No. 23-_____

IN THE

Supreme Court of the United States

JACQUELINE GRAHAM,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

HARRY SANDICK
Counsel of Record
ANDREW I. HADDAD
HILARIE M. MEYERS
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000
hsandick@pbwt.com

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a defendant waives her Sixth Amendment ineffective-assistance-of-counsel claim by not asking the trial court to reinstate a plea offer that expired before her counsel conveyed it to her, where the defendant did not know that she had a right to have the plea offer reinstated.

2. Whether a court of appeals violates the party-presentation rule stated in *United States v. Sineneng-Smith,* 140 S. Ct. 1575 (2020), by ruling on an issue that the parties did not raise and that the prevailing party expressly abandoned twice at oral argument.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

United States v. Graham, No. 16 CR. 786-2 (NSR), 2019 WL 2366724 (S.D.N.Y. May 31, 2019)

United States v. Graham, No. 16-CR-00786-2 (NSR), 2019 WL 4221512 (S.D.N.Y. Sept. 4, 2019)

United States Court of Appeals (2d Cir.):

United States v. Graham, 51 F.4th 67 (2d Cir. 2022)

United States v. Graham, No. 20-832 (2d Cir. Dec. 2, 2022) (order denying petition for rehearing)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional and Statutory Provisions

PETITION FOR A WRIT OF CERTIORARI

Jacqueline Graham respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 51 F.4th 67 (2022) and reprinted in the Appendix to the Petition (App.) at 3a-43a.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 2022. The court of appeals denied panel rehearing and rehearing *en banc* on December 2, 2022. App. 1a-2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND PROCEDURAL RULES INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.

This case also involves the party-presentation rule as recently reaffirmed by this Court in *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020).

STATEMENT

Among the most fundamental constitutional rights is the right to effective assistance of counsel. Among other things, this right entitles a defendant to have her counsel share a plea offer with her and advise her on the merits of the offer before that offer expires. A criminal defendant waives her right to counsel only if she understands and knowingly relinquishes this right.

Under *Missouri v. Frye*, 566 U.S. 134, 144 (2012), and *Lafler v. Cooper*, 566 U.S. 156 (2012), if defense counsel fails to convey a plea offer made by the government before it expires and thereby prejudices the defendant, then the court must order the government to reinstate the plea offer even if the defendant has been convicted after a fair trial.

Despite this Court's prior rulings, the Second Circuit has created a new rule in this appeal that a defendant waives her right to have a plea offer conveyed to her if she proceeds to trial rather than asking the trial court to reinstate the offer, even where there is no evidence that she was told that she had this right. This new rule contravenes *Lafler* and several other of this Court's precedents and is unprecedented: no other court has ever reached this conclusion since *Lafler*. The new rule undermines both the right to effective assistance of counsel and the longstanding principle that waiver of a constitutional right must be knowing and voluntary. This Court should grant certiorari to clarify that the right to effective assistance of counsel cannot be waived unless the waiver is knowing and voluntary, rather than inadvertent. Absent this Court's

intervention, litigants in the Second Circuit and other circuits will needlessly raise ineffectiveness arguments in the trial court and on direct appeal, which this Court discouraged in *Massaro v. United States*, 538 U.S. 500 (2003).

To make matters worse, the Second Circuit found waiver even after the government abandoned any waiver argument by failing to raise it in its brief and even expressly rejecting the court's suggestion at oral argument that the defendant waived her ineffective-assistance claim. Instead of deciding the appeal based on the issues presented by the parties, the Second Circuit *sua sponte* reached beyond those arguments, asked for post-argument briefing on the waiver issue, and then denied the defendant's appeal on that basis alone.

The Second Circuit violated the party-presentation rule, which requires that courts remain neutral decisionmakers and rely on the parties to frame the issues for decision. This Court's precedent in *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575 (2020), reaffirmed this foundational principle of our adversarial justice system, and the Second Circuit disregarded it here. Rather than act as referee in this appeal, the panel majority coached the government to a guaranteed victory. No extraordinary circumstances warranted the panel's judicial activism. As discussed below, the decision below is one of many decisions since *Sineneng-Smith* in which the Second Circuit and other courts of appeals have intervened in cases in contravention of the party-presentation rule. To end these rampant violations of the rule, this Court should grant certiorari.

A. Background

1. The Sixth Amendment Requires That Defense Counsel Convey Plea Offers

The Sixth Amendment guarantees a criminal defendant's right "to have the Assistance of Counsel for his defence," which this Court has held includes the right to effective assistance of counsel in the plea-bargaining context. *Frye*, 566 U.S. 134, 140 (2012). To succeed on an ineffective-assistance claim, a defendant must show that (1) his attorney's performance was deficient and (2) the deficient performance prejudiced her. *See Strickland v. Washington*, 466 U.S. 668, 687-696 (1984) (establishing this two-prong test). Defense counsel performs deficiently by failing to convey a formal plea offer to the client before it expires. *Frye*, 566 U.S. at 145 ("[D]efense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.").

In *Lafler v. Cooper*, 566 U.S. 156 (2012), the Court addressed the situation presented here: what happens when a defendant goes to trial after his attorney failed to convey a formal plea offer. In *Lafler*, after the ineffective assistance led the defendant not to accept a plea offer, he went to trial and was convicted. Ruling for the defendant, this Court held that a fair trial does not "wipe[] clean any deficient performance by [] counsel during plea bargaining" and therefore "order[ed] the State to reoffer the plea agreement." The Court rejected the idea that this remedy would "grant a windfall to the

defendant," *id.* at 169-174. *See also id.* at 167. The Court further stated that it did not matter whether the defendant's "rejection of the plea was knowing and voluntary" because that inquiry "is not the correct means by which to address a claim of ineffective assistance of counsel." *Id.* at 173 (citations omitted).

Following *Lafler*, this Court has never addressed the question of whether a defendant can waive her right to be advised of the government's plea offer simply based on her decision to proceed to trial in the absence of a showing that the defendant knew that**,** under *Lafler*, she had the right to compel the government to extend its plea offer again.

2. The Party-Presentation Rule Limits The Authority Of Appellate Courts To Address Issues That The Parties Did Not Present

This Court recently addressed the party-presentation rule in a criminal appeal in *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). This unanimous decision stands for the proposition that "[i]n both civil and criminal cases, in the first instance and on appeal…, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* (citation omitted).

In *Sineneng-Smith*, neither party raised the issue of whether the criminal statute at issue was unconstitutionally overbroad at the district court or on appeal. *Id.* at 1578, 1580. After oral argument, the Ninth Circuit named three *amici* and invited them and the parties to brief and argue the

overbreadth issue, and ultimately held that the statute was overbroad. *Id.* at 1580-1581. After granting certiorari, the Supreme Court vacated the Ninth Circuit's judgment because the "the appeals panel departed so drastically from the principle of party presentation as to constitute an abuse of discretion." *Id.* at 1578.

B. Facts and Procedural History

1. Graham's Counsel Fails to Convey the Government's Plea Offer

Graham was indicted along with four co-defendants in November 2016. By March 27, 2019, each of Graham's co-defendants had accepted plea offers and pleaded guilty, leaving Graham as the sole remaining defendant. *United States v. Lewis*, No. 7:16-cr-00786-NSR, ECF Min. Entries, Sept. 18, 2017, Mar. 22, 2019, Mar. 27, 2019. Because Graham is indigent, her counsel was appointed by the court.

On April 2, 2019, the government asked the district court to schedule a conference in order to ask Graham whether she received the government's plea offer. App. 115a-119a. The government explained that, on February 22, 2019, it provided Graham's attorney with a written plea offer to which Graham had not responded. App. 115a-116a. As such, the government was "concerned that Graham may not have fully understood [its] plea offer." App. 116a.

The government also noted that "the offer expired nearly one month ago" and that any future plea offers would "likely be less advantageous to Graham than its February 22, 2019 offer." App. 117a. Accordingly, the government expressed concern that

Graham's Sixth Amendment right to effective assistance of counsel may have been violated. App. 116a-117a (citing *Frye*, 566 U.S. at 145).

In response, the district court held a conference on April 10, 2019, at which defense counsel confirmed that he never provided Graham with a copy of the government's proposed plea agreement. The district court immediately called a recess so that counsel could share and discuss the agreement with Graham. App. 95a-97a.

After reading the plea agreement for the first time, Graham asked for additional time to research and consider it. App. 98a-99a. The district court then asked the government three times in a row if its plea offer was still available—giving the government every opportunity to re-extend the offer to Graham. App. 100a-101a. In response, the government said in seven different ways that its offer was off the table and was not being extended again:

1. "[T]hat plea offer has technically expired." App. 100a.
2. "It's our position that we don't bid against ourselves." App. 100a.
3. "[W]e don't keep on making new plea offers." App. 100a.
4. "[T]he closer we get to trial, the less flexible we are likely to be to the extent that we have flexibility in a plea negotiation." App. 100a.
5. "[T]he longer [Ms. Graham] waits, the less likely it is that it will benefit her." App. 100a.

6. "[The offer] has been taken off the table…." App. 100a-101a.
7. "[We have considered] discussing alternative ways of structuring the plea, but again, the longer she waits, the less likely it is that it will work out." App. 101a.

Graham then told the court that she had lost confidence in defense counsel's representation. App. 103a-104a. She complained that defense counsel had not even told her about the existence of a plea offer until the "end of March via email"—which was after the plea offer expired—and that he had not discussed the case with her generally. App. 103a-104a.

Defense counsel admitted that Graham was correct and he had not emailed Graham about the offer until late March. App. 104a. By March 27, Graham's co-defendants had already accepted their plea offers and pleaded guilty, leaving Graham as the sole remaining defendant and severely reducing her negotiating leverage with the government. No. 7:16-cr-00786-NSR, ECF Min. Entries, Sept. 18, 2017, Mar. 22, 2019, Mar. 27, 2019.

In response, the court appointed new counsel for Graham. App. 106a-107a. The court agreed to a brief delay of trial to account for Graham's change in counsel—from May 10, 2019 to early June 2019. App. 105a, 107a-109a. Nothing in the record indicates that the government ever renewed its plea offer or made any new offers to Graham before trial. Indeed, the government stated at the final pretrial conference on May 31, 2019 that it had "not made any new offers." App. 64a.

There is also no record evidence that *anyone*—not the district court, the government, or Graham's counsel—told Graham at *any time* that the district court could order the government to reopen its expired offer. Nor did anyone tell Graham that, by not asking the district court to reinstate the offer, she was waiving her rights to bring an ineffective-assistance claim under *Frye* and to have the government's expired plea offer reopened under *Lafler*.

Graham went to trial and was convicted of conspiracy to commit mail fraud, wire fraud, and bank fraud. She was sentenced to 132 months' imprisonment, a much longer sentence than her co-defendants received after pleading guilty.[1]

2. After Not Briefing Waiver, The Government Expressly Declines To Argue Waiver At Oral Argument

Graham appealed her conviction, arguing among other things that her counsel's failure to convey the government's plea offer to her constituted ineffective assistance of counsel. In its appellate brief, the government never argued that Graham waived her ineffective-assistance claim and argued instead that her claim should either be rejected or left

[1] Among the non-cooperating defendants, Bruce Lewis was sentenced principally to 84 months' imprisonment and Anthony Vigna was sentenced to one year and one day's imprisonment. No. 7:16-cr-00786-NSR, Dkt. Nos. 227 and 228 (July 29, 2019).

for further development in a 28 U.S.C. § 2255 proceeding. App. 32a n.2.

At oral argument, a member of the panel asked counsel for the government whether Graham knowingly relinquished her *Frye* rights, and counsel replied, "I don't know if I would style it as a knowing relinquishment." App. 38a (quoting Oral Arg. Audio Recording at 17:20-28 (Mar. 1, 2022)). The judge raised the same question a second time, asking whether the government was making a waiver argument, and the prosecutor again disavowed the argument, telling the panel that "ineffective assistance [] can be raised for the first time in collateral review, so I'm not sure that the defendant was obligated to raise it" in the district court. App. 31a n.1 (quoting Oral Arg. Audio Recording at 17:35-18:00).

On March 15, 2022, two weeks after argument, the panel ordered the parties to provide supplemental briefing addressing the following question:

> Whether, by proceeding to trial after the government's expired plea offer was acknowledged on the record, where new counsel had replaced allegedly ineffective counsel, Appellant waived any right under *Missouri v. Frye*, 566 U.S. 134 (2012), to plead guilty under the terms of the offer after her conviction or to raise a claim of ineffective assistance of counsel based on counsel's failure timely to provide the terms of the plea offer to Appellant.

App. 44a-45a. The panel directed the government to file a brief by March 28, Graham to file a response by April 11, and the government to file a reply by April 18. App. 45a. Even though the government had forfeited and then expressly disavowed a waiver argument, the court asked the government to file two briefs on the issue. Only then, after the court's prodding, did the government finally argue that Graham had waived her *Frye* claim.

3. The Second Circuit Rules That Graham Waived Her Right To Effective Assistance

Two judges on the panel affirmed Graham's conviction on the basis that she had waived her ineffective-assistance claim because, after she learned of the expired offer on April 10, 2019, she went to trial rather than "exercis[ing] her *Frye* right to compel the government to revive the expired plea offer." App. 16a. The panel majority reasoned: "Graham could not both proceed to trial and benefit from the government's [plea] offer … so waiver rules preclude her from doing so now." App. 16a. The majority acknowledged that its decision to "cast the decision to go to trial … as waiver of some other right" may "seem unusual." App. 19a.

While Judge Pérez concurred in the judgment, she wrote separately to express her disapproval of the panel majority's finding of waiver. As an initial matter, she stated that "the government abandoned this argument" by "not rais[ing] waiver in its opposition brief" and by "express[ing] serious doubt on whether there was a waiver when first questioned about it during oral argument." App. 31a. In Judge

Pérez's view, "[s]omething as bedrock to our criminal justice system and judicial process—the right to effective assistance of counsel—demands the judiciary be modest in its approach to doctrines that may serve to limit the right, such as waiver." App. 33a.

Judge Pérez also opined that, even if the government had not abandoned this issue, it did not meet its burden of proving that Graham's purported waiver was knowing and intelligent. In Judge Pérez's view, *Frye* demands a "robust process" before any finding of waiver because it "implicates both the right to effective counsel and the right of a defendant to accept a plea offer once made." App. 36a. Accordingly, the district court should have conducted "further inquiry of whether Graham wanted the plea offer ordered reopened (or if she even knew she could request that), or whether there was a knowing and voluntary waiver of her *Frye* right." App. 38a.

Additionally, Judge Pérez indicated that the panel majority's waiver ruling was inconsistent with *Massaro v. United States*, 538 U.S. 500, 506 (2003). App. 42a-43a. In *Massaro*, this Court held that an ineffective-assistance claim cannot be waived or forfeited by a defendant's failure to raise it on direct appeal, even if the defendant's appellate counsel is different from her trial counsel. This Court reasoned that appellate counsel's efforts to receive information from trial counsel would be hindered if appellate counsel were required to simultaneously argue that trial counsel performed deficiently. Judge Pérez noted that "Graham's new counsel was preparing for a two-week trial—on two months' notice—which

entailed learning the record and communicating with former trial counsel about the case." App. 42a. Therefore, she stated, "[t]he same considerations" animating *Massaro* "are applicable to declining to find waiver because of the unique nature of raising an ineffective assistance of counsel claim." App. 42a-43a.

For all of these reasons, Judge Pérez stated that the panel majority's decision "has muddied the waters concerning the right to effective assistance of counsel in plea bargaining." App. 31a. She concurred in the judgment, but only on the basis that Graham had not yet proved prejudice (*i.e.*, a reasonable probability that she would have accepted the February 2019 plea offer) caused by her counsel's error. App. 42a-43a. On that rationale, Graham would still be entitled to bring her *Frye* claim in a petition under 28 U.S.C. § 2255, and to develop evidence regarding the probability that she would have accepted the February 2019 plea offer.

REASONS FOR GRANTING THE PETITION

Two aspects of the Second Circuit's ruling in this case warrant this Court's review. *First*, the Second Circuit's expansion of waiver doctrine undermines the Sixth Amendment right to effective assistance of counsel and contradicts this Court's prior rulings. *Lafler* held that a fair trial does not wipe away deficient performance in plea bargaining. Yet, according to the Second Circuit, a defendant who goes to trial with new counsel thereby waives any *Frye* claim, even if the defendant was not aware they could petition the court for reinstatement of the expired plea offer.

In addition to being impossible to reconcile with *Lafler* and *Frye*, the ruling below has created a gaping and unwarranted exception to *Massaro*: now a defendant with new counsel *must* petition for renewal of an expired plea offer *before the trial* or else she waives her right to do so forever. This is unfair to defendants and their new counsel, who must present and litigate ineffective-assistance claims while simultaneously preparing for trial. It also incentivizes any defendant who replaces their counsel pretrial to immediately raise an ineffective-assistance claim and then renew the claim on appeal, lest they waive it—the exact inefficiency *Massaro* sought to prevent.

Second, by basing its decision on waiver, the panel majority violated the party-presentation rule that this Court recently reaffirmed in *Sineneng-Smith*. This was nothing more than judicial activism: the panel majority directed the government, a sophisticated and well-resourced party, to argue an issue it abandoned and then ruled in favor of the government on that very issue. Courts should not decide appeals on issues the parties abandoned, and especially should not do so to benefit the government in a criminal case against an indigent defendant.

Both holdings—on Graham's alleged waiver and on the government's abandonment of the waiver argument—warrant the Court's review.

I. The Second Circuit's Expansion of Waiver Doctrine Undermines the Right to Effective Assistance of Counsel In Plea Bargaining And Conflicts with *Lafler*, *Massaro*, and Other Precedents Requiring a Waiver to be Knowing and Intelligent

The Second Circuit held that Graham waived her ineffective-assistance claim because, after she learned of the expired offer on April 10, 2019, she went to trial rather than "exercis[ing] her *Frye* right to compel the government to revive the expired plea offer." App. 16a. The Second Circuit reasoned: "Graham could not both proceed to trial and benefit from the government's [plea] offer … so waiver rules preclude her from doing so now." App. 15a-16a.

As the Second Circuit recognized, its finding of waiver is "unusual." App. 19a. To the undersigned's knowledge, before this decision, *no court had ever found waiver of a* Frye *claim* on the basis that a defendant did not ask for an expired plea offer to be reopened. The Second Circuit's decision is the first of its kind, conflicts with this Court's precedents, and "has muddied the waters concerning the right to effective assistance of counsel in plea bargaining." App. 31a. Criminal defendants in the Second Circuit are left in limbo as to whether *Lafler* and *Massaro* remain in effect, and as to whether they are at risk of unknowingly waiving their Sixth Amendment rights.

A. The Second Circuit's Expansion of Waiver Doctrine Conflicts with *Lafler*, *Massaro*, and Other Binding Precedents

As an initial matter, the Second Circuit decision runs afoul of *Lafler*, which held that a fair trial does not "wipe[] clean any deficient performance by [] counsel during plea bargaining" and therefore "order[ed] the State to reoffer the plea agreement." 566 U.S. at 169, 174. If the *Lafler* defendant did not waive his *Frye* right by rejecting a plea offer and going to trial, then neither did Graham, who did not even know about her offer until after it expired and was never told that she could ask the court to order the government to reinstate the offer.

The only difference between the *Lafler* defendant's conduct and Graham's is that Graham was appointed new counsel before trial—but *Massaro* teaches that this fact is irrelevant. In *Massaro*, this Court held that an ineffective-assistance claim cannot be waived or forfeited by a defendant's failure to raise it on direct appeal, even if the defendant's appellate counsel is different from her trial counsel. 538 U.S. at 504. If an ineffective-assistance claim need not be raised by new counsel on direct appeal, then surely Graham could not have waived her claim by failing to raise it in the district court before trial. *See* App. 42a-43a (explaining why the "same considerations" discussed in *Massaro* "are applicable to declining to find waiver" here). Indeed, the government conceded at oral argument that a finding of waiver would not comport with *Massaro*. App. 31a n.1. Under the new rule announced in this case, a defendant with new counsel *must* petition for renewal of an expired plea

offer *before the trial* or else she waives her right to ever do so. This rule creates an unwarranted exception to *Massaro* that the Court should correct.

The Second Circuit claimed that *Massaro* is distinguishable because it concerned forfeiture, not waiver. But Graham did not waive her ineffective-assistance claim because she never even understood that she had such a claim, let alone intentionally relinquished it. Thus, this case falls squarely within the scope of *Lafler* and *Massaro*. Just like in *Massaro*, the Second Circuit reached here to find that a criminal defendant waived an effective-assistance claim by not raising it quickly enough. This Court should grant certiorari in order to make clear that *Massaro* still controls and that there is no need to raise ineffective assistance claims before trial.

B. Ineffective-Assistance Claims Can Be Waived Only Via Express Statements On the Record Because the Right to Counsel Is So Fundamental

The decision below is based on the mistaken premise that a person can implicitly waive their right to effective assistance of counsel, like certain other constitutional rights. Contrary to what the decision below says, the right to effective assistance is not among those rights that are subject to the "usual principles of determining waiver." *Berghuis v. Thompkins*, 560 U.S. 370, 383-384 (2010). Unlike a defendant's *Miranda* rights, the right to effective assistance cannot be waived by speaking after a warning or by acquiescing in a trial error. And, as *Lafler* and *Massaro* teach, a defendant does not waive

a *Frye* claim by failing to raise it in the district court or on direct appeal, even if new counsel is engaged.

Because the right to effective assistance is so fundamental, it can be waived only via "formal or express statements of waiver" and other procedural safeguards like those "expected in, say, a judicial hearing to determine if a guilty plea has been properly entered." *Berghuis*, 560 U.S. at 383. As such, there are "several instances where the district court must conduct a meaningful inquiry with the defendant to ensure that the waiver of [her] right [to effective assistance] was knowing and intelligent." App. 35a. For example, a district court must hold a *Faretta* hearing before a defendant can waive their right to counsel and proceed pro se. *Faretta v. California*, 422 U.S. 818, 835 (1975). Similarly, in the Second Circuit, like in many other jurisdictions, a district court must hold a *Curcio* hearing before a defendant can waive their right to conflict-free counsel. *See United States v. Arrington*, 941 F.3d 24, 40 (2d Cir. 2019) (citing *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982)); *see also United States v. Foster*, 469 F.2d 1, 4-5 (1st Cir. 1972) (requiring trial courts to hold inquiry to ensure criminal defendants are aware of the risks of joint representation).

These cases show that the right to effective assistance can be waived only via formal or express statements of waiver at a judicial hearing where the defendant is made aware of the rights she is waiving and the "dangers and disadvantages" of doing so. *Faretta*, 422 U.S. at 835. Such procedural safeguards ensure "that the record will establish that [the defendant] knows what [s]he is doing and [her] choice

is made with eyes open." *Id.* (citation and quotation marks omitted).

These safeguards are especially important in the context of a defendant's rights under *Frye*, which "implicate[] both the right to effective counsel and the right of a defendant to accept a plea offer once made," and "accordingly demands a robust process." App. 36a. For this reason, district courts often hold a *Frye* hearing "to ensure that [a defendant] fully understood the terms of the plea agreement" before rejecting it, even where there is no indication that defense counsel was ineffective.[2] *United States v. Albarran*, 943 F.3d 106, 113 (2d Cir. 2019).

Nothing like a *Faretta*, *Frye*, or *Curcio* hearing occurred here. The district court asked Graham about the expired plea offer only once, at the April 10, 2019 conference. In response, Graham expressed interest in the offer and complained about her counsel's delay in sharing and discussing it with her. Despite Graham's concerns, the district court never told her that she had a right to have the plea offer reopened or that, by not asking for the offer to be reopened, she

---

[2] At the *Frye* hearing in *Albarran*, "before the defendant stated on the record that he was rejecting the government's proposed plea agreement, the government reviewed the specific terms of the proposed plea agreement, identified the elements to which the defendant would plead guilty, listed the rights the defendant would forfeit by entering a guilty plea, and described the Sentencing Guidelines' application to the defendant's conviction." App. 36a-37a n.4 (citing *Albarran*, 943 F.3d at 113). Moreover, "the defendant was present when the parties discussed the evidence that they would present and 'each side candidly acknowledged the strengths and weaknesses of its case.'" App. 36a-37a n.4 (quoting *Albarran*, 943 F.3d at 113).

was forever waiving her Sixth Amendment right to bring an ineffective-assistance claim.

If courts are concerned about the opportunity for gamesmanship on the part of a hypothetical defendant who elects to go to trial while keeping a *Frye* claim in reserve, the answer is for the district court to conduct a *Frye* hearing in which the defendant is asked to decide if she would prefer to accept the government's offer or proceed to trial. A defendant presented with this choice could not present a *Frye* claim in the future based on this knowing and intelligent waiver.

Here, Graham's failure to ask the government to reopen its plea offer—which would have been pointless, for all she knew, absent advice that she was entitled to this relief—cannot constitute a waiver of her right to effective assistance. The Second Circuit's contrary finding has undermined the procedural protections to which defendants are entitled before waiving their right to effective assistance of counsel. This Court's review is necessary to resolve this exceptionally important question.

C. Even Under Typical Waiver Principles, There Was No Waiver Because Graham Neither Understood Nor Knowingly Relinquished the Rights She Allegedly Waived

Even assuming that typical waiver principles apply to a *Frye* claim (which they do not), Graham did not waive her rights in this case. Waiver is "the intentional relinquishment or abandonment of a

known right," *United States v. Olano*, 507 U.S. 725, 733 (1993) (citation omitted), and "must [] [be] made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it," *Moran v. Burbine*, 475 U.S. 412, 421 (1986). Simply put, a defendant cannot waive a right she does not fully understand; that is why all of the waiver decisions cited in the Second Circuit's decision are premised on the defendant's "full understanding of his or her rights." *See, e.g.*, App. 14a (quoting *Berghuis*, 560 U.S. at 385).

There is no basis to find that Graham understood her right to petition the district court to order the government to renew its offer and yet intentionally relinquished it. Nothing in the record suggests that anyone—not the district court, not the government, and not her counsel—ever told her she had this right under *Frye* or *Lafler*. Thus, the Second Circuit's decision conflicts with the numerous precedents holding that defendants can only waive rights they understand, including *Olano* and *Moran*.

II. The Second Circuit Violated the Party-Presentation Rule by Denying Graham Relief Based on an Argument the Government Abandoned

The Second Circuit's consideration of the waiver issue at all was a violation of the party-presentation rule that this court unanimously reaffirmed in *Sineneng-Smith*. As Judge Pérez noted while concurring in the judgment, the government did not raise waiver in its initial briefing and "even expressed serious doubt on whether there was a waiver when first questions about it during oral

argument." App. 31a. Reaching beyond what the parties argued and denying Graham's appeal based on an argument that the government abandoned was an abuse of discretion.

The principle of party presentation and its corollary, judicial neutrality, are critical to the functioning of our adversarial justice system. As this case illustrates, lower courts' application of the party-presentation rule is inconsistent if not nonexistent. Particularly troubling is the trend of courts abandoning the party-presentation rule to assist the government in a criminal case. This Court should grant certiorari to reinforce the party-presentation rule and clarify when a court may interject issues that the parties themselves declined to raise.

A. The Second Circuit's Decision Violates the Party-Presentation Rule That This Court Recently Reaffirmed in *Sineneng-Smith*

The Second Circuit violated the principle of party presentation that this Court recently reaffirmed in *United States v. Sineneng-Smith* when it denied Graham relief based on an issue that the government abandoned in its appellate briefing and disavowed at oral argument.

Under the party-presentation rule, "we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Sineneng-Smith*, 140 S. Ct. at 1579 (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)). In *Sineneng-Smith*, this Court applied the party-presentation principle to vacate a judgment out

of the Ninth Circuit that had reversed a defendant's criminal convictions on overbreadth grounds. 140 S. Ct. at 1580-1582. Neither party had raised the issue of whether the charging statute was unconstitutionally overbroad at the district court or in their initial appellate briefing. *Id.* at 1578, 1580. Nevertheless, after oral argument, the court of appeals invited three *amici* and the parties to brief and argue the overbreadth issue, and ultimately ruled for the defendant on that basis. *Id.* at 1580-1581. After granting certiorari, this Court held that the Ninth Circuit's "takeover of the appeal" violated the party-presentation principle and constituted an abuse of discretion. *Id.* at 1578, 1581.

Like the Ninth Circuit in *Sineneng-Smith*, the Second Circuit's *sua sponte* consideration of whether Graham waived her *Frye* claim "so drastically [departed] from the principle of party presentation as to constitute an abuse of discretion." *Id.* at 1578, 1582. The government did not raise the issue of whether Graham waived her ineffective-assistance claim in its initial appellate brief, and instead argued that the claim should either be rejected or left for further development in a 28 U.S.C. § 2255 proceeding. App. 32a n.2. And at oral argument, the government repeatedly disavowed the possibility of waiver despite the panel's persistent prodding. *See* App. 38a (replying to a question about whether Graham knowingly relinquished her *Frye* rights by stating: "I don't know if I would style it as a knowing relinquishment" (quoting Oral Arg. Audio Recording at 17:20-28)), 31a n.1 (stating that "ineffective assistance [] can be raised for the first time in collateral review, so I'm not sure that the defendant

was obligated to raise it" before the district court (quoting Oral Arg. Audio Recording at 17:35-18:00)).

Only after oral argument and at the court's urging did the government reverse its position. *See Sineneng-Smith*, 140 S. Ct. at 1581 (holding that the Ninth Circuit violated party-presentation rule by granting relief on the basis of an argument that the prevailing party adopted only after the appellate panel's urging). Then, the panel majority denied Graham's ineffective-assistance claim on the basis of waiver alone, an issue that the court itself interjected into the case, without reaching any of the issues presented by the parties.

While it may be appropriate for a court to take a "modest initiating role" in "extraordinary circumstances," *Sineneng-Smith*, 140 S. Ct. at 1579, 1581, there were no extraordinary circumstances here. As this Court has explained, "[i]n criminal cases, departures from the party presentation principle have usually occurred 'to protect a *pro se* litigant's rights.'" *Id.* at 1579 (first quoting *Greenlaw*, 544 U.S. at 244, then citing *Castro v. United States*, 540 U.S. 375, 381-383 (2003)). Other courts have veered slightly from the issues presented by the parties when necessary to prevent manifest injustice. *E.g.*, *United States v. Turchin*, 21 F.4th 1192, 1999-2000 (9th Cir. 2022) (explaining that "it would be manifestly unjust" not to consider a lower court's plain error affecting substantial rights); *United States v. McReynolds*, 964 F.3d 555, 566, 568-569 (6th Cir. 2020) (exercising discretion to consider a new issue "because allowing the district court's decision to stand would seriously undermine the

integrity and perceived fairness of our judicial system").

But as Judge Pérez noted in her concurrence, "no one—even . . . after the government was prodded by [the court] to make a waiver argument—argue[d] such manifest injustice would occur here if [the panel] considered Graham's ineffective assistance claim." App. 32a. Rather than protecting a *pro se* litigant or preventing manifest injustice, the Second Circuit's intervention here punished an indigent defendant who had received ineffective assistance from her court-appointed counsel.

It is particularly troubling that the panel majority tipped the scales of justice in favor of the federal government, a sophisticated and well-resourced party, when it based its decision to deny Graham relief on an issue that the government chose not to raise. *See Greenlaw,* 554 U.S. at 244 ("Counsel [must] almost always know a great deal more about their cases than we do, and this must be particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before us." (quoting *United States v. Samuels*, 808 F.3d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of reh'g en banc))). Indeed, there is "much irony" in the fact that "the majority opinion easily [found] Graham's *Frye* claim waived but decline[d] to find the government's new argument abandoned given that the government would not have asserted waiver if not for a request for supplemental briefing by this Court." App. 32a. This is especially true given that it is the government's "burden to establish

waiver by a preponderance of the evidence." *Berghuis*, 560 U.S. at 384.

The Second Circuit violated the party-presentation rule when it denied Graham's appeal on the basis of an argument that the government abandoned. The panel majority's radical transformation of the case was an abuse of discretion. This Court should grant review to correct the Second Circuit's error and reaffirm the party-presentation rule as stated in *Sineneng-Smith*.

B. Lower Courts Disagree About the Proper Application of the Party-Presentation Rule and the Circumstances in Which a Court May Consider Issues Abandoned by the Parties

In the three years since *Sineneng-Smith*, lower courts have repeatedly disregarded this Court's clear and unanimous instruction to remain "passive instruments of government" and "decide only questions presented by the parties." *Sineneng-Smith*, 140 S. Ct. at 1579 (quoting *Samuels*, 808 F.2d at 1301 (Arnold, J., concurring in denial of reh'g en banc). Application of the party-presentation rule in the circuits is inconsistent at best and nonexistent at worst.

The Second Circuit's jurisprudence alone is enough to illustrate the widespread disagreement over the scope and application of the party-presentation rule. In *United States v. Moyhernandez*, a Second Circuit panel split 2-1 on this issue, with the dissent contending that the majority violated

Sineneng-Smith by affirming a conviction based on an argument the government did not make. 5 F.4th 195, 208, 210 (2d Cir. 2021) (Pooler, J., dissenting) ("Here, the district court and [the court of appeals] have advanced a narrow reading of an important remedial statute despite the government's evident disagreement with this position."), *cert. granted, vacated, and remanded on other grounds*, 142 S. Ct. 2899 (2022) (mem.). Just a few months later, in *Anilao v. Spota*, a panel majority applied the party-presentation principle, refusing to consider "legal arguments that the plaintiffs ha[d] never advanced," 27 F.4th 855, 873 (2d Cir. 2022), while the dissent would have granted the plaintiffs' appeal based on those arguments, *id.* at 885 & n.13 (Chin, J., dissenting). And several months after the court "reach[ed] beyond what the parties initially argued" in *Graham*, App. 31a, yet another Second Circuit panel invoked the party-presentation principle to refuse consideration of an issue that the party—an individual facing deportation—failed to argue with specificity. *See Debique v. Garland*, 58 F.4th 676, 684-685 (2d Cir. 2023) ("Under 'the party-presentation rule,' we 'normally decide only questions presented by the parties and may play only a modest initiating role in shaping the arguments before' us." (quoting *Graham*, 51 F.4th at 80)).

The Fifth Circuit's application of the party-presentation rule (or lack thereof) has been similarly inconsistent. For example, in *Lucio v. Lumpkin*, the Fifth Circuit departed from the party-presentation principle when it made arguments on behalf of the state in a criminal case. 987 F.3d 451 (5th Cir.), *cert. denied*, 142 S. Ct. 404 (2021). *But see Gonzalez v.*

CoreCivic, Inc., 986 F.3d 536, 541 (5th Cir. 2021) (declining dissent's invitation to find in a defendant's favor based on a theory that conflicted with the defendant's "actual positions before the district court").

Other circuits have also disregarded this Court's guidance in recent months. Much like the appeals panel in this case, the Eleventh Circuit, in *United States v. Campbell*, strayed well beyond the bounds of party-presentation when it decided a case against a criminal defendant based on an issue that the government forfeited. 26 F.4th 860, 880 (11th Cir.), *cert. denied*, 143 S. Ct. 95 (2022). In a vigorous dissent, Judges Newsom and Jordan, joined by three others, criticized the majority for undermining our country's adversarial justice system by failing to adhere to the principle of party presentation. 26 F.4th at 893-920 (Newsom, Jordan, J.J., dissenting). And in *United States v. Jenkins*, the D.C. Circuit overlooked the principle of party presentation when it adopted an argument that the government forfeited. 50 F.4th 1185, 1212 (D.C. Cir. 2022) (Ginsburg, J., concurring in part, dissenting in part).

The Court should grant certiorari to reinforce consistent application of the party-presentation rule and clarify the circumstances in which courts may inject issues into a criminal case. It is particularly important that the Court not leave litigants and lower court judges with the impression that this doctrine is a one-way rule that only prevents courts from coming to the aid of defendants, while leaving the door open to assist the government in its appellate litigation.

III. This Case is the Ideal Vehicle for Resolving These Important Issues

Granting certiorari here allows this Court to address a key question concerning the Sixth Amendment right to effective assistance of counsel. If a defendant waives that right in the circumstances presented here, then the right to effective assistance as well as *Lafler* and *Massaro* are undermined. In the aftermath of the Second Circuit's decision below, it would be unwise for new counsel in the district court to fail to raise an argument based on ineffective assistance of counsel, both in the district court and on direct appeal, as the failure to do so might be treated as waiver. Left in place, we can expect a wave of such claims—including many that are meritless—that are raised out of fear of a waiver argument in the future.

This Court should grant this petition and reaffirm that a defendant can waive a constitutional right, and especially the right to effective assistance of counsel, only if they understand the right and knowingly relinquish it. A defendant's failure to petition a court for a remedy cannot be waiver if the defendant did not know that remedy was available.

Granting certiorari also allows the Court to reinforce and clarify the party-presentation rule, which is not being followed by the Second Circuit or by several other Circuits. Party presentation and judicial neutrality are fundamental elements of our adversarial justice system. Allowing the Second Circuit's actions to go unchecked will sanction future departures from these principles. Moreover, there is already widespread disagreement in the lower courts about the party-presentation rule's scope and

application. Like the panel majority here, several other circuits have recently violated the party-presentation rule by making arguments on the government's behalf to the detriment of a criminal defendant. *E.g.*, *Lucio*, 987 F.3d 451; *Campbell*, 26 F.4th at 880. Without the Court's intervention, lower court judges will continue as they did before *Sinneneng-Smith*, going beyond the issues raised by the parties whenever it suits the views of a particular judge.

CONCLUSION

The petition for certiorari should be granted.

March 2, 2023

Respectfully submitted,

HARRY SANDICK
Counsel of Record
ANDREW I. HADDAD
HILARIE M. MEYERS
PATTERSON BELKNAP WEBB
& TYLER LLP
1133 Avenue of the
Americas
New York, NY 10036-6710

Counsel for Petitioner

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of December, two thousand twenty-two.

ORDER

Docket No. 20-832

United States of America,

Appellee,

—v.—

Jacqueline Graham,

Defendant-Appellant.

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

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk
[SEAL]

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2021
Argued: March 1, 2022
Decided: October 14, 2022

No. 20-832

UNITED STATES OF AMERICA,

Appellee,

—v.—

JACQUELINE GRAHAM,

Defendant-Appellant.*

On Appeal from the United States District Court
for the Southern District of New York

Before: WALKER, PARK, and PÉREZ, *Circuit Judges*.

Defendant-Appellant Jacqueline Graham was convicted after a jury trial of conspiracy to commit mail, wire, and bank fraud, in violation of 18 U.S.C. § 1349. On appeal, Graham argues that her pretrial counsel was constitutionally ineffective for failing to

---

* The Clerk is respectfully directed to amend the caption accordingly.

transmit a plea offer from the government to Graham before it expired, thereby depriving her of the chance to plead guilty under the terms of the offer. *See Missouri v. Frye*, 566 U.S. 134 (2012). We conclude that Graham has waived any claim that the alleged error violated her Sixth Amendment rights. Unlike the defendant in *Frye*, Graham learned of her expired plea offer and received new court-appointed counsel two months before trial. She nonetheless chose to go to trial rather than to plead guilty or to petition the court for reinstatement of the offer. This knowing and voluntary choice was inconsistent with seeking the benefit of the expired plea offer and thus constitutes waiver. We reject Graham's remaining arguments and thus **AFFIRM**.

Judge Pérez concurs in a separate opinion.

HARRY SANDICK (Christopher Wilds, Andrew Haddad, *on the brief*), Patterson Belknap Webb & Tyler LLP, New York, NY, *for Defendant-Appellant*.

DAVID R. FELTON, Assistant United States Attorney (Michael D. Maimin, Karl Metzner, *on the brief*), *for* Audrey Strauss, United States Attorney for the Southern District of New York, New York, NY, *for Appellee*.

PARK, Circuit Judge:

Defendant-Appellant Jacqueline Graham was convicted after a jury trial of conspiracy to commit mail, wire, and bank fraud, in violation of 18 U.S.C. § 1349. On appeal, Graham argues that her pretrial counsel was constitutionally ineffective for failing to transmit a plea offer from the government to Graham before it expired, thereby depriving her of the chance

to plead guilty under the terms of the offer. *See Missouri v. Frye*, 566 U.S. 134 (2012). We conclude that Graham has waived any claim that the alleged error violated her Sixth Amendment rights. Unlike the defendant in *Frye*, Graham learned of her expired plea offer and received new court-appointed counsel two months before trial. She nonetheless chose to go to trial rather than to plead guilty or to petition the court for reinstatement of the offer. This knowing and voluntary choice was inconsistent with seeking the benefit of the expired plea offer and thus constitutes waiver.

We also reject Graham's remaining arguments on appeal. The district court did not abuse its discretion by admitting evidence of Graham's other fraudulent activity that was similar and/or related to the charged conduct; the court did not err by allowing the government to introduce certain "red flag" emails from an outside attorney for the limited purpose of proving her knowledge; and the court's decision to instruct the jury on conscious avoidance was proper. We thus affirm.

I. BACKGROUND

A. The Government's Case

Jacqueline Graham approached struggling homeowners with an offer that was too good to be true: In exchange for a fee, her partnership (the "Terra Foundation" or "Terra") could purportedly eliminate a customer's mortgage debts in full. Styling herself as a "sovereign citizen[]," Graham pledged that she would help these homeowners fight against the prevailing "[Uniform Commercial Code (UCC)] system" by marshaling obscure parts of the "common

law." Joint App'x at A-676, A-1110, A-1113. In reality, however, Graham's tactics were far more mundane. She and her coconspirators would pretend to be employees of mortgagee banks, send county title offices fake notices of discharge, and convince them to erase any record of the banks' interests in the subject properties. Once Graham's scheme was uncovered, the banks reinstated their interests, but Terra's "clients" could not recover the fees they had paid. In all, the scheme temporarily erased nearly $40 million of debt in connection with over 60 mortgage loans.

To execute the fraud, Terra used a "three-step procedure": "(1) an audit, (2) a 'Qualified Written Request' [QWR] to the client's mortgage lender, and (3) the filing of a discharge of mortgage in the local clerk's office." *Id.* at A-54. Each QWR contained a series of pseudo-legal questions, purportedly based on one of Terra's "audits," demanding detailed narrative responses and documentary submissions. If Terra received no response from the lender or considered a response insufficient, it would claim that the lending bank had ceded authority over the mortgage to Terra. One of Graham's coconspirators would then claim to be an agent of the lending bank, prepare a notice of discharge, and file it with the relevant county clerk.

Terra collected substantial fees from these homeowners in consideration for the promise of debt relief. For example, Augustine Alvarez testified that in 2011, Terra employees told him that they could render his mortgage debt "reduced or eliminated." *Id.* at A-376. After paying $1100 upfront and completing a so-called "UCC Financing Statement" form, Alvarez waited for nearly a year until Terra provided him with an authentic title search showing that his mortgage had been removed from county records. *Id.* at A-377. In exchange, Alvarez—who had been, prior

to Terra's involvement, barely able to satisfy his mortgage payments—wrote Terra two checks for $250,000 each. Soon thereafter, Alvarez's bank notified him that the mortgage had been removed pursuant to a "fraudulent transaction" and had thus been reinstated. *Id.* at A-388. Alvarez tried repeatedly to contact Terra affiliates, who dodged his calls and ultimately refused to return his money.

The government introduced evidence that Graham had directed the fraudulent scheme as the head partner of Terra. Witness testimony suggested that she personally helped prepare the QWRs and other documents. And documentary evidence showed her control of Terra's finances, including its bank accounts.

The defense principally argued that Graham lacked the requisite knowledge of the fraudulent means of the scheme. In particular, defense counsel argued that Graham "believed in good faith that the unorthodox methods and unconventional programs that she promoted . . . would help homeowners stay in their homes." *Id.* at A-1007. To rebut this argument, the government introduced, among other evidence: (1) Graham's communications with coconspirators scolding them for sending multiple QWRs "to the same lender for the same client" because the QWRs would soon "look like some bull****," Supp. App'x at SA-90; (2) Graham's handwritten confession admitting her participation in the creation and distribution of "fraudulent mortgage discharges" and her "aware[ness] [that her] partners were committing fraudulent acts," *id.* at SA-71; (3) Graham's insistence that customers pay upfront; (4) Graham's attempts to move Terra's proceeds offshore; and (5) Graham's efforts to remove her name from many of Terra's documents and bank accounts.

B. Procedural History

1. *Pretrial*

In November 2016, a grand jury returned an indictment charging Graham and four coconspirators with a single count of conspiracy to commit mail, wire, and bank fraud, in violation of 18 U.S.C. § 1349. On April 2, 2019, just over one month before the scheduled trial date, the government sent a letter to the district court requesting a conference with Graham and her counsel. The government represented that it had transmitted a plea offer to Graham's counsel on February 22, 2019 and that the offer had expired nearly one month prior to the April 2 letter. The government had not received a response and was thus concerned that Graham may not have "received, understood, discussed with her counsel, and rejected" the offer. Joint App'x at A-82. The government noted that all parties still had to "invest significant time and effort into preparing for trial," so it would be advisable to act "at the Court's earliest convenience in order to ensure that Graham fully understood the plea offer and, if she intended to reject it, did so with a full understanding of the consequences of such a rejection." *Id.*[1]

[1] The letter also presumed that if Graham asserted that she had not received and understood the offer, and if the government declined to reissue it, the district court would have to "hold a hearing" as late as the eve of trial, and the outcome of that hearing might be to override the government's decision not to reissue the offer. *See* Joint App'x at A-82 (expressing concern that the hearing, if delayed, "might render all of the Court's, Government's, and [defense counsel's] [additional] work and preparation for naught")

The district court held a conference on April 10, 2019. Graham's counsel told the court that he had shared the "substance" of the plea agreement with Graham—he was not sure when—but he had not transmitted the agreement itself. *Id.* at A-90. Counsel explained that the reason for this was that he "knew that this plea offer would not be received well on [Graham's] part." *Id.* at A-100. Graham stated that she had not heard anything about the plea agreement until the "end of March via email." *Id.* at A-99. The court then instructed the government to provide a copy of the agreement—on the record—directly to Graham, remarking:

> I don't want this later to come back to haunt us, so to speak. I don't want there to be a claim made that this plea offer was not conveyed to [Graham], and that she didn't have an opportunity to review it and understand it; and that she has made a determination not to accept the plea offer and that we are, in fact, going to trial . . .
>
> I just want her to make sure . . . [that] she has a full understanding of the offer that has been made, and she has made a knowing and intelligent decision to proceed to trial if that's what she wants to do; and if she wants to go to trial, I have no problems with that. I just want to make sure that those decisions are made intelligently and knowingly, and that there is no basis for her later coming before the Court and saying that she was not aware that a plea offer was made and the consequences of it, of either accepting or denying the plea offer.

Id. at A-90 to -92. Graham reviewed the offer with trial counsel and, through counsel, indicated on the record that she wanted more time to consider it. The government explained that the offer had already expired but stated that it "would probably be able to get it reauthorized" if Graham so requested and that the government was also open to "alternative ways of structuring" a deal if Graham returned to negotiations "sooner rather than later." *Id.* at A-96. The court then reiterated that it "want[ed] the record to be clear, that [Graham had] been given an opportunity to review the plea offer that was conveyed." *Id.* at A-97.

At the same conference and immediately after this exchange, the district court dismissed Graham's attorney due to a "breakdown of communication"—which the court partly attributed to Graham's decision to remain in California prior to trial—and appointed Graham new trial counsel. *Id.* at A-101. The court then stated that new counsel would "probably want an opportunity to review the plea offer as well and discuss it with" Graham, *id.* at A-105, and the court told Graham directly that if she wanted to explore further plea discussions she could do so with new counsel. Graham acknowledged the court's instruction.

Graham did not raise the issue again with the district court at any time before trial. At the final pretrial conference on May 31, 2019, the government stated that it had "not made any new offers" or been "asked to reopen any offers." *Id.* at A-172. Graham's new counsel did not dispute the government's characterization and said that he "expect[ed] to be in front of the Court on Monday ready to select a jury." *Id.*

2. *Trial and Appeal*

Jury selection began on June 3, 2019, almost two months after the conference regarding the government's plea offer. After a six-day trial, the jury returned a verdict of guilty. The district court sentenced Graham to 132 months' imprisonment, followed by five years' supervised release. The court also ordered over $800,000 in restitution and forfeiture.

Graham timely appealed. Oral argument was held on March 1, 2022, and we ordered supplemental briefing on Graham's ineffective-assistance claim on March 15, 2022. Briefing was completed on April 18, 2022.

II. DISCUSSION

A. Ineffective Assistance of Counsel

Graham argues that her pretrial counsel's failure to communicate the government's plea offer entitles her to reinstatement of the offer, followed by resentencing. For the reasons that follow, we conclude that even assuming counsel's alleged failure gave rise to an ineffective-assistance claim, any such claim has since been waived.

1. *Doctrinal Background*

The Constitution guarantees that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The right to counsel necessarily includes "the right to the *effective* assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (emphasis added) (citation omitted). And it is well-

established that the Sixth Amendment entitles a defendant to relief when (1) counsel's "deficient performance" has (2) "prejudiced the defense" by leading to a conviction at trial or to an ill-advised guilty plea. *Id.* at 687; *see Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). A defendant satisfies the performance prong by proving that counsel failed to provide "reasonably effective assistance" in executing the defense. *Strickland*, 466 U.S. at 687. And the prejudice prong requires a defendant to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In a pair of companion cases in 2012, the Supreme Court held that the right to effective assistance "for [one's] defence" encompasses a right to effective assistance in *forgoing* a defense. In the first case, *Missouri v. Frye*, the Court held that, although no defendant has a right to a plea bargain, once such a bargain has been offered, the Sixth Amendment is violated when a defendant loses the opportunity to benefit from the offer without the advice of competent counsel. *See* 566 U.S. 134, 142-44, 148 (2012). In *Frye*, the defendant's counsel had failed to advise him that the government transmitted a plea offer before that offer expired. The defendant then entered a guilty plea without the benefit of the bargain. *Id.* at 138–39. Applying *Strickland*'s performance prong, the Court held that "[w]hen defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires." *Id.* at 145. As for the prejudice prong, the Court explained that a defendant must show a "reasonable probability" that "they would have accepted the . . . plea offer had they been afforded

effective assistance of counsel," that "the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it," and that "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id.* at 147. The Court did not resolve whether the defendant in *Frye* had satisfied the prejudice prong and left the issue for remand. *See id.* at 151.

In the other case, *Lafler v. Cooper*, 566 U.S. 156 (2012), the defendant alleged that he had been improperly advised to reject a plea offer and was later convicted at trial. The government conceded that defense counsel was deficient in advising the defendant not to accept its plea bargain, and the Court concluded that the defendant was indeed prejudiced by proceeding to trial rather than taking the deal. The Court then turned toward structuring a remedy aimed at "neutraliz[ing] the taint of [the] constitutional violation, while at the same time not grant[ing] a windfall to the defendant or needlessly squander[ing] the considerable resources" put toward a prosecution. *Id.* at 170 (cleaned up) (citation omitted). When the only advantage a defendant would have received by accepting the plea is a lesser sentence, remand for resentencing is proper so that a district court may "exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between." *Id.* at 171. When, however, resentencing would not "full[y] redress" the constitutional injury, the court may "require the prosecution to reoffer the plea proposal . . . [and] then [on remand] exercise discretion in deciding whether to vacate the

conviction from trial and accept the plea or leave the conviction undisturbed." *Id.*

2. *Graham's Waiver*

Graham asserts that this case is directly controlled by *Frye*: The government made her an offer, which her counsel failed to convey to her. The government contends that more factual development on collateral review is needed to determine whether Graham has a viable ineffective-assistance claim and that the court should defer resolution of her claim.

We need not reach these arguments because we hold that any such ineffective-assistance claim has been waived. "[W]aiver can result only from a defendant's intentional decision not to assert a right." *United States v. Spruill*, 808 F.3d 585, 597 (2d Cir. 2015). "As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford." *Berghuis v. Thompkins*, 560 U.S. 370, 385 (2010); *see also United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995) ("If . . . [a] party consciously refrains from objecting as a tactical matter, then that action constitutes a true 'waiver,' which will negate even plain error review." (citation omitted)); *Hemphill v. New York*, 142 S. Ct. 681, 694–95 (2022) (Alito, *J.*, concurring) (explaining that waiver "is predicated on [either] conduct evincing intent to relinquish the right" or "action inconsistent with the assertion of that right").

In *Frye*, the defendant "had no knowledge of the [plea offer] until after he was convicted, sentenced, and incarcerated." *Frye v. State*, 311 S.W.3d 350, 352

(Mo. Ct. App. 2010), *vacated*, 566 U.S. 134. But here, Graham acknowledged the expired plea offer on the record—and was appointed new, competent counsel—nearly two months before trial began. The government, going above and beyond its obligations, sent a letter to the district court on April 2, 2019, explaining that it had received no response to its plea offer and requesting that the court schedule a conference. The district court held a hearing on April 10, during which Graham reviewed and acknowledged the offer on the record. Graham stated that she wanted time to consider how to proceed and received new counsel to help her do so. Two months later, she proceeded to trial without any further mention to the court of the expired offer.

Graham's choice was plainly inconsistent with vindicating her rights under *Frye* and *Lafler*. Those cases held that defendants have a contingent right to benefit from a plea offer in the sense that, once an offer has been made, a defendant is entitled to the advice of competent counsel before rejecting the offer or letting it expire. *See, e.g.*, *Lafler*, 566 U.S. at 163–64 ("[I]neffective advice led not to an offer's acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged."). Proceeding to trial is incompatible with a pretrial plea agreement, which of course requires a defendant to enter a guilty plea.[2] Graham could not both

---

[2] The concurrence disagrees that Graham waived her *Frye* right and refers to the "well-established processes and procedures to ensure that . . . a plea is entered voluntarily, knowingly, and intelligently," citing Fed. R. Crim. P. 11(b). Concurrence at 5–6. But Rule 11(b) prescribes procedures for when a defendant is "considering and accepting a guilty or nolo contendere plea"—*i.e.*, waiving the right to *trial*. Fed. R. Crim. P. 11(b). But Graham's case relates to waiver of her right to a

proceed to trial and benefit from the government's conditional offer, which—even under the special rights conferred by *Frye* and *Lafler*—required a guilty plea. She could not have availed herself of both options in real time, so waiver rules preclude her from doing so now.

The remedy that Graham seeks highlights why her ineffective-assistance claim is waived. Graham asks us to enter a judgment forcing the government to reinstate its old, expired plea offer so that she may now plead guilty under its terms.[3] But Graham already chose not to pursue that offer by going to trial with full awareness of the offer's existence under the advice of competent counsel. That is, after the April 10, 2019 conference, Graham had the option either (1) to exercise her *Frye* right to compel the government to revive the expired plea offer, and then accept that offer or negotiate its terms;[4] or (2) to

---

plea offer, to which Rule 11(b) does not apply. *Cf. United States v. Albarran*, 943 F.3d 106, 113 & n.5 (2d Cir. 2019) (explaining that the purpose of "a *Frye* hearing" is "to ensure that a full and accurate communication on the subject has occurred" so that a defendant "fully underst[ands] the terms of the plea agreement that he [is] *rejecting*" (emphasis added)).

[3] The other remedy available under *Lafler*—resentencing alone—would not make any sense here because the district court already knew about the expired plea offer well before Graham was sentenced. In any event, either approach would be equally inconsistent with Graham's choice to go to trial because it would aim to give Graham the benefit of a plea offer that had required her to plead guilty.

[4] Even then, the district court could still exercise "discretion" in determining whether to accept the plea, and it could base that discretion on intervening events between the time of the original offer and the time of the request. *See Lafler*, 566 U.S. at 170–71.

proceed to trial.[5] From at least April 10 on, Graham (with her new counsel) was aware of any *Frye* errors committed by her former attorney. But she chose not to seek reinstatement of the deal, invoking her trial right instead. Graham may not undo the consequences of that decision on appeal.[6]

Without a waiver rule, a defendant in Graham's position would have little reason to exercise her *Frye* rights before trial. Such a defendant could instead go to trial and hope for an acquittal, knowing that she could force the government to reoffer the same, expired pretrial deal if she were convicted.[7] Or she

---

[5] Graham also could have negotiated with the government without first seeking reinstatement of the offer; such bargaining would have occurred in the shadow of Graham's *Frye* rights.

[6] Graham asks us to create an exception to the "usual principles of determining waiver" for *Frye* and *Lafler* errors by requiring some sort of additional formal judicial proceeding. Appellant's Supp. Br. at 4 (quoting *Berghuis*, 560 U.S. at 383). We decline to do so. Graham's two examples of special rules—*Curcio* and *Faretta* hearings—both involve circumstances in which the court cannot be sure that the defendant is adequately represented. *See id.* (first citing *United States v. Arrington*, 941 F.3d 24, 40 (2d Cir. 2019) (describing *Curcio* hearings for possibly conflicted counsel); and then citing *Torres v. United States*, 140 F.3d 392, 401 (2d Cir. 1998) (describing *Faretta* hearings for pro se representation)). Here, there has been no suggestion that Graham's trial counsel after the April 10 conference was ineffective, conflicted, or absent.

[7] We do not mean to suggest that courts are generally required to give a defendant the full benefit of the original bargain in cases where the ineffective-assistance claim was not waived. To the contrary, *Lafler* emphasized that judges must use "discretion"—either in "determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between" or in "deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed."

could try to trade her free roll of the dice for a new, better deal with the government. Either way, *Frye* would give a defendant the option to rewind the clock after a guilty verdict, violating the Supreme Court's instruction that a Sixth Amendment remedy should not "grant a windfall to the defendant." *Lafler*, 566 U.S. at 170. This sort of gamesmanship is, of course, precisely what waiver rules guard against. *See United States v. Gersh*, 328 F.2d 460, 463 (2d Cir. 1964) (Friendly, *J.*) (noting that there would be waiver where a party had knowledge of an error "but had nevertheless stood mute, gambling on an acquittal while holding this issue in reserve").

The *Frye* Court anticipated precisely this scenario when explaining how courts can prevent "late, frivolous, or fabricated claims" of expired plea offers raised only "after a trial leading to conviction with resulting harsh consequences." 566 U.S. at 146. The Court explained that trial judges could make "formal offers . . . part of the record at any subsequent plea proceeding *or before a trial on the merits*, all to ensure that a defendant has been fully advised before those further proceedings commence." *Id.* (emphasis added). The district court heeded that advice here and recognized that a *Frye* error could "haunt" the case if not redressed immediately. Joint App'x at A-90. So the court summoned Graham to New York from California, ensured that she was aware of the offer, and required her to review it on the record. The district court stated clearly and repeatedly that the purpose of this conference was to avoid any belated claim "that this plea offer was not conveyed to [Graham]," "that she didn't have an opportunity to

---

566 U.S. at 171. But such remedial measures do not displace ordinary waiver rules.

review it and understand it," or that Graham made anything other than a "knowing and intelligent decision to proceed to trial if that's what she wants to do." *Id.* at A-90 to -91. The court also appointed new counsel that day to aid Graham in her decision. These efforts were aimed at putting Graham in a position to exercise her *Frye* rights *before trial*, not to grant her the option to seek to vacate her conviction after a guilty verdict. *See United States v. Draper*, 882 F.3d 210, 218 (5th Cir. 2018) (rejecting the argument that "*Frye* permits district judges to identify [ineffective assistance] but not to remedy it" before a trial or subsequent plea).[8] Entertaining Graham's claim now would both penalize the government for proactively bringing a possible error to the court's attention and disregard the court's conscientious efforts to correct it.

Typically, a waiver of rights arises from the choice to plead guilty, not from exercising the right to go to trial. *See* Fed. R. Crim. P. 11; *Class v. United States*, 138 S. Ct. 798, 805 (2018). Accordingly, we appreciate that it may seem unusual to cast the decision to go to trial—itself a right enshrined by the Sixth Amendment—as waiver of some other right. But that is so only because outside the context of *Lafler* and *Frye*, there is no "right" to a plea bargain at all nor a "right" that the judge accept a plea offer. *See Frye*, 566 U.S. at 148–49 (first citing *Weatherford v.*

---

[8] The concurrence states that "the district court should have done more." Concurrence at 7. We respectfully disagree. The district court informed Graham of the government's offer, described the consequences of accepting or declining the offer, and suggested that Graham review the offer with new counsel. *See supra* at 7-8. In light of that colloquy, it's hard to see how Graham's decision to go to trial was not knowing and intelligent or to fault the district court for not doing more.

Bursey, 429 U.S. 545, 561 (1977); and then citing *Santobello v. New York*, 404 U.S. 257, 262 (1971)). Waiver here takes a unique form because *Frye* and *Lafler* convey unique rights. A defendant waives a right to trial by pleading guilty; we have no trouble concluding that she waives a contingent right to plead guilty—the kind granted by *Frye* and *Lafler*—by making a knowing and intelligent decision to proceed to trial.[9]

3. *The Government's Purported "Waiver"*

Graham and the concurrence respond that we should look past Graham's waiver because the government did not mention waiver in its principal brief. *See* Concurrence at 1-3. According to the concurrence, the government abandoned this argument on appeal by failing to raise Graham's waiver in its opposition brief and expressing "serious doubt" about waiver when questioned during oral argument. *Id.* at 1-2. In other words, the government itself "waived" the waiver argument.

This reasoning is flawed. To be sure, we have at times used the shorthand "waiver" to describe a

---

[9] Nothing in this opinion should be construed as holding that waiver of a *Lafler* or *Frye* right can occur *only* beginning on the first day of trial. We need not decide whether Graham's waiver occurred even earlier, *i.e.*, whether some other action she took before the start of trial was also inconsistent with timely pursuing reinstatement of the expired plea offer. For example, a defendant may not act inconsistently with exercising rights under *Frye*, learn that the government has discovered strong inculpatory evidence, and then ask the court to reinstate a stale, expired offer after the fact. We need not develop the record here further because it is clear already that, at least by the time trial commenced, Graham's course of conduct was inconsistent with vindicating any *Frye* rights.

party's failure to raise an argument in its brief on appeal. *See, e.g.*, *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998); *United States v. Brown*, 352 F.3d 654, 663 (2d Cir. 2003) ("waiver" of waiver argument).[10] But as a formal matter, this confuses several distinct concepts. One set of rules—waiver and forfeiture—governs when a court may *subtract* from the arguments raised on appeal. Waiver, the "intentional relinquishment or abandonment of a known right" at or before the time of appeal, "extinguish[es] an error" along with any appellate review. *United States v. Olano*, 507 U.S. 725, 733 (1993) (cleaned up); *see Yu-Leung*, 51 F.3d at 1121 ("[W]aiver necessarily 'extinguishes' the claim." (citation omitted)). Forfeiture, a mere "failure to make the timely assertion of a right" when procedurally appropriate, allows a court either to disregard an argument at its discretion (in civil cases) or otherwise subject it to plain-error review (in criminal cases). *Olano*, 507 U.S. at 733; *see Greene v. United States*, 13 F.3d 577, 585–86 (2d Cir. 1994) (civil cases); Fed. R. Crim. P. 52(b) (criminal cases).[11]

---

[10] Despite use of the term "waiver," we have never treated omission of an argument alone as the "intentional relinquishment of a known right," which is why unlike in instances of true waiver, we emphasize that a failure to raise an argument does not extinguish appellate review entirely. *See Norton*, 145 F.3d at 117 (noting these arguments "*normally* will not be addressed on appeal" (emphasis added)).

[11] Graham's confusion of waiver and forfeiture also explains why her reliance on *Massaro v. United States*, 538 U.S. 500 (2003), is misplaced. There, the Supreme Court rejected this Circuit's rule that ineffective-assistance claims should be raised on direct appeal rather than collateral review. Although the Court occasionally used the term "waiver," it was expressly evaluating a rule of "procedural default"—*i.e.*, forfeiture—and accordingly determining at what time it was "preferable" to

A different rule, the party-presentation rule, governs when a court may *add* to the issues raised on appeal. The party-presentation rule reflects the principle that courts "normally decide only questions presented by the parties" and may play only "a modest initiating role" in shaping the arguments before them. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (citation omitted). Here, Graham raised a claim of ineffective assistance of counsel, and we ordered supplemental briefing on whether that claim was waived. Graham and the concurrence object to our decision to do so and to decide her claim on that ground now. *See* Concurrence at 1-3. This objection to the government's allegedly "abandoned claim[]" thus sounds in the party-presentation rule. *Id.* at 2. But "it cannot be a departure from the principle of party presentation to decide the issue on which the *appellant* relies for relief." *United States v. Moyhernandez*, 5 F.4th 195, 207 (2d Cir. 2021) (emphasis added), *cert. granted, vacated, and remanded on other grounds*, 142 S. Ct. 2899 (2022) (mem.).[12] In other words, because we are not

---

require ineffective-assistance claims after trial. *Id.* at 503–04. The case was about the efficient handling of claims, not the intentional relinquishment of a known right; procedural default, unlike true waiver, is excused with a showing of cause and prejudice. *Id.* at 504, 506.

[12] Moreover, the district court was clearly concerned about the waiver issue, as it articulated at the *Frye* conference. *See supra* at 7-9. And once we ordered supplemental briefing, the government endorsed the proposition that Graham waived her claims. We thus conclude, with the benefit of supplemental briefing, that the district court ensured that Graham had the opportunity to assert her *Frye* right after being presented with the expired plea offer. *See supra* at 14-18. In any event, the government's arguments in its principal brief—mostly regarding

"hidebound by the precise arguments of counsel," *Sineneng-Smith*, 140 S. Ct. at 1581, we may affirm a judgment of the district court on any ground that is directly responsive to an appellant's arguments. That is why we may affirm a judgment even when an appellee submits no brief at all. *See* Fed. R. App. P. 31(c). In considering Graham's ineffective-assistance argument, we find the issue waived, which "necessarily extinguishes" the error and our review, so we decline to opine on its hypothetical merits. *Yu-Leung*, 51 F.3d at 1121 (cleaned up).

* * *

In sum, even assuming that Graham would have accepted the government's offer if it had been timely presented to her by her prior counsel, once competent counsel was appointed, she elected not to exercise her *Frye* rights and chose to take her chances at trial instead. She cannot now revive any *Frye* remedies on appeal. The record already reflects Graham's review of the plea offer and the court's appointment of new counsel, so there is no need for further fact-finding.

---

the lack of prejudice to Graham, assuming there was deficient performance—focused on the timing of Graham's representations to the court and to the government, her appointment of new counsel, and her decision to go to trial. Our "modest initiating role" was to ask the parties whether Graham's central claim on appeal was waived. *Sineneng-Smith*, 140 S. Ct. at 1579. The parties have now fully addressed the waiver issue, and so we decide that issue today.

The concurrence states that we have engaged in a "sua sponte application[] of waiver" or even judicial immodesty. Concurrence at 3. We respectfully disagree. It is the concurrence's approach that would have us discredit the district court's efforts, reach the merits, and apply *Frye* to the facts of Graham's case. *See id.* at 11–12.

We thus reject Graham's claim for relief without waiting for a collateral challenge.

B. Evidentiary Rulings and Jury Charge

Graham also raises several challenges to the admission of evidence and jury instructions at trial. All are meritless.

1. *Other Acts Evidence*

At trial, the government introduced evidence of (a) Graham's participation in an electronic funds transfer ("EFT") scheme that purported to eliminate debts by writing checks against a zero-balance checking account; and (b) Graham's attempts to improve a victim's credit score using sham methods. As to both sets of evidence, the district court provided a limiting instruction that the evidence could be used only to show intent, mental state, or lack of good faith. We review for abuse of discretion. *See United States v. Rowland*, 826 F.3d 100, 114 (2d Cir. 2016).

Graham argues that admitting this evidence ran afoul of Federal Rule of Evidence 404(b), which provides:

> (1) *Prohibited Uses*. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) *Permitted Uses*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

In general, "'[o]ther act' evidence serves a proper purpose so long as it is not offered to show the defendant's propensity to commit the offense." *United States v. Curley*, 639 F.3d 50, 57 (2d Cir. 2011). "This Circuit follows the 'inclusionary' approach, which admits all 'other act' evidence that does not serve the sole purpose of showing the defendant's bad character and that is neither overly prejudicial under Rule 403 nor irrelevant under Rule 402." *Id.* at 56 (citation omitted). Relevance toward a permissible purpose often turns on the similarity between the prior act and the charged offense. *See, e.g.*, *United States v. Garcia*, 291 F.3d 127, 137 (2d Cir. 2002).

a. EFT Scheme

The government introduced evidence that, concurrently with the charged fraud, Graham instructed a coconspirator, Rocco Cermele, to etch markings on checks in "[c]ertain colors" of ink so that they could be drawn against closed checking accounts to cover Cermele's debts. Joint App'x at A-799. The evidence included two email chains between Graham and Cermele. In the first, Graham says that she will detail the method to Cermele, and in the second, Cermele explains that his efforts to avail himself of the scheme were fruitless.

We agree with the government that this evidence was probative of Graham's fraudulent intent. At trial, Graham's principal defense was that she lacked the requisite mental state for a fraud conspiracy conviction. "[W]here it is apparent that intent will be in dispute, evidence of prior or similar acts may be introduced during the government's case-in-chief . . . ." *United States v. Pitre*, 960 F.2d 1112, 1120 (2d Cir. 1992). Even when "the [other bad] acts and the

charged conduct d[o] not involve exactly the same co-conspirators, [conduct], or temporal timelines," the evidence may still be "[]sufficiently relevant or probative" to be admitted. *United States v. Dupree*, 870 F.3d 62, 77 (2d Cir. 2017). Here, the EFT scheme was done at the same time as the charged conspiracy, with the same coconspirators, and with the same hallmarks—"unconventional" financial techniques used to purportedly discharge debt. The district court properly admitted this evidence.

b. Credit Repair Scheme

The government also introduced testimony from one of the victims of the charged fraud, Sherry Hopple. According to Hopple, Graham had induced her to redirect $25,000 worth of mortgage payments to Graham, after which Hopple would declare bankruptcy. When this ploy did not save Hopple and her husband from financial trouble, the pair had to leave their home, and her husband's credit score plummeted. Graham said that she could boost that score into the 700s or 800s as she had purportedly done for three other clients— indeed, supposedly removing any record of their foreclosures from their credit reports within ten days.

We agree with the government that this evidence was properly admitted as "direct evidence of the crime charged" because it "arose out of the same transaction or series of transactions as the charged offense, . . . [was] inextricably intertwined with the evidence regarding the charged offense, or . . . [was] necessary to complete the story of the crime on trial." *United States v. Hsu*, 669 F.3d 112, 118 (2d Cir. 2012) (citation omitted). First, the evidence tended to show conduct that was intertwined with the charged fraud,

of which Hopple was a victim. Second, the jury could have found that the credit repair scheme served to "lull" Hopple into not reporting Graham or working with authorities against her. *Cf. United States v. Lane*, 474 U.S. 438, 451–52 (1986) (explaining that lulling can be in furtherance of fraudulent conduct). Third, Graham's purported offer to help could be taken as evidence of fraudulent intent by taking steps to mask her missteps. *See United States v. Kelley*, 551 F.3d 171, 176 (2d Cir. 2009) (holding that subsequent acts to hide a fraud "indicate[d] that [Defendant's] actions in defrauding his clients were not simple mistakes but were instead part of a larger, intentional scheme to defraud"). Any one of these reasons would be sufficient to admit the evidence, and the district court did not abuse its discretion by doing so.

2. *Red-Flag Evidence*

The government also introduced certain "red flag" emails sent among Graham, Cermele, and an outside attorney. The attorney, after learning of Graham's methods, gave a detailed explanation of why they were illegitimate. Referring to those methods, he summarized that he could "unequivocally say that the filing of those liens, the transfer of the properties, the creation of the trusts, etc., constitutes a crime." Joint App'x at A-1107. Graham responded by asserting that this attorney was uneducated in the "common law," and she later wrote that "title companies . . . are LAWYER owned and part of the UCC system we fight against." *Id.* at A-1110, A-1113. The district court instructed the jury to use these emails as evidence only of Graham's intent, knowledge, or lack of good faith.

Graham contends that these emails were inadmissible hearsay, *see* Fed. R. Evid. 801, 802, and that they unduly prejudiced the jury by providing a legal opinion, *see Cameron v. City of N.Y.*, 598 F.3d 50, 62 (2d Cir. 2010). Again, we disagree. The evidence was introduced not for the truth of the matter asserted—*i.e.*, that Graham's actions were in fact illegitimate—but rather to show her fraudulent intent and, indeed, her knowledge that she was breaking the law. In other words, the evidence "rebut[ted] [Graham's] argument that [she] had no reason to know [her conduct] was fraudulent." *United States v. Dupre*, 462 F.3d 131, 137 (2d Cir. 2006).

Nor did the emails create a risk of prejudice that substantially outweighed their probative value. *See* Fed. R. Evid. 403; *United States v. Reyes*, 18 F.3d 65, 70 (2d Cir. 1994) (noting that we look at "whether the probative value of th[e] evidence for its non-hearsay purpose is outweighed by the danger of unfair prejudice resulting from the impermissible hearsay use of the declarant's statement"). The danger of prejudice was low because there was no reasonable dispute that Graham used illegitimate means to eliminate the debts of Terra's clients. And the probative value of the evidence was high because it tended to undermine Graham's argument that she lacked mens rea. Moreover, the court gave a limiting instruction that the evidence could be considered "for a very limited purpose" as to her intent, which it repeated during the general jury charge. Supp. App'x at SA-56. The "law recognizes a strong presumption that juries follow limiting instructions." *United States v. Snype*, 441 F.3d 119, 129 (2d Cir. 2006). We thus conclude that admission of the evidence was not an abuse of discretion.

3. *Conscious-Avoidance Instruction*

Finally, Graham argues that the district court erred by instructing the jury on conscious avoidance, also known as willful blindness. In general, a criminal conspiracy conviction requires actual knowledge of the unlawful aims of the conspiracy, but a "defendant's conscious avoidance of knowledge of the unlawful aims of the conspiracy . . . may be invoked as the equivalent of knowledge of those unlawful aims." *United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003). The conscious-avoidance doctrine applies to a defendant who "consciously avoided learning [a] fact while aware of a high probability of its existence." *Id.* at 477 (citation omitted); *see also Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766–67 (2011). An instruction on the doctrine is proper when the "factual predicate for the charge" exists such that "a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." *Svoboda*, 347 F.3d at 480 (cleaned up). We review jury instructions de novo and find error only if "the charge, taken as a whole, [is] prejudicial." *United States v. Caban*, 173 F.3d 89, 94 (2d Cir. 1999).

We conclude that there was sufficient evidence for a rational jury to conclude that Graham consciously avoided evidence of wrongdoing. In addition to the "red flag" emails, *see supra* Section II.B.2, and much of the evidence of actual knowledge, *see supra* at 5-6, the government introduced evidence showing Graham's active disregard of information tending to show a high probability of the fraudulent aims of the conspiracy. For example, the government introduced comments from title companies expressing alarm at

Graham's methods. It also recounted that law enforcement raided Graham's office in 2012, after which Graham's criminal conduct continued. The government's evidence served to show that Graham ignored these signals and told others not to engage with outside lawyers or the title companies. There was therefore ample basis for the district court's conscious-avoidance instruction.

III. CONCLUSION

Graham's ineffective-assistance claim was waived, and her remaining arguments are meritless. For the foregoing reasons, the judgment of conviction is affirmed.

PÉREZ, *Circuit Judge*, concurring in the judgment as to Section II.A:

There is no debate that "criminal defendants require effective counsel during plea negotiations" and that "anything less might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." *Missouri v. Frye*, 566 U.S 134, 144 (2012) (cleaned up). Binding precedent does not treat the right to counsel during plea negotiations with short shrift.

I agree with the majority opinion that we should reject Graham's claim, though I would do so on the merits, instead of finding waiver, because she is not able to prove the requisite prejudice. As such, I respectfully concur in the judgment of the Court in Section II.A, but not its discussion and conclusion as to waiver. I fear that the majority opinion—after reaching beyond what the parties initially argued—has muddied the waters concerning the right to effective assistance of counsel in plea bargaining by finding waiver.

I.

The Court should not have reached for waiver here. To speak plainly: the government abandoned this argument. The government did not raise waiver in its opposition brief—it even expressed serious doubt on whether there was a waiver when first questioned about it during oral argument.[1] "It is well established

---

[1] Counsel stated during oral argument that "ineffective assistance [] can be raised for the first time in collateral review, so I'm not sure that the defendant was obligated to raise it at the time" before the district court. Oral Arg. Audio Recording at 17:35–18:00.

that an argument not raised on appeal is deemed abandoned[.]" *United States v. Quiroz*, 22 F.3d 489, 490 (2d Cir. 1994) (internal quotation marks omitted); *see also United States v. Olano*, 507 U.S. 725, 732–33 (1993) (a party forfeits an argument when it "fail[s] to make the timely assertion of a right," subjecting it to plain error review); *cf. JLM Couture, Inc. v. Gutman,* 24 F.4th 785, 801 n.19 (2d Cir. 2022) (declining to address "belatedly" made arguments raised in reply brief on appeal). Of course, this Court may consider abandoned claims if "manifest injustice would otherwise result[.]" *Quiroz*, 22 F.3d at 491. But no one—even now after the government was prodded by this Court to make a waiver argument—argues such manifest injustice would occur here if we considered Graham's ineffective assistance claim.[2] Respectfully, I see much irony in that the majority opinion easily finds Graham's *Frye* claim waived but declines to find the government's new argument abandoned given that the government would not have asserted waiver if not for a request for supplemental briefing by this Court.

While it is true that there is "no right to be offered a plea . . . nor a federal right that the judge accept it," *Frye*, 566 U.S. at 148 (internal citations omitted), there is no question that the Sixth Amendment enshrines the right to counsel—"a right that extends to the plea-bargaining process," *Lafler v. Cooper*, 566 U.S. 156, 162 (2012); *see also Frye*, 566 U.S at 138 ("The right to counsel is the right to *effective*

---

[2] In fact, the government initially suggested additional fact finding could be useful and that the Court should consider Graham's ineffective assistance claim if presented via a 28 U.S.C. § 2255 motion, as an alternative argument to the record not supporting her claim.

assistance of counsel." (emphasis added)). As such, "the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." *Lafler*, 566 U.S. at 170; *see also Frye*, 566 U.S. at 143 ("The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.").

Something as bedrock to our criminal justice system and judicial process—the right to effective assistance of counsel—demands the judiciary be modest in its approach to doctrines that may serve to limit the right, such as waiver. *See, e.g., Carnley v. Cochran*, 369 U.S. 506, 514 (1962) ("[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights." (internal quotation marks omitted)). Accordingly, when a fundamental right such as the right to effective assistance of counsel is implicated, sua sponte applications of waiver should be made with considerable restraint.

II.

Even if waiver had been raised by the government in its initial briefing, the government did not overcome the presumption against waiver, or meet its burden for us to find Graham's purported waiver was knowing and intelligent.

"There is a presumption against the waiver of constitutional rights[.]" *Brookhart v. Janis*, 384 U.S. 1, 4 (1966). "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Olano*, 507 U.S. at 733.

"Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *Id.* (internal quotation marks omitted). There is no dispute that the Court has discretion to correct certain errors that were forfeited using a plain error analysis, and that, in most cases, forfeiture occurs when a defendant fails to assert an objection in the district court due to mistake or oversight. *See United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 2015). But the Court has no such discretion to conduct a plain error review if there was a true waiver. *See id.* The government must prove waiver by a preponderance of the evidence. *See, e.g., Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010). Where this Court has found waiver, "the record has supported the critical determination that the defendant . . . acted intentionally in pursuing, or not pursuing, a particular course of action." *United States v. Spruill*, 808 F.3d 585, 597 (2d Cir. 2015).

A.

The record does not support a finding by a preponderance of the evidence that any purported waiver was knowing and intelligent. *See Berghuis*, 560 U.S. at 384; *see also Brady v. United States*, 397

U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.").

This Court has recognized several instances where the district court must conduct a meaningful inquiry with the defendant to ensure that the waiver of a constitutional right was knowing and intelligent. *See, e.g.*, *United States v. Ferguson*, 758 F.2d 843, 850–51 (2d Cir. 1985) (noting requirement that waiver of indictment be made in open court, where the defendant is "informed of the nature of and the cause for the accusation, and the court must be satisfied that the defendant[] waive[s] their right[] knowingly, intelligently and voluntarily" to safeguard Fifth Amendment right to an indictment); *United States v. Arrington*, 941 F.3d 24, 39–40 (2d Cir. 2019) (requiring the defendant participate in *Curcio* hearing for possibly conflicted counsel to safeguard Sixth Amendment right to effective assistance of counsel); *Torres v. United States*, 140 F.3d 392, 401 (2d Cir. 1998) (requiring the defendant participate in *Faretta* hearing before allowing the defendant to proceed pro se to safeguard Sixth Amendment right to counsel); *see also United States v. Carmenate*, 544 F.3d 105, 108 (2d Cir. 2008) ("strongly encourag[ing] the district court to give appropriate warnings and question a defendant on the record" before finding waiver of right to jury trial).[3]

---

[3] The majority opinion dismisses *Arrington* and *Torres* as inapposite because each "involve[s] circumstances in which the court cannot be sure that the defendant is adequately represented." Op. at 15 n.6. The animating concern of *Arrington* and *Torres*, ensuring the Sixth Amendment right to adequate

And there is no dispute that deciding to waive the constitutional right to trial and instead plead guilty is among the decisions that a defendant must personally participate in, and there accordingly are well-established processes and procedures to ensure that such a plea is entered voluntarily, knowingly, and intelligently. *See* Fed. R. Crim. P. 11(b), (c); *Taylor v. Illinois*, 484 U.S. 400, 417–18, 418 n.24 (1988); *see also Brookhart*, 384 U.S. at 7–8; *United States v. Livorsi*, 180 F.3d 76, 79–80 (2d Cir. 1999) (explaining that Rule 11 is "designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary" and that the defendant "knows the consequences of doing so" (quoting *United States v. Maher*, 108 F.3d 1513, 1520 (2d Cir. 1997)). *Frye*, which indisputably implicates both the right to effective counsel and the right of a defendant to accept a plea offer once made, *see* Op. at 17–18, *Frye*, 566 U.S. at 148–49, accordingly demands a robust process.[4]

---

assistance of counsel, is present here. In any case, the district court had good reason to believe that Graham had not been adequately represented in plea negotiations before she was appointed new counsel, because former counsel indicated that he had only conveyed the "substance" of the plea agreement, but not the offer itself, and Graham indicated that that communication was in late March—seemingly after the offer had expired. Joint App'x at A-90, A-99. While there has been no claim that counsel after the April 10 conference was ineffective, that does not mean the district court should not have taken steps to ensure any earlier Sixth Amendment violation was actually adequately remedied.

[4] As the majority opinion highlights in citing *United States v. Albarran*, *Frye* hearings involve distinct procedures, where the "court strives to ensure that a full and accurate communication on the subject has occurred" so a defendant

As the majority opinion aptly notes, it is not as if "*Frye* permits district judges to identify [ineffective assistance] but not to remedy it before a trial or subsequent plea." Op. at 17 (quoting *United States v. Draper*, 882 F.3d 210, 218 (5th Cir. 2018)) (internal quotation marks omitted). To its credit, the district court did acknowledge the potential *Frye* issue and raised its concern for the parties, stating that it did not want this *Frye* issue "to come back to haunt us, so to speak." Joint App'x at A-90. Recognizing that the scenario was dynamic and unfolding in real-time, merely acknowledging the potential for a *Frye* issue does not provide the groundwork for finding waiver. *See Arrington*, 941 F.3d at 43 (noting that the key for waiver is not whether "a trial judge recited any particular litany of questions[,]" but whether "the defendant appreciated his predicament and made a properly informed choice"); *see also United States v. Jenkins*, 943 F.2d 167, 176 (2d Cir. 1991) (referring to "the common sense notion that the existence of a knowing and intelligent waiver inevitably depends

---

"fully underst[ands] the terms of the plea agreement that he [is] rejecting." 943 F.3d 106, 113 & n.5 (2d Cir. 2019); Op. at 13–14 n.2. But Graham did not have a *Frye* hearing like the defendant in *Albarran*, where before the defendant stated on the record that he was rejecting the government's proposed plea agreement, the government reviewed the specific terms of the proposed plea agreement, identified the elements to which the defendant would plead guilty, listed the rights the defendant would forfeit by entering a guilty plea, and described the Sentencing Guidelines' application to the defendant's conviction. *Id*. at 113. And during the *Frye* hearing in *Albarran,* the defendant was present when the parties discussed the evidence that they would present and "each side candidly acknowledged the strengths and weaknesses of its case." *Id*. The district court here conducted no such hearing or inquiry with Graham, and thus could—and in hindsight should—have done more. *See* Op. at 17 n.8.

upon the particular facts and circumstances surrounding each case, including the background, experience, and conduct of the accused" (cleaned up)).

Once a potential *Frye* issue arose, to ensure any *Frye* right was knowingly and intentionally waived, the district court should have done more than flag it and rest on the assurance of the allegedly ineffective counsel.[5] Besides the statements to former counsel, there was no further inquiry of whether Graham wanted the plea offer ordered reopened (or if she even knew she could request that), or whether there was a knowing and voluntary waiver of her *Frye* right. Indeed, even when counsel for the government addressed waiver for the first time after the Court raised it during oral argument, counsel stated, "I don't know if I would style it as a knowing relinquishment." Oral Arg. Audio Recording at 17:20–28. Without more, the government has not sufficiently demonstrated the purported waiver was knowing and intelligent.

---

[5] The district court stated that it "just want[ed] to make sure that those decisions [concerning the expired plea agreement] are made intelligently and knowingly, and that there is no basis for [Graham] later . . . [to] say[] that she was not aware that a plea offer was made and the consequences of it, of either accepting or denying the plea offer." Joint App'x at A-91–A-92. Counsel—who admitted on the record to not having timely shared the plea agreement with his client—responded that he had "accomplished that." *Id.* at A-92. This is an important point, and the majority opinion does not adequately engage with it: the district court's explanation and the subsequent assurance came from *former* trial counsel who—moments later—was replaced.

B.

Waiver also cannot be found here because it does not appear, by a preponderance of the evidence, that Graham made a strategic, calculated decision to waive her *Frye* right. "[W]aiver can result only from a defendant's intentional decision not to assert a right." *Spruill*, 808 F.3d at 597. "As a corollary, if a party consciously refrains from objecting as a tactical matter, then that action constitutes a true 'waiver[.]'" *United States v. Cosme*, 796 F.3d 226, 231–32 (2d Cir. 2015) (internal quotation marks omitted). "[C]ourts applying [the] waiver doctrine have focused on strategic, deliberate decisions that litigants consciously make." *United States v. Dantzler*, 771 F.3d 137, 146 n.5 (2d Cir. 2014). While the Court has declined to make a "tactical benefit a prerequisite to identifying waiver[,]" it is certainly "evidence that the relinquishment of a right was intentional[.]" *Spruill*, 808 F.3d at 599. We have accordingly declined to hold an argument waived when there was "nothing in the record suggesting . . . a strategic, calculated decision[.]" *Dantzler*, 771 F.3d at 146 n.5.

The majority opinion concludes Graham waived her *Frye* right because she chose to take her case to trial. But this high-level characterization dismisses the complete picture of Graham's circumstance. The court replaced allegedly ineffective counsel with new counsel, and Graham went to trial where she sought an acquittal largely on the basis that she lacked the requisite intent.[6] Advancing to trial with the hope

---

[6] Graham's defense strategy focused on the contention that she lacked the requisite intent to defraud and believed in good faith in the legality of her actions—to the point where the government sought a conscious avoidance charge.

and belief that a jury would acquit, without requesting the government reopen its plea offer, does suggest that Graham *would not* have taken the plea had she been properly advised—which speaks to the lack of requisite prejudice, not waiver.[7] *See Lafler*, 566 U.S. at 164 (requiring the defendant show that "but for the ineffective advice of counsel there is a

---

[7] Of course, a defendant advancing to trial after learning of a plea offer does not necessarily mean that the defendant would not have accepted a plea offer, had they been properly advised by counsel. The Court's usual practice to defer resolution of such claims on direct appeal to allow further development of the evidentiary record is a sound one. For this case, however, we can resolve the issue now because Graham's assertion of prejudice is not "accompanied by some 'objective evidence'" and instead relies "solely on [her] own, self-serving statement post-verdict that [she] would have accepted a more favorable plea deal." *United States v. Bent*, 654 F. App'x 11, 13 (2d Cir. 2016) (summary order).

Among other facts, the district court informed Graham's new counsel that there was an expired plea offer that the government indicated could come back on the table if Graham indicated an interest in pursuing it. At the final pretrial conference, Graham's counsel did not dispute the government's characterization that there had been some discussions of "resolving the matter short of trial," but that it was the government's understanding that Graham was "not seeking resolution, so [the government had] not made any new offers, nor [had it] been asked to reopen any offers." Joint App'x at A-172. Counsel merely stated that he was "ever hopeful of resolving [this] matter," but expected to be before the jury the following week. *Id.* This suggests Graham's lack of interest in the original plea offer, such that Graham is not able to show there was a reasonable probability she would have accepted the plea offer. The majority opinion instead interprets these events as evidencing waiver. As I discuss *supra* Section I, I believe that approach is inappropriate and unnecessary here, given the presumption against waiver of constitutional rights and that this Court raised waiver sua sponte, to the government's initial skepticism.

reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea . . . .)"). This case would not result in the "windfall" scenario *Lafler* warns of, for it does not present a credible worry that a defendant could seek a tactical benefit by waiting to raise a *Frye* claim on appeal where ineffective counsel during plea bargaining was replaced before trial. *See id.* at 170, 172. Here, there simply is "nothing in the record suggesting . . . a strategic, calculated decision" to decline a possible reinstatement of the government's plea offer, only to potentially resurrect the claim on appeal after losing at trial—or even sandbag the government on appeal. *Dantzler*, 771 F.3d at 146 n.5. The majority thus should not have found waiver.

C.

By finding waiver, the majority opinion fails to grapple with the practical realities of the situation Graham faced in the time between the April 10, 2019 hearing (where the district court appointed new counsel), and the May 31, 2019 final pretrial conference (where the district court asked "whether or not the parties have discussed any possibility of resolving this [case] short of trial?"). Joint App'x at A-171–A-72. The district court made clear during the April 10 conference that it "intend[ed] to stick to th[e] trial schedule that [it] already set." *Id.* at A-95. And while it did move the trial date back by approximately one month to allow newly appointed counsel to get up to speed, the district court set the trial date as commencing only two months from the appointment. During the April 10 conference, the government—at several points—made clear that the "plea offer has technically expired" and that it doesn't

"bid against [itself]. That is, we don't keep on making new plea offers." *Id.*; *see also id.* at A-96. The government also explained that "the closer we get to trial, the less flexible [the government is] likely to be to the extent that we have flexibility in plea negotiation. . . . [T]he longer she waits, the less likely it is that it will benefit her[.]" *Id.* at A-95–A-96.[8]

As already explained, Graham's new counsel was preparing for a two-week trial—on two months' notice—which entailed learning the record and communicating with former trial counsel about the case. Raising concerns about deficiencies regarding former counsel's performance for the purpose of requesting a *Frye* remedy would have hindered new counsel's ability to receive information and context from former counsel. *Cf. Massaro v. United States*, 538 U.S. 500, 506 (2003) (explaining challenges for appellate counsel when preparing an appeal that also attacks actions of trial counsel). Additionally, requiring new counsel to raise an ineffective assistance of counsel claim immediately after appointment would create a "perverse incentive[]" to raise potentially frivolous issues just to avoid subsequent allegations of waiver, "creat[ing] inefficiencies[.]" *Id.* at 506–07. *Massaro* evaluated a rule of "procedural default" to determine it is "preferable" to bring ineffective assistance of counsel claims under 28 U.S.C. § 2255 instead of by direct appeal. *Id.* at 504. The same considerations are applicable to declining to find waiver because of the

---

[8] The government restated the same sentiment on several more occasions throughout this hearing, including that "[the offer] has been taken off the table, . . . " Joint App'x at A-96, and "[the government has considered] discussing alternative ways of structuring the plea, but again, the longer she waits, the less likely it is that it will work out[,]" *id.*

unique nature of raising an ineffective assistance of counsel claim.

III.

The majority opinion's finding of wavier here appears to be a solution in search of a manufactured problem. Indeed, the majority opinion searches for a solution when waiver was not even advanced by the government until it was ordered to brief it. Even so, the government has not established by a preponderance of the evidence that Graham knowingly and voluntarily waived her *Frye* right. Nonetheless, I respectfully concur that we should reject her claim. Graham's ineffective assistance claim may be considered, and rejected, under existing precedent, because Graham has not demonstrated there was a reasonable probability that she would have accepted the plea offer. *See Lafler*, 566 U.S. at 164.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of March, two thousand twenty-two.

PRESENT: JOHN M. WALKER, JR.,
MICHAEL H. PARK,
MYRNA PÉREZ,
Circuit Judges.

20-832

United States of America,
Appellee,

—v.—

Jacqueline Graham,
Defendant-Appellant.

The parties are hereby ORDERED to provide supplemental briefing addressing the following question:

> Whether, by proceeding to trial after the government's expired plea offer was acknowledged on the record, where new counsel had replaced allegedly ineffective counsel, Appellant waived any right under *Missouri v. Frye*, 566 U.S. 134 (2012), to plead guilty under the terms of the offer after her conviction or to raise a claim of ineffective assistance of counsel based on counsel's failure timely to provide the terms of the plea offer to Appellant. *See Berghuis v. Thompkins*, 560 U.S. 370, 384–85 (2010); *Strickland v. Washington*, 466 U.S. 688 (1984).

Submissions in response to this order shall be by letter brief, the length not to exceed five pages single-spaced. Appellee shall file its brief by 5:00 PM on Monday, March 28. Appellant shall file its response by 5:00 PM on Monday, April 11. Appellee shall file a reply, if any, by 5:00 PM on Monday, April 18.

FOR THE COURT:
/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk
[SEAL]

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case Number: 7:16Cr.00786-02 (NSR)

USM Number: 23853-111

Bruce D. Koffsky, Esq. and Peter J. Schaffer, Esq.
Defendant's Attorney

UNITED STATES OF AMERICA

—v.—

JACQUELINE GRAHAM

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) One after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section

18 U.S.C. §§ 1349, 1341, 1343, and 1344

Nature of Offense

Conspiracy to Commit Mail Fraud, Wire Fraud, and Bank Fraud – Class B Felony

Offense Ended

12/7/2016

Count

1

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

2/28/2020

Date of Imposition of Judgment

/s/ Nelson S. Román

Signature of Judge

Nelson S. Roman, U.S.D.J.
Name and Title of Judge

3/4/2020
Date

[SEAL]

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: 3/4/20

Judgment — Page 2 of 9

DEFENDANT: JACQUELINE GRAHAM
CASE NUMBER: 7:16Cr.00786-02 (NSR)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

One Hundred thirty-Two (132) Months. Defendant advised of her right to appeal.

☐ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends incarceration at FCI Dublin in California or, if such designation is unavailable, alternatively to a minimum security facility in Eastern Pennsylvania to facilitate family visitation.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m.on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____

to _____

at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: JACQUELINE GRAHAM
CASE NUMBER: 7:16Cr.00786-02 (NSR)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Five (5) Years, subject to the standard conditions 1-12 as well as mandatory and special conditions.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☐ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.)* as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

Judgment — Page 4 of 9

DEFENDANT: JACQUELINE GRAHAM
CASE NUMBER: 7:16Cr.00786-02 (NSR)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer

instructs you to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to

change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me

with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions,* available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

Judgment — Page 5 of 9

DEFENDANT: JACQUELINE GRAHAM
CASE NUMBER: 7:16Cr.00786-02 (NSR)

SPECIAL CONDITIONS OF SUPERVISION

1. You must provide the probation officer with access to any requested financial information.

2. You must not incur new credit charges or open additional lines of credit without the approval of the probation officer unless you are in compliance with the installment payment schedule.

3. You must submit your person, and any property, residence, place of business, vehicle, papers, computer, other electronic communications, data storage devices, cloud storage or media, and effects to a search by any United States Probation Officer, and if needed, with the assistance of any law enforcement. The search is to be conducted when there is reasonable suspicion concerning violation of a condition of supervision or unlawful conduct by the person being supervised. Failure to submit to a search may be grounds for revocation of release. You shall warn any other occupants that the premises may be subject to searches pursuant to this condition.

Any search shall be conducted at a reasonable time and in a reasonable manner.

4. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

5. The Court recommends you be supervised by the district of residence.

6. You shall notify, within 30 days, the Clerk of Court, the United States Probation Office (during any period of probation or supervised release), and the United States Attorney's Office, 86 Chambers Street, 3rd Floor, New York, New York 10007 (Attn: Financial Litigation Unit) of (1) any change of your name, residence, or mailing address or (2) any material change in your financial resources that affects your ability to pay restitution in accordance with 18 U.S.C. § 3664(k). If you disclose, or the Government otherwise learns of, additional assets not known to the Government at the time of the execution of this order, the Government may seek a Court order modifying the payment schedule consistent with the discovery of new or additional assets

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution
TOTALS	$ 100.00	$ 694,450.00

Fine	AVAA Assessment*
$	$

JVTA Assessment**
$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(1), all nonfederal victims must be paid before the United States is paid.

Name of Payee

Attn:Cashier's Office, Clerk – U.S.District Court

500 Pearl Street, New York, NY 10007

For disbursement to the victims (names and addresses to be provided by the U.S. Attorney's Office)

Total Loss***	Restitution Ordered	Priority or Percentage
	$694,450.00	
TOTALS $0.00	$694,450.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

  ☐ the interest requirement is waived for the ☐ fine ☐ restitution.

  ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JACQUELINE GRAHAM
CASE NUMBER: 7:16Cr.00786-02 (NSR)

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

While serving the term of imprisonment, you shall make installment payments toward your restitution obligation and may do so through the Bureau of Prisons' (BOP) Inmate Financial Responsibility Plan (IFRP). Pursuant to BOP policy, the BOP may establish a payment plan by evaluating your six-month deposit history and subtracting an amount determined by the BOP to be used to maintain contact with family and friends. The remaining balance may be used to determine a repayment schedule. BOP staff shall help you develop a financial plan and shall monitor the inmate's progress in meeting your restitution obligation.

You shall make restitution payments by certified check, bank check, money order, wire transfer, credit card or cash. Checks and money orders shall be made payable to the "SDNY Clerk of the Court" and mailed or hand-delivered to: United States Courthouse, 500 Pearl Street, New York, New York 10007 – Attention: Cashier, as required by 18 U.S.C. § 3611. You shall write your name and the docket number of this case on each check or money order. Credit card payments must be made in person at the Clerk's Office. Any cash payments shall be hand delivered to the Clerk's Office using exact change and shall not be mailed. For payments by wire, you shall contact the Clerk's Office for wiring instructions.

You shall commence monthly installment payments of an amount equal to ___15___ percent of your gross income, payable on the ___1st___ of each month, upon release from prison.

Judgment — Page 8 of 9

DEFENDANT: JACQUELINE GRAHAM
CASE NUMBER: 7:16Cr.00786-02 (NSR)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ ____ over a period of _____ *(e.g., months or years),* to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years),* to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60*

days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:
See page 7 of the Judgment – ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment ofcriminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number
Defendant and Co-Defendant Names
(including defendant number)

Total Amount

Joint and Several Amount

Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States: $138,941.86 in United States currency.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

Judgment — Page 9 of 9

DEFENDANT: JACQUELINE GRAHAM
CASE NUMBER: 7:16Cr.00786-02 (NSR)

ADDITIONAL FORFEITED PROPERTY

Specific properties identified in Preliminary Order of Forfeiture, United States v. Graham, 16 CR 786-02 (NSR), dated February 28, 2020.

Appendix E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 16-cr-00786-02

UNITED STATES OF AMERICA,

—vs.—

JACQUELINE GRAHAM,

Defendant.

United States Courthouse
White Plains, New York

May 31, 2019
11:17 a.m.

B e f o r e :

HONORABLE NELSON S. ROMAN

District Judge

A P P E A R A N C E S:

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
MICHAEL MAIMIN
DAVID FELTON
Assistant United States Attorneys

KOFFSKY & FELSEN, LLC
BRUCE D. KOFFSKY
Attorney for Defendant

PETER J. SCHAEFFER, ATTORNEY AT LAW
PETER J. SCHAEFFER
Attorney for Defendant

ALSO PRESENT:
FBI SPECIAL AGENT MICHAEL MAZZUCA
JIM McLAUGHLIN, Paralegal

PROCEEDINGS

THE COURT: Please be seated, everyone.

THE DEPUTY CLERK: United States of America versus Graham.

Would counsel please state their appearances for the record, beginning with the government?

MR. MAIMIN: Michael Maimin and David Felton for the government. Good after -- sorry. Good morning, Your Honor.

THE COURT: Good morning.

MR. KOFFSKY: Good morning, Your Honor. Bruce Koffsky. I am here with Attorney Peter Schaffer, and also our client, Jacqueline Graham.

MR. SCHAFFER: Good morning, Your Honor.

THE COURT: Good morning to you all. You can remain seated throughout this proceeding. All right.

This is a final pretrial conference. You should be aware that -- I am not sure if you were given a copy of the draft jury instructions or preliminary instructions, which also includes the voir dire questions. All right. We are still working on finalizing

that, but I wanted to give you a copy nonetheless so that you have a sense of where we are going to be going with the types of questions we will be asking.

I am also working to finalize my decision on the respective motions in limine. All right. I did have some questions, though.

Before I get to that, I just want to know whether or not the parties have discussed any possibility of resolving this short of a trial?

MR. MAIMIN: Your Honor, we have discussed with Mr. Koffsky whether there is a possibility. It's our understanding at this time that his client is not seeking a resolution, so we have not made any new offers, nor have we been asked to reopen any offers.

MR. KOFFSKY: Your Honor, I am ever hopeful of resolving a matter, but at this point in time, I expect to be in front of the Court on Monday ready to select a jury.

THE COURT: Okay. So just -- let's go over a couple things. This is regarding your motion. One issue was whether or not the government should be precluded from presenting copies or documentation regarding laws related to Ms. Graham's beliefs. That includes introduction of documenting evidence or copies of law such as the Federal Administrative Procedures Act, the Uniform Commercial Code or the Common Law. Any of that is pretty straightforward, you know, given the Court's role as the gatekeeper of evidence, and as the -- you know, as having an exclusive role of instructing the jury on what the relevant law is, so that's pretty straightforward.

And the other issue that comes to mind was described -- you can remain seated. I know how tall you are. Nice suit. Nice tie.

MR. KOFFSKY: Did you see my shoes?

THE COURT: No, but we can talk about those later.

MR. KOFFSKY: But if the Court -- when the Court gets an opportunity, I would just like to speak to a couple of the matters that the Court addressed.

THE COURT: Okay. Do you want to speak to the issue about what -- the introduction of what the law is or --

MR. KOFFSKY: Certainly, Your Honor. Certainly, Your Honor. And we have absolutely no intention of offering to this jury the law, meaning, we are not going to ask to have admitted any tomes of the law or submit through the Court any case law; but during the course of the trial, I expect the Court to hear testimony from the government's witnesses about lawyers who were involved in this conspiracy, the involvement of those lawyers, and the sharing of case law that they discussed justifying this scheme. There are references to --

THE COURT: Alleged scheme.

MR. KOFFSKY: Excuse me, Your Honor?

THE COURT: Alleged scheme.

MR. KOFFSKY: Alleged scheme. Correct. Thank you, Your Honor.

THE COURT: Not that I am trying to help you.

MR. KOFFSKY: I can take all the help I can get, Your Honor.

There is discussion of cases, other jurisdictions that justify this. There are emails as to that, and I would suggest to the Court that if I lay a proper foundation, that evidence should come as the discussions

amongst the alleged coconspirators. Again, we are not offering --

THE COURT: I think that goes to a different topic, and it's part of the government's motion in limine, but I think their concern was that they don't want -- they don't want a flow of documents being put forth in front of the jury that would take away from the Court's exclusive role of informing the jury of what the relevant case law is; and also they don't want anything that will lead to confusion, right? where they are being asked to consider principles of law that may or may not be relevant to this proceeding, right? Or, actually, that are not relevant to the preceding, and so they don't want to distract the jury from their role as well, which is factfinding as opposed to deciding what law applies and what law doesn't apply.

MR. KOFFSKY: I absolutely -- I get the Court's direction. I will follow it. And one of the reasons I raise this issue is because I have looked at some of the government's proposed evidence, and in the evidence there are opinion pieces of lawyers indicating whether the alleged scheme is legal or not, and I think the government wants to admit evidence that suggests it's not legal, and I would suggest that I think both the government and the defendant will be mindful with the Court's instructions, and the Court might hear objections as to the relevance and the basis for certain submissions by the government.

THE COURT: Well, doesn't that kind of flow into the next topic wherein the government seeks to preclude the defendant's view on the law, and I guess part of that is they anticipate that you are going to proffer evidence or there is a possibility that your

client may testify concerning her good-faith defense and/or good-faith reliance on the advice of counsel?

MR. KOFFSKY: That's correct, Your Honor.

THE COURT: All right. So certainly, there is legions of case law that indicates that such defense -- defenses, if properly asserted and believed by the jury, serve as a complete defense. I get that.

However, that -- my understanding of the law is that that is not an affirmative defense. All right. And the government's obligation is to prove beyond a reasonable doubt that your client: One, had a fraudulent intent or that her intention was to defraud and did not have a good-faith basis, all right, for relying on the information or did not have a good-faith basis for providing the information that she -- the misrepresentations and statements that she made to the clients of the Terra Foundation. All right? So that they are entitled to introduce evidence concerning, you know, her lack of good faith and so forth.

So while your client may testify or you can present evidence as to what she believed the law to be, all right, and she can only testify as to the sources of those beliefs, right? My understanding is such evidence would be admissible for a limited purpose of demonstrating her lack of intent to commit the crime. All right?

There is also evidence which the government seeks to introduce on their direct case concerning a husband and wife and they are identified as M.H. and S.H. wherein there was contact in 2008 regarding a loan or a request for a loan modification; and then it's my understanding that soon after Ms. Graham was released on bail, there were further communications

with this couple, or one of the individuals, wherein she made reference as to using a cryptic or encrypted email, and also -- what else? There was also some references to -- let me see here.

I believe there were communications concerning your client's attempts -- alleged attempt to assist in the purchase of a home, and that your client provided some information wherein she was trying to have them purchase or have this couple purchase a new home from one of her clients, which was supposedly another scheme or something like that?

MR. KOFFSKY: As I understand it, Your Honor, the government has sort of made three 404(b) -- they had sought permission of the Court or they have suggested that three separate alleged schemes should come in under 404(b). There is the EFT scheme that they allege in their supplemental motion in limine dated May 3rd, and then there are the two other schemes that they have alleged in their May 10, 2019, letter to me and their May 17th letter to me, both of which I attached to my objections to the 404(b) evidence in my memorandum.

We object to all of it, Your Honor. We think it's -- as I tried to make clear in our objections to the offer, we don't believe it's relevant, admissible, it's timely. It doesn't add to -- it's not inextricably intertwined with the story of conspiracy, and it's simply piling on. We would suggest to the Court that it's --

THE COURT: No, but I think it's the government's position that that goes to a lack of good faith. It also goes to your client's intent to defraud because some of her conduct or alleged bad conduct occurs after she is arrested, after she is indicted, after she is put on notice that such conduct is illegal, and despite that

notice, having that notice, she continues to perpetuate similar acts.

And as I indicated before, right, the government has to prove that she had the requisite intent to defraud, and you have already asserted that your defense is good faith and good-faith reliance on counsel's advice. All right? So that tends to support the government's position. Right?

MR. KOFFSKY: Right.

THE COURT: That they -- well, I know you disagree with me, and I know you disagree with the government, but it is relevant conduct, and it would appear to me to go directly to her intent. Further, my inclination is to permit that -- those acts, all right, obviously, provided that the government lays the proper foundation for it.

There is also an application to exclude Ms. Graham's beliefs that banking financial institutions are corrupt and should be wiped out. I don't see how that's relevant. It doesn't go to her -- her intent. It doesn't go to good faith. It doesn't go to good-faith reliance on counsel. So I don't see how that's relevant at all.

MR. KOFFSKY: Your Honor, just by way of background, and I would suggest some of this is going to be coming out through the government's own evidence, maybe comes out through the government's case-in-chief through their direct. I have taken a look at some of their exhibits. It's not lost on the Court -- it's probably not going to be lost on the jury -- that in 2007, 2008, 2009, there was a financial crisis which led to the foreclosure of some houses; and as a result, some of the government's own witnesses were foreclosed upon, and as a result of those foreclosures,

the government's own witnesses, their chief cooperator engaged in an investigation on how the banks performed these foreclosures, how to get out of those foreclosures, what was the net effect of these foreclosures on people; and the creation of documents by the government's own witnesses suggested that this Pillow Foundation and then later the Terra Foundation was created to help out victims of bank fraud, bank manipulation, mortgage fraud perpetrated by the banks; and I would suggest to the Court that we are not going to dwell on that. We are not going to talk about it. We are not going to point to the banks as the ultimate coconspirators, but I would suggest to the Court that some of the evidence is going to come out through the government. They have already identified documents that have names of banks on them and pictures of -- I don't know -- Steitzner (phonetic) or the head of the Fed, but that's part of their evidence, and I would suggest to the Court that we will follow up as what was the rational basis for the creation of these mortgage elimination schemes. That's -- so I would suggest to the Court that if I lay the proper --

THE COURT: As to which mortgage -- which mortgage schemes?

MR. KOFFSKY: The --

THE COURT: We are not talking about other mortgage schemes, right?

MR. KOFFSKY: No, this one.

THE WITNESS: We are not talking about illegal mortgage schemes, right? Other illegal mortgage schemes, right?

MR. KOFFSKY: No. Absolutely not.

THE COURT: And we're not necessarily talking about permissible modifications of mortgages or permissible lawful discharges of mortgages, right? What they are -- what the government is seeking to do is to preclude your client from introducing opinion testimony. I believe that's what they are asking me to preclude, right? And a statement such as banks and financial institutions are corrupt and should be eliminated or done away with or wiped out, whatever the term may be, is merely opinion testimony, which is not relevant to any of the elements of the crime charged, and is not relevant to any of the elements of a defense.

MR. KOFFSKY: Absolutely, Judge.

THE COURT: So we are on the same page. We both deem it irrelevant and it shouldn't come in.

MR. KOFFSKY: The defendant will not testify as to her opinion of the banks, but I would suggest that some of the government's own witnesses, their homeowners will say, we were under foreclosure. We went looking for modifications.

THE COURT: It's one thing to say, were you happy when the bank foreclosed on you? No. That's a feeling, right? You know, nobody likes to get foreclosed on. I get that. Right? Nobody likes to get a late notice from the bank. Hey, you owe us an additional $35 because your payment was late. If I received that notice, I would be unhappy, and if somebody was to ask me, were you happy when you received that notice? No. I wasn't happy. That's a feeling. It's not, you know, me saying, oh, Chase Bank is a corrupt institution, and I'm not saying that it is. That's an opinion, right? An opinion. It's not based on fact. All right? And as I said, evidence that's introduced has to go to the core issues before the

Court. It has to go to the elements, all right, or to the defense.

I do want to touch upon the electronic funds transfer scheme for debt elimination. What's the government's seeking to introduce? It appears to me on the surface that it's a similar scheme. All right? And it would go to the defendant's fraudulent intent, lack of good faith, absence of mistake or accident.

Also, as the government aptly points out, in the event they submit or present that confidential witness, who was part of this scheme, all right, they have a duty to not only disclose any prior bad acts that were perpetrated by this individual, they have the right to question the witness on issues dealing with credibility. All right? And they have the right to question the witness to contradict any inference that the government is concealing a witness's bias. There is a string of cases that support that proposition. All right.

And again, it appears to me to be very similar to the underlying mortgage fraud scheme that's alleged to have occurred in this case. So it appears to me at this time that it is admissible.

There is a question, I think that the other 404(b) acts deal with the credit score of Mr. Hopple? How is that relevant?

And the other question that I have is: We have 60-some-odd mortgages involved here. You also have what's relevant conduct as I indicated was -- I would allow you to introduce, right? Aren't we just piling on? Which is what Mr. Koffsky would say, but he would say it much more articulately than I would.

MR. MAIMIN: I doubt that, Your Honor, no offense to Mr. Koffsky.

There are 60-some-odd mortgages, although what we are presenting is a sampling of the homeowners. The Hopples are among them, and, by the way, this will only come up more for the voir dire, and we already told Mr. Koffsky, originally we believe that Mr. Hopple -- it's a couple -- Mr. Hopple would be the witness because Mrs. Hopple is ill, but Mrs. Hopple has said she is well enough to travel, so it will actually be Sherry Hopple who will be testifying.

But the relevance of the credit score scheme is that it's wrapped up in the relationship between Ms. Graham and the Hopples. In particular, this was a multiyear relationship that included the conspiracy here where Ms. Graham was effectively bilking the Hopples of money regarding their financial problems and the fact that they were going to -- and eventually did -- lose their house, and one of the issues that came up along the way was: As a result of all of this, my husband's credit score, Mr. Hopple's credit score, has been totally downgraded; will be unable to get credit; and Ms. Graham said, oh, we can wrap that in as well. You give me some money, and I will be able to add some points to his score. I have ways of doing that.

So it's really more than it's intertwined because she was effectively advising them on all financial matters, including their mortgage in an effort --

THE COURT: But it's not charged. It's an uncharged crime.

MR. MAIMIN: Yes, Your Honor.

THE COURT: Is it not?

MR. MAIMIN: It is, Your Honor.

THE COURT: How is it similar?

MR. MAIMIN: It's similar --

THE COURT: I understand that you are saying that it's intertwined, right, because it's part of a fluid transaction so to speak, right? When the mortgage issue is one, and then -- and then it winds up, it results in the mortgage not being properly addressed, and then it results in a bad credit report as a result; and then that's further -- I am not saying that happened, but this is the way it's being presented. So I don't want you to think that I am assuming that this actually occurred, but this is the way it's being presented, right, that Ms. Graham continues to misrepresent, all right, to make misrepresentations to the Hopples with the hope of squeezing more money out of them. All right?

But, you know, again, it sound to me like it's piling on. It's an uncharged crime. All right. And it's a slightly different transaction. It's not similar to the mortgage fraud. It's not similar to the other debt reduction attempt that's made. So why should I let it in? And, again, you have 60-some-odd mortgages involved here. You have this post arrest incident. All right. You have these another bad acts. It just seems -- again, I know I am repeating myself -- like you're piling on.

MR. MAIMIN: I understand what Your Honor is saying, and I will give it one last varsity try before I give, which is part of the purpose of -- of this is that Ms. Graham is effectively stringing the Hopples along because if at some point she says, This is a problem I can't handle, what's going to happen when they go to an actual financial advisor who knows what's going on and says, wait, she is charging you how much? She says that your mortgage is just going to vanish if she files these crazy papers? She says that she's found

fraud in your mortgage that allows you to get out of paying your mortgage, et cetera? And so the idea is, every single time that there is any kind of financial problem that the Hopples have, Ms. Graham has a miracle, and miracles that are not real, an ephemeral solution for it, and this is simply one of them. That is, it's part of the parcel. She was effectively offering herself, I am going to make all of your financial troubles go away at once, and this was just one of those financial troubles.

THE COURT: All right. So how does that go to one of the elements of the crime or to the issues that are before the Court? I think you concede it is an uncharged crime.

MR. MAIMIN: Well, among other things, it helps to demonstrate that she had an intent to defraud because every step of her financial advice was fraudulent. That is, it would be -- it would be perfectly reasonable to say, where she is offering a package of financial advice, and there are nine things that are clearly fraudulent, and she argues, but the tenth wasn't, then a jury can say, no, you were offering this all as a big sham.

THE COURT: And it goes to what? What element does it go to? Lack --

MR. MAIMIN: Lack of good faith. Intention, Your Honor.

THE COURT: So how do you address the issue of, you know, the way that it's mainly piling on? I mean, after a while -- and this is a concern that I think you should have, the government should really be concerned about this, right? Assuming that your claims are true and the allegations are true, she committed this mortgage fraud, right, and assuming

that even after she is arrested, she continues, all right, to make misrepresentations, all right? And you also have information concerning a very similar scheme, and all of that goes to intent, all right, a lack of good faith and so forth. At what point does it become, you know, for the jury -- at what point do you become concerned that the jury may say, you know, listen, that was bad, but then not only did she do it once, but then look at this act, look at this act, and she must have done it because, not only did she do it the first time, right, but look at all of these other acts, right? I mean, the concern becomes one of: Are you proffering too many prior bad acts or similar acts such that the jury kind of zones out and is basing the decision on propensity more than anything else? And that's the real balance that I have to deal with.

MR. MAIMIN: We understand that balance. Frankly, I just think that they are so intertwined with the Hopples, and I will point out, like I said, we are not putting on 60 homeowners. We are putting on maybe four or five homeowners. So we are not trying to overwhelm the jury here, and I think that if there is a concern that a jury might misuse this for propensity, we have no problem with a limiting instruction about these acts saying, you may not use this for any purpose other than to --

THE COURT: I get that. I get that. But, you know, they are going to hear it the first time, and they are going to hear it the second time, they going to hear it the third time, and then conceivably they are going to hear it a fourth time, and that still doesn't address the issue that I am weighing here, right?

And you also have to be concerned about appellate review should there be a conviction, all right? I know. I just put the question out there. Ultimately, I will

decide. I still have to look at this one more time, and I have a draft a decision, but I have been looking at -- I looked at it one more time, and that's my real concern.

MR. MAIMIN: And we understand that concern, and respectfully, I think that that's why we weren't trying to overwhelm with acts that could potentially be misused by the jury for propensity. We were trying to be pretty careful in what we did and didn't put in here. Although, obviously, if Your Honor rules it's out, we will tell Ms. Hopple not to get into that testimony.

THE COURT: Now, in regards to the alleged fraudulent IRS refund program, the government has indicated that they have no intentions of introducing that?

MR. MAIMIN: That's right, Your Honor.

THE COURT: All right. And obviously, there is also an application to exclude evidence based on speculation. That's more a case of making the appropriate objection?

MR. KOFFSKY: We will be on our feet, Your Honor, if a witness tries to give an opinion or speculates. We just wanted to highlight it for the Court.

THE COURT: All right. So you have a draft copy of my preliminary instructions, the voir dire. I hope to do my final edits on it on the motion in limine, so I should have that hopefully by late this afternoon.

Is there anything else?

MR. MAIMIN: Just one thing that I wanted to put on the record just so the Court isn't caught by surprise if it's an issue that we have to deal with.

Defense counsel -- and we have been talking a great deal over the last tweak or two, not only to try to streamline this, for example, we understand that there are going to be some stipulations that should eliminate a bunch of records custodians and the like, and we are just working with the language to make sure that the defendant can preserve certain objections to potential evidence that won't undermine the stipulations otherwise. That is, for example, that an email will be subject to certain objections, but will be authenticated so we don't need to call the legal custodian of records, things like that.

THE COURT: So you should have those stipulations presented at the very beginning of trial.

MR. MAIMIN: Absolutely.

THE COURT: Typically what I tend to do is to -- if there is evidence that's being offered for a purpose or a limited purpose or there is a stipulation that certain evidence is going to be introduced on consent, then that's done at the very beginning of the trial.

MR. MAIMIN: Okay. And the -- and because of this also, there's been some evidence that we have discussed with defense counsel as to its admissibility, and we have come to agreements on some of it in order to avoid having to burden the Court or burden the jury with dealing with it at trial.

However, the one thing that I wanted to put on the Court's radar because we have not yet been able to come to an agreement -- and we may end up having to write something on it -- is there is an audio-taped interview of Messrs. Cermele and Vigna, who were coconspirators and co-defendants, both of whom have pled guilty here, where they were interviewed by the Cheshire Police Department, and it's my

understanding that Koffsky and Mr. Schaffer are strongly considering trying to admit that as substantive evidence, that is, putting aside using it for impeachment purposes, but as substantive evidence. We don't think it would be admissible. We have been talking about bases of admissibility, so that way we can either come to an agreement or, if not, if we have to present something to Your Honor when we come to you, it's already focused on what the issues are, but that may be something that we will have to raise prior to the trial.

THE COURT: Can you give me a little bit more information?

MR. MAIMIN: Sure.

THE COURT: I take it that these two individuals were arrested, or they were about to be arrested, or they were questioned by a Connecticut police department?

MR. MAIMIN: They were questioned by the Connecticut police department during the investigation. This was before their arrest, and they came in, and they tried to justify the scheme as, this is why it's legal. This is why, you know, we are able to discharge the mortgages this way. You have to understand it's all about standing. All of the things that Your Honor has seen in these papers about -- about these supposed legal justifications for why it is that the Terra Foundation was simply able to discharge mortgages on its own.

And so they went in, and they basically pitched the police on this, and so there is no question this was a voluntary interview. This wasn't custodial or anything along those lines.

THE COURT: All right. So the question becomes: How does the audiotape come in?

MR. MAIMIN: That's my question as well, Your Honor. Like I said, it's our belief that it doesn't, but Mr. Koffsky has told me he thinks that it does, and that's why I am just teeing up that this may be an issue that we will raise. I don't know if Mr. Koffsky wants to add anything or if he wants to wait until we have any further discussions.

MR. KOFFSKY: Judge, at some point I think we should argue about the admissibility or the relevance of it. Some of the things the government's described with regard to the contents I would -- I would probably describe it a little differently. I think this was a whole-hearted justification for the bona fides of this mortgage elimination program that the Terra Foundation had developed. I believe -- I believe that the evidence will come in that, at least Attorney Vigna believed that it was justifiable and legal at the time he described it to the Cheshire Police Department. This was -- the Indictment alleges that this conspiracy started in 2011 and went through 2012. The statements that were made were made in May, smack in the middle of the conspiracy, by two coconspirators.

THE COURT: Can I ask you a question?

MR. KOFFSKY: Certainly, Your Honor. And just so the Court knows, I gave the Court a transcript in my binder of the entire exhibit, and I believe --

THE COURT: Is it fair to say that it's not a court statement?

MR. KOFFSKY: Oh, it's 74 minutes.

THE COURT: Seventy-four minutes. So it's not a quick statement. So what basis would you be introducing it for? It's not a sworn statement, is it?

MR. KOFFSKY: No. It's not a sworn statement. Nobody was under oath. Your Honor, as the Court knows, as the Court has already indicated, this is all about whether the defendant had a reasonable basis to believe --

THE COURT: I get it. The question becomes, though, you are saying that it should come in as direct evidence?

MR. KOFFSKY: I would suggest that it -- well, first of all, I think it's going to be coming in during the witnesses' cross-examination to describe the justification. I suggest that it comes in under -- I will argue that it comes in under a number of grounds. I have already had some lengthy discussions with the government on what I think the legal basis is.

THE COURT: So you are not seeking to introduce it on direct evidence?

MR. KOFFSKY: Oh, I think I am, on the defendant's direct case. I may use parts of it during the cross-examination of one of the government's witnesses. I may use it on my direct examination of Attorney Vigna -- Vigna?

THE COURT: Vigna.

MR. KOFFSKY: Vigna. If he complies with the subpoena and comes in and doesn't take the Fifth. It might come in during -- through the testimony of the detective, the Cheshire detective who took it, Detective Nastri. That's one. I would seek to limit -- and I will be prepared -- maybe not today -- to argue the justification for its admittance, Your Honor.

THE COURT: I can't wait.

MR. KOFFSKY: As the Court knows -- well --

THE COURT: I have one other question, and that is: Does the government intend to introduce evidence that Ms. Graham is a sovereign or evidence pertaining to sovereign citizenship? And if so, why that should be permitted?

MR. MAIMIN: Your Honor, the first answer to that is -- is how Your Honor phrases it, the answer is no simply because we think that sovereign citizenship is not a real thing. It's a fiction. Ms. Graham is a United States citizen, and there is no special law that absolves her or Bruce Lewis or anybody else from the laws by the virtue of their claim that they're sovereigns. But I think that the corollary to that is, that when the cooperators discuss their relationship with Ms. Graham and how Ms. Graham explained the scheme to them, part and parcel of the scheme was, as sovereigns, we are immune from the law. As sovereigns, we do not have to follow the law that others do.

THE COURT: Why is that relevant? Why can't the coconspirators discuss the scheme without discussion of sovereign concepts?

MR. MAIMIN: Well, one reason is because of this question of intent, which, as Your Honor has pointed out, is going to end up being the crux of this trial, which is there is a difference in intent between, I believe that the mortgage elimination scheme that I am engaging in is actually founded in law and is totally legit, and it's all good, versus: I believe it doesn't matter whether it's founded in law because I can never be prosecuted because I am a sovereign; and therefore, I am immune from the laws.

In the same way that, say, somebody with diplomatic immunity who parks illegally, he is still parked illegally, even if the parking ticket can never be enforced against him.

THE COURT: But there, there is an actual possibility that they may be immune as a matter of fact, right? I think -- I think foreign dignitaries are immune from those liabilities, right? So it is an acceptable legal concept. Here, the sovereign citizen -- citizenship concept, whatever you want to call it, philosophy, as you say -- is a myth.

MR. MAIMIN: I agree.

THE COURT: So why would we want to introduce that type of evidence which would only lead, I think, to confusion?

MR. MAIMIN: I think, again, because it's part of the story. We are certainly not emphasizing it, and we are not asking the Court for an instruction that she may be right that she is immune from the law.

THE COURT: So why can't you just say -- why can't you just -- assuming there is a discussion pertaining to principles that are unfounded, which is basically what this amounts to, right, that they are immune from liability, all right, why can't that just be presented in that fashion? You know, the belief is that she is immune from prosecution without getting into, you know, because she is a sovereign.

MR. MAIMIN: I think that part of the other reason is that in a lot of emails she refers to the idea that she is a sovereign and that Bruce Lewis is a sovereign, and so I think -- I understand what Your Honor is saying, just not using the word "sovereign" except that I think the jury would ask, so why is it

that the emails are referring to this word that nobody is uttering? "Sovereign."

THE COURT: Well, that comes back, that raises the other issue: Why shouldn't that be precluded from the emails?

MR. MAIMIN: Because these are her statements, and these are her statements saying --

THE COURT: With all due respect, anything that you introduce into evidence has to be relevant, right?

MR. MAIMIN: Yes.

THE COURT: All right. And even if the statement is made, right, it doesn't mean that all of the statements, the entire statement comes in if there is a basis for exclusion, all right? Here they are espousing some unfounded principle, right? And why shouldn't that be excluded if it's not relevant? It doesn't go to any -- any of the elements of the crime, right? It would not support a lack of intent, so it doesn't go toward the defense, so likewise, they can't present it. All right? So why should it come in?

MR. MAIMIN: Respectfully, I think it does go to a lack of intent because it's her saying, it's okay because I, personally, cannot be prosecuted for this because I am immune from the laws of these United States, and also it's essential to the story.

THE COURT: So why can't she say that as opposed to, I am immune because I am a sovereign citizen? Because now you get into this whole thing of what's a sovereign citizen, and you have to explain it away. All right? And the last thing I want the jury to hear is what is sovereign citizen is and believe that, conceivably, right, there is a permissible basis for

such belief, and that's the concern that you should have.

MR. MAIMIN: Your Honor, I think that if that's the concern, that can be cured by a single instruction that sovereign citizenship is not actually a legal basis.

THE COURT: It could also be accomplished by excluding it altogether. This way I don't even have to give that instruction, and the jury doesn't have to hear anything about it.

MR. MAIMIN: But the problem is that if when Jackie Graham -- when Jacqueline Graham emails somebody and says, this has to be signed by me and Bruce because we are the only two sovereigns right now in this group, then if you redact it -- I understand what you are saying, that would be one thing for testimony, but if you redact it, there is nothing in the redaction that says, "because we are generally immune from liability." They are using the word "sovereign," and we have to work with what -- how they -- the words that they use.

THE COURT: So now I would have to tell the jury that there is no legal concept as a sovereign citizen, and you have to explain to the jury what a sovereign is.

MR. MAIMIN: And the cooperator will say, this is what Jackie explained a sovereign is.

Again, we don't need to get into a legal debate in front of the jury because I think that we all agree. I suspect Mr. Koffsky would agree sovereign citizenship is not a real legal concept. It's a part of it. It's part of this scheme, part of the sham. But the fact of the matter is, that was part of the motivation for why Ms. Graham was doing this was she believed

that she was not subject to the laws of the United States. It was part of the sales pitch to other cooperators -- to other coconspirators. This is why this scheme will work. We have this method. It's called sovereign citizenship where the laws don't apply to us the way that they do to others. It's part of the -- because this explains, this helps to explain her pitch for -- for example, one of things that she constantly says, everything has to stay out of the courts. You can never let the courts find out. And the real reason, obviously, is if the courts find out, the courts are going to see that there is this crazy theory that, oh, I can just discharge somebody else's mortgage on my own. But the claim in the documents, the claim to the coconspirators in explaining how this works -- and remember, Ms. Graham -- there is going to be evidence that Ms. Graham helped create this whole scheme -- was because of this whole sovereign citizenship thing, that has to be done in private. The moment you involve the courts, you may undo some of your sovereign citizen benefits.

And so every step that they take is at least in part motivated by this nutty belief in the sovereign citizen movement, and to try to redact that would eventual -- would effectively be to pare this down to a case with very, very little evidence because so much of it is constructed in this fabulous construct of sovereign citizenship in the first place.

THE COURT: Anything you want to say?

MR. KOFFSKY: I would just follow up, I've just hitched my ride to the Court's wagon.

THE COURT: I have no wagon. I don't have --

MR. KOFFSKY: I think --

THE COURT: I only raise the issue, and sometimes I play Devil's advocate.

MR. KOFFSKY: I understand. I think it should be precluded. I think the mention of sovereignty should be precluded. I think you run into 403 problems where there is very little probativeness, and it's far too prejudicial. I think the government is going to go up there, and it's similar to some of our 404(b) arguments that this is nothing but propensity. They are not proving the fraud. They are proving that --

THE COURT: Actually, the argument -- their argument is that it is proof of the fraud because your client believes that she is immune from prosecution and can do whatever she wants and disregard the law.

MR. KOFFSKY: I have had a short time to look at a lot of evidence, but none of the evidence talks about that or very little of the evidence talks about that.

This is -- the case involves sending letters to banks with hundreds of questions that, if they are not answered, gives somebody the right to go into the bank and file a document that indicates that a mortgage is no longer effective. It doesn't talk at all about sovereignty. It doesn't talk at all about citizenship.

THE COURT: I mean, I didn't see all the evidence, but there are some references to "supreme law." There are some references to "sovereign," and the government's position is that it gives context to what -- why they were doing what they were doing, meaning that because they were this -- they were members of this group, right, they didn't have to follow the law.

MR. KOFFSKY: I would suggest that it's more likely the -- the evidence is more likely to demonstrate that there were meetings between mortgage brokers and lawyers talking about law that came out of New Jersey, talking about trial court decisions which justified these requests for information and that had nothing to do with the supreme law or *Gills* or anything to do with the sort of Erich von Daniken's book from 1980, right? I would suggest to the Court that sovereignty is going to have very little to do with this case, and we are going to demonstrate -- we are going to attempt to demonstrate that Ms. Graham had a good-faith basis to believe that this was a working program, and it was a justified program, and it wasn't justified because she had decided that she was like the Island of Belize, immune from prosecution. I think that is going to be a chimera. I think that's going to be a red herring on the part of the government.

THE COURT: Anything further?

MR. KOFFSKY: I just -- one, may I -- may I make one request, Your Honor?

THE COURT: You can make two requests. I am not going to limit you.

MR. KOFFSKY: Can I hold one for later? Like that last piece of gum, just in case.

Your Honor handed out a draft copy of the Court's instructions, and the first two paragraphs talk about the allegations against the defendant. May I request a third short paragraph that indicates that the defendant has pled not guilty --

THE COURT: Sure.

MR. KOFFSKY: -- to the charges?

THE COURT: Yes.

MR. MAIMIN: No objection.

THE COURT: Do you have a fax number for my office?

MR. KOFFSKY: 203. Yes, I do. Oh, your fax number. Absolutely, Your Honor.

THE COURT: Send me something as soon as possible, hopefully before the end of business today.

MR. KOFFSKY: I will, Your Honor. I just have a court matter in front of Judge Briccetti at 3:30 with Mr. Maimin, and as soon as I get back to the office, I will do it unless Mr. Schaffer can do it.

THE COURT: That's fine. I will take a fax from you or your colleague. All right.

Is there anything else?

MR. MAIMIN: Just again, with these, and we will look through them, but putting aside the personal hurt that I feel that after all of these years my name is still misspelled.

THE COURT: All right. I take no credit for that. I would say this: If there is any additions that you want, this was a draft. I wanted to give you something so that you at least have a sense for the direction we were going, but if you have any more additions or modifications, you know, certainly, you should submit that to me as soon as possible, you know, today.

MR. MAIMIN: Absolutely. And I was just going to say, some of the potential witnesses, you know, we have, for example, Google records custodian and Federal Deposit Insurance Corporation records custodians as we now know are going to disappear,

there are others who may, depending on our further discussions, that are possible stipulations. So we will let Your Honor know as soon as --

THE COURT: You should put your spelling of your last name on the record so that it's official now.

MR. MAIMIN: I don't know. I have been doing this for so many years, and nobody has ever spelled it right. It would feel weird to see it.

THE DEPUTY CLERK: M-A-I-M-I-N.

THE COURT: So hopefully you will get it right.

MR. MAIMIN: Yes, but that's now how it's spelled in there.

THE COURT: Spell it.

MR. MAIMIN: M as in Mary, A as in apple, I as in India, M as in Mary, I as in India, N as in Nancy. It's the second-to-last letter that everybody has gotten wrong since the day I was born.

THE COURT: M-A-I-M-I-N?

MR. MAIMIN: Yes, sir.

THE COURT: Okay. See, now it's official. It's on the record.

MR. MAIMIN: I feel special.

THE COURT: All right. So please get any modifications or any additions that you want. I will review them, and my office will try and get this all done tonight so that you guys will be ready to go first thing Monday morning.

MR. MAIMIN: Absolutely. And in light -- just so the Court knows, in light of the streamlining, we have been talking to Mr. Koffsky about how long he will take on some cross-examinations. We think there

is a real chance that we will finish up the government's case, if not at the end of this coming week, at the beginning of the following week. There's no promises, but hope against hope, Your Honor.

THE COURT: So we are hoping one week at best, five days, more or less?

MR. MAIMIN: For the government, and then obviously Mr. Koffsky.

THE COURT: I think -- I am not sure if we discussed this, but I was discussing this with Gina -- so we will do jury selection on Monday. Hopefully, we will complete jury selection that day. If we still have time, you should be prepared to give opening statements, all right? And at the very least have your witnesses available for Tuesday morning.

MR. MAIMIN: Absolutely, Your Honor.

THE COURT: Is that okay?

MR. KOFFSKY: Yes, Your Honor.

MR. MAIMIN: And just logistically, when is Your Honor's trial day, and do you sit on Fridays?

THE COURT: I sit Monday through Thursdays. Fridays we typically have -- we put everything on the calendars to Fridays, so we may not sit on a Friday. At least we won't sit the first Friday.

However, if we are able to get all of the evidence in, and the only thing that's left to be done is closings and summations and charge, that I will do on a Friday.

MR. MAIMIN: Got you.

THE COURT: Provided I have enough time on the calendar for that.

MR. MAIMIN: And what time do we start, and what time do you like the lawyers here?

THE COURT: I start at 9:30. You should try and be here before me.

MR. MAIMIN: 9:29 and a half.

THE COURT: Just so that we can get started sooner rather than later. That's all.

MR. MAIMIN: Absolutely. That's fine.

MR. KOFFSKY: And I will ask Gina about this, Your Honor, with the Court's permission. Does the Court have a room for Attorney Schaffer and I that -- you said a war room. It will be a short war, but just a war room?

THE COURT: I think we do.

MR. MAIMIN: We would like a peace room, Your Honor.

THE COURT: I am all for that. All right. Anything else?

MR. MAIMIN: No, Your Honor.

MR. KOFFSKY: Thank you, Your Honor.

THE COURT: All right. Thank you.

THE DEPUTY CLERK: Court in recess.

(Time noted 12:17 p.m.)

Appendix F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 16-cr-00786-02

UNITED STATES OF AMERICA,

—vs.—

JACQUELINE GRAHAM,

Defendant.

United States Courthouse
White Plains, New York

April 10, 2019
11:58 a.m.

** PARTIALLY SEALED **

B e f o r e :

HONORABLE NELSON S. ROMAN

District Judge

A P P E A R A N C E S:

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
MICHAEL MAIMIN
JAMES McMAHON
DAVID FELTON
Assistant United States Attorneys

MICHAEL F. KEESEE
Attorney for Defendant

KOFFSKY & FELSEN, LLC
BRUCE D. KOFFSKY
Attorney for Defendant

PROCEEDINGS

THE DEPUTY CLERK: All rise.

THE COURT: Please be seated, everyone.

THE DEPUTY CLERK: United States of America versus Graham. Would counsel please state their appearance for the record, beginning with the government?

MR. MAIMAN: Michael Maiman, James McMahon and David Felton for the government. Good morning, Your Honor.

THE COURT: Good morning to you all. You can remain seated throughout this proceeding.

MR. KEESEE: Good morning, Your Honor. Michael Keesee, Port Chester, New York, for Jacqueline Graham, who is present in the courtroom.

THE COURT: All right. Good morning to you and to your client. You can remain seated throughout this proceeding.

All right. I scheduled this matter for a conference because this matter is scheduled for trial somewhat soon, relatively soon, number one; and number two, I know that I have excused Ms. Graham's appearance at a lot of these conferences because she is located in California if I am not mistaken.

MR. KEESEE: Correct, Your Honor.

THE COURT: All right. However, I wanted to make sure that Ms. Graham was aware of the posture that we are in. Just going over things, the trial is scheduled to begin with jury selection on May 6th, and we have a final pretrial conference on May 3rd.

In addition to that, all right, it's my understanding that the government provided defense counsel with a plea offer, a plea agreement that's dated February 21st, 2019; and I wanted to be sure that Ms. Graham is not only aware of the fact that we are proceeding to trial, right, but that that plea offer was actually conveyed by the government and that she has received a copy of that plea agreement.

Has she received a copy of that plea agreement?

MR. KEESEE: Your Honor, I have discussed the contents with her. I have emailed her the substance of it. I didn't send the plea agreement itself.

THE COURT: Okay. Do you have a copy of that plea agreement here today in court?

MR. MAIMAN: Yes. We have provided Mr. Keesee with a copy.

THE COURT: I am going to ask you to actually provide her with a copy of that plea agreement, and I want to ask her and you to go over that plea agreement, to review it; and then I am going to ask --

I am going ask you some questions with respect to that plea agreement to make sure that she has thoroughly reviewed that plea agreement and understands the nature of that plea agreement. All right. I don't want this later to come back to haunt us, so to speak. I don't want there to be a claim made that this plea offer was not conveyed to her, and that she didn't have an opportunity to review it and understand it; and that she has made a determination not to accept the plea offer and that we are, in fact, going to trial. All right? So I am going to give you some time to review it with her.

MR. KEESEE: Of course I will do that, Your Honor, abide by your instructions. Should I remain seated? I want to address the Court.

THE COURT: You can remain seated. If you want to -- if you want to address me, you can address me, but I want to make sure that she has -- that she has an opportunity to review the actual plea agreement; that if she has any questions about the plea agreement, that those questions should be asked of you, and that you should explain them, you know, explain anything that she may have any questions about.

I just want her to make sure, you know, given that I have allowed her to stay away, that she may not -- that that may have been an impediment to her, being aware of any plea offers or any discussions that may have taken place; that it is no longer an impediment. All right. And so that -- so she has a full understanding of the offer that has been made, and she has made a knowing and intelligent decision to proceed to trial if that's what she wants to do; and if she wants to go to trial, I have no problems with that. I just want to make sure that those decisions are

made intelligently and knowingly, and that there is no basis for her later coming before the Court and saying that she was not aware that a plea offer was made and the consequences of it, of either accepting or denying the plea offer.

MR. KEESEE: Yes, Your Honor. Certainly accomplished that.

THE COURT: All right. So I am going to -- we will take a break. I will ask the government to step out. This way you don't have to leave. You can have those discussions, and you can take whatever amount of time you need. All right. So we will recess for about 10, 15 minutes.

MR. KEESEE: And I will be glad to do that, Judge, but there will be another matter I wish to bring to your attention.

THE COURT: Okay. So you can go over the plea agreement with her, and then we will take -- we will address whatever issues we may need to address.

MR. MAIMAN: So that we don't come in in the middle of this, we will be in the atrium right outside if somebody can let us know.

THE COURT: Okay. Fine.

MR. MAIMAN: Thank you, Your Honor.

(Recess)

THE DEPUTY CLERK: All rise.

THE COURT: Please be seated. All right. We are back on the record. Mr. Keesee, we are back on the record. I just want to make sure that you had an opportunity to discuss with your client, Ms. Graham, the plea offer that was made by the government, and

that plea offer is contained in the document that's dated February 21st, 2019.

MR. KEESEE: Yes, I have, Your Honor.

THE COURT: All right. And she received a copy of that plea offer?

MR. KEESEE: Well, we have one now, Your Honor.

THE COURT: All right. But during your discussions with her, you gave her a copy of the plea offer?

MR. KEESEE: Previously, no.

THE COURT: No. When you had the discussions today --

MR. KEESEE: Today?

THE COURT: -- when we recessed --

MR. KEESEE: Yes.

THE COURT: -- for the purpose of you going over the plea offer with her, correct?

MR. KEESEE: Correct. I misunderstood you, Judge.

THE COURT: All right. So you -- you went over the plea offer with her. She -- I am not sure if she had any questions, but any questions that she may have had, they were addressed by you?

MR. KEESEE: Yes, Your Honor. But I would like to say that she indicated that certainly she understands the broad outline of the plea agreement. There is the guideline levels, offense levels, there is a criminal history category, and the fact that either party can -- we are not bound by those guidelines, but she indicated to me that there were matters in there she

would like to research, some of the statutes, some of the section numbers she is not totally familiar with.

THE COURT: Okay. Did you go over those sections with her?

MR. KEESEE: I think it's a little hard to go over those, Judge. In other words, if like it's 2B1.1, it's an offense level of seven. Okay. That's what we have set forth in the plea agreement. There are add-ons based on loss and victims and things like that. She indicated she would like to research those further. I don't know exactly what that would entail. I am not trying to not answer your question.

THE COURT: I understand. I just want to make sure that she had an opportunity to review the plea agreement, the plea offer. All right. And that she discussed it with you, and that you went over, as best you could, you went over all of the issues that she had questions about.

MR. KEESEE: Yes.

THE COURT: Okay. All right. Are you suggesting that based on your conversation with her, that she may want additional time to mull over this plea offer?

MR. KEESEE: May I have a moment, please?

THE COURT: Yes.

MR. KEESEE: The answer is yes, Your Honor.

THE COURT: Okay. Because we are on the eve of trial. We are -- and understand this: I intend to stick to that trial schedule that I already set. We have had -- we also have -- the government has already filed a motion in limine. So the only -- there is nothing that should prevent us from proceeding to trial. So if you want more time to mull over this plea offer, that's fine.

Is the government still willing to keep the plea offer open?

MR. MAIMAN: Your Honor, I think that would help for me -- for Ms. Graham to hear our position on where we are in terms of the negotiations and procedure.

First of all, that plea offer has technically expired. I am not saying that we wouldn't remake this or discuss another possible plea offer. I have spoken with Mr. Keesee about this. It's our position that we don't bid against ourselves. That is, we don't keep on making new plea offers.

If Mr. Keesee comes to us and says, my client would like to talk, through me, about the possibility of negotiating a plea, we are happy to enter into those discussions. Ms. Graham should understand the closer we get to trial, the less flexible we are likely to be to the extent that we have flexibility in a plea negotiation.

So if Ms. Graham would like to enter into negotiations, we are always open to that; but the longer she waits, the less likely it is that it will benefit her, and I want her to hear that so that she is not caught off guard by waiting a couple of weeks.

THE COURT: I understand that, but my question is as to right now. There is a plea offer that was presented, I take it back in February. The only question I have right now is -- and given that Ms. Graham is here -- whether or not that plea offer is still available or whether or not it's been taken off the table.

MR. MAIMAN: It has been taken off the table, but we would probably be able to get it reauthorized if she moved on it. But right now, it's technically

expired. But, again, I am not saying that we wouldn't reoffer it, but we would need to know quickly what's going on.

THE COURT: So you have considered the possibility of re-offering this plea offer provided that she gets back to you sooner rather than later?

MR. MAIMAN: That's right. Or even discussing alternative ways of structuring the plea, but again, the longer she waits, the less likely it is that it will work out.

THE COURT: Okay. Because I didn't want there to be an impediment based on the fact that Ms. Graham has chosen -- and this has been her own doing -- has chosen to remain in California during the pendency of this proceeding. All right. She made that request based, in part, because she had some medical issues that she said she needed to address, and that she couldn't do that while she was in New York, and so she wanted to remain in California close to her doctors. All right.

But she made -- she, not the Court, not the defense counsel -- made the choice to remain in California and to allow her attorney to appear at any and all conferences without the benefit of her being present. That was the decision that you, Ms. Graham, made. Not the Court, and not defense counsel.

All right? In addition, I want the record to be clear, that you have been given an opportunity to review the plea offer that was conveyed. All right. The government has, to some extent, indicated that they are willing to have discussions about possibly revisiting that plea offer and/or perhaps having further discussions regarding the possible plea. All right.

The Court does not participate in any of those discussions. Those discussions are made between the government and defense counsel and the defendant. I do not participate in them, nor does any other court get involved in that.

But I do want to stress the fact that we are ready for trial. This case will proceed to trial in May. It will not be delayed for any reason whatsoever, and I want to also stress that the expectation is, Ms. Graham, that you will be here from start to finish. Once the trial starts, all right, the minute the pretrial conference begins, you will be present. Expect to be present each and every day. All right? You should also be aware that there's already been motions in limine filed by the government. All right. And I have already received opposition from your attorney, and I am prepared to address those motions today.

MR. KEESEE: Your Honor, there is one other matter that I alluded to earlier --

THE COURT: Okay.

MR. KEESEE: -- and it's a significant one.

I believe that we have a situation here where we really have no attorney-client relationship. About the only thing that she and I agree on is that she'd be better off with a different lawyer. I don't want to be too specific, unless you need more, but, Your Honor --

THE COURT: Has she conveyed to you that she no longer has confidence in your representation?

MR. KEESEE: Absolutely. Yes, Your Honor.

MR. MAIMAN: Your Honor, would you like us to step out?

THE COURT: Yes. You can step out at this time.

MR. MAIMAN: Thank you.

(Government attorneys leave the courtroom)

(The following portion of the transcript is under seal)

SEALED PROCEEDINGS

THE COURT: Before we proceed, this portion of the proceedings shall be under seal, and with the exception of Mr. Keesee and/or Ms. Graham, they should be entitled to obtain a copy of these minutes. Okay. The government's attorneys are no longer in the courtroom.

MR. KEESEE: Your Honor, throughout the case Ms. Graham has certainly not had any confidence in me or my ability to defend her. She has received advice from other people. She feels that that's the way this case should be going. I don't always agree with that, but it's just created a tremendous amount of stress for her, and frankly for me, which you don't usually worry too much about, but this case is a little unusual in that regard. I'm just not sure we are ever going to be able to get onto the same page, so to speak.

And we had a discussion today, and the situation just seems like it's not going to be resolved.

THE COURT: All right. So, Ms. Graham, you no longer have confidence in your attorney?

THE DEFENDANT: No, I don't. And I made this --

THE REPORTER: I need the mic in front of her.

THE DEFENDANT: This right here is February 21st. The first time I have ever heard of this is end of

March via email. So why did it take almost 30 days for me -- actually, it was about --

THE COURT: Well, Mr. Keesee represented that he had -- he attempted to have discussions with you and that you --

THE DEFENDANT: I had --

THE COURT: Ms. Graham, do not interrupt me.

THE DEFENDANT: Sorry.

THE COURT: And that he communicated with you that there was a plea offer and gave you a summary of the plea offer. Is that what you represented to the Court?

MR. KEESEE: I did, Judge, but I don't know what date that was; but all along Ms. Graham has been asserting her innocence, and I knew that this plea offer would not be received well on her part.

THE COURT: The question is: Did you convey the plea offer to her?

MR. KEESEE: In March.

THE COURT: Okay. Well, this is where we are. You no longer have any confidence in Mr. Keesee?

THE DEFENDANT: No. I do not, Your Honor, because there is a lot more to this.

THE COURT: Okay.

THE DEFENDANT: He is telling his side, but my side has not been heard.

THE COURT: Okay. But all I am asking is: You no longer have confidence in him?

THE DEFENDANT: Absolutely not. No.

THE COURT: There's been a lack of communication? You believe a breakdown of communication?

THE DEFENDANT: He hasn't even discussed the case with me. How am I supposed to have a defense when I don't --

THE COURT: With all due respect, Ms. Graham, you have decided, you have decided to excuse yourself from all the court proceedings that have been taking place. You could have chosen to be present, but you decided not to be present. That was your choice.

THE DEFENDANT: Okay. Can I explain?

THE COURT: Okay. No. All right?

So the only question is now: This case is ready for trial. I am going to -- I am going to have new counsel appointed, but there will be no delay. No delay whatsoever.

THE DEFENDANT: Are you aware I only received --

THE COURT: Ma'am, there will be no delay. I am appointing new counsel, and I am going to have CJA counsel appointed. I believe Mr. Koffsky was --

THE DEPUTY CLERK: Yes, Judge. Bruce Koffsky.

THE COURT: Who's scheduled to be CJA counsel today?

Mr. Keesee, are you prepared to transfer your file?

MR. KEESEE: Yes, Your Honor. I could have it by tomorrow in Mr. Koffsky's office. I believe he is in Stamford, but I could take it there.

THE COURT: Okay. Okay. All right. As soon as Mr. Koffsky comes in, we will -- we will relieve you, Mr. Keesee.

And Mr. Koffsky will be appointed to represent you, Ms. Graham. The government seems somewhat amenable to possibly having further plea discussions. You can do that through Mr. Koffsky.

THE DEFENDANT: All right.

THE COURT: All right?

MR. KEESEE: Judge, the government also indicated today they would be amenable to doing a reverse proffer, and my client has indicated that she would participate and listen to what they have to say. So --

THE COURT: All right. You can have that discussion with Mr. Koffsky.

MR. KEESEE: Yes.

(Pause)

(End of sealed portion of transcript)

PROCEEDINGS

(Government attorneys are present, as well as Mr. Bruce Koffsky)

THE COURT: All right. We are back on the record. All right.

Given the discussion that I have had with Ms. Graham and with Mr. Keesee, I am going to relieve Mr. Keesee from further representing Ms. Graham at this time; and I am going to appoint Mr. Bruce Koffsky as new counsel, substitute counsel.

My understanding, Mr. Koffsky, is that Mr. Keesee is prepared to turn over his file as early as tomorrow. You should be aware that there is a motion before the Court, and since you are newly appointed, Mr. Keesee has responded to the motion, but I am not sure if you want -- you want to take a look at that and see whether or not you want to either adopt his response and/or supplement his response or perhaps assert new arguments. So I am going to give you that opportunity.

MR. KOFFSKY: Thank you, Your Honor.

THE COURT: The only question becomes how much time do you think you may need? It's a motion in limine dealing with certain anticipated evidence that they believe -- that the government believes the defendant may proffer and whether or not it should be precluded; and there is another portion of that motion dealing with acts which occurred after the arrest of Ms. Graham which the government believes is relevant -- relevant conduct. She was not charged with the additional acts, I believe, but they believe that it's relevant nonetheless.

Do you think you could respond -- because typically I give about a week on the motion in limine.

MR. KOFFSKY: Your Honor, if I have an opportunity to talk to Mr. Keesee in the next day or two, would the Court give me ten days to sort of the middle to end of next week?

THE COURT: All right. So I will give you ten days to either respond and/or adopt the submission or you can supplement the submission. I was prepared to rule today, but I -- I understand that you are new trial counsel, in essence, because this case is ready for trial or at least was scheduled for trial. We had a

tentative trial date of May 3rd. We were supposed to begin the jury selection -- I am sorry -- May 6th. But there is a pretrial conference, final pretrial conference scheduled for May 3rd. There may be a possibility that I have to adjust the schedule now.

MR. KOFFSKY: Yes. I will not be available, Your Honor.

THE COURT: All right. So that -- all right. I will have to look in my calendar and see what weeks I can recalendar this for, but I suspect, based on my preliminary discussions with my courtroom deputy, that we will be able to proceed to trial in June. We are looking at -- we are looking at beginning June 10th. So I want to make something very clear, though. This case will go to trial. If -- and it's my understanding that there was a plea offer that was conveyed. I am not sure. The government hasn't necessarily -- has indicated that the plea -- while Ms. Graham's opportunity to accept the plea has already -- the timeframe within which to accept the plea has expired, the government has indicated that they are amenable to opening up further plea discussions. They are not foreclosing that possibility. Am I speaking --

MR. MAIMAN: That's correct, Your Honor.

THE COURT: -- correctly? That's number one.

The plea offer -- a copy of the plea offer has been given to Ms. Graham. It's my understanding that Mr. Keesee went over the plea offer with Ms. Graham. I take it you'd probably want an opportunity to review the plea offer as well and discuss it with her. And, you know, I anticipate that we will be able to schedule this, the new trial date to commence on June 10th. All right. And I believe there's also been

some discussions, Mr. Keesee or -- you will have those discussions with Mr. Koffsky about one or two matters which you put on the record that we discussed outside of the government's presence.

MR. KEESEE: Yes, Your Honor.

THE COURT: All right.

MR. KOFFSKY: Your Honor, may just ask: Has the government estimated how long their trial is expected to go?

THE COURT: They are indicating two weeks, approximately. So I anticipate -- they are saying a week and a half, so I am anticipating this will take slightly more than two weeks.

MR. KOFFSKY: As I indicated, I am engaged the first two weeks in July, Your Honor. I believe starting June 29th. I just wanted the Court to take that into consideration.

THE COURT: And how long will you be on trial?

MR. KOFFSKY: Two weeks, Your Honor.

THE COURT: Let me ask you this: If I adjust my calendars, would everyone be available the week before June 3rd?

MR. MAIMAN: We would, Your Honor.

MR. KOFFSKY: Yes, Your Honor.

THE COURT: You would be available?

MR. KOFFSKY: Yes, Your Honor.

THE COURT: All right. So I want this to be clear, Ms. Graham; that there is a possibility, while the current trial calendar has been adjusted, and there is a possibility that this case will go to -- start trial the first week in June. All right? I'll have to speak to my

courtroom deputy and see if we can make some adjustments to my schedule. All right.

Also, given that we are so close to a trial date, Ms. Graham, I want this to be clear. It's incumbent upon you to communicate with Mr. Koffsky, your new attorney. He should not have to chase you down. All right?

And I want to make it clear that you have chosen to remain in California throughout the pendency of this matter because you represented to the Court that you had medical issues and you needed to be close to your doctor, and it was on that basis, on that representation that the Court allowed you to remain in California. However, it would behoove you to adjust your schedule so that you become much more accessible to Mr. Koffsky so that he can prepare an adequate defense to your case. All right. But that's on you, not on me. All right.

Mr. Koffsky is located here in Westchester County, am I correct?

MR. KOFFSKY: Connecticut.

THE COURT: Connecticut. All right. So it's incumbent upon you to make yourself available, and it's you who is choosing to remain in California.

All right. So in ten days you will either submit new opposition or you will inform the Court whether or not you are going to adopt or modify some of the arguments that Mr. Keesee took in response to the motion in limine.

MR. KOFFSKY: Yes, Your Honor.

THE COURT: All right. I would also ask that in the event you wanted to make a motion in limine, you make that motion soon thereafter.

MR. KOFFSKY: Certainly, Your Honor.

THE COURT: Is there anything further?

MR. MAIMAN: Just a few small matters. One is because I know that Mr. Koffsky's main offices are in Connecticut, we would have no objection to Ms. Graham's bail being modified to allow her to travel to Connecticut for the purposes of consulting with counsel.

THE COURT: I will grant that application.

MR. MAIMAN: And second of all, there were a number of deadlines that were tied to the original trial date. I would just ask that when Your Honor normally orders a new trial date, that we get a new schedule regarding all of those deadlines; and if you don't have them, obviously, I will be happy to send them to your courtroom deputy.

THE COURT: You can send it to us, but we do have a copy.

MR. MAIMAN: Okay.

THE COURT: I think we are the ones who set the schedule.

MR. MAIMAN: Absolutely.

And it may make sense under the new deadlines, so that Mr. Koffsky isn't unnecessarily under the gun and in case there are any additional motions that may come up after our conversations with Mr. Koffsky and to set up a supplemental motions in limine deadline schedule.

THE COURT: Okay.

MR. MAIMAN: Thank you.

THE COURT: All right. Ms. Graham, the minute I set the trial schedule, all right, I am going to ask that you return to New York several days before the trial is scheduled to begin. I do not want you coming into court and making representations that you got here the day before trial started and so that you haven't had an opportunity to consult with your attorney. All right. I am directing you to be in New York, or at least in Westchester County, several days before the trial is scheduled to begin so that in the event Mr. Koffsky has any questions or any further discussions that he has to have with you, that those discussions take place before the trial and jury selection commences and not the day of. All right.

And again, it's incumbent upon you to stay in contact with Mr. Koffsky and to make yourself accessible to him. Do not come back and say because you were in California, that you didn't have enough time to communicate with him or to get in contact with him because it is you who are choosing to remain in California. Do you understand me?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Is there anything further?

MR. MAIMAN: Yes, Your Honor. We would ask that time be excluded through June 3rd, 2019, and we will submit an additional application if that ends up not being the final trial date. We believe that the interests of justice in the adjournment through June 3rd outweigh the interest of the defendant and the public in a speedy trial. Among other things, it will allow her new counsel to meet with her to learn about the case, to review discovery, to prepare motions, and prepare for trial that he literally inherited today.

THE COURT: All right. I believe that such time period is acceptable to allow defense counsel an opportunity to review all of the discovery materials, to have consultations with his client, and to prepare for trial. All right. So I am excluding this time period.

Is there anything further?

MR. MAIMAN: None from the government.

MR. KEESEE: Your Honor, just one brief thing. I think previously the Court and perhaps the Pretrial had given permission to Ms. Graham to be in Pennsylvania. She has family there, and I just thought we should mention it now just in terms of coming back here pursuant to your order, she may come back to Pennsylvania as a staging area, so to speak.

THE COURT: I will allow her to go to Pennsylvania for that purpose.

MR. KEESEE: Thank you, Your Honor.

THE COURT: All right. So Westchester, Connecticut, Pennsylvania, she can -- she can travel to and from those areas and New York, obviously.

Anything else?

MR. KEESEE: Nothing further, Your Honor.

MR. KOFFSKY: Thank you for the appointment, Your Honor. Nothing from me.

THE COURT: All right. So within the next couple of days or so I will try and work out, see what makes sense so that I can put this -- give you an actual date for when the final pretrial conferences are going to take place and when the trial is actually going to start. It may be I have to make some other adjustments, all right, but my hope is to try the case.

Obviously, if it can't be done in May because Mr. Koffsky is not available, should that change, I ask that you inform the Court.

MR. KOFFSKY: Certainly, Your Honor.

THE COURT: All right? But I anticipate we will be able to start in June. There being nothing further, this matter is adjourned.

MR. MAIMAN: I assume both parties are relieved from all other schedules until the new schedule is commenced?

THE COURT: Yes.

MR. KEESEE: Thank you, Your Honor.

THE DEPUTY CLERK: Court in recess.

(Time noted: 1:07 p.m.)

Appendix G

[LETTERHEAD]

U.S. Department of Justice

United States Attorney
Southern District of New York

United States District Courthouse
300 Quarropas Street
White Plains, New York 10601

April 2, 2019

By ECF
The Honorable Nelson S. Román
United States District Judge
Southern District of New York
300 Quarropas Street
White Plains, New York 10601

Re: *United States v. Jacqueline Graham*, 16 cr. 786 (NSR)

Dear Judge Román:

The Government respectfully requests that this Court schedule a conference at its earliest convenience—giving defendant Jacqueline Graham sufficient time to travel to White Plains from California—in order to allocute Graham on whether she received, understood, and discussed with her attorney a plea offer made by the Government.

By way of background, on February 22, 2019, the Government provided Graham's counsel—Michael Keesee, Esq.—with a written plea offer. Graham

never responded, indicating that she did or did not wish to accept that plea offer. We have spoken with Mr. Keesee; while we did not ask him to reveal any attorney-client communications, after our conversations, we are concerned that Graham may not have fully understood the Government's plea offer.

A defendant is entitled to the effective assistance of counsel in connection with plea negotiations, because one of the basic duties of a defense attorney is to provide clients with the benefit of professional advice on whether to plead guilty. *See Lafler v. Cooper*, 566 U.S. 156, 162–63 (2012); *Purdy v. United States*, 208 F.3d 41, 44–45 (2d Cir. 2000). "As part of this advice, counsel must communicate to the defendant the terms of the plea offer, and should usually inform the defendant of the strengths and weaknesses of the case against him, as well as the alternative sentences to which he will most likely be exposed." *Purdy*, 208 F.3d at 45; *accord Missouri v. Frye*, 566 U.S. 134, 145 (2012) ("defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused"). An attorney's failure to communicate a plea offer to his client, or to advise his client adequately about the decision to plead guilty, may constitute constitutionally deficient performance. *See*, *e.g.*, *Cullen v. United States*, 194 F.3d 401, 404 (1999); *United States v. Gordon*, 156 F.3d 376, 380 (2d Cir. 1998); *Boria v. Keane*, 99 F.3d 492, 496-97 (2d Cir. 1996). To establish a Sixth Amendment violation, the defendant must establish that his attorney in fact failed to communicate a plea offer, or failed to provide objectively reasonable advice about the decision to

plead guilty. *Gordon*, 156 F.3d at 380; *Boria*, 99 F.3d at 496-98.[1]

In light of a defendant's rights to effective counsel in plea negotiations, a frequent practice of courts—and regular request of the Government's—is to allocute a defendant prior to trial about whether she received, understood, discussed with her counsel, and rejected any offers made by the Government.

The Government has no reason to believe that Mr. Keesee did not effectively communicate the Government's offer to Graham. However, in light of the facts that: (1) Graham never formally accepted or rejected the offer, or, for that matter, otherwise discussed the offer with the Government; (2) the offer expired nearly one month ago; (3) Graham is living, on bail, in California, and therefore does not have the advantage of sitting down with Mr. Keesee in person to discuss offers; (4) as the trial approaches, any plea offers by the Government will likely be less advantageous to Graham than its February 22, 2019, offer; (5) the Government will have to invest

---

[1] While it is clear that this Court may not involve itself in plea negotiations, *see*, *e.g.*, Fed. R. Crim. P. 11(c)(1) ("An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. *The court must not participate in these discussions.*" (emphasis added)); *United States v. Davila*, 569 U.S. 597 (2013) (reinforcing Rule 11(c)(1)'s prohibition on judicial involvement in plea discussions), the Government is not asking this Court to get involved in those negotiations in any way, but rather to ensure that Graham is communicating with her attorney in a way that gives her the potential benefit of those negotiations. Similarly, the Government is not asking the Court to opine on whether it would be advisable for Graham to accept or reject the plea offer—needless to say, that would be impermissible interjection into the negotiations themselves—but simply to ensure that Graham is making her decisions in a fully informed manner.

significant time and effort into preparing for trial; (6) the Court will have to invest significant time and effort into preparing for trial, as well as trying the case itself; and (7) Mr. Keesee will have to invest significant time and effort into preparing for trial, it is advisable to allocute Graham at the Court's earliest convenience in order to ensure that Graham fully understood the plea offer and, if she intended to reject it, did so with a full understanding of the consequences of such a rejection. If this Court were to wait for the final pretrial conference or the morning of jury selection for such an allocution, it would run the risk of having to hold a hearing if Graham asserted that she did not fully understand the offer, and the Government declined to provide Graham with the same offer. Such a hearing would likely delay the trial and might render all of the Court's, Government's, and Mr. Keesee's work and preparation for naught.

Graham lives in California. Accordingly, the Government respectfully requests that the Court schedule a conference at its earliest convenience to allocute Graham, giving Graham at least one business day's notice to arrange for a flight to the White Plains area. (Needless to say—and particularly in light of the fact that one of the reasons for concern in this matter is that Graham has been unable to meet with Mr. Keesee in person—it would be essential that Graham, who has been excused from personal appearance at a series of prior conferences, appear in person at this conference). This would also give Graham time to meet with Mr. Keesee prior to such a conference.

I have reached out to Mr. Keesee by telephone, but have not yet had a chance to talk with him to ask if he consents to this request.

Please do not hesitate to contact me with any questions or concerns.

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney

By: /s/ David Felton
David Felton
Michael D. Maimin
James F. McMahon
Assistant United States Attorneys
Tel: (914) 933-1908 / 1952 / 1936

cc: Michael Keesee, Esq.