APPENDIX

APPENDIX A

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

July 14, 2023

Before

DAVID F. HAMILTON, *Circuit Judge*
CANDACE JACKSON-AKIWUMI, *Circuit Judge*
JOHN Z. LEE, *Circuit Judge*

No. 21-2986

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JAMES E. SNYDER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 2:16-cr-00160-MFK-2
Matthew F. Kennelly, *Judge*.

O R D E R

On consideration of defendant James E. Snyder's petition for panel rehearing and rehearing en banc, filed June 29, 2023, no judge in active service has requested a vote on the petition for rehearing en banc, and all judges on the original panel have voted to deny the petition for panel rehearing.[*]

[*] Circuit Judge Thomas L. Kirsch II did not participate in the consideration of this petition for rehearing en banc.

Accordingly, the petition for panel rehearing and rehearing en banc filed by defendant James E. Snyder is DENIED.

APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

No. 21-2986
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES E. SNYDER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 2:16-cr-00160-MFK-2 — **Matthew F. Kennelly**, *Judge*.[*]

ARGUED JANUARY 18, 2023 — DECIDED JUNE 15, 2023

Before HAMILTON, JACKSON-AKIWUMI, and LEE, *Circuit Judges*.

HAMILTON, *Circuit Judge*. Appellant James Snyder is a former mayor of Portage, Indiana. He was convicted of federal funds bribery in violation of 18 U.S.C. § 666(a)(1)(B) for soliciting and accepting $13,000 in connection with the city's purchases of garbage trucks. Snyder was also convicted of obstructing the administration of federal revenue laws in violation of 26

[*] Of the Northern District of Illinois, sitting by designation.

U.S.C. § 7212(a) for concealing assets and income from the IRS. Snyder was sentenced to 21 months in prison and one year of supervised release. Snyder has appealed, challenging his convictions on several grounds. We affirm.

I. *Factual and Procedural History*

A. *Purchases of Garbage Trucks by the City*

We begin with a summary of the facts, adding more details below as relevant for each of Snyder's challenges. Snyder was elected mayor of Portage, Indiana and took office in January 2012. In December 2012 and November 2013, his administration announced that it would purchase garbage trucks for the city through public bidding. Both contracts were awarded to Great Lakes Peterbilt (GLPB), a Portage truck dealer owned by two brothers, Robert and Stephen Buha. The mayor put his longtime friend Randy Reeder in charge of the bidding process. Reeder testified at trial that he drafted the bid specifications to favor GLPB. Evidence at trial also showed that Mayor Snyder was in frequent contact with the Buha brothers—but no other bidders—during the bidding process. Less than three weeks after the second contract was awarded, GLPB paid Snyder $13,000.

B. *Snyder's Dealings with the IRS*

Years before Snyder was elected mayor, his business, First Financial Trust Mortgage, failed to pay its payroll taxes in full for 2007, 2008, and 2009. The IRS then levied its bank accounts. Shortly after the levy, Snyder made an arrangement with another mortgage company, GVC Mortgage, whereby Snyder would manage and operate First Financial Trust Mortgage as a division of GVC Mortgage. Snyder sent invoices to GVC Mortgage for costs ostensibly incurred in operating First Financial

Trust Mortgage. But rather than having GVC Mortgage reimburse First Financial Trust Mortgage, Snyder had GVC Mortgage send reimbursements to a different company that Snyder had created called SRC Properties. If the reimbursement checks had been deposited into First Financial Trust Mortgage's bank account, they would have been subject to the IRS levy.

Snyder was also behind in paying his personal taxes, and in December 2010 and February 2011, the IRS levied his personal bank accounts. In trying to negotiate a settlement or installment plan with the IRS on his personal taxes, Snyder submitted three Form 433-As. In each, he purported to disclose fully his assets and liabilities under penalty of perjury. On all three forms, Snyder failed to report that he owned SRC Properties, and on two of the forms, he omitted his employment with GVC Mortgage.

C. *District Court Proceedings*

In November 2016, a federal grand jury indicted Snyder for federal funds bribery and obstructing the IRS. He went to trial in January and February 2019. The jury convicted on one count of federal funds bribery and one count of obstructing the IRS and acquitted Snyder on a separate bribery charge involving the city's towing contracts. Snyder then moved for a judgment of acquittal or a new trial on the counts of conviction. The district court denied the motion for acquittal but granted Snyder a new trial on the bribery charge. Snyder was retried on the bribery charge in March 2021, and the jury again returned a verdict of guilty.[1]

[1] Snyder's case was initially assigned to the late Judge Lozano before being reassigned in September 2017 to Judge Van Bokkelen,

Snyder now appeals, challenging decisions on motions to dismiss, jury instructions, and sufficiency of the evidence. We have organized Snyder's challenges into three parts. Part II addresses Snyder's argument that the district court erred in denying his motion to dismiss the indictment or disqualify the prosecution team after the government, pursuant to a search warrant, seized communications between Snyder and his attorney. Part III considers two challenges specific to the IRS obstruction count: his statute of limitations defense and the sufficiency of the evidence. Finally, in Part IV, we address speedy trial, jury instruction, and sufficiency-of-the-evidence challenges to Snyder's federal funds bribery conviction.

II. *Challenges to the Seizure of Snyder's Emails*

First, Snyder argues that the district court erred in denying his motion to dismiss the indictment or disqualify the prosecution team on the theory that the government intruded on his attorney-client relationship. Snyder contends that his Fourth and Sixth Amendment rights

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who presided over Snyder's first trial and who granted his motion for a new trial. In November 2020, the case was reassigned to Judge Kennelly of the Northern District of Illinois, sitting by designation, who presided over Snyder's second trial and imposed the sentence. Snyder's attorney from July 2014 until October 2017 had been Thomas L. Kirsch II, who took office on October 10, 2017 as United States Attorney for the prosecuting district, the Northern District of Indiana. On December 17, 2020, he took office as a United States Circuit Judge on the Seventh Circuit Court of Appeals. When Judge Kirsch took office as United States Attorney, responsibility for the prosecution shifted from the Northern District of Indiana to the Northern District of Illinois, and all personnel in the Northern District of Indiana were recused except for two trial attorneys and support staff who had already been working on the case. Attorneys for the Northern District of Illinois have also handled this appeal.

were violated when, pursuant to an overbroad warrant, the government seized communications between him and his attorney and then employed a filter process to screen for privileged communications without oversight by a court or defense counsel.

A. *Background*

In September 2015, the government obtained a search warrant for Snyder's personal and City of Portage email accounts. At that time, Snyder had not yet been indicted, but he knew he was under investigation and had retained counsel. The government was aware that Snyder had retained counsel, so it developed a filter process to prevent the prosecution team from receiving privileged communications among Snyder's emails seized under the warrant.

At an evidentiary hearing in the district court, the lead FBI agent testified that after he received data from Snyder's email providers, he arranged for the data to be copied, secured the original hard drive, and then sent the copied data to the FBI's Investigative Data Management System. The agent provided a list of search terms to identify potentially privileged communications, which the computer applied to "quarantine" roughly 8,600 of 109,000 emails. A team of FBI employees who were not otherwise involved in Snyder's case then examined the quarantined documents. Those employees were not attorneys but were instructed on criteria for privileged attorney client communications and were advised to err on the side of caution. Of the roughly 8,600 emails sent to the team, they identified 900 as potentially privileged. Those 900 emails were then sent to an Assistant U.S. Attorney for a final review. The reviewing attorney worked in the same office as the prosecution team but was not otherwise involved in

Snyder's case. She identified roughly 300 emails as privileged, which were not provided to the prosecution team.

Snyder was indicted in November 2016. In February 2018, he moved to dismiss the indictment, or, in the alternative, to disqualify the prosecution team. He argued that members of the prosecution team intruded on his attorney-client relationship by reviewing privileged communications with his attorney in violation of the Sixth Amendment. Snyder identified roughly forty emails that he argued were privileged but had been shared with the prosecution team. Snyder also argued that the search warrant was overbroad, in violation of the Fourth Amendment.

Judge Van Bokkelen denied Snyder's motion. *United States v. Snyder*, No. 2:16-CR-160 JVB, 2018 WL 4637253, at *9 (N.D. Ind. Sept. 27, 2018). The court began by analyzing whether any of the forty-some emails Snyder identified were indeed privileged. The court identified three exhibits that should not have been shared with the prosecution team. Two were emails regarding consulting contracts, but they were not related to this case. The third was a compilation of emails containing Quickbooks financial data that Snyder had generated upon his attorney's request. The government already had access to at least some of the Quickbooks data, but the court found that Snyder suffered some prejudice by the disclosure because the Quickbooks emails made it easier for the government to analyze his finances. The court prohibited the prosecution team from using the Quickbooks data or evidence stemming from it at trial. *Id.* at *8.

The court then evaluated the government's filter

process. The court commented that the process had a "semblance of the fox guarding the hen house," but the court concluded that participation by a magistrate judge or Snyder's attorney was not required. *Snyder*, 2018 WL 4637253, at *6. The court credited the FBI agent's testimony that he sent Snyder's emails for computerized review without examining them. More generally, the court found that the "Chinese wall" between the filter team and the prosecution had not been breached. *Id.* The court also found no evidence indicating that the three privileged exhibits shared with the prosecution were disclosed intentionally.

Turning to the constitutional arguments, the court found no violation of the Sixth Amendment. The emails had been seized and the filter process completed before Snyder was indicted in November 2016, and only at that time did his Sixth Amendment right to counsel attach. *Snyder*, 2018 WL 4637253, at *7. The court also concluded that seizure of Snyder's emails under the warrant did not violate the particularity requirement of the Fourth Amendment. *Id.* at *8.

B. *Analysis*

We review the district court's findings of fact for clear error and its legal conclusions de novo. See *United States v. Pace*, 48 F.4th 741, 747 (7th Cir. 2022); *United States v. Arceo*, 535 F.3d 679, 684 (7th Cir. 2008).

1. *Fourth Amendment*

On appeal, Snyder argues that the government's warrant was overbroad because it sought "all information" associated with his email accounts and was not limited by date or time. Snyder notes that the warrant affidavit focused on events that occurred from 2011 through 2014,

and he suggests that the warrant should have been limited to that time frame.

The Fourth Amendment requires that warrants be supported by probable cause and that they "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The particularity requirement is intended to prevent "the issuance of a warrant that permits a 'general, exploratory rummaging in a person's belongings,'" and "thereby ensures that the scope of a search will be confined to evidence relating to a specific crime that is supported by probable cause." *United States v. Vitek Supply Corp.*, 144 F.3d 476, 481 (7th Cir. 1998), quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). "Warrants that are overbroad, that is, that allow officers to search for items that are unlikely to yield evidence of the crime, violate the Fourth Amendment." *United States v. Vizcarra-Millan*, 15 F.4th 473, 502 (7th Cir. 2021).

Even if we assume that the warrant might have been overbroad in violation of the Fourth Amendment, the district court did not err in denying Snyder's motion to dismiss. The remedy for such Fourth Amendment violations in a criminal proceeding is suppression of the evidence, not dismissal of the indictment or disqualification of the prosecution team. *United States v. Morrison*, 449 U.S. 361, 366 (1981) (remedy for searches and seizures contrary to Fourth Amendment in criminal proceeding "is limited to denying the prosecution the fruits of its transgression"). We deny this challenge.[2]

[2] If Snyder's challenge had come to us as an appeal from a denial of a motion to suppress, we expect that we would have had to consider other issues, including whether the officers relied on the warrant in

2. *Sixth Amendment*

Snyder next argues that the district court erred in finding no violation of his Sixth Amendment rights. He insists that the government's filter process was deficient because it was conducted solely by government agents, without court oversight or participation by Snyder's counsel. Snyder characterizes the seizure of emails and the challenged filter process as an intentional intrusion into his attorney-client relationship for which dismissal of the indictment was an appropriate remedy.

The Sixth Amendment guarantees assistance of counsel to the "accused" in "all criminal prosecutions." U.S. Const. amend. VI. The right "is limited by its terms" and "'does not attach until a prosecution is commenced.'" *Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2007), quoting *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). More specifically, the right to counsel attaches upon "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.*, quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984).

The attorney-client privilege, by contrast, is not a constitutional right but an evidentiary privilege. *Lange v. Young*, 869 F.2d 1008, 1012 n.2 (7th Cir. 1989). It applies in criminal and civil proceedings to protect confidential communications between attorney and client made for the purpose of seeking or providing legal advice. *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir. 2007). A violation of the attorney-client privilege is not a per se violation of the Sixth Amendment. Nevertheless, a government intrusion into the attorney-client relationship

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good faith.

can in some circumstances violate the Sixth Amendment. See, e.g., *Shillinger v. Haworth*, 70 F.3d 1132, 1134–36, 1138 (10th Cir. 1995) (holding that Haworth's Sixth Amendment rights were violated when deputy sheriff, who was present at meetings between Haworth and his attorney, disclosed defense's trial strategy to the prosecution, who used that information to impeach Haworth at trial); *Bishop v. Rose*, 701 F.2d 1150, 1151, 1155 (6th Cir. 1983) (finding Sixth Amendment violated where defendant's handwritten statement, prepared at his attorney's request, was discovered by prison guards, sent to the prosecutor, and used to impeach defendant's credibility at trial).

The seizure and filtering of Snyder's emails did not violate his Sixth Amendment right to counsel because the right had not yet attached. The government seized Snyder's emails in September 2015 and completed its filter process in early 2016, well before Snyder was indicted in November 2016. Because Snyder's Sixth Amendment right to counsel had not attached, the conduct he complains of could not violate that right. It makes no difference for purposes of the Sixth Amendment that Snyder had already retained counsel, who was representing him in negotiations with the government regarding criminal charges. *Moran v. Burbine*, 475 U.S. 412, 430 (1986) ("[I]t makes little sense to say that the Sixth Amendment right to counsel attaches at different times depending on the fortuity of whether the suspect or his family happens to have retained counsel prior to interrogation."); *United States ex rel. Shiflet v. Lane*, 815 F.2d 457, 465 (7th Cir. 1987) (defendant "cannot claim the protection of the sixth amendment merely because he retained counsel prior to the filing of charges against

him").

Snyder nevertheless argues that even if the seizure and filter process occurred before he was indicted, those supposed violations unconstitutionally interfered with his post-indictment attorney-client relationship. He offers no controlling authority to support his expansive view of the Sixth Amendment. Even if the right had attached when the government seized Snyder's emails, the district court did not err in declining to dismiss the indictment. Although the filter process used here did not operate perfectly, we find no violation of the Sixth Amendment and no grounds for dismissing the case.

In *Weatherford v. Bursey*, 429 U.S. 545 (1977), the Supreme Court considered whether the presence of an undercover agent at a meeting between a defendant awaiting trial and his attorney violated the Sixth Amendment. The Court rejected the per se rule proposed by the defendant. *Id.* at 550–51. Instead, the Court found that under the facts before it, the Sixth Amendment was not violated. *Id.* at 558. The Court observed that the agent did not disclose the details of the conversation to the government, none of the state's evidence originated in the conversation, the agent did not testify about the conversation at trial, and, in short, the conversation was not "used in any other way to the substantial detriment" of the defendant. *Id.* at 554. The Court also stressed that the agent was invited to the meeting by the defendant. It was not a "situation where the State's purpose was to learn what it could about the defendant's defense plans." *Id.* at 557. Because there was "no tainted evidence in [the] case, no communication of defense strategy to the prosecution, and no purposeful intrusion" by the agent, the defendant's right to effective assistance of counsel was

not violated. *Id.* at 558.

Here, the seizure and filtering of Snyder's emails resulted in three privileged documents being shared with the prosecution team. Two documents concerned consulting contracts unrelated to the case against Snyder, so their disclosure caused no prejudice to Snyder in this case. The only disclosure that was possibly detrimental, the Quickbooks data, had already been shared in part with the government, and the district court ordered the government not to use the data or any evidence derived from it at trial. Moreover, after an evidentiary hearing, the district court found that there was "no evidence, or even suggestion," that the privileged files were shared with the prosecution team with the intent that they be used to prosecute Snyder. 2018 WL 4637253, at *6. As in *Weatherford*, there was here no intentional intrusion by the government, no tainted evidence from the few improper disclosures, and no communication of defense strategy. Under these circumstances, we find no violation of the Sixth Amendment right to counsel.

Still, Snyder argues that the filter process used in his case was deficient and that similar protocols have been rejected by the Third, Fourth, Sixth, and Eleventh Circuits. We disagree. As an initial matter, in none of the cases Snyder cites did the court find that a defective filter process violated the Sixth Amendment or required the indictment to be dismissed, as Snyder argues here.

Each case is distinguishable from Snyder's in other ways as well. The Eleventh Circuit in *In re Sealed Search Warrant & Application*, 11 F.4th 1235, 1252 (11th Cir. 2021), actually approved of the government's filter process. *In re Grand Jury Subpoenas*, 454 F.3d 511 (6th Cir. 2006), concerned subpoenas, not a search warrant.

Though the Sixth Circuit rejected the government's request to conduct a privilege review of documents subpoenaed from a third party, that rejection was based in part on the fact that the documents were not yet in the government's possession. *Id.* at 523. The court observed that government taint teams are primarily used in cases—like Snyder's—where the government has already gained control of the potentially privileged documents through a search warrant. *Id.* at 522–23. In those cases, the court explained, "the use of the taint team to sift the wheat from the chaff constitutes an action respectful of, rather than injurious to, the protection of privilege." *Id.*

Next, Snyder cites *In re Search of Electronic Communications*, 802 F.3d 516 (3d Cir. 2015), for the proposition that non-lawyer federal agents may not make privilege determinations. While this may be sound policy, the Third Circuit's order was not a constitutional holding but a prospective, cautionary measure designed to protect a privilege holder's rights. *Id.* at 530. The court did not find that review by non-attorney federal agents necessarily violated the attorney-client privilege, much less the Sixth Amendment.

Snyder's strongest support comes from *In re: Search Warrant Issued June 13, 2019*, 942 F.3d 159 (4th Cir. 2019), but it too is readily distinguishable. As part of its investigation into "Lawyer A," an attorney at a Baltimore law firm suspected of aiding the crimes of "Client A," the government searched the law firm and seized "voluminous materials," including all of Lawyer A's email correspondence. *Id.* at 165–66. Only 0.2% of the seized emails were sent to or from Client A or contained his surname. *Id.* at 172. An "extensive" portion of the seized emails concerned other firm clients, some of whom were

also being investigated or prosecuted by the same U.S. Attorney's Office. *Id.* at 167. Invoking the attorney-client privilege, the law firm sought an injunction to stop the filter team of government employees from reviewing the seized communications. *Id.* at 168. The district court denied the firm's request, but the Fourth Circuit reversed and ordered that the magistrate judge conduct the privilege review. *Id.* at 170. The Fourth Circuit reasoned that the firm would be irreparably harmed if the government were permitted to view communications regarding its *other* clients. *Id.* at 172. The court also concluded that the firm was likely to succeed on the merits of its claim because the filter protocol approved by the magistrate judge impermissibly assigned judicial functions to the executive branch. *Id.* at 176.

Snyder's case is distinguishable. To start, *In re: Search Warrant* concerned the seizure of an attorney's email correspondence, not that of a client, and the Fourth Circuit was focused on the harm posed to clients other than Client A, the target of the government's investigation. The court also emphasized that the vast majority of seized emails—99.8%—were apparently unrelated to the government's investigation.

Despite these distinguishing facts, Snyder encourages us to read *In re: Search Warrant* as holding that *all* privilege reviews in criminal investigations must be performed by a judicial officer. We are not persuaded. The Fourth Circuit criticized the magistrate judge's approval of the filter protocol—which occurred before the law firm invoked privilege—on the grounds that resolution of privilege "disputes" is a judicial function. 942 F.3d at 176 (Once "a dispute arises as to whether" communications are privileged, "the resolution of that

dispute is a judicial function."). If the Fourth Circuit meant that once a claim of privilege is made, a court may not delegate its responsibility to resolve that dispute to the executive branch, then we agree. The district court in Snyder's case made no such error because Snyder asserted privilege after the government's filter process was complete. If, however, the Fourth Circuit meant what Snyder argues, that district courts must act as legal advisers to investigators or that resolving legal questions—before any claim of privilege is made or any concrete dispute arises—is a non-delegable judicial function, then we would need to disagree based on the limits of the judicial function. See *E.F.L. v. Prim*, 986 F.3d 959, 962 (7th Cir. 2021) ("The Constitution limits our jurisdiction to resolving live 'Cases' and 'Controversies,' rather than issuing advisory opinions."), quoting U.S. Const. art. III, § 2, cl. 1.

To be sure, where law enforcement has reason to expect that a search (electronic or otherwise) will sweep up privileged communications, it should take appropriate measures to avoid intruding on attorney-client relationships. We are not convinced, however, that the filter process used here would have been rejected by other circuits, nor do we agree that the Constitution required earlier participation of defense counsel or oversight by the district court.

In sum, Snyder's Sixth Amendment rights were not violated by the seizure and subsequent filtering of his emails because the right had not yet attached. Even if the right had attached, the filter process would not have violated his Sixth Amendment rights where there is no indication that the government purposefully intruded on the attorney-client relationship or that privileged

materials were disclosed to Snyder's detriment. The district court did not err in denying his motion to dismiss on this basis.

III. *Snyder's Conviction for Obstructing the IRS*

Next, we turn to Snyder's arguments challenging his conviction for obstructing the IRS. Snyder challenges this conviction on two grounds. First, he argues the prosecution was barred by the statute of limitations. Second, he insists that his conviction was not supported by sufficient evidence.

A. *Background*

Before he was elected mayor, Snyder owned and operated First Financial Trust Mortgage in Portage. After First Financial Trust Mortgage failed to pay its 2007, 2008, and 2009 payroll taxes in full, the IRS notified the company that its bank accounts would be levied in July 2009. By the end of 2009, First Financial Trust Mortgage owed nearly $100,000 in payroll taxes.

In January 2010, Snyder agreed with GVC Mortgage that Snyder would operate First Financial Trust Mortgage (under the same name and at the same location) as a division of GVC Mortgage. Soon after reaching this agreement with GVC Mortgage, Snyder opened a bank account in the name of SRC Properties. Snyder then created invoices on SRC letterhead billing First Financial Trust Mortgage for services. He forwarded the invoices to GVC Mortgage, which paid SRC Properties directly. The government argued that by routing payments directly to SRC Properties, Snyder was able to conceal assets from the IRS, which had levied First Financial Trust Mortgage's bank account.

During this time, Snyder was also behind in paying his personal taxes. In 2009, the IRS completed a civil audit of Snyder's 2005, 2006, and 2007 personal tax returns. He was assessed roughly $30,000 in taxes, penalties, and interest. In December 2010 and February 2011, the IRS levied Snyder's personal bank accounts.

As part of his efforts to settle his personal tax debt and negotiate an installment plan with the IRS, Snyder submitted three 433-A forms: one in March 2010, one in January 2011, and one in April 2013. Each document required him to disclose fully his assets and liabilities under penalty of perjury. On all three forms, Snyder failed to report that he owned SRC Properties, and on the 2010 and 2013 forms, he omitted his employment with GVC Mortgage. In March 2011, Snyder agreed with the IRS to pay $112 per month. He paid off his personal tax debt in full in early 2016, six months before his indictment.

B. *Statute of Limitations*

In the district court, Snyder moved under Federal Rule of Criminal Procedure 7(d) to strike paragraphs 1–20 of Count 4 of the indictment as irrelevant and immaterial surplusage. Those paragraphs describe Snyder's failure to pay payroll taxes in 2007, 2008, and 2009, his partnership with GVC Mortgage, his creation of SRC Properties, and his efforts to direct payments from GVC Mortgage to SRC Properties. Snyder argued that the paragraphs described conduct that occurred before November 17, 2010, outside the six-year statute of limitations period for violations of 26 U.S.C. § 7212(a). See 26 U.S.C. § 6531(6). He also insisted that the challenged paragraphs had no bearing on his alleged obstruction of the IRS on his personal taxes.

The district court denied the motion. The court reasoned that the paragraphs were necessary to understand the alleged scheme and contained facts the government would need to prove at trial. The court recognized that the conduct alleged in the challenged paragraphs occurred outside the statute of limitations period, but it concluded that the alleged past conduct was "intertwined" with acts within the statute of limitations, "making the earlier acts relevant and proper to this case."

On appeal, Snyder argues that the district court erred in failing to dismiss the § 7212(a) charge on statute of limitations grounds. Specifically, he asserts that the district court erred by treating the scheme to obstruct the collection of payroll taxes as intertwined with the scheme to obstruct the collection of his personal taxes, which improperly brought the former within the statute of limitations period.

We review de novo a district court's denial of a motion to dismiss on statute of limitations grounds. *United States v. O'Brien*, 953 F.3d 449, 454 (7th Cir. 2020). Here, however, Snyder did not seek dismissal of the tax obstruction count. He moved only to strike paragraphs 1–20 of the tax count—which describe his efforts to impede collection of his payroll but not his personal taxes—as surplusage. We review a district court's denial of that motion for abuse of discretion. *United States v. O'Connor*, 656 F.3d 630, 645 (7th Cir. 2011). Regardless of how Snyder's challenge is characterized, we find no error.

The six-year statute of limitations clock for a violation of § 7212(a) begins to run on the date of the last corrupt act. *United States v. Wilson*, 118 F.3d 228, 236 (4th Cir. 1997). To defeat a motion to dismiss the indictment in Snyder's case, the government needed to allege that

Snyder engaged in an affirmative act to obstruct the IRS on or after November 17, 2010. It did so with respect to both personal and payroll taxes. The indictment alleged that, from 2010 to 2013, Snyder impeded the collection of his company's payroll taxes by diverting payments from GVC Mortgage to SRC, which the IRS did not know about. With regard to his personal taxes, the indictment alleged that Snyder concealed the existence of SRC in 433-A forms he filed in March 2010, January 2011, and April 2013.

Snyder's insistence that the district court erroneously intertwined his payroll tax and personal tax conduct misreads the district court's order. The court simply recognized that, although paragraphs 1–20 did not describe conduct that occurred within the statute of limitations period, those paragraphs were essential to understand the government's allegations that Snyder impeded the collection of payroll taxes by diverting payments to SRC after November 17, 2010. The district court did not err.[3]

C. *Sufficiency of the Evidence*

Snyder next argues that there was insufficient evidence to support the jury's verdict on the tax count. We will overturn a conviction only if, viewing the evidence in the light most favorable to the government, "no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v.*

[3] Before he was indicted, Snyder signed three agreements waiving his right to be indicted within the statute of limitations period. On appeal, he stresses that he was indicted forty-five days after the third and final agreement expired. Because we find that the indictment alleged affirmative acts within the six-year limitations period, we need not consider these agreements.

Maldonado, 893 F.3d 480, 484 (7th Cir. 2018), quoting *United States v. Brown*, 726 F.3d 993, 1005 (7th Cir. 2013). While this is a high hurdle for defendants to clear, the "height of the hurdle depends directly on the strength of the government's evidence," and a "properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." *United States v. Moreno*, 922 F.3d 787, 793 (7th Cir. 2019), quoting *United States v. Garcia*, 919 F.3d 489, 496–97 (7th Cir. 2019), quoting in turn *United States v. Jones*, 713 F.3d 336, 339 (7th Cir. 2013), and *Jackson v. Virginia*, 443 U.S. 307, 317 (1979).

A person violates the so-called "omnibus clause" of 26 U.S.C. § 7212(a) when he "corruptly or by force or threats of force … obstructs or impedes, or endeavors to obstruct or impede, the due administration of [the Internal Revenue Code]." 26 U.S.C. § 7212(a); see *Marinello v. United States*, 138 S. Ct. 1101, 1104–05 (2018) (explaining that § 7212(a) has an "Officer Clause" and an "Omnibus Clause"). To act "corruptly" means "to act with the intent to secure an unlawful advantage or benefit either for one's self or for another." *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998). By "due administration" of the Internal Revenue Code, the statute refers to "targeted governmental tax-related proceedings, such as a particular investigation or audit," not the "routine administrative procedures that are near-universally applied to all taxpayers, such as the ordinary processing of income tax returns." *Marinello*, 138 S. Ct. at 1104. The administrative proceeding must have been pending or reasonably foreseeable to the defendant when he engaged in the obstructive conduct, and there must have been a nexus—a "relationship in time, causation, or logic"—

between the defendant's obstructive conduct and the proceeding. *Id.* at 1109–10, quoting *United States v. Aguilar*, 515 U.S. 593, 599 (1995).

The evidence here was sufficient to support the jury's verdict. Evidence at trial established that Snyder owed personal and payroll taxes and that the IRS had taken "specific, targeted" steps to collect by levying Snyder's personal and business bank accounts. See *Marinello*, 138 S. Ct. at 1106. The jury could conclude that Snyder impeded or attempted to impede the IRS's collection of owed taxes in two ways. First, with respect to his payroll tax debt, he diverted reimbursement payments from GVC Mortgage directly to SRC Properties, thereby evading the IRS's levy on First Financial Trust Mortgage's bank account. Second, with respect to his personal taxes, Snyder failed to report his ownership of SRC Properties and his employment with GVC Mortgage on 433-A forms he submitted to the IRS. The jury could reasonably conclude that misrepresenting assets and income in settlement and installment-plan negotiations with the IRS could have the effect of impeding the IRS's collection efforts. Finally, the jury could conclude that Snyder acted with the intent to gain an unlawful advantage. The evidence established multiple omissions on his 433-A forms. It also established that he opened the SRC bank account soon after he started working for GVC Mortgage and that he directed payments to SRC over several years, all while concealing his ownership of SRC from the IRS. Viewing the evidence in the light most favorable to the government, we find sufficient support for the jury's verdict.

Snyder's arguments to the contrary are not persuasive. He notes that his personal taxes were paid in

full before he was indicted, and he insists that paying via an installment plan, which the IRS permits, is not obstructive and did not give him any unlawful benefit. Snyder also disputes that he omitted information on the 433-A forms. In his accountant's copy of the 433-A form submitted in 2013, his ownership of SRC was reported on a page that is missing from the IRS's copy. He suggests that pages or attachments might also be missing from the 2010 and 2011 forms that reported his employment with GVC Mortgage and his ownership of SRC. Snyder further argues that he did not report income from SRC because the company made little or no money in the relevant years and that, in any case, his failure to report income from SRC could not have impeded the IRS. He also claims that, although he did not list GVC Mortgage as an employer on his 2013 433-A form, he accurately reported his gross wages on that form. With regard to his payroll tax debt, Snyder argues that First Financial Trust Mortgage dissolved on June 14, 2010, and that he did not own GVC Mortgage, so any income earned by First Financial Trust Mortgage after that date could not be levied to pay its payroll taxes.

Snyder's arguments were appropriate before the trial jury, but they do not entitle him to acquittal as a matter of law. The fact that he eventually paid his personal taxes on an installment plan did not prevent the jury from finding that he concealed income sources and assets from the IRS earlier in the process to try to obtain a favorable settlement. There is of course nothing per se obstructive about settling with the IRS or paying overdue taxes in installments. But evidence at trial showed that the IRS seeks to obtain a complete picture of a taxpayer's income and assets so it can make a "fair assessment" when

deciding whether to agree to a settlement or installment plan. A reasonable jury could conclude that Snyder omitted income and asset information on his 433-A forms in hopes of receiving a more favorable deal with the IRS.

Likewise, while the jury might have credited Snyder's assertions that he reported his ownership of SRC Properties on pages or attachments that were missing from the IRS's files, the jury was not required to draw that conclusion. The revenue agent testified that Snyder should have reported his ownership of SRC Properties at several places on the 433-A form he submitted in 2013, not just on the page missing from the IRS's copy. The jury might also have rejected Snyder's argument given that he failed to report his ownership of SRC Properties on the 433-A forms he filed in 2010 and 2011 as well.

We are similarly unpersuaded by Snyder's argument that his failure to report his modest income from SRC Properties could not have obstructed the IRS. The jury heard that thousands of dollars were deposited into and then withdrawn from SRC's bank account each month. While this might have left Snyder with only modest net income each month, the jury could have reasonably credited the revenue agent's testimony that Snyder's ownership of SRC Properties would have been important to the IRS in assessing his ability to pay.

Nor are we convinced that Snyder is entitled to an acquittal because, as he argues, he reported his wages from GVC Mortgage on the 433-A form he submitted in 2013 even though he failed to list GVC Mortgage as his employer on that form. First, while the revenue agent testified that it was possible, no evidence at trial established that Snyder's GVC Mortgage wages were included in the aggregate wage amount listed on the 2013

form. Second, the jury was not required to credit Snyder's argument given evidence of his other omissions on the 433-A forms, including his failure to report his employment with GVC Mortgage or any wages on the 433-A form he filed in 2010.

Finally, the jury could reasonably conclude that Snyder diverted payments from GVC Mortgage to SRC to avoid the IRS's levy on First Financial Trust Mortgage's bank account and thereby to impede the IRS. While Snyder's mortgage company was administratively dissolved in June 2010, the jury heard evidence that the IRS continued its attempts to collect and sent levy notices to First Financial Trust Mortgage in August 2011. The jury could reasonably conclude that routing payments to SRC obstructed, or had the potential to obstruct, the IRS's efforts to collect First Financial Trust Mortgage's payroll taxes. Sufficient evidence supported the jury's verdict.[4]

IV. *Challenges to Snyder's Conviction for Federal Funds Bribery*

Last, we consider several challenges to Snyder's conviction for federal funds bribery. First, Snyder argues that his statutory and constitutional rights to a speedy trial were violated by the delay between his first and second trials. Second, he insists that 18 U.S.C. § 666(a)(1)(B) applies to bribes but not to gratuities and therefore does not apply to his case. He contends that the

[4] Snyder also argues that the district court erred in admitting emails from a friend regarding Snyder's financial records. He insists that the emails were unfairly prejudicial. Framed as a challenge to the sufficiency of the evidence rather than as an evidentiary error, we find no reversible error. The emails were properly admitted and supported the jury's verdict.

district court erred when it rejected his statutory argument, which he presented in a motion to dismiss, a proposed jury instruction, and a motion for judgment of acquittal. Finally, Snyder argues that the evidence was not sufficient at either trial to support a guilty verdict.

A. *Background*

Snyder took office as mayor of Portage in January 2012. In January 2013 and December 2013, Portage awarded two contracts worth a total of $1.125 million to Great Lakes Peterbilt (GLPB), the trucking company owned by Robert and Stephen Buha. As state law required, the contracts were awarded through public bidding overseen by the City of Portage Board of Works and Public Safety. The Board was composed of Mayor Snyder and two of his appointees. Snyder put his longtime friend, Randy Reeder, in charge of the bidding process, even though Reeder had no experience administering public bids.

On December 13, 2012, the city issued the first invitation to bid. The invitation sought bids to sell three garbage trucks. It specified that the trucks must be unused and the manufacturer's current production model. At trial, the government presented evidence that Reeder tailored the bid specifications to favor GLPB. Reeder testified that he based the chassis specifications on a Peterbilt chassis, which naturally favored the Buhas' Peterbilt dealership. Reeder also specified that the trucks must be delivered within 150 days, a deadline that was suggested to him by GLPB, but was an unusually fast turnaround for a new garbage truck.

Roughly two weeks before the Board of Works was scheduled to meet to award the first contract, Reeder

circulated a chart summarizing the bids. He highlighted GLPB's bid and calculated the difference between its bid and every other bid. At the Board of Works meeting on January 28, 2013, the Board was informed that only GLPB's bid was fully responsive to the invitation's specifications, including the 150-day delivery deadline. Mayor Snyder's appointee moved to award the contract to GLPB, and the Board voted in favor.

That same month, the manager of GLPB approached Reeder to see whether the city wanted to purchase an unused, 2012 model truck that had been sitting on GLPB's lot for two years. Mayor Snyder first tried to purchase the truck outright, but he was informed by the city attorney that the truck was too expensive to be purchased without going through the public bidding process.

The Board of Works then announced a second bid for two garbage trucks on November 15, 2013. Again, the bid invitation specified that the trucks should be unused and the manufacturer's current production model. The invitation to bid sought two trucks, but it specified a smaller engine and transmission for one of the trucks. Reeder testified that he adjusted those specifications to match the truck sitting on GLPB's lot. A mechanic for the city testified that, from a maintenance standpoint, it made little sense to purchase trucks with different specifications.

GLPB was the lowest responsive, responsible bidder, and it was awarded the second contract at a Board of Works meeting on December 23, 2013. Neither Reeder nor Mayor Snyder informed the Board that one of the trucks it was purchasing from GLPB was a 2012 model, so it did not meet the bid specifications.

Evidence at trial showed that Snyder was in frequent contact with the Buha brothers around the time of the second-round bid. Mayor Snyder's calendar showed a scheduled lunch with Robert Buha on December 12, 2013, one day before the second-round bids were due. Phone records revealed twenty-nine phone calls or text exchanges between the mayor and the Buha brothers in the four weeks between the announcement of the second-round bid and the date the bids were due. Records showed an additional eighteen phone calls or text messages between Snyder and the Buhas in the ten days after bids were due until the contract was awarded. Mayor Snyder did not have phone contacts with any other bidders during that time.

Robert Buha testified that shortly after GLPB was awarded the second-round bid, Snyder visited the Buha brothers at the GLPB dealership to ask for $15,000. He told the Buhas that he needed the money to pay off his tax debt and to cover holiday expenses. Buha testified that the brothers agreed to pay Snyder $13,000 up front supposedly for consulting services he intended to provide.

On January 10, 2014, GLPB issued a $13,000 check to Snyder. GLPB's controller, who issued the check at Robert Buha's direction, testified that Buha told him they were paying Mayor Snyder for his influence. When the FBI later questioned Snyder about the check, he insisted it was payment for health insurance and information technology consulting he had provided to GLPB. But Mayor Snyder had also told Reeder that the $13,000 check was for payroll and telephone consulting he performed for GLPB. And Mayor Snyder had told someone else, a city planning consultant, yet another story: that GLPB paid him to lobby the state legislature on its behalf.

Robert Buha testified that he had conversations with Snyder about his employees' health insurance and IT upgrades, but that in his opinion, Snyder's services did not justify $13,000. GLPB employees, including the controller, testified that to the best of their knowledge, Snyder did not perform any consulting work for the company.

B. *Speedy Trial Rights*

After a jury found Mayor Snyder guilty of federal funds bribery, the district court granted his motion for a new trial on that count on November 27, 2019. On November 19, 2020, Snyder moved to dismiss the bribery count, arguing that his retrial would fall outside the 70-day period permitted by the Speedy Trial Act and would violate his Sixth Amendment right to a speedy trial. The district court denied the motion. *United States v. Snyder*, No. 2:16-cr-160, 2021 WL 369674, at *1 (N.D. Ind. Feb. 3, 2021). We address Snyder's statutory argument and then his constitutional argument.

1. *Speedy Trial Act*

When a defendant is to be retried after an order for a new trial, the Speedy Trial Act requires that the second trial commence within 70 days "from the date the action occasioning the retrial becomes final." 18 U.S.C. § 3161(e). The Act allows certain periods of delay, identified in § 3161(h), to be excluded from consideration in calculating the 70-day period.

Relevant here, § 3161(h)(7)(A) provides that any period of delay resulting from a continuance will be excluded "if the judge granted [the] continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public

and the defendant in a speedy trial." The Act requires the court to "se[t] forth, in the record of the case, either orally or in writing" these findings. *Id.* If the court fails to do so, the time shall not be excluded. *Id.* Section 3161(h)(7)(B) provides a non-exclusive list of factors the court shall consider in deciding whether to grant a continuance.

The statutory issue in this appeal boils down to whether one specific 45-day continuance from December 7, 2019 to January 20, 2020, granted on the government's motion, should be excluded under the Act. At a hearing nine days after Snyder's motion for a new trial was granted, the government explained that the U.S. Attorney's Office for the Northern District of Illinois, which was supervising Snyder's prosecution due to recusals by attorneys in the Northern District of Indiana, had not decided whether to retry Snyder. The government requested a 45-day continuance so that supervisors in Chicago could review the trial transcripts and make an "informed decision" regarding retrial. The government also asked that the "45-day time period be excluded in the interests of justice."

Judge Van Bokkelen asked defense counsel if they had "any problem with that?" Counsel replied, "I don't think so." Judge Van Bokkelen then asked, "By don't think so, is that going to change?" Counsel replied it would not and said specifically that Snyder did "not object on a speedy trial basis." Judge Van Bokkelen granted the motion and ordered that the docket entry note that the delay was excluded under the Speedy Trial Act in the interests of justice.

Snyder contends that the 45 days should not have been excluded because Judge Van Bokkelen failed to state

sufficiently on the record his findings that the continuance was in the interests of justice. Snyder argues further that it was an abuse of discretion to exclude the 45 days because the case was not sufficiently complex to merit the continuance.

The district court, which denied Snyder's motion to dismiss under the Speedy Trial Act, excluded the 45 days from its calculation. *Snyder*, 2021 WL 369674, at *4. Among other reasons, the court found that Snyder had forfeited or waived the issue of that particular continuance by failing to develop it in his initial brief. In his initial motion to dismiss in the district court, Snyder presented his Speedy Trial Act calculation in a chart that listed periods of time and designated each as excluded or not excluded. He designated the 45-day continuance as excluded, with the notation that the days were "waived pursuant to Mr. Snyder's agreement … but see fn. 3." In that footnote 3, Snyder asserted, without explanation, that the continuance was not supported by an "ends of justice" finding, and he questioned whether his waiver could effectively exclude the time. He then wrote that, "For purposes of the record only," his position was that the 45 days were *not* excluded. But because he believed the government had exceeded the allowed 70 days even excluding the 45-day continuance, he said he would "not push the point."

As we see the situation, the district court tried to make a clear record on the defense response to the continuance. When counsel hedged at first ("I don't think so"), the judge rightly pressed for a more definitive position and got it: counsel said Snyder would not object on a speedy trial basis. And when Snyder and his counsel later briefed the speedy trial motion, they hedged more,

but their clearest signal was that they would not "push the point" of the particular 45-day continuance.

The deliberately ambiguous dance around this 45-day continuance came very close to inviting error, which would certainly foreclose appellate review. Whether invited or not, Snyder certainly waived the issue by telling the district court he was not going to "push the point," so appellate review is also foreclosed on that basis. See *United States v. Cook*, 406 F.3d 485, 487 (7th Cir. 2005) ("A forfeiture is basically an oversight; a waiver is a deliberate decision not to present a ground for relief that might be available in the law."). Even if Snyder had not expressly declined to press the argument, the footnote's "skeletal" argument, which was "really nothing more than an assertion," was insufficient to preserve his claim. *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991); see also *Crespo v. Colvin*, 824 F.3d 667, 674 (7th Cir. 2016) ("perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived"), quoting *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991). Although Snyder developed the argument in his reply brief in the district court, that was "too little, too late, for '[a]rguments raised for the first time in a reply brief are [also] waived.'" *Harper v. Vigilant Ins. Co.*, 433 F.3d 521, 528 (7th Cir. 2005), quoting *James v. Sheahan*, 137 F.3d 1003, 1008 (7th Cir. 1998); see also *United States v. Alhalabi*, 443 F.3d 605, 611 (7th Cir. 2006) (finding waiver where defendant did not develop issue in initial brief and raised it "in a meaningful way only in his reply brief").

While we have some discretion to consider waived arguments for compelling reasons, we see no reason to exercise such discretion here. Snyder agreed to exclude

the 45 days, and the continuance furthered the interests of justice by giving supervisors overseeing Snyder's prosecution time to review transcripts and to make a considered choice regarding his retrial.

2. *Sixth Amendment*

We consider four factors in deciding whether a defendant's Sixth Amendment right to a speedy trial has been violated: "(1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) any prejudice the defendant suffered by the delay." *Hart v. Mannina*, 798 F.3d 578, 596 (7th Cir. 2015), citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

The district court found no violation of Snyder's Sixth Amendment rights. *Snyder*, 2021 WL 369674, at *8. Because more than one year had passed since the order was issued granting Snyder a retrial, the court recognized that the delay was presumptively prejudicial. *Id.* at *7. The court, however, found that other factors weighed against finding a Sixth Amendment violation.

The court observed that the delay in Snyder's case was caused largely by the global pandemic, which made holding trials unsafe for jurors, parties, and court staff. The court said this delay was justifiable and could not be attributed to the prosecution.

The court also noted that some of the delay resulted from consideration of motions Snyder filed and was therefore attributable to him. Snyder asserted his speedy trial right on November 2, 2020, but the court reasoned that this factor did not weigh strongly in his favor because he asserted his right after the delays of which he complained. *Id.*

Finally, the court concluded that Snyder—who was not in pre-trial detention, did not complain of undue anxiety or concern while awaiting trial, and did not argue that his defense was hampered in any way—was not prejudiced by the delay. *Id.* at *8. Weighing these factors together, the court concluded that Snyder's constitutional right to a speedy trial was not violated. *Id.* We review a district court's denial of a constitutional speedy trial claim de novo and its findings of fact for clear error. *United States v. Bell*, 925 F.3d 362, 375–76 (7th Cir. 2019).

We agree that the first factor favors Snyder. The delay was "presumptively prejudicial" because more than one year passed between the order for a new trial in November 2019 and Snyder's second trial in March 2021. *O'Connor*, 656 F.3d at 643. Snyder timely asserted his speedy trial right on November 2, 2020, so we also weigh the third factor in his favor.

When assessing the second factor, we ask "whether the government or the criminal defendant is more to blame for [the] delay." *Doggett v. United States*, 505 U.S. 647, 651 (1992). The district court found that the delay between Snyder's first and second trials was principally due to the Covid-19 pandemic. We agree with the district court that the pandemic-related delays in Snyder's case were justifiable and cannot fairly be attributed to the government. See *United States v. Keith*, 61 F.4th 839, 853 (10th Cir. 2023) (treating pandemic-related delays as a "neutral" factor favoring neither side). On appeal, Snyder does not challenge the district court's determination that the delay was also caused by motions he filed. We therefore weigh this factor against Snyder.[5]

[5] In his opening brief, Snyder agreed with the district court's

We also weigh the fourth factor against Snyder. We assess prejudice "in light of the interests the Sixth Amendment seeks to protect," namely, preventing oppressive pretrial incarceration, minimizing anxiety and concern of the accused, and limiting the possibility that his defense will be impaired. *Bell*, 925 F.3d at 376, quoting *United States v. Harmon*, 721 F.3d 877, 883 (7th Cir. 2013). Snyder was not held in pre-trial detention.

Snyder argues that his defense was prejudiced by the fading memories of four witnesses who would have otherwise exonerated him. We are not convinced. Two of those witnesses, Reeder and Joseph Searle, claimed not to remember certain facts on the stand, but both had testified at Snyder's first trial. The fact that Reeder's and Searle's previous testimony was available to refresh their memories or to impeach their later testimony belies Snyder's contention that, if he had been tried earlier, Reeder and Searle could have exonerated him.

Snyder also claims he was prejudiced by Robert Buha's inability to remember the consulting work Snyder had supposedly performed for GLPB. In fact, Buha testified that Snyder consulted on healthcare and information technology issues faced by GLPB. In any case, Buha was questioned about GLPB's supposed consulting agreement with Snyder well before the second trial. The parties had the benefit of his statements to the FBI and his grand jury testimony on the matter, which were used to refresh his memory on the stand.

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finding that the delay between his first and second trials was largely due to the pandemic. In his reply, he challenged the district court's determination as error. Because he conceded the point in his opening brief, any challenge to the district court's determination is waived.

Finally, Snyder complains that John Beck, the city mechanic, had forgotten that he, not Snyder, was the source of the 150-day deadline in the first-round bid. Snyder bases this assertion on an FBI agent's notes from an interview with Beck in 2015 indicating that Beck suggested the 150-day deadline. Snyder used the agent's notes to impeach Beck's testimony. Confronted with the agent's report, Beck insisted that the agent had misunderstood him and that he had corrected the misunderstanding with the FBI soon after the interview. We cannot see how an earlier trial would have changed Beck's testimony or its impact on the trial.

In sum, although the delay in Snyder's case was presumptively prejudicial and he asserted his speedy trial right, he is more to blame for the delay than the government, and he has not shown prejudice from the delay. The district court did not err in rejecting his Sixth Amendment speedy trial challenge.

C. *The Scope of 18 U.S.C. § 666—Bribes and Gratuities?*

Next, Snyder contends that 18 U.S.C. § 666 does not apply to the facts here. Recall that the payment to Mayor Snyder was made after both of the city's truck purchases. Snyder argues that the evidence showed at worst a gratuity rather than a bribe. Here's the difference. A bribe requires a *quid pro quo*—an agreement to exchange this for that, to exchange money or something else of value for influence *in the future*. A gratuity is paid "as a reward for actions the payee has already taken or is already committed to take." *United States v. Agostino*, 132 F.3d 1183, 1195 (7th Cir. 1997). Snyder insists that the evidence does not support a finding that he and the Buhas agreed to exchange money for the truck contracts *before* they

were awarded. Without a prior *quid pro quo* agreement, he argues, § 666 cannot apply.

Snyder pressed this argument at several points in the district court. Before trial, he moved to dismiss the count from the indictment. At trial, he proposed a jury instruction that would have defined bribe, reward, and gratuity and instructed the jury to acquit if the government proved that he solicited or accepted only a gratuity, agreed to and paid only after the fact. After trial, he again argued in his motion for acquittal that the evidence did not support a finding that he and the Buhas had entered into an agreement *before* the contracts were awarded as, he argued, the statute requires. The district court denied each of these challenges, citing precedent from this court holding that § 666 applies to gratuities as well as bribes.

The district court correctly rejected Snyder's proposed reading of § 666. We start with the statutory text. In relevant part, § 666(a)(1)(B) makes it a crime for an agent of a state or local government receiving federal funds to "corruptly solicit[ ] or demand[ ] for the benefit of any person, or accept[ ] or agree[ ] to accept, anything of value from any person, intending to be influenced or rewarded in connection with" any government business or transaction worth $5,000 or more. 18 U.S.C. § 666(a) & (b). The governing statutory language does not use the terms "bribe" or "gratuity." The statutory language "influenced or rewarded" easily reaches both bribes and gratuities.[6]

[6] The title of the codified § 666 refers to "Theft or bribery concerning programs receiving Federal funds," without mentioning gratuities, but the same is true of 18 U.S.C. § 201, "Bribery of public

This circuit has repeatedly held that § 666(a)(1)(B) "forbids taking gratuities as well as taking bribes." *United States v. Hawkins*, 777 F.3d 880, 881 (7th Cir. 2015); *United States v. Johnson*, 874 F.3d 990, 1001 (7th Cir. 2017). That is, we have refused to "import an additional, specific *quid pro quo* requirement into the elements" of § 666. *Agostino*, 132 F.3d at 1190; *United States v. Gee*, 432 F.3d 713, 714 (7th Cir. 2005); *United States v. Boender*, 649 F.3d 650, 654 (7th Cir. 2011); *United States v. Mullins*, 800 F.3d 866, 871 (7th Cir. 2015). Many other circuits have taken the same position. See, e.g., *United States v. Ganim*, 510 F.3d 134, 150 (2d Cir. 2007); *United States v. Porter*, 886 F.3d 562, 565 (6th Cir. 2018); *United States v. Zimmermann*, 509 F.3d 920, 927 (8th Cir. 2007); *United States v. McNair*, 605 F.3d 1152, 1188 (11th Cir. 2010).

Snyder asks us to reconsider our precedent in light of contrary decisions by the First and Fifth Circuits in *United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013), and *United States v. Hamilton*, 46 F.4th 389 (5th Cir. 2022). Both cases held that § 666 does not apply to gratuities.

The First and Fifth Circuits relied on similarities between the language of § 666 and that of 18 U.S.C. § 201(b), which criminalizes bribery of federal officials. (A different subsection, 18 U.S.C. § 201(c), criminalizes gratuities paid to or received by federal officials.) Specifically, the courts interpreted the words "corruptly" and "influence" in § 666 as evidence that the statute requires a prior *quid pro quo* agreement. *Fernandez*, 722 F.3d at 22; *Hamilton*, 46 F.4th at 397.

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officials and witnesses," which all agree covers both bribes paid to federal officials in § 201(b) and gratuities paid to them in § 201(c).

The First and Fifth Circuits also compared the punishments imposed by § 666 to those imposed by § 201(b) and § 201(c). Violations of § 201(c), the federal gratuity provision, are punishable by up to two years in prison, far less than the possible ten-year sentence for violations of § 666. See 18 U.S.C. §§ 201(c) & 666. The First and Fifth Circuits reasoned that the ten-year maximum imposed by § 666 was more in line with the fifteen-year maximum sentence for violations of § 201(b), the federal bribery provision. *Fernandez*, 722 F.3d at 24; *Hamilton*, 46 F.4th at 398; see also 18 U.S.C. § 201(b).

Fernandez and *Hamilton* do not persuade us to overrule our precedents on this statute. "We do not lightly overturn circuit precedent, and we give 'considerable weight to prior decisions of this court unless and until they have been overruled or undermined by the decisions of a higher court, or other supervening developments.'" *Wesbrook v. Ulrich*, 840 F.3d 388, 399 (7th Cir. 2016), quoting *Santos v. United States*, 461 F.3d 886, 891 (7th Cir. 2006). We understand the reasoning of the First and Fifth Circuits, and in particular the odd difference in possible sentences for illegal gratuities paid to federal officials and those paid to state and local officials. Still, for several reasons in addition to *stare decisis*, we are not persuaded to overrule our decisions holding that § 666 applies to gratuities.

First, as we have explained, the word "rewarded" in § 666—which is not found in the federal bribery provision—is a strong indication that § 666 covers gratuities as well as bribes. *Johnson*, 874 F.3d at 1001; see also *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 405 (1999) (defining an illegal gratuity under § 201(c) as "a *reward* for some future act

that the public official will take (and may already have determined to take), *or for a past act that he has already taken*") (emphasis added). Second, while we recognize the disparate penalties imposed for gratuities paid to local officials compared to those paid to federal officials, that difference is mitigated by the additional requirement in § 666 that the reward be paid or received "corruptly," i.e., with the knowledge that giving or receiving the reward is forbidden. *Hawkins*, 777 F.3d at 882. Third, the approach of the First and Fifth Circuits produces its own disparity of a different sort: gratuities paid to federal officials are criminalized, whereas gratuities paid to state and local officials are not under federal law.

Accordingly, we follow here our precedents holding that 18 U.S.C. § 666 applies to gratuities and does not require evidence of a prior *quid pro quo* agreement. The district court did not err when it refused to dismiss the count from the indictment, when it declined to give Snyder's proposed jury instruction, or when it denied his motion for judgment of acquittal.

D. *Sufficiency of Evidence*

Last, Snyder argues that even if § 666(a)(1)(B) applies to gratuities, the evidence was not sufficient at either of his trials to convict. Again, we will overturn a conviction for insufficient evidence only if, viewing all evidence in the light most favorable to the prosecution, no rational trier of fact could have found the defendant guilty. E.g., *Maldonado*, 893 F.3d at 484; see also *Moreno*, 922 F.3d at 793; *Garcia*, 919 F.3d at 496–97.

To prove a violation of 18 U.S.C. § 666(a)(1)(B), the government must show that a public agent "corruptly" solicited or accepted something of value "intending to be

influenced or rewarded" in connection with a transaction of $5,000 or more. 18 U.S.C. § 666(a)(1)(B); see *Mullins*, 800 F.3d at 870. A public agent acts "corruptly" when "he understands that the payment given is a bribe, reward, or gratuity." *Id.* The parties agree that the truck contracts were worth at least $5,000 and that Mayor Snyder was an agent of Portage, which received enough federal funding to be covered by § 666. His argument on appeal is that the evidence was insufficient at either trial for a reasonable jury to find that he solicited the $13,000 check intending to be influenced or rewarded in connection with the two contracts awarded to GLPB.

Snyder challenges the sufficiency of the evidence at both trials, so we must consider the evidence presented to both juries. (If the evidence at the first trial had been legally insufficient to convict, the Double Jeopardy Clause would have barred the second trial. See *Burks v. United States*, 437 U.S. 1, 18 (1978); *Webster v. Duckworth*, 767 F.2d 1206, 1207 (7th Cir. 1985).) Viewing the evidence in each trial in the light most favorable to the government, we find ample support for the juries' verdicts. Mayor Snyder put his good friend Reeder in charge of the bidding process even though Reeder had no experience administering public bids. Reeder then tailored both bid requirements to favor GLPB. In the first-round invitation, Reeder based the chassis specifications on a Peterbilt chassis, and after GLPB told Reeder it could deliver trucks in 150 days, Reeder included a 150-day deadline. In the second round, Reeder tailored the bid specifications to match the truck that had been sitting on GLPB's lot even though the truck was not the manufacturer's current model. The second invitation to bid was issued after Mayor Snyder tried unsuccessfully to

purchase the GLPB truck outright. Evidence at both trials established that Snyder communicated with the Buhas around the time of the second-round bid.

Less than three weeks after the second contract was awarded to GLPB, the Buhas had GLPB pay Snyder $13,000. When questioned by the FBI, Snyder claimed the $13,000 check was payment for healthcare and information-technology consulting he performed for GLPB. When pressed for specifics, Snyder could not identify any work product he provided GLPB. He said that he went to meetings and "discussed things." Although Snyder claimed to have advised GLPB on healthcare options after passage of the Affordable Care Act, he could not recall what decision GLPB made regarding its employees' insurance coverage. The government subpoenaed GLPB and Snyder for all documentation, correspondence, work product, and billing records related to Snyder's consulting work for GLPB. No such evidence was produced.

Given irregularities in the bidding process, Snyder's contemporaneous contacts with the Buhas (unique among bidders), the timing of the $13,000 payment, the dubious explanations offered for the payment, and the lack of corroborating evidence for Snyder's claim that he was paid for consulting, a reasonable jury could conclude that Snyder accepted the check as a bribe or gratuity for steering the contracts to GLPB.

Snyder's arguments to the contrary are unpersuasive. He argues that the evidence at his first trial was insufficient because the government did not provide direct evidence that he intended to be influenced or rewarded when he accepted the $13,000. This argument is a nonstarter. A verdict may be rational even if it relies on

circumstantial evidence, especially of the defendant's state of mind. *United States v. Lawrence*, 788 F.3d 234, 242 (7th Cir. 2015).

Next, Snyder contends that he is entitled to a judgment of acquittal because the government failed to show that the $13,000 check was a bribe or gratuity in connection with *both* rounds of bidding, as opposed to only the second round. This is incorrect as a matter of both law and fact. As a point of law, evidence at trial need not exactly match allegations made in the indictment. See generally *United States v. Miller*, 471 U.S. 130, 136 (1985). As a point of fact, when viewed in the light most favorable to the government, evidence at trial showed that Reeder—whom Snyder put in charge of the bidding process—drafted the chassis and deadline specifications in the first round to favor GLPB.

Finally, Snyder insists that a rational jury would have to conclude that he performed *some* work for GLPB, which would make the $13,000 check bona fide income, not a bribe or gratuity. We disagree. A reasonable jury could conclude that even if Snyder spoke with the Buhas and on occasion offered his advice, the $13,000 check was not paid for consulting services. In response to the government's subpoenas, neither Snyder nor the Buhas could produce a contract, billing records, work product, or any other documentation showing that Snyder worked for GLPB. This, as well as evidence that Reeder crafted both bids to favor GLPB, the timing of the payment, and Snyder's contemporaneous communication with the Buhas, permitted a reasonable jury to conclude that the $13,000 check was not payment for consulting services. The

evidence was sufficient to support both juries' verdicts.[7]

The judgment of the district court is AFFIRMED.

[7] Snyder also argues that the reasoning of the district court, which denied his motions for acquittal after both trials, was flawed in several respects. He asks this court to find the evidence insufficient based on what he characterizes as unreasonable inferences drawn by the district court. On a challenge to the sufficiency of the evidence, we do not defer to the district court's reasoning. *United States v. Harris*, 51 F.4th 705, 714 (7th Cir. 2022). Rather, our focus is on the evidence presented at trial and whether, viewing that evidence in the light most favorable to the government, any rational trier of fact could find Snyder guilty. We therefore need not address or defend every inference drawn by the district court.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

UNITED STATES OF AMERICA **Plaintiff,** **vs.** **JAMES E SNYDER** **Defendant.**	**CASE NUMBER: 2:16CR160-002** **USM Number: 16726-027** **ANDREA E GAMBINO** **MATTHEW B DOGAN** **DEFENDANT'S ATTORNEYS**

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT was found guilty on count 3 of the Indictment after a plea of not guilty on February 14, 2019; and found guilty of count 2 of the Indictment after a plea of not guilty on March 19, 2021.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offenses:

Title, Section & Nature of Offense	Date Offense Ended	Count Numbers
18:666(a)(1)(B) CORRUPT SOLICITATION OF A THING OF VALUE and FORFEITURE ALLEGATION	January 10, 2014	2
26:7212(a) CORRUPT INTERFERENCE WITH THE ADMINISTRATION OF THE INTERNAL REVENUE LAWS	April 2, 2013	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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 any material change in economic circumstances.

October 13, 2021
Date of Imposition of Judgment

s/ Matthew F. Kennelly
Signature of Judge

Matthew F. Kennelly, United States District Judge
Name and Title of Judge

October 14, 2021
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **21 months each on Counts 2 and 3, to be served concurrently for a total term of 21 months.**

The Court recommends to the Bureau of Prisons that the defendant be located in a facility as close as possible to Northwest Indiana that is consistent with the defendant's security classification as determined by the Bureau.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons on January 5, 2022. If the Defendant is unable to report to the designated institution as required, then Defendant shall voluntarily surrender to the United States Marshal's office located in the Hammond Federal Courthouse on the required date and time.

RETURN

I have executed this judgment as follows:

Defendant delivered _____ to _____ at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **1 year on each Counts 2 and 3 to be served concurrently for a total term of 1 year.**

MANDATORY CONDITIONS OF SUPERVISION

While on supervision, the defendant shall comply with the following mandatory conditions:

1. Defendant may not commit another federal, state or local crime.
2. Defendant may not unlawfully use or possess a

controlled substance.

3. The mandatory drug testing condition is suspended, based on the Court's determination that the defendant poses a low risk of future substance abuse.

4. Defendant shall cooperate in the collection of DNA as directed by the probation officer.

DISCRETIONARY CONDITIONS OF SUPERVISION

While on supervision, the defendant shall comply with the following discretionary conditions:

1. The defendant shall not knowingly leave the Northern District of Indiana, Northern District of Illinois and Southern District of Indiana without the permission of the court or probation officer. The probation office will provide a map or verbally describe the boundaries of the federal judicial district at the start of supervision.

2. The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. Thereafter, the defendant shall report to the probation officer in the manner and as frequently as reasonably directed by the court or probation officer during normal business hours.

3. The defendant shall not knowingly answer falsely any inquiries by the probation officer. However, the defendant may refuse to answer any question if the defendant believes that a truthful answer may incriminate him.

4. The defendant shall follow the instructions of the probation officer as they relate to the conditions as

imposed by the court. The defendant may petition the Court to seek relief or clarification regarding a condition if he believes it is unreasonable.

5. The defendant shall make reasonable effort to obtain and maintain employment at a lawful occupation unless he is excused by the probation officer for schooling, training, or other acceptable reasons such as child care, elder care, disability, age or serious health condition.

6. The defendant shall notify the probation officer at least ten days prior to any change in residence or any time the defendant leaves a job or accepts a job. In the event that a defendant is involuntarily terminated from employment or evicted from a residence, the offender must notify the Probation Officer within forty-eight (48) hours.

7. The defendant shall not meet, communicate, or otherwise interact with a person whom he knows to be engaged or planning to be engaged in criminal activity.

8. The defendant shall permit a probation officer to visit him at any time at home or any other reasonable location between the hours of 8:00 a.m. and 10:00 p.m. and shall permit confiscation of any contraband observed in plain view by the probation officer.

9. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

10. The defendant shall not enter into any agreement to act as an informant for a law enforcement agency without the permission of the court.

11. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in this judgment.

Total Assessment	Total Fine	Total Restitution
$200	NONE	NONE

The defendant shall make the special assessment payment payable to Clerk, U.S. District Court, 5400 Federal Plaza, Suite 2300, Hammond, IN 46320. The special assessment payment shall be due immediately.

FINE

No fine imposed.

RESTITUTION

No restitution imposed.

ACKNOWLEDGMENT OF SUPERVISION CONDITIONS

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

I have reviewed the Judgment and Commitment Order in my case and the supervision conditions therein. These conditions have been read to me. I fully understand

the conditions and have been provided a copy of them.

(Signed) _____ _____
Defendant Date

_____ _____
U.S. Probation Officer/ Date
Designated Witness

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA **vs.** **JAMES E. SNYDER**	**Case No. 2:16-CR-160**

ORDER ON DEFENDANT'S POST-TRIAL MOTIONS

After a re-trial, a jury found James Snyder, formerly Mayor of the City of Portage, guilty on Count 3 of the indictment, which charged that he had "corruptly solicit[ed], demand[ed], accept[ed], and agree[d] to accept a bank check in the amount of $13,000, intending to be influenced an rewarded in connection with" the City's purchase of garbage truck, in violation of 18 U.S.C. § 666(a)(1)(B). The Court's instructions to the jury, to which Snyder does not object,[1] required the government to prove the following:

1. The defendant was an agent of the City of Portage.

2. The defendant solicited, demanded, accepted or agreed to accept a thing of value from another person.

3. The defendant acted corruptly, with the intent to

[1] In his motion for new trial, Snyder cites the Court's overruling of his request for a separate instruction defining (among other things) the term "gratuities," but he does not contend that anything about the elements instruction that the Court actually gave was wrong.

> be influenced or rewarded in connection with contracts with the City of Portage.
>
> 4. These contracts involved a thing of a value of $5,000 or more.
>
> 5. The City of Portage, in a one-year period, received benefits of more than $10,000 under any Federal program involving a grant, contract, subsidy, loan, guarantee, insurance or other assistance. . . .

Jury Instructions at 17 (dkt. no. 505). Only the second and third elements were a matter of dispute. On these elements, the Court instructed the jury that

> Bona fide salary, or wages, or fees, or other compensation paid, in the usual course of business, does not qualify as a thing of value solicited, demanded, accepted, or agreed to by the defendant.
>
> A person acts corruptly when he acts with the understanding that something of value is to be offered or given to reward or influence him in connection with his official duties.

Id. at 18. Again, Snyder makes no objection to these instructions.

Snyder moved for a judgment of acquittal at the conclusion of the government's case. The Court reserved ruling on the motion. He has now renewed the motion and insists—appropriately—that in ruling the Court may consider only the evidence that had been introduced at that point. *See* Fed. R. Crim. P. 29(b) ("If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.").

Snyder has moved alternatively for a new trial, citing

various acts of claimed misconduct by the prosecution and errors by the Court. The Court will address each motion in turn.

1. Motion for judgment of acquittal

In considering Snyder's motion for a judgment of acquittal, the Court is required to view the evidence in the light most favorable to the prosecution and must deny the motion unless no rational jury could have found Snyder guilty beyond a reasonable doubt. *See, e.g., United States v. Wallace*, 991 F.3d 810, 812 (7th Cir. 2021). The Court does not reweigh the evidence or assess credibility. *Id.*

It is undisputed that, on or about January 10, 2014, Snyder deposited a $13,000 check from Great Lakes Peterbilt, payable to "SRC Consulting." The government offered no *direct* evidence that this was a bribe or reward within the meaning of the statute, but it did not have to: as the Court instructed the jury—without objection by the defense—circumstantial evidence is considered just as direct evidence is considered, and the law does not say that one is better (or more persuasive) than the other. A verdict may be rational even when it relies solely on circumstantial evidence; the question is whether each link in the chain of inferences is sufficiently strong to avoid a lapse into speculation. *See, e.g., United States v. Lawrence*, 788 F.3d 234, 242 (7th Cir. 2014); *United States v. Moore*, 572 F.3d 334, 337 (7th Cir. 2009).

Following the conclusion of the first trial on the charges against Snyder, the judge who presided over the trial, Judge Van Bokkelen, denied Snyder's motion for a judgment of acquittal. *See* dkt. no. 322 (Order of Nov. 27, 2019). The evidence admitted during the government's case at the trial presided over by this Court largely

tracked that offered at the first trial. This Court's summary thus tracks, to a significant extent, the summary by Judge Van Bokkelen in his order.

The evidence at trial, considered in the light most favorable to the government, showed the following. Snyder was elected Mayor of Portage and took office in January 2012. His campaign platform included automating garbage collection. Great Lakes Peterbilt (GLPB), which was owned by Robert Buha and Stephen Buha, was a truck dealer located in Portage. In 2012-13, GLPB was in serious financial difficulty. So was Snyder. He had gotten notices from the Internal Revenue Service of personal taxes due and of the IRS's intent to assess penalties against him for failure to pay payroll taxes from a mortgage company he owned. Snyder also had significant other debts, including past due payments on certain obligations.

In January and December 2013, GLPB was awarded two contracts totaling $1.125 million to sell garbage trucks to the City of Portage. The contracts were bid out publicly. GLPB was one of the bidders on each round of bidding. The contracts were awarded to GLPB by the Portage Board of Works, whose members were Snyder and others he had appointed.

In January 2014, a little under three weeks after GLPB was awarded the second garbage truck contract, it issued a check for $13,000 to SRC Consulting. There was no company named that, but the name was similar to SRC Marketing and SRC Properties, which were, respectively, an entity owned by Snyder and a name under which that entity did business. SRC Properties had been administratively dissolved prior to January 2014, but its bank account still existed. The $13,000 check from GLPB

was deposited into the SRC account, and $10,000 was quickly transferred to Snyder's personal account. The $13,000 was the bribe or reward that Snyder was convicted of corruptly soliciting, demanding, accepting, or agreeing to accept.

There was evidence that, taken in the light most favorable to the government, permitted the jury to find that there were significant irregularities in the bidding process and that Snyder had it set it up to come out in GLPB's favor. Snyder hand-picked a close friend, Randy Reeder, to oversee the bid processes, rather than Steve Charnetzky, the superintendent of the City's Streets and Sanitation Department and a longtime veteran of that department. Charnetzky had extensive experience overseeing public bid processes and in the relevant City department; Reeder had none. Snyder told Charnetzky not to get involved in the bid processes and that he and Reeder would handle it.

The invitations to bid prepared by Reeder or under his direction told bidders to send their bids to the Mayor's office. This was not the usual procedure; the City's Clerk-Treasurer testified that the custom had been to submit bids to her office.

The terms of the invitations to bid required that "[a]ll equipment furnished shall be new, unused and the same as the manufacturer's current production model." The Court will return to this in a few moments.

Reeder testified that he tailored the bid specifications for the first round to a Peterbilt chassis and a McNelius body—even though the overwhelming majority of garbage trucks use a Mack chassis.[2] Reeder conceded that

[2] This might have been a justifiable requirement, but the jury was not

this favored GLPB and made it difficult for other suppliers to compete. Reeder also turned down equipment demonstrations offered by a number of prospective suppliers, and there was evidence that would permit a rational jury to find that this was odd. In the specifications, Reeder also set a 150-day delivery deadline; he admitted this was based on GLPB's production schedule. The only companies able to meet that deadline were those selling a vehicle with a Peterbilt chassis.

A little under two weeks before the Board of Works met to award the first contract, Reeder sent the Board's members a chart providing details on all of the bids. Reeder's chart highlighted GLPB's bid and calculated the price difference between that bid and the bids of every other company (Reeder did not do this for the other bids). According to the chart, none of the lower bidders were able to meet, or come close to meeting, the 150-day delivery deadline that had been imposed—the deadline that Reeder admitted was based on GLPB's schedule.

At the meeting, the Board of Works was told that GLPB was the only company whose bid was fully responsive to the bid specifications and met the 150-day deadline. The jury reasonably could find, however, that Snyder, through Reeder, had set up the bidding process to make sure that would happen. At the meeting, a motion was made by an appointee of Snyder's to accept GLPB's bid and reject all others as nonresponsive. Snyder accepted the motion, and it passed without dissent.

On to the second contract. As stated earlier, the terms of the invitations to bid required all equipment furnished to be new, unused, and the same as the manufacturer's

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required to see it that way.

current production model. GLPB offered a truck, however, that had a 2012-model chassis that it had ordered in 2011 but had been unable to sell. It had sat on GLPB's lot over two winters, and it had been there so long without being sold that GLPB had to obtain a loan to finance it. As of later in 2013, GLPB would have had to start making balloon payments on the loan in order to avoid losing the truck. Reeder admitted that he knew the chassis was not from the current year and that it had been sitting outside. He testified, however, that he knew Mayor Snyder wanted to buy that vehicle.

Before the second round of bidding, the jury reasonably could find that there was an effort by Snyder, through Reeder, to see if the truck could be purchased from GLPB without putting the contract out to bid. The City's attorney advised that this would require the price to be under $150,000. GLPB would not reduce the price that far, so the truck purchase was put out to bid.

Reeder testified that for the bidding, he changed the specifications for one of the two trucks that the City sought in order to match GLPB's 2012-model truck just discussed. The government offered evidence that would permit the jury to find that it made little sense to buy two different truck models in terms of facilitating repairs and interchangeability of parts. In addition, tweaking the specifications to make them consistent with GLPB's older-model chassis was inconsistent with the invitation to bid's general terms, which required any truck offered to be new and the same as the manufacturer's current production model—which this particular truck was not. Other bidders offered trucks with a 2014 Peterbilt chassis. The truck offered by GLPB had an older chassis and, as indicated, had been sitting outside on GLPB's lot over two

winters.

Snyder's personal calendar, which was introduced into evidence, showed that he had scheduled a lunch with Robert Buha, one of GLPB's owners, on December 12, 2013, the day before the second-round bids were due. Phone records also showed that Snyder had 21 phone contacts and 8 text exchanges with Robert or Stephen Buha—but with no other prospective bidder—between the issuance of the second round invitation to bid in November 2013 and the bid due date four weeks later.

At the meeting of the Board of Works on December 23, 2013, Reeder represented that GLPB's bid had met all of the specs—which was not true given the age of the chassis—and that it was the lowest bid. Snyder then asked if there was a motion to award the contract "to the lowest bidder"; a motion was made; and Snyder and two other members he had appointed to the Board voted to award the bid to GLPB.

After the Board of Works meeting, GLPB asked for written proof of the sale. Reeder prepared a handwritten purchase order and gave it to Snyder. Snyder signed it. Reeder evidently used an outdated form, and a review of the files of the office of the Clerk-Treasurer of Portage did not turn up a copy. Snyder texted Steven Buha, "I have purchase order for you." That day, GLPB made a payment toward the overdue financing balance for the truck and requested and extension to pay the rest, sending a copy of the purchase order in support.

About a week later, Robert Buha directed GLPB's controller Brett Searle to issue a $13,000 check to SRC Consulting. Searle asked for written documentation for his file but was given nothing. He testified that Robert

Buha told him they were paying Snyder for an "inside track."

When Snyder was interviewed by the FBI in July 2014, he was asked about the $13,000 check. He said it was for consulting work he had done for GLPB "all throughout the year" and, elaborating, said it was for "health insurance advising" and "IT advising all throughout the, the course of the year." Snyder said that to do this work, he "met with a lot of people" and "brought a lot of people to meet with them and talk to them and sat in a [sic] lot of meetings and discussed things." When the agents asked if GLPB was doing business with the City of Portage at the time, Snyder said that the City had gotten a number of garbage trucks from GLPB and that "they have all been bid. And he's had to win the bids. *I have nothing to do with that process on pur, on purpose. Nothing. Whatsoever*." GX 190A (emphasis added).

The jury reasonably could find that much of what Snyder told the FBI was false. Specifically, his claim that he had nothing to do with the bidding was contradicted by Reeder's testimony and other evidence that the jury reasonably could credit. In addition, the jury reasonably could find, based on the evidence, that Snyder lacked the background or expertise to do paid health insurance or IT consulting. Indeed, Snyder himself had tried to hire an IT consultant for his mortgage consulting business.

During the government's investigation, subpoenas were served on Snyder, GLPB, and the Buhas for contracts and other documentation relating to any consulting agreement or services performed by Snyder for GLPB. Nothing was produced: no written agreement, no communications regarding an agreement, no work product, no evidence of any meetings, no invoices, nothing

showing that Snyder had actually performed any work. The jury reasonably could have viewed this as indicating that Snyder had not actually done the work he claimed to have done for the $13,000 payment and, indeed, had not done any legitimate work at all for that payment.

When Reeder learned about the payment to Snyder, he asked Snyder about it. Snyder told him that he had been hired to provide "phone and payroll consulting"—a different story from the one he told the FBI. Snyder told John Shepherd, a city planning consultant, still another story—he said that the Buhas had hired him to lobby for GLPB in Indianapolis. In addition, Snyder did not disclose his payment from GLPB on a form he filed with the City on which he was required to disclose anyone doing or seeking to do business with the City from whom he had received compensation. Finally, Reeder's testimony permitted a reasonable jury to find that before the first trial in this case, Snyder asked him to retract certain inculpatory testimony that Reeder had given before the grand jury—testimony that the jury reasonably could find had actually been true. All of this reasonably could be considered by the jury as significant consciousness-of-guilt evidence.

All of this was more than sufficient to permit a rational jury to find that Snyder "solicited, demanded, accepted or agreed to accept" the $13,000 payment, intending to be rewarded for steering the contract awards to GLPB—as the jury instructions required. This would not have involved any speculative leaps; it is all safely within the realm of reasonable inference.[3] The jury reasonably could

[3] In this regard, this case is nothing like *United States v. Garcia*, 919 F.3d 490 (7th Cir. 2019), cited by Snyder.

find that Snyder, directly or through others, influenced the bidding and award processes to make sure that GLPB would win; got paid as a reward (or a bribe) for doing this; and knew that was what the payment was for. The jury was entitled to believe that the payment GLPB made to Snyder was not really for consulting and that Snyder was not only not qualified to conduct the consulting he claimed but actually had not done any consulting for GLPB. A rational jury could conclude that this, the timing of the payment, Snyder's failure to disclose it as required, and his lies and misleading statements about it showed that it was, in fact, a corrupt payment that Snyder understood was a reward or payment of a bribe for steering the contract awards to GLPB.

Snyder argues that the statute's prohibition of corrupt "rewards" requires an upfront agreement, before the official act in question, to make a payment. That contention is not supported by Seventh Circuit caselaw, and it is contrary to a plain-language reading of section 666, which penalizes corrupt "rewards" *in addition to* bribes. *See United States v. Hawkins*, 777 F.3d 880, 881-82 (7th Cir. 2015); *United States v. Gee*, 432 F.3d 713, 714-15 (7th Cir. 2005); *United States v. Agostino*, 132 F.3d 1183, 1190 (7th Cir. 1997); *United States v. Medley*, 913 F.3d 1248, 1260-61 (7th Cir. 1990). *See also United States v. Johnson*, 874 F.3d 990, 1001 (7th Cir. 2017). But even if Snyder were right about this, there was ample evidence permitting a rational jury to find, from the circumstantial evidence, that there was an up-front agreement to reward Snyder for making sure GLPB won the contract award(s). This includes the machinations to make sure GLPB would win, which a rational jury reasonably could find were done at Snyder's direction and would not have been done

without an understanding that he would be rewarded; Snyder's contacts with GLPB before the second round of bidding; making it clear to Reeder that he wanted GLPB to win the bidding; and his shifting stories and lies about why he had been paid and the work he had supposedly done for GLPB.

For these reasons, the Court denies Snyder's motion for a judgment of acquittal.

2. Motion for new trial

A court may grant a new trial in a criminal case "if the interest of justice so requires," Fed. R. Crim. P. 33(a), which may occur when the "substantial rights of the defendant have been jeopardized by errors or omissions during the trial." *United States v. Eberhart*, 388 F.3d 1043, 1048 (7th Cir. 2004), *overruled on other grounds*, 546 U.S. 12 (2005). The Court addresses Snyder's arguments in support of his motion for a new trial in the sequence in which he makes them.

a. Randall Evans

Snyder argues that the government knowingly called Randall Evans, a former Indiana Department of Insurance official, to elicit false testimony from him. The testimony was related to Snyder's claim in his FBI interview that he had rendered advice to GLPB regarding, among other things, the Affordable Care Act ("Obamacare"). Evans testified that rendering such advice would have required Snyder to be registered with the Department as a health insurance consultant, which he was not.[4] Snyder argues this testimony was false and

[4] An Indiana statute defines a "consultant" required to be licensed as a person who, among other things, offers for a fee "any advice,

that the government knew it.

The Court disagrees. Although the Court ultimately found that Evans's testimony on this particular point was not supported by the statute, it was apparent that he sincerely believed it, and there is no basis in the record to support a contention that the government knew the testimony was false or erroneous. Rather, it involved a matter of statutory interpretation, regarding a statute that Evans had previously assisted in administering for the State of Indiana.

In any event, the Court, on Snyder's motion, instructed the jury that "offering advice, counsel, opinion, or service about the Affordable Care Act/Obamacare does not constitute giving advice, counsel, opinion, or service about a policy of insurance under the [Indiana] licensing law . . . and therefore does not require obtaining a license." The Court further instructed the jury to "disregard Mr. Evans's testimony to the extent it is inconsistent with this." This is the only respect in which there is a colorable claim that Evans's testimony was false. The jury is presumed to have followed the Court's instruction, *see, e.g., United States v. Garvey*, 693 F.3d 722, 726 (7th Cir. 2012), and it was sufficient to cure any conceivable unfair prejudice to Snyder from the challenged testimony.

The Court also notes that Snyder suggests in his post-trial briefs that what he told the FBI was that he consulted with GLPB on healthcare-related matters about the ACA, and only about the ACA. That may have been his contention to the jury at trial, but it does not square with

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counsel, opinion, or services with respect to the benefits, advantages, or disadvantages promised under any policy of insurance that could be issued in Indiana." Ind. Code § 27-1-15.6-2(4).

the evidence. During his FBI interview, which was recorded, Snyder said that "I did health insurance advising," and, elaborating, referenced not just the ACA but also GLPB's "union health insurance" and "HSAs," saying that GLPB was working on "all three of those things" and clearly suggesting he had consulted with GLPB about all of them.

In sum, Snyder has not shown that the government presented false testimony knowingly or that it should have known was false and has not shown a likelihood that it affected the jury's judgment. He is not entitled to a new trial on this basis.

b. Bid tampering evidence

Snyder challenges the introduction of several envelopes that contained bids submitted to the Board of Works for the garbage truck contracts and contends that the government misleadingly suggested, and invited the jury to speculate, that Snyder had actually addressed GLPB's bid. This argument is entirely lacking in merit. The government asked a single question on that point to a single witness (Reeder); the witness said he did not know; and the government did not return to the point. There was no conceivable unfair prejudice to Snyder from this—particularly in light of the Court's specific instruction to the jury that lawyers' questions are not evidence—and the government had a good-faith basis to ask the question.

The Court also overrules Snyder's contention that the government inappropriately invited the jury to speculate in closing that Snyder had addressed the envelope. The government did contend in closing that the envelope had not been addressed by the Buhas or Scott McIntyre, but that falls fall short of, as Snyder contends, "intend[ing] to

convey to the jury . . . that Mr. Snyder had addressed the envelope." Mot. for New Trial at 11. In any event, the jury was clearly instructed that it should disregard arguments not supported by the evidence. The Court also notes that Snyder does not appear to have interposed any contemporaneous objection to this particular argument during closing and thus has forfeited the point, and he has not shown (or attempted to show) that the argument amounts to plain error.

Finally, the Court is not persuaded by the suggestion that the government acted inappropriately in seeking and obtaining the bid envelopes from the City shortly before trial, and then producing them promptly (and just before trial) when it obtained them. (Among other things, it appears that the government had sought this material via subpoena several years earlier, but it had not been produced.) Nor has Snyder persuasively shown that he was unfairly prejudiced by the timing of the government's production of the bid envelopes.

c. Government's closing argument

Snyder argues that the government "constructively amended the indictment" by suggesting to the jury that it should convict Snyder on a broader or different basis than his solicitation/acceptance of the $13,000 payment as an influence or reward. The basis for this argument is, in the Court's view, a tortured and unsupportable interpretation of a short excerpt of the government's closing argument. The Court disagrees that this argument amounted to "reviving [a] previously struck allegation" in the indictment, Mot. for New Trial at 15, or changing or expanding the basis for conviction. The Court also notes that Snyder forfeited the point by failing to make any objection to the argument at the time, and he has not

shown that the argument amounted to plain error.

In addition, Snyder's contention that the government was improperly arguing bad character or seeking a propensity evidence as a basis for conviction is untenable and not supported by the record. That aside, Snyder likewise forfeited this point by failing to make a contemporaneous objection, and he has not shown that the argument amounted to plain error.

d. "Gratuity" jury instruction

Snyder's argument regarding the Court's declining of his proposed jury instruction defining "gratuities," as well as "bribes" and "rewards," consists of a single sentence without any supporting argument. The contention has been forfeited. *See, e.g., United States v. Parkhurst*, 865 F.3d 509, 524 (7th Cir. 2017) ("Perfunctory, undeveloped arguments without discussion or citation to pertinent legal authority are waived.") (citation omitted). Nor has Snyder shown that the Court's ruling was plain error; among other things, the instruction was an unnecessary addition to the statutory elements instruction, to which Snyder did not object.

e. Cumulative error

Snyder has not shown any prejudicial error at all, for the reasons the Court describes. And in this case the whole is no greater than the sum of the parts. He has failed to show that there was a cumulative effect of individual errors that rendered the trial unfair or otherwise unfairly prejudiced him.

Conclusion

For the reasons described in this order, the Court denies defendant James Snyder's motion for a judgment

of acquittal [515] and his motion for a new trial [517].

Date: August 13, 2021

Matthew F. Kennelly
MATTHEW F. KENNELLY
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **JAMES E. SNYDER,** **Defendant.**	**Case No. 2:16-cr-160**

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

James Snyder has moved for dismissal of Count 2 of the indictment (solicitation of bribery), the only count remaining for trial in this case. He argues that his re-trial on this count would be outside the 70-day window provided by the Speedy Trial Act, and he asks the Court to dismiss the count with prejudice. Snyder also argues that his retrial would violate his constitutional right to a speedy trial. For the reasons stated below, the Court denies Snyder's motion.

Background

Snyder is the former mayor of the City of Portage, Indiana. In 2019, he was convicted by a jury on charges of corruptly soliciting or accepting bribes in relation to the City's contracts to purchase garbage trucks (Count 2) and corruptly interfering with the administration of Internal

Revenue laws (Count 3). The jury acquitted Snyder on a charge of corruptly soliciting or accepting bribes in relation to the City's tow list (Count 1). On November 27, 2019, on Snyder's motion, Judge Joseph Van Bokkelen granted a new trial on Count 2.

Since Judge Van Bokkelen's November 2019 order granting a new trial, several motions, continuances, and the COVID-19 pandemic have all contributed to delays in the retrial of Count 2. On November 2, 2020, Snyder asserted his right to a speedy trial and informed the Court that he intended to file the present motion to dismiss.

Discussion

Snyder alleges two violations of his speedy-trial rights: a statutory violation and a constitutional violation. The alleged statutory violation involves the Speedy Trial Act; the alleged constitutional violation involves the Sixth Amendment.

A. Statutory right to a speedy trial

The Speedy Trial Act requires that when a "defendant is to be tried again . . . following an order [by the trial judge] for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final." 18 U.S.C. § 3161(e). If a defendant is not brought to trial within the Act's 70-day period, the information or indictment "shall be dismissed on motion of the defendant" with or without prejudice. 18 U.S.C. § 3162(a)(2); *see also id.* § 3161(e) ("The sanctions of section 3162 apply to [subsection 3161(e)].").

"To provide courts with the necessary flexibility to accommodate pretrial proceedings," the Speedy Trial Act allows certain intervals of time between arraignment and

trial to be excluded from consideration under the 70-day limit. *United States v. Hills*, 618 F.3d 619, 626 (7th Cir. 2010); *see also* 18 U.S.C. § 3161(e) (stating that the "periods of delay enumerated in Section 3161(h) are excluded in computing the time limitations specified in [subsection 3161(e)])." Among the excluded intervals is any "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion[,]" 18 U.S.C. § 3161(h)(1)(D), and "[a]ny period of delay resulting from a continuance . . . if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial," *id.* § 3161(h)(7)(A).

The period relevant for Snyder's Speedy Trial Act argument is November 27, 2019, when Judge Van Bokkelen granted a new trial, to November 16, 2020, the date on which the district's chief judge entered the most recent of several orders making ends-of-justice findings based on the COVID-19 pandemic. When calculating excluded time for continuances, courts must "count from the day after the case is continued to the date of the next appearance." *United States v. Bell*, 925 F.3d 362, 374 n.1 (7th Cir. 2019). But "for motions that are filed and remain pending, the Supreme Court and the Seventh Circuit count from and including the date the motion was filed through and including the date it was resolved." *Id.*; *see also* 18 U.S.C. § 3161(h)(1)(D) (excluding "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion").

The chart below outlines the events that occurred

between November 27, 2019 and November 16, 2020. Where applicable, the dates and events include their corresponding docket entries. When dates in the parties' briefs conflicted with the dates recorded on the docket, the Court used the dates recorded on the docket. Numbers in parentheses concern events that potentially would toll the 70-day period under the Act.

Date	No. of days	Event
Nov. 28 – Dec. 6, 2019	9	No exclusion applies
Dec. 7, 2019 – Jan. 20, 2020	(45)	Government requests 45-day continuance to review trial transcripts; Snyder did not object to the 45-day continuance and agreed to exclude this time from calculation under the Act (Dkt. no. 325)[1]
Jan. 21 – 26, 2020	6	No exclusion applies
Jan. 27 – 28, 2020	(2)	Defense attorney motion to withdraw (Dkt. no. 349, 351)
Jan. 29 – 30, 2020	(2)	Defense attorney motion to withdraw (Dkt. no. 352, 353)
Jan. 31 – Feb. 2, 2020	3	No exclusion applies
Feb. 3 – 10, 2020	8[2]	Joint motion to continue pretrial and trial dates (Dkt. no. 354, 355)

[1] The government argues that, in addition to the 45 days excluded due to the continuance, four additional days must be excluded because the parties' next appearance before Judge Van Bokkelen was not until January 24, 2020. The Court need not address this argument because even if those four days are not excluded under the Act, 70 non-excluded days have not passed since the new trial was granted.

[2] The government contends this period encompasses only seven days, but that number is incorrect because, including the date the motion was filed and the date the motion was resolved, eight days passed. *See Bell*, 925 F.3d at 374 n.1.

Feb. 11, 2020	1	No exclusion applies
Feb. 12 – 13, 2020	(2)	Government's unopposed motion to continue hearing (Dkt. no. 356, 357)
Feb. 14 – March 4, 2020	20	No exclusion applies
March 5 – Oct. 22, 2020	(232)	Defense motions to dismiss on double jeopardy and "supervisory authority" grounds (Dkt. no. 363–66, 404–05); at oral argument on August 24, 2020, Snyder agreed to exclude the time between argument and the issuance of Judge Theresa Springmann's opinion (no later than October 24, 2020) (Dkt. no. 402)
Oct. 23 – Nov. 15, 2020	24	No exclusion applies

Snyder argues that at least 77 non-excluded days have passed since Judge Van Bokkelen granted him a new trial on Count 2. This calculation omits certain dates the government argues are excluded under the Act. By the government's count, only 62 non-excluded days have passed.

1. "Ministerial" motions

First, the government contends that the time during which certain pretrial motions were pending is excluded regardless of whether they actually delayed the trial date. Specifically, it argues that the time that the two defense motions to withdraw and the two motions to continue were pending are automatically excluded under section 3161(h)(1)(D).[3] Snyder concedes that pretrial motions are

[3] The government argues in the alternative that the 70-day clock for the new trial on Count 2 did not begin until the time for appeal ran because until then the order granting a new trial was not yet final. *See* 18 U.S.C. § 3161(e) ("If the defendant is to be tried again following . . . an order . . . for a new trial, the trial shall commence within seventy

excludable under the Act, but he characterizes the two motions to withdraw, and perhaps the motions to continue, as "merely ministerial" and therefore inappropriate for exclusion under the Act.

No controlling authority supports Snyder's position. The Act itself undercuts Snyder's argument: it provides that delays "resulting from *any* pretrial motion" are excluded from the Speedy Trial calculation. *See* 18 U.S.C. § 3161(h)(1)(D) (emphasis added); *see also* 5 Wayne R. LaFave et al., *Criminal Procedure* § 18.3(b) n.29 (4th ed. 2020) ("Because Congress said 'any,' there is no authority for excluding some pretrial motions on the basis that they do not require a significant amount of thought or attention by the court.") (certain internal quotation marks omitted). Moreover, the Supreme Court has expressly held that filing a pretrial motion tolls the clock "irrespective of whether it actually causes, or is expected to cause, delay in starting a trial." *United States v. Tinklenberg*, 563 U.S. 647, 650 (2011).

Though Snyder cites *United States v. Parker*, 30 F.3d 542 (4th Cir. 1994), for support, that case is unpersuasive. First, the Court cannot agree with the proposition that the motions in question were merely "ministerial," as Snyder contends. On the motions to withdraw, an attorney cannot exit from a case by simply giving notice. Leave of the court is required, so counsel must *request* leave to withdraw. *See* N.D. Ind. L. R. 83–8(c). And in a criminal case, withdrawal of an attorney is, or at least can be, a matter of consequence, even if (as was the case here)

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days from the date the action occasioning the retrial becomes final."). The Court need not address this argument, because even if the clock began on the day Judge Van Bokkelen's order was entered, 70 non-excluded days have not yet elapsed.

the attorney is one of several representing the client. As for the motions to continue,[4] even an "agreed" or unopposed motion to continue a pretrial or trial date still requires approval of the court. There is no rule that the parties can bind the court to vacate or extend a date by simply agreeing to a continuance.

Second, even if the motions were "ministerial," the discussion of "merely ministerial" motions in *Parker*—which is not binding authority to begin with—is dicta. *See id.* at 550. As the Fourth Circuit noted, the motions in *Parker*—a motion to withdraw counsel and the decision to substitute counsel—were not "ministerial." *See id.* In fact, the court's discussion of ministerial motions was limited to a hypothetical: "*if* a district court were to assert, after the fact, that a series of consecutive 30–day delays had been 'reasonably attributable' to the consideration of pretrial motions, yet we found those motions to be clearly frivolous or *merely ministerial*, *we would not* hesitate to reverse for an abuse of discretion." *Id.* (emphasis added). In any event, to the extent that dicta is persuasive, it is arguably foreclosed by the Supreme Court's decision in *Tinklenberg*. *See Tinklenberg*, 563 U.S. at 650.

In sum, the pretrial motions automatically tolled the Speedy Trial Act clock.

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[4] Snyder does not appear to contest this exclusion in his reply, but his opening brief describes the period including February 3-10, 2020 as a period for which "no exclusion applies," Def.'s Mot. at 4, so the Court addresses it for purposes of completeness.

2. Judge Van Bokkelen's 45–day continuance and Judge Springmann's post-hearing exclusion of time

In his reply brief, Snyder also takes issue with the exclusion of two other periods. The first, a continuance, came soon after Judge Van Bokkelen granted a new trial on Count 2. On December 6, 2019, the government requested a 45-day continuance in order to review the prior trial's transcripts so that it could assess how it should proceed going forward, and it specifically requested an exclusion of this time under the Speedy Trial Act. Snyder did not object to the 45-day continuance and expressly agreed to exclusion of this time under the Act, saying "[w]e do not object on a speedy trial basis." Dkt. no. 388 at 4.

The second event occurred while Judge Springmann considered Snyder's motions to dismiss on double jeopardy and "supervisory authority" grounds. After hearing oral argument on these motions, Judge Springmann advised the parties that although she had originally expected to rule within 30 days, for various reasons, largely concerning the complexity of the parties' presentations, she anticipated it would be closer to 60 days. The judge also stated that she wanted to obtain the transcript of the parties' lengthy oral arguments and said that "I would like to make sure that there are no issues with that additional time . . . and effectively extending the time period that might otherwise bump against the speedy trial time limits."[5] Dkt. no. 403 at 120. When

[5] Under 18 U.S.C. § 3161(h)(1)(H), a "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court" is automatically excluded. Presumably for this reason, Snyder takes

asked if the defense had "any concern or issues," Snyder's counsel stated, "Your Honor, we have no objection to that calendar." *Id.*

Snyder has now done an about-face on both of these points: he argues that neither Judge Van Bokkelen's 45-day continuance nor Judge Springmann's 30-day extension should be excluded under the Act. Specifically, Snyder contends that Judge Van Bokkelen's 45-day continuance is non-excludable because the judge did not make sufficient or valid ends-of-justice findings under section 3161(h)(7). With regard to the period after the oral argument on the motions to dismiss and Judge Springmann's ruling, Snyder argues that only the first 30 days should be excluded, not the extra 30 that Judge Springmann requested, because on the day of the hearing—August 24, 2020—the judge had already received all of the documents necessary to start the 30-day clock under 18 U.S.C. § 3161(h)(1)(H).

The Court rejects these arguments for several reasons. First, Snyder forfeited both points. In his initial brief, he prominently included a chart setting out the periods that he contended were and were not appropriately excluded. Def.'s Mot. at 4. In this chart, he identified both of these periods as excluded under the Act but included a reference "but see fn. 3 below." In that small-type footnote, Snyder stated that for "purposes of the record only" his position was that these two periods were not excluded under the Act but further stated that because he believed the non-excludable time exceeded 70 days even without these periods, he would not "push" the

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issue with only 30 of the 60 days it took Judge Springmann to issue her ruling on the motion.

points. And he didn't; he left these points undeveloped and made no effort to explain why the Court should ignore his express waivers before Judges Van Bokkelen or Springmann. "As litigants have often been reminded, a skeletal argument, really nothing more than an assertion, does not preserve a claim." *United States v. Macchione*, 660 F. Supp. 2d 918, 926 (N.D. Ill. 2009) (alterations accepted) (internal quotation marks omitted) (citing *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)); *see also United States v. Lupton*, 620 F.3d 790 n.2, 803 (7th Cir. 2010) ("An exiguous mention . . . does not a developed argument make"). It wasn't until his reply brief that Snyder made full-fledged arguments to press either of these points. This is likely because it did not become apparent until he saw the government's response that the treatment of these two periods could make a difference in the outcome. But this is pretty close to the very definition of a forfeiture, or even a waiver: not arguing or effectively whispering some points because others seem more important.

Second, aside from forfeiture, Snyder *affirmatively agreed* to both of these continuances and to the exclusion of time under the Act. He cannot take that back now. In other words, Snyder isn't entitled to rescind his concessions because it no longer serves his interests. *See United States v. Wasson*, 679 F.3d 938, 948–49 (7th Cir. 2012) (citing cases that discuss the unfairness of a defendant agreeing to or seeking a continuance only to later assert that insufficient findings were made under the Act, but declining to decide whether estoppel prevents a party from challenging a continuance on that basis). Snyder's circumstances are nothing at all like those the Supreme Court faced in *Zedner v. United States*, 547 U.S.

489 (2006), which Snyder cites. *Zedner* concerned a defendant's prospective waiver of the Speedy Trial Act at the outset of his case. *Id.* at 502. In this case, Snyder did not waive the Act's application, and his waiver was not prospective. Rather, he contemporaneously agreed that particular continuances and time exclusions were proper. Put simply, Snyder is asking "to sandbag the government by insisting that the time be counted against the speedy trial clock" even though he "explicitly agree[d] to the government's request that time be excluded." *See United States v. Baskin-Bey*, 45 F.3d 200, 204 (7th Cir. 1995). There is no basis in law to support this.

Third, even if he was entitled to rescind his concessions and argue the point now, Snyder's arguments still lack merit. The Court addresses the 45-day continuance first. At bottom, Snyder's argument is that Judge Van Bokkelen failed to make sufficient ends-of-justice findings because he didn't tick off all the Act's relevant statutory elements contemporaneously with his granting the government's motion. This, however, was not required; a judge may rely on the words of the party's motion. *See Wasson*, 679 F.3d at 947 ("Although it may have been better for the district court to spell out its agreement with Wasson's motion when granting it, the fact that Wasson's motion laid out the reasons supporting the continuance and the court subsequently granted the motion satisfies us the court considered the appropriate factors.").

It is apparent from the record that Judge Van Bokkelen, in excluding the 45 days, relied on the government's request, which sufficiently addressed the ends-of-justice factors under § 3161(h)(7)(B). During the status conference, the government explained that the

United States Attorney's Office in Chicago (rather than the office in Northern Indiana) was supervising Snyder's case and would need time to review the entirety of the trial's transcripts to make an "informed decision" on whether to retry Count 2. Dkt. no. 388 at 4. In the "interests of justice," the government asked for a 45-day continuance and that the time be excluded under the Act.[6] *Id.* The government's request is reasonably interpreted as invoking the second factor in the Act: "the case is so unusual or so complex, due to . . . the nature of the prosecution . . . that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section." 18 U.S.C. § 3161(h)(7)(B)(ii). That aside, if the explanations given by Judge Van Bokkelen or by the government were insufficient, one would have expected Snyder to say so at the time. The fact that he didn't indicates that the rationale offered by the government was sufficient or at least that Snyder perceived it as such.

Next the Court considers Snyder's newly-minted challenge to Judge Springmann's exclusion of an extra 30 days following arguments on the defense motions to dismiss. As the Court has noted, Judge Springmann held argument on the relevant motions on August 24, 2020 and, at the conclusion of that argument, indicated that it would take her approximately 60 days to issue a decision, rather than 30 as she had originally expected. Judge Springmann explained that she required additional time

[6] Again, Snyder *agreed* to this exclusion of time. When Judge Van Bokkelen asked if Snyder had "any problem with" the exclusion of time, Snyder's counsel said "I don't think so." Dkt. no. 388 at 4. Judge Van Bokkelen pushed defense counsel, stating: "By I don't think so, is that going to change?" *Id.* Snyder's counsel said, "No." *Id.*

due to, among other things, the length of the oral arguments and that she wanted "to receive the transcript." Dkt. no. 403 at 120. She stated that she "would like to make sure there are no issues with that additional time . . . and effectively extending the time period that might otherwise bump against the speedy trial time limits."[7] *Id.* When Judge Springmann directly asked defense counsel, "Would there be any concern or issues in that regard for the Defense?" Snyder's attorney stated: "Your Honor, we have no objection to that calendar." *Id.* Given this express agreement, the Court's conclusions regarding Judge Van Bokkelen's continuance—relating to Snyder's forfeiture, agreement, and estoppel—apply with equal force here.

That aside, under 18 U.S.C. § 3161(h)(1)(H), a "delay

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[7] Here is the complete quote of Judge Springmann's remarks:

> My estimate on getting a decision out, a ruling with regard to the two motions to dismiss, I think I'm going to recommend extending that; and I just want to make sure there would be no issues in doing the same, so that the Court can review the arguments today from the transcripts that the court reporter will be preparing.
>
> I had anticipated being able to do so within 30 days from today's date; but given the amount of time the Court has taken in on the arguments, the supplemental authority that was filed in August 20th, and the additional information highlighted and presented, the Court thinks it may be closer to 60 days. And so I've kind of circled October 24, 2020 to get an opinion out. I would like to make sure there are no issues with that additional time for the Court to receive the transcript and incorporate the Power Points of today's oral argument, and effectively extending the time period that might otherwise bump against the speedy trial time limits. Would there be any concern or issues in that regard for the Defense?

Dkt. no. 403 at 120.

reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court" is automatically excluded. A proceeding is "under advisement" once "the court receives all the papers it reasonably expects" on the motion. *Henderson v. United States*, 476 U.S. 321, 329 (1986). Snyder now argues, contrary to his position at the time, that the Speedy Trial Act clock started to run once Judge Springmann had received the parties' PowerPoint presentations (on August 24, 2020 during the oral argument) and not later when she obtained a copy of the oral-argument transcript. For that reason, Snyder now contends, the 30-day delay provided by section 3161(h)(1)(H) ended on September 23, and the clock began running again on September 24.

Contrary to Snyder's argument, the guidance is *Henderson* is not limited to the parties' briefs. The Supreme Court explained the 30-day delay begins when a motion is "'under advisement,' i.e., 30 days from the time the court receives all the papers it reasonably expects." *Henderson*, 476 U.S. at 329. Judge Springmann made it clear that among the papers she reasonably expected and needed before issuing a decision was the transcript of the hearing. The docket shows the hearing transcript wasn't available until September 23, 2020. *See* Dkt. no. 403. Judge Springmann issued her opinion 29 days after that, on October 22, 2020, within the 30-day excluded period. Thus, even if Snyder has not forfeited or waived the point or is not estopped from making the 180-degree turn he is now attempting, his argument fails on the merits.

In sum, both continuances tolled the Speedy Trial Act clock.

3. Final calculation

The chart below outlines the events that occurred over the period and totals the number of the non-excluded days. As noted earlier, "for motions that are filed and remain pending" courts must "count from and including the date the motion was filed through and including the date it was resolved." *United States v. Bell*, 925 F.3d 362, 374 n.1 (7th Cir. 2019).

Date	Non-excluded days	Event
Nov. 28 – Dec. 6, 2019	9	No exclusion applies
Dec. 7, 2019 – Jan. 20, 2020		Government requests 45-day continuance to review trial transcripts; Snyder did not object to the 45-day continuance and agrees to exclude this time from calculation under the Act (Dkt. no. 325)
Jan. 21 – 26, 2020	6	No exclusion applies
Jan. 27 – 28, 2020		Defense attorney motion to withdraw (Dkt. no. 349, 351)
Jan. 29 – 30, 2020		Defense attorney motion to withdraw (Dkt. no. 352, 353)
Jan. 31 – Feb. 2, 2020	3	No exclusion applies
Feb. 3 – 10, 2020		Joint motion to continue pretrial and trial dates (Dkt. no. 354, 355)
Feb. 11, 2020	1	No exclusion applies
Feb. 12 – 13, 2020		Government's unopposed motion to continue hearing (Dkt. no. 356, 357)
Feb. 14 – March 4, 2020	20	No exclusion applies
March 5 – Oct. 22, 2020		Defense motions to dismiss on double jeopardy and "supervisory authority"

		grounds (Dkt. no. 363–66, 404–05); at oral argument on August 24, 2020, the parties agreed to exclude time between argument and the issuance of Judge Theresa Springmann's opinion (no later than October 24, 2020) (Dkt. no. 402)
Oct. 23 – Nov. 15, 2020	24	No exclusion applies
TOTAL:	**63 days**	

In sum, only 63 non-excluded days have passed since the order granting a new trial. Snyder's rights under the Speedy Trial Act have not been violated.

B. Constitutional right to a speedy trial

The Sixth Amendment right to a speedy trial is "triggered when an indictment is returned against a defendant." *Hills*, 618 F.3d at 629. To determine whether a pretrial delay violates the Sixth Amendment, courts consider: "(1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his speedy trial right, and (4) the prejudice to the defendant caused by the delay." *United States v. Thomas*, 933 F.3d 685, 694 (7th Cir. 2019).

1. Length of the delay

"[T]o trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay. *Doggett v. United States*, 505 U.S. 647, 651–52 (1992). "The length of the delay . . . is not so much a factor as it is a threshold requirement: without a delay that is presumptively prejudicial, [courts need not examine] other factors."

Hills, 618 F.3d at 629–30 (alterations accepted) (internal quotation marks omitted). The Seventh Circuit has said that "delays approaching one year [are] presumptively prejudicial." *United States v. White*, 443 F.3d 582, 589–90 (7th Cir. 2006).

Snyder argues that the proper way to determine the length of the delay is to count from the date of his indictment, November 17, 2016, to the present. If Snyder not yet had a trial, this would make sense. But there was a trial, held in January-February 2019. After that, a new trial was granted on Count 2 on Snyder's motion. In the Court's view, it would defy logic and common sense to count from November 2016 to now and pretend the earlier trial never happened. It therefore seems to the Court that the more appropriate start date is the date the order for a new trial was entered, November 27, 2019. Regardless, no matter the start date, a year or more has passed and Snyder's retrial has not occurred, so the delay is presumptively prejudicial.

2. Blame for delay

Turning to the second factor, reason for the delay, "[b]ecause pretrial delay is often both inevitable and wholly justifiable, different weights should be given to different reasons for delay." *Hills*, 618 F.3d at 630 (alterations accepted) (citations omitted). "Delays due to the complexity of the case . . . support a finding that no Sixth Amendment violation occurred." *Id.* "[D]elays resulting from defense counsel's need to prepare are attributable to the defendant," while "delays resulting from a trial court's schedule are ultimately attributed to the government, but weighted less heavily." *Id.*

Nearly all of the delay in bringing Count 2 to trial

since Judge Van Bokkelen granted a new trial has been the result of the global pandemic and the resulting inability to conduct a trial in a manner that is safe for jurors, litigants, and court staff. That delay cannot rationally be attributed to the prosecution and cannot be viewed as anything other than completely justifiable. Snyder does not argue otherwise.

The two delays Snyder presses—resulting from consideration of his motions related to the government's seizure of his e-mail and his post-trial motions—are arguably attributable to him, not the government. Though Snyder acknowledges this, he argues that because these motions were necessary to challenge what he claims was unethical government conduct, the government must share some of the burden as well. But, of the many allegations of governmental misconduct Snyder has advanced to date, the vast majority have been rejected.[8] On balance then, the majority of this delay is appropriately attributed to Snyder. This factor cuts against finding a constitutional violation.

3. Assertion of speedy trial rights

The parties agree that Snyder asserted his right to a speedy trial on November 2, 2020. But this assertion occurred after the delays that Snyder argues violated his speedy trial rights. As a result, his late assertion "does not weigh strongly in his favor." *See United States v. Patterson*, 872 F.3d 426, 436 (7th Cir. 2017); *see also White*, 443 at 590–91 (stating that because defendant's

[8] In 2018, Judge Van Bokkelen precluded the government from using certain exhibits at trial after determining that the government failed to appropriately filter out e-mails that contained privileged attorney-client communications.

speedy-trial assertion came three months after the delay had occurred, this factor did "not weigh strongly in his favor").

4. Prejudice resulting from delay

Finally, the Court must examine whether Snyder has been prejudiced as a result of the delay of his trial. "Prejudice to the defendant is assessed in light of the interests which the speedy trial right was designed to protect." *Patterson*, 872 F.3d at 436. Those rights are: "preventing oppressive pretrial incarceration, minimizing the anxiety and concern of the accused, and [—the one given the most weight—] limiting the possibility that the defense will be impaired by the delay." *Id.*

Snyder is not in pretrial detention, so that is not at issue here. He does not argue that his defense has been limited by delay, nor does he argue that he suffers from undue anxiety or concern as a result of the delay. Instead, he summarily argues that a litany of "major evils" listed in *United States v. Marion*, 404 U.S. 307, 320 (1971), are present in this case. Even if the Court were to interpret the invocation of the *Marion* "evils" as a contention that Snyder suffers from undue anxiety or concern as a result of the delay of his trial, he has not offered evidence to support those claims. When a defendant fails to offer evidence of anxiety beyond a "general assertion" that he is afflicted, courts "need not give [such claims] much weight." *Hills*, 618 F.3d at 632.

Weighing the four factors together, although the delay was presumptively prejudicial within the meaning of *White*, the other factors do not support finding a constitutional violation: most of the relevant delay is appropriately attributed to Snyder; he asserted his right

after the events that he alleges caused the delay occurred; and he suffered no specific prejudice from the delay.

Conclusion

For the reasons stated, the Court denies Snyder's motion to dismiss [dkt. no. 425].

Matthew F. Kennelly
MATTHEW F. KENNELLY
United States District Judge

Date: February 3, 2021

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA v. JAMES E. SNYDER	CAUSE No.: 2:16-CR-160-2-TLS-JEM

OPINION AND ORDER

This matter is before the Court on Defendant James E. Snyder's Motion to Dismiss Count 2 Based on the Supervisory Power of the Court [ECF No. 365]. For the reasons set forth below, the Defendant's Motion is DENIED.

FACTUAL AND PROCEDURAL HISTORY

The factual and procedural background of this case has been discussed by the Court at length in earlier orders. The Court incorporates by reference its brief recount of relevant facts and procedural history as well as its description and analysis of the "Buha Error" and the Immunity Order contained within its Opinion and Order dismissing the Defendant's Motion to Dismiss Count 2 on Double Jeopardy Grounds [ECF No. 404], which is being issued simultaneously with the instant Opinion and Order.

ANALYSIS

The Defendant, in his Motion to Dismiss Count 2 Based on the Supervisory Power of the Court [ECF No.

365], requests the court to invoke its supervisory power to dismiss Count 2 of the Indictment. By utilizing their supervisory powers, "federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress . . . to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and finally, as a remedy designed to deter illegal conduct." *United States v. Hasting*, 461 U.S. 499, 505 (1983) (citations omitted). The Defendant argues that the Court should invoke its supervisory power and dismiss Count 2 of the Indictment because the Government violated the Defendant's due process rights when it deterred the Buha brothers from testifying by threatening them with perjury charges and/or by withdrawing their immunity to testify.

The Supreme Court has explained that the Defendant has the right to present a defense which "include[s], as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *Washington v. Texas*, 388 U.S. 14, 18 (1967) (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)). Further,

> [t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due

process of law.

Id. Accordingly, "[i]t is well-settled that substantial government interference with a defense witness's free and unhampered choice to testify violates the defendant's due process rights." *Newell v. Hanks*, 283 F.3d 827, 837 (7th Cir. 2002) (citing *United States v. Vavages*, 151 F.3d 1185, 1191 (9th Cir. 1998); *Freeman v. Georgia*, 599 F.2d 65, 69 (5th Cir. 1979); *Lockett v. Blackburn*, 571 F.2d 309, 314 (5th Cir. 1978); *United States v. Morrison*, 535 F.2d 223, 225–28 (3d Cir. 1976)).

The Defendant compares his case to *Morrison*. In *Morrison*, the Third Circuit considered "whether [the] appellant was denied a fair trial in that he was deprived of his constitutional right to call witnesses in his defense by the actions of . . . the Assistant United States Attorney." *Morrison*, 535 F.2d at 224. In that case, the defendant's lawyer "planned his defense around the testimony of [his girlfriend], who allegedly was prepared to swear it was she and not [the defendant] who had been involved in the conspiracy to sell hashish." *Id.* at 225. The AUSA

> [o]n at least three occasions . . . sent messages to [the witness] through counsel warning that she was liable to be prosecuted on drug charges; that if she testified, that testimony would be used as evidence against her and, further, that as she was now eighteen it would be possible to bring federal perjury charges against her.

Id. In addition to these communications, the AUSA also sent the witness a subpoena, which the Third Circuit concluded was used only to intimidate the witness because it was legally invalid. *Id.* at 225–26. Finally, the AUSA brought the witness to his office, where she was

surrounded by law-enforcement officers involved in the case and was once again warned of the dangers of testifying. *Id.*

At trial, the witness refused to answer over thirty questions and the defendant was found guilty. *Id.* at 226. On appeal, the Third Circuit found that "[t]he actions of the prosecutor in his repeated warnings which culminated in a highly intimidating personal interview were completely unnecessary," *id.* at 227, and concluded that his conduct "was without doubt responsible for the course pursued by [the witness] in refusing to testify and to that extent deprived [the defendant] of due process of law under the Fourteenth Amendment," *id.* at 228.

Despite this comparison, *United States v. Johnson*, 437 F.3d 665 (7th Cir. 2006) is more applicable to the instant case. In *Johnson*, the defendant—like the Defendant in this case—argued that "the government denied him constitutional due process by threatening investigation and indictment of a defense witness . . . to prevent her from testifying." 437 F.3d at 677. The basis for the defendant's argument was a letter the government sent to defense counsel, which indicated:

> Witness A is currently the possible subject or target of an investigation concerning false statements and/or obstruction of justice concerning her statements on February 24, 2000, and she may be charged with a crime. The U.S. Attorney's Office currently has not provided Witness A with any consideration or promises of consideration.

Id. at 678. The Seventh Circuit recognized that "[t]he government's messages to a witness, conveyed through

defense counsel, have in the past been held to be improper threats," *id.* (citing *Morrison*, 535 F.2d at 225–26); however, it also clarified that the relevant caselaw focuses on "what the prosecutor communicates *to the witness*," *id.* (citing *United States v. Jackson*, 935 F.2d 832, 847 (7th Cir. 1991)), and identified that a court-ordered letter to defense counsel was "a rather inefficient medium for conveying threats to a witness, [suggesting] that it probably was not intended to deter Witness A from testifying," *id.*

Despite the Defendant's attempt to liken his case to *Morrison*, the two cases are incomparable. The Defendant does not contend that AUSA Koster, like the AUSA in *Morrison*, attempted to threaten or intimidate the Buha brothers by meeting with them or sending them messages or other communications. Instead, the Defendant cites to two instances of what he alleges to be intimidation in the instant case: AUSA Koster's reference that the Government believed the Buha brothers had been untruthful during their grand jury testimony, and her revocation of the Buha brothers' immunity to testify at trial. However, even if AUSA Koster had truly revoked the Buha brothers' immunity, it cannot have been intimidation because it ultimately did not make the Buha brothers any more or less safe to testify during trial.[1] Further, the Court is unconvinced that AUSA Koster's statements can be considered intimidation because AUSA

[1] In the Court's Order Denying the Defendant's Motion to Dismiss Count 2 on Double Jeopardy Grounds [ECF No. 404], the Court explains at length that the Buha brothers were not in danger of being prosecuted for bribing the Defendant, as the statute of limitations had elapsed, and that the Immunity Order did not protect the Buha brothers from perjury charges. As such, a revocation of the granted immunity would not increase the risks associated with testifying.

Koster's statements did not include obviously threatening language and the context surrounding AUSA Koster's statements make it unlikely that the statements were intended to be a threat.

First, an examination of AUSA Koster's actual statement illustrates that it cannot be considered a threat. At Sidebar, AUSA Koster stated that "[t]he government does not believe that [the Buha brothers] have been truthful." Trial Tr. vol. 6, 187. Notably, Defense counsel, and not the Government, brought up perjury allegations. *Id.* at 189. AUSA Koster's statements fall short of the obviously threatening conduct that other courts have deemed to be witness intimidation, as it did not guarantee (or even clearly reference the possibility of) prosecution. *See Webb v. Texas*, 409 U.S. 95, 97 (1972) ("[T]he judge implied that he expected [the witness] to lie, and went on to assure him that if he lied, he would be prosecuted and probably convicted for perjury, that the sentence for that conviction would be added on to his present sentence, and that the result would be to impair his chances for parole."); *United States v. Smith*, 478 F.2d 976, 977, 979 (D.C. Cir. 1973) (concluding that a prosecutor's in person statement to a witness representing that the witness, if he chose to testify, would be prosecuted for concealing a deadly weapon, obstruction of justice, and as a principal in a murder, resulted in depriving the defendant of the witness's testimony.). Exactly how the Defendant's attorneys conveyed AUSA Koster's statements to the Buha brothers is not before the Court; it is possible that they felt threatened and were actually concerned that they would be prosecuted for perjury. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 262 (1988). However, such fear cannot be ascribed to AUSA Koster's

conduct and thus cannot be grounds for dismissal. *See id.* ("The witness may have felt threatened by the prosecutor's statement, but his subjective fear cannot be ascribed to governmental misconduct . . .").

Second, the context of AUSA Koster's statements make it unlikely that the statements were intended to be a threat. AUSA Koster's statements were made to opposing counsel and the presiding judge during a sidebar, which—like the court-ordered letter in Johnson—is a rather inefficient medium for conveying a threat to a witness.[2] Attempting to convey a threat in such a manner would be particularly inefficient because neither the Buha brothers' attorney nor the Buha brothers themselves were present during the sidebar, thus decreasing the likelihood that the threat would be conveyed to the intended party at all. Furthermore, the statement was made in the presence of the judge, which is a setting that limits the potential for threats and overreaching statements. *See Jackson*, 935 F.2d at 847. If AUSA Koster intended to threaten the Buha brothers, it is unlikely that she would elect do so in front of the judge and in a manner that did not guarantee that the threat would be received by the Buha brothers.

As there is no evidence that AUSA Koster directly communicated a threat, either by message or in person, *Morrison* does not support dismissal. Furthermore, as the Court has concluded that the threatening conduct

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[2] At some point counsel for the Buha brothers contacted AUSA Koster and asked her about the basis of her belief that the Buha brothers had been untruthful. Aff. of Thomas J. Mullins ¶ 6, ECF No. 262-2. At that time, it appears that she reiterated her belief to the Buha brothers' attorney that they had been untruthful, but made no additional statements regarding the veracity of their testimony. *Id.*

cited by the Defendant does not amount to intimidation, there is no grounds to dismiss the charges against the Defendant. While AUSA Koster's statements "pushed the envelope," *see* Nov. 27, 2020 Op. & Order 13, ECF No. 322, the Court cannot conclude that her statements amounted to a threat that infringed upon the Defendant's due process rights.

Even if the Court did conclude that AUSA Koster's conduct intimidated the Buha brothers and caused them to withhold their testimony, the Court would not dismiss Count 2 of the Indictment. In such a scenario, "it is the general rule that a new trial untainted by error is sufficient remedy for the error." *United States v. Medina-Herrera*, 606 F.2d 770, 775 (7th Cir. 1979) (citing *United States v. Tateo*, 377 U.S. 463, 465 (1964)); *see also United States v. Reese*, 561 F.2d 894, 902 (D.C. Cir. 1977) ("There is no question that interference by prosecutors with a defendant's ability to call witnesses is a proper ground for a new trial." (citations omitted)); 3 Fed. Prac. & Proc. Crim. § 588 (4th ed.) ("Nevertheless, if the prosecutor indulges in misconduct of a substantial nature that interferes with the defendant's right to a fair trial, a new trial must be ordered." (collecting cases)). The relief requested by the Defendant is rarely granted and is reserved for only the most extreme scenarios. *See United States v. Childs*, 447 F.3d 541, 545 (7th Cir. 2006) ("[W]e have never taken what we see to be an extreme step of dismissing criminal charges against a defendant because of government misconduct." (citing *United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995); *United States v. Miller*, 891 F.2d 1265 (7th Cir. 1989)). Even in *Morrison*, where the conduct of the AUSA was much more extreme than the instant case, the remedy was not dismissal of the charges;

instead, the Third Circuit reversed the district court's order denying a new trial and instructed that if the witness "invokes her Fifth Amendment right not to testify [during the new trial], a judgment of acquittal shall be entered unless the Government, pursuant to 18 U.S.C. §§ 6002, 6003, requests use immunity for her testimony." *Morrison*, 535 F.2d at 229. Dismissal may be warranted in extreme cases of prosecutorial intimidation, *see United States v. Herrera-Medina*, 853 F.2d 564, 568 (7th Cir. 1988); however, the Defendant presented, and the Court has found, no case where charges were dismissed due to conduct of the same type and severity as the conduct at issue.

The Defendant argues that a new trial is an insufficient remedy because the Buha brothers cannot be reimmunized and thus remain intimidated, Mem. in Supp. of Mot. to Dismiss Count 2 Based on Supervisory Power of the Court 6–10, ECF No. 366, and because the Government has an unfair advantage now that it has seen the Defendant's case. Def.'s Reply 24–27, ECF No. 392. Neither argument renders a new trial insufficient as a remedy.

First, the Defendant argues that a new immunity Order cannot be granted because "AUSAs in this Circuit are on record saying that it is impossible to immunize a perjury charge," Mem. in Supp. of Mot. to Dismiss Count 2 Based on Supervisory Power of the Court 6. However, this contention appears to be inaccurate.[3] In its brief, the

[3] The Court notes that the case cited by the Defendant, *United States v. Wright*, 634 F.3d 917 (7th Cir. 2011), does not hold that such an immunity order cannot be granted. Furthermore, although in *Wright* the AUSA indicated that he couldn't "imagine the Department of Justice authorizing immunity for potential perjury," there is no

Government represents that "[p]rior to filing [their] brief, the government sought and obtained permission from the Department to immunize the Buhas at the retrial if they are called by the defense, assert the Fifth and their assertions are accepted by the Court." Gov't's Resp. 43 n.27. Accordingly, the Defendant's concern is not at issue.

Second, the Defendant contends that "[t]here would be no reason for the Buhas to trust a new immunity order," Mem. in Supp. of Mot. to Dismiss Count 2 Based on Supervisory Power of the Court 7. But this is simply incorrect. If the Buha brothers were issued immunity they would be free to testify truthfully without fear of prosecution. While there is generally an exception to immunity orders that permit prosecution for perjury, "the exception refers to future perjury, future false statements or future failure to comply with the immunity order, rather than previous acts." *United States v. Watkins*, 505 F.2d 545, 546 (7th Cir. 1974); *accord United States v. Patrick*, 542 F.2d 381, 385 (7th Cir. 1976) ("[T]his exception refers only to 'future' perjury, false statements or non-compliance with the court order. To interpret this perjury exception to include a prosecution under § 1623(c) for inconsistent statements, some of which were made prior to the latest grant of immunity, would be too broad of a reading of § 6002."). Accordingly, if the Buha brothers are called as witnesses in the new trial, the general exception for perjury would not preclude immunity from perjury for their previous testimony before the grand jury.

Finally, the Court is not persuaded by the

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indication that the AUSA confirmed that granting such an immunity would be impossible. 634 F.3d at 919.

Defendant's argument that Count 2 should be dismissed because the Government has already seen his case. *See* Notice of Suppl. Authority (citing *United States v. Bundy*, 968 F.3d 1019 (9th Cir. 2020)), ECF No. 400. The Defendant's argument is contrary to the well-established rule that a new trial is a sufficient remedy in the event of prosecutorial error. *See Medina-Herrera*, 606 F.2d at 775. If the law were as the Defendant suggests, a new trial would never be a sufficient remedy for prosecutorial error that occurred after the trial began. There are many cases where the Seventh Circuit has ruled that a new trial was a sufficient remedy, even in instances where the prosecution had seen the entirety of the defendant's case. *See, e.g.*, *id.* (holding that a new trial is sufficient to remedy the prosecutorial error that occurred during closing arguments). As such, the Defendant's arguments do not support dismissal of Count 2.

CONCLUSION

For the reasons stated above, Defendant James E. Snyder's Motion to Dismiss Count 2 Based on the Supervisory Power of the Court [ECF No. 365] is DENIED.

SO ORDERED on October 22, 2020.

s/ Theresa L. Springmann
JUDGE THERESA L. SPRINGMANN
UNITED STATES DISTRICT COURT

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA v. JAMES E. SNYDER	CAUSE No.: 2:16-CR-160-2-TLS-JEM

OPINION AND ORDER

This matter is before the Court on Defendant James E. Snyder's Motion to Dismiss Count 2 on Double Jeopardy Grounds [ECF No. 363]. For the reasons set forth below, the Defendant's Motion is DENIED.

FACTUAL AND PROCEDURAL HISTORY

Although the factual and procedural background of this case has been discussed by the Court at length in earlier orders, a brief recount of the relevant facts and procedural history is necessary.

The Defendant was previously the mayor of Portage, Indiana ("City"). Nov. 27, 2019 Order 3, ECF No. 322. As mayor, the Defendant directed the City to buy automated garbage trucks. *Id.* The City ultimately purchased four garbage trucks from Great Lakes Peterbilt, a truck dealership owned by Robert and Steve Buha. *Id.* After the City purchased the trucks from Great Lakes Peterbilt, the Buha brothers wrote the Defendant a check for $13,000. *Id.* at 4. The Defendant claims that the check was payment for consulting services he provided Great

Lakes Peterbilt. *Id.* at 5.

After years of investigations, charges were brought against the Defendant. On November 17, 2016, an Indictment [ECF No. 1] was filed, charging the Defendant with two counts of accepting a bribe in violation of 18 U.S.C. § 666(a)(1)(B) (Counts 1 and 2) and one count of interfering with the administration of the Internal Revenue Code in violation of 26 U.S.C. § 7212(a) (Count 3).[1] Count 2 concerns the above described payment the Defendant received from the Buha brothers.

From January 14, 2019, to February 14, 2019, this case proceeded to a 19-day jury trial. *See* ECF Nos. 218–20, 222–27, 229, 234, 236, 238, 241, 243, 249–52. During trial, the Buha brothers did not testify, as they invoked their Fifth Amendment privilege against self-incrimination. Nov. 27, 2019 Order 9.[2] On February 14, 2019, the Jury returned a verdict of not guilty on Count 1 and verdicts of guilty on Counts 2 and 3. Jury Verdict, ECF No. 256.

On February 8, 2019, prior to the conclusion of the trial, the Defendant filed a Motion for Judgment of Acquittal [ECF No. 245]. After the trial concluded, on February 28, 2019, the Defendant filed a Supplement to his Motion for Judgment of Acquittal [ECF No. 262] and a Rule 33 Motion for a New Trial [ECF No. 263]. The

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[1] Although these Counts are identified in the Indictment as Counts 1, 3, and 4, at trial the Counts were presented to the Jury as Counts 1, 2, and 3.

[2] The Court refers to both Buha brothers throughout its Opinions and Orders because the parties refer to both brothers throughout their briefs. However, it should be clarified that only Robert Buha took the witness stand and invoked his Fifth Amendment privilege. See Trial Tr. vol. 16, 180–89, ECF No. 337; Trial Tr. vol 17, 16, ECF No. 361.

Court, in its November 27, 2019 Order [ECF No. 322], denied the Defendant's Motion for Judgment of Acquittal [ECF No. 245] and granted in part and denied in part the Defendant's Rule 33 Motion for a New Trial [ECF No. 263] by granting the Defendant's request for a new trial as to Count 2 but denying his request for a new trial as to Count 3. The Court cited "the cumulative effect of several irregularities on behalf of the government" as its justification for ordering a new trial. Nov. 27, 2019 Order 7.

On December 11, 2019, this case was reassigned from Judge Van Bokkelen to the undersigned. *See* ECF No. 327. Shortly thereafter, the Defendant filed a Motion to Dismiss Count 2 [ECF No. 329] and Motion to Dismiss Count 3 [ECF No. 331]. The Court, in its January 21, 2020 Order [ECF No. 345], denied both motions. The Defendant, on March 5, 2020, then filed the instant Motion to Dismiss Count 2 on Double Jeopardy Grounds [ECF No. 363] as well as a Motion to Dismiss Count 2 Based on the Supervisory Power of the Court [ECF No. 365]. At this time both Motions are fully briefed and on August 24, 2020, the Court held an Oral Argument Hearing [ECF No. 402] to allow the parties to present additional arguments.

The Court, in this Opinion and Order, denies the Defendant's Motion to Dismiss Count 2 on Double Jeopardy Grounds [ECF No. 363]. The Court is simultaneously issuing a separate order which addresses the Defendant's Motion to Dismiss Count 2 Based on the Supervisory Power of the Court [ECF No. 365].

ANALYSIS

The Defendant's Motion to Dismiss Count 2 on Double Jeopardy Grounds [ECF No. 363] argues that the

Defendant's retrial is barred by the Double Jeopardy Clause of the Fifth Amendment because the Government engaged in prosecutorial misconduct. The Defendant's argument relies upon both the well-established Fifth Amendment protections set forth by the Supreme Court in *Oregon v. Kennedy*, 456 U.S. 667 (1982), as well as the less acknowledged extension to *Kennedy* contemplated by the Second Circuit in *United States v. Wallach*, 979 F.2d 912 (2d Cir. 1992). The Seventh Circuit has not formally adopted the *Wallach* extension; however, regardless of whether *Wallach* applies, the Defendant's retrial is not barred.

Both *Kennedy* and *Wallach* present circumstances in which a defendant's retrial is barred; however, both require that the prosecutor engage in misconduct. *United States v. Oseni*, 996 F.2d 186, 188 (7th Cir. 1993); *Wallach*, 979 F.2d at 917. In this case, the Defendant argues that AUSA Koster engaged in misconduct, which he refers to as the "Buha Error," when she stated that the government did not believe that the Buha brothers were truthful when they testified before the grand jury and when she revoked the immunity granted to the Buha brothers during the grand jury proceedings. However, the Court has previously held that neither amounts to prosecutorial misconduct. Furthermore, even if prosecutorial misconduct occurred, the Court would not grant the Defendant's Motion because he has failed to show that his retrial is barred under either *Kennedy* or *Wallach*.

A. The "Buha Error"

During Attorney Cacioppo's cross-examination of Agent Eric Field, AUSA Koster made numerous hearsay objections as Attorney Cacioppo attempted to question the witness. Trial Tr. vol. 6, 185–87. The following

exchange occurred:

> **Q**. At no point during your investigation was there ever any evidence that the $13,000 paid to James Snyder was ever intended to be a bribe, correct?
>
> **A**. No, that's not correct.
>
> **Q**. There's testimony from a witness—it can only be Steve Buha or Robert Buha—saying that they intended $13,000 to be a bribe?
>
> **Ms. Koster:** Objection, Your Honor, argumentative. Also hearsay.

Id. at 185–86. During the objection argument, the Court, at the request of AUSA Koster, held a sidebar ("Sidebar"). *Id.* at 187. During the Sidebar, the following exchange occurred:

> **Ms. Koster:** Judge, Robert and Steve Buha testified in the grand jury. They were granted immunity to do that. Okay. The government does not believe that they have been truthful. They—
>
> **Ms. Cacioppo:** (Indicating.)
>
> **Ms. Koster:** I would like, please—allow me to finish, please. This is very important. This is the crux of the charge.
>
> **The Court:** This question is not the crux of the change.
>
> **Ms. Koster:** No, this question—
>
> **Ms. Cacioppo:** Thank you, Judge.
>
> **Ms. Koster:** Well, arguably, it is, Your Honor.

The Court: You think this question makes the whole thing? Once he testifies, we can all go home as to this count; is that what you're saying?

Ms. Koster: If you allow this—the testimony of the Buha brothers from the grand jury—

The Court: That's not what I said.

Ms. Koster: —in on cross-examination, then any testimony from any witness in the grand jury is admissible if this witness is familiar with it. Of course not.

The Court: The question—

Ms. Koster: I want to make this clear, Judge. Here's the thing, the Buha brothers had immunity to testify in the grand jury. They don't have immunity to testify at trial unless the government asks the Court to extend that, and we don't plan to do that.

The Court: I understand that.

Ms. Koster: They need to take the witness stand and testify under oath subject to cross-examination if what they believe is going to be admissible. Their out-of-court statements as to whether they intended this to be a bribe is what she is attempting to elicit here, and that testimony is hearsay.

(Counsel simultaneously speaking.)

Ms. Cacioppo: It was under oath.

Ms. Koster: That doesn't make it non-hearsay—

Ms. Cacioppo: I'm just saying—

Ms. Koster: —and you know that.

Ms. Cacioppo: You're saying it's fundamentally unbelievable because they had immunity. So you're saying they perjured themselves—

Ms. Koster: I'm saying—

Ms. Cacioppo: —because they had immunity

Ms. Koster: I'm saying—

The Court: What was your question again?

Ms. Cacioppo: My question is, is there any evidence in the case that the Buhas ever intended to make that $13,000 payment a bribe.

The Court: I'm not going to let that question be asked that way.

Ms. Cacioppo: How would you let it be asked?

The Court: Well, the thing is that I know where you're going with it.

Ms. Cacioppo: Yeah, but there's no evidence, Judge.

The Court: It just seems like we daze around a little bit.

Ms. Cacioppo: But there is no evidence in the case that Buhas or anybody associated with them ever said it was a bribe.

The Court: Somebody's going to call them. I assume.

Ms. Cacioppo: Well, she's going to revoke their immunity so that they can't testify—

Ms. Koster: No, that's—

Ms. Cacioppo: —so my hands are going to be tied.

Ms. Koster: —not true. I never said that. I said I'm not going to give them immunity. They never had immunity to testify at trial. They had immunity—

Ms. Cacioppo: I understand that, but you're—

Ms. Koster: —to testify in front of the grand jury.

Ms. Cacioppo: —going to revoke it from the grand jury.

Ms. Koster: No.

The Court: Wait a minute. Stop. I'm going to sustain the objection as to the question as you've phrased it.

Ms. Cacioppo: That I just phrased?

The Court: That you just phrase.

Ms. Cacioppo: Okay.

The Court: If not, I—

Ms. Koster: I understand.

The Court: I can't do any more than I did.

Ms. Koster: I understand. I want Your Honor—she's just going to rephrase it, and she's going to ask the same thing a different way, and we're going to be right back here. And I don't want to upset you further, so I—

The Court: I'm not upset. I'm very content right now. But I'm saying I'm not going to sanitize this case the way the government wants to sanitize the case. There's two sides to it.

Ms. Koster: We just want the rules of evidence to be followed, Judge. We are not asking for anything extraordinary—

The Court: And I'm trying to do that. I could go to the residual exception. I could go to an exception to let it in.

Ms. Koster: You think the residual exception applies?

The Court: They were under oath.

Ms. Koster: That doesn't make it—that does not make it admissible.

The Court: I'm not going to let it in then. I sustained the objection. I can't do any more than that.

Ms. Koster: All right. Just know that if she goes and asks it a different way, I'm going to ask—

The Court: You can object.

Ms. Koster: —to be heard—

The Court: You can object.

Ms. Koster: Okay. I have no choice.

(End of bench conference.)

Id. at 187–92. When Robert Buha was called to testify, he invoked his Fifth Amendment privilege against self-incrimination. Trial Tr. vol. 16, 180–89. The Defendant argues that during this Sidebar the Government accused the Buha brothers of committing perjury and revoked their previously awarded immunity to testify, which resulted in their testimony being blocked.

The Defendant, in response to the "Buha Error," filed

a Motion for Judgment of Acquittal and Motion to Dismiss Count 2 for Prosecutorial Misconduct [ECF No. 262] arguing that the Government's conduct amounted to "prosecutorial misconduct and a violation of due process." Suppl. to Mot for Judgment of Acquittal 1, ECF No. 262. The Court, based on the totality of the Government's conduct, determined that a new trial was necessary, but declined to enter a judgment of acquittal or dismiss Count 2 and "[did] not find[] prosecutorial misconduct." Nov. 27, 2019 Order 13.[3]

B. AUSA Koster Did Not Commit Prosecutorial Misconduct

The Defendant argues that AUSA Koster's accusation of perjury and revocation of immunity are examples of prosecutorial misconduct because she acted to intimidate the Buha brothers to block them from testifying. However, AUSA Koster never threatened the witnesses with perjury charges and she could not revoke the Buha brothers' immunity because the immunity no longer afforded the Buha brothers any protection from prosecution.

Regarding perjury charges, although Attorney Cacioppo suggested that AUSA Koster was accusing the Buha brothers of committing perjury, AUSA Koster did not indicate that the Government intended to prosecute the Buha brothers for perjury. Trial Tr. vol. 6, 187–89. Further, while AUSA Koster said that "[t]he government does not believe that [the Buha brothers] have been

[3] The Defendant argues that the Court has already ruled that the Government committed an error regarding the Buha brothers. Although the Court observed "several irregularities on behalf of the [G]overnment," the Court did not find that AUSA Koster engaged in prosecutorial misconduct. *See* Nov. 27, 2019 Order.

truthful," it was Attorney Cacioppo and not AUSA Koster who first referenced perjury charges. *Id.* Finally, AUSA Koster's comment is not a threat, as it falls short of the obviously threatening conduct that other courts have deemed to be witness intimidation; *see Webb v. Texas*, 409 U.S. 95, 97 (1972) ("[T]he judge implied that he expected [the witness] to lie, and went on to assure him that if he lied, he would be prosecuted and probably convicted for perjury, that the sentence for that conviction would be added on to his present sentence, and that the result would be to impair his chances for parole."); *United States v. Smith*, 478 F.2d 976, 977, 979 (D.C. Cir. 1973) (concluding that a prosecutor's in person statement to a witness representing that the witness, if he chose to testify, would be prosecuted for concealing a deadly weapon, obstruction of justice, and as a principal in a murder, resulted in depriving the defendant of the witness's testimony.), and was only made during a sidebar with Defendant's counsel and the Judge, *see United States v. Jackson*, 935 F.2d 832, 847 (7th Cir. 1991) ("The encounter took place in the presence of the district judge as well as all counsel, a setting which limited the potential for threats and overreaching intended to deter [the witness] from testifying.") As the statements cannot qualify as a threat to the witnesses, they are not prosecutorial misconduct.[4]

Regarding immunity revocation, on January 14, 2016, two Orders of Use Immunity Before the Grand Jury for both Stephen Buha and Robert Buha were issued. Jan. 14, 2016 Immunity Orders, 2:15-mc-79, ECF No. 34. The

[4] The separate Opinion and Order addressing the Defendant's Motion to Dismiss Count 2 Based on the Supervisory Power of the Court [ECF No. 365] contains a full comparison of the context of AUSA Koster's statements to caselaw surrounding witness intimidation.

Orders required the Buha brothers "to testify and provide other information in regard to a matter to be presented to the November 2015 Regular Grand Jury, and to provide such information at any *other proceedings ancillary* to the above-styled matter." *Id.* at 2, 4 (emphasis added). The Defendant argues that the reference to "other proceedings ancillary" includes trial; however, the Government contends that the Buha brothers did not have immunity to testify at trial. The Court, in its November 27, 2019 Opinion and Order, declined to rule on the scope of the Immunity Order. Nov. 27, 2019 Op. & Order 13.

During the above described Sidebar, Attorney Cacioppo argued: "Well, [AUSA Koster]'s going to revoke their immunity so that [the Buha brothers] can't testify." Trial Tr. vol. 6, 190.[5] The instant Motions reiterate and build upon this claim made by Attorney Cacioppo. However, the scope of the Immunity Orders is a red herring, because even under the Defendant's view, the Orders have no impact on the Buha brothers' potential testimony.

If the Buha brothers refused to testify after the "Buha Error" because they were concerned that they would be prosecuted for perjury, the Immunity Order is irrelevant to the resolution of the instant Motions. The Immunity Orders "granted immunity from the use against" Steven Buha and Robert Buha "in any criminal case of any testimony or other information compelled under such order, or any information directly or indirectly derived from such testimony or other information," except it did

[5] The Court notes that AUSA Koster did not affirmatively say that the Government was revoking the Buha brother's immunity, rather that they never had immunity to testify at trial and that she was opposed to granting them immunity.

not immunize Steven Buha and Robert Buha "against charges of perjury, giving a false statement or otherwise failing to comply with the order of the Court." Jan. 14, 2016 Immunity Orders 2, 4; *see also* 18 U.S.C. § 6002. Thus, regardless of whether the Immunity Order was intended to grant the Buha brothers immunity to testify at trial or whether the Buha brothers' immunity was revoked by AUSA Koster, the Buha brothers would have still been subject to prosecution for perjury if they lied during trial.

Alternatively, if the Buha brothers refused to testify after the "Buha Error" because they were concerned that they would be prosecuted for bribery, the Immunity Order is equally irrelevant. If the Buha brothers were to be prosecuted for bribery, it would be pursuant to 18 U.S.C. § 666. The statute of limitations for such an offense is five years. 18 U.S.C. § 3282(a) ("Except as otherwise expressly provided by law, no person shall be prosecuted, tried or punished for any offense not capital, unless the indictment is found or the information is instituted within five years after such offense shall have been committed."). In the instant case, the Indictment provides that "[f]rom in or about January 1, 2012 and on or about January 10, 2014 . . . James E. Snyder . . . did corruptly solicit, demand, accept, and agree to accept a bank check in the amount of $13,000, intending to be influenced and rewarded in connection with a transaction and series of transactions of the City of Portage, Indiana." Indictment 4, ECF No 1. The first day of trial in this case commenced on January 14, 2019, over five years after the alleged wrongdoing. As the Buha brothers were never indicted for bribery prior to January 10, 2019, the Buhas brothers, at the time of trial, were already immune from being prosecuted for

bribing of the Defendant. *See United States v. Yashar*, 166 F.3d 873, 879–80 (7th Cir. 1999).[6]

At the time of trial, the Buha brothers' previously granted immunity was irrelevant to the proceedings. The immunity did not protect them from a perjury charge, they did not need protection from a bribery charge, and no other charge has been suggested. Based on the above analysis, the Court concludes that the scope of the Immunity Orders and whether the Buha brothers' immunity was revoked is equally irrelevant to the disposition of the instant Motions, because AUSA Koster could not have engaged in prosecutorial misconduct by revoking the grant of an irrelevant immunity.[7]

C. The Double Jeopardy Clause Does Not Warrant Dismissal of Count 2

The Fifth Amendment of the United States Constitution provides that:

> No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself . . .

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[6] The Government has acknowledged that the statute of limitations has lapsed. Nov. 8, 2019 Oral Arg. Tr. 28, ECF No 378; Aug. 24, 2020 Oral Arg. Hr'g, Tr. 81, ECF No. 403

[7] The Defendant also argues that the "Buha Error" cannot be remedied because the Government has intimidated the Buha brothers, which will impact their future testimony. Mem. in Supp. of Mot. to Dismiss Count 2 on Double Jeopardy Grounds 21–23. This argument is duplicative of the arguments advanced in the Defendant's Motion to Dismiss Count 2 Based on the Supervisory Power of the Court [ECF No. 365]. The Court addresses this argument in full in the simultaneously issued Opinion and Order.

U.S. Const. amend. V. It is universally understood that the Double Jeopardy Clause of the Fifth Amendment "protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense." *United States v. Dinitz*, 424 U.S. 600, 606 (1976) (citing *United States v. Wilson*, 420 U.S. 332, 343 (1975); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). Beyond this well-known protection, the Double Jeopardy Clause's protections can also be triggered when a trial is terminated over the objection of the defendant. *See Kennedy*, 456 U.S. at 672. Accordingly, prosecutors are generally prohibited, upon determination that a case is going poorly, from dismissing a case and subsequently reprosecuting the defendant. *Oseni*, 996 F.2d at 187–88.

1. *The Supreme Court's Holding in* United States v. Kennedy *Does Not Bar the Defendant's Retrial*[8]

In *Kennedy*, the Supreme Court addressed whether the Double Jeopardy Clause bars retrial of a defendant if the first trial ended in a mistrial due to prosecutorial misconduct. When considering this question, the Supreme Court held that only if "the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial . . . a defendant [may] raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion," thus establishing "a narrow exception to the rule that the Double Jeopardy Clause is no bar to retrial" when the defendant moves for a mistrial. *Kennedy*, 456 U.S. at 673, 76. The Supreme Court explained that the intent of the prosecutor is dispositive, as "[p]rosecutorial conduct that might be

[8] The Defendant does not explicitly argue that *Kennedy* bars the Defendant's retrial; however, *Kennedy*, not *Wallach*, is the law of the circuit.

viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent *intent* on the part of the prosecutor to subvert protections afforded by the Double Jeopardy Clause." *Id.* at 675–76 (emphasis added).

In the instant case, *Kennedy* does not bar retrial of the Defendant. Foremost, there has been no prosecutorial misconduct. *See Oseni*, 996 F.2d at 188. Even if there were, the Defendant did not move for mistrial, which the Seventh Circuit has indicated is a requirement for the invocation of *Kennedy*. *United States v. Doyle*, 121 F.3d 1078, 1086 (7th Cir. 1997) ("[A] defendant who did not move for a mistrial on the basis of intentional prosecutorial misconduct cannot invoke the double jeopardy clause to bar the state from retrying him after his conviction is reversed on that ground." (quoting *Beringer v. Sheahan*, 934 F.2d 110, 114 (7th Cir. 1991))).

The Court acknowledges that a Rule 29 motion requesting a judgment of acquittal, a Rule 33 motion requesting a new trial,[9] and a motion for mistrial have similar consequences; however, only a motion for mistrial can be abused in the manner contemplated by the Supreme Court in *Kennedy*. In *Kennedy*, the Supreme Court was concerned that the prosecution could, upon realizing that a trial is going poorly, abort the trial by provoking the defendant into moving for a mistrial to obtain a second opportunity to prosecute the defendant. *Doyle*, 121 F.3d at 1085–86 (citing *Oseni*, 996 F.2d at 187–

[9] Because the Defendant argued his Rule 29 Motion should be sufficient, and also moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, the Court has elected to consider whether either is sufficient to invoke the Double Jeopardy Clause as contemplated by the Supreme Court in *Kennedy*.

88). Neither Rule 29 nor Rule 33 motions create the same incentive. A successful Rule 29 motion bars retrial of a defendant, *Fong Foo v. United States*, 369 U.S. 141, 143 (1962); 2A Fed. Prac. & Proc. Crim. § 468 (4th ed.) ("A judgment of acquittal, whether resulting from a jury verdict or ordered by the court, terminates the prosecution, and . . . bars further proceedings against the defendant for the same offense, except to the extent that it may now be set aside on appeal by the government."), and a Rule 33 motion can only be made after a judgment has been entered against the defendant, *see* Fed. R. Crim. P. 33. As such, a prosecutor seeking a second opportunity to prosecute a defendant has no incentive to provoke Rule 29 or Rule 33 motions. Accordingly, neither motion triggers double jeopardy protections under *Kennedy*. *United States v. McAleer*, 138 F.3d 852, 856 (10th Cir. 1988) ("Although Defendants attempt to characterize the district court's order setting aside the jury verdicts and granting a new trial as the functional equivalent of a mistrial, Defendants miss a crucial distinction.")

But even if there were prosecutorial misconduct, and even if either Motion were sufficient, *Kennedy* would still not bar the Defendant's retrial because he has failed to show that AUSA Koster had the requisite intent to warrant the invocation of the Double Jeopardy Clause. To bar retrial under *Kennedy*, the defendant must show that the prosecutor was "'trying to abort the trial' through his or her conduct." *United States v. Cornelius*, 623 F.3d 486, 497 (7th Cir. 2010) (quoting *Oseni*, 996 F.2d at 188). "The only relevant intent is intent to terminate the trial, not to prevail at this trial by impermissible means," thus "[i]t doesn't even matter that [the prosecutor] knows he is acting improperly, provided that his aim is to get a

conviction." *Id.* (citing *Oseni*, 996 F.2d at 188).

The Defendant's motion argues that AUSA Koster committed the "Buha Error" to prevent the Buha brothers from being called as witnesses and testifying during trial because she knew that the Defendant would be acquitted if the Buha brothers were to testify. Even accepting this view, the prosecutor cannot have intended to *terminate* the trial by committing the "Buha Error;" rather, her intent was to *prevail* at trial, albeit by impermissible means. Simply terminating the trial would not serve the Government's needs in the Defendant's view; for example, if the testimony of the Buha brothers doomed the Government's case, it would make little sense to abort the trial knowing that the Buha brothers could still testify in the new trial.

For the reasons stated above, the Court concludes that the Defendant's retrial is not barred under *Kennedy*.

2. *Even if it Applied, the Extension to Kennedy Contemplated by the Second Circuit in* United States v. Wallach *Does Not Bar the Defendant's Retrial*

The Defendant also argues *Wallach* should bar his retrial. In *Wallach*, the Second Circuit explored the need to extend the protections established by *Kennedy* and explained that:

> If any extension of *Kennedy* beyond the mistrial context is warranted, it would be a bar to retrial only where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct. If jeopardy bars a

> retrial where a prosecutor commits an act of misconduct with the intention of provoking a mistrial motion by the defendant, there is a plausible argument that the same result should obtain where he does so with the intent to avoid an acquittal he then believes is likely. The prosecutor who acts with the intention of goading the defendant into making a mistrial motion presumably does so because he believes that completion of the trial will likely result in an acquittal. That aspect of the *Kennedy* rationale suggests precluding retrial where a prosecutor apprehends an acquittal and, instead of provoking a mistrial, avoids the acquittal by an act of deliberate misconduct. Indeed, if *Kennedy* is not extended to this limited degree, a prosecutor apprehending an acquittal encounters the jeopardy bar to retrial when he engages in misconduct of sufficient visibility to precipitate a mistrial motion, but not when he fends off the anticipated acquittal by misconduct of which the defendant is unaware until after the verdict. There is no justification for that distinction.

979 F.2d at 917. The Defendant argues that his retrial is barred based on this extension.

Most circuits, including the Seventh Circuit, have acknowledged the existence of the Second Circuit's proposed extension, but have refrained from formally subscribing to the extension of *Kennedy* set forth in *Wallach*. *See, e.g., United States v. Catton*, 130 F.3d 805, 808 (7th Cir. 1997) ("And so we have left open the question whether to adopt *Wallach's* dictum as the law of this circuit, *United States v. Doyle*, 121 F.3d 1078, 1085 (7th

Cir. 1997), as has the Eighth Circuit. *Jacob v. Clarke*, 52 F.3d 178, 182 (8th Cir. 1995). We need not bite the bullet in this case either."). The Defendant represents that the Seventh Circuit has not rejected *Wallach* and that it has left "this area of law open for defendants to develop." Mem. in Supp. of Mot. to Dismiss Count 2 on Double Jeopardy Grounds 12, ECF No. 364. Even assuming that the Seventh Circuit would adopt *Wallach*, it would not apply to the instant case because, as previously explained, there has been no finding of prosecutorial misconduct. Moreover, even if the Court did find that the conduct at issue constitutes prosecutorial misconduct, *Wallach* would still not apply because the Defendant was not "unaware" of the conduct, and the Defendant has failed to demonstrate that AUSA Koster had the required intent, or that the "Buha Error" was of sufficient severity to bar retrial under *Wallach*.

Foremost, even if the "Buha Error" represented prosecutorial misconduct, it is not the type of misconduct the Second Circuit sought to address in *Wallach*. The Second Circuit considered the need to narrowly expand *Kennedy* to afford protections to defendants who were unable to move for mistrial because they were unaware and unable to discover that prosecutorial misconduct had occurred until after their trial had concluded and judgment was entered. *Wallach*, 979 F.2d at 917. Similarly, the Seventh Circuit in *Catton* examined the difference between committing open and covert error and considered the argument that *Kennedy*, as it stands, encourages the commission of covert error by only punishing openly committed prosecutorial error. *Catton*, 130 F.3d at 807 ("*Kennedy* would leave a prosecutor with an unimpaired incentive to commit an error that would not

be discovered until after the trial and hence could not provide the basis for a motion for a mistrial, yet would as effectively stave off an acquittal and thus preserve the possibility of a retrial."). The conduct at issue is incomparable to the conduct in either *Wallach* or *Catton*, as the Defendant was aware of the "Buha Error" during trial—as his attorney was present when it occurred and referenced it throughout the duration of the trial—and could have moved for a mistrial. The prosecutorial conduct in *Wallach* and *Catton* was, respectively, presenting false testimony and concealing exculpatory evidence, *see Wallach*, 979 F.2d at 913, *Catton*, 130 F.3d at 806, which, unlike statements made directly to defense counsel during a sidebar, cannot be easily discovered during the course of trial.[10]

Further, even if the "Buha Error" represented prosecutorial misconduct, it lacks the intent or severity necessary for the Defendant's retrial to be barred pursuant to *Wallach*. In *Wallach*, the Second Circuit explained that the factual predicate for extending *Kennedy* required "*deliberate* prosecutorial misconduct." *Wallach*, 979 F.2d at 917 (emphasis added). Further, the court, when analyzing the prosecutors' conduct and determining that the defendant's retrial was not barred,

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[10] The Defendant argues that the "Buha Error" was only discoverable after trial because "[i]t was only during the course of post-trial briefing that the prosecutor revealed she had no evidence to justify her accusation of perjury, and she admitted she could never prove it." Mem. in Supp. of Mot. to Dismiss Count 2 on Double Jeopardy Grounds 14. However, the Defendant's attorney argued during trial that the Buha brothers were not going to testify due to AUSA Koster's conduct, indicating that the Defendant was aware of the "Buha Error" and its effects before the conclusion of trial. Trial Tr. vol 16, 137–139, 181–89.

explained that the prosecutors did not act malevolently. *Id.* Other courts interpreting *Wallach* have also alluded that the error at issue must be severe to bar retrial. *United States v. Lewis*, 368 F.3d 1102, 1108 (9th Cir. 2004) ("Several subsequent cases have referenced the reasoning in *Wallach*. None, however, concluded that the relevant prosecutorial misconduct was sufficiently egregious to bar a retrial."); *United States v. Gary*, 74 F.3d 304, 315 (1st Cir. 1996) ("Indeed, courts have held that prosecutorial misconduct must rise to an egregious level for double jeopardy to bar a retrial."); *United States v. Pavloyianis*, 996 F.2d 1467, 1475 (2d Cir. 1993) ("[T]here is no indication he engaged in the type of conduct required to invoke the double jeopardy bar to retrial.").

The Defendant has failed to show that AUSA Koster had the requisite prosecutorial intent or to articulate why the "Buha Error" is sufficiently severe to satisfy the requirements of *Wallach*. Indeed, the Defendant has not identified what evidence in the record shows that the Government's intent was to avoid an acquittal which it reasonably believed at the time was likely to occur absent the "Buha Error." *See Doyle*, 121 F.3d at 1087. The Defendant argues that "[b]ut for the Buha Error, there is a strong likelihood that [the Defendant] would have been acquitted," and that "[t]he timeline adds further weight to the Court's already-established finding that the government had no basis behind the Buha Error"; Mem. in Supp. of Mot. to Dismiss Count 2 on Double Jeopardy Grounds 14–18, however, both contentions are entirely speculative and neither directly satisfy the requirements of *Wallach*.

The Defendant also argues that "[t]he prosecutor's own statements show that she committed the Buha Error

because she feared acquittal," because she "described her efforts at blocking the jury from hearing the Buha's testimony as 'the crux of the charge.'" *Id.* at 18–19, However, the context surrounding the "Buha Error" makes it clear that AUSA Koster was not attempting to block the Buhas brothers' testimony out of fear that the Defendant would be acquitted. Rather, it is apparent that AUSA Koster was attempting to prevent the Defendant from using Agent Field as a conduit for the Buha brothers' hearsay statements. Trial Tr. vol. 6, 187–92; *see also* Arg. Hr'g, Tr. 68–70. Such a conclusion is supported by the fact that the Court granted AUSA Koster's objection and withheld Agent Field's testimony. Accordingly, during the Sidebar, AUSA Koster certainly understood that her actions, if unsuccessful, would result in an increased likelihood that the Defendant would be acquitted. However, the Seventh Circuit in *Doyle* explained that "[p]rosecutors act at all times during trial with knowledge that if they do not perform in certain ways, acquittal may be a possibility." *See Doyle*, 121 F.3d at 1087. The Defendant has presented no evidence to suggest that AUSA Koster acted with more than "a general sort of fear of acquittal" which is insufficient to satisfy the requirements of *Wallach* and bar retrial. *See id.*

D. Additional Fifth Amendment Privilege

The Defendant also argues his retrial should be barred because he "is not a wealthy man," and that he has "now lived under the continuing ordeal and accumulating expenses of federal prosecution for an additional four years"; therefore, the Double Jeopardy Clause should bar retrial "so that the [G]overnment cannot attempt to bankrupt [him]." Mem. in Supp. of Mot. to Dismiss Count 2 on Double Jeopardy Grounds 23–24. The Defendant

thus seemingly requests the Court to recognize a Fifth Amendment privilege based on the retention of private counsel and the length of litigation. The Defendant provides no case law supporting such a privilege.[11] The Court holds the Defendant's retrial is not barred on this ground.

CONCLUSION

For the reasons set forth above, the Court DENIES Defendant James E. Snyder's Motion to Dismiss Count 2 on Double Jeopardy Grounds [ECF No. 363].

SO ORDERED on October 22, 2020.

s/ Theresa L. Springmann
JUDGE THERESA L. SPRINGMANN
UNITED STATES DISTRICT COURT

[11] *United States v. Dinitz*, 424 U.S. 600 (1976), the only case cited in this portion of the Defendant's brief, does not articulate such a view of the Fifth Amendment.

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA v. JAMES E. SNYDER	CAUSE NO.: 2:16-CR-160-TLS-JEM

OPINION AND ORDER

This matter is before the Court on the Defendant's Motion to Dismiss Count 2 [ECF No. 329] and Motion to Dismiss Count 3 [ECF No. 331] and the Government's Second Motion to Strike, or in the alternative, an Extension of Time to Seek Reconsideration [ECF No. 344]. The Court will also address various Motions [ECF Nos. 313, 318, 320, 334] which are pending in this case. For the reasons stated below, these Motions are DENIED.

BACKGROUND

On November 17, 2016, the Grand Jury charged the Defendant with corruptly soliciting bribes in relation to the City of Portage's towing contract (Count 1); corruptly soliciting bribes in relation to contracts approved by the Portage Board of Works and a construction project undertaken by the Portage Redevelopment Commission (Count 2); and corruptly interfering with the administration of the internal revenue laws (Count 3).[1]

[1] Although these Counts are identified in the Indictment as Counts 1, 3, and 4, at trial, the Counts were presented to the Jury as Counts 1,

Indictment, ECF No. 1.

On September 21, 2018, the Defendant filed a Motion to Strike Pursuant to Rule 7(D) [ECF No. 130]. In pertinent part, the Defendant argued that paragraphs 1–20 of Count 3 described conduct which was irrelevant and outside the statute of limitations. On January 8, 2019, the Honorable Joseph S. Van Bokkelen rejected this argument and concluded as follows:

> Paragraphs 1–20 are necessary to understand the scheme and contain facts that the government must prove at trial. While the alleged conduct—standing alone—would be outside the six-year statute of limitations, *see* 26 U.S.C. § 6531(6), it is not stand-alone conduct. Rather, the earlier acts are intertwined with the acts that do fall within the statute of limitations, thus making the earlier acts relevant and proper to this case. As a result, the Court denies Mr. Snyder's motion to strike paragraphs 1–20 of [Count 3].

Order, pp. 2–3, ECF No. 200.

On January 14, 2019, this matter proceeded to a jury trial. *See* ECF No. 218. On February 14, 2019, the Jury found the Defendant not guilty of Count 1. *See* Jury's Verdict, p. 2, ECF No. 256. However, the jury found the Defendant guilty of Counts 2 and 3. *Id.* at 3–4.

On February 28, 2019, the Defendant filed a Rule 33 Motion for a New Trial [ECF No. 263] as to Counts 2 and 3. In pertinent part, as it related to Count 2, the Defendant argued that a new trial was required due to alleged prosecutorial misconduct. Mot. for a New Trial

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2, and 3.

¶¶ 4, 6. The Defendant had also filed a Motion for Judgment of Acquittal [ECF No. 245] at the end of the Government's case in chief. As relevant here, the Defendant argued that the Government failed to present sufficient evidence from which a rational jury could find the Defendant guilty of Count 3. *See* Mot. for Judgment of Acquittal, p. 21.

On November 27, 2019, Judge Van Bokkelen granted in part and denied in part the Defendant's Motion for a New Trial and denied the Defendant's Motion for Judgment of Acquittal. *See* Order, p. 17, ECF No. 322. Judge Van Bokkelen granted the Defendant's request for a new trial as it related to Count 2. *Id.* at 17. Judge Van Bokkelen concluded that "in the interest of justice, a new trial is required on Count 2" due to "the cumulative effect of several irregularities on behalf of the government." *Id.* at 7. Judge Van Bokkelen then described the irregularities at length. *See id.* at 7–13. However, Judge Van Bokkelen specifically did not make a finding of prosecutorial misconduct. *Id.* at 13 ("Although the Court is not finding prosecutorial misconduct, the government 'pushed the envelope.'"). Furthermore, Judge Van Bokkelen found that a new trial was not required on Count 3 because "[t]he two counts were distinct from each other to the point that the problems identified in Count 2 did not flow over into Count 3." *Id.* at 17. In ruling on the Motion for Judgment of Acquittal, as it related to Count 3, Judge Van Bokkelen specifically found as follows:

> [T]he government presented sufficient evidence that Mr. Snyder intended to obstruct or impede the IRS, that his false filings weren't mere mistakes or oversights. Mr. Snyder shielded his income from the IRS through diverting GVC

> payments to SRC, thus creating an impression that FFTM was destitute. This scheme had reasonable tendency to obstruct the due administration of the IRS laws. With Mr. Snyder misrepresenting his affairs, the IRS was led into believing that a full collection effort would have been futile. Finally, there was significant evidence showing that Mr. Snyder's intentions in evading the collection were corrupt.

Id. at 16. On December 6, 2019, Judge Van Bokkelen conducted a telephonic status conference at which he ordered that he would not accept any motions to reconsider. *See* ECF No. 325; *see also* Mot. to Dismiss Count 2, p. 1, ECF No. 329 ("Judge Van Bokkelen instructed the parties at the last telephonic conference (DE # 325) to not file any motions to reconsider.").

On December 11, 2019, the Clerk of Court reassigned this case to the undersigned as the presiding judge. *See* Order, ECF No. 327. On December 23, 2019, the Defendant filed the instant Motion to Dismiss Count 2 [ECF No. 329]. In essence, the Defendant argues that Judge Van Bokkelen erred by not finding prosecutorial misconduct and requests that Count 2 be dismissed due to this alleged prosecutorial misconduct. *See* Mem. in Supp. of Def.'s Mot. to Dismiss, p. 1, ECF No. 332 ("Given the substance of Judge Van Bokkelen's findings, Count 2 should be *dismissed*, and we respectfully request this Court grant Mr. Snyder that relief."). On December 23, 2019, the Defendant also filed the instant Motion to Dismiss Count 3 [ECF No. 331]. Essentially, the Defendant argues that the Government failed to prove any of the allegations in Count 3 which are still punishable under the statute of limitations. On December 26, 2019,

the Government filed the instant Motion to Strike, or in the alternative, an Extension of Time to Seek Reconsideration [ECF No. 344] in which it seeks leave of court to file a motion to reconsider Judge Van Bokkelen's order which granted a new trial on Count 2.

ANALYSIS

As indicated above, both the Government and the Defendant disagree with Judge Van Bokkelen's rulings on the Motion for Acquittal and the Motion for New Trial. For the reasons stated below, the parties' motions are DENIED.

"Under the law of the case doctrine, a court generally should not reopen issues decided in earlier stages of the same litigation." *United States v. Harris*, 531 F.3d 507, 513 (7th Cir. 2008) (citing *Agostini v. Felton*, 521 U.S. 203, 236 (1997)). "The twin goals of this doctrine are to ensure that the parties marshal all of their facts and arguments so that a dispute may be resolved in one pass, and to conserve judicial resources." *Peoples v. United States*, 403 F.3d 844, 846 (7th Cir. 2005). In an exercise of discretion, a court may reconsider a previous ruling in the same litigation "if there is a compelling reason, such as a change in, or clarification of, law that makes clear that the earlier ruling was erroneous." *Harris*, 531 F.3d at 513 (quoting *Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 572 (7th Cir. 2006)). However, the Seventh Circuit has cautioned that, "because litigants have a right to expect consistency even if judges change, the second judge should 'abide by the rulings of the first judge unless some new development, such as a new appellate decision, convinces him that his predecessor's ruling was incorrect.'" *Galvan v. Norberg*, 678 F.3d 581, 587 (7th Cir. 2012) (quoting *Fujisawa Pharm. Co. v. Kapoor*, 115 F.3d

1332, 1339 (7th Cir. 1997)); *Brengettcy v. Horton*, 423 F.3d 674, 680 (7th Cir. 2005) ("Generally speaking, a successor judge should not reconsider the decision of a transferor judge at the same hierarchical level of the judiciary when a case is transferred."); *see also United States v. Walters*, No. 88 CR 709, 1991 WL 280286, at *3 (N.D. Ill. Nov. 15, 1991) ("Furthermore, a district court judge does not review a fellow district court judge's decision for error in the manner in which an appellate court might. Instead, comity requires that the second judge should follow the prior ruling unless there are reasons to believe that substantial changes justify a fresh review.").

In this case, the Defendant argues that Count 2 should be dismissed because of purported prosecutorial misconduct. However, Judge Van Bokkelen explicitly did not find prosecutorial misconduct. Judge Van Bokkelen presided over this trial and was therefore in the best position to determine whether prosecutorial misconduct occurred. *See United States v. Marshall*, 75 F.3d 1097, 1107 (7th Cir. 1996) ("A trial judge's decision regarding prosecutorial misconduct is reviewed for an abuse of discretion for we assume that the trial judge is in the best position to determine whether an incident was so serious as to warrant a mistrial." (internal quotation marks omitted)). Regardless, under the law of the case doctrine, the Court declines to revisit Judge Van Bokkelen's findings regarding the existence of prosecutorial misconduct. *See Horton*, 423 F.3d at 680. The Government also requests that it be given leave of court to file a motion to reconsider Judge Van Bokkelen's order which granted a new trial on Count 2. For the reasons explained above, this request is also denied pursuant to the law of the case doctrine. *See id.*

The Defendant also argues that Count 3 should be dismissed pursuant to the statute of limitations. The Defendant argues that "Judge Van Bokkelen's ultimate ruling makes clear" that "the government only proved the conduct that Judge Van Bokkelen had already ruled would be outside the statute of limitations by itself, and did not prove any of the alleged acts that could, perhaps in theory, save the earlier acts as part of a scheme." Mot. to Dismiss Count 3, p. 2, ECF No. 331. As noted above, the Defendant previously argued in his September 21, 2018 Rule 7(d) Motion to Strike that paragraphs 1–20 of Count 3 described conduct which was outside the statute of limitations. However, Judge Van Bokkelen rejected this argument and concluded as follows:

> Paragraphs 1–20 are necessary to understand the scheme and contain facts that the government must prove at trial. While the alleged conduct—standing alone—would be outside the six-year statute of limitations, *see* 26 U.S.C. § 6531(6), it is not stand-alone conduct. Rather, the earlier acts are intertwined with the acts that do fall within the statute of limitations, thus making the earlier acts relevant and proper to this case. As a result, the Court denies Mr. Snyder's motion to strike paragraphs 1–20 of [Count 3].

Order, pp. 2–3, ECF No. 200.

After the Defendant was convicted of Count 3, Judge Van Bokkelen held that the Government presented sufficient evidence to support this conviction. Specifically, Judge Van Bokkelen found as follows:

> [T]he government presented sufficient evidence that Mr. Snyder intended to obstruct or impede

> the IRS, that his false filings weren't mere mistakes or oversights. Mr. Snyder shielded his income from the IRS through diverting GVC payments to SRC, thus creating an impression that FFTM was destitute. This scheme had reasonable tendency to obstruct the due administration of the IRS laws. With Mr. Snyder misrepresenting his affairs, the IRS was led into believing that a full collection effort would have been futile. Finally, there was significant evidence showing that Mr. Snyder's intentions in evading the collection were corrupt.

Order, p. 17, ECF No. 322. Based upon these rulings, the Court finds that Judge Van Bokkelen addressed and rejected the merits of the Defendant's statute of limitations argument. Accordingly, pursuant to the law of the case doctrine, the Court declines to readdress this issue. *See Horton*, 423 F.3d at 680. Furthermore, notwithstanding the Defendant's lengthy argument, Judge Van Bokkelen did not find that the Government "only" proved conduct which would be outside the statute of limitations. Thus, the Court rejects the Defendant's strained interpretation of Judge Van Bokkelen's Order.

The Defendant argues in the alternative that "Count 3 as indicted and as instructed to the jury is 'duplicitous.'" Mem. in Support of Mot. to Dismiss Count 3, p. 20; *see also United States v. Berardi*, 675 F.2d 894, 897 (7th Cir. 1982) ("A duplicitous count is one that charges more than one distinct and separate offense."). Accordingly, the Defendant argues that Count 3 should be dismissed because "there was no special verdict form or instruction" which could have guided the Jury. Mem. in Supp. of Mot. to Dismiss Count 3, p. 21. However, the Defendant agreed

to the jury instruction for Count 3. *See id.* at 20 n. 5 ("Neither party proposed a special jury instruction, nor a special verdict form, for Count 3. Mr. Snyder ultimately agreed to the Count 3 instruction."). "Although passive silence with regard to a jury instruction permits plain error review, a defendant's affirmative approval of a proposed instruction results in waiver." *United States v. Natale*, 719 F.3d 719, 729 (7th Cir. 2013) (citations omitted). This waiver forecloses the Defendant's ability to challenge the proposed instruction. *United States v. Kirklin*, 727 F.3d 711, 716 (7th Cir. 2013); *United States v. Griffin*, 493 F.3d 856, 864 (7th Cir. 2007). Furthermore, to the extent that Count 3 may have been duplicitous, the issue is forfeited because (1) the Defendant should have raised the issue earlier and (2) the Defendant failed to demonstrate good cause for his delay. *See United States v. Nixon*, 901 F.3d 918, 920 (7th Cir. 2018) ("Nixon did not ask the district court before trial to dismiss the indictment as duplicitous. She raised the subject for the first time during a mid-trial conference devoted to jury instructions. That delay forfeited her current argument.").

Finally, as a matter of docket management, the Court will address the various other motions which are pending in this case. On September 27, 2019, the Defendant filed a Motion for Clarification Regarding the Status of the Buhas' Immunity [ECF No. 313] in which he requested "clarification regarding whether the Buhas have immunity to testify at the sentencing hearing . . . so that he may plan his presentation accordingly." Mot. at 5. The Defendant also filed a Motion to Strike Sentencing Memorandum [ECF No. 318] on November 21, 2019. However, in light of his November 27, 2019 Order granting Defendant's request for a new trial on Count 2,

Judge Van Bokkelen vacated the sentencing hearing which he had previously scheduled. Order, ECF No. 323. Based upon the procedural posture of this case and the vacated sentencing hearing, the Court denies the Motion for Clarification [ECF No. 313] and Motion to Strike Sentencing Memorandum [ECF No. 318] as moot.

On November 25, 2019, the Defendant also filed a Motion for Order to Show Cause [ECF No. 320] in which he requested that the Court "hold a hearing where the prosecution can explain why they should not be lightly censured for violating their obligations to accurately represent case law and the factual record to the Court." Mot. at 13. However, the purported misconduct occurred while Judge Van Bokkelen was the presiding judge and prior to the case reassignment on December 11, 2019. *See* Order, ECF No. 327. Judge Van Bokkelen was in a far better position to determine whether the prosecution should have been "lightly censured" for their purported misconduct, yet he apparently did not believe that the prosecutor's actions warranted a hearing on the matter. Furthermore, the Court finds that the requested relief would be an inefficient use of judicial resources. Thus, in an exercise of discretion, the Court denies the Motion for Order to Show Cause. *See Foreman v. Wadsworth*, 844 F.3d 620, 627 (7th Cir. 2016) (recognizing that whether to censure an attorney is "left to the sound discretion of the district court.").

CONCLUSION

For the reasons stated above, the Court DENIES the Defendant's Motion to Dismiss Count 2 [ECF No. 329], the Defendant's Motion to Dismiss Count 3 [ECF No. 331], the Government's Second Motion to Strike, or in the alternative, an Extension of Time to Seek Reconsideration

[ECF No. 344], and the Defendant's Motion to Show Cause [ECF No. 320]. The Court further DENIES AS MOOT the Defendant's Motion for Clarification Regarding the Status of the Buhas' Immunity [ECF No. 313], the Defendant's Motion to Strike Sentencing Memorandum [ECF No. 318], and the Government's First Motion to Strike, or in the alternative, an Extension of Time to Seek Reconsideration [ECF No. 334].

SO ORDERED on January 21, 2020.

s/ Theresa L. Springmann
CHIEF JUDGE THERESA L. SPRINGMANN
UNITED STATES DISTRICT COURT

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JAMES E. SNYDER, Defendant.	Case No.: 2:16-CR-160 JVB

ORDER

Defendant James Snyder was the Mayor of the City of Portage. The Grand Jury charged him with corruptly soliciting bribes in relation to the City's towing contract (Count 1) and the purchase of garbage trucks (Count 2), and with corruptly interfering with the administration of the Internal Revenue laws (Count 3).[1]

At trial, the Jury found Mr. Snyder not guilty on Count 1 but convicted him of the charges in Counts 2 and 3.

At the end of the government's case in chief, Mr. Snyder moved for acquittal under Federal Rule of Criminal Procedure 29. After the trial, he supplemented his motion and, in the alternative, moved for new trial

[1] The original Counts in the Indictment against Mr. Snyder were 1, 3, and 4, and John Cortina was charged separately in Count 2. At trial, the Counts were presented to the Jury as 1, 2, and 3 and the Court will continue with this sequence for consistency.

under Rule 33.

The Court denies Mr. Snyder's motion for acquittal as to both Counts 2 and 3, denies the motion for a new trial as to Count 3, but grants the motion for a new trial on Count 2.

A. Rule 29 and Rule 33

Under Rule 29, "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29. "We have often said that after a guilty verdict, a defendant seeking a judgment of acquittal faces a 'nearly insurmountable hurdle,' but the height of the hurdle depends directly on the strength of the government's evidence. The Constitution requires the government to prove guilt beyond a reasonable doubt. If a reasonable jury could not find guilt beyond a reasonable doubt, the court may not enter judgment on a guilty verdict." *United States v. Jones*, 713 F.3d 336, 339 (7th Cir. 2013) (citations omitted).

"When reviewing the sufficiency of the evidence, we ask 'whether, after viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' The inquiry does not ask what we would have decided if we were on the jury. We need not be convinced by the evidence ourselves. Our inquiry is whether a reasonable jury considering the evidence in the light most favorable to the government could have found each element of the offense beyond a reasonable doubt." *Id.* at 340 (citations omitted).

In cases where all evidence leading to conviction is circumstantial, the court "must carefully consider each

inference necessary to prove all elements of the offense. We do not suggest that there is a bright line between reasonable and unreasonable inferences from circumstantial evidence, but there is a line. The government may not prove its case, as we have said, with 'conjecture camouflaged as evidence.'" *Id.*

Under Rule 33, "the court may vacate any judgment and grant a new trial if the interest of justice so requires.

B. Count 2: Garbage Trucks

For the purposes of Rule 29 motion, the Court construes trial evidence in the light most favorable to the government:

Mr. Snyder became the Mayor of the City of Portage in 2012. Great Lakes Peterbuilt ("GLPB") was a truck dealership in Portage, owned by the Buha brothers, Bob and Steve. In 2013 and at the beginning of 2014, both Mr. Snyder and GLPB were in financial straits. Following up on his mayoral campaign promise, Mr. Snyder directed the City to purchase automated garbage trucks. Mr. Snyder assigned the oversight of the bidding project to his close and loyal friend, Randy Reeder. In doing so, he sidelined Portage Streets Superintendent Steve Charnetzky, whose past duties including overseeing such bids. Charnetzky was highly qualified, and has received Indiana State recognition for his work as the superintendent. Reeder, on the other hand, was new to the City; on top of that, he had no experience with the bidding process.

During this time, the Buhas were desperate to sell the trucks, and selling them to Portage would be especially beneficial because the dealership would conduct truck maintenance, thus earning additional profit. In fact,

maintenance was more profitable than the sales.

The evidence introduced by the government showed that Reeder set up the bid specifications (commonly known as "specs") to greatly favor GLPB. Consequently, on January 28, 2013, GLPB won the bid to sell three of its trucks to the City. The trucks were delivered to the City in July 2013.

At end of the year, the Buhas desperately needed to sell one more truck: a 2012 Peterbilt 320 chassis that had been sitting on GLPB's lot since November 2011. That truck had been financed by the Buhas and in November 2013 they became past due on a balloon payment of over $60,000.

As the Buhas' financial situation worsened, Mr. Snyder directed Reeder to investigate whether the City could buy the 2012 model truck from GLPB without a public bid process; it turned out that was not an option.

Shortly after that, the City began the second round of bids for a garbage truck. Reeder again was in charge of creating the City's specs. Reeder used the same specs as those of the GLPB's 2012 truck and set a short delivery deadline that few other companies could meet. Reeder's bid form required that the bids be sent to the Mayor's office, instead of the Clerk's office as was the usual practice.

The government introduced evidence that, shortly before the bid deadline, Mr. Snyder met with the Buhas several times. No evidence exists as to what was said during those meetings.

The Board of Works was the entity that awarded the bids. Mr. Snyder was the Chairman of the Board of

Works, as required by Indiana law, along with two other persons whom he appointed.

On December 23, 2013, the Board of Works voted without any discussion in favor of selecting GLPB's bid. Although the GLPB's bid was for the sale of a new truck, the actual truck to be sold was the GLPB's 2012 model truck.[2] Mr. Snyder knew the sale was contrary to the bid specs. All the losing bidders submitted bids for sales of new trucks. Also, because the specs were tailored to GLPB, other companies' bids either did not constitute the lowest bid or were noncompliant.

Two and a half weeks later, on January 10, 2014, the Buha brothers wrote Mr. Snyder a check for $13,000. Mr. Snyder deposited the check into what amounted to a shell account to cover up the tracks of this payment.

In July 2014, law enforcement agents interviewed Mr. Snyder about the $13,000 payment. He claimed he was hired by GLPB in January to perform health insurance and IT consulting. He insisted that he had provided such consulting by holding numerous meetings at the dealership. But he could not give a specific example of a product or information binder that he provided to the dealership. An employee of the dealership contradicted Mr. Snyder's account, testifying that he did not see Mr. Snyder at any of the dealership meetings; in fact, he did not see him at the dealership at all. The Jury also heard evidence that Mr. Snyder was not licensed or qualified to perform health insurance or IT consulting. Finally, although Mr. Snyder claimed that the money was for his professional services outside his job as a mayor, he never

[2] Its actual manufacturing date was November 10, 2011, and it complied with the 2010 emissions standards.

disclosed this payment to the City as required.

During his interview, Steve Buha told the federal agents that GLPB and Snyder had a written contract for his consulting services. However, the Buhas never produced the contract.[3]

For Count 2, the government had to prove beyond a reasonable doubt that Mr. Snyder solicited, demanded, accepted, or agreed to accept money from the Buhas and that he did so corruptly, that is with the intent to be influenced or rewarded in connection with contracts approved by the Portage Board of Works.[4] (Court's Jury Instr. 21, DE 254.) The government met this burden for the purposes of Rule 29, which directs the Court to draw all inferences in favor of the government.

Mr. Snyder claims that a conviction based upon the above facts amounts to nothing but speculation on the part of the Jury. He likens this case to *United States v. Garcia*, 919 F.3d 489 (7th Cir. 2019), where the Court of Appeals reversed the district court's denial of a motion to acquit. In *Garcia*, the defendant was found guilty of distributing cocaine even though no witness testified about seeing the defendant possess the cocaine and the government's entire case was built around an expert deciphering the defendant's phone conversations with a co-defendant.

Mr. Snyder's case is different from *Garcia*. Whereas

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[3] The Buhas later recanted this assertion—in the Grand Jury testimony—saying that they insisted on having a contract, but Mr. Snyder never delivered it.

[4] The Jury Instruction also includes other elements, but they aren't contested.

in *Garcia* neither the money nor the drugs were found on the defendant, and only cryptic phone conversations existed, in this case, the evidence includes both the money (the $13,000 from the Buhas) and the goods (seemingly rigged sale of the trucks, especially during the second round of the bids). Mr. Snyder put his loyal, yet inexperienced, friend—Reeder—in charge of the bidding process, replacing the person who, up to this point, was in charge of such things. At the Board of Works meeting or shortly thereafter, Mr. Snyder knew that, although the price was right, the second-round truck was a 2012 model truck from GLPB even though the specs required a brand new truck.[5] Not even three weeks later, the Buhas paid Mr. Snyder $13,000; Mr. Snyder deposited the money into a shell account and later moved the money into his regular accounts. Viewed in the light most favorable to the government, these transactions amounted to money laundering. In fact, Mr. Snyder even went further: there was some suggestion at trial that Mr. Snyder paid tithe on that money, perhaps hoping for an inference that no bribe taker would be tithing to his church. However, an equally reasonable inference is that he paid the tithe to wash the money clean.

When law enforcement interviewed Mr. Snyder, he claimed that the money was paid because he provided insurance and IT consulting services, even though he could not articulate what exact services he provided, and even though he had no real qualifications in either field.

In turn, the Buhas claimed that they had a contract

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[5] Other bidders testified at trial that it would have been impossible for them to match the bidding price for their new trucks with the price of the old truck GLPB was offering.

with Mr. Snyder for his services, even though they could not produce it. An employee at the dealership testified that he did not see Mr. Snyder at the dealership at all, let alone doing any consulting. This contradicted Mr. Snyder's account to the agents to whom he told that he was at the dealership frequently during this time period.

Although this was a closer case than the government makes it out to be, these facts, and all the reasonable inferences that come from them, doom Mr. Snyder's motion for acquittal.

Although Mr. Snyder can't prevail under Rule 29, his Rule 33 motion has merit: in the interest of justice, a new trial is required on Count 2. This is so because of the cumulative effect of several irregularities on behalf of the government.

Mr. Snyder's attorneys were diligent about preparing for trial. Although 99% of the discovery evidence disclosed by the government turned out to be irrelevant, they had sifted through and analyzed everything. In relation to Count 2, they prepared to defend Mr. Snyder as charged in the Indictment: against the allegations of bribery relating to the sale of the garbage trucks and against the allegations of bribery relating to the Willowcreek road construction.

Yet, the government did not present any evidence about the Willowcreek road construction.[6] Worse yet, it's reasonable to assume that the government knew before

[6] The government mentioned the Willowcreek construction in the opening statement, but in retrospective, it was just a lip service to the charge in the Indictment.

trial started that no evidence regarding the Willowcreek road would be introduced. While this may appear to ultimately benefit Mr. Snyder, Mr. Snyder's attorneys had to spend resources and significant time in preparing to defend against the Willowcreek road charges, when, as it turns out, they could have spent their efforts elsewhere.

Worse yet, the government's failure to concede the Willowcreek road matter came on the heels of the Court striking the words "and other consideration" from Count 2 of the Indictment, because the government could not show that it had any evidence of consideration other than the $13,000 the Buhas paid Mr. Snyder. At that point, the government should have known that the Court would not tolerate the inclusion of material allegations in the Indictment that the government had no intention of proving.

In addition, during trial, the government introduced several pieces of evidence that had not been previously provided to Mr. Snyder's attorneys. Some of this evidence was found by the government's agents and the attorneys weren't aware of its existence. But the effect of such late evidence was to disallow Mr. Snyder's counsel due preparation to challenge the evidence.

Next, the government chose to present a significant portion of its evidence regarding Count 2 through FBI Agent Eric Field. While law enforcement agents routinely testify at trials, it was second-hand testimony, and there was too much of it. The disparity became all too obvious when Mr. Snyder's counsel attempted to cross examine Agent Field and was met with hearsay objection upon objection. Importantly, Mr. Snyder's counsel could not cross-examine Agent Field about his testimony concerning the Buhas, who were central players in the

case. Had the Court known that the Buhas would not be witnesses at the trial, Agent Field's testimony would have been greatly limited. The sum of Agent Field's testimony turned out to be both a sword and a shield: the sword to pit the non testifying witnesses' words against Mr. Snyder; the shield to prevent Agent Field from expanding further upon cross examination.

Indeed, the fact that the Buhas refused to testify by invoking the Fifth Amendment to the United States Constitution was a surprise to Mr. Snyder. In fact, the Court was surprised just as much.[7] The consequence of their refusal to testify was to deprive Mr. Snyder of eyewitnesses as to what happened between him and the Buhas. This came about when one of the government's attorneys told the Court and one of Mr. Snyder's attorneys during a side bar conference that the government would not be calling the Buhas to testify because the attorney believed that the Buhas lied before the Grand Jury.[8] Within the bounds of law, the

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[7] From years of experience on every side of litigation, the Court cannot recall a case that was tried without the testimony of the giver or the receiver of the bribe, or the testimony of some other direct witness of the bribery. Of course, this observation is not dispositive to the outcome of this case, but in the view of this Court, this case is an outlier among § 666 cases.

[8] The government has proffered several explanations as to why it believed that the Buhas lied before the Grand Jury, but it's difficult to understand why the two brothers would vouchsafe for Mr. Snyder whom they did not know closely and for whom they seemingly did not care; on top of that, they did so while under the protection of an immunity agreement. The Court is left with the impression that there was some gamesmanship being played out by the government to discourage the Buhas from testifying. This is similar to the government leaving in Count 2 of the Indictment the language regarding the Willocreek construction project.

government's attorneys can call whomever they wish to testify trial. In turn, they cannot be forced into calling the witnesses they do not want to call. The question as to why the government was not going to call the Buhas was not at issue, and the government's representation about the veracity of the Buhas at that juncture was unnecessary. It would have sufficed for the government to state that it did not intend to call the Buhas, rather than cast its opinion as to the veracity of the witnesses.

Mr. Snyder's attorneys shared this information with the Buhas' attorney, which ended up in the Buhas' attorney advising them "to plead the fifth." The government refused to immunize the Buhas, as is its right, but the overall result was the loss of two witnesses who may have helped in shedding the light as to what happened in relation to the charges in Count 2.

The government argues that, if the Buhas testified consistent with their Grand Jury testimony, they would not have helped Mr. Snyder's case; just the opposite. The Court disagrees with this assessment. While the Buhas did not outright exonerate Mr. Snyder when testifying before the Grand Jury, they paint a picture of contract negotiations over a consulting agreement between them and Mr. Snyder, while at the same time feeling as victims of Mr. Snyder because of his authority as the Mayor; they vehemently deny that the $13,000 payment was related to selling the trucks to the City. For example, Bob Buha described Mr. Snyder's involvement as limited to being a consultant for the Buhas:

> Q. So what did he propose to do to earn this 15,000 that he was seeking?[9]

[9] According to the Buhas Grand Jury testimony, Mr. Snyder

> A. He was---and he did---I had conversation with him before that I was having---I was thinking of changing software companies. Our computer system was getting old. And he seemed very knowledgeable with---now, it's become popular the cloud storage systems. I call them storage because I 'm not that IT knowledgeable. And I'm impressed easily by people that know stuff about that. So I listened. And it was right about the time the Affordable Care Act was starting to affect businesses, and I have some union employees and some non-union employees. And we were trying to mesh the two with the insurance. That was difficult. And he works with union employees there and has to handle their insurance and non-union. And he said he can assist me with the understanding of the Affordable Care Act, which it's difficult---it was---it was even more difficult at that time to see how it affected your business and what things. And we did make---you know, he said, I can help you out with that. I can help you out with your computer system. He had a mortgage company at that time. He said, I can assist you with the people that I have contacts with to evaluate your mortgage needs on your business. And it was a justification on his part, and offer on his part.

(Bob Buhas GJ Testimony, 39:9--40:17.)

Similarly, Bob Buha denied any connection between the sale of the trucks and the $13,000 check: "He never came to us or said---and we never went to him and said, you give us this amount, and we'll give you this amount. Nothing ever said." (Bob Buha GJ Testimony 93:1--4.)

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initially sought $15,000 in compensation.

Although the government's attorney kept pressing him on the issue, Bob Buha did not waiver:

> Q. Did you feel that you owed him the money in the sense of---to thank him for getting you the trucks, or for whatever role he played in your bids being accepted?
>
> A. No. . . .

(Bob Buha GJ Testimony 43:22–44:1.)

It's noteworthy that, even though Bob Buha's testimony could be read as him hedging his bets, Steve Buha never backed off his assertion that they paid Mr. Snyder for his consultation services.

Thus it's not clear at all what the Jury would have thought of the Buhas' testimony had they testified.[10]

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[10] Here, one may be tempted to succumb to the skepticism about "all politicians being corrupt," so surely "he did it." Yet the law guards the accused against the rash judgment. Sir Thomas More, the Chancellor of England (1529–1532) explains it best in the movie "A Man For All Seasons" when demanded to arrest a would-be traitor, but who had not yet committed a crime:

ALICE MORE: Arrest him!

SIR THOMAS MORE: For what?

ALICE: He's dangerous!

WILLIAM ROPER: For libel, he's a spy!

MARGARET MORE: Father, that man's bad.

MORE: There is no law against that.

ROPER: There is! God's law!

MORE: Then God can arrest him.

ALICE: While you talk, he's gone!

MORE: And go he should, if he were the Devil himself, until he broke the law!

Nevertheless, the government insists that, if Mr. Snyder really wanted the Buhas' side of the story, his counsel could have introduced it through their Grand Jury testimony. The government directs the Court to Federal Rule of Criminal Procedure 804(b)(1), but that rule would not allow such testimony because Mr. Snyder did not have an opportunity to cross examine the Buhas. *See* Rule 804(b)(1).[11]

Mr. Snyder argues persuasively that the Buhas' immunity agreements covered their testimony at trial. Their argument is cohesive: regardless of what the government counsel said at the immunity hearing before

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ROPER: So! Now you'd give the Devil benefit of law!

MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?

ROPER: Yes! I'd cut down every law in England to do that!

MORE: Oh? And when the last law was down, and the Devil turned round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast — man's laws, not God's — and if you cut them down — and you're just the man to do it — do you really think you could stand upright in the winds that would blow then?

Yes, I'd give the Devil benefit of law, for my own safety's sake!

An excerpt from the movie "A Man For All Seasons," https://fee.org/articles/id-give-the-devil-benefit-of-law-for-myown-safetys-sake/ (last visited November 27, 2019).

[11] The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Judge Simon, his Order---perhaps containing the terms that the government itself proposed---had no limiting language. Rather, the immunity Order refers to ancillary proceedings in addition to the Grand Jury testimony, which the Department of Justice itself views as including trials. According to the affidavit of the Buhas' attorney, both brothers were willing to testify at trial but that changed because of their perceived threat by the government, a threat that came in the midst of trial and for the first time in almost three years since they testified before the Grand Jury.

Nevertheless, the Court declines to rule at this time definitively as to what the scope of the immunity agreement was. At this juncture it is not necessary to decide whether the government withdrew or declined to offer the immunity agreement. The result is the same: the unfair cumulative effect of the circumstances described above can be remedied only through a new trial.[12]

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[12] It never helps the Court when the opposing attorneys are uncivil toward each other. Fairness to both the government and the defendant is the paramount consideration for the Court, so it won't attribute the attorneys' squabbles to the parties themselves. But whatever the case, there is no need for the government's counsel to refer to the defendant's attorneys as the "cadre" (DE 319 at 6), and it's sophomoric for the defendant's counsel to write as if they were lifting off pages from a beginner reader book: "How did we figure out that *Salerno* was vacated and reversed, and that the law in the Second Circuit is the exact opposite of what [the government's counsel] represented? By looking at *the big, red flag that pops up on any case reporter website as soon as anyone enters the citation*." (DE 320 at 3 (emphasis added.) The Court understands and appreciates colloquialism when it's used properly; the Court abhors the same when it's used to belittle another person. Certainly, the attorneys on both sides are capable of expressing their ideas without personally deriding each other.

Although the Court is not finding prosecutorial misconduct, the government "pushed the envelope."

C. Count 3: Attempt to Interfere with Administration of Internal Revenue Laws

As with Count 2, for the purposes of Rule 29 motion, the Court reviews evidence related to Count 3 in the light most favorable to the government.

For Mr. Snyder to be found guilty of the charges in Count 3, the government had to prove the following beyond a reasonable doubt:

1. The defendant made an effort, or acted with the purpose, to obstruct or impede the due administration of the internal revenue laws;

2. The defendant's efforts or acts had a reasonable tendency to obstruct or impede the due administration of a known pending or reasonably foreseeable tax-related action or proceeding. The effort need not be successful;

3. The defendant acted knowingly; and

4. The defendant acted corruptly, that is, with the purpose to obtain an unlawful benefit for himself or someone else.

The "due administration of the Internal Revenue laws" for purposes of this charge, means a particular tax-related proceeding or targeted administrative action. Routine administrative procedures that are near-universally applied to all taxpayers, such as ordinary processing of tax returns, do not qualify under this definition.

(Jury Instr. 27, DE 254.)

The Court explained to the Jury that—

> "[t]o 'obstruct or impede' as used in [the above instruction] means to hinder, stop, or retard the progress of any accomplishment."

(Jury Instr. 28, DE 254.)

Furthermore, the Court defined the word "knowingly":

> Persons act knowingly if they realize what they are doing and are aware of the nature of their conduct, and do not act through ignorance, mistake, or accident. In deciding whether the defendant acted knowingly, you may consider all the evidence, including what the defendant did or said.

(Jury Instr. 29, DE 254.)

Finally, the Court submitted to the jury a "good faith" instruction:

> . . . if the defendant believes in good faith that he is acting within the law or that his actions comply with the law, he cannot be said to have acted corruptly. This is so even if the defendant's belief was not objectively reasonable. However, you may consider the reasonableness of the defendant's belief together with all the other evidence to determine whether the defendant held the belief in good faith.

(Jury Instr. 30, DE 254.)

The government met its burden.

The evidence at trial established that Mr. Snyder signed an employment agreement with GVC Mortgage on January 27, 2010. The agreement states that Snyder is to manage a branch office of GVC located at 5955 Central Avenue in Portage (the same address where First

Financial Trust Mortgage ("FFTM") operated). Mr. Snyder signed the form and self-identified his position with GVC as "President." In 2010, Mr. Snyder was paid wages by GVC totaling $141,891.27. At the same time, GVC began paying FFTM's employees' salaries directly, and those employees, including Mr. Snyder, continued operating under the name FFTM. Not long after joining GVC's payroll, Mr. Snyder established a bank account in the name of SRC Properties ("SRC"). That bank account listed SRC as a "Mortgage Company" and its business address as 5955 Central Avenue in Portage (the same address as FFTM and GVC).

Beginning in 2010, Snyder created false SRC invoices purporting to bill FFTM for services rendered, including consulting. In other words, Mr. Snyder began creating fake invoices purporting to bill FFTM on behalf of SRC. Mr. Snyder then forwarded those invoices to GVC, causing GVC to reimburse SRC for work it supposedly performed for FFTM. In reality, through these payments, GVC was paying SRC for operating expenses incurred in the continued operation of FFTM. But by having the money from GVC routed to SRC instead of FFTM, Mr. Snyder was able to conceal FFTM's true financial status from the IRS. Because the IRS did not know about SRC at the time, Snyder's diversion of FFTM income made that entity appear insolvent and unable to muster sufficient resources to pay its taxes.

These GVC-funneled payments to SRC, which were rightly due FFTM, thwarted the IRS from collecting on FFTM's overdue payroll tax debt. Snyder's scheme proved successful. As of February 2019, FFTM owed over $200,000 in unpaid taxes and penalties to the IRS.

Mr. Snyder engaged in the above conduct while lying

to the IRS about nearly every aspect of his financial dealings involving GVC, FFTM, and SRC.

These facts support the Jury's verdict. The Jury was properly instructed about the law in relation to Count 3, including the meaning of the term "due administration of the Internal Revenue laws." This instruction is consistent with *Marinello v. United States*, 138 S.Ct. 1101 (2018) (holding that to convict a defendant under the Omnibus Clause, the Government must prove the defendant was aware of a pending tax-related proceeding, such as a particular investigation or audit, or could reasonably foresee that such a proceeding would commence). When the trial evidence is considered in the light most favorable to the government, there is a nexus between Mr. Snyder's conduct and a particular administrative proceeding. Therefore, his conduct was within the scope of § 7212.

Moreover, the government presented sufficient evidence that Mr. Snyder intended to obstruct or impede the IRS, that his false filings weren't mere mistakes or oversights. Mr. Snyder shielded his income from the IRS through diverting GVC payments to SRC, thus creating an impression that FFTM was destitute. This scheme had reasonable tendency to obstruct the due administration of the IRS laws. With Mr. Snyder misrepresenting his affairs, the IRS was led into believing that a full collection effort would have been futile. Finally, there was significant evidence showing that Mr. Snyder's intentions in evading the collection were corrupt.

As for Rule 33, Mr. Snyder has failed in showing that the course of trial regarding Count 3 (in contrast to Count 2) was so devoid of fairness that a new trial would be required. Moreover, the fact that Count 2 requires a new trial does not change anything about Count 3. The two

counts were distinct from each other to the point that the problems identified in Count 2 did not flow over into Count 3.

D. Conclusion

The Court grants Mr. Snyder's motion under Rule 33 for a new trial regarding Count 2. However, all his other requests pursuant to Rules 29 and 33 are denied.

SO ORDERED on November 27, 2019.

s/ Joseph S. Van Bokkelen
JOSEPH S. VAN BOKKELEN
UNITED STATES DISTRICT JUDGE

APPENDIX J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA, v. James E. Snyder	Case No.: 2:16-CR-160 JVB

ORDER

Defendant James E. Snyder moved for reconsideration of the Court's order on his motion to dismiss the indictment or disqualify the trial team.

As the parties recognize, motions to reconsider are proper "to correct manifest errors of law or fact or present newly discovered evidence." *Caisse Nationale de Credit Agricole v. CBI Industries*, 90 F.3d 1264, 1269 (7th Cir. 1996). The standard is deliberately high to avoid repeated motions on the same subject.

Mr. Snyder believes that the Court was misled by the government as to what constitutes the attorney work-product doctrine and thus it overlooked the significance of many of the emails in question. While the Court's discussion on the attorney work-product doctrine did not set out every possible way attorney work-product comes into being, the Court understands its application. As such, it wasn't that the government misled the Court but rather that Mr. Snyder failed to convince it of his position. It did not find that the work-product doctrine only applies to

work made by attorneys; rather, it found that the emails in question didn't have an attorney's involvement to such an extent that it would turn the communication into a legally protected work.

Likewise, the Court understood and still understands Mr. Snyder's Sixth Amendment argument. Moreover, as the beginning of the order sets out, the Court sees the potential for abuse under the strictures that the government followed. Yet, in this case, no law was violated.

For all these reasons, the Court denies Mr. Snyder's motion to reconsider.

SO ORDERED on January 14, 2019.

s/ Joseph S. Van Bokkelen
JOSEPH S. VAN BOKKELEN
UNITED STATES DISTRICT JUDGE

APPENDIX K

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. John Cortina, *et al.*, Defendants.	Case No.: 2:16-CR-160 JVB

ORDER

Defendant James Snyder moved pursuant to Federal Rule of Criminal Procedure 7(d) to strike what he calls surplusage from Counts 3 and 4 of the indictment. Count 3 charges that Mr. Snyder "did corruptly solicit, demand, accept, and agree to accept [$13,000], intending to be influenced and rewarded in connection with . . . series of transactions of the City of Portage . . . involving $5,000 or more." (DE 1 at 4.) The alleged series of transactions are "contracts approved by the Portage Board of Works totaling over $1.25M; a construction project undertaken by the Portage Redevelopment Commission at an approximate cost of $13,000; and other consideration." (*Id.*) Mr. Snyder seeks to strike the phrase "and other consideration," arguing that this does not sufficiently inform him of the charge against him, making his defense impossible.

Likewise, Mr. Snyder asks the Court to strike

paragraphs 1–20 of Count 4, insisting that they have nothing to do with the actual charge of failing to pay his personal taxes and, in fact, describe conduct that is outside the statute of limitations.

An indictment is sufficient if it states the elements of the offense, fairly informs the defendant of the nature of the charge so he may prepare a defense, and enables the defendant to plead an acquittal or conviction as a bar against future prosecutions for the same offense. *United States v. Ramsey*, 406 F3d 426, 429–30 (7th Cir. 2005).

A. Count 3

In Count 3, the government used the statutory language of 18 U.S.C. § 666(B) to inform Mr. Snyder that he's charged with corrupt solicitation of a thing of value. But whereas subsection (B) ends with the words "involving a thing of value of $5,000 or more," the indictment describes the things of value: Portage Board of Works contracts, Portage Redevelopment Commission's projects, "and other consideration." Having enumerated some of the conduct specifically, the government may not remain vague as to what "other consideration" is. If the indictment is to retain that phrase, the government must submit by Friday, January 11, a filing setting out what conduct it intends to prove that encompasses "other consideration," and it must introduce evidence tending to prove that conduct at trial. For now, the Court takes Mr. Snyder's request to strike the phrase "and other consideration" from Count 3 under advisement.

B. Count 4

Mr. Snyder also wants to strike paragraphs 1–20 in Count 4, claiming that they describe irrelevant conduct

and conduct that is outside the statute of limitations. Count 4 charges Mr. Snyder with "corruptly obstructing or impeding due administration of the Internal Revenue Code," 26 U.S.C. § 7212(a). In particular, Count 4 alleges that Mr. Snyder designed a scheme to obstruct the collection of his unpaid taxes during the time when IRS was attempting to collect FFTM's tax debt by diverting "the repayment of FFTM's operating expenses to SRC." (DE 1 at 13). Paragraphs 1–20 are necessary to understand the scheme and contain facts that the government must prove at trial. While the alleged conduct—standing alone—would be outside the six-year statute of limitations, *see* 26 U.S.C. § 6531(6), it is not stand-alone conduct. Rather, the earlier acts are intertwined with the acts that do fall within the statute of limitations, thus making the earlier acts relevant and proper to this case. As a result, the Court denies Mr. Snyder's motion to strike paragraphs 1–20 of Count 4.[1]

In summary, Mr. Snyder's motion (DE 130) is taken under advisement in part and denied in part.

SO ORDERED on January 8, 2019.

s/ Joseph S. Van Bokkelen
JOSEPH S. VAN BOKKELEN
UNITED STATES DISTRICT JUDGE

[1] Mr. Snyder dedicates a separate brief to his negotiations with the government and a series of statute of limitation waivers that he executed before charges were filed in this case. In reaching the ruling, it's not necessary to address those contentions.

APPENDIX L

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. John Cortina, *et al.*, Defendants.	Case No.: 2:16-CR-160 JVB

OPINION AND ORDER

Mr. Snyder asks the Court to dismiss Counts 1 and 3 of the indictment. In particular, he argues that gratuities are not covered by 18 U.S.C. § 666 and, if the government intends to prove its case by showing that he received gratuities, then the Court should dismiss these two counts against him. Mr. Snyder wants the government to declare whether it intends to prosecute him under the gratuities theory. The government objects to any such demand and submits that Counts 1 and 3 adequately inform Mr. Snyder of the offenses he's charged with.

The Court agrees with the government.

The Seventh Circuit distinguishes bribes and gratuities as follows: "If the payer's intent is to influence or affect future actions, then the payment is a bribe. If, on the other hand, the payer intends the money as a reward for actions the payee has already taken, or is already committed to take, then the payment is a gratuity."

United States v. Anderson, 517 F.3d 953, 961 (7th Cir. 2008) (citing *United States v. Agostino*, 132 F.3d 1183, 1195 (7th Cir.1997)). Both bribes and gratuities are crimes in the Seventh Circuit. *See United States v. Johnson*, 874 F.3d 990, 1001 (7th Cir. 2017), cert. denied, 138 S. Ct. 1275, 200 L. Ed. 2d 427 (2018) ("As Walton acknowledges in his brief, this court has ruled that the word 'reward' in § 666 criminalizes the receipt of bribes and gratuities. *United States v. Hawkins*, 777 F.3d 880, 881 (7th Cir. 2015) ('§ 666 forbids taking gratuities as well as taking bribes.'). So, the district court's instruction, even if it permitted conviction for taking a gratuity, certainly was not clearly erroneous under current law.").

Mr. Snyder argues that the above cases are just dicta and relies on the First Circuit Court of Appeals case, *United States v. Fernandez*, 722 F.3d 1, 26 (1st Cir. 2013), which found gratuities not prohibited under § 666. *See id.* ("By including that language [in the jury instructions], the court improperly invited the jury to convict both Martínez and Bravo for conduct involving gratuities rather than bribes. Consequently, the jury was allowed to convict Martínez and Bravo on a legally erroneous theory."). Mr. Snyder even claims that the Seventh Circuit is waiting for the opportunity to overturn itself and has invited the defendants in *Hawkins*, *supra*, to do just that. (Snyder Br. at 4, DE 129.)

Mr. Snyder exaggerates. *Hawkins* did not invite defendants to argue that gratuities do not fall under § 666 so as to give the Seventh Circuit Court of Appeals an opportunity to overturn its precedent. Rather, *Hawkins* merely acknowledged *Fernandez* and stated a fact: "Defendants have not asked us to overrule *Anderson* and *Agostino* in favor of the position taken in *Fernandez*."

United States v. Hawkins, 777 F.3d 880, 881 (7th Cir. 2015). There's no invitation there.

In light of the controlling law, the Court denies Mr. Snyder's motion to dismiss Count 1and 3.

SO ORDERED

October 2, 2018

s/ Joseph S. Van Bokkelen
JOSEPH S. VAN BOKKELEN
UNITED STATES DISTRICT JUDGE

APPENDIX M

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. James Snyder, Defendant.	Case No.: 2:16-CR-160 JVB

OPINION AND ORDER[1]

Writing to Corinthians, Apostle Paul cautioned: "'Everything is lawful,' but not everything is beneficial. 'Everything is lawful,' but not everything builds up." 1 Cor. 10:23 (New American Bible). And so it is in this case: while in obtaining and screening Defendant Snyder's emails, the government remained (largely) within the bounds of the law, its tactics—given that Mr. Snyder's attorney, Thomas Kirsch, had a good reputation and was

[1] In the evolution of briefing the attorney-client privilege, the filings began in the open and the Court held open hearings. As the case progressed, in the interest of caution, some of the filings were sealed and even sealed from the trial team, with AUSA Timothy Chapman of the Chicago United U.S. Attorney's office doing the briefing. At the same time, some of the filings continued in the open. In ruling on the matters before it, the Court has determined that this order does not have to be filed under seal as it does not reveal any information that is prejudicial to Mr. Snyder and the public's interest in the transparency of litigation outweighs any privacy concern that Mr. Snyder or the government may have.

cooperative—created a potential for violating Mr. Snyder's right to a fair. What the government did, it could do: the law is in its favor, even if the prudence of its actions can be questioned.

In filtering out emails that contained privileged attorney-client communications, the government employed a process where the only check against privileged information crossing over "the Chinese Wall" was the integrity of its attorneys and the FBI agents working on this case. To be sure, there's nothing to suggest that the agents involved in the case improperly handled Mr. Snyder's emails or that the agent in charge was peaking behind the curtain of the privilege. However, any process that leaves government agents unchecked is problematic. That is, while Special Agent Eric Field appears to be an honest man, will every other agent in his situation also be honest? Likewise, although the trial team consists of two attorneys of impeccable integrity, the government, with its almost infinite resources, must be kept in check, because the temptation to skirt the safeguards of the attorney-client privilege is ever-present and next attorneys may not be as conscientious as the current set.

I.

Mr. Snyder claims that the government violated his Fourth, Fifth, and Sixth amendment rights when they seized his work and personal emails pursuant to a warrant. In particular, Mr. Snyder contends that the government knew that, at the time the warrant was to be executed, he had already retained counsel, Thomas Kirsch,[2] to assist him in dissuading the government from

[2] Kirsch is no longer representing Mr. Snyder as he was

filing charges, and that the government knew that a broad sweep of his emails would inevitably seize privileged communications with his attorney. Furthermore, Mr. Snyder accuses the government of failing to set up a process that would protect privileged emails from reaching the trial team attorneys and agents. Mr. Snyder points to over forty emails that he insists are privileged and yet were not shielded from the trial team. He claims that the government was able to glean information from those emails that gave it an unfair advantage, prejudicing him to the point of no return. Mr. Snyder asks that the Court dismiss the indictment as a sanction for government's violations or, in the alternative, remove the prosecution team.

The government maintains that it's seizure of emails was appropriate, the three-tier review process to prevent privileged emails from reaching the trial team worked (for the most part), the emails that Mr. Snyder challenges are not privileged (again, for the most part) and, in any case, Mr. Snyder has suffered no undue prejudice.

The parties have filed multiple and voluminous briefs on the issues before the Court, and the Court held evidentiary hearings and oral arguments. The Court even conducted an ex parte hearing with Mr. Snyder's counsel. Through it all, what has become clear is that, with the exception emails containing QuickBooks data, the government trial team is not in possession of privileged materials and that the privileged financial data has not

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confirmed to the position of the United States Attorney for the Northern District of Indiana. Kirsch and all the government attorneys in the Norther District of Indiana are recused from this case, with the exception of AUSAs Phil Benson and Jill Koster. These two are supervised by the U.S. Attorney's office in Chicago.

unduly prejudiced Mr. Snyder. Thus, while the Court finds no fault with the taint team process, even if the process had been faulty as Mr. Snyder argues, no error has been introduced that would necessitate either dismissal of this case or recusal of the trial team.

II.

Before delving into Constitutional questions, the Court will first address the challenged emails to determine if any of them are privileged under the attorney-client privilege doctrine.

The attorney-client privilege is carefully guarded by the Courts but its violation does not rise to a violation of a constitutional right; rather, it remains an evidentiary rule. *See United States v. White*, 970 F.2d 328, 336 (7th Cir. 1992) ("The attorney-client privilege is a testimonial privilege. Consequently, so long as no evidence stemming from the breach of the privilege is introduced at trial, no prejudice results."). The privilege protects communications between attorney and client that are conducted in confidence and for the purpose of seeking or providing legal assistance to the client. *See United States v. BDO Seidman*, 492 F.3d 806, 815 (7th Cir. 2007). The knowing disclosure to a third party of an otherwise privileged communication eliminates the privilege. *See In re Pebsworth*, 705 F.2d 261, 263 (7th Cir. 1983). Likewise, there's no privilege for statements made to one's attorney in the presence of a third party. *See Jenkins v. Bartlett*, 487 F.3d 482, 490 (7th Cir. 2007). "The party seeking to invoke privilege bears the burden of proving all its essential elements." *United States v. Evans* 113 F.3d 1457, 1461 (7th Cir. 1997).

The attorney-client privilege extends to confidential

communications passing from one party to the attorney of the other party or vice versa for a common purpose related to the defense of both. *See Evans*, 113 F.3d at 1467). The joint defense doctrine applies so long as the attorneys "engage in a common legal enterprise." *United States v. Keplinger*, 776 F.2d 678, 701 (7th Cir. 1985).

An attorney's agents—such as paralegals, investigators, secretaries, etc.—are also within the realm of the privilege if they are engaged to assist the attorney in providing legal services for the client. The same does not extend to a defendant's agents.

In addition to privileged communications, materials prepared by attorneys in anticipation of litigation are also protected from the eyes of the government. This is known as the work-product doctrine and it "shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1974). The work-product doctrine also protects the work prepared by the attorney's agents. "As with the attorney-client privilege, documents that are not primarily legal in nature are not privileged under the work product doctrine." *RBS Citizens, N.A. v. Husain*, 291 F.R.D. 209, 217 (N.D. Ill. 2013) (citing *Loctite Corp. v. Fel–Pro, Inc.*, 667 F.2d 577, 582 (7th Cir.1981) ("Only where the document is primarily concerned with legal assistance does it come within [attorney-client or work product] privileges.")). "[T]he work-product doctrine is intended to guard only against divulging the attorney's legal impressions and strategies. The doctrine cannot be used to protect the underlying facts found within work-product." *United States v. Dean Foods Co.*, 2010 WL 3980185, at *2 (E.D. Wis. Oct. 8, 2010) (citing *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)

("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."))

The Court will review the emails in light of the law stated above.

A. Grand Jury Subpoenas (Exhibits 12–14, 20)

The day Mr. Snyder received multiple grand jury subpoenas he retained Mr. Kirsch as his counsel and emailed him copies of the subpoenas (Exhibit 13). Mr. Kirsch immediately responded confirming his receipt of the email (Exhibit 12). Several months later, Mr. Snyder retransmitted the same email to Mr. Kirsch "so it is fresh" (Exhibit 14) and Mr. Kirsch emailed Mr. Snyder two subpoenas (Exhibit 20).

These emails are not privileged as they contain no request for nor give any legal advice. Likewise, they contain no privileged materials.

B. Press inquiries and newspaper article (Exhibits 5, 6, 16, 19)

Several times, when Mr. Snyder received inquiries from the press, he forwarded them to Mr. Kirsch without discussion. He also forwarded to Kirsch a newspaper article. These emails are not privileged.

C. Scheduling phone calls (Exhibits 17, 24,26)

Three emails relate to scheduling phone calls between Mr. Snyder and Mr. Kirsch. These are not privileged emails.

D. SRC's corporate status (Exhibits 15, 22)

Mr. Kirsch emailed Mr. Snyder with a subject line, "Is

SRC an S Corp?"[3] Mr. Snyder responded the same day with one line: "Just confirmed at SOS website that it is LLC thanks." Mr. Kirsch's request for publicly available information is not privileged nor is Mr. Snyder's response that is based on that publicly available information. The emails contain neither legal advice nor a request for such advice.

E. Emails copied to Joseph Calhoun and Amanda Lakie (Exhibits 1, 2)

The government agrees that Mr. Snyder's October 21, 2014, email to Mr. Kirsch and his other attorney, Mr. Dogan, was privileged. But Mr. Snyder forfeited that privilege when he forwarded the same email to Calhoun.[4] Calhoun responded the next day at which time Mr. Snyder added Lakie[5] to the chain. Mr. Kirsch did not represent either Calhoun or Lakie, nor is there a joint defense between them and Mr. Snyder. Moreover, although she was Mr. Snyder's administrative assistant, Lakie wasn't Mr. Kirsch's agent so as to create a privileged relation with Mr. Snyder.

F. Fraternal Order of Police (Exhibits 23, 27)

Mr. Snyder emailed Kirsch the meeting minutes of the Fraternal Order of Police. The meeting minutes themselves are not privileged and the emails contain no request for legal advice. There's no basis here for Mr. Snyder's claim of the government's intrusion upon his

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[3] SRC stands for Citizens for Snyder.

[4] Mr. Calhoun was the Director of Administration and Emergency Management for the City of Portage.

[5] Ms. Lakie was the Administrative Assistant to the Mayor or Portage.

right to counsel.

G. Fronius Corporation Trip (Exhibits 36--38)

When the FBI agents interviewed Mr. Snyder in July 2014, they interviewed him about his use of taxpayer money for his trip to Austria to visit Fronius Corporation and questioned whether he illegally solicited and received funds from Great Lakes Peterbilt (GLPB) that Mr. Snyder later used to reimburse the City of Portage for the trip. In two emails Mr. Snyder sent a letter from Fronius to Kirsch and a series of letters on the city's letterhead that were used to solicit money to pay for the trip. There's no request for legal advice nor legal advice in any of the emails so as to make them privileged. The attached letters fare the same.

H. Cassie Teesdale (Exhibits 21, 33)

Cassie Teesdale is Mr. Snyder's administrative assistant at his company, First Financial Trust Mortgage. On November 19, 2014, the Agents interviewed her, and the next day Mr. Snyder asked her, possibly at Kirsch's request,[6] to summarize her recollections of the agents' questions and her answers. She did as asked. Mr. Kirsch responded in an email, simply saying "thanks."

These emails are not privileged. Teesdale did not have a joint defense, she was not Kirsch's agent, the

[6] Kirsch testified, often times he would phrase his answers in terms of what he would have done as opposed to what he clearly did. Chapman asked him to clarify what he meant by saying "I would have (done this or that)," and Kirsch answered that sometimes he actually did what he said "I would have done" and at other times his was his customary practice. As a result, it is not completely clear which actions Kirsch remembers actually doing as opposed to what his customary practice was.

emails do not deal with asking or receiving legal advice, and the emails contain only factual information.[7] Nor is Teesdale's email attorney work-product as it does not divulge Kirsch's legal impressions and strategies and the email itself is fact-based.

I. Mr. Snyder's GLPB Timeline (Exhibits 3, 4)

On September 14, 2014, Mr. Snyder emailed the city attorney, Gregg Sobkowski, a timeline summary of the bidding and award process for the City of Portage's purchase of three garbage trucks from GLBP. He attached to the email a bid tabulation charts prepared by Randy Reeder, the Assistant Superintendent of Streets. Mr. Snyder copied Mr. Kirsch and Reeder.

These emails are not privileged. Sobkowski was the attorney for the City, not Mr. Snyder. The emails were not sent in confidence to Kirsch, and Reeder was not in joint defense with Mr. Snyder.

J. Cummins Engines (Exhibits 7–11, 25, 35)

A company called PACCAR manufactured the garbage trucks purchased by the City. For a time, the agents believed that the trucks did not meet the bidding requirements as they did not contain Cummins engines as specified in the bid. Unbeknownst to them, PACCAR uses Cummins engines for its trucks. Mr. Snyder sent this information to Kirsch so that he could clarify this to the government. The emails contain publically available information and none of them constitute privileged attorney-client communications.

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[7] While not dispositive of the issue, it's interesting to note that Kirsch himself testified at the hearing that he didn't see Teesdale's email as privileged. (Tr. 58–59.)

K. Kent Martin (Exhibits 28, 29)

Mr. Snyder forwarded to Kirsch and Dogan two email exchanges between himself and Ken Martin, Mr. Snyder's campaign manager in 2011. The first email (Exhibit 28) contains no substantive statements. Its subject line references an attached Excel document called "Summary Quickview." The second email has subject line "CFA Workbook in Progress" and indicates that an Excel spreadsheet is attached. The emails were released to the prosecution team but not the attachments. While Mr. Snyder claims that the attachments were created by Martin at Kirsch's direction and therefore constitute attorney work product, the fact is that the attachments were quarantined from the trial team. The emails themselves, even though referencing the attachments, do not constitute attorney-client communications.

L. Fact Sheets (Exhibits 30, 32)

Mr. Snyder sent two emails to Kirsch and Dogan with subject lines "City Fact Sheet" and "Citizen Fact Sheet." The attachments with these emails were quarantined from the trial team. The emails don't contain any legal discussion or request for legal advice. As such, they are not privileged.

M. Dan Pickart (Exhibit 31)

In one email, Kirsch directs Mr. Snyder's accountant Dan Pickart to begin preparing defendant's taxes. That's it. As such it's not a privileged communication.

N. SRC Rental Agreement (Exhibits 34, 42)

In two emails, Mr. Snyder forwarded to Kirsch and Dogan (at separate times) a draft lease agreement between SRC and Citizens for Snyder that was sent to

him by Steve Lakie, the husband of Amanda Lakie). Steve Lakie is not affiliated with either attorney and the emails don't contain any legal discussion. In short, they are not privileged.

O. NWI Times Complaint Email (Exhibit 43)

Mr. Snyder emailed Dogan, without any substantive comment, a press inquiry about a lawsuit filed against the City of Portage by two of its former employees. Mr. Snyder was not sued personally. The press inquiry and the civil complaint attached to the email are not privileged.

P. "James, what is the status of the document scanning?" (Exhibit 18)

That's the email from Kirsch to Mr. Snyder. The subject line ("document subpoenas.") doesn't add much more: Needless to say, the email is not privileged.

Q. Ron McColly Services Agreement (Exhibit 40)

Ron McColly owned Community Title Company. In January 2014, Mr. Snyder enlisted Dogan as his personal attorney to draft a consulting agreement between Mr. Snyder and Community Title Company. Dogan sent the draft of the consulting agreement to Mr. Snyder's email account at City of Portage and from there Mr. Snyder forwarded the email to his personal account. Dogan's email states: "Also, I must advise you to seek independent legal advice concerning how you wish to carry out the services utilizing the agreement. I am not very familiar with the laws concerning government elected officials and the private enterprises they participate in."

This email is privileged as it contains legal advice. The government passingly argues that the email is not

privileged because it was sent to Mr. Snyder's publicly owed email account, so that the privilege had been waived. Yet this argument is not supported by either law or the specific facts in this case.

R. Leo Hatch Jr. Consulting Agreement (Exhibit 41)

Dogan also emailed to Mr. Snyder's City of Portage email account a draft consulting agreement with Leo Hatch Jr. This email, too, provides Mr. Snyder with legal advice and is privileged. The government makes the same argument about the email being sent to Mr. Snyder's City of Portage email account, but it's unavailing.

S. QuickBooks Compilation (Exhibit 39)

Kirsch directed Mr. Snyder to generate QuickBooks financial records for various entities associated with Mr. Snyder because his financial records were in disarray. Mr. Snyder used Intuit online software multiple times to email himself such records. The emails from Intuit contained various financial data in the body of the emails. He would then forward these to his attorneys. The emails from Intuit to Snyder (generated by Snyder) slipped through the government's filter process, and the government now concedes that those documents should not have been made available to the prosecution team because they constitute attorney work-product. However, the same data that was forwarded to the attorneys was quarantined.

At the evidentiary hearing, Kirsch testified that he provided some QuickBooks data to the government. However, Kirsch did not know which precise documents were given to the government, as one of the associates was in charge of this task. Some of the documents provided by Kirsch overlap with the documents sent from Intuit to

Snyder's email account.

To decide the remedy for the government viewing the privileged materials, the Court must determine whether the government did so intentionally and what the applicable law is.

III.

As discussed above, only three sets of documents contain privileged materials that the government's trial team has in its possession. Mr. Snyder claims that the process of screening the emails for privileged materials was inherently flawed and had no way of filtering out the attorney work-product. In addition, Mr. Snyder insists that the government should not have wholesale seized Mr. Snyder's emails in the first place as they knew that Mr. Snyder was represented by Kirsch and they would certainly be seizing attorney-client communications. Moreover, Mr. Snyder insists that the government's intrusion upon his relationship with his attorneys was inevitable given that the government decided to undertake the matter by itself rather than employing the assistance of a magistrate judge or Mr. Snyder's attorneys.

The Court held an evidentiary hearing to determine whether the screening process for emails that contain privileged attorney client communications was flawed as claimed by Mr. Snyder. While Mr. Snyder asks the Court to infer that Special Agent Eric Field must have reviewed privileged emails because Google sent all the files to him directly, the Court finds that he did not do so. The Court credits his testimony that he merely passed the files over to BIDMAS at the FBI headquarters and did not review them. Mr. Snyder is correct that it would have been

better had the files been sent to a person behind "the Chinese Wall" as that would have added credibility to the screening process, but in this case, there was no harm sending the files directly to Field.

Agent Field provided a list of search terms for BIDMAS to identify potentially privileged materials.[8] BIDMAS, which was administered by FBI officials in Washington, D.C., flagged materials it deemed privileged and quarantined them. Out of 109,000 emails, BIDMAS quarantined about 8,600 of them. At that point, the quarantined data was provided to a "filter team" of FBI employees who were not involved in this case. The employees were not lawyers, but Field instructed them to err on the side of caution in flagging communications as privileged. These agents boiled down the 8,600 quarantined emails to 900.

Next, AUSA Maria Lerner reviewed the 900 emails. Although she works in the Hammond office, Lerner is not part of the prosecution team; she was and continues to be sequestered from this case. Lerner reduced the list to some 300 emails as privileged, which are not available to the prosecution team. It turns out she missed the series of emails related to Mr. Snyder's QuickBooks file and two emails from Dogan.

The Court agrees with Mr. Snyder that the government could have cooperated with Kirsch to filter out privileged communications, at least in the last stage of review. But, while such cooperation may have been prudent, it was not legally required. Mr. Snyder also suggests that the government could have asked a

[8] Among other things, the search terms related to Kirsch's and Dogan's email addresses and website domains associated with them.

magistrate judge to carry out such a review. While the Court does not know if that would have been a practical idea, there's no guarantee that a magistrate judge would have done better than the taint team, unless, again, Kirsch would have been asked to be part of the review process. But that too is not required by law. Rather, the Court finds that, *as carried out in this case*, the filter process worked sufficiently, even if the process itself has inherent flaws (it has s semblance of the fox guarding the hen house). That is, there's no evidence, or even suggestion, that persons behind "the Chinese Wall" passed on privileged information to the prosecution team or that releasing the QuickBooks files and two Dogan emails to the prosecution team was done with the intention that the privileged documents be used to prosecute Mr. Snyder.

IV.

Mr. Snyder argues that, by seeing the QuickBooks files and the Dogan emails, the government unlawfully gained an advantage over him that cannot be undone. He insists that the government thus violated the Fifth and Sixth Amendments to the Constitution. Therefore, according to Mr. Snyder, this violation warrants the dismissal of the indictment against him or at least the removal of the trial team.

The Court finds no violation of the Sixth Amendment. The Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated against [a defendant]," *Kirby v. Illinois*, 406 U.S. 682, 688 (1972), either "by way of formal charge, preliminary hearing, indictment, information, or arraignment," *Id.* at 689. Here, the emails were seized and underwent the filter process long before the indictment was filed on November 17, 2016. The fact that

Mr. Snyder had an attorney during that time changes nothing, and the Supreme Court has noted so:

> Questions of precedent to one side, we find respondent's understanding of the Sixth Amendment both practically and theoretically unsound. As a practical matter, it makes little sense to say that the Sixth Amendment right to counsel attaches at different times depending on the fortuity of whether the suspect or his family happens to have retained counsel prior to interrogation. More importantly, the suggestion that the existence of an attorney-client relationship itself triggers the protections of the Sixth Amendment misconceives the underlying purposes of the right to counsel. The Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor. Its purpose, rather, is to assure that in any "criminal prosecutio[n]," U.S. Const., Amdt. 6, the accused shall not be left to his own devices in facing the "'prosecutorial forces of organized society.'" By its very terms, it becomes applicable only when the government's role shifts from investigation to accusation. For it is only then that the assistance of one versed in the "intricacies ... of law," is needed to assure that the prosecution's case encounters "the crucible of meaningful adversarial testing."

Moran v. Burbine, 475 U.S. 412, 430 (1986) (citations omitted).

Mr. Snyder relies on *United States v. Neill*, 952 F. Supp. 834 (D.D.C. 1997), a district court case in the District of Columbia, for proposition that the Sixth

Amendment right to counsel extends to the pre-indictment stage. But *Neill* neither controls this case nor is it consistent with the Seventh Circuit's jurisprudence that is in line with *Kirby*. *See e.g. United States ex rel. v. Lane*, 815 F.2d 457, 465 (7th Cir. 1987) ("[Defendant], however, cannot claim the protection of the sixth amendment merely because he retained counsel prior to the filing of charges against him.").

In addition, Mr. Snyder argues that this case falls within the purview of the Sixth Amendment because the government retained privileged information post indictment. That's a novel argument but not a convincing one, as it would turn the Sixth Amendment jurisprudence on its head. After all, in every case where the government obtains privileged information before the indictment, such information is retained, if nowhere else, in the minds of the attorneys and agents and thus exist post indictment. Yet the courts differentiate between information obtained before and after the indictment and address such violations under two different standards.

Mr. Snyder also argues that, if the Court rules against him on the Sixth Amendment issue, the government will be able seize a suspect's privileged attorney-client emails one day and charge him the next, thus avoiding the Sixth Amendment scrutiny. Two things must be noted: first, the Court is obliged by the precedent; second, if the government makes use of preindictment *privileged* attorney-client communications, they do not go scot-free, making Mr. Snyder's scenario unlikely. Moreover, the cases upon which Mr. Snyder is relying do not deal with privileged communications.

The Court considers the government's infringement of the privileged documents in the context of testimonial

privilege." [S]o long as no evidence stemming from the breach of the privilege is introduced at trial, no prejudice results." *United States v. White*, 970 F.2d 328, 336 (7th Cir. 1992). The Court finds that Mr. Snyder suffered some prejudice in that the disorganized financial data may have been more difficult for the government to analyze. However, Kirsch made some of this information available to the government in the same or a slightly amended version, and the information itself is factual in nature and does not reflect Kirsch's legal opinions or strategies. (Arguably, that's one of the reasons why Kirsch could make it available to the government.) Nevertheless, since the government's viewing of these attorney work-product documents constitutes a violation of the attorney-client privilege, the Court will preclude the government from using the contents of Exhibit 39 at trial or any evidence stemming from it.[9]

However, the Court finds that Mr. Snyder did not suffer prejudice from the trial team obtaining the two Dogan emails (40 & 41). In both instances, the government had obtained the agreements long before the emails were seized. Having received the same documents later, the government wasn't accorded any new insights into them and the accompanying messages from Dogan make no new revelations.

It is also worth noting briefly that none of the emails, aside from the ones in Exhibit 39 were unfairly prejudicial to Mr. Snyder. Many of the emails contain information already known to the government. Others, such as "I will

[9] Of course, the government is not precluded from using the information it received from Kirsch, even if that information is identical to data in Exhibit 39.

call you in five minutes," do not provide any information at all. And some emails forward to Kirsch publically available information, news coverage, or media inquiries, none of which create undue prejudice.

As for the Fifth Amendment, Mr. Snyder suggests that the government induced Kirsch to have Mr. Snyder organize his financial statements so they could use those statements against him. There is no such evidence, and Mr. Snyder's creation of cohesive records at Kirsch's request does not amount to forced self-incrimination. Also, for the reasons noted above, the use of the taint team in this case did not constitute outrageous conduct that shocks "the universal concept of justice." *United States v. Miller*, 891 F.2d 1265, 1267 (7th Cir. 1989).

Finally, Mr. Snyder has not shown that seizing the emails violated a particularity requirement of the Fourth Amendment. Federal Rule of Criminal Procedure 41(e)(2)(B) allows warrants for seizing electronic storage media that will be searched later for information as provided in the warrant. This rule recognizes the nature of electronic information and that there is no practical way to seize only certain information contained in the emails. The Court finds no fault with either the affidavit presented to the magistrate judge to get a warrant nor with how the search was executed.

V.

For all these reasons, the Court denies Mr. Snyder's motion to dismiss the indictment or to disqualify the government's trial team (DE 40). However, the Court will preclude the government from using the contents of Exhibit 39 or any evidence stemming from it at trial. *See White*, 970 F.2d at 336 (7th Cir. 1992).

SO ORDERED on September 27, 2018.

s/ Joseph S. Van Bokkelen
JOSEPH S. VAN BOKKELEN
UNITED STATES DISTRICT JUDGE

APPENDIX N

18 U.S.C. § 201. Bribery of public officials and witnesses

(a) For the purpose of this section—

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

(2) the term "person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever—

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with

intent—

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing,

or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom;

(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom;

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(c) Whoever—

(1) otherwise than as provided by law for the proper discharge of official duty—

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official,

otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;

(3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom;

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

(d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any

such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(e) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title.

APPENDIX O

18 U.S.C. § 666. Theft or bribery concerning programs receiving Federal funds

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

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

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

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

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

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

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such

organization, government, or agency involving anything of value of $5,000 or more;

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

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

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

(d) As used in this section—

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

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

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

(4) the term "State" includes a State of the United

States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

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