d 112 (3d Cir. 2019)(vacating conviction of a congressman based upon the public official's emails, letters and calls of support to the benefit of a benefactor). Thus, the Panel's bald assumption that the recordings in which the undercover cooperators dangled the prospect of the Solicitorship referral in front of Allinson with

no reference to what action Pawlowski may take in furtherance of that referral equates to Allinson's intent that Pawlowski abuse his governmental office to do so was incorrect as a matter of law. This misinterpretation of the law was particularly egregious in light of the undisputed evidence offered by the government plainly disproving any intent on the part of Pawlowski to "exert pressure" or abuse his office. *See supra* at pp. 11-12 (summarizing the government's evidence of the Muller-McCarthy discussion between Fleck and Pawlowski).

D. This Case Presents Important Questions And Is An Ideal Vehicle For Certiorari Review

If certiorari is granted, this case presents a natural next step in this Court's articulation of corruption law. This Court has consistently and clearly sounded the alarm for prosecutors, narrowing the scope of federal corruption law, rightfully protective of the First Amendment concerns presented by the same. *See, e.g., U.S. v. McNally*, 483 U.S. 350 (1987)(eliminating schemes and artifices to defraud citizens of the right to good government under the mail fraud statute); *Skilling v. U.S.*, 501 U.S. 358 (2010) (eliminating the "undisclosed conflict of interest" theory of prosecution under honest services fraud); *McDonnell*, *surpa* (narrowly defining what constitutes an "official act"); *Kelly*, *supra* (narrowing the definition of what constitutes a property interest in order for fraud to be a crime). This case also squarely presents the opportunity to reconcile a long-existing split amongst the circuits on how to apply the *McCormick* and *Evans* decisions distinguishing between the explicit and implicit *quid pro quo* standards in campaign contribution versus non-contribution cases. *See supra* at pp. 13-15.

CONCLUSION

If the Panel's decision stands, every professional constituent who stands to do work with a municipality will be at risk of prosecution for engaging in normal discourse with candidates for office who rely on these very same constituents to fund campaigns. This outcome is untenable. Campaigns are enormously expensive. In the vast majority of elections, the outcome often comes down to who outspent who. Consequently, public office will be increasingly limited to the independently wealthy as the economically less advantaged are deterred by constant threat of prosecution for soliciting campaign contributions from the very section of their base that have the funds to donate. This is exactly the stymieing effect that *McCormick* and *McDonnell* intended to avoid in order to protect an individual's First Amendment rights to participate in our nation's electoral process. Without further review by this Court, Allinson's conviction will remain a distant outlier amongst corruption cases as the most expansive criminalization of an individual's participation in the electoral process to date.

Accordingly, this case involves a question of exceptional importance, implicating the most coveted form of free speech guaranteed by the First Amendment: an individual's rights to participate in the electoral process. By affirming Petitioner's conviction, the Panel endorsed a lesser standard of a *quid pro quo* at odds with both *McCormick* and *McDonnell* that would transform commonplace political conduct into a federal crime and precariously erode what this Court has deemed the "fullest and most urgent" protection of the First Amendment. *See Cruz*, *supra.*

For the foregoing reasons, Scott Allinson respectfully asks this Court to grant certiorari review of the judgment below.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED MARCH 3, 2022

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3806

UNITED STATES OF AMERICA,

v.

SCOTT ALLINSON,

Appellant.

Appeal from the United States District Court
for the Eastern District of Pennsylvania.
(D.C. Criminal Action No. 5-17-cr-00390-002).
District Judge: Honorable Juan R. Sanchez.

Before: AMBRO, KRAUSE, and BIBAS, *Circuit Judges*.

Submitted Under Third Circuit
L.A.R. 34.1(a) September 28, 2021;
March 4, 2022, Opinion Filed

OPINION OF THE COURT

AMBRO, *Circuit Judge*

Scott Allinson appeals his convictions of federal programs bribery, 18 U.S.C. § 666(a)(2), and conspiracy,

18 U.S.C. § 371, in connection with a pay-to-play scheme involving Edwin Pawlowski, the former Mayor of Allentown, Pennsylvania. Allinson's challenges are based on several theories: (1) there was insufficient evidence to support the bribery charge; (2) the Government failed to prove the single conspiracy alleged in the indictment, resulting in a prejudicial variance from the indictment; (3) it impermissibly amended the bribery charge; (4) it made improper statements during its closing argument; and (5) his trial should have been severed from that of his co-defendant Pawlowski, as Allinson was prejudiced by the numerous charges lodged against the former Mayor.[1]

In thorough and well-reasoned opinions and orders, the District Court rejected Allinson's contentions. We do the same.[2]

I.

We start with Allinson's sufficiency-of-the-evidence challenge, which we review anew. *United States v. John-Baptiste*, 747 F.3d 186, 201, 60 V.I. 904 (3d Cir. 2014). But out of deference to the jury's verdict, we "consider the evidence in the light most favorable to the [G]overnment and affirm the judgment if there is substantial evidence

1. Pawlowski's appeal is pending before our Court, C.A. No. 18-3390, and is consolidated with this matter for disposition purposes by Clerk's Order entered January 29, 2020. A separate opinion addresses that appeal.

2. The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291.

from which any rational trier of fact could find guilt beyond a reasonable doubt." *Id.* (quoting *United States v. Benjamin*, 711 F.3d 371, 376 (3d Cir. 2013)). We will uphold its decision "as long as it does not 'fall below the threshold of bare rationality.'" *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 431 (3d Cir. 2013) (en banc) (quoting *Coleman v. Johnson*, 566 U.S. 650, 656, 132 S. Ct. 2060, 182 L. Ed. 2d 978 (2012)).

The federal programs bribery statute—the basis of Allinson's bribery conviction—makes it a crime to "corruptly give[], offer[], or agree[] to give anything of value to any person, with intent to influence or reward [a government agent] in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more." 18 U.S.C. § 666(a)(2). The Government's evidence against Allinson consisted of several recorded conversations among himself, Pawlowski, and two of Pawlowski's political consultants, Michael Fleck and Sam Ruchlewicz (both of whom were, unbeknownst to Allinson and Pawlowski, cooperating with the Federal Bureau of Investigation). From these conversations the jury learned the following.

In December 2014, Allinson—then an attorney at the law firm Norris McLaughlin—complained to Ruchlewicz about a legal services contract then-Mayor Pawlowski had diverted from Norris McLaughlin to another firm. Allinson complained that he was now unable to "rally [his] troops

with their checks." P-Supp. App. 1234.[3] He told Ruchlewicz he was "just talking our dialect of English" and explained, "[W]e've been unbelievably supportive in the past and now, you know, the work's going everywhere . . . but to our shop." *Id.* at 1235. He then confirmed with Ruchlewicz that this was "a short[-]term fixable issue." *Id.*

Shortly thereafter, Ruchlewicz told Allinson that the City's current Parking Authority Solicitor would be fired and a Norris McLaughlin partner, Richard Somach, would be appointed in his place. He explained that Allinson would be the originating attorney for the appointment, allowing him to receive internal firm credit. But he also informed Allinson that the firm would need "to do something for the mayor's holiday party." *Id.* at 1239. Allinson responded by offering to write a check for $2,500 in the new year.

The men confirmed this arrangement a few days later. Ruchlewicz assured Allinson that Pawlowski would be "putting [the firm] on the [P]arking [A]uthority" and that Allinson would "get[] credit for it." *Id.* at 1241. Allinson warned Ruchlewicz, "[I]f I don't get the first call, and the first email, this will get fucked up and I'm not gonna be responsible for the fuck up." *Id.* at 1242. The latter reiterated that Allinson would "get the first call," to which Allinson responded, "Then, then everything is gonna be smooth, smooth as a baby's bottom." *Id.*

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3. Citations to "P-Supp. App." refer to the Supplemental Appendix docketed by the Government in Pawlowski's appeal, whereas citations to "A-Supp. App." refer to the Supplemental Appendix docketed by the Government in this appeal.

The two met again the following month. Ruchlewicz noted that he was solving Allinson's "[P]arking [A]uthority problems." *Id.* at 1153. Allinson stated, "That's the only problem, Sam, I'm telling you right now . . . [i]f you solve that problem, you get the golden goose. . . . You get everything." *Id.* at 1153-54. He cautioned Ruchlewicz, however, "The money flow comes from me. The golden goose comes to me." *Id.* at 1154. Ruchlewicz confirmed that Allinson would receive credit for the contract but reiterated that Pawlowski wanted him to raise money for the Mayor's campaign. Allinson replied, "Well of course I am going to raise money." *Id.* at 1155.

The next week, Allinson complained to Fleck and Ruchlewicz about "sore feelings" at the firm and told them that the Parking Authority job would "get the checkbooks back out." *Id.* at 1168. Referring to a specific fundraising request from Pawlowski, Allinson noted that "for us to come up with [$12,500], I think that's going to be a really heavy stretch unless I can say hey, good news, this is . . . the mayor's way of finding a good spot for us." *Id.* at 1169.

When Ruchlewicz relayed to Pawlowski Allinson's apparent reluctance to donate, the Mayor was incensed. He noted that he had "given [Allinson] millions of dollars" and declared, "[He] will get nothing now." *Id.* at 1296-97. "You know, fuck them," he continued. *Id.* at 1297. "And . . . I'm not gonna make Somach solicitor or anything. Screw it all." *Id.* Ruchlewicz asked Pawlowski not to do anything yet, as he and Fleck would be seeing Allinson again shortly.

At their next meeting, Allinson reiterated to Fleck and Ruchlewicz that if the firm was to receive the Parking Authority contract, he would "get a hundred percent of . . . the kind of credit that turns into money that goes out of my checkbook where you want it to go." *Id.* at 1178. He told them that he and the firm's chairman, Matthew Sorrentino, would ensure the firm contributed to Pawlowski's campaign, noting that "Matt understands everything," and "Matt and I have always spoken . . . the same language." *Id.* at 1179.

On the day of Pawlowski's Mardi Gras fundraiser, Allinson and Ruchlewicz again discussed the Parking Authority contract. Allinson reiterated the importance of receiving firm credit for the work. Ruchlewicz responded, "[Y]ou know what the mayor cares about. And the mayor's got plans. He's got to raise money." *Id.* at 1202. Allinson then brought a $250 check—which, when talking to Pawlowski, Ruchlewicz referred to as "[i]nstallment number one"—to the fundraiser. *Id.* at 1204. Afterward, Ruchlewicz relayed to Pawlowski that Allinson wanted "it . . . known" that he had dropped off a check. *Id.* Ruchlewicz informed the Mayor that he had told Allinson they could now move forward with the "Somach to solicitor plan." *Id.* Pawlowski responded, "That's good." *Id.*

A few weeks later, Allinson told Fleck and Ruchlewicz that he would tell his law partners, "If you guys are going to handle the [City] work and deal with all that stuff, you're gonna have to work with [Fleck] and [Ruchlewicz] on . . . cobbling some money together. This isn't like we're being hired because we are good guys, it's not the way this shit

works. . . . It just isn't. I don't care how good you are." *Id.* at 1251. When Ruchlewicz later checked in with Pawlowski about the Parking Authority contract, Pawlowski told him, "I'm working on it." *Id.* at 1214. Ruchlewicz told Pawlowski that Allinson would need to get the credit for bringing in the contract, as Allinson controlled the firm's political contributions. Pawlowski replied, "I got you." *Id.* at 1215.

Pawlowski then met with Allinson, Fleck, and Sorrentino (the firm chairman who "spoke[] the same language" as Allinson) to pitch them on a nascent senatorial campaign, and asked the firm to raise $25,000 before his June 30th fundraising deadline. Allinson later complained to Ruchlewicz that this was "a lot of fucking money when you're getting absolutely zero back from the [C]ity. I mean, I mean when I tell you bone dry, bone fucking dry." *Id.* at 1247. Ruchlewicz responded, "Well, we'll have to change that. The mayor will." *Id.*

Norris McLaughlin contributed $17,300 to Pawlowski's campaign prior to the fundraising deadline. Fleck informed Pawlowski of the contribution and asked if they could now appoint Somach as Parking Authority Solicitor. Pawlowski told Fleck that he did not control the board's decisions but could talk to them. The men then discussed plans for getting rid of the current Solicitor.

Viewed in the light most favorable to the Government, this evidence showed the parties' plan to steer the Parking Authority contract to Allinson's firm in exchange for campaign contributions and was thus sufficient to support Allinson's bribery conviction. *See* 18 U.S.C. § 666(a)(2). His arguments to the contrary fall short.

Allinson first contends the evidence did not show an explicit *quid pro quo*, that is, that he gave or agreed to give campaign funds with the specific intent to influence Pawlowski to take a specific official action. *See McCormick v. United States*, 500 U.S. 257, 273, 111 S. Ct. 1807, 114 L. Ed. 2d 307 (1991).[4] He suggests that, while Fleck and Ruchlewicz repeatedly solicited funds from him, he never clearly acquiesced to their requests. But a jury could find from the conversations and conduct detailed above that Allinson agreed to contribute, did contribute, and caused other firm attorneys to contribute to Pawlowski's campaign, with the specific intent of obtaining the Parking Authority contract. Although he presented at trial several Norris McLaughlin attorneys who testified that Allinson played no role in their contribution decisions, the jury had no duty to credit this testimony. He himself stated that he and Sorrentino "control[led] the flow of [the firm's] political donations," P-Supp. App. 1179, and they were the only firm lawyers to entertain Pawlowski's request for $25,000 in senatorial campaign contributions. Allinson complained to Ruchlewicz and Fleck shortly thereafter about the amount of the ask given the lack of legal work coming in from the City, was assured the Mayor would "change that," *id.* at 1247, and, the day before the fundraising deadline, the firm contributed thousands to Pawlowski's campaign. This

4. In *McCormick*, the Supreme Court held that an explicit *quid pro quo* is required to convict a public official of Hobbs Act extortion premised on the exchange of campaign funds. *See* 500 U.S. at 273. We have yet to decide if the same holds true for federal programs bribery, *see United v. Willis*, 844 F.3d 155, 164, 65 V.I. 489 (3d Cir. 2016), and we need not do so here because we hold that there was enough evidence of an explicit *quid pro quo* anyway.

evidence—which included the many conversations in which Allinson expressly contemplates exchanging donations for the Parking Authority job—was sufficient to show that he engaged in an explicit *quid pro quo*.

Allinson further submits that there was insufficient evidence of an "official act" as that term is defined in *McDonnell v. United States*, 579 U.S. 550, 136 S. Ct. 2355, 2367-69, 195 L. Ed. 2d 639 (2016). The *McDonnell* Court interpreted the general federal bribery statute, which "makes it a crime for 'a public official or person selected to be a public official, directly or indirectly, corruptly' to demand, seek, receive, accept, or agree 'to receive or accept anything of value' in return for being 'influenced in the performance of any official act.'" *Id.* at 2365 (quoting 18 U.S.C. § 201(b)(2)). It narrowed the conduct that would constitute an "official act" under this provision: merely "setting up a meeting, calling another public official, or hosting an event" is not enough. *Id.* at 2368. Rather, to prove an "official act," the prosecution must show "a 'question, matter, cause, suit, proceeding or controversy'" involving a "specific," "focused," and "formal exercise of governmental power." *Id.* at 2371-72.

The parties agreed prior to trial that the Government needed to prove that Allinson intended to influence an "official act" per *McDonnell*. We thus assume, but do not decide, that the Government had to show Allinson bought official acts. It met this burden. The Parking Authority solicitorship surely qualifies as a specific matter that would "be pending . . . before [a] public official, in such official's official capacity." *Id.* at 2365; *see also United States v.*

Repak, 852 F.3d 230, 253 (3d Cir. 2017) (the awarding of a contract by a redevelopment agency's board of directors constitutes a "matter"). And a reasonable jury could find from Allinson's statements that he intended Pawlowski do more to help obtain the contract than merely "arrange a meeting" or perform some other informal action on the firm's behalf. The above conversations indicate Allinson's intent that Pawlowski use his public office to facilitate installing a Norris McLaughlin attorney as Parking Authority Solicitor. *See, e.g.*, P-Supp. App. 1241-42 (Ruchlewicz states that Pawlowski would "put[the firm] on the [P]arking [A]uthority" and that Allinson would get the credit, and Allinson responds, "[I]f I don't get the first call, and the first email, this will get fucked up"). The evidence shows that this was Pawlowski's understanding, as well. *See, e.g., id.* at 1296-97 (after learning of Allinson's reluctance to contribute, Pawlowski notes, "I'm not gonna make Somach solicitor or anything. Screw it all."); *id.* at 1288-89 (Pawlowski explains that he has "gotta get rid" of the then-current Parking Authority Solicitor before a Norris attorney can be installed and strategizes ways of getting the Solicitor to resign); *see also McDonnell*, 136 S. Ct. at 2370 (it is an "official act" to agree to use one's office "to exert pressure on another official to perform an 'official act'"); *Repak*, 852 F.3d at 253 (it is an "official act" for a public official to use his or her power to influence the awarding of government contracts, even if the official lacks final decisionmaking power).

Finally, Allinson submits the Government's evidence was insufficient to prove that the sought-after contract was worth $5,000 or more, as required for a federal

programs bribery conviction. *See* 18 U.S.C. § 666(a)(2). Yet the record suggests that Allinson himself understood the contract to be worth more than $5,000.[5] *See* P-Supp. App. 1251 (Allinson responds "[o]h yeah" to Fleck's assertion that "the Parking Authority bills a few hundred thousand a year"); *see also id.* at 1179 (Allinson states that if the contract "comes to me and I get the billing credit, then I get the full stack of cash on my side to do what I need to do with it, annually"); *id.* at 1153 (Allinson tells Ruchlewicz that "[i]f you solve [the Parking Authority] problem, you get the golden goose"); *id.* at 1169 ("[F]or us to come up with [12,500] dollars [in campaign funds], I think that's going to be a really heavy stretch unless I can say, hey, good news, this is, this is the mayor's way of finding a good spot for us.").

Moreover, the amount of money Allinson agreed to contribute to Pawlowski's campaign indicates that the value of the proposed transaction exceeded $5,000. *See United States v. Zwick*, 199 F.3d 672, 690 (3d Cir. 1999) (finding a transaction to be worth more than $5,000 where

5. Allinson takes issue with the Government's reliance on two conversations between him and Fleck, wherein the latter stated that the Parking Authority contract was worth well over $5,000. He suggests that Fleck's valuation was unreliable, not only because Fleck lacked knowledge concerning the value of the contract but also because he was cooperating with the Government to develop its case against Allinson. But it is not Fleck's statement that supports the value of the transaction. Rather, it is Allinson's acceptance of Fleck's valuation that is relevant (along with his many other comments indicating that the Parking Authority contract was worth a great deal to him), as Allinson's valuation goes to the objective value of the contract.

the public official helped obtain permits in exchange for a $15,000 donation), *abrogated on other grounds, Sabri v. United States*, 541 U.S. 600, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004). Allinson counters that the amount of the bribe cannot substantiate the transaction value where the subject of a transaction is a tangible interest. However, even assuming a legal services contract—and the internal firm credit Allinson hoped to receive from that contract—is "tangible," we have never said that the amount of a bribe cannot prove the value of the transaction where parties seek to exchange tangible assets. As Allinson notes, courts look to the bribe amount as one method for valuing an intangible asset, such as freedom for a prisoner, *see United States v. Townsend*, 630 F.3d 1003, 1011 (11th Cir. 2011), or a conjugal visit, *see United States v. Marmolejo*, 89 F.3d 1185, 1193-94 (5th Cir. 1996). But we have found no holding that the bribe amount is irrelevant in other contexts, and we decline to hold so here.[6] *See, e.g.*, *United States v. Richard*, 775 F.3d 287, 294 (5th Cir. 2014) (finding a school board superintendent position to be worth $5,000 or more based on the $5,000 bribe amount).

In sum, the Government's evidence easily suffices to support Allinson's bribery conviction.

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6. Which is not to say that the amount of a bribe will always support the value of the transaction. Rather, "the utility of looking to the bribe amount will vary depending on the circumstances of the transaction." *United States v. Delgado*, 984 F.3d 435, 447 (5th Cir. 2021). If, for instance, an undercover government agent bribes a public official with $5,000, the price the agent is willing to pay for an asset may not be an accurate proxy for its market value.

II.

We next consider Allinson's argument that the indictment, which alleged a single conspiracy among Allinson and others, impermissibly varied from the evidence at trial that, he submits, proved only multiple, unrelated conspiracies.[7]

For a conspiracy, the Government had to establish an agreement to achieve an unlawful end, knowing and voluntary participation by the co-conspirators, and the commission of an overt act to further the agreement. *United States v. Gonzalez*, 905 F.3d 165, 179 (3d Cir. 2018). The evidence recounted above was sufficient for a jury to find that Allinson, Pawlowski, Fleck, and Ruchlewicz agreed to exchange campaign donations for a specific official act, that Allinson's involvement was knowing and voluntary, and that the men engaged in overt acts to further the scheme. Allinson does not seriously dispute this conclusion.

But he does raise a separate challenge. In its indictment, the Government charged Allinson with a single, "hub-and-spokes" style conspiracy involving not just Pawlowski and his political consultants, but also several other private vendors vying for government contracts. The evidence, Allinson contends, failed to show

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7. To the extent the Government suggests Allinson failed to preserve this argument, we disagree. While he may not have used the word "variance" in the trial court, we are satisfied that he sufficiently raised a variance theory, arguing that the Government failed to prove the single conspiracy alleged in the indictment.

a single endeavor among all these alleged participants and instead showed several distinct schemes. *See United States v. Kemp*, 500 F.3d 257, 287-88 (3d Cir. 2007). In other words, while the Government may have proven separate agreements between the hub (Pawlowski) and the various spokes (the vendors) to exchange campaign funds for contracts, it failed to prove a "rim" connecting the spokes to one another. *See id.*

Where an indictment charges a single conspiracy but the evidence at trial proves only multiple, separate conspiracies, a variance occurs. *Id.* at 287. When faced with a variance argument, we must first decide "whether there was sufficient evidence from which the jury could have concluded that the government proved the single conspiracy alleged in the indictment." *United States v. Kelly*, 892 F.2d 255, 258 (3d Cir. 1989). But unlike a "pure" sufficiency-of-the-evidence challenge, a successful variance challenge requires us to vacate a conviction only where the discrepancy between the indictment and the proof at trial prejudiced the defendant's substantial rights. *Kemp*, 500 F.3d at 287 n.4, 291.

To assess whether a single conspiracy, rather than multiple conspiracies, existed, we look for sufficient evidence of: (1) a common goal among the conspirators; (2) a common scheme wherein "the activities of one group . . . were 'necessary or advantageous to the success of another aspect of the scheme or to the overall success of the venture'"; and (3) overlap in the dealings of the conspiracy's participants. *Kelly*, 892 F.2d at 259 (quoting *United States v. DeVarona*, 872 F.2d 114, 118-19 (5th Cir. 1989)).

The Government argues its evidence proved a single conspiracy between Allinson and the other vendors. It asserts they all sought the same end—public contracts—the achievement of which depended on Pawlowski's satisfaction and success. It submits Allinson was aware that others contributed to Pawlowski's campaigns with the goal of influencing his official conduct. And it suggests that their enterprise was cooperative and mutually interdependent, as each had a shared motive in ensuring Pawlowski's electoral success so all could continue calling on his influence to obtain government work.

This single-conspiracy theory is appealing in the abstract; however, it finds little support in the record. There is no evidence that any of the alleged conspirators were motivated to contribute for any purpose other than to obtain their own individual contracts. *See Kemp*, 500 F.3d at 288 ("[A]lthough each of these alleged spoke conspiracies had the same goal, there was no evidence that this was a *common* goal." (emphasis in original) (quoting *United States v. Chandler*, 388 F.3d 796, 811 (11th Cir. 2004))). The record instead indicates that they gave campaign funds in exchange for their contracts because that is what Pawlowski and his political consultants asked for—not to ensure that Pawlowski remained in a position to keep doling out official favors generally. *See Blumenthal v. United States*, 332 U.S. 539, 558, 68 S. Ct. 248, 92 L. Ed. 154 (1947). And while Allinson may have suspected that others donated to Pawlowski to secure government contracts, there is no evidence that he "derived [any] benefit" from his alleged co-conspirators' conduct, *see United States v. Smith*, 82 F.3d 1261, 1271 (3d Cir. 1996),

or "aided in any way, by agreement or otherwise, in procuring" work for other would-be city contractors, *Blumenthal*, 332 U.S. at 558. Indeed, in its summation, the Government itself described this case as consisting of several "different schemes," rather than a single, overarching enterprise. App. 2830.

But even if the Government's proofs were insufficient to show a single conspiracy, our inquiry does not stop there. We must also determine whether Allinson was prejudiced by the variance between the indictment and the evidence. *See Kemp*, 500 F.3d at 291. As he was not, his conviction must stand.

In arguing otherwise, Allinson contends the variance affected his right "not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others." *Id.* (quoting *United States v. Schurr*, 775 F.2d 549, 553 (3d Cir. 1985)). Put simply, he alleges the separate conspiracy of Group A spilled over to Group B such "that the jury might have been unable to separate offenders and offenses and easily could have transferred the guilt from one alleged co-schemer to another." *Schurr*, 775 F.2d at 557 (quoting *United States v. Camiel*, 689 F.2d 31, 38 (3d Cir. 1982)).

Where, however, "the government compartmentalize[s] its presentation . . . as to each defendant separately" and the court "charge[s] the jury to consider the evidence against each defendant separately," there is little risk of spillover. *United States v. Greenidge*, 495 F.3d 85, 95 (3d Cir. 2007). That standard was met here. The evidence against Allinson was segregated, coming in

through the testimony of Ruchlewicz and consisting of a series of recorded conversations, all of which involved or concerned Allinson. There was, moreover, no suggestion that evidence relevant to Pawlowski's agreements with other campaign contributors was relevant to proving Allinson's role in the conspiracy. *See Kemp*, 500 F.3d at 292 (no prejudice where the government "rigorously segmented its proofs and 'never suggested in any way that any piece of evidence related to [the separate defendants] was relevant to establish [the appellants'] participation in the conspiracy'"). And the District Court instructed the jury that "[y]our decision on any one defendant or any one offense, whether guilty or not guilty, should not influence your decision on any one of the other defendants or offenses," A-Supp. App. 16-17, and that "Allinson [was] not charged with conspiring to commit any offense other than federal programs bribery," *id.* at 27.

We recognize that the risk of prejudice "increases along with the number of conspiracies and individuals that make up the wrongly charged single conspiracy." *Kemp*, 500 F.3d at 292 (citing *Kotteakos v. United States*, 328 U.S. 750, 766-67, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)). The conspiracy charged in this case included over ten alleged co-conspirators and seven distinct sub-schemes, only one of which involved Allinson. Even so, the Government's efforts at trial were reasonably calculated to prevent guilt transference, and we see no reason to think they were unsuccessful given the nature of the evidence in this case. We thus reject his variance challenge.[8]

8. Allinson argues that his bribery conviction was tainted by prejudicial spillover from the conspiracy conviction, such that if we

III.

Allinson also asserts that the Government constructively amended its indictment with respect to the bribery charge. A constructive amendment occurs "when evidence, arguments, or the district court's jury instructions effectively 'amend[] the indictment by broadening the possible bases for conviction from that which appeared in the indictment.'" *United States v. McKee*, 506 F.3d 225, 229 (3d Cir. 2007) (quoting *United States v. Lee*, 359 F.3d 194, 208 (3d Cir. 2004)). We exercise a fresh review over such claims. *United States v. Vosburgh*, 602 F.3d 512, 531 (3d Cir. 2010). If we determine that a constructive amendment occurred, it is "a *per se* violation of the [F]ifth [A]mendment's grand jury clause." *United States v. Syme*, 276 F.3d 131, 148 (3d Cir. 2002) (quoting *United States v. Castro*, 776 F.2d 1118, 1121-22 (3d Cir. 1985)).

The bribery charge here alleges that Allinson

> corruptly gave, offered to give, agreed to give, caused, and attempted to cause others to give, something of value, that is, campaign contributions, to defendant EDWIN PAWLOWSKI and his political action committees . . . with intent to influence and reward defendant PAWLOWSKI in connection with the business, transaction, and series of

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vacate his conspiracy conviction, we must also vacate his bribery conviction. *See United States v. Wright*, 665 F.3d 560, 575 (3d Cir. 2012). Because the conspiracy conviction stands, we do not address this contention.

> transactions of the City of Allentown involving something of value of $5,000 or more, namely, legal services contracts awarded to [Norris McLaughlin].

App. 141. Allinson argues that the indictment's use of "awarded" refers to an alleged *quid pro quo* based only on legal-services contracts already given or awarded in the past, whereas at trial the Government asserted that the jury could convict Allinson even if no such work had been awarded to his firm.

Again we disagree. Allinson's reading of the charge is much too cramped, that is, it encompasses both past *and* prospective legal work to his firm. It indicates that Allinson "inten[ded] to influence" Pawlowski so legal services contracts would be awarded to the firm and intended to "reward" him for contracts already awarded to the firm. *Id.* Indeed, the bribery charge expressly incorporates Allinson's conduct as alleged in the conspiracy charge, such as its allegation that Allinson made and caused others to make campaign contributions in exchange for future contracts. *See id.* at 105 ¶ 33 (alleging he "made campaign contributions and caused others to make campaign contributions . . . in return for which [he] received, *and anticipated receiving*, favorable treatment from [Pawlowski] in obtaining [C]ity contracts with the City of Allentown" (emphasis added)). The indictment contemplated a bribery conviction premised on anticipated legal work, and the District Court therefore did not err in finding that no constructive amendment occurred.[9]

9. Alternatively, Allinson alleges a variance between the indictment and the evidence of bribery presented at trial. But the

IV.

Next, Allinson submits that the District Court erred in denying him a new trial based on an alleged misstatement of law in the Government's closing argument. We review this decision for abuse of discretion. *See United States v. Wood*, 486 F.3d 781, 786 (3d Cir. 2007). "To find that the court abused its discretion . . . we must first be convinced that the prosecution did in fact misconduct itself." *Id.* (quoting *United States v. Rivas*, 479 F.3d 259, 266 (3d Cir. 2007)). If so, we assess whether the prosecution's improper statement can be excused as harmless error. *United States v. Gambone*, 314 F.3d 163, 177 (3d Cir. 2003).

The Government's closing argument contained the following statement:

> Bribery happens with a wink and a nod and sometimes a few words, an understanding between two people, we all know what's happening here. You're giving me this, I'm giving you that.

App. 2473. According to Allinson, this line suggested to the jury that the *quid pro quo* agreement between the parties could be implicit—a lower burden than proving an explicit *quid pro quo*. *See United States v. Antico*, 275 F.3d 245, 257-58 (3d Cir. 2001).

Government's evidence showed that Allinson agreed to contribute to Pawlowski's campaign to obtain the Parking Authority contract for his firm, and these facts do not "materially differ[]" from those alleged in the indictment. *See Vosburgh*, 602 F.3d at 532.

But the Government's statement is consistent with the law, which recognizes that bribery can occur through "knowing winks and nods." *See Evans v. United States*, 504 U.S. 255, 274, 112 S. Ct. 1881, 119 L. Ed. 2d 57 (1992) (Kennedy, J., concurring). Nowhere in its summation did the Government use the term "implicit" or suggest that "a wink and a nod" would, standing alone, be sufficient to convict. Rather, it repeatedly stated that it was required to show "a clear, unambiguous understanding between the parties that the campaign contribution was being offered in exchange for the official action by the mayor"—that is, an explicit *quid pro quo*. App. 2472; *see also id.* (informing the jury that the *quid pro quo* must be "clear and unambiguous, leaving no uncertainty about the terms of the bargain"). This same statement of the law was echoed in the jury instructions, which were approved by all parties. A-Supp. App. 45 ("The explicitness requirement does not require an official's specific statement that he will exchange official action for a contribution, but rather requires that the quid pro quo be clear and unambiguous, leaving no uncertainty about the terms of the bargain.").

The Government's closing remark was not improper when considered in context, and the District Court did not abuse its discretion in denying Allinson a new trial because of it. In any event, the Government's case against Allinson consisted of far more than mere "winks" and "nods." As explained above, its evidence proved an explicit *quid pro quo*. Thus, even were its closing statement improper, any conceivable error was harmless.

V.

We last consider Allinson's argument that the District Court erred in denying the motion to sever his trial from Pawlowski's. Again we review the Court's decision for abuse of discretion. *United States v. Walker*, 657 F.3d 160, 170 (3d Cir. 2011).

"Ordinarily, defendants jointly indicted should be tried together to conserve judicial resources." *United States v. Eufrasio*, 935 F.2d 553, 568 (3d Cir. 1991). Yet Allinson (continuing with his defense theme of prejudicial spillover) contends that a joint trial was improper because the "sweeping charges against Pawlowski and others" led the jury to convict him. Allinson Br. 41. But "[n]either a disparity in evidence, nor introducing evidence more damaging to one defendant than others[,] entitles seemingly less culpable defendants to severance." *Eufrasio*, 935 F.2d at 568. Allinson must instead show real prejudice arising from the joint trial either compromising his trial rights or preventing the jury "from making a reliable judgment about guilt or innocence." *United States v. Lore*, 430 F.3d 190, 205 (3d Cir. 2005) (quoting *United States v. Urban*, 404 F.3d 754, 775 (3d Cir. 2005)). He fails to do so.

The District Court instructed the jurors that "[e]ach offense and each defendant should be considered separately." A-Supp. App. 17. It told them that evidence "admitted solely against Edwin Pawlowski cannot be considered by you in determining the guilt or the innocence of Scott Allinson," and that "[y]our decision on

any one defendant or any one offense, whether guilty or not guilty, should not influence your decision on any one of the other defendants or offenses." *Id.* at 16-17. "[J]uries are presumed to follow" such limiting instructions. *Zafiro v. United States*, 506 U.S. 534, 540-41, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993) (quoting *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987)).

This case was not, moreover, so complex that the jury could not "reasonably be expected to compartmentalize the evidence" against Allinson. *United States v. Ward*, 793 F.2d 551, 556 (3d Cir. 1986) (quoting *United States v. Wright-Barker*, 784 F.2d 161, 175 (3d Cir. 1986)). As previously discussed, the evidence against him was segregated and largely consisted of his own recorded statements. Allinson fails to show "clear and substantial prejudice" resulting from the joint trial, and thus he fails to meet the high bar required to gain a severance. *Urban*, 404 F.3d at 775.

* * * * *

The jury here was privy to private conversations in which Allinson and Pawlowski repeatedly expressed their intent for Norris McLaughlin to receive the Parking Authority contract and Allinson the credit, all in exchange for political donations. Allinson's words and actions were sufficient to support his bribery and conspiracy convictions.

Moreover, while we see little evidence in the record to support the Government's single-conspiracy theory, any

variation between the indictment and the evidence was not prejudicial. The Government's efforts at trial were sufficient to avert the risk that jurors might transfer guilt from the alleged co-schemers to Allinson. And as to his other claims of error, there was no impermissible amending of the bribery charge, the Government's closing statement was not improper, and Allinson was not prejudiced by having his trial remain joined with that of Pawlowski. We thus affirm.

APPENDIX B — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, FILED NOVEMBER 20, 2018

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

351 F.Supp.3d 846

UNITED STATES OF AMERICA,

v.

EDWIN PAWLOWSKI.

November 20, 2018, Decided;
November 20, 2018, Filed

CRIMINAL ACTION No. 17-390-1

MEMORANDUM

Juan R. Sánchez, C.J.

On March 1, 2018, after a six-week trial, a jury convicted Defendant Edwin Pawlowski, the former mayor of the City of Allentown, of 47 counts of corruption-related offenses arising out of his orchestration of a pay-to-play scheme while in public office to fund his campaigns for Governor of Pennsylvania and the United States Senate. At the close of the Government's case, and again at the close of all evidence, Pawlowski moved for a judgment of

acquittal pursuant to Federal Rule of Criminal Procedure 29. The Court reserved ruling on the motion. By Order of October 22, 2018, the Court granted Pawlowski's motion in part and denied it in part. Pursuant to Third Circuit Local Appellate Rule 3.1, the Court issues this Memorandum to summarize the basis for its rulings.

BACKGROUND

In July 2017, Pawlowski and Co-Defendants Scott Allinson and James Hickey were charged by indictment with conspiring to commit mail fraud, wire fraud, honest services fraud, federal program bribery, and Travel Act bribery and with numerous substantive offenses, arising out of Pawlowski's wide-ranging pay-to-play scheme. As discussed in greater detail below, the scheme involved various sub-schemes whereby Pawlowski, directly and through his operatives, agreed to steer City contracts or provide other favorable official action to companies, law firms, and individuals in exchange for campaign contributions and other items of value. In addition to the conspiracy charge (Count 1), Pawlowski was charged with 14 counts of federal program bribery (soliciting), in violation of 18 U.S.C. § 666 (Counts 2, 4-11, 13, 15-18); three counts of attempted Hobbs Act extortion under color of official right, in violation of 18 U.S.C. §§ 1951 and 2 (Counts 3, 12, 14); nine counts of mail fraud, in violation of 18 U.S.C. § 1341 (Counts 20-28); nine counts of wire fraud, in violation of 18 U.S.C. § 1343 (Counts 29-37); six counts of honest services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346 (Counts 38-43); two counts of honest services mail fraud, in violation of 18 U.S.C. §§ 1341 and

1346 (Counts 44-45); three counts of Travel Act bribery, in violation of 18 U.S.C. § 1952 (Counts 46-48); and seven counts of making false statements, in violation of 18 U.S.C. § 1001 (Counts 49-55).

Pawlowski and Allinson, an attorney whose law firm was seeking contract work from the City, proceeded to trial in January 2018.[1] At trial, the Government sought to establish Pawlowski's orchestration of and involvement in the pay-to-play scheme through tape recorded conversations,[2] witness testimony, and documentary evidence. The Government's proof showed that Pawlowski used and sold his public office to raise campaign funds for his political ambitions to become the Governor of Pennsylvania and a United States Senator. In order to identify potential donors to his campaigns, Pawlowski generated lists of vendors that held City contracts and used those lists to determine the amount of campaign contributions to be solicited from the vendors. Pawlowski also targeted vendors that were affiliated with politically-influential individuals in the Democratic party for City contracts and then solicited campaign contributions from these vendors.

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1. Hickey pleaded guilty to a single count of the Indictment prior to trial.

2. For ease of reference, citations to the recorded conversations below are to the transcripts of those conversations rather than to the audiotapes themselves. Although the transcripts were not admitted into evidence, they were used during trial as aids, and their accuracy is not contested.

Appendix B

To facilitate his pay-to-play scheme, Pawlowski deployed his campaign staff, campaign manager Michael Fleck[3] and campaign aide Sam Ruchlewicz, as his operatives. Francis Dougherty, the City's Managing Director, also worked closely with Pawlowski and assisted with Pawlowski's scheme. Pawlowski told Dougherty that Fleck and Ruchlewicz "represented him," and Dougherty thus took direction on City-related matters from them in addition to Pawlowski. Trial Tr. Day 3 at 76-77, Jan. 23, 2018. By late 2013 to 2014, Pawlowski had provided Fleck and Ruchlewicz—who would otherwise have no authority to conduct official City business—with direct access to City Hall, enabling them to meet with City officials to manage the awarding of City contracts on their own. Even though he used Fleck, Ruchlewicz, and Dougherty to help execute his scheme and provide a layer of insulation between him and those he sought to engage in his scheme, Pawlowski was "paranoid" about his conduct being detected. *See* Trial Tr. Day 9 at 168, Feb. 2, 2018. To further shield his conduct from being discovered, Pawlowski took additional precautionary measures, including sweeping his office for electronic eavesdropping devices, using burner phones, and speaking to his operatives in person to avoid being recorded. *See id.*

The evidence at trial connected Pawlowski to nine pay-to-play sub-schemes, involving (1) an agreement to expedite a zoning application and inspection for real estate

3. In addition to his political consulting work, Fleck also had a general consulting business called Hamilton Development Partners, which represented private companies seeking to conduct business with local governments.

developer Ramzi Haddad, in addition to the steering of City contracts (2) for the collection of delinquent real estate taxes to Northeast Revenue Service; (3) to revamp the City's street lights to The Efficiency Network; (4) to update the City's cybersecurity system to CIIBER; (5) for the design and construction of the City's pools to Spillman Farmer Architects; (6) for a street construction project to McTish, Kunkle & Associates; and for legal services to the law firms of (7) Norris McLaughlin; (8) Stevens & Lee; and (9) Dilworth Paxson all in exchange for campaign contributions or other items of value.

Following a six-week trial, Pawlowski was convicted of 47 of the 54 counts against him.[4] At the close of the Government's case, and again at the close of all evidence, Pawlowski moved for a judgment of acquittal on all counts on the basis that the Government's evidence was insufficient to sustain his convictions.[5] On October 22,

4. The Dilworth Paxson scheme will not be discussed below as Pawlowski was acquitted of all counts relating to that scheme. In addition, Pawlowski's arguments as to Counts 29, 31, 32, 38, and 39 will not be addressed because these counts were dismissed on the Government's motion following sentencing.

5. When Pawlowski moved for a judgment of acquittal at trial, he did not offer any argument as to why the motion should be granted as to Count 1, charging him with conspiracy to commit mail fraud, wire fraud, honest services mail fraud, honest services wire fraud, federal program bribery, and Travel Act bribery. Pawlowski also made no argument as to Count 1 in his written post-trial motion filed with the Court on April 20, 2018. On August 29, 2018, in his response to the Government's Sentencing Memorandum, Pawlowski filed a Supplement to his Rule 29 motion in which he argues there was insufficient evidence to prove each overt act charged in the

2018, the Court granted Pawlowski's motion in part and denied it in part. The Court explains the basis for its rulings below.

LEGAL STANDARD

Under Federal Rule of Criminal Procedure 29, a defendant may move for a judgment of acquittal "[a]fter the [G]overnment closes its evidence or after the close of all evidence." Fed. R. Crim. P. 29(a). The court must grant the motion and enter a judgment of acquittal "of any offense for which the evidence is insufficient to sustain a conviction." *Id.* In evaluating a sufficiency of the evidence challenge pursuant to Rule 29, a district court must "review the record in the light most favorable to the [Government] to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence." *United States v. Smith*, 294 F.3d 473, 476 (3d Cir. 2002) (internal quotation marks and citation omitted). When a court reserves ruling on a Rule 29 motion made at the close of the Government's case, the court must "decide the motion on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 29(b); *see also United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005) ("[T]he District Court was required to, and properly did, determine whether an acquittal was

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Indictment. The Court construes his Supplement as an explicit challenge to the sufficiency of the evidence as to Count 1, and it will address these arguments below. *See infra* note 15. To the extent his arguments apply to the substantive offenses of the conspiracy, however, the Court will also address these arguments in the discussion of each sub-scheme.

appropriate based solely on the evidence presented by the [G]overnment."). The court must "review the evidence as a whole, not in isolation," *United States v. Boria*, 592 F.3d 476, 480 (3d Cir. 2010), and should not weigh the evidence or determine the credibility of witnesses, *United States v. Dent*, 149 F.3d 180, 187 (3d Cir. 1998). The Court "must uphold the jury's verdict unless no reasonable juror could accept the evidence as sufficient to support the defendant's guilt beyond a reasonable doubt." *United States v. Fattah*, 902 F.3d 197, 268 (3d Cir. 2018).

DISCUSSION

In his Rule 29 motion, Pawlowski argues a judgment of acquittal should be entered as to the counts of the Indictment charging him with attempted Hobbs Act extortion under color of official right, honest services mail and wire fraud, federal program bribery, and Travel Act bribery because the Government failed to prove an explicit quid pro quo, as required under *McCormick v. United States*, 500 U.S. 257, 111 S. Ct. 1807, 114 L. Ed. 2d 307 (1991), or that he took (or agreed to take) any "official acts" in exchange for a thing of value to satisfy *McDonnell v. United States*, ____ U.S. ____, 136 S.Ct. 2355, 195 L. Ed. 2d 639 (2016). Relying on these arguments, Pawlowski asserts a judgment of acquittal should be entered as to the counts of the Indictment charging him with mail and wire fraud as well. He further argues the Government failed to prove he made false statements to agents of the Federal Bureau of Investigation, and a judgment of acquittal should also be entered as to these counts. The Court will address Pawlowski's arguments as to the attempted

Hobbs Act extortion under color of official right, honest services mail and wire fraud, federal program bribery, and Travel Act bribery counts in Section A, mail and wire fraud counts in Section B, and false statements counts in Section C.

A. Attempted Hobbs Act Extortion, Honest Services Mail and Wire Fraud, Federal Program Bribery, and Travel Act Bribery

As noted, in his Rule 29 motion, Pawlowski argues the Government failed to prove an explicit quid pro quo for each of the attempted Hobbs Act extortion under color of official right, honest services mail and wire fraud, federal program bribery, and Travel Act bribery counts, or that these counts involved an official act by Pawlowski.

To sustain a conviction for Hobbs Act extortion under color of official right, the Government must offer proof of a quid pro quo—i.e., that a public official "'receive[d] a payment in return for his agreement to perform specific official acts.'" *United States v. Munchak*, 527 F. App'x 191, 193 (3d Cir. 2013) (quoting *Evans v. United States*, 504 U.S. 255, 268, 112 S. Ct. 1881, 119 L. Ed. 2d 57 (1992)); *see also In re Lueders' Estate*, 164 F.2d 128, 135 (3d Cir. 1947) (noting a "'[q]uid pro quo' in its common acceptance means 'something for something'"). Like extortion under color of official right, a conviction for honest services mail or wire fraud also requires proof of a quid pro quo, "that is, a specific intent to give or receive something of value in exchange for an official act." *United States v. Wright*, 665 F.3d 560, 567-68 (3d Cir. 2012) (defining honest services

fraud in the context of a bribery theory). Although the Third Circuit Court of Appeals has not decided whether proof of a quid pro quo is required for a federal program bribery conviction, *see United States v. Willis*, 844 F.3d 155, 164, 65 V.I. 489 (3d Cir. 2016), or Travel Act bribery, as discussed below, the parties agree that where the "quid," or thing of value offered, is a campaign contribution, the Government must prove a quid pro quo that is explicit—i.e., an *explicit* quid pro quo.

The requirement of an explicit quid pro quo derives from *McCormick v. United States*. In *McCormick*¸ when a state elected official sponsored legislation benefiting a group of his constituents and received payments from an organization that represented the same constituents the legislation benefited, he was prosecuted and convicted for violating the Hobbs Act by extorting payments under color of official right. 500 U.S. 257, 111 S. Ct. 1807, 114 L. Ed. 2d 307 (1991). In reversing the conviction, the Supreme Court reasoned that allowing the Government to prosecute a politician's act that serves his constituents before or after campaign contributions are solicited or received "would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation." *Id.* at 272. It thus held that the receipt of campaign contributions is actionable under the Hobbs Act as having been taken under color of official right "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." *Id.*

Although *McCormick* involved a prosecution for Hobbs Act extortion under color of official right, courts have applied its explicit quid pro quo requirement to prosecutions for honest services fraud and bribery when the thing of value offered in exchange for an official act is a campaign contribution. *See, e.g., United States v. Ring*, 706 F.3d 460, 466, 403 U.S. App. D.C. 410 (2d Cir. 2013) ("[W]e assume without deciding . . . that *McCormick*, which concerned extortion, extends to honest-services fraud."); *United States v. Siegelman*, 640 F.3d 1159, 1172-74 (11th Cir. 2011) (assuming, without deciding, that *McCormick* extends to honest services fraud and federal program bribery); *United States v. Malone*, No. 03-CR-00500, 2006 U.S. Dist. LEXIS 63814, 2006 WL 2583293, at *1 (D.Nev. Sept. 6, 2006) ("the Supreme Court's reasoning in *McCormick* [is] equally applicable to charges of honest services wire fraud where the 'scheme or artifice to defraud' involved the payment of campaign contributions"); *see also United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993) (finding extortion under color of official right and bribery "different sides of the same coin").[6]

6. The parties have also agreed an explicit quid pro quo is required for a Travel Act bribery conviction. The Travel Act makes it a federal offense for an individual to utilize the facilities of interstate commerce with the intent to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity," *see* 18 U.S.C. § 1952(a)(3), and in this case, incorporates Pennsylvania's substantive law of bribery into federal law as the "unlawful activity." Because the unlawful activity here involves bribery in the campaign contribution context, the parties agree the more stringent standard is required.

Appendix B

In determining whether the Government has met its burden to prove an explicit quid pro quo, the relevant inquiry is "whether a rational juror could find that there was a quid pro quo and that the charged [d]efendant was aware of its terms." *United States v. Menendez*, 291 F. Supp. 3d 606, 624 (D.N.J. 2018) (emphasis omitted). "While the quid pro quo must be explicit, it need not be express"; thus, "political contributions may be the subject of an illegal bribe even if the terms are not formalized in writing or spoken out loud." *Id.* (emphasis omitted). The "'jury may consider both direct and circumstantial evidence, including the context [of the arrangement].'" *Id.* (alteration in original) (quoting *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992)).[7]

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7. Shortly after the Supreme Court articulated the explicit quid pro quo standard in *McCormick*, it decided *Evans v. United States*, 504 U.S. 255, 112 S. Ct. 1881, 119 L. Ed. 2d 57 (1992), a case in which an elected county official—who accepted an unsolicited cash contribution and a check payable to his campaign in exchange for making favorable zoning decisions—was convicted of Hobbs Act extortion under color of official right. The official subsequently challenged his conviction on the basis that he did not solicit the benefits and the trial court's jury instructions did not sufficiently articulate the quid pro quo requirement if the jury found that the benefits he received were campaign contributions. *See id.* at 267. The Supreme Court held that an affirmative act of inducement was not required for the conviction and found the trial court's jury instructions satisfied *McCormick. See id.* at 268. In a concurring opinion, Justice Kennedy discussed the quid pro quo requirement, stating, "The official and the payor need not state the quid pro quo in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods. 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.* at 274.

Appendix B

The "quo" aspect of the quid pro quo requirement was addressed by the Supreme Court in *McDonnell v. United States*, ____ U.S. ____, 136 S. Ct. 2355, 195 L. Ed. 2d 639 (2016). *McDonnell* narrowed the scope of conduct that may qualify as an "official act" and held:

Following *Evans*, some courts have interpreted *McCormick*'s explicit quid pro quo standard by noting "explicit" is not interchangeable with "express," and instead have looked to the directness of the link between the quid and the quo or the degree of awareness of the exchange by the parties involved. *See Menendez*, 291 F. Supp. 3d at 624; *United States v. Terry*, 707 F.3d 607, 612-13 (6th Cir. 2013) (noting that "specific," "express," and "explicit" do not add a new element to [] bribery statutes "but signal that the statutory requirement must be met," and "[a]s 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"); *Siegelman*, 640 F.3d at 1172 ("an explicit agreement may be 'implied from [the official's] words and actions'" (alteration in original) (quoting *Evans*, 504 U.S. at 274)); *United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994) (explaining that *Evans* instructed that by "'explicit' *McCormick* did not mean 'express,'" and "[e]xplicit . . . speaks not to the form of the agreement between the payor and the payee, but to the degree to which the payor and payee were aware of its terms, regardless of whether those terms were articulated"); *Carpenter*, 961 F.2d at 827 (explaining that "what *McCormick* requires is that the quid pro quo be clear and unambiguous, leaving no uncertainty about the terms of the bargain" and noting that to "read *McCormick* as imposing [a requirement that a defendant specifically state that he will exchange official action for a contribution] would allow officials to escape liability under the Hobbs Act 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"); *see also United States v. Inzunza*, 638 F.3d 1006, 1014 (9th Cir. 2011) (noting that in the campaign contribution context, the connection between the explicit promise of official action and the contribution "may be circumstantial").

> an "official act" is a decision or action on a "question, matter, cause, suit, proceeding or controversy." The "question, matter, cause, suit, proceeding or controversy" must involve 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. It must also be something specific and focused that is "pending" or "may by law be brought" before a public official. To qualify as an "official act," the public official must make a decision or take an action on that "question, matter, cause, suit, proceeding or controversy," or agree to do so. That decision or action may include using his official position to exert pressure on another official to perform an "official act," or to advise another official, knowing or intending that such advice will form the basis for an "official act" by another official.

Id. at 2371-72.[8] The Third Circuit Court of Appeals recently applied the *McDonnell* standard in an appeal by a former congressman who was convicted of bribery-related offenses in *United States v. Fattah*, and it held that the congressman's act of arranging a meeting with a United States Trade Representative for a friend did not qualify as an "official act" under *McDonnell*. 902 F.3d at 238.

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8. The parties agree *McDonnell*'s definition of the term "official act" applies to the attempted Hobbs Act extortion and honest services fraud counts as well as the federal program bribery and Travel Act bribery counts in this case.

Here, the Government presented sufficient evidence from which a reasonable jury could find beyond a reasonable doubt that the requirements of both *McCormick* and *McDonnell* were satisfied as to all counts involving attempted Hobbs Act extortion under color of official right, honest services mail and wire fraud, federal program bribery, and Travel Act bribery except Counts 11, 12, 13 and 14. The Court will explain its reasoning by reviewing the evidence presented as it relates to each particular sub-scheme of which the counts are a part.

1324 Sherman Street

The first sub-scheme involves zoning and inspection for a property located at 1324 Sherman Street in the City of Allentown. Count 6 charges Pawlowski with federal program bribery stemming from expediting a zoning application related to this property for real estate developer Ramzi Haddad in exchange for a $2,500 campaign contribution in December 2014. Count 48 charges Pawlowski with Travel Act bribery based on his May 2015 trip to New York to solicit campaign contributions from Haddad in exchange for expediting an inspection for the Sherman Street property.

As to Count 6, Pawlowski argues the evidence showed the check Haddad gave to him in December 2014 was part of a longstanding pattern of donations with no connection to zoning assistance. Pawlowski also contends Haddad communicated only with Ruchlewicz, Dougherty, and Zoning Supervisor Barbara Nemith about the zoning issue, and that Dougherty did nothing more than refer the issue

to the appropriate City official, Nemith, who performed her job properly and legally. Because he had no part in the zoning matter, Pawlowski argues that there could be no explicit quid pro quo agreement under *McCormick*. As to Count 48, Pawlowski argues his and Haddad's discussion about Haddad's upcoming property inspection during the New York meeting was not connected to any discussion about campaign contributions. Finally, Pawlowski argues the Government failed to prove an official action under *McDonnell* as to both Counts 6 and 48.

The Court disagrees. Contrary to Pawlowski's assertions, a reasonable juror could conclude that Pawlowski and Haddad had two explicit quid pro quo agreements, whereby Haddad would give Pawlowski (1) $2,500 in exchange for Pawlowski's assistance with expediting a zoning application for his Sherman Street property; and (2) campaign contributions in exchange for assistance with an inspection on the same property. There was also sufficient evidence from which a jury could find that Pawlowski took official acts in exchange for these contributions as required by *McDonnell*.

Haddad testified that when he initially contacted the zoning office about the Sherman Street property in early December 2014, he was told his zoning request would not be acted on until January 2015, which would have been a lengthy delay for him. *See* Trial Tr. Day 8 at 267, Jan. 31, 2018. Shortly thereafter, Haddad spoke with Ruchlewicz on December 4, 2014, and asked, "[W]ho do I need to grease today?" Gov't's Ex. SR220T at 1. Ruchlewicz replied, "The mayor," explaining Pawlowski

needed $2,500. *See id.* Haddad responded he might need help with a zoning issue. *See id.*

After their conversation, Ruchlewicz informed Fleck, Pawlowski, and Dougherty that Haddad needed assistance with a zoning issue. *See* Trial Tr. Day 9 at 221. When Haddad and Ruchlewicz spoke again on December 10, 2014, Haddad asked Ruchlewicz how much the contribution check should be for, and Ruchlewicz stated $2,500. *See* Gov't's Ex. SR231T at 2. After Haddad scoffed at the amount, Ruchlewicz explained he had already talked to Pawlowski about the zoning issue, and Pawlowski had agreed to intervene on Haddad's behalf: "[Pawlowski] said whatever you want . . . it's done. Consider it done." *Id.* Haddad wrote a check for $2,500 as requested and reiterated his concern that tire storage would not be approved at his building, which was zoned as "warehouse" at the time. *Id.* at 5. Ruchlewicz reassured him that Pawlowski would "fix it . . . [and] just do it. The zoning authority in Allentown rests with the mayor." *See id.* Haddad continued to be skeptical, but Ruchlewicz assuaged him by telling him the mayor had "veto power over all the zoning," he would do whatever he had to, and the zoning matter would "sneak" through because the zoning officer worked for the mayor. *See id.* at 5. After their discussion, Ruchlewicz apprised Dougherty that Haddad needed assistance with his building on Sherman Street and had a "time frame issue," and Dougherty responded he would direct Nemith to prioritize review of Haddad's application. *See* Gov't's Ex. SR245T at 1-3.

Appendix B

After Haddad submitted his zoning application, Nemith sent two emails to Dougherty providing him with updates concerning the application, *see* Gov't's Exs. C-6, C-7, and the application was approved the following day on December 19, 2014, *see* Gov't's Ex. C-10. Without Dougherty's intervention, this approval could have taken days or weeks to obtain. *See* Trial Tr. Day 8 at 201-02. Haddad later thanked Dougherty for his help with the Sherman Street property when he met with Dougherty and Pawlowski on December 31, 2014. *See* Gov't's Ex. SR260AT at 1.

A few months later, on April 19, 2015, Pawlowski acknowledged the impropriety of his relationship with Haddad, agreeing with Fleck that he did not want to get "Rob McCord'd"[9] and telling Fleck that Ruchlewicz should talk to Haddad to see if "we can separate the stuff out so that he's actually not the one giving the money. . . . Since we're doing so many direct things with him." Gov't's Ex. MF26T at 1-2. Pawlowski further explained, "I just don't want him to show up, you know, as a big donor . . . ." *Id.* at 2. Fleck suggested that when Haddad needed to talk to someone about City-related issues, he use Dougherty as a buffer "[bec]ause the last thing you want is to get on, you know, on a conversation on the phone, and he's talking to you about, you know, hey, how's the garage coming?" *Id.* at 3. Pawlowski stated this was why he wanted burner phones because then he could "just talk business on [one] phone and then . . . anything fund related [would be discussed

9. Robert McCord was a former Pennsylvania Treasurer and gubernatorial candidate who pleaded guilty to two counts of attempted Hobbs Act extortion.

on] a different burner." *Id.* Fleck agreed with Pawlowski's proposal to use burner phones to avoid detection, adding, "[t]hen if anybody's ever trying to record you, they'll never get it, you know what I mean?" *Id.* Pawlowski responded, "Exactly, that's the point. That's the [] whole point of the burner phone, yes." *Id.*

The following month, on May 18, 2015, Pawlowski and Fleck drove to New York to meet with Haddad and Jack Rosen, a wealthy New York real estate developer. *See* Trial Tr. Day 8 at 274, 277. On the drive, Fleck and Pawlowski agreed they needed to have a frank conversation with Haddad about what each wanted from the other, and then never discuss those issues aloud again. *See* Gov't's Ex. MF54-0921T at 1-2. They then discussed how much in campaign contributions Pawlowski should request from Haddad for Pawlowski's Senate race, *see* Gov't's Ex. MF54-0933T at 1, and Fleck told Pawlowski that Haddad had an upcoming property inspection, and that if the inspection uncovered any problems with his property, Haddad wanted "just a letter and some time to work on it," *see id.* at 2. When Pawlowski asked which property the inspection was in reference to, Fleck said, "Sherman Street. . . . Do you know what I'm talking about? They're inspecting Sherman Street." *Id.* Pawlowski immediately recognized the building, which was the subject of his zoning intervention, and responded he needed to find out who the inspector was, and that although there might not be much he could do, he would try. *See id.* When Fleck asked what Sherman Street was, Pawlowski explained it was one of Haddad's industrial properties. *See id.*

At the May 18, 2015, meeting with Haddad, Pawlowski acknowledged he and Haddad needed to refrain from speaking to one another over the phone and joked about going to prison. *See* Gov't's Ex. MF55-1818T at 1-2. Later in the conversation, Pawlowski asked Haddad how much Haddad could raise for him by June 30—his United States Senate race fundraising deadline. *See id.* at 3. Haddad responded he had "[$35,000] in his pocket" and $10,000 more from some of his business partners for Pawlowski's campaign, *see id.* at 3, but made clear he expected Pawlowski's help with the upcoming Sherman Street inspection in exchange, explaining "you gotta tell these morons at the [C]ity . . . ." *See id.* at 3. Fleck asked if Haddad was talking about Sherman Street. *See id.* Haddad confirmed, explaining how he had already waited two months for the City to inspect the property and lost customers as a result of the delay. *Id.* Pawlowski responded he was working on the issue. *Id.*

After the meeting, Pawlowski intervened to ensure Haddad's inspection would take place and occur without any complications. On May 21, 2015, the City's Building Standards and Safety Bureau Director David Paulus and Pawlowski discussed the inspection of Haddad's Sherman Street property. *See* Trial Tr. Day 8 at 218. Later that day, Paulus wrote an email to Pawlowski, on which Dougherty was copied, informing him that the Sherman Street inspection was scheduled for that afternoon. *See id.* at 217; Gov't's Ex. C-3. The next day, Paulus e-mailed Pawlowski and Dougherty, advising them "the inspection for Mr. Ramsey on Sherman Street went well." *See* Trial Tr. Day 8 at 218-19; Gov't's Ex. C-4.

Appendix B

On June 29, 2015, the day before Pawlowski's June 30, 2015, campaign contribution deadline, while discussing potential contributors with Pawlowski, Fleck mentioned an upcoming meeting with Haddad and asked if Pawlowski helped him with his Sherman Street zoning and inspection issues. *See* Gov't's Ex. MF95-225T at 1. Pawlowski confirmed he had helped Haddad with "everything," complained how he had "bent over backwards" for Haddad, and insisted Haddad and others needed to help him so he could "get this thing done," i.e., meet his fundraising goal. *See id.* After Pawlowski texted Haddad, Haddad agreed to meet with him, and the next day, Pawlowski and Fleck picked up a check from Haddad. *See* Trial Tr. Day 9 at 7-9.

This evidence is more than sufficient for the jury to have found beyond a reasonable doubt that two explicit quid pro quo agreements existed between Pawlowski and Haddad. As to Count 6, contrary to Pawlowski's assertion that Haddad's December 2014 check had no connection to zoning, the Government's evidence—including Haddad and Ruchlewicz's conversations—shows Haddad made a $2,500 contribution to Pawlowski in December 2014 with the expectation that Pawlowski would assist him with his zoning issue. The conversations also show that Pawlowski agreed, through Ruchlewicz, to assist Haddad with his zoning issue for the $2,500 campaign contribution.

As to Count 48, the evidence belies Pawlowski's contention that Pawlowski's assistance with Haddad's inspection was not connected to campaign contributions. The tape of the meeting between Pawlowski and Haddad reflects that Haddad offered Pawlowski campaign

contributions contingent on Pawlowski assisting with the Sherman Street property inspection. Rather than divorcing the two topics during their discussion, Pawlowski responded he was "working" on the inspection issue. A few days later, he personally involved himself in the matter by speaking to Paulus to ensure the inspection would take place without any complications, raising the inference that Pawlowski agreed to ensure Haddad's property inspection would occur in exchange for campaign contributions.

Pawlowski's additional argument that *McDonnell*'s official act requirement was not met as to Counts 6 and 48 fails for two reasons. First, the matters at issue, a zoning application and a property inspection, are both "specific, focused, and relatively circumscribed, such that [they] can be put on an agenda, tracked for progress, and then checked off as completed" to qualify as a "question" or "cause" that involves a formal exercise of governmental power under *McDonnell*. 136 S. Ct. at 2371.

Second, despite Pawlowski's contention that he took no decision or action to satisfy *McDonnell* because he did not personally act on Haddad's zoning application, a reasonable jury could have nonetheless found that he took official action. Based on the evidence, including Ruchlewicz informing Pawlowski about Haddad's zoning issue, Ruchlewicz's representations to Haddad that Pawlowski had agreed to solve Haddad's zoning problem, and Pawlowski's exclamations of the great lengths he had gone to help Haddad, a reasonable jury could have found that Pawlowski "exert[ed] pressure" on Dougherty and Nemith to perform an official act, i.e.—expedite

Haddad's zoning application—or "advise[d]" them to do so, knowing or intending that such advice would result in Haddad's application being expedited. *See McDonnell*, 136 S. Ct. at 2371 (holding an official act "may include [the official] using his official position to exert pressure on another official to perform an 'official act' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official"). While the Court agrees with Pawlowski that arranging a meeting between Haddad and Nemith or referring Haddad to Nemith would not qualify as an official act under *McDonnell*, the evidence shows Pawlowski's actions went beyond simply arranging a meeting here.

The same analysis applies to the inspection. Based on Pawlowski's representation to Haddad that he was "working" on the inspection issue, Pawlowski personally reaching out to Paulus to discuss Haddad's inspection, and Paulus's follow up emails to Pawlowski advising him of the inspection's status, a jury could reasonably find that Pawlowski used his official position to exert pressure on Paulus to perform an official act or advise him, knowing or intending that such advice would form the basis of official action as well. *See McDonnell*, 136 S. Ct. at 2371.

Northeast Revenue Service

The next sub-scheme involves the firm Northeast Revenue Service. Counts 4 and 5 charge Pawlowski with federal program bribery in connection with his solicitation of campaign contributions and other benefits in exchange for the award of a contract for the collection

of delinquent real estate taxes to Northeast Revenue Service (Northeast). As to Count 4, Pawlowski argues the Government failed to present sufficient evidence to prove that, on or about December 18, 2013, he solicited campaign contributions from Sean Kilkenny, an attorney whose firm agreed to partner with Northeast for tax collection work, in exchange for awarding Northeast the delinquent tax collection contract. Pawlowski notes Kilkenny testified his December 18, 2013, campaign contribution check to Pawlowski was given without contingencies. As to Count 5, Pawlowski argues the other benefits he received, Philadelphia Eagles playoff game tickets and a dinner at Del Frisco's Steakhouse, were also not in exchange for the tax collection contract. He therefore contends there was no clear and unambiguous quid pro quo agreement between him and Kilkenny as required by *McCormick* and that there was no evidence he made a decision or took any official action concerning the contract as required by *McDonnell*.

The Court disagrees. The Government presented evidence from which a jury could find that Pawlowski and Kilkenny had an agreement to exchange campaign contributions and other items of value for the tax collection contract, despite no overt conversation between Pawlowski and Kilkenny outlining the terms of this agreement. The evidence also supports the jury's finding of an official act.

The Government first presented evidence bringing to light Kilkenny's political importance to Pawlowski: Kilkenny was the heir apparent of the Democratic party in Montgomery County. *See* Trial Tr. Day 3 at 180. The

support of Montgomery County, a wealthy county in Pennsylvania, was critical for politicians who had statewide and national political ambitions. *See id.*

In 2013, around the time Pawlowski decided to run for governor, the City elected to issue a request for proposals (RFP)[10] for a contract to collect delinquent real estate taxes for the City, which was a contract to which the City had historically appointed Portnoff Law Associates, Ltd. (Portnoff Law). *See* Trial Tr. Day 5 at 124, 127, 130, 137, Jan. 25, 2018. Before an RFP was issued, in October 2013, Kilkenny and Northeast had a meeting with Pawlowski to market their services and discuss the delinquent tax collection contract. *See* Trial Tr. Day 6 at 12. During the meeting, Pawlowski expressed that Portnoff Law's owner, Michelle Portnoff, whose firm had the contract at that time, "had done nothing" for him. *Id.* After the meeting, Ruchlewicz informed Kilkenny that Pawlowski did not like Portnoff because she was "not generous" with him. *See* Trial Tr. Day 6 at 14.

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10. To secure a company to fulfil a contract for certain types of City work that was delineated in the City's purchasing ordinance, the City was required to issue an RFP. *See* Trial Tr. Day 6 at 90, Jan. 29, 2018. After the RFP was issued, bidders on the RFP would submit a technical proposal and a cost proposal, and an evaluation committee would then assess the bids to make a recommendation to the City's purchasing office as to which company should receive the contract. *See id.* at 92-93. The City's purchasing office would formally award the contract, but no contract was official until signed by the mayor. *See id.* at 93, 114. Legal services contracts, however, were generally an exception to the RFP process and were awarded directly by the City's solicitor's office. *See id.* at 111-14.

Shortly thereafter, the City advertised its RFP for the delinquent tax collection contract. Before Portnoff submitted her firm's proposal, she received a phone call from Pawlowski asking her to contribute to his campaign for governor. *See* Trial Tr. Day 5 at 142-43. She declined to contribute and informed Pawlowski it was "inappropriate" to have this type of discussion, given the pendency of the City's RFP for a contract for which her firm would submit a proposal. *See id.* Despite Portnoff's admonition, after Northeast's submission of a proposal in response to the RFP, Pawlowski called Kilkenny and asked him to contribute to his gubernatorial campaign. *See* Trial Tr. Day 6 at 15. Kilkenny contributed on December 18, 2013, while Northeast's proposal was pending, because he "felt pressure" to do so. *See id.* at 18.

While Northeast's proposal was pending, Pawlowski, through Ruchlewicz, also asked Kilkenny and Northeast for tickets to a Philadelphia Eagles playoff game. *See* Trial Tr. Day 6 at 20-21. Kilkenny's colleague—John Rogers of Northeast—agreed to procure the tickets, and the day of the game, on January 4, 2014, Kilkenny, Pawlowski, Ruchlewicz, and others ate dinner at Del Frisco's Steakhouse in Philadelphia. *See id.* at 21-23. During the meal, Ruchlewicz, Pawlowski's campaign staff, told Kilkenny that Northeast's proposal for the tax collection contract "looked good" in Pawlowski's presence. *See id.* at 22-23. Neither Pawlowski nor Ruchlewicz offered to pay for the meal, which Northeast bought. *See id.* at 22. The football tickets and dinner were never reported by Pawlowski as any type of campaign gift. *See id.* at 177.

Appendix B

After the City's evaluation committee reviewed the proposals in response to the tax collection contract RFP, the committee decided to recommend that the law firm Linebarger, Goggan, Blair and Sampson (Linebarger) be awarded the contract. *See* Trial Tr. Day 5 at 82. Karen Csanadi, a member of the committee, testified that after the committee had decided to recommend Linebarger, City Finance Director Garret Strathearn—who was not a member of the evaluation committee—told her he wanted to check with Pawlowski to see if it was acceptable to him if Northeast was not selected. *See* Trial Tr. Day 5 at 82.

When Pawlowski learned that the committee was not recommending Northeast for the contract, he told Strathearn that he wanted Northeast to win the contract because the firm was "important" to him. *See* Trial Tr. Day 5 at 174-75. Pawlowski then directed Strathearn to ensure that Northeast, not Linebarger, received the contract. *See* Trial Tr. Day 3 at 167-68. After Pawlowski spoke with Strathearn, a new evaluation committee, which included Strathearn, was convened. *See* Trial Tr. Day 5 at 90. Strathearn took steps to alter the committee's proposal ranking process to ensure Northeast's proposal would be ranked highest by the new committee. *See* Trial Tr. Day 5 at 176-78. As a result of Strathearn's efforts, the contract was ultimately awarded to Northeast. *See* Trial Tr. Day 5 at 146.

The Government also presented evidence of Pawlowski's expectations as a result of Northeast being awarded the contract. On several occasions in June 2015, Pawlowski expressed frustrations about Northeast's

failure to contribute to his campaign. *See* Gov't's Ex. SR403T at 1 (Pawlowski exclaiming to Ruchlewicz that he was "pissed off" about Northeast's lack of campaign contributions because he had "broken his back" over Northeast); Gov't's Ex. MF75-1846T at 1 (Pawlowski telling Fleck he was "getting really tired of" Northeast and that it was easy to go back to Portnoff); Gov't's Ex. MF87-1152T at 1-2 (Pawlowski agreeing with Fleck that he had taken "bullets" for Northeast and calling Kilkenny to solicit a $25,000 campaign contribution).

As to Count 4, a jury could reasonably conclude based on this evidence that Pawlowski—who both told Kilkenny that Portnoff "had done nothing for him" while discussing the tax collection contract with him and called Kilkenny to solicit a campaign contribution while Northeast's proposal for the contract was pending—entered into an explicit quid pro quo agreement with Kilkenny—who knew Pawlowski preferred vendors who were "generous" and who contributed to Pawlowski while Northeast's proposal was pending—to exchange the tax collection contract for campaign contributions. Pawlowski's expressed frustration at the lack of additional campaign contributions from Northeast and Kilkenny after the award of the contract to Northeast is further evidence of this agreement.

As to the Eagles tickets and meal at Del Frisco's Steakhouse, Count 5, no proof of an explicit quid pro quo is required here as the benefits provided to Pawlowski were not campaign contributions. Outside the campaign contribution context, the Government is only required to

show proof of a quid pro quo, *see United States v. Antico*, 275 F.3d 245, 257-58 (3d Cir. 2001), which it has. The evidence shows Pawlowski requested and received free Eagles tickets and knowingly benefited from a paid-for meal while Northeast's proposal for the tax collection contract was pending before the City. In addition, Northeast's proposal for the tax collection contract was explicitly referenced at the meal by Ruchlewicz, Pawlowski's campaign staff, in front of Pawlowski and without objection from him—raising the inference that Pawlowski had mentioned the contract to Ruchlewicz and agreed with his campaign staff's assessment that Northeast's proposal "looked good." Based on this evidence, a jury could reasonably conclude that Northeast and Kilkenny provided Pawlowski with Eagles tickets and a meal in exchange for official action, including the tax collection contract.

As to Pawlowski's argument that he made no decision or took no action concerning the contract to satisfy *McDonnell*, the evidence shows Pawlowski not only told Strathearn that he wanted Northeast to win the contract, but also directed Strathearn to take steps to ensure Northeast would be awarded the contract when it appeared that the evaluation committee was going to recommend Linebarger for the contract. A jury could find such intervention to be an impermissible attempt to "exert pressure" on another official to perform an official act, i.e., award the contract to Northeast, or "advise another official," intending such advice would form the basis of an official act, both of which satisfy the official act requirement. *See McDonnell*, 136 S. Ct. at 2371.

Appendix B

The Efficiency Network

The Court next turns to the sub-scheme involving an important political stakeholder in Western Pennsylvania, The Efficiency Network. All counts concerning The Efficiency Network (TEN) relate to the award of a City contract for street lights. Counts 15 and 16 charge Pawlowski with federal program bribery, and Counts 40 through 45 charge Pawlowski with honest services wire and mail fraud. Specifically, Count 15 charges Pawlowski with soliciting a sponsorship for a Pennsylvania Municipal League meeting from a principal of TEN, Patrick Regan, in exchange for the street lights contract, and Count 16 charges Pawlowski with soliciting campaign contributions from one of TEN's political consultants, Co-Defendant James Hickey, in exchange for the award of the street lights contract. Counts 40 through 45 charge Pawlowski with sending emails and mails to other vendors and TEN in connection with the street lights contract bidding process.

As to Count 15, Pawlowski argues the phone call in which he makes a sponsorship solicitation from Regan contains no reference to any business or contract. As to Count 16, Pawlowski argues the Government failed to present evidence that he knew Hickey had any involvement with TEN, which is further supported by the fact that his request for campaign contributions from Hickey makes no reference to TEN. To bolster his argument that no explicit quid pro quo agreement between him and Hickey existed, he points to a recording in which Hickey complained about not receiving City contracts and another recording in

which Pawlowski said he could understand why Hickey might not want to give campaign contributions.

As to both Counts 15 and 16, Pawlowski contends any illegal agreements pertaining to awarding TEN the street lights contract were orchestrated by Ruchlewicz, not him. He also argues the Government failed to show he made a decision or took any action concerning the contract as required by *McDonnell*. As to Counts 40 through 45, the honest services wire and mail fraud counts, he argues the Government failed to prove any underlying fraud as there were no illegal agreements between him and Regan or Hickey.

Pawlowski's arguments are unpersuasive. The Government presented evidence that Pawlowski had (1) a quid pro quo agreement with Regan to exchange the street lights contract for a Municipal League meeting sponsorship from Regan; and (2) an explicit quid pro quo agreement with Hickey to exchange the street lights contract for campaign contributions. It also presented sufficient evidence from which a jury could find an official act. As there is sufficient evidence from which a jury could find that Pawlowski entered into these agreements and took official action, Pawlowski's arguments as to the honest services fraud counts also fail.

While Pawlowski's March 10, 2015, solicitation call to Regan made no mention of a contract, the evidence demonstrated this solicitation was part of Regan and Pawlowski's quid pro quo agreement, as they had discussed the street lights contract prior to the call. Prior

to Pawlowski making the March 10, 2015, call, Pawlowski and Regan had a breakfast meeting where the City's street lights contract was discussed. *See generally* Gov't's Ex. SR294-1000T. Ruchlewicz, Pawlowski's campaign staff, was also present at the meeting, during which Pawlowski requested that Regan send him language that could be incorporated into the City's request for qualifications (RFQ)[11] for the street lights contract and informed Regan that although he had met with another provider about the contract, he would not "pick them or anything." *See id.* at 2-3. After Pawlowski left the meeting, Ruchlewicz told Regan the "deal was lined up," Pawlowski wanted him to attend his Mardi Gras fundraiser, and Pawlowski was "hoping for [a] $2,500 [contribution]" for his United States Senate run. *See id.* at 4-6. Regan agreed to contribute, and Ruchlewicz reiterated Pawlowski needed the City's vendors to "give back a little bit." *Id.* at 6. On February 13, 2015, prior to the issuance of the RFQ, Regan contributed $1,500 to Pawlowski's Mardi Gras fundraiser. *See* Gov't's Ex. B-21.

To ensure TEN would be favored in the RFQ and RFP process for the street lights contract, Dougherty provided Public Works Director Craig Messinger, a member of the street lights contract evaluation committee, with language favoring TEN to be incorporated in the City's RFQ and RFP for the street lights contract at Pawlowski's direction. *See* Trial Tr. Day 3 at 85-88. The evaluation committee disregarded the unsolicited language favoring TEN and

11. A request for qualifications is a precursor to an RFP and is used to prequalify a company before the company submits a full proposal in response to an RFP. *See* Trial Tr. Day 6 at 95.

opted to write an RFQ that was "fair" and did not favor any particular company. *See* Trial Tr. Day 7 at 68-70, 73, 75, Jan. 30, 2018. Thus, the RFQ that was ultimately issued did not contain the language favoring TEN. *See* Trial Tr. Day 3 at 89. After the issuance of this RFQ, Jennifer McKenna, another member of the evaluation committee, testified that she felt her job was "in jeopardy" as a result of not incorporating the language favoring TEN in the issued RFQ. *See* Trial Tr. Day 7 at 75-76.

On March 10, 2015, Ruchlewicz informed Pawlowski of the omission and complained to Pawlowski that he had spent three months with Hickey preparing the RFQ language favoring TEN. *See* Gov't's Ex. SR345-1001T at 3. Pawlowski was outraged that the evaluation committee had sent out a different RFQ, *see id.*, and asked Dougherty who needed to be fired over its omission, *see* Trial Tr. Day 3 at 89. Pawlowski called Regan that same day to ask if TEN would be a sponsor for the Pennsylvania Municipal League meeting in the City of Allentown and remarked on how TEN had recently received a large contract from Penn State. *See* Gov't's Ex. SR345-1001T at 1. On March 13, 2015, TEN contributed $5,000 to the City of Allentown, Office of the Mayor. *See* Gov't's Ex. B-22.

On March 27, 2015, the day the RFQ submissions were due, TEN failed to send in its submission. *See* Gov't's Ex. SR354439T at 1. Ruchlewicz and Dougherty discussed how to address the problem. *Id.* TEN was allowed to make an untimely submission, and when Ruchlewicz told Pawlowski about TEN missing the deadline, Pawlowski asked Ruchlewicz if he had taken care of the problem. *See*

Gov't's Ex. SR360T at 1. Ruchlewicz assured Pawlowski that the problem was resolved. *See id.* at 2. Five other companies submitted responses to the RFQ in addition to TEN, and TEN and another company, Johnson Controls, were ultimately selected as the two finalists to submit proposals in response to an RFP for the street lights contract. *See* Trial Tr. Day 3 at 92. Once the RFP had been issued, Dougherty sent it directly to Hickey to give TEN a competitive edge at Pawlowski's behest. *See id.*

On May 5, 2015, before the street lights contract was awarded, Fleck told Pawlowski that Hickey would be sending campaign contributions, and Pawlowski responded he would want more money from Hickey once the street lights contract was awarded, but that he did not want the money to come directly from TEN. *See* Gov't's Ex. MF44T at 1. That same day, Pawlowski also told Ruchlewicz he wanted Hickey to donate $50,000 in campaign contributions. *See* Gov't's Ex. SR391T at 1.

The following day, Ruchlewicz met with Hickey and told him that Pawlowski wanted him to contribute and TEN would be awarded the street lights contract. *See* Gov't's Ex. SR392-0921T at 1-2. Hickey responded that Ruchlewicz could first ask Regan and another principal of TEN, Troy Geanopulos, for contributions, and then Hickey would "reinforce" the request. *Id.* at 2. Ruchlewicz then told Hickey that Pawlowski wanted Hickey to donate. *Id.* at 3. Hickey stated he would contribute and explained how he was the one who taught Pawlowski how to "set up his own system to raise money" and have the "[campaign manager] control the vendor chain . . . [s]o everyone in

the vendor chain is friendly." *Id.* at 3-4. He suggested Ruchlewicz obtain a vendor list and use it to fundraise. *Id.* at 4. Approximately one month after this meeting, the street lights contract was awarded to TEN. *See* Trial Tr. Day 8 at 68.

Based on this evidence, a reasonable jury could conclude both a quid pro quo agreement existed between Pawlowski and Regan and an explicit quid pro quo agreement existed between Pawlowski and Hickey. As to Count 15, which involves Regan and concerns Pawlowski's non-campaign contribution solicitation, only a quid pro quo is required. *See Antico*, 275 F.3d at 257-58. When Pawlowski's solicitation—which occurred before TEN had submitted its response to the RFQ—is viewed in light of Pawlowski's campaign staff's presence at Regan's breakfast meeting with Pawlowski, Pawlowski assuring Regan that his company would be awarded the contract, and his campaign staff informing Regan that vendors "need to give back a little bit"—a jury could reasonably find that Pawlowski and Regan had an agreement whereby Pawlowski would award TEN the street lights contract in exchange for Regan "giving back" when requested.

As to Count 16, Pawlowski's efforts to cherry-pick certain portions of the record to support his argument that there was no explicit quid pro quo agreement between him and Hickey also fail. When the evidence is reviewed as a whole, there is ample evidence from which a jury could conclude that Pawlowski knew Hickey was affiliated with TEN and that an explicit quid pro quo agreement concerning the street lights contract existed between

the two, including: (1) Pawlowski directing Dougherty to send Hickey the RFP for the street lights contract; (2) Fleck informing Pawlowski that Hickey would be sending a check and Pawlowski responding that he would want more money once the street lights contract was awarded; and (3) Ruchlewicz requesting campaign contributions on Pawlowski's behalf from Hickey—while mentioning the street lights contract and before the contract was awarded to TEN—and Hickey agreeing to donate.

The Government also presented sufficient evidence from which a reasonable jury could find an official act. In light of Pawlowski's repeated efforts to secure the street lights contract for TEN, including directing Dougherty to provide both an RFQ favoring TEN to the street lights contract evaluation committee and an RFP directly to Hickey, there is sufficient evidence from which a jury could find that Pawlowski exerted pressure through Dougherty on other officials, including evaluation committee members Messinger and McKenna, to award the street lights contract to TEN. *See McDonnell*, 136 S. Ct. at 2371. Because the Government proved Pawlowski entered into unlawful agreements with Regan and Hickey that resulted in an unfair contracting scheme, Pawlowski's arguments as to Counts 40 through 45 also fail.

CIIBER/5C Security

The next sub-scheme involves CIIBER/5C Security. Count 18 charges Pawlowski with federal program bribery for soliciting campaign contributions from Jack Rosen, a wealthy New York real estate developer, in exchange for

steering a cybersecurity contract to Rosen's company, CIIBER/5C Security. Counts 46 and 47 charge Pawlowski with Travel Act bribery based on Pawlowski's travels to New York in February and May of 2015 to discuss the cybersecurity contract with Rosen. Pawlowski contends the Government failed to prove an explicit quid pro quo between him and Rosen, relying on Rosen's request to put up a "Chinese wall," i.e., a communication barrier, between their conversations about business development and politics. He further argues the Government's pay-to-play theory fails as to this sub-scheme because Rosen contributed $30,000 in campaign contributions to Pawlowski to receive only a $35,000 contract.

Pawlowski's arguments are unpersuasive because the Government's evidence at trial demonstrated Pawlowski specifically sought to find a contract for Rosen so that he would be motivated to raise campaign funds for Pawlowski in New York. *See* Trial Tr. Day 3 at 144-45 (Dougherty's testimony describing Rosen as "an extremely wealthy, well-connected developer," who was "very active in Democratic circles [and] known as a prestigious fundraiser for the Clintons and [] the Gores"), 148-49; Gov't's Ex. I-7 (Dougherty's contemporaneous meeting notes reflecting Pawlowski stating, "Rosen. Get something."); Gov't's Ex. I-8 (Dougherty's contemporaneous meeting notes with Pawlowski characterizing City Information Technology Specialist Matt Leibert as saying, "5C[/CIIBER]. Good to go."); Gov't's Ex. SR11173T at 1 (audiotape recording in which Ruchlewicz asks Dougherty for an update on the security contract, to which Dougherty responds, "[W]e're gonna give [CIIBER] a job, okay? That's [] my instructions from the mayor.").

Pawlowski took several steps to ensure that his plans to award Rosen a cybersecurity contract would remain covert. For example, during a January 6, 2015, meeting in Pawlowski's office, after Ruchlewicz and Pawlowski discussed Rosen's security company, Ruchlewicz reminded Pawlowski how he and Pawlowski "got them that deal." *See* Gov't's Ex. SR264-RosenT at 1-2. Pawlowski responded, "No. I mean yeah . . . they responded to an RFP. Yes. Yes, I know." *Id.* at 2. After they left the office, Pawlowski told Ruchlewicz he had his office swept for "bugs," indicating he was becoming worried about his conduct being detected, and explained the 5C deal should not be discussed aloud: "[J]ust by saying yeah, we got the 5C deal. You know what I mean? You just don't want to say any of that stuff. You know? . . . And if, either of those interns wants to be really pissy at us someday and say 'hey, the mayor was talking about all these deals they had.'. . . You know what I'm saying? . . . You gotta be careful." *Id.* at 3.

The next month, in February 2015, Pawlowski and Ruchlewicz met with Rosen in New York to discuss the cybersecurity contract. *See generally* Gov't's Ex. SR308BT. During this meeting, after discussing campaign contributions and Pawlowski's Mardi Gras fundraiser, Pawlowski informed Rosen, "[W]e're going to do the contract." *Id.* at 2-3. After discussing contract details and how the City's contracting process worked, Rosen told Pawlowski that it did not matter if he failed to make money on the contract because the contract would eventually lead to more business for him in Pennsylvania. *See id.* at 5. Rosen then signaled it was time to discuss contributions: "[L]et's get off business. I don't like talking about both at

the same time," and then he and Pawlowski proceeded to discuss fundraising for Pawlowski. *See id.* at 7.

In the elevator ride with Ruchlewicz following the meeting, Pawlowski reflected on his discussion with Rosen and told Ruchlewicz to avoid verbalizing his pay-to-play scheme, cautioning: "[W]e gotta be careful. I can't, I get uncomfortable when we start talking about hey, we're just gonna give you this. Who has the contract process? I'm so scared [nowadays] like, who the hell knows who's wearing a wire? Who's tapped? Who's not? You know what I mean? I think I just gotta be, we just gotta be, we just gotta be really careful when we talk about this stuff." *Id.* at 7. Ruchlewicz agreed. *See id.*

In May 2015, during another meeting with Rosen in New York, Pawlowski informed Rosen that the contract was "lined up" and described how all his departments would convene the following week to assess security lapses. *See* Gov't's Ex. MF55-1425T at 1-2. Pawlowski then asked if he and Rosen were done talking about "other business," signaling that it was time to discuss contributions. *Id.* at 2. Rosen responded, "Yeah. Put up a Chinese wall." *Id.* at 3. Pawlowski then told Rosen how he would like to raise as much money as possible before June 30, and Rosen stated, "I think we will raise you some money." *Id.* at 4. In months following this meeting, Rosen and several of his family members contributed approximately $30,000 to Pawlowski's campaign. *See* Trial Tr. Day 10 at 118-21, Feb. 5, 2018.

Appendix B

In addition to Pawlowski and Rosen's own words as evidence of an explicit quid pro quo agreement, the Government presented City employees who testified that the cybersecurity contract was an unusual contract for the City, further suggesting the contract was created to provide work for Rosen's company and campaign contributions for Pawlowski. *See, e.g.*, Trial Tr. Day 7 at 240-41 (City Superintendent of Communications Michael Hilbert's testimony that the network information he was being asked to provide to CIIBER felt like "giving them the keys to our network kingdom" and the requests for a cybersecurity contract appeared to be flowing from the top down), 264-65 (City Information Technology Specialist Matthew Leibert's testimony that the CIIBER contract was not necessary for the City).

Based on the snippets of conversation the jury heard between Rosen and Pawlowski—where both the cybersecurity contract and campaign fundraising were discussed—Pawlowski's concern about discussing the "5C deal" aloud, and the City employees' testimony, a reasonable jury could have found an explicit quid pro quo agreement between Rosen and Pawlowski. Pawlowski's contention that a "Chinese wall" wall prevented a link between the cybersecurity contract and the solicitation of campaign contributions is belied by his actual conversations with Rosen, which reveal the "Chinese wall" to be nothing more than an imaginary barrier. As to Pawlowski's argument that Rosen could not have entered into this unlawful agreement due to the value of the contract, Rosen admitted his motivation for entering into the agreement was to gain a foothold in the Pennsylvania market, not to make a large profit on the contract.

Appendix B

Spillman Farmer Architects

The next sub-scheme concerns Spillman Farmer Architects, an architecture company. Count 8 charges Pawlowski with federal program bribery for soliciting a $2,700 campaign contribution from Joseph Biondo, part owner of Spillman Farmer Architects (Spillman Farmer), in a June 24, 2015, email, in exchange for the award of a contract for the design and construction of several City pools. Pawlowski contends there is no evidence of an explicit quid pro quo agreement between him and Biondo because (1) his initial June 2, 2015, request for a campaign contribution—followed by the June 24, 2015, email from his campaign consultant—contained no reference to the pools contract or any other work; and (2) the pool contract was awarded to Spillman Farmer even though Biondo declined to give a campaign contribution. Finally, Pawlowski maintains he took no official action under *McDonnell* with respect to the pools contract.

The Court disagrees. The evidence presented by the Government was sufficient for a reasonable juror to find both that there was an explicit quid pro agreement between Pawlowski and Biondo, and Pawlowski took official action. Even before the RFP for the pools contract was issued, Pawlowski had explained to Dougherty that Spillman Farmer was important to him because its members would be campaign contributors. *See* Trial Tr. Day 3 at 177. Once the RFP for the pool contract was issued, Pawlowski set out to secure the pools contract for Spillman Farmer.

Dougherty, who not a member of the pools contract evaluation committee, initially informed Superintendent of Parks Richard Holtzman, a member of pools contract evaluation committee, that Pawlowski wanted the contract to be awarded to Spillman Farmer. *See* Trial Tr. Day 3 at 178-79. Holtzman responded they should wait for the committee's recommendation. *See id.* After the pools contract committee evaluated the proposals submitted in response to the RFP and interviewed the finalists, the committee's preference for the contract appeared to be Integrated Aquatics. *See* Trial Tr. Day 13 at 229-30, 233-36, Feb. 8, 2018. Dougherty was made aware of the committee's preference, and he told Holtzman to "take another look" at Spillman Farmer. *See* Trial Tr. Day 13 at 236. Holtzman conveyed this information to the other committee members and testified that he felt pressure to favor Spillman Farmer for the pools contract. *See id.* at 237. When Holtzman reached out to one of Spillman Farmer's references, however, the reference provided him with a negative recommendation. *See id.* at 238. Holtzman informed Dougherty, *see id.*, who informed Pawlowski, and Pawlowski directed Dougherty to discuss the matter with Ruchlewicz, *see* Trial Tr. Day 3 at 179-80.

Ruchlewicz subsequently called Biondo. He notified him that "everybody liked" his company's pools project bid and asked Biondo to provide him with another reference "as soon as possible" so that Spillman Farmer could be awarded the contract. *See* Gov't's Ex. SR35090T at 1-2. Biondo knew Ruchlewicz was not a representative of the City, and he testified that he had never received this type of "inside information" about a pending municipal

contract. *See* Trial Tr. Day 14 at 139, Feb. 12, 2018. Nonetheless, Biondo agreed to provide Ruchlewicz, Pawlowski's campaign staff, with a new reference, *see* Gov't's Ex. SR35090T at 2, and Spillman Farmer was notified it was awarded the contract on April 9, 2015, *see* Trial Tr. Day 13 at 244-45.

Before the contract was officially signed by Pawlowski, on June 2, 2015, Pawlowski and Biondo spoke on the phone. *See* Gov't's Ex. SR402-1602T at 1-2. During this conversation, Pawlowski asked if Spillman Farmer could contribute $2,700 to his campaign. *See id.* Biondo responded he would have to "run it up the flagpole." *See* Trial Tr. Day 14 at 141. While Pawlowski did not reference the pool contract explicitly on the phone, he made clear to Ruchlewicz after the phone call ended that he expected contributions from Biondo and Spillman Farmer in exchange for the pools contract. After ending his call with Biondo, Pawlowski immediately exclaimed, "I'll run it up the flag pole, what the hell does that mean?" *See* Gov't's Ex. SR402-1602T at 2. When Ruchlewicz asked who Pawlowski had just spoken to on the phone, Pawlowski answered Biondo. *Id.* Ruchlewicz remarked that Spillman Farmer received the pools contract, to which Pawlowski laughingly replied, "Yes, I know. Better run it up the flagpole fairly quick," *id.*, suggesting that Biondo's donation, as per the parties' agreement, needed to be given before his June 30, 2015, fundraising deadline if the contract was going to be signed. Pawlowski's campaign staff emailed Biondo on June 24, 2015, asking about the possible contribution and informing him about the June 30, 2015, deadline. *See* Gov't's Ex. E-5. Biondo responded to the email on June

29, 2015, and stated he would not be contributing at that time. *See* Gov't's Ex. E-34. Pawlowski told Fleck to call Biondo again because "he's doing all my pools right now." *See* Gov't's Ex. MF99T at 1.

Based on this evidence, including Pawlowski's campaign staff directly calling Biondo—who did not question the call or the information relayed to and requested from him—and discussing the City's pools contract with him while his company's proposal was pending, a jury could find that Biondo, through Ruchlewicz, had an explicit quid pro quo agreement with Pawlowski. Furthermore, given Pawlowski's interference in the contracting process to ensure the award of the pools contract to Spillman Farmer and expectations that Spillman Farmer contribute to his campaign after the award of the contract, a jury could infer that Pawlowski's June 24, 2015, email was an effort by Pawlowski to receive his end of the bargain before he officially signed the contract. While Biondo may have changed his mind about executing their agreement, a jury could still find he entered into the agreement with Pawlowski through his conversation with Ruchlewicz—who called Biondo at Pawlowski's direction.

As to Pawlowski's argument that there could be no agreement between him and Biondo because he signed the pools contract despite Biondo's failure to donate, this argument is undercut by the fact that the contract was signed on July 2, 2015, the day the Federal Bureau of Investigation raided City Hall to investigate Pawlowski. *See* Gov't's Ex. E-7. Given the timing of the raid and the signing of the contract, a jury could infer that Pawlowski signed the contract to avoid any appearance of impropriety.

Finally, the evidence also demonstrated Pawlowski (1) directly informed Dougherty and indirectly informed committee member Holtzman that he wanted the contract to be awarded to Spillman Farmer and (2) asked Dougherty to speak to Ruchlewicz about Spillman Farmer's negative reference. Based on this evidence, a jury could certainly find that Pawlowski's actions were an impermissible attempt to "exert pressure" on other City officials to perform an official act, i.e., award the contract to Spillman Farmer, or advise them, knowing or intending that such advice would lead them to award the contract to Spillman Farmer. *See McDonnell*, 136 S. Ct. at 2371.

McTish, Kunkel & Associates

McTish, Kunkel & Associates, an engineering firm, is involved in the next sub-scheme. Count 10 charges Pawlowski with federal program bribery for soliciting campaign contributions from engineer Matthew McTish, a principal of McTish, Kunkel & Associates, on April 27, 2015, in exchange for an engineering contract. Pawlowski contends he and McTish did not enter into an explicit quid pro quo agreement, noting there was no agreement made during the April 27, 2015, recorded meeting and that there could not be an agreement for some unspecified future act, as alleged in the Indictment.

The Government presented evidence from which a reasonable juror could find an explicit quid pro quo agreement between Pawlowski and McTish. The Government first presented evidence of McTish and Pawlowski's relationship and McTish's familiarity with

Pawlowski's pay-to-play schemes. McTish explained he and Pawlowski would often have discussions about the type of work his firm would like to do for the City and campaign contributions in the same conversation. *See* Trial Tr. Day 13 at 45 (McTish's testimony describing how Pawlowski would discuss engineering projects for the City with him and then "slide right in to how he needed my help making a campaign contribution for the campaign"). He believed he could not obtain work from the City unless he donated to Pawlowski and observed that "there was a relationship between getting work [from the City] and making campaign contributions." *See id.* at 142, 145.

One specific engineering project in which McTish was interested was the Chew Street project, a street improvement project along Chew Street. Pawlowski first learned of McTish's desire to be awarded this project prior to the April 27, 2015, meeting Pawlowski references. In December 2014, Ruchlewicz informed Pawlowski that he, City Controller Mary Ellen Koval, and Dougherty had found some work, the Chew Street project, for McTish pursuant to Pawlowski's request. *See* Gov't's Ex. SR223DT at 1. Pawlowski expressed his approval, and Ruchlewicz told him to "hit [McTish] up" for his holiday party. *Id.* Pawlowski agreed and said he would do so the following week. *See id.* A few days later, Ruchlewicz relayed to McTish that he had told Pawlowski that McTish would be contributing $2,500 and that Pawlowski responded that as soon as the Chew Street project came across his desk, he would "give it the rubber stamp, sign it, seal it," and it would be McTish's. *See* Gov't's Ex. SR230T at 1. McTish then made campaign contributions to both Koval, *see* Gov't's Ex. D-15, and Pawlowski, *see* Gov't's Ex. D-17.

By the time Pawlowski and McTish met on April 27, 2015, however, McTish was angry because he had not yet received a contract for the Chew Street project. *See* Trial Tr. Day 13 at 61, 63, 69. Before Pawlowski arrived to his meeting with McTish on April 27, Ruchlewicz spoke with McTish to assure him that an RFP would be forthcoming for Chew Street and told him that Pawlowski would confirm this information. *See* Gov't's Ex. SR386-1258T at 1. After Pawlowski arrived, he gave McTish a campaign pitch regarding his run for Senate and asked him to donate $21,600 to his campaign by June 30, 2015. *See* Trial Tr. Day 13 at 72-77; Gov't's Ex. SR386-1258T at 2. McTish and Pawlowski then discussed bridges, roads, and infrastructure. *See* Trial Tr. Day 13 at 73. After McTish and Pawlowski spoke, Ruchlewicz asked McTish if he and Pawlowski were "squared away" and if he and Pawlowski had discussed bridges, which McTish affirmed. *Id.* That same day, McTish received an email from Pawlowski's campaign consultant, who was also at the lunch meeting, requesting campaign contributions. *See id.* at 74. McTish never received the Chew Street project, and he contributed $2,500 to Pawlowski's campaign after the June 30, 2015, deadline. *See id.* at 76.

Despite McTish never being awarded the Chew Street project, a jury could nonetheless find evidence of an explicit quid pro quo agreement between Pawlowski and McTish from the evidence as a whole. First, at the time of Pawlowski's April 27, 2015, campaign contribution solicitation from McTish, Pawlowski knew through Ruchlewicz that McTish wanted engineering work from the City and to be awarded the Chew Street project.

Second, immediately prior to Pawlowski's campaign pitch on April 27, 2015, Ruchlewicz discussed the Chew Street project with McTish, raising the inference that Ruchlewicz, as campaign staff, was acting as a buffer for Pawlowski and speaking on his behalf when he told McTish that Chew Street would still be awarded to him. Third, while there is no direct evidence that Pawlowski and McTish discussed Chew Street on April 27, they did discuss campaign contributions and City work. Ruchlewicz mentioning Chew Street to McTish immediately before McTish met with Pawlowski—who then discussed City work with McTish and asked for campaign contributions—suggests a link between the Chew Street project and campaign contributions. And fourth, after Pawlowski and McTish spoke, McTish confirmed to Ruchlewicz that he and Pawlowski were "squared away." Based on this evidence, in the context of Pawlowski and McTish's relationship and each being aware of what the other desired, one campaign contributions and the other the Chew Street project, a jury could infer that an explicit quid pro quo agreement existed between Pawlowski and McTish.

To the extent Pawlowski argues the Government failed to prove an official act under *McDonnell* because he never took any action to award McTish the Chew Street project, this argument fails as a public official need not make a decision or take any action on a "question, matter, cause, suit, proceeding, or controversy" to satisfy *McDonnell*; rather, it is enough that the official "agree to do so." *See McDonnell*, 136 S. Ct. at 2371. Here, the Government presented evidence that Pawlowski wanted

McTish to be awarded an engineering contract, had his operatives find a specific contract for him, the Chew Street contract, and then agreed to "stamp, sign, and seal" it once it came across his desk. This evidence is sufficient for a jury to conclude that Pawlowski agreed to "make a decision" or "take an action" on the City contract to satisfy *McDonnell*. *See id.*

Norris McLaughlin

The next sub-scheme involves the law firm Norris McLaughlin. Count 17 charges Pawlowski with federal program bribery for soliciting campaign contributions from Co-Defendant Scott Allinson and his law firm, Norris McLaughlin, in exchange for a parking authority solicitorship contract. Pawlowski argues there was no explicit quid pro quo between him and Allinson, noting that a recording of a May 20, 2015, meeting in which he requested campaign contributions from Norris McLaughlin attorneys contains no mention of an exchange of a contract for campaign contributions. He further argues that prior to the May 20, 2015, meeting, he had expressly instructed Fleck to "not cross the line" during the meeting. In addition, he argues the Government failed to prove an official act under *McDonnell* because he did not intervene to award any solicitorship contract to Norris McLaughlin and, in fact, he had no actual authority to make such an award.

The Government presented sufficient evidence from which a reasonable jury could find an explicit quid pro quo between Pawlowski and Allinson and an official act under

McDonnell. The Government's tape recordings showed that months before the May 20, 2015, meeting took place, Allinson, Fleck, and Ruchlewicz discussed how Allinson's law firm would receive the parking authority solicitorship contract in exchange for campaign contributions to Pawlowski on several occasions. *See, e.g.*, Gov't's Ex. SR21602T at 1-2 (December 12, 2014, audiotape recording in which Ruchlewicz informs Allinson that a partner at Norris McLaughlin, Richard Somach, would receive the parking authority solicitorship because Pawlowski "controls all the [parking authority] board members" and asks Allinson to help sponsor Pawlowski's upcoming holiday party); Gov't's Ex. SR286T at 1-3 (January 22, 2015, audiotape recording in which Ruchlewicz tells Allinson that his "parking authority problems" have been solved and asks for Allinson's help to raise money for Pawlowski's United States Senate campaign); Gov't's Ex. SR287T at 1 (January 23, 2015, audiotape recording in which Ruchlewicz informs Allinson that he, Fleck, and Pawlowski had discussed their agreement); Gov't's Ex. SR301T at 5 (February 3, 2015, audiotape recording in which Allinson explains to Fleck that if he were to receive a phone call requesting that he oversee the parking authority solicitorship, then he would "get a hundred percent of the[] kind of credit that turns into money that goes out of [his] checkbook where [Fleck and Ruchlewicz] want it to go").

The Government also showed that Pawlowski was aware of these discussions, and the pay-to-play scheme received his approval. For example, after Allinson had dropped off a campaign contribution check at Pawlowski's

Mardi Gras fundraiser on February 13, 2015, Ruchlewicz told Pawlowski, "Installment number one is in," referring to the check Allinson had dropped off. *See* Gov't's Ex. SR318T at 4. During the same conversation, Ruchlewicz informed Pawlowski that Allinson had told him to make sure Pawlowski knew Allinson had brought a check and that he had told Allinson they could continue with the "Somach to Solicitor plan," i.e., the plan to appoint Norris McLaughlin Attorney Richard Somach as the parking authority solicitor. *Id.* Pawlowski raised no questions about the information Ruchlewicz presented and noted his approval, responding "That's good." *Id.*

A couple months later, Pawlowski explained to Ruchlewicz that he was working on having the parking authority solicitorship assigned to Norris McLaughlin. *See* Gov't's Ex. SR365CT at 1. Ruchlewicz stressed the terms of the agreement—the solicitorship had to be awarded to Norris McLaughlin through Allinson even though Somach would receive the work because Allinson was the firm's managing partner and controlled the political action committee money. *See id.* at 2. Pawlowski confirmed his understanding of the agreement, responding, "[T]hat's logical" and "[G]otcha." *Id.*

These conversations took place prior to the May 20, 2015, meeting Pawlowski references. At that meeting, Pawlowski made a campaign pitch to Norris McLaughlin attorneys, including Allinson, explaining why he would make a good candidate for Senate and asking the law firm to raise $25,000 in campaign contributions before June 30, 2015. *See* Gov't's Ex. MF58T at 1-2. The day

before Pawlowski's campaign contribution deadline, June 29, 2015, Fleck told Pawlowski that Norris McLaughlin "came through" with $17,300 in campaign contributions, and Pawlowski responded, "Great. . . . Awesome." Gov't's Ex. MF95-0227T at 1. When Fleck then raised the issue of appointing Somach to the parking authority, Pawlowski did not question the connection between the appointment and the contributions, but noted he first needed to get "rid" of the current solicitor. *Id.* Pawlowski stated that although he did not control the board in charge of the parking authority, he could talk to the board, and he and Fleck then discussed alternate means of forcing the current solicitor to withdraw. *See id.* at 2.

When the May 20, 2015, meeting is viewed in light of these conversations, a reasonable jury could find there was an explicit quid pro quo agreement between Pawlowski and Allinson: Allinson would ensure campaign contributions were donated from Norris McLaughlin to Pawlowski in exchange for Somach's appointment to the parking authority solicitorship, a matter for which Allinson would receive origination credit.

A reasonable jury could also find the solicitorship contract to be an official act under *McDonnell*. While Pawlowski never took any action to award the solicitorship to Somach, under *McDonnell*, "it is enough that [Pawlowski] agree[d] to do so." *See McDonnell*, 136 S. Ct at 2370-71 (citing *Evans*, 504 U.S. at 268). From Pawlowski's conversations with Fleck and Ruchlewicz, in which Pawlowski acknowledged and agreed Somach would receive the solicitorship in exchange for campaign

contributions from members of the Norris McLaughlin law firm, a reasonable jury could find that Pawlowski agreed to take official action concerning the solicitorship.

Pawlowski's argument that the Government failed to prove an official act under *McDonnell* because he had no authority to take any official action on the parking authority solicitorship contract is also unpersuasive. Pawlowski's statement that he could talk to the board in charge of the parking authority concerning Somach's appointment could allow a reasonable jury to infer that Pawlowski either intended to "exert pressure" on members of the board in charge of the parking authority to appoint Somach or "advise" them on who to appoint as solicitor, knowing or intending such advice would form the basis of an official act. *See id.* at 2370-71.[12]

Stevens & Lee

The final sub-scheme involves the law firm Stevens & Lee. Counts 11, 12, 13, and 14 arise out of Pawlowski's

12. In his Rule 29 Supplement, while discussing the Norris McLaughlin scheme but without any citation to the record, Pawlowski makes the cursory argument that the Government "misled the jury by raising the issue of [a] meeting with the [G]overnment in relation to Talen Energy Company." *See* Suppl. 24. Because the Court is not sustaining Pawlowski's conviction as to the Norris McLaughlin sub-scheme on any evidence related to Talen Energy, and it appears testimony related to Talen Energy was not presented in the Government's case-in-chief, *see Brodie*, 403 F.3d at 133 (explaining when a court reserves ruling on a Rule 29 motion made at the close of the Government's case, it must determine whether acquittal was appropriate based solely on the evidence presented by the Government), the Court does not address this argument.

solicitation of campaign contributions from two attorneys at Stevens & Lee in exchange for the award of legal work. Specifically, Counts 11 and 12 charge Pawlowski with federal program bribery and attempted Hobbs Act extortion under color of official right for soliciting campaign contributions from Jonathan Saidel, who was of counsel at Stevens & Lee. Counts 13 and 14 also charge Pawlowski with federal program bribery and attempted Hobbs Act extortion under color of official right based on his solicitation of campaign contributions from Donald Wieand, another attorney affiliated with Stevens & Lee. Pawlowski argues a judgment of acquittal should be entered as to all four counts because the Government failed to establish an explicit quid pro quo agreement between him and Saidel or Wieand or that he took any official act for either of them.

As to Saidel, Pawlowski contends there was no explicit quid pro quo agreement because he never requested campaign contributions from Saidel, and only stated he would "reconsider" giving work to Stevens & Lee at a March 12, 2015, meeting between the two. In addition, Pawlowski argues that to the extent he referred Saidel to City Solicitor Susan Wild to discuss legal work Stevens & Lee might be able to receive from the City, he did nothing more than arrange a meeting, which cannot constitute an official act under *McDonnell*.

As to Wieand, Pawlowski argues that while he requested a contribution at a meeting he had with Wieand in January 2015, there was no discussion of the contribution being made in return for any specific type

of legal work; rather, Pawlowski only told Wieand that Wild would be calling him. Pawlowski further argues Wieand's contributions were not evidence of an explicit quid pro agreement as Wieand had contributed in the past. Pawlowski also argues that while Wieand testified that he agreed to contribute to Pawlowski during a June 8, 2015, solicitation call from him because he felt that he would not receive a call from Wild unless he gave, Wieand's unilateral, subjective belief that he needed to contribute to meet with Wild cannot form a clear and unambiguous agreement. Further, he again argues the only official act he could have taken was arranging a meeting between Wieand and Wild, which does not meet *McDonnell*'s definition of an official act.

The Court agrees with Pawlowski that the Government failed to prove an explicit quid pro quo agreement as to either Saidel or Wieand. The Government showed that Wieand met with Pawlowski in the City of Allentown on January 15, 2015, to ask Pawlowski to award some legal work to Stevens & Lee. *See* Trial Tr. Day 2 at 114, Jan. 22, 2018. At the meeting, Wieand asked Pawlowski about the possibility of receiving legal work from the City, but Pawlowski responded, "I don't deal with that. You're going to have to talk to Susan Wild." *See id.* at 124.

On February 10, 2015, Ruchlewicz told Pawlowski that he had complained to Saidel about Stevens & Lee sending a $100 check to Pawlowski because it was "like a slap in the face." *See* Gov't's Ex. SR315FT at 2. Pawlowski told Ruchlewicz about his January 15, 2015, meeting with Wieand, Wieand's request for more City work, and

stated Stevens & Lee needed to "make up" and send more campaign contributions. *See id.* at 2-3. Ruchlewicz said he was going to send out invitations for Pawlowski's Mardi Gras fundraiser, and Pawlowski observed the fundraiser was "a way for Stevens and Lee to show that they actually love me." *Id.* When Ruchlewicz suggested $5,000 as a target amount, Pawlowski responded "at the very least," noting he had given the firm "millions[] of dollars' worth of legal work," but the firm treated him like "absolute crap." *Id.*

A month later, on March 12, 2015, Saidel met with Pawlowski and Ruchlewicz in an effort to convince Pawlowski to award legal work to Stevens & Lee. *See* Trial Tr. Day 2 at 190-91. At the meeting, as Saidel attempted to pitch Stevens & Lee, Pawlowski complained he "had given [the firm] millions of dollars of work in the past," but the firm had only given him "a hundred bucks." Gov't's Ex. SR347-1547T at 1. Saidel responded, "[L]ife is a two[-]way street, which you and I both understand." *Id.* Pawlowski agreed and stated he was willing to reconsider Saidel's request to give work to Stevens & Lee. *See id.* Later in the meeting, Pawlowski mentioned that he, Ruchlewicz, and Saidel should all meet with his new City solicitor. *See id.* at 4. At the end of the meeting, Saidel asked if Pawlowski would "take care of the Stevens and Lee thing, to which Pawlowski responded, "Yeah . . . it's not a big lift." *Id.* at 5.

A few days later, Ruchlewicz mentioned to Pawlowski that Wieand only contributed $25 at a recent event. *See* Gov't's Ex. 362bT at 1. Irritated, Pawlowski suggested they let Saidel know about Wieand's meager donation

and stated if Wieand would have donated $2,500, "it would have been a totally different story." *Id.* Ruchlewicz called Saidel, in Pawlowski's presence, and told him that "twenty[-]five is a good number if it has two zeros behind it." *Id.* at 2. Saidel responded he would take care of it. *See id.* at 3.

On June 8, 2015, Pawlowski called Wieand and told him he would be receiving a call from Wild. *See* Trial Tr. Day 2 at 128-29. Pawlowski then launched into a campaign pitch and asked Wieand to contribute $1,000. *Id.* at 129-30. Wieand agreed to contribute, believing that if he said no, he would not receive a call from Wild. *Id.* at 130. After the call, Wieand was angry because he thought Pawlowski was just "playing [him]" to obtain campaign contributions, but then he feared that he would be involved in a pay-to-play situation if he did receive a call from Susan Wild. *See id.* at 130. Wanting no part of such a situation, Wieand never sent a check to Pawlowski. *Id.* at 131-32.

A week later, on June 15, 2015, Pawlowski and Fleck discussed Saidel approaching Fleck at Ruchlewicz's wedding and asking when Stevens & Lee would receive work from the City. *See* Gov't's Ex. MF87-1140T at 1-2. Pawlowski laughed and noted that Stevens & Lee might receive some work in the future but the way his system worked, nothing would happen until after his June 30, 2015, campaign contribution deadline. *See id.* at 2.

While Pawlowski's conversations with Wieand and Saidel demonstrate he expected Stevens & Lee to engage in his pay-to-play scheme, they fail to show any

agreement between the parties or elucidate the terms of any alleged agreement. *See Menendez*, 291 F. Supp. 3d at 624 (explaining the "relevant inquiry to determine if the Government has met its burden with respect to [bribery] counts" that involve political contributions is "whether a rational juror could find that there was a quid pro quo and that the charged [d]efendant was aware of its terms"). At most, the evidence suggests that Saidel and Wieand agreed to contribute to Pawlowski in exchange for the possibility of receiving unspecified legal work from the City at some point in the future. While such evidence may support a finding of a quid pro quo agreement in the non-campaign contribution context, more is required in the campaign contribution context. *Compare United States v. Kemp*, 500 F.3d 257, 282 (3d Cir. 2007) (explaining that "the [G]overnment need not prove that each [bribe] was provided with the intent to prompt a specific official act" and sustaining convictions for honest services fraud on a bribery theory when bribes were offered in exchange for a flow of favorable treatment outside campaign contribution context) *with McCormick*, 500 U.S. at 273 (explaining that when bribes are made "in return for an explicit promise or undertaking by an official to perform or not perform an official act," "the official asserts that his conduct will be controlled by the terms of the promise or undertaking" in the campaign contribution context). Here, the evidence does not support the finding that any campaign contributions or agreements to donate were made in exchange for Pawlowski's promise or undertaking to perform an official act. While Pawlowski did agree to "take care" of Stevens & Lee in his conversation with Saidel, this reference to some unspecified future action,

in conjunction with Pawlowski's later statement that Stevens & Lee might receive legal contracts in the future, fail to reveal the quo of the explicit quid pro quo, i.e., the subject of Pawlowski's promise or undertaking. Because the evidence is insufficient to establish an explicit quid pro quo between Pawlowski and Wieand or Saidel, Pawlowski's motion for judgment of acquittal was granted as to Counts 11, 12, 13, and 14.[13]

B. Mail and Wire Fraud

Counts 20-22, 26-28, 30, and 33-37 charge Pawlowski with mail or wire fraud arising out of the Northeast, TEN, and Spillman Farmer schemes, which unfairly eliminated other companies or firms that were seeking the City contracts that were ultimately awarded to those entities. A conviction for mail or wire fraud requires "(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 the mails or interstate wire communications in furtherance of the scheme." *Antico*, 275 F.3d at 261.

As to these counts, relying on the arguments he made as to the Northeast, TEN, and Spillman Farmer schemes above, the thrust of Pawlowski's argument is that the Government failed to prove mail or wire fraud because it did not provide any evidence of an explicit quid pro quo

13. As the Court granted Pawlowski's motion on Counts 11, 12, 13, and 14 on the basis that the Government failed to prove an explicit quid pro quo, it does not reach Pawlowski's arguments as to whether his actions qualified as an official act under *McDonnell*.

agreement between him and Kilkenny, Regan, or Biondo. As an initial matter, the Court notes that an explicit quid pro quo or quid pro quo is not required for a mail or wire fraud conviction, and Pawlowski fails to provide any support for his assertions to the contrary. Given that the Court has already found there was sufficient evidence from which a jury could find either a quid pro quo or an explicit quid pro quo where applicable, however, Pawlowski's argument fails nonetheless.

C. False Statements

Counts 49-55 charge Pawlowski with making false statements to agents of the Federal Bureau of Investigation.[14] A false statement conviction requires that a defendant "knowingly and willfully . . . make[] a[] materially false, fictitious, or fraudulent statement or

14. Specifically, these counts charge Pawlowski with falsely stating he: (1) "stayed out of the contract bidding process in the City of Allentown" (Count 49); (2) "did not try to influence the awarding of contracts from the City of Allentown to particular vendors" (Count 50); (3) "did not tell the City of Allentown City Solicitor to whom to award City of Allentown contracts" (Count 51); (4) "has never used a list of vendors and the amount of money they have received in contracts from the City of Allentown to determine how much money those vendors should contribute to his political campaign" (Count 52); (5) "has never taken anything of value from anyone bidding on a City of Allentown contract, when he knew that he did take a free meal and tickets to a Philadelphia Eagles playoff game from a company bidding on a city contract" (Count 53); (6) "has never taken any official action to benefit Ramzi Haddad" (Count 54); and (7) "had no role in selecting or not selecting the law firm Stevens and Lee for contracts with the City of Allentown." (Count 55). Indict. 59.

representation" in any matter within the jurisdiction of the Government of the United States. *See* 18 U.S.C. § 1001(a)(2). Pawlowski argues a judgment of acquittal should be entered as to each of these counts because the Government failed to prove his statements were false.

Pawlowski's arguments are unpersuasive. As to Counts 49 and 50, the voluminous evidence described above regarding Pawlowski's pay-to-play scheme is more than sufficient for a reasonable juror to conclude that Pawlowski involved himself in the City's contracting process and influenced which companies, firms, and individuals received certain City contracts and that Pawlowski's denials of such involvement or influence were false.

As to Count 51, a jury could also conclude that Pawlowski's statement that he never directed City Solicitors to award certain law firms legal work were false. The Government presented testimony from Jerry Snyder, the City Solicitor prior to 2015, about an instance in which Pawlowski called him at home and directed him to award a specific lawsuit to Duane Morris instead of Norris McLaughlin, the firm Snyder had already chosen. *See* Trial Tr. Day 14 at 263-65. In addition, Susan Wild, the City Solicitor in 2015, testified that Pawlowski recommended a particular attorney from Norris McLaughlin to work on a legal matter concerning a trust. *See* Trial Tr. Day 14 at 60-61, 71. The Government also presented evidence concerning Pawlowski's plan to award Norris McLaughlin a contract related to the parking authority in exchange for campaign contributions, raising the inference that he

would have to direct Wild, who had the authority to award legal contracts, to do so.

Concerning Count 52, several witnesses testified that Pawlowski obtained lists of vendors who had City contracts and described how Pawlowski used these lists to solicit campaign contributions and determine how much in contributions each vendor should give. *See, e.g.*, Trial Tr. Day 3 at 51 (Dougherty's testimony describing Pawlowski's requests for lists of law firms that had City contracts or had otherwise received business from the City in order to identify potential campaign contributors); Trial Tr. Day 6 at 108 (City Purchasing Agent Beth Ann Strohl's testimony stating Dougherty asked her for a list of City vendors and the amount each vendor was compensated for City work); Trial Tr. Day 9 at 167-68 (Ruchlewicz's testimony explaining Pawlowski's use of vendor lists); Trial Tr. Day 13 at 176-77 (Fleck's employee Celeste Dee's testimony stating Pawlowski brought a thumb drive to Fleck's office containing the names of companies and individuals who had received City contracts). Contrary to Pawlowski's contention, this is more than sufficient evidence from which a reasonable jury could find that Pawlowski falsely stated he had never used vendor lists to determine the amount of campaign contributions to solicit from vendors.

As to Count 53, although Pawlowski argues he never requested the free meal or Eagles tickets he received from Northeast, the Government's evidence demonstrated he requested the Eagles tickets through Ruchlewicz and did not offer to pay for the dinner with Northeast and

Kilkenny at Del Frisco's Steakhouse. This is evidence from which a jury could have reasonably found that Pawlowski's statements with respect to the meal and Eagles tickets were false.

And as to Count 54, while Pawlowski contends he never took any official action related to Haddad, the Government's evidence shows a jury could have rationally found he impermissibly exerted pressure on Dougherty, Nemith, and Paulus to take official action as to Haddad's zoning and inspection matters. Finally, as to Count 55, Dougherty specifically testified that Pawlowski told him Stevens & Lee "fell out of favor" with him because of its lack of campaign contributions, raising the inference that Pawlowski steered legal work away from Stevens & Lee and toward other firms who had contributed. *See* Trial Tr. Day 3 at 206-07. This evidence is sufficient for a jury to have found that Pawlowski's statements were false as to Counts 54 and 55.[15]

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15. As previously noted, Pawlowski filed a Supplement to his Rule 29 motion, in which he argues "many of the overt acts charged" fail to satisfy *McCormick* and *McDonnell*. Suppl. 17. The Court construes his Supplement as a challenge to the sufficiency of the evidence as to Count 1, his conspiracy conviction.

A defendant is guilty of conspiracy under the federal conspiracy statute if he agrees with another "to commit any offense against the United States, or to defraud the United States," and at least one of the conspirators takes an act "to effect the object of the conspiracy." *See* 18 U.S.C. § 371. For a court to sustain a conspiracy conviction in the Third Circuit, the Government must show: "(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

Appendix B

Because the Government presented sufficient evidence to sustain the convictions relating to conspiracy, false statements, and mail and wire fraud, and its evidence was sufficient to support a finding of a quid pro quo/explicit quid pro quo and an official act as to all of the convictions relating to federal program bribery, attempted Hobbs Act extortion under color of official right, honest services

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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 and citation omitted).

As explained above in the discussion of Pawlowski's various sub-schemes, the Government presented ample evidence of both (1) Pawlowski entering into an agreement with Fleck, Ruchlewicz, and Dougherty to commit the various substantive crimes of which he has been convicted and (2) his knowing and voluntary involvement in these crimes. Moreover, as the Court sustained Pawlowski's convictions as to the substantive offenses that were the objects of the conspiracy, the Government has presented more than sufficient evidence of overt acts in furtherance of the conspiracy. Pawlowski's arguments as to the specific deficiencies in the Government's proof as to the overt acts fail for the same reasons his challenges to his convictions for the underlying substantive offenses fail. To the extent Pawlowski argues he should be granted a judgment of acquittal as to Count 1, there is sufficient evidence from which a jury could find that he conspired to commit mail fraud, wire fraud, honest services mail fraud, honest services wire fraud, federal program bribery, or Travel Act bribery.

In addition to challenging Count 1 in his Supplement, Pawlowski appears to suggest that campaign contributions cannot form the basis of a bribe, relying on *McCutcheon v. FEC*, 572 U.S. 185, 208, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014). *See* Suppl. 19. The Court disagrees. As the *McCutcheon* Court specifically stated, "Spending large sums

mail and wire fraud, and Travel Act bribery except as to those concerning Counts 11, 12, 13, and 14, the Court granted Pawlowski's motion for judgment of acquittal as to Counts 11, 12, 13, and 14, and denied it as to the balance of the counts.

BY THE COURT:

/s/ Juan R. Sánchez
Juan R. Sánchez, C.J.

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of money in connection with elections, *but not in connection with an effort to control the exercise of an officeholder's official duties*, does not give rise to [] quid pro quo corruption." 572 U.S. at 208 (emphasis added and removed). Contrary to Pawlowski's assertion, *McCutcheon* demonstrates the Supreme Court's ongoing concern with "precisely the type of dollars-for-official-action exchange that is at the core of the Government's allegations in this case." *Menendez*, 291 F. Supp.3d at 621; *see also Citizens United v. FEC*, 558 U.S. 310, 359-60, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (noting the Government's interest in preventing quid pro quo corruption). The Court rejects Pawlowski's argument.

APPENDIX C — ORDER AND MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, FILED JULY 30, 2018

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

CRIMINAL ACTION No. 17-390-2

UNITED STATES OF AMERICA

v.

SCOTT ALLINSON

ORDER

AND NOW, this 29th day of June, 2018, upon consideration of Defendant Scott Allinson's oral motion for judgment of acquittal and Motion for New Trial, the Government's opposition thereto, and the parties supplemental briefing on the motions, and following a June 25, 2018, oral argument, it is ORDERED the motions for judgment of acquittal and for new trial (Document 170) are DENIED.[1]

BY THE COURT:

/s/
Juan R. Sánchez, J.

1. Pursuant to Third Circuit Local Appellate Rule 3.1, the Court intends to supplement this Order with the basis for its rulings in the event of an appeal.

Appendix C

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL ACTION No. 17-390-2

UNITED STATES OF AMERICA

v.

SCOTT ALLINSON

Juan R. Sánchez, J.

July 30, 2018, Decided
July 30, 2018, Filed

MEMORANDUM

Juan R. Sánchez, J.

On March 1, 2018, after a six-week jury trial, Defendant Scott Allinson was convicted of one count of conspiracy and one count of federal program bribery for his role in a pay-to-play scheme orchestrated by former Allentown Mayor Edwin Pawlowski, Allinson's co-defendant. At the close of the Government's case, and again at the close of all evidence, Allinson moved for judgment of acquittal on both counts pursuant to Federal Rule of Criminal Procedure 29, arguing the Government's evidence at trial was insufficient to convict him. The Court reserved ruling on the motion. Following the verdict, Allinson filed a motion for new trial pursuant to Federal

Rule of Criminal Procedure 33, arguing the verdict was against the weight of the evidence, the Government's closing argument improperly urged the jury to apply the incorrect legal standard, and the Government's proof at trial went beyond the allegations in the Indictment, resulting in a constructive amendment. By Order of June 29, 2018, this Court denied Allinson's Rule 29 and Rule 33 motions. Pursuant to Third Circuit Local Appellate Rule 3.1, the Court issues this Memorandum to summarize the basis for its rulings.

BACKGROUND

On July 25, 2017, Allinson, Pawlowski, and a third Defendant, James Hickey, were charged by indictment with corruption-related offenses arising out of Pawlowski's pay-to-play scheme in the City of Allentown, in which Pawlowski was alleged to have accepted over $150,000 in campaign contributions in exchange for the use of his official position. Allinson, an attorney, was named in two counts of the 55-count Indictment, in which he is accused of trying to direct city legal work to his law firm in exchange for the promise of campaign contributions. Count One charged him with conspiracy to commit federal program bribery, in violation of 18 U.S.C. § 371, and Count Nineteen charged him with the substantive offense of federal program bribery, in violation of 18 U.S.C. § 666(a)(2).

Allinson and Pawlowski proceeded to trial in January 2018.[1] At trial, the centerpiece of the Government's case

1. Hickey pled guilty to a single count of the Indictment prior to trial, in December 2017.

against Allinson was a series of recorded conversations between Allinson and two of Pawlowski's operatives—Michael Fleck, Pawlowski's campaign manager, and Sam Ruchlewicz, who worked for Fleck. In the recordings, which spanned from December 30, 2013, to June 29, 2015, the parties unmistakably discussed plans to funnel legal work from the City of Allentown to Allinson's law firm (Norris McLaughlin) and to ensure that Allinson received origination credit for the work, in exchange for campaign contributions from Norris McLaughlin to Pawlowski. The Government also introduced recordings of conversations between Pawlowski and his operatives, demonstrating Pawlowski's awareness and involvement in this pay-to-play scheme.

The recordings reveal Allinson's view that Pawlowski could expect campaign contributions from Norris McLaughlin only in exchange for legal work for the City. On December 10, 2014, for example, Allinson complained to Ruchlewicz that members of his law firm were disappointed that Pawlowski had given a City legal matter to another law firm, and he explained that as a result, he was not in a position to "rally [his] troops with their checks," *see* Gov't's Ex. SR21183T at 2.[2] Allinson repeatedly stressed to Ruchlewicz that he was "just talking [their] dialect of English," adding that his firm had "been unbelievably supportive in the past" but that

2. For ease of reference, citations to the recorded conversations are to the transcripts of those conversations rather than to the audiotapes themselves. Although the transcripts were not admitted into evidence, they were used during trial as aids, and their accuracy is not contested.

"now, you know, the work's going everywhere but [] to [their] shop," and reported that this was "a short[-]term fixable issue." *Id.* at 3.

Two days later, on December 12, 2014, Ruchlewicz informed Allinson that the current solicitor for the Allentown Parking Authority was going to be terminated from employment and Richard Somach, a partner in Allinson's firm, would receive the appointment. *See* Gov't's Ex. SR21602T at 1-2. Ruchlewicz further explained that the appointment would go through Allinson to ensure that Allinson received origination credit for the work. *Id.* at 2. Ruchlewicz then stated, "I need you guys to do something for the mayor's holiday party," to which Allinson responded, "Here's what we're gonna do. . . . I'll speak, I'll speak our dialect of English" and expressed willingness to be a sponsor for Pawlowski's holiday party and to write a check for $2,500 after January. *Id.* at 3.

A month later, on January 22, 2015, Ruchlewicz told Allinson he had solved Allinson's "[P]arking [A]uthority problems," and Allinson responded, "If you solve that problem, you get the golden goose." Gov't's Ex. SR286T at 1. When Ruchlewicz then stated that Fleck and Pawlowski wanted Allinson's help raising money for Pawlowski's United States Senate campaign, Allinson agreed to do so, saying, "Well of course I am going to raise money." *Id.* at 3.[3] The next day, at a breakfast meeting, Ruchlewicz said,

3. After Allinson had agreed to be a sponsor for Pawlowski's holiday party, on January 30, 2015, Ruchlewicz informed Pawlowski that he had a strange meeting with Allinson concerning his fundraising and proposed meeting with Susan Wild, the

"Umm, so our particular brand of English." *See* Gov't's Ex. SR287T at 1. He then told Allinson that he and Fleck had talked to Pawlowski and informed him that all legal work given to Norris McLaughlin would go through Allinson. *See id.*

The following week on February 3, 2015, Allinson explained to Fleck that if he were to receive a phone call requesting that he oversee the Allentown Parking Authority solictorship, then he would "get a hundred percent of the[] kind of credit that turns into money that goes out of [his] checkbook where [Fleck and Ruchlewicz] want it to go." Gov't's Ex. SR301T at 5. Allinson elaborated: "If it comes to me and I get the billing credit, then I get the full stack of cash on my side to do with it what I need to do, annually." *Id.* at 6. Allinson then represented that Matthew Sorrentino, the chairman of Norris McLaughlin, would be cooperative in ensuring that contributions were made to Pawlowski, explaining: "Matt and I have always spoken[] the same language. . . . Matt and I control the flow of political donations." *Id.*

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current City solicitor, to discuss continuing to do work for the City. *See* Gov't's Ex. SR296T at 1. When Pawlowski heard this news, he exclaimed, "Really! . . . I've given him[] millions of dollars." *Id.* Ruchlewicz told Pawlowski that Fleck was "fixing it." *Id.* Pawlowski remained upset and stated, "You know, fuck them! And I'm not gonna put, I'm not gonna make Somach solicitor or anything. Screw it all." *Id.* at 2. Later that day, Pawlowski asked Fleck and Ruchlewicz, "Are you gonna light up Allinson? I don't have to do it? . . . Because that really pisses me off." Gov't's Ex. SR297-1857T at 1. Fleck and Ruchlewicz told him that they would take care of it. *Id.* at 2.

Appendix C

On February 11, 2015, Ruchlewicz asked Allinson to stop by Pawlowski's Mardi Gras fundraiser on February 13, 2015. Gov't's Ex. SR27984T at 2. Allinson confirmed that he would attend the fundraiser and bring a check. *Id.* Ruchlewicz responded, "I love you Scotty, but I love that even more," to which Allinson replied, "Yeah, I understand. That's the way it works." *Id.* Ruchlewicz then told Allinson that Pawlowski had taken care of all of Allinson's problems, and said he had told Pawlowski that Norris McLaughlin loved him and that "everything was gonna work out, and we have to keep giving Scotty all the things that Scotty loves." *Id.* Allinson asked about Pawlowski's response, and Ruchlewicz stated, "He was like well, he's like yeah, good, as long as it's all worked out. He's like, I'm happy to support Scott. He's like, I always have. He's like, we've given him lots of stuff and we want to continue to do that." *Id.* at 3. Allinson responded "Cool, alright, we'll make all that happen." *Id.*

Two days later, on the day of the Mardi Gras fundraiser, Ruchlewicz met with Allinson and told him that he had spoken to Allentown City Manager Francis Dougherty, and that the Parking Authority contract was going to go to Allinson: "It's gonna go to you. The email will come to you. It's gonna say Scott[y], we'd really like Norris to come in, and the attorney we were thinking about is Rich Somach. The first email will come to you. Then and after that you can do whatever you have to do on your end." Gov't's Ex. SR318T at 4. Allinson stressed to Ruchlewicz that he needed to get financial credit for the parking solicitor work assigned to Norris McLaughlin. *See id.* at 5-6 ("[W]hen the fish comes in off the boat

. . . [i]f you're not holding the fishing rod, you're not gonna get financial credit in our internal system."). Ruchlewicz assured Allinson he would be taken care of: "[Y]ou know what the [M]ayor cares about. . . . And the [M]ayor's got plans. He's got to raise money. So as long as checks come in, I can go to Ed and say, look, [M]ayor . . . Norris has held up their end of the bargain . . . [w]e need to hold up ours." *Id.* at 6-7. Ruchlewicz concluded the conversation by stating the "machine is going" and "[e]verybody understands what has to be done." *Id.* at 7. Later the same day, after the fundraiser, Ruchlewicz informed Pawlowski that Allinson showed up to the event with a check[4] and said, "Installment number one is in." *Id.* Ruchlewicz also recounted his conversation with Allinson in which Allinson told him to make sure Pawlowski knew he had brought a check. *Id.* Ruchlewicz told Pawlowski that he had told Allinson they could continue with the "Somach to solicitor plan." *Id.* Pawlowski noted his approval, responding, "That's good." *Id.*

Approximately one month later, on March 25, 2015, in a discussion with Fleck and Ruchlewicz about getting work from the City for Norris McLaughlin, Allinson acknowledged that the work would be in exchange for campaign contributions, explaining that he would tell his law partner, "If you guys are going to handle the [City] work and deal with all that stuff, you're gonna have to work with [Fleck] and [Ruchlewicz] on . . . cobbling some money together. This isn't like we're being hired because we are

4. Allinson made this $250 check payable to Pawlowski's campaign committee, "Friends of Ed Pawlowski." *See* Gov't's Ex. K10.

good guys, it's not the way this shit works. . . . It just isn't. I don't care how good you are." Gov't's Ex. MF09T at 4.

On April 1, 2015, Pawlowski explained to Ruchlewicz that he was working on getting the Parking Authority solicitorship assigned to Norris McLaughlin. *See* Gov't's Ex. SR365CT at 1. Ruchlewicz stressed that the solicitorship had to go through Allinson even though Somach would do the work because Allinson was the firm's managing partner and controlled the political action committee money. *See id.* at 2. Pawlowski confirmed these terms, responding, "that's logical," and "[g]otcha." *Id.* When Ruchlewicz reiterated that it was "very, very important that Scott[y] gets that call so . . . that when we call Scotty there's money in their little fund," Pawlowski again said, "I got you." *Id.*

Allinson later participated in a sit-down meeting with Pawlowski, Fleck, and Sorrentino—the chairman of Norris McLaughlin—where Pawlwoski made a pitch as to why he would make a good candidate for Senate and asked the firm to raise $25,000 in campaign contributions before June 30, 2015. *See* Gov't's Ex. MF58T at 1-2. Sorrentino, whom Allinson had previously identified to Fleck and Ruchlewicz as "speaking the same language" stated that supporting Pawlowski would be good "from a legal work" perspective. *Id.* at 3. Following this May 20 meeting, Allinson told Ruchlewicz: "You know, $25,000 is a lot of fucking money when you're getting absolutely zero back from the [C]ity. I mean, I mean when I tell you bone dry, bone fucking dry." Gov't's Ex. SR39323T at 1. Ruchlewicz responded, "Well, we'll have to change that. The [M]ayor

will." *Id.* On June 17, 2015, Fleck called Allinson and told him, "I told you about the . . . Somach[] solicitorship. Everything will go through you. It will happen after, you know, the June 30th deadline that we have. But, Somach called Ed yesterday asking when he's gonna be appointed." Gov't's Ex. MF12729T at 1. Ruchlewicz then relayed what Pawlowski had responded to Somach: they have a June 30th deadline, he and Somach would talk after the deadline, and that he was working with Allinson and Sorrentino. *Id.* Allinson said that he would manage whatever he needed to internally. *Id.*

On June 29, 2015, Fleck told Pawlowski that Norris McLaughlin came through with $17,300 in campaign contributions,[5] and Pawlowski responded, "Great. . . . Awesome." Gov't's Ex. MF95-0227T at 1. When Fleck asked if they could now appoint Somach to the Parking Authority, Pawlowski noted that he first needed to get rid of the current solicitor and he didn't control the board's decisions, but that he could talk to the board. *Id.* at 1-2. He and Fleck then discussed another way to get the current solicitor to withdraw. *Id.* at 2.

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5. Somach testified on the Government's behalf, and he was the only Norris McLaughlin attorney to testify in the Government's case-in-chief who donated to Pawlowski's senatorial campaign in June 2015. *See* Trial Tr. Day 14 at 10, Feb. 12, 2018 (hereinafter Trial Tr. Day 14). Somach testified that he never discussed donating with Allinson, but he discussed it with Sorrentino. *See id.* at 41-42. While Somach had never previously donated to Pawlowski, he testified that this race was different because it was national, and he liked how Pawlowski had revitalized the City. *Id.* at 35, 42.

The Government also presented testimony concerning a trust account, the Trexler Trust, as additional legal work being awarded to Allinson's firm in exchange for campaign contributions. Jerry Snyder, the former solicitor of the City of Allentown, testified that the prospect of Norris McLaughlin handling the Trexler Trust matter on behalf of the City with Oldrich Foucek, a Norris McLaughlin attorney, first arose in 2013 or 2014. *See* Trial Tr. Day 14 at 281-82. He further testified that in 2013 or 2014, he recommended to Pawlowski that Judith Harris from Norris McLaughlin handle the Trexler Trust. *Id.* at 283. Susan Wild, the City solicitor from January 2015-January 2018, also testified. She stated that no one directed her to give Allinson or Norris McLaughlin work. *See id.* at 110-11. City Manager Francis Dougherty also provided testimony that Pawlowski had asked him to reach out to Norris McLaughlin concerning the Trexler Trust, and he had identified Judith Harris as someone who could "possibly" assist with the work. *See* Trial Tr. Day 3 at 209-10, Jan. 23, 2018. Dougherty further testified that he had received a message from Ruchlewicz that "all legal work to Norris McLaughlin had to be funneled through a gentleman named Scott Allinson." *Id.* at 210.

Allinson did not testify in his defense, but presented testimony from several fact witnesses, including members from Norris McLaughlin who had donated to Pawlowski in June 2015 following the May 20, 2015, meeting. Attorneys Oldrich Foucek, Charles Smith Jr., and Scott Lipson each testified they made their donations to Pawlowski in June 2015 after Sorrentino, the firm's chairman, asked them whether they would consider donating to Pawlowski's

campaign. *See* Trial Tr. Day 16 at 18, 45, 56, Feb. 14, 2018 (hereinafter Trial Tr. Day 16). Foucek testified that he had not spoken to Allinson about his donation. *See id.* at 21. Smith and Lipson testified that they had not spoken to Allinson about their donations either, and they made their donations based on the positive transformation they had witnessed in the City during Pawlowski's tenure. *See id.* at 45-47, 56-57. Sorrentino testified on Allinson's behalf as well, explaining that during the May 20, 2015, meeting with Pawlowski, he told Pawlowski and everyone else present that raising contributions was "doable." *Id.* at 94. He also testified about a brief conversation he had with Allinson after the May 20 meeting: Allinson asked him if he could "follow through on the Mayor's request to raise some money for the campaign" and alluded he did not want to contribute personally. *Id.* at 102. Sorrentino did not have any further conversation with Allinson regarding contributions, and he did not inform Allinson that he or others had agreed to make contributions. *Id.* at 105-06.

As to the Trexler Trust, Judith Harris, another attorney from Norris McLaughlin, testified that she never spoke with Allinson about the Trexler Trust matter and that Norris McLaughlin was never retained to represent the Trexler Trust. *Id.* at 72-73. Allinson's defense concluded with testimony from several character witnesses.

LEGAL STANDARD

In evaluating a sufficiency of the evidence challenge pursuant to Rule 29, a district court must "review the

record in the light most favorable to the [Government] to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence." *United States v. Smith*, 294 F.3d 473, 478 (3d Cir. 2002) (internal quotation marks and citation omitted). When a court reserves ruling on a Rule 29 motion made at the close of the Government's case, the court must "decide the motion on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 29(b); *see also United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005) ("[T]he District Court was required to, and properly did, determine whether an acquittal was appropriate based solely on the evidence presented by the [G]overnment."). The court must "review the evidence as a whole, not in isolation," *United States v. Boria*, 592 F.3d 476, 480 (3d Cir. 2010), and should not weigh the evidence or determine the credibility of witnesses, *United States v. Dent*, 149 F.3d 180, 187 (3d Cir. 1998). So long as there is "substantial evidence, viewed in the light most favorable to the [G]overnment, to uphold the jury's decision," the court must sustain the jury's verdict. *Brodie*, 403 F.3d at 133 (citations omitted). "[A] finding of insufficiency should be confined to cases where the [Government's] failure is clear." *Id.*

Rule 33 permits a court to "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). When the sufficiency of the evidence is challenged, the Rule 33 standard differs from the Rule 29 standard in that a court "does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government's case." *United*

States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002). The court can order a new trial on the ground that the jury's verdict is contrary to the weight of 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." *Id.* (citations and internal quotation marks omitted).

DISCUSSION

A. Sufficiency of the Evidence Challenges to Count Nineteen — Federal Program Bribery

Count Nineteen charges Allinson with violating 18 U.S.C. § 666(a)(2), the federal program bribery statute, which is one of several federal anti-bribery statutes. Section 666 criminalizes both the offer and acceptance of a bribe. *See* 18 U.S.C. § 666(a)(1)-(2). As to an offer of a bribe, the statute makes it unlawful for any person to:

> corruptly give[], offer[], or agree[] to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more.

18 U.S.C. § 666(a)(2). Bribery generally requires a "quid pro quo," which is "to give or receive something of value, [the quid,] in exchange for an official act[, the quo]." *United*

States v. Kemp, 500 F.3d 257, 281 (3d Cir. 2007) (construing federal bribery statute, 18 U.S.C. § 201, and holding the same analysis applies "to bribery in the honest services fraud context"). When the alleged thing of value offered in an exchange for an official act is a political contribution, the First Amendment is implicated. *See United States v. Siegelman*, 640 F.3d 1159, 1169 (11th Cir. 2011) (noting that because defendants' bribery convictions were based upon campaign contributions, they "impact[ed] the First Amendment's core values—protection of free political speech and the right to support issues of great public importance"). The Supreme Court has long protected speech in the campaign contribution context based on First Amendment grounds, *see, e.g., Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010), and in *McCormick v. United States*, 500 U.S. 257, 111 S. Ct. 1807, 114 L. Ed. 2d 307 (1991), it held that pursuant to the Hobbs Act, a defendant could be convicted of extorting campaign contributions under color of official right only if the Government has proven an explicit quid pro quo.

Although the Third Circuit has not decided whether proof of a quid pro quo is necessary for a § 666 federal program bribery conviction, *see United States v. Willis*, 844 F.3d 155, 164, 65 V.I. 489 (3d Cir. 2016), the parties agree that where the alleged bribe takes the form of a campaign contribution, an explicit quid pro quo is required, *see McCormick*, 500 U.S. at 273 (requiring an explicit quid pro quo for a Hobbs Act extortion conviction in the campaign contribution context); *Siegelman*, 640 F.3d at 1170 n.14 (applying *McCormick* to federal program bribery); *United States v. Allen*, 10 F.3d 405, 411 (7th

Cir. 1993) (finding extortion under color of official right and bribery are "different sides of the same coin" and concluding "courts should exercise the same restraint in interpreting bribery statutes as the *McCormick* Court did in interpreting the Hobbs Act").

"While the quid pro quo must be explicit, it need not be express; political contributions may be the subject of an illegal bribe even if the terms are not formalized in writing or spoken out loud." *United States v. Menendez*, 291 F. Supp. 3d 606, 624 (D.N.J. 2018) (emphasis omitted). The "relevant inquiry to determine if the Government has met its burden with respect to [bribery] counts" that involve political contributions is "whether a rational juror could find that there was a quid pro quo and that the charged [d]efendant was aware of its terms." *Id.* at 624 (emphasis omitted). The "'jury may consider both direct and circumstantial evidence, including the context [of the arrangement].'" *Id.* (alteration in original) (quoting *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992)).

The Supreme Court recently addressed the "quo" aspect of the quid pro quo requirement in *McDonnell v. United States*, 136 S. Ct. 2355, 195 L. Ed. 2d 639 (2016), narrowing the definition of an "official act" to:

> a decision or action on a "question, matter, cause, suit, proceeding or controversy." The "question, matter, cause, suit, proceeding or controversy" must involve 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. It must also be something specific and focused that is "pending" or "may by law be brought" before a public official. To qualify as an "official act," the public official must make a decision or take an action on that "question, matter, cause, suit, proceeding or controversy," or agree to do so. That decision or action may include using his official position to exert pressure on another official to perform an "official act," or to advise another official, knowing or intending that such advice will form the basis for an "official act" by another official.

Id. at 2371-72.[6]

In support of his Rule 29 motion on the federal program bribery charge, Allinson argues there is insufficient evidence from which a jury could find he engaged in any explicit quid pro quo or that Pawlowski engaged in "official acts." In his Rule 33 motion, he argues the verdict is against the weight of the evidence. Allinson argues there was no "quid," as he made only one personal contribution to Pawlowski during the relevant time frame—for far less than the amounts requested by Fleck and Ruchlewicz—and he was not responsible for the $17,300 in contributions

6. While the *McDonnell* Court interpreted the "official act" requirement under the federal bribery statute, 18 U.S.C. § 201, courts have applied its analysis to other bribery charges. *See, e.g., United States v. Skelos*, 707 F. App'x 733 (2d Cir. 2017) (summary order). The parties agree *McDonnell*'s definition of the term "official act" applies to the bribery counts in this case.

made by members of his law firm in June 2015.[7] Allinson also argues there was no "quo," as Pawlowski never took any official action or exerted pressure on anyone to award legal work to his firm, including the Parking Authority solicitorship or work relating to the Trexler Trust. Finally, he contends that neither he nor his firm received any legal contract work from the City of Allentown during the relevant time period.

The Court disagrees. From Allinson's actions and express words, the jury could find a "quid"—i.e., that Allinson gave, agreed to give, or caused others to give campaign contributions to Pawlowski. First, the jury could find Allinson gave a contribution based on the $250 check he dropped off at Pawlowski's Mardi Gras fundraiser in February 2015 and his instruction to Ruchlewicz to inform Pawlowski of that contribution. While Allinson argues that this donation was not evidence of any agreement because Fleck and Ruchlewicz were asking him to contribute much greater sums of money than he actually donated, the jury could still find his $250 donation—which Ruchlewicz described to Pawlowski as "installment one," enabling the parties to continue with the "Somach to solicitor" plan—sufficient to bribe Pawlowski.

Second, the jury could find that Allinson agreed to make contributions to Pawlowski based on Allinson's express words. While stating that he spoke the same

7. Allinson also argues evidence of his contributions to Pawlowski in 2011, 2012, and 2013 are irrelevant because the Government failed to offer any evidence tying these contributions to the charges in the Indictment.

language as them, controlled the flow of political donations at his law firm, and understood how "this shit" worked, Allinson repeatedly assured Fleck and Ruchlewicz that he would help raise campaign contributions for Pawlowski in exchange for legal contract work from the City, including the Parking Authority solicitorship. And third, the jury could infer that Allinson caused other members of his law firm to donate based on the circumstances in which these contributions were made: On June 17, 2015, after the May 2015 meeting where Pawlowski solicited campaign contributions from Norris McLaughlin and less than two weeks before Pawlowski's June 30, 2015, deadline for the receipt of campaign contributions, Fleck called Allinson to inform him that Somach had called Pawlowski to ask when he would be appointed solicitor. Fleck then told Allinson that Pawlowski had responded by telling Somach that the deadline was June 30, they would talk after the deadline, and that he was working with Allinson and Sorrentino. Allinson responded that he would manage whatever was necessary internally. On June 29, Ruchlewicz reported to Pawlowski that Norris McLaughlin had donated $17,300 in campaign contributions. The proximity of these events combined with Allinson's statement that he and Sorrentino spoke the "same language" and controlled the flow of political donations from the firm, and Somach's testimony that he spoke to Sorrentino about donating to Pawlowski in June 2015 are all facts from which a jury could infer that Allinson caused other members of his firm to donate.

As to the "quo" component of a quid pro quo, a reasonable jury could find the Parking Authority solicitorship as an "official act" under *McDonnell*. 136 S.

Ct. at 2371 (explaining that an official act requires (1) a "question, matter, cause, suit, proceeding or controversy"; and that (2) a public official "make a decision or take an action on that 'question, matter, cause, suit, proceeding or controversy'"). Here, the "matter" before Pawlowski was the Parking Authority solicitorship. While Pawlowski never took action to award Norris McLaughlin the Parking Authority solicitorship, under Supreme Court precedent, a "public official is not required to actually make a decision or take an action on a 'question, matter, cause, suit, proceeding, or controversy; it is enough that the official agree to do so.'" *Id.* at 2370-71 (citing *Evans v. United States*, 504 U.S. 255, 268, 112 S. Ct. 1881, 119 L. Ed. 2d 57 (1992)). From Pawlowski's conversations with Fleck and Ruchlewicz, in which he acknowledged and agreed that Somach would receive the solicitorship in exchange for campaign contributions from members of the Norris McLaughlin law firm, a reasonable jury could find that Pawlowski agreed to take official action concerning the solicitorship. In addition, while Pawlowski stated that he did not control the board in charge of the Parking Authority, he said that he could talk to them. The jury could thus find an official act as to the Parking Authority solicitorship from Pawlowski's words.[8]

As the recordings introduced at trial by the Government demonstrated, the terms of the quid pro quo were clear and

8. The Court agrees with Allinson, however, that none of the Government's witnesses, recordings, or exhibits connected Allinson to the Trexler Trust work. That work thus cannot be an "official act" from which Allinson's federal program bribery conviction can be sustained.

were affirmed by both Allinson and Pawlowski, through Fleck and Ruchlewicz, time and time again: Allinson would ensure campaign contributions were donated to Pawlowski in exchange for Somach's appointment to the Parking Authority solicitorship, a matter for which Allinson would receive origination credit. *See McCormick*, 500 U.S. at 273. Viewed in the light most favorable to the Government, as the Court must, the Government's evidence is more than sufficient for the jury to have found beyond a reasonable doubt that Allinson entered into an explicit quid pro quo agreement with Pawlowski.

As to Allinson's argument pursuant to Rule 33, the thrust of his argument is that the verdict was against the weight of the evidence because the Government's evidence did not show he engaged in an explicit quid pro quo. Viewing the evidence independently, however, the Court disagrees for the reasons set forth above. The Court is not persuaded a miscarriage of justice occurred in this case.

B. Sufficiency of the Evidence Challenges to Count One — Conspiracy

Allinson further argues the Government did not prove the single conspiracy charged in Count One of the Indictment, as it failed to present evidence connecting Allinson as a co-conspirator with many of the alleged conspirators and Overt Acts identified in Count One. Count One alleges Allinson, Pawlowski, Dougherty, Ruchlewicz, Fleck, and other individuals involved in Pawlowski's broad-ranging pay-to-play scheme—including Hickey, Ramzi Haddad, Matthew McTish, Patrick Regan, Garret

Strathearn, and Dale Wiles—conspired and agreed to commit mail fraud, wire fraud, honest services fraud, federal program bribery-soliciting, federal program bribery-offering, and Travel Act bribery, *see* Indict. ¶ 31, and describes numerous Overt Acts taken in furtherance of the conspiracy, *see id.* Overt Acts ¶¶ 1-132. These Overt Acts encompass Fleck and Ruchlewicz's efforts to obtain campaign contributions on Pawlowski's behalf in exchange for specific favorable actions from the City of Allentown, including the award of legal services contracts, street light contracts, pool contracts, and other favorable official action. Prior to trial, the Government clarified that, as to Allinson, Count One was limited to conspiracy to commit federal program bribery. *See* Allinson Mot. to Dismiss Ex. A, ECF No. 31.

A defendant is guilty of conspiracy under the federal conspiracy statute if he agrees with another "to commit any offense against the United States, or to defraud the United States," and at least one of the conspirators takes an act "to effect the object of the conspiracy." *See* 18 U.S.C. § 371. To sustain a conspiracy conviction in the Third Circuit, "the [G]overnment must show: (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 and citation omitted). Unlike in the Tenth Circuit, co-conspirator interdependence—i.e., the requirement that all charged co-conspirators' activities must constitute integral steps toward the realization of a common, illegal

goal—is not an element of the offense of conspiracy in the Third Circuit. *Compare, e.g., United States v. Baldridge*, 559 F.3d 1126, 1136 (10th Cir. 2009) (listing the conspiracy elements as "(1) two or more persons agreed to violate the law, (2) the defendant knew the essential objectives of the conspiracy, (3) the defendant knowingly and voluntarily participated in the conspiracy, and (4) the alleged coconspirators were interdependent"), *with Rigas*, 605 F.3d at 206 (listing the elements of conspiracy as "(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"). "The [G]overnment can prove the existence of a conspiratorial agreement and the knowledge of the defendant with circumstantial evidence alone." *United States v. Whiteford*, 676 F.3d 348, 357 (3d Cir. 2012). Furthermore, "[t]he [G]overnment need only prove that the defendant agreed with at least one of the persons named in the indictment that they or one of them would perform an unlawful act." *United States v. Kelly*, 892 F.2d 255, 259 (3d Cir. 1989) ("Failing to prove that all named co-conspirators conspired with the defendant is not fatal to the [G]overnment's case.").

In his Rule 29 and 33 motions, Allinson argues that the Government did not prove he was part of the single conspiracy charged. Relying on *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)—in which the defendants argued and the Court considered a variance argument—and *Kelly*, 892 F.2d at 259—in which the Third Circuit fashioned a balancing test to assess variance arguments—Allinson maintains the

Government has not proven that he and *all* of the alleged co-conspirators named in Count One engaged in a "single, illegal enterprise, with a common goal or purpose or that their conduct was mutually supportive." Mot. for Judgment of Acquittal 4. Citing to the Tenth Circuit's decision in *Baldridge*, he contends that at most, the Government has attempted to prove a single conspiracy involving a common defendant, Pawlowski, rather than interdependence among all the co-conspirators. Because there was no evidence connecting the scheme in which Allinson was involved—offering campaign contributions in exchange for the award of legal services contracts—to the other pay-to-play schemes described in Count One, Allinson also argues a jury could not infer interdependence among his scheme and the others. He maintains that without a common goal, cooperation, and overlap among the alleged co-conspirators, his conspiracy conviction cannot stand.

Because Allinson makes a sufficiency of the evidence argument rather than a variance argument, his position lacks merit. The Third Circuit "distinguishes between challenges to the sufficiency of the evidence, in which the [defendant] claims that the [G]overnment failed to prove an essential element of conspiracy, and variance claims, in which the [defendant] argues that the [G]overnment proved multiple conspiracies instead of the one charged in the indictment." *Kemp*, 500 F.3d at 287 n.18; *see also United States v. Perez*, 280 F.3d 318, 342 (3d Cir. 2002) (separately considering sufficiency of the evidence and variance challenges to the same conspiracy conviction); *United States v. Kenny*, 462 F.2d 1205, 1216 (3d Cir. 1972) (explaining, before commencing a variance analysis, that

the case was not one "where there was no evidence of the existence of a conspiracy"; rather, "the [G]overnment allegedly proved several separate unrelated conspiracies under each conspiracy count").

Kotteakos is a variance case, and the Third Circuit has applied it and *Kelly* in the variance context. *See, e.g.*, *Kemp*, 500 F.3d at 287-88 (citing *Kotteakos* and applying *Kelly* to hold that the evidence at trial established separate conspiracies rather than the single one alleged in the indictment because "the [G]overnment failed to present evidence that some of the defendants knew or should have known about [other co-conspirators' activities], and the defendants' activities were neither "interdependent or mutually supportive," which would have served as evidence of a conspiratorial agreement under *Kelly*); *see also United States v. Camiel*, 689 F.2d 31, 35 (3d Cir. 1982) (noting "that in a conspiracy case, the determination of whether there is a variance sufficient to justify a trial judge's reversal of a jury conviction is controlled by the teachings of *Kotteakos*"). Allinson's reliance on *Kotteakos* and its progeny to make a sufficiency of the evidence argument is thus misplaced. Furthermore, Allinson's reliance on *Baldridge* is misguided, as the Tenth Circuit requires an additional element, interdependence, to prove conspiracy. Interdependence is not an element of the crime of conspiracy in the Third Circuit.

Whether a variance occurred at trial or the jury could find interdependence among all co-conspirators is not the question before the Court. The question is whether the Government offered sufficient evidence of all three

elements of a conspiracy—an agreement to commit an unlawful objective, knowing and voluntary participation in the agreement, and an overt act in furtherance of the agreement—to prove that Allinson engaged in a conspiracy to commit federal program bribery. The answer is that it has. First, the jury could find that Allinson, Fleck, Ruchlewicz, and Pawlowski all had an agreement to exchange campaign contributions for legal contract work from the City of Allentown. Second, given the hours of recordings played for the jury in which Allinson speaks his "dialect of English" to Fleck and Ruchlewicz while discussing his willingness to contribute to Pawlowski in exchange for legal work, including the Parking Authority solicitorship, the jury could reasonably find that Allinson's involvement in this conspiracy was knowing and voluntary. Third, given that the jury found Allinson guilty of the substantive crime of federal program bribery, it is clear there was sufficient evidence from which it could find overt acts in furtherance of the conspiracy, including meetings and phone calls with Ruchlewicz and Fleck where Allinson referenced raising money for Pawlowski in exchange for legal work such as the Parking Authority solicitorship and the $250 check Allinson gave Ruchlewicz at Pawlowski's Mardi Gras fundraiser with instructions that Ruchlewicz tell Pawlowski that he brought the check. Viewed in the light most favorable to the Government, the foregoing evidence is sufficient for the jury to have found beyond a reasonable doubt that Allinson knowingly joined an agreement to commit federal program bribery. Viewing the evidence independently, Allinson's argument pursuant to Rule 33 that the evidence does not show he was a part of the conspiracy charged in Count One is also unpersuasive

to the Court for the reasons set forth above.

C. Prejudicial Remarks During Government's Closing Argument

In his Rule 33 motion, Allinson additionally argues the Government's explanation of the quid pro quo standard to the jury during its closing argument was improper and incorrect, prejudicing him. At trial, the Government explained the quid pro quo standard as follows:

> The Court is not going to instruct you on some magic phrase that has to be said that turns it into an explicit quid pro quo. Why? Well, because frankly, few people are stupid enough to say that out loud. That's not the way the world works. That's not the way bribery happens. Bribery happens with a wink and a nod and sometimes a few words, an understanding between two people, we all know what's happening here. You're giving me this, I'm giving you that. You decide if there was an explicit quid pro quo on these bribery counts. You are the finders of fact. And that includes conversations where there's a discussion about contracts, and a few moments later, there's a discussion about campaign contributions. You decide if that was an explicit quid pro quo that both parties clearly understood. You decide, and again, considering the intent of the people, based on their words, based on their actions, based on their lack of action, based on the

circumstances they were in . . . .

Trial Tr. Day 22 at 13, Feb. 27, 2018 (hereinafter Trial Tr. Day 22). Allinson objects to the Government's use of the "wink and a nod" phrase, taken from *Evans v. United States*, 504 U.S. 255, 274, 112 S. Ct. 1881, 119 L. Ed. 2d 57 (1992), which he characterizes as describing a lesser, implicit quid pro quo standard that applies only in the non-campaign contribution context. He contends the Government's deliberate attempt to have the jury apply this less demanding standard significantly influenced the guilty verdict in this case, particularly in light of evidence presented at trial suggesting the lack of an explicit quid pro quo: Allinson consistently refusing to contribute the amounts requested by Fleck and Ruchlewicz and the Norris McLaughlin attorneys' testimony that Allinson had nothing to do with their contributions to Pawlowski.

"In deciding whether the [Government] has improperly commented at trial, [a] court should look to the overall context of the statements in the trial record." *United States v. Mastrangelo*, 172 F.3d 288, 297 (3d Cir. 1999) (citing *United States v. Young*, 470 U.S. 1, 11, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)). If it has been determined that the Government's remarks were improper, the court will weigh the remarks under a harmless error standard. *See United States v. Zehrbach*, 47 F.3d 1252, 1264 (3d Cir. 1995); *see United States v. Wood*, 486 F.3d 781, 789 (3d Cir. 2007) ("[A] mistrial is not required where improper remarks were harmless, considering their scope, their relation to the context of the trial, the ameliorative effect of any curative instructions and the strength of the

evidence supporting the conviction." (internal quotation marks and citation omitted)).

Here, when read in context, the Government's statement was not incorrect or misleading. Rather than informing the jury that a mere "wink and a nod" is enough to find an explicit quid pro quo between the parties, the Government invited the jury to consider all of the evidence presented—including the parties' words, their actions, their lack of action, and the surrounding circumstances—in determining whether there was an explicit quid pro quo. This explanation of the law was not improper or incorrect.

Moreover, Allinson's argument that the Government's use of the "wink and a nod" phrase is inconsistent with the explicit quid pro quo requirement, which all parties agree applies in this case, is unpersuasive. As previously noted, the explicit quid pro quo requirement derives from *McCormick*, in which the Supreme Court held that the exchange of campaign contributions for an official act constitutes extortion under color of official right only when made as part of an explicit quid pro quo agreement. 500 U.S. at 273. The Supreme Court, however, "failed to clarify what it meant by 'explicit,'" and "subsequent courts have struggled to pin down the definition of an explicit quid pro quo." *United States v. Ring*, 706 F.3d 460, 466, 403 U.S. App. D.C. 410 (D.C. Cir. 2013). The Third Circuit has not had occasion to address what constitutes an explicit quid pro quo, as it has addressed the quid pro quo requirement only in the non-campaign contribution context. *See United States v. Salahuddin*, 765 F.3d 329, 343 (3d Cir. 2014); *United States v. Antico*, 275 F.3d 245, 260 (3d Cir. 2001);

Appendix C

United States v. Bradley, 173 F.3d 225, 232 (3d Cir. 1999).

As Allinson notes, the "wink and a nod" phrase appears in Justice Kennedy's concurring opinion in *Evans v. United States*, 504 U.S. 255, 112 S. Ct. 1881, 119 L. Ed. 2d 57 (1992), a Supreme Court case decided shortly after *McCormick*. In *Evans*, an elected county official accepted unsolicited contributions of cash and a check payable to his campaign from undercover FBI agents in exchange for favorable zoning decisions. 504 U.S. at 257. The trial court instructed the jury that "if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution." *Id.* at 258. The county official argued that the jury instruction allowed the jury to convict based on passive acceptance; he also argued it did not properly describe the quid pro quo standard for campaign contributions. *Id.* at 267. The Supreme Court disagreed, holding that for a Hobbs Act extortion under color of official right conviction, inducement of the payment by a public official is not required. *Id.* at 268. It further held that extortion occurs when "the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the quid pro quo is not an element of the offense." *Id.*

Justice Kennedy wrote a concurring opinion in *Evans* to explain that while he agreed with the quid pro quo standard set forth by the majority, he believed that the quid pro quo was in fact an element of the offense, "essential

to a determination of those acts which are criminal and those which are not." *Evans*, 504 U.S. at 272-73 (Kennedy, J., concurring). Discussing the concept of quid pro quo generally, Justice Kennedy further explained, "The official and the payor need not state the quid pro quo in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods. 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.* at 274.

The Third Circuit has indeed suggested that *Evans* sets forth a lesser, implicit quid pro quo standard. *See e.g., Antico*, 275 F.3d at 257 (declining to apply an explicit quid pro quo requirement outside of the campaign contribution context); *Bradley*, 173 F.3d at 232 (same). For example, in *Antico*, a case about an official in the Philadelphia Department of Licenses and Inspections who illegally demanded payment and other gifts from businesses to approve zoning permits and licenses, the official argued that the trial court should have charged the jury to find a specific quid pro quo for his extortion convictions. 275 F.3d at 256. The Third Circuit disagreed, stating that in the non-campaign contribution context, the quid pro quo could be "implicit, that is, a conviction can occur if the Government shows that [the defendant] accepted payments or other consideration with the implied understanding that he would perform or not perform an act in his official capacity under color of official right." 275 F.3d at 257 (internal quotation marks omitted). The Third Circuit characterized *Evans* as holding that "no 'official act' (i.e., no 'quo') need be proved to convict under

the Hobbs Act. Nonetheless, the official must know that the payment—the 'quid'—was made in return for official acts." *Id.* And relying on that standard, the Third Circuit held that the district court did not err in instructing the jury: "If [the defendant] knew that payments or other consideration were extended to him to secure unwarranted favorable treatment in his official capacity, he is guilty of Hobbs Act extortion under color of official right without the need to prove that the official action (or inaction) occurred." *Id.* at 259. While the Third Circuit rejected the official's argument to apply *McCormick*'s explicit quid pro requirement to non-elected public employees outside the campaign contribution context and applied *Evans* in the non-campaign contribution context, its analysis does not illuminate the meaning of explicit or what form an explicit quid pro quo must take.

Citing to Justice Kennedy's concurrence in *Evans*, some courts have interpreted *McCormick*'s explicit quid pro quo standard by noting "explicit" is not interchangeable with "express," and have instead looked to the directness of the link between the quid and the quo or the degree of awareness of the exchange by the parties involved. *See Menendez*, 291 F. Supp. 3d at 624 (explaining what matters is not so much the form of the agreement between the payor and payee "but the degree to which the payor and the payee were aware of its terms."); *United States v. Terry*, 707 F.3d 607, 612-13 (6th Cir. 2013) (noting that "specific," "express," and "explicit" do not add a new element to the bribery statutes "but signal that the statutory requirement must be met," and "[a]s 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"); *Siegelman*, 640 F.3d at 1172 ("an explicit agreement may be 'implied from [the official's] words and actions'" (quoting *Evans*, 504 U.S. at 274)); *Blandford*, 33 F.3d at 696 (explaining that *Evans* instructed that by 'explicit' *McCormick* did not mean 'express,'" and "[e]xplicit . . . speaks not to the form of the agreement between the payor and the payee, but to the degree to which the payor and payee were aware of its terms, regardless of whether those terms were articulated")[9]; *Carpenter*, 961 F.2d at 827 (explaining that "what *McCormick* requires is that the quid pro quo be clear and unambiguous, leaving no uncertainty about the terms of the bargain" and noting that to "read *McCormick* as imposing [a requirement that a defendant specifically state that he will exchange official action for a contribution] would allow officials to escape liability under the Hobbs Act with winks and nods, even when the evidence as a whole proves that there has

9. The *Blandford* Court turned to dictionary definitions of "express" and "explicit" to demonstrate their differences. 33 F.3d at 696 n.13 (distinguishing the dictionary definitions of "explicit"—"[n]ot obscure or ambiguous, having no disguised meaning or reservation. *Clear in understanding.*" and "express"—"Clear . . . *Declared in terms; set forth in words. Directly and distinctly stated. . . . Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct.*" (emphasis in original) (citing Black's Law Dictionary 579 (6th ed. 1990)). The Court notes that although the *Antico* Court referred to the *McCormick* standard as "overt" or "express" quid pro quo, it did so without analysis of the explicit quid pro quo requirement and outside of the campaign contribution context. *See Antico*, 275 F.3d at 257, 260.

been a meeting of the minds to exchange official action for money"); *see also United States v. Inzunza*, 638 F.3d 1006, 1014 (9th Cir. 2011) (noting that in the campaign contribution context, the connection between the explicit promise of official action and the contribution "may be circumstantial"). Thus, even in the campaign contribution context, a wink and a nod can constitute circumstantial evidence that supports the existence of an explicit quid pro quo. The Third Circuit has not held otherwise.

To the extent the Government's statement on the law was inaccurate, any error was cured by the Court's instructions, which the jury is presumed to follow. *See Weeks v. Angelone*, 528 U.S. 225, 234, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000) ("A jury is presumed to follow its instructions."); *United States v. Bryant*, 655 F.3d 232, 252 (3d Cir. 2011) ("[W]e generally presume that juries follow their instructions."). The Court informed the jury during preliminary instructions and again as part of the final charge that it is the Court's role to instruct the jury on the law, and it is the Court's instructions that the jury is bound to follow. *See* Jury Selection Tr. at 52, Jan. 16, 2018 ("[Y]ou must follow my instructions to keep an open mind and refrain from determining the guilt or the innocence of the defendants until you have heard all of the evidence on both sides, and further, until you have heard my instructions on the law to be applied to the facts."); *id.* at 65 ("The function of the jury is to decide the questions of fact, but when it comes to the law, however, you are to take the instructions from the Court, whether you agree with them or not."); Trial Tr. Day 23 at 7, Feb. 28, 2018 ("I will instruct you on the law. . . . My role now

is to explain to you the legal principles that must guide you in your decisions. . . . You must not substitute or follow your own notion or opinion about what the law is or ought to be. You must apply the law that I give to you whether you agree with it or not."). The Government also informed the jurors that only the judge instructs them on the law. Trial Tr. Day 22 at 4-5 ("Additionally, the Judge is going to instruct you on the law after we've finished all of these arguments, and his instructions control. So while I might speak about the law or defense counsel might speak about the law, his instructions are the ones that you follow."). Given that both the Court and the Government informed the jury it was required to follow the Court's instructions on the law, to the extent the Government made any misstatements, the Court finds them to be cured. *See United States v. Bentley*, No. 10-525, 2015 U.S. Dist. LEXIS 184362, 2015 WL 12743602, at *5 (E.D. Pa. June 10, 2015) (finding the court's instructions to the jury before trial, before closing arguments, and in the final charge that its instructions on the law govern "certainly cured any error the [Government] committed"); *United States v. Williams*, 764 F. Supp. 1019, 1023 (E.D. Pa. 1991) (finding Government's alleged misstatements on the law during closing argument were harmless, "as the jury was instructed that [it] should rely on the law [given to it by the] district court," and the Government, during closing argument, stressed to the jury that the law as stated by the judge controls), *aff'd*, 952 F.2d 1394 (3d Cir. 1991).

D. Constructive Amendment of the Indictment

Allinson's final argument in his Rule 33 motion is that the Government did not prove what it charged in Count Nineteen, resulting in a constructive amendment of the Indictment and/or a prejudicial variance. Because the Indictment charged Allinson with federal program bribery "in connection with the business, transaction, and series of transactions of the City of Allentown involving something of value of $5,000 or more, namely, legal services contracts *awarded* to [Norris McLaughlin]," Indict., Count Nineteen (emphasis added), Allinson contends the alleged quid pro quo involved only past legal contracts awarded to Allinson's firm. At trial, however, the Government argued the jury could convict Allinson even if no such work had been awarded to his firm, meaning the legal services contracts could have been prospective. Allinson asserts this broader theory of the crime was not charged in the Indictment.

A constructive amendment occurs "where a defendant is deprived of his 'substantial right to be tried only on charges presented in an indictment returned by a grand jury.'" *United States v. Syme*, 276 F.3d 131, 148 (3d Cir. 2002) (quoting *United States v. Miller*, 471 U.S. 130, 140, 105 S. Ct. 1811, 85 L. Ed. 2d 99 (1985)). "The key inquiry is whether the defendant was convicted of the same conduct for which he was indicted." *United States v. Daraio*, 445 F.3d 253, 260 (3d Cir. 2006) (internal quotation marks and citation omitted). "An indictment is constructively amended when . . . the evidence and jury instructions at trial modify essential terms of the charged offense in such

a way that there is a substantial likelihood that the jury may have convicted the defendant for an offense differing from the offense the indictment returned by the grand jury actually charged." *Id.* A variance occurs "when the evidence at the trial proves facts materially different from those alleged in the indictment." *United States v. Vosburgh*, 602 F.3d 512, 532 (3d Cir. 2010) (internal quotation marks and citation omitted). A variance constitutes reversible error only where "'it is likely to have surprised or has otherwise prejudiced the defense.'" *Id.* (quoting *Daraio*, 445 F.3d at 262).

Considering all of the language in Count Nineteen, there is no constructive amendment or variance present here. Count Nineteen reads in its entirety as follows:

> THE GRAND JURY FURTHER CHARGES THAT:
>
> 1. Paragraphs 1 to 30, 32 and 33, and Overt Acts 113 to 132 of Count One of this indictment are incorporated here.
>
> 2. From on or about February 2015 through on or about June 30, 2015, in Allentown, in the Eastern District of Pennsylvania, and elsewhere, defendant SCOTT ALLINSON corruptly gave, offered to give, agreed to give, caused, and attempted to cause others to give, something of value, that is, campaign contributions, to defendant EDWIN PAWLOWSKI and his political action

> committees, while PAWLOWSKI was the Mayor of Allentown and an agent of the City of Allentown, which received benefits in excess of $10,000 in the one-year period from January 1, 2015 to December 31, 2015, from federal programs involving a grant, contract, subsidy, loan, guarantee, insurance and other form of federal assistance, with intent to influence and reward defendant PAWLOWSKI in connection with the business, transaction, and series of transactions of the City of Allentown involving something of value of $5,000 or more, namely, legal services contracts awarded to Law Firm #2. All in violation of Title 18, United States Code, Section 666(a)(2).

Indict., Count Nineteen. The Count specifically incorporates Overt Acts 113 to 132—which include Allinson's interactions with Fleck and Ruchlewicz and describe Allinson discussing legal work to be given to Allinson's firm—evincing that anticipated legal work was part of the offense. Count Nineteen also includes the language "with intent to influence" and "reward," further confirming the Indictment included both prospective and past legal work: Allinson "gave, offered to give, agreed to give, caused, and attempted to cause others to give . . . campaign contributions . . . with the intent to influence and reward defendant PAWLOWSKI in connection with the business . . . involving something of value of $5,000 or more, namely, legal services contracts awarded to [Norris McLaughlin]." *Id.* Reading the Indictment as a whole, it is clear that the "quo" in the quid pro quo is charged as

both future and past legal work—i.e., Allinson is alleged to have intended to influence Pawlowski in connection with future legal work and reward him for past legal work. Because the charges of both future and past legal work were presented to the grand jury, and Allinson was convicted based on evidence of anticipated legal work and not on facts "materially different from those alleged in the [I]ndictment," no constructive amendment has occurred. *See Daraio*, 445 F.3d at 260. The evidence at trial of prospective legal work was not materially different from the facts alleged in the Indictment; thus, no variance has occurred. In addition, because the anticipated legal work was referenced in the Indictment, there is no evidence that is "likely to have surprised or otherwise prejudiced" Allinson in the preparation of his defense. *See Vosburgh*, 602 F.3d at 532.

For all of the foregoing reasons, this Court denied Allinson's post-verdict motions.

BY THE COURT:

/s/ Juan R. Sánchez
Juan R. Sánchez, J.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, FILED JANUARY 17, 2018

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

No. 17-390
CRIMINAL ACTION

UNITED STATES OF AMERICA

v.

EDWIN PAWLOWSKI
SCOTT ALLINSON

ORDER

AND NOW, this 17th day of January, 2018, following a pretrial conference held on January 4, 2018, it is ORDERED:

1. The Government's Motion to Admit Audio and Video Recordings (Document 49) is GRANTED insofar as Defendants do not object to the accuracy or methodology of the recordings. Defendants shall have the right to object to the admission of such recordings at trial on hearsay grounds.

2. The Government's Trial Motions, incorporated in its Trial Memorandum (Document 50), are resolved as follows:

Appendix D

a. The Government's Motion to Preclude Reference to Defendant's Background is GRANTED as unopposed;

b. The Court RESERVES RULING on the Government's Motion to Preclude Use of Defendants' Prior Recorded Statements;

c. The Government's Motion to Introduce Co-Conspirator Statements is GRANTED[1];

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1. For an out-of-court co-conspirator statement to be admissible against a defendant under Federal Rule of Evidence 801(d)(2)(E), "the Government must prove by a preponderance of the evidence that: (1) a conspiracy existed; (2) the declarant and the party against whom the statement is offered were members of the conspiracy; (3) the statement was made in the course of the conspiracy; and (4) the statement was made in furtherance of the conspiracy." *United States v. Turner,* 718 F.3d 226, 231 (3d Cir. 2013). The Government moves to admit the statements of second or third parties contained in certain intercepted conversations. Defendant Scott Allinson argues any co-conspirator statements admitted against him must be limited to the conspiracy with which he was charged.

Although the Court may not permit the jury to consider a co-conspirator's statement against a defendant unless the Government establishes the required foundation, the Court may permit the Government to conditionally introduce co-conspirator statements subject to the requirement that the Government satisfy the requirements of Rule 801(d)(2)(E) by the close of its case. *See United States v. Gambino,* 926 F.2d 1355, 1360 (3d Cir. 1991); *United States v. Ammar,* 714 F.2d 238, 246-47 (3d Cir. 1983); *United States v. Cont'l Grp., Inc.,* 603 F.2d 444, 456 (3d Cir. 1979). The Government's motion is thus granted. However, Defendants may challenge the sufficiency of the Government's foundational showing at trial and

d. The Government's motion to admit certain 404(b) evidence is DISMISSED as MOOT;

e. The Government's Motion to Preclude Jury Nullification Arguments is GRANTED as unopposed;

f. The Government's Motion to Preclude Defense Reference to Prior Good Acts is DENIED without prejudice to reassertion at trial; and

g. The Court RESERVES RULING on the Government's Motion to Permit Jury to Use the Indictment During Deliberations.

3. The Government's Motion in Limine to Limit Cross Examination of a Certain Witness (Document 74) is GRANTED as unopposed.

4. Defendant Scott Allinson's Motion in Limine to Preclude Evidence of Certain Campaign Contributions (Document 62) is DENIED without prejudice.[2]

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seek appropriate relief in the event the Court determines the Government has failed to meet its burden. *See Cont'l Grp.*, 603 F.2d at 456 (noting such relief may take the form of a mistrial if cautionary instructions to the jury are insufficient to cure the resulting prejudice to the defendant).

2. Defendant Allinson moves to preclude the Government from introducting at trial evidence of his campaign contributions to Edwin

Pawlowski or the Friends of Ed Pawlowski on February 22, 2012, August 27, 2012, January 23, 2013, and October 2, 2013 (the 2012-2013 Contributions). He also seeks to preclude reference to promised or actual campaign contributions he made on December 12, 2014, and February 12, 2015 (the 2014-2015 Contributions). Allinson argues the Government failed to allege the 2012-2013 Contributions and 2014-2015 Contributions were made in exchange for anything from Pawlowski, as required under *McCormick v. United States,* 500 U.S. 257 (1991), and these contributions are therefore not relevant to the conspiracy or federal program bribery charges against Allinson. Allinson further argues that even if evidence of the 2012-2013 and 2014-2015 Contributions is minimally relevant, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusing the issues, or misleading the jury. The Government disputes that it has failed to make a showing of a quid pro quo with respect to the 2012-2013 and 2014-2015 Contributions, arguing Allinson's December 10, 2014, statement, set forth in the Indictment, provides the necessary link between the contributions and expected legal work. *See* Govt.'s Resp. 2 ("[B]ut the well is completely dry right now and so I'm talking our dialect of English that, you know, we've been unbelievably supportive in the past and now, you know, the work's going everywhere but, but to our shop ... This is a short term fixable issue."). The Government further argues the 2012-2013 and 2014-2015 Contributions are relevant to the conspiracy charge, which alleges conduct that occurred between February 22, 2012, and June 26, 2015.

Pursuant to Federal Rule of Evidence 401, evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." A court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Although "this

Appendix D

BY THE COURT:

/s/ Juan R. Sánchez
Juane R. Sánchez, J.

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language places the decision to exclude such evidence within the sound discretion of the district court, *United States v. Pelullo,* 14 F.3d 881, 888 (3d Cir. 1994), Rule 403 "creates a presumption of admissibility," *United States v. Cross,* 308 F.3d 308, 323 (3d Cir. 2002). In making a Rule 403 determination, the court "must appraise the genuine need for the challenged evidence and balance that necessity against the risk of prejudice to the defendant." *Pelullo,* 14 F .3d at 888 (citation omitted). "Evidence can be kept out only if its unfairly prejudicial effect 'substantially outweigh[s]' its probative value." *Cross,* 308 F.3d at 323 (quoting Fed. R. Evid. 403).

At this stage, the Court finds evidence of the 2012-2013 and 2014-2015 Contributions may be relevant to the conspiracy and bribery charges against Allinson, who in his December 10, 2014, statement indicated he expected legal work in exchange for his prior political contributions to the mayor. Allinson has failed to show any unfair prejudice arising from the introduction of those Contributions substantially outweighs their probative effect. If the Government fails to establish an explicit quid pro quo pertaining to the 2012-2013 and 2014-2015 Contributions, the jury, with the proper instructions from this Court, may determine those Contributions to be legal campaign contributions.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, FILED DECEMBER 7, 2017

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

CRIMINAL ACTION
No. 17-390-2; No. 17-390-3

UNITED STATES OF AMERICA

v.

SCOTT ALLINSON, JAMES HICKEY

December 7, 2017, Decided
December 7, 2017, Filed

ORDER

AND NOW, this 7th day of December, 2017, upon consideration of Defendant Scott Allinson's Motions to Dismiss Count One and Count Nineteen of the Indictment, which Defendant James Hickey has joined, and the Government's response thereto, and following a November 28, 2017, oral argument on the Motions, it is ORDERED the Motions (Documents 31 & 32) are DENIED without prejudice to Defendants' right to challenge the sufficiency of the evidence at trial.[1]

1. On July 25, 2017, Edwin Pawlowski, Scott Allinson, and James Hickey were charged with corruption-related offenses arising from an alleged pay-to-play scheme in the City of

Allentown, in which Pawlowski accepted over $150,000 in campaign contributions in exchange for the use of his official position. Allinson is named in two counts of the 55-count Indictment: Count One, charging him with conspiracy, in violation of 18 U.S.C. § 371, and Count Nineteen, charging him with Federal Program Bribery-Offering, in violation of 18 U.S.C. § 666(a)(2). Allinson moves to dismiss the counts against him on the basis that (1) Count One fails as a matter of law; (2) both counts fail to allege an explicit quid pro quo, as required by *McCormick v. United States*, 500 U.S. 257, 111 S. Ct. 1807, 114 L. Ed. 2d 307 (1991); (3) both counts fail to allege the commission of an official act, as required by *McDonnell v. United States*, 136 S. Ct. 2355, 195 L. Ed. 2d 639 (2016); and (4) his due process rights were violated as a result of a misinformed grand jury.

An indictment must be a "plain, concise, and definite written statement of the essential facts charged." *United States v. Willis*, 844 F.3d 155, 161, 65 V.I. 489 (3d Cir. 2016) (quoting Fed. R. Crim. P. 7(c)). Federal Rule of Criminal Procedure 12(b) permits a defendant to move to dismiss an indictment based on a defect therein, including failure to state an offense. Fed. R. Crim. P. 12(b)(3). However, "[i]t is well-established that an indictment returned by a legally constituted and unbiased grand jury, . . . *if valid on its face* is enough to call for trial of the charge on the merits." *United States v. Huet*, 665 F.3d 588, 594-95 (3d Cir. 2012) (alteration in original) (citation omitted). An indictment is facially sufficient if it "(1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution." *Willis*, 844 F.3d at 161 (citation omitted). "[N]o greater specificity than the statutory language is required so long as there is sufficient factual orientation to permit the defendant to prepare his defense." *Id.* at 161-62 (citation omitted). As such, a court should uphold an indictment "unless it

is so defective that it does not, by any reasonable construction, charge an offense." *Id.* (citation omitted). In reviewing a motion to dismiss, a court must accept "as true the factual allegations set forth in the indictment." *United States v. Besmajian*, 910 F.2d 1153, 1154 (3d Cir. 1990).

Allinson first argues Count One should be dismissed because it fails to allege a connection between Allinson and any of the alleged co-conspirators other than Pawlowski, or any facts demonstrating a common illicit goal or mutually shared objective. Instead, Allinson argues, the Indictment alleges seven unrelated overt acts, and the fact that those acts involve a single common conspirator—Pawlowski—cannot transform those separate acts into a single conspiracy.

To establish the offense of conspiracy under 18 U.S.C. § 371, the Government must prove "(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). Although the essence of a conspiracy is an agreement, the "government need only prove that the defendant agreed with at least one of the persons named in the indictment that they or one of them would perform an unlawful act." *United States v. Kelly*, 892 F.2d 255, 258-59 (3d Cir. 1989). In determining whether a series of events constitutes a single conspiracy or separate conspiracies, a court considers (1) "whether there was a common goal among the conspirators"; (2) "the nature of the scheme to determine whether the agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators"; and (3) "the extent to which the participants overlap in the various dealings." *Id.* at 259. Members of a single conspiracy must be aware of the scheme and the existence of other members, and their activities must be interdependent or mutually supportive. *See United States v. Kemp*, 500 F.3d 257, 288-89 (3d Cir. 2007). The absence of one

Kelly factor, however, "does not necessarily defeat an inference of the existence of a single conspiracy." *United States v. Padilla*, 982 F.2d 110, 115 (3d Cir. 1992).

The Indictment adequately sets forth the elements of the offense. Count One of the Indictment alleges that between February 2012 and July 2, 2015, in the City of Allentown, Pawlowski, Allinson, Hickey, and others "conspired and agreed to commit mail fraud, wire fraud, honest services fraud, federal program bribery-soliciting, federal program bribery-offering, and Travel Act bribery in violation of federal criminal law." Indictment, Count One, The Conspiracy ¶ 31. The Indictment further alleges Defendants and their co-conspirators "made campaign contributions and caused others to make campaign contributions" to Pawlowski "in return for which they received, and anticipated receiving, favorable treatment" from Pawlowski in obtaining contracts with the City of Allentown. *Id.* Manner and Means ¶ 33. The Indictment identifies the specific offense underlying the conspiracy as it pertains to Allinson—federal program bribery—and the means by which Allinson committed the offense, including by making campaign contributions to one of Pawlowski's political action committees. *See* Indictment, Count One, Scott Allinson and Law Firm #2 ¶¶ 113-16, 126; *see also* Def.'s Mot. to Dismiss Count One and Count Nineteen, Ex. A (email from Government confirming that Allinson is charged with only conspiracy to commit § 666 bribery). The charges therefore sufficiently allow Allinson to prepare his defense. *See Willis*, 844 F.3d at 161-62.

The Indictment also satisfies the *Kelly* test for the purposes of this motion. Under the first factor, the Indictment sufficiently alleges a common goal to make campaign contributions and cause others to make campaign contributions to Pawlowski—who "required substantial amounts of money to finance his statewide campaigns"—in return for his favorable treatment in obtaining contracts with the City of Allentown. *See* Indictment, Count

One, Manner and Means ¶¶ 32-33. Although the Indictment alleges Allinson was involved in only one of the seven overt acts charged, "in a conspiracy, distinctly separate steps taken can be in furtherance of a common goal." *United States v. Mitan*, No. 08-760, 2009 U.S. Dist. LEXIS 49643, 2009 WL 1651288, at *21 (E.D. Pa. June 11, 2009) (citing *United States v. Adams*, 759 F.2d 1099, 1110 (3d Cir. 1985), and *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183 (3d Cir. 1984)). The Indictment also sufficiently alleges the conspiracy was dependent on the continuous cooperation of the conspirators, as it alleges Allinson provided campaign contributions to Pawlowski and, over the course of three years, discussed with Pawlowski's operatives, S.R. and Michael Fleck, potential contributions to Pawlowski with the expectation of receiving legal work in return. The Indictment therefore alleges that Allinson's actions were advantageous to the success of the scheme. *See Padilla*, 982 F.2d at 114 (finding the second prong of the *Kelly* test is satisfied where co-conspirators' participation is "at least *advantageous* to the overall success of the venture" (emphasis in original) (internal quotation marks and citation omitted)). Finally, the Indictment alleges a sufficient degree of overlap in time of activities to further the scheme and participant overlap insofar as it alleges the co-conspirators were scheming with Pawlowski and his operatives—central figures in the conspiracy. *See id.* at 115 (finding third *Kelly* factor satisfied where "there was some overlap with Aguilar, the central figure in the scheme"); *Kelly*, 892 F.2d at 260 ("[T]he government need not prove that each defendant knew all the details, goals, or other participants in order to find a single conspiracy." (internal quotation marks and citation omitted)). In any event, any failure to allege one of these *Kelly* factors is not necessarily fatal to the single conspiracy charge. *See Padilla*, 982 F.2d at 115.

Although the interdependence among all members of the conspiracy is not specifically alleged in the Indictment, "the existence of a single conspiracy or multiple conspiracies hinges on

factual issues that arise at trial." *United States v. Weiner*, No. 08-614, 2009 U.S. Dist. LEXIS 56105, 2009 WL 1911286, at *5 (E.D. Pa. 2009) (citing *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946), *Blumenthal v. United States*, 332 U.S. 539, 68 S. Ct. 248, 92 L. Ed. 154 (1947), and *United States v. Kemp*, 500 F.3d 257 (3d Cir. 2007)); *see United States v. Bobb*, 471 F.3d 491, 494 (3d Cir. 2006) ("The issue of whether a single conspiracy or multiple conspiracies exist is a fact question to be decided by a jury."). To be sure, an impermissible variance may result if an "indictment charges a single conspiracy while the evidence presented at trial proves only the existence of multiple conspiracies." *Kemp*, 500 F.3d at 287; *see Bobb*, 471 F.3d at 494 ("Where a single conspiracy is alleged in the indictment, there is a variance if the evidence at trial proves only the existence of multiple conspiracies."). The Government argues Allinson and his co-conspirators shared the common goal of providing "campaign contributions to Pawlowski in return for favorable treatment on the contracts," Tr. 132, Nov. 28, 2017, and that Allinson was aware that other individuals and law firms were similarly "making contributions to the mayor to keep him in office so the contracts keep on coming to them," *id.* at 135. It will be for the Government to provide such evidence to the jury, and for the jury to decide whether the Government proved the single conspiracy alleged in the Indictment. Dismissing Count One therefore would be premature at this time. *See Weiner*, 2009 U.S. Dist. LEXIS 56105, 2009 WL 1911286, at *5.

Allinson next argues both Count One and Count Nineteen should be dismissed as to him because the Indictment fails to allege an explicit quid pro quo between Allinson and Pawlowski or Pawlowski's performance of an official act on behalf of Allinson, both of which Allinson contends are essential elements of § 666 bribery under *McCormick* and *McDonnell*. As the Third Circuit has recognized, in *McCormick*, the Supreme Court held "an explicit quid pro quo is necessary for conviction [of extortion under

color of official right] under the Hobbs Act when a public official receives a campaign contribution." *United States v. Antico*, 275 F.3d 245, 256 (3d Cir. 2001) (citing *McCormick*, 500 U.S. at 274), abrogated on other grounds by *Skilling v. United States*, 561 U.S. 358, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010). In *McDonnell*, the Supreme Court clarified that an "official act" under the federal bribery statute, 18 U.S.C. § 201, means making a decision or taking action, or agreeing to do either, on a "question, matter, cause, suit, proceeding or controversy" that involves a "formal exercise of governmental power." 136 S. Ct. at 2371-72. The question or matter must be something "specific and focused" that is "pending or may by law be brought before a public official." *Id.* at 2372 (internal quotation marks omitted). "Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit that definition of 'official act.'" *Id.*

The Court first notes it is not clear a quid pro quo is an essential element of bribery under 18 U.S.C. § 666. *See Willis*, 844 F.3d at 164 (declining to decide whether the government must allege and prove a quid pro quo to establish a § 666 bribery offense); *United States v. Andrews*, 681 F.3d 509, 527, 56 V.I. 1007 (3d Cir. 2012) ("We have never decided whether § 666(a)(2) requires proof of a quid pro quo . . . ."); *United States v. Beldini*, 443 F. App'x 709, 717 (3d Cir. 2011) (noting the "Supreme Court has not addressed whether reasoning analogous to that of *McCormick* . . . requires a quid pro quo for § 666," and "[t]here is an earnest circuit split on whether § 666 does or does not require proof of a quid pro quo").

Even if the Government is required to allege a quid pro quo to state an offense under § 666, the Court finds a quid pro quo between Allinson and Pawlowski has been adequately alleged. A "quid pro quo" is "a specific intent to give or receive something of value in exchange for an official act." *Willis*, 844 F.3d at 161 (quoting *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05, 119 S. Ct. 1402, 143 L. Ed. 2d 576 (1999)). The

McCormick Court described the necessary explicit quid pro quo in the campaign contribution context as follows:

> The receipt of such contributions is also vulnerable under the Act as having been taken under color of official right, but 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. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking. This is the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act.

500 U.S. at 273. The *McCormick* Court did not elaborate on the meaning of "explicit" in this context. *See United States v. Ring*, 706 F.3d 460, 466, 403 U.S. App. D.C. 410 (D.C. Cir. 2013) (noting the "*McCormick* Court failed to clarify what it meant by 'explicit,' and subsequent courts have struggled to pin down the definition of an explicit quid pro quo in various contexts"). Some Circuit Courts have found the "explicit" quid pro quo requirement "is satisfied by something short of a formalized and thoroughly articulated contractual arrangement (*i.e.*, merely knowing the payment was made in return for official acts is enough)." *United States v. Blanford*, 33 F.3d 685, 696 (6th Cir. 1994); *see United States v. Siegelman*, 640 F.3d 1159, 1171 (11th Cir. 2011) ("*McCormick* uses the word "explicit" when describing the sort of agreement that is required to convict a defendant for extorting campaign contributions. Explicit, however, does not mean *express."); United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992) (finding *McCormick*'s explicitness requirement does not require an official's specific statement that he will exchange official action for a contribution, but rather "requires . . . the quid pro quo be clear and unambiguous, leaving no uncertainty about the terms of the bargain"). The Third Circuit has suggested "explicit" may be equated to "express," but has not squarely addressed the issue.

See Antico, 275 F.3d at 260 (distinguishing the Hobbs Act quid pro quo requirement in the non-campaign contribution context before the court from the "express quid pro quo requirement" applied in campaign contribution cases); *see also United States v. Menendez*, 132 F. Supp. 3d 635, 643 (D.N.J. 2015) (finding bribery counts in indictment satisfied *McCormick*'s quid pro quo requirement and noting "[t]hat the alleged agreement was not express is irrelevant").

Count Nineteen of the Indictment incorporates paragraphs 113-132 of Count One, which pertain to Allinson's campaign contributions to one of Pawlowski's political action committees in exchange for Pawlowski's official action of providing Allinson's law firm with legal contract trust work, and alleges Allinson:

> corruptly gave, offered to give, agreed to give, cause, and attempted to cause others to give, something of value, that is, campaign contributions, to defendant EDWIN PAWLOWSKI and his political action committees, while PAWLOWSKI was the Mayor of Allentown and an agent of the City of Allentown, . . . with intent to influence and reward defendant PAWLOWSKI in connection with the business, transaction, and series of transactions of the City of Allentown involving something of value of $5,000 or more, namely, legal services contracts awarded to Law Firm #2.

Indictment, Count Nineteen ¶ 2. Regardless of the meaning of "explicit," because the Indictment charges that Allinson provided campaign contributions in exchange for Pawlowski's use of his official position to provide favorable treatment to Allinson's firm in the award of contract work from the City of Allentown, it adequately alleges a quid pro quo at this stage in the proceedings. *See Willis*, 844 F.3d at 164 (holding indictment adequately alleged a quid pro quo based on similar language); *Menendez*, 132 F. Supp.

3d at 643 (finding indictment "clearly allege[d] an explicit *quid pro quo*" by stating defendant made campaign contributions "in return for" defendant-senator's advocacy on behalf of the defendant in his contract dispute). Similarly, the favorable treatment alleged—the awarding of legal services contracts—is sufficient to constitute "official acts" for the purposes of the motion to dismiss.

Whether the acts alleged in the Indictment in fact satisfy the meaning of an explicit quid pro quo under *McCormick*, or the definition of an "official act" under *McDonnell*, are factual determinations to be resolved after the Government has presented evidence at trial. *See McDonnell*, 136 S. Ct. at 2371 ("It is up to the jury, under the facts of the case, to determine whether the public official agreed to perform an 'official act' . . . [and] the jury may consider a broad range of pertinent evidence, including the nature of the transactions, to answer that question."). The Indictment returned against Allinson sets forth the elements of § 666 bribery and conspiracy to commit § 666 bribery, and therefore sufficiently apprises him of what he must defend against.

Finally, Allinson argues Counts One and Nineteen must be dismissed as to him on due process grounds based on the Government's failure to present evidence to the grand jury of the May 20, 2015, meeting the Government alleges took place between Allinson, Pawlowski, and others at Law Firm #2. The Indictment alleges that at that meeting, Pawlowski "solicited a contribution of $25,000, and said that the City of Allentown might have more legal contract trust work for Law Firm #2." Indictment, Count One, Scott Allinson and Law Firm #2 ¶ 129. Allinson argues that allegation serves as the only factual basis of an explicit quid pro quo arrangement between Allinson and Pawlowski and is central to the Government's theory of an "official act," and, therefore, failure to provide evidence of the meeting to the grand jury resulted in an uninformed and biased jury. In response, the Government argues it presented sufficient evidence from which the grand jury could find Allinson provided campaign contributions to Pawlowski in

exchange for the referral of legal contract trust work to Allinson's law firm, even without presentation of the May 20, 2015, meeting recording, *see* Govt's Resp. 11-14 (summarizing evidence presented to grand jury), and that it in fact provided evidence of the meeting to the grand jury by presenting recordings of conversations in which Allinson and others discussed the meeting, as well as evidence that Pawlowski instructed that legal work be given to Law Firm #2 following the meeting, *see* Tr. 111, Nov. 28, 2017. The Government further argues the transcript of the May 20, 2015, meeting is not exculpatory, as it can be inferred from the conversation during the meeting, and from a recorded conversation between Pawlowski and Fleck immediately following the meeting, that Pawlowski, Allinson, and others from Law Firm #2 were discussing an exchange of campaign contributions for legal work. *See* Govt's Resp. 13 (citing Def.'s Mot. to Dismiss on Due Process Grounds, Ex. B at 21-22).

The United States Supreme Court has recognized the "necessity to society of an independent and informed grand jury." *Wood v. Georgia*, 370 U.S. 375, 390, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1062). In *Bank of Nova Scotia v. United States*, the Supreme Court noted a prosecutor's infringement of a grand jury's independence "may result in grave doubt as to a violation's effect on the grand jury's decision to indict." 487 U.S. 250, 259, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988). This Court agrees with the Government that its failure to present a recording of the May 20, 2015, meeting does not cast "grave doubt" as to the grand jury's decision to indict. The transcript of the meeting shows Pawlowski soliciting $25,000 from Law Firm #2, and an attorney from the firm indicating that contributing money would be good "from a legal work standpoint," Def.'s Mot. to Dismiss on Due Process Grounds, Ex. B. at 20-21. Further, following the meeting, Pawlowski made an explicit statement to Fleck regarding "more legal work" for the firm. The Court is not persuaded the grand jury was misinformed by not hearing a recording of the May 20, 2015, meeting, and finds that,

It is further ORDERED Allinson's Motion for Severance (Document 30), which Defendant James Hickey has also joined, is DENIED.[2]

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in fact, the recording may have provided further evidence of a quid pro quo between Allinson and Pawlowski. Allinson's motion to dismiss on due process grounds is therefore denied.

2. Allinson moves to sever his trial from that of Pawlowski and Hickey based on the limited allegations in the Indictment that pertain to him, as compared to his co-Defendants. Allinson alleges he will be prejudiced by a joint trial because the disparate levels of culpability among the co-Defendants will create a risk of conviction based on guilt by association and will make it difficult for the jury to compartmentalize the evidence against each Defendant.

Under Federal Rule of Criminal Procedure 14(a), "[i]f the joinder of offenses or defendants in an indictment . . . appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." A court may grant severance "to prevent the serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *United States v. Walker*, 657 F.3d 160, 170 (3d Cir. 2011) (internal quotation mark and citation omitted). Nevertheless, "[t]here is a preference in the federal system for joint trials of defendants who are indicted together," *Zafiro v. United States*, 506 U.S. 534, 537, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993), and the burden of showing prejudice from the joinder rests with the defendant seeking severance, *see United States v. Eufrasio*, 935 F.2d 553, 568 (3d Cir. 1991). "[A] defendant is not entitled to a severance merely because evidence against a co-defendant is more damaging than the evidence against the moving party." *Zafiro*, 506 U.S. at 539 (citation omitted). Rather, "the question of prejudice hinges upon whether the jury will be able to compartmentalize the evidence as it relates to separate defendants in view of its volume and limited

BY THE COURT:

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admissibility." *Walker*, 657 F.3d at 170 (internal quotation marks and citation omitted). Ultimately, the court must "balance the potential prejudice to the defendant against the advantages of joinder in terms of judicial economy." *United States v. Sandini*, 888 F.2d 300, 305-06 (3d Cir. 1989).

Here, because of the nature of the charges, including the conspiracy charge against all three Defendants, any potential prejudice against Allinson is outweighed by the judicial economy of holding a joint trial. *See Zafiro*, 506 U.S. at 537 ("[Joint trials] promote efficiency and serve the interest of justice by avoiding the scandal and inequity of inconsistent verdicts." (internal quotation marks and citation omitted)); *United States v. McGlory*, 968 F.2d 309, 340 (3d Cir. 1992) ("We must also balance the public interest in joint trials against the possibility of prejudicial joinder. . . . [J]udicial economy often favor[s] a joint trial when a conspiracy is charged."). Although Allinson is charged with only two counts in the 55-count Indictment, and much of the evidence presented to the jury at trial will likely not pertain to him, "neither a disparity in evidence, nor introducing evidence more damaging to one defendant than others entitles seemingly less culpable defendants to severance." *Eufrasio*, 935 F.2d at 568; *see also United States v. Lore*, 430 F.3d 190, 205 (3d Cir. 2005) ("We long have held that a defendant is not entitled to a severance merely because evidence against a co-defendant is more damaging than the evidence against the moving party." (internal quotation marks and citation omitted)). Further, the Court will provide limiting instructions to the jury directing the jury to consider the evidence separately as to each Defendant and each count. Although this case involves seven different overt acts, the acts themselves are not overly complex and the Court sees no reason why, with proper instructions, the jury should have difficulty compartmentalizing the evidence against each Defendant. *See Lore*, 430 F.3d at 205-06 (finding that because the claims charged were "relatively straightforward and discrete, not involving overly technical or scientific issues[,] . . . the jury

Appendix E

/s/ Juan R. Sánchez
Juan R. Sánchez, J.

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reasonably could have been expected to compartmentalize the evidence as it related to [the defendant]," especially where the court "instructed the jury several times to compartmentalize the evidence by considering the evidence separately as to each defendant and each count"). Allinson's motion is therefore denied.

APPENDIX F — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JUNE 6, 2022

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3806

UNITED STATES OF AMERICA

v.

SCOTT ALLINSON,

Appellant.

(District Court No.: 5-17-cr-00390-002)

SUR PETITION FOR REHEARING

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

BY THE COURT

s/ Thomas L. Ambro
Circuit Judge

Dated: June 6, 2022

APPENDIX G — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

18 U.S. Code § 371 - Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of theconspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Appendix G

18 U.S. Code § 666 - Theft or bribery concerningprograms receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, oraccepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organizationor of a State, local

or Indian tribal government, or any agency thereof,in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section—

(1) the term "agent" means a person authorized to act on behalf ofanother person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal

entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States ; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.