DOCKET NO.: 23-7404

ORIGINAL

BEFORE THE UNITED STATES SUPREME COURT

WILLIAM MAXWELL

Petitioner/Appellant/Defendant

VS,

UNITED STATES OF AMERICA

Respondent/Appellee/Plaintiff

On Petition for Certiorari to the United States Court of Appeals for the Third Circuit

On Appeal from the United States District Court For the District of New Jersey, Camden Vicinage, Honorable Robert Kugler, presiding.

PETITION FOR CERTIORARI

Respectfully Submitted,

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QUESTIONS PRESENTED

Maxwell has convictions for 18 U.S.C. :1343, 1349 (wire fraud and wire fraud conspiracy) based on the intangible property right to information to make an economic decision and intangible right of control; 18 U.S.C. §1956(h) (money laundering conspiracy) based on the wire fraud convictions and revenue streams long past alleged objective of conspiracy; 18 U.S.C. §922(g)(1), §922(d)(1)(conspiracy to transfer a firearm to a non-violent felon); 18 U.S.C. §1512(k), §1512(c)(2)(over broad reading of §1512(c)(2)). All of these charges were subsumed into an eight-month-long "monster trial" under yet another conspiracy 18 U.S.C. §1962(d) RICO conspiracy (the above were predicates), all based on an alleged enterprises that did not have to actually exist.

I. The Supreme Court in Ciminelli, Bruen, Rahimi, Cleveland, Kelly, and Fischer, issued (or will issue) post conviction/post Maxwell's Third Circuit Panel decision (July 15, 2022), opinions that address and limit the scope and/or constitutionality of the statutes applied to Maxwell. (Cleveland and Kelly applicable under Ciminelli) Because this Court has already addressed the issues in Maxwell's favor, post trial and/or post panel decision, the question is: **Whether this case should be granted certiorari for full briefing on issues already decided in Maxwell's favor by this Court or whether a G.V.R. would be appropriate in the first instance?**

II. **Whether the use by the jury and trial and appellate court(s) of 276 material exhibits which were never offered or admitted into evidence, and the reasonable inferences drawn therefrom, constitute such a denial of due process and a**

deviation from the American adversarial system of justice as to constitute structural error?

LIST OF PARTIES

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Nicodemo S. Scarfo is incarcerated in the Bureau of Prisons and proceeding pro se' on his 28 U.S.C. §2255 petition (on information and belief). Petitioner has no other contact information for Mr. Scarfo.

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Co-Defendant John Maxwell is on supervised release, having completed his full 10 year sentence during the pendency of this direct appeal.

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The opinion of the United States Court of Appeals appears at Appendix 7 to the Petition and is reported at United States v. Scarfo, ___ F.4th ___ (2022); 2022 WL 2763761; issued on July 15, 2022.

A Third Motion by Appellant to Recall the Judgment was Granted (First and Second Granted as well) and the judgment was reissued on July 16, 2023, and a copy of the order is attached at Appendix 6 to the Petition.

A SUR Petition for Rehearing was denied on September 15, 2023, and a copy of the order is attached at Appendix 5 to the Petition.

JURISDICTION

The date on which the United States Court of Appeals for the Third Circuit denied my case was July 15, 2022. A timely SUR Petition for Rehearing was denied by the United States Court of Appeals for the Third Circuit on September 15, 2023, and a copy of the order denying the rehearing appears at Appendix 5.

An extension of time to file the Petition for a Writ of Certiorari was granted to and including February 12, 2024 on November 2, 2023 in Application No. 23A399. See Appendix 4.

Maxwell's Petition was post-marked on February 9, 2024 and received by the Clerk for the Supreme Court on February 21, 2024. The Clerk returned the brief for technical corrections by letter dated March 11, 2024. The Petition is now due on or before May 10, 2024. This Petition is timely.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the Third Circuit is invoked under 28 U.S.C. §1291. The jurisdiction of the trial court is in Amendment 6 to the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES -- SEE APPENDIX 3

U.S. Constitution Second Amendment; U.S. Constitution Fifth Amendment; U.S. Constitution Sixth Amendment; 18 U.S.C. §922(d)(1); 18 U.S.C. §922(g)(1); 18 U.S.C. §1341; 18 U.S.C. §1343; 18 U.S.C. §1349; 18 U.S.C. §1512(b)(3); 18 U.S.C. §1512(c)(2); 18 U.S.C. §1512(k); 18 U.S.C. §1956(h); 18 U.S.C. §1961; and 18 U.S.C. §1962(d).

I. STATEMENT OF THE CASE

William Maxwell was charged in an Omnibus Indictment (Nov. 1, 2011) of purportedly inter-related conspiracies alleged to support an 18 U.S.C. §1962(d) Racketeering Conspiracy. These alleged supporting conspiracies included 18 U.S.C. §371 Securities Fraud Conspiracy; 18 U.S.C. §1349 Wire Fraud Conspiracy; 18 U.S.C. §1343 Substantive Wire Fraud counts; 18 U.S.C. §1956(h) Money Laundering Conspiracy; 18 U.S.C. §922(d)(1), §922(g)(1) Conspiracy to Transfer a Firearm to a non-violent felon; 18 U.S.C. §1512(k), §1512(c)(2) obstruction of justice conspiracy. These are all allegedly related to Maxwell's (a then licensed Texas attorney) representation of FirstPlus Financial Group, Inc. (FPFG) as outside counsel. FPFG is a Nevada Corporation with its corporate headquarters in Dallas, Texas. (See the indictment given to jury although not listed in exhibits or joint appendix (JAC 13932)).

The trial court **GRANTED** a Rule 29 Motion to Dismiss two other charges (false federal filing and bank fraud conspiracy) as to William and John Maxwell at the end of the Government's case-in-chief.[EN1]

Maxwell was convicted on July 3, 2014 of 18 U.S.C. §1962(d) racketeering conspiracy, for an enterprise that did not have to exist (JAC 12354, 12361-362) and for conduct to be imagined by the jury (JAC 12372-373).

Maxwell was convicted of 18 U.S.C. §371 securities fraud conspiracy; 18 U.S.C. §1349 wire fraud conspiracy, the objective of which was the intangible right to information to make economic decisions (JAC 12362-363) and the intangible property of elected board of director seats of FPFG and, thus control of FPFG (JAC 12379-380); 18 U.S.C. §1343 substantive wire fraud for the same basis as the wire fraud conspiracy (JAC 12370) or even events **not** charged in the indictment (JAC 12372-373); 18 U.S.C. §1956(h) money laundering conspiracy based on the Wire Fraud Jury Instructions. Supra. (JAC 12386-387); 18 U.S.C. §1512(k), §1512(c)(2) obstruction of justice, as well as §1512(b)(3) allegations -- Maxwell was not indicted under §1512(b)(3);[EN2] and 18 U.S.C. §922(g)(1) conspiracy to transfer a firearm to a non-violent felon. (JAC 12331, 12333, 12334)

Maxwell was sentenced to 240 months on virtually every count to run concurrently.

Maxwell's counseled direct appeal raised insufficiency of the evidence among other issues. (Joint Appendix, Third Cicuirt Brief; William Maxwell Opening Brief and Amended Opening Brief -- Doc.(s) 165, 303)

Maxwell's counseled appellate brief was filed prior to this Court's decision in New York Rifle & Pistol Assn. v. Bruen, 142 S.Ct. 2111 (2022). One month later, post Bruen, the Third Circuit Panel affirmed on July 15, 2022. See United States v, Scarfo, ___ F.4th ___ (3d Cir. 2022); WL 2753761, See Appendix 7.

As explained to Justice Alito in Maxwell's Motion for Extension to File Petition for Certiorari **(Granted November 3, 2023)** (App. No. 23A399), Maxwell asked his counsel Huff to file a petition for certiorari to the Supreme Court, and if not, to provide him with the Record on Appeal (ROA) so Maxwell could prepare his own petition for certiorari.

Counsel Huff failed and refused to contact Maxwell. Rather counsel Huff promptly filed a petition to withdraw, which was granted by the Third Circuit, but otherwise did not contact Maxwell.

Maxwell filed three separate Motions to Recall and Reissue the judgment, **all Granted** by the Third Circuit. Because the ROA is so voluminous (more than 75,000 pages) Huff was granted leave to produce the ROA to Maxwell in electronic format. However, the BOP did not have a computer or software to open the ROA. A computer, with software, and an opportunity to review was finally provided to Maxwell in the summer of 2023. See Third Motion to Recall Judgment - Granted - Appendix 6.

During the interim while the BOP and Maxwell's former counsel Huff were providing the ROA, computer, and software to Maxwell this Court issued Ciminelli v. United States, 598 U.S. ___ (2023) (limiting the scope of federal fraud statutes, which make up the bulk of this case, to traditional property rights --

which do not include the right to "information" from which to make economic decisions, or the right to control elected board of director seats).

Additionally, this Court has pending United States v. Rahimi, No. 22-915 addressing the scope of Bruen's holding, which may also impact the Third Circuit's holding in Range v. Atty. Gen., 54 F.4th 262 (3d Cir. 2022)(per curiam)(rev'd en banc, 69 F.4th 96 (2023)) which held that 18 U.S.C. §922(g)(1) was unconstitutional as applied to Range, a non-violent felon. The Third Circuit in Range substantively adhered to then appellate Justice Coney-Barrett's dissent in Kantar v. Barr, 919 F.3d 437, 452 (7th Cir. 2019).

Further still, this Court has pending Fischer v. United States, No. 23-5572 addressing the scope of 18 U.S.C. §1512(c)(2), obstruction of justice. Maxwell's Petition for Certiorari was extended to February 12, 2024. (App. No. 23A399)

The Clerk extended Maxwell's due date until May 10, 2024 to enable Maxwell to make technical corrections. This Petition is timely.

II. REASONS FOR GRANTING THE PETITION

The United States Court of Appeals for the Third Circuit has entered a decision which conflicts with this Court's decisions(s) in New York Rifle & Pistol Assn. v. Bruen, 142 S.Ct. 2111 (2022) and Ciminelli v. United States, 598 U.S. ___ (2023). This Court is currently considering United States v. Rahimi, No. 22-915, which is addressing the scope of 18 U.S.C. §922(g) restrictions on firearms. See also the Third Circuit's application of Bruen

in Range v. Atty. Gen., 69 F.4th 96, 106 (3d Cir. 2023) (en banc) (non-violent felon retains his Second Amendment rights to possess a firearm). This Court is also considering United States v. Fischer, No. 23-5572 on the scope of 18 U.S.C. §1512(c)(2) and therefore the scope of 18 U.S.C. §1512(k).

The Third Circuit opinion and the over-broad jury instructions which informed the affirmed conviction were all issued before this Court's opinion in Bruen, Ciminelli, Rahimi and Fischer, and the Third Circuit opinion in Range. The July 15, 2022 Third Circuit opinion is manifestly in error when considering these cases.

Additionally, the United States Court of Appeals for the Third Circuit has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the lower court as to call for an exercise of this Court's supervisory power.

In particular, the Government tendered to the jury for deliberation 276 separate non-offered and non-admitted exhibits (audio wire taps and their transcripts). See Appendix 2. The trial court considered the 276 separate non-offered and non-admitted exhibits, after close of evidence (JAC 12244) and reasonable inferences drawn therefrom in denying Maxwell's two Rule 29 Motions (in part -- the Court dismissed two counts at the first Rule 29 Motion hearing). (JAC 8901-8911; 13924-925; 12438)

The Third Circuit considered the 276 non-offered and non-admitted exhibits and reasonable inferences drawn therefrom in affirming Maxwell's conviction. See United States v. Scarfo, 2022 WL 2763761, fn. 2 (3d Cir. 2022)

The reliance by the jury, the trial court and the Third Circuit on 276 separate non-offered and non-admitted exhibits **and reasonable inferences drawn therefrom** as evidence, when performing a de novo review under Rule 29, Rule 33, and on appeal for the sufficiency of the evidence is such a departure from the Federal Rules of Evidence and the accepted and usual course of judicial proceedings, as well as constituting a structural error, which affects the process of trials in general, as to call for an exercise of this Court's Supervisory Power.

Alternatively, because the Court's holdings in the primary cases (Bruen, Ciminelli, Rahimi, and Fischer -- along with the Third Circuit's Range case) each affect the convictions in this case, and were issued (or will be issued this term) after the Third Circuit's Panel decision (or so close to the decision and long after counsel's briefing), GVR may be initially appropriate under this Court's precendent.

III. 2023 CASE LAW CHANGES

After the Third Circuit's Panel decision in July 2022 (Bruen was issued two weeks before the Panel decision) several cases issued by this Court cabin what conduct can be criminalized under federal fraud statutes or the United States' Constitution.

A. Ciminelli v. United States, 598 U.S. ___ (2023)

In Ciminelli this Court teaches that the federal fraud statutes are limited to "schemes to deprive people of traditional property interests," citing Cleveland v. United States, 531 U.S. 12, 24 (2000). The Court asserted that "the Government must

prove not only that fraud defendants 'engaged in deception' but also that money or property was 'an object of their fraud'" and not merely incidental thereto. Citing Kelly v. United States, 590 U.S. ___, ___ (2020) (Slip Op. at 12). This Court further held that "the right to information necessary to make informed economic decisions, while perhaps useful for protecting and making use of one's property, had not been recognized as a property interest." Ciminelli, n.4 (Slip Op. at 7).

The jury instructions provide as a basis for conviction instructions that were used throughout the wire fraud counts (Count 1 RICO with wire fraud predicates, Counts 3-19 conspiracy to commit wire fraud and substantive wire fraud, Count 20 money laundering conspiracy based on wire fraud conspiracy).

The record reveals at (JAC 12362-363)

> "The false or fraudulent representation or ommission must relate to a material fact or matter. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision, such as the decision as to whether to invest in a public company's stock."
>
> "This means that if you find that particular statement of fact was false, you must determine whether that statement was one a reasonable person or investor might have considered important in making his or her decision."

At (JAC 12386)

> "The term 'proceeds,' as used in these instructions, means any property, or any interest in property, that someone acquires or retains as a result of criminal activity. Proceeds may be derived from ... such as a wire fraud scheme."

At (JAC 12386-387)

> "I instruct you, as a matter of law, that the term 'specified unlawful activity' [for money laundering purposes] includes violations of the mail fraud, wire

fraud, and securities fraud statutes, as charged in this case."

See also, supra at EN2 (the Court's jury instruction applying this intangible "right to information necessary to make informed economic decisions" to Counts 1, 3-19 and 20. (JAC 12370)

At (JAC 12373),

> "When I instruct you on Counts Four through Nineteen ... when you consider whether each individual defendant agreed to the commission of wire fraud in furtherance of the alleged enterprise, you are not limited to considering only specific acts alleged in the indictment."(emphasis added)

Next, the Court instructed the jury at (JAC 12379-380)

> "The term 'property' [this is the only definition of property, and is found in the RICO predicate section and no where else in the jury instructions] includes money and other tangible things of value. The property at issue in Count One of the indictment consists of the seats on the bard of directors of FPFG including the compensation due to those members, and thus control of FPFG."(emphasis added)
>
> [ ]
>
> "In this case, you may find that a particular defendant induced the victims to surrender the property if he caused the victims to agree that any of the coconspirators would obtain seats on the board of directors of FPFG, including the compensation due to those members, based upon the wrongful use of economic injury."(emphasis added)

At (JAC 12386-387)

> "In this case, the Government claims that each defendant charged with this predicate act knew that the proceeds were derived from unlawful activity which constitutes mail fraud, securities fraud, and bank fraud, which are all felonies under federal law."(emphasis added)[William Maxwell was not included in Bank Fraud Conspiracy -- the Court Granted a Rule 29 Motion to Dismiss at the close of the case.](JAC 12438; 13924-925)

These over-broad jury instructions, post Ciminelli, allowed the jury to find guilt for virtually any imagined act. Dubin v.

United States, 216 L.Ed.2d 136, 157 (2023) (Gorsuch, J. concurring)(The United States "maximalist approach has simplicity on its side, yes; an everybody-is-guilty standard is no challenge to administer.").

"The right-to-control theory," that the Government argued and the jury instructions permit, (JAC 12379-380), thus criminalizes civil matters and federalizes traditionally state matters. See Ciminelli, (Slip Op. at 8). "[T]he right-to-control theory [here information to make economic decisions and/or board seats of FPFG and thus control of FPFG] theory vastly expands federal jurisdiction without statutory authorization. Because the theory treats mere information as a protected interest, almost any deceptive act would be criminal." Ciminelli (Slip Op. at 8)(internal citations omitted). "The theory thus makes a federal crime of an almost limitless variety of deceptive activities traditionally left to state contract and tort law -- `in flat contradiction with our caution that, '[a]bsent [a] clear statement by Congress,' courts should 'not read the mail [and wire] fraud statutes to place under federal superintendence a vast array of conduct traditionally policed by the states.'" Ciminelli, (Slip Op. at 8)(alterations in original) That is exactly what happened here. The alleged conduct involving Maxwell's legal services agreement is governed by Texas law not federal law.[EN3] Ciminelli made clear that Cleveland and Kelly were not limited solely to governmental functions, but applied in the private context as well.

The Proskauer Rose, LLP, Fifth circuit case, and the Cantey Hanger, LLP a Texas Supreme Court case referenced therein (See

EN3), both issued post Maxwell's conviction, pre-appeal is now relevant under Ciminelli's instruction that "state contract and tort law" control most allegedly fraudulent conduct.

The fraudulanet conduct allegedly related to Maxwell involves his Texas "legal services agreement" approved by unanimous consent of his client, the board of directors of FPFG, located in Dallas, Texas, post what the Government alleged was the fraudulent transfer of the board of director seats. (JAC 5315-16); (JAC 1653-75); Scarfo, ____ F.4th ___ (Slip Op. at 4). (Of course, all proper procedures were followed.) See infra.

And while Cantey Hanger discusses immunity in a civil context, Ciminelli makes clear that state "contract and tort" law are applicable to most fraud situations. Breach of contract is not criminal. Ciminelli makes clear that the expansion of the federal wire fraud and mail fraud statutes to issues of "state contract and tort law" is prohibited. Ciminelli, (Slip Op. at 8); Dubin, (Slip Op. at 16-18); see also Cleveland, 531 U.S. at 27 ("Courts should not read the mail [and wire] fraud statutes to place under federal superintendence a vast array of conduct traditionally policed by the states.") See also Kelly, (Slip Op. at 12).

Texas law governs Maxwell's bar license [SBN 24028775] and his legal services agreement. Executors, trustees, and other similar roles for private attorneys, independent of court supervision, have similarly broad legal services agreements. Here, Maxwell is being held criminally liable to non-client shareholders -- FPFG was Maxwell's client. Maxwell did not prepare filings nor submissions to the SEC. The SEC attorney (David Adler) was acquitted.

There are full treatises (Restatement First, Second, Third of the Law Governing Lawyers) that address attorney conduct, along with the 50 individual states' bars themselves who govern the practice of law. The Government overreach, regarding Maxwell's alleged conduct purportedly to fall under the wire fraud conspiracy statutes, travel in aide of RICO -- pertaining to wire fraud predicates, is not something that is permissable, post Ciminelli.

The fraud statutes as explained to the jury with no definition of property, and, the property definition in the RICO conspiracy predicates which allow (under the materiality instruction) for the intangible property definition to include elected "board seats of FPFG," and thus control of FPFG and, the "material fact" definition which includes "information to make economic decisions," is not punishable under the federal fraud statutes and does not extend to Maxwell or his legal services agreement, post Ciminelli and Dubin. Nor are the jury instructions themselves correct, post Ciminelli, for they permit conviction for conduct far astray of traditional property interests and for conduct controlled by Texas contract and tort law.

Dubin provides an informative contrast. In Dubin this Court examined the range and applicability of §1028A(a)(1) words and phrases. The Court required that statutes be examined in context. Dubin, 599 U.S. ___ (2023)(Generally)[EN4]

All of Maxwell's alleged actions, as outside counsel, were unanimously approved by FPFG's board of directors, to include Maxwell's legal services agreement.[EN5] Maxwell's legal services

agreement was lawful under Texas law. Alternatively, there was no evidence presented at trial that the "legal services agreement," was not lawful. No jury question was presented to the jury to determine that the "legal services agreement" was unlawful, illegal, or fraudulent. No testimony was presented to the jury by a legal expert (attorney) that the legal services provided by Maxwell or the legal services agreement itself was unlawful or fraudulent (although the U.S. called attorneys as witnesses during trial). Rather, the jury instructions simply proceeded to call it the "fraudulent" legal services agreement. When in fact, the opposite was presented to the jury. See Scarfo, (Slip Op. at 4-5)("The necessary corporate formalities were followed....")

Next, following the acquisition of the intangible property -- the board seats of FPFG, an elected position -- conduct that occurred months later down stream is not part of any scheme or artifice to defraud, arguing in the alternative, post Ciminelli and Dubin. As the jury instructions reveal, supra, the jury was not required to find "that money or property" were the object of the conspiracy; nor was the conduct required to be within the scope of the federal fraud statute; nor that wires or mails were used in a scheme to defraud. As the Third Circuit found, in reliance on unadmitted evidence (discussed infra, without waiving Maxwell's structural error arguments), the sum and substance of the alleged fraud was the acquisition of the board seats and thus control of FPFG. (JAC 1822).[EN6]

Post acquisition of the board of director seats, the object of the alleged conspiracy charges, the use of wire and mail,

subsequently is not related to the scheme to defraud. See Cleveland, 531 U.S. 12, 148 L.Ed.2d 221 ("Even when tied to an expected stream of income the state's right to control [here the FPFG board seats] does not create a property interest" after the fact.). It is the same with the FPFG board seats. The right to enter into contracts to purchase companies or legal services agreements are paradigmatic of the intangible property -- FPFG director seats themselves. This reading is confirmed by the Supreme Court in Dubin. (Slip Op. at 16-18) The allegedly improper conduct, if any, would be governed by Texas law, where Maxwell is licensed and where FPFG headquarters were located (Dallas) or Nevada law where FPFG was incorporated. The federal fraud statutes, as this Court has found, are not so broadly written as to regulate any conduct a particular federal proescutor or trial court finds untoward.

Finally, as this Court concluded in Ciminelli and the cases therein, reversal is required.[EN7] Ciminelli, (Slip Op. at 9)('yet, the Government insists that its concession does not require reversal because we can affirm Ciminelli's convictions on the alternate ground that the evidence was sufficient to establish wire fraud under a traditional property fraud theory ...[]... the Government asks us to cherry-pick-facts presented to a jury on the right-to-control theory and apply them to the elements of a different wire fraud theory in the first instance. In other words, the Government asks us to assume not only the function of a court of first view, but also a jury. That is not our role.") Id. See e.g. McCormick v. United States, 500 U.S. 257, 270-71, n.8 (1991) ("Appellate courts are not permitted to

affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury.") See also Chiarella v. United States, 445 U.S. 222, 236 (1980). (emphasis in original)

Here, as noted in the jury instructions supra, the wholly overbroad jury instructions allow for expanded definitions of intangible property under the federal fraud statutes to include the intangible right to information needed to make economic decisions along with control, and to include revenue streams that would occur long past the purported objective of the conspiracy was achieved. This is fatal to the conviction post Ciminelli and Dubin. Maxwell's case has remained on direct appeal during all these substantive case changes and their holdings are applicable to him.[EN8] In Teague v. Lane, 489 U.S. 288, 107 S.Ct. 1060, 103 L.Ed.2d 234 (1989) this Court adopted, with modifications, Justice Harlan's approach to retroactivity of changes-in-law.

In general a case announces a new rule when it breaks new ground or imposes a new obligation on the states or the federal government. See Rock v. Arkansas, 483 U.S. 44, 62, 97 L.Ed.2d 37, 107 S.Ct. 2704 (1987). Justice Harlan advised that new rules "should always be applied retroactivity to cases on direct review...." Teague, 489 U.S. at 303 (internal citation omitted).

All of the case changes applicable are scope of statute and/or constitutional interpretations and are retroactive on direct appeal. All Maxwell's convictions are based on federal fraud statutes, RICO conspiracy whose predicates are federal fraud statutes, firearm transfer to non-violent felon, and obstruction of justice conspiracy -- all of which have been addressed or are being addressed this term by this Court.

B. New York Rifle & Pistol Assn. v. Bruen, 142 S.Ct. 2111 (2022)

Initially, it is important to note that Maxwell is not convicted of a substantive offense, 18 U.S.C. §922(g)(1); rather Maxwell is charged with the inchoate offense of conspiracy to transfer a firearm to a non-violent felon. 18 U.S.C. §922(d)(1). Although the indictment alleges 18 U.S.C. §922(g)(1)[EN9] there are no historical traditions in the United States to support a inchoate conspiracy for providing a firearm to a non-violent felon. Because the jury instructions in this case allow for conviction on an inference to support the inchoate charge, the conviction, post Bruen, is unconstitutional.

Judge Counts explains it thusly: "Before Bruen, the Second Amendment looked like an abandoned cabin in the woods. A knot of vines, weeds, and roots, left unkempt for decades, crawling up the cabin's sides as if pulling it under the earth. Firearm regulations are that overgrowth. Starting with Federal Firearms Act in 1938, laws were passed with little-if-any-consideration given to their constitutionality." United States v. Perez-Gallen, 2022 U.S. Dist. LEXIS 204758, *1 (W.D. Tex. Nov. 10, 2022)

In Range v. Atty. Gen, the Third Circuit, sitting en banc, found that Range, convicted of a years old fraud felony was still among the people entitled to possess a firearm. See also United States v. Bullock, 2023 U.S. Dist. LEXIS 112397, 2023 WL 4232309, at 1 (S.D. Miss. June 28, 2023)(finding §922(g)(1) unconstitutional as applied).

The Range Court looked at then appellate Justice Coney-Barrett's dissent in Kantar v. Barr, 919 F.3d 437, 452 (7th Cir.

2019) which held that non-violent felons are among those persons protected by the Second Amendment. Maxwell argues that Justice Barrett's analysis is correct. The Second Amendment extends to non-violent felons and persons not demonstrated by the Government to be currently violent. Further, under Bruen there are no historical analogues for an inferred conspiracy based on the alleged objective of the transfer of a firearm to a non-violent felon.

This Court is currently considering Rahimi v. United States, No. 22-915, addressing the scope of §922(g) post Bruen, §922(g) itself having multiple subsections and different qualifiers. The Court's ruling thereon may inform Maxwell's arguments herein on Bruen and Range. However, given the Court's teaching in Bruen, Maxwell's conviction for 18 U.S.C. §922(d)(1) conspiracy to transfer a firearm to a non-violent felon is unconstitutional as applied.

C. Fischer v. United States, No. 22-3038

This Court has granted certiorari in Fischer to address the scope of 18 U.S.C. §1512(c)(2). In count 23 of Maxwell's case the Government alleged a conspiracy to violate 18 U.S.C. §1512(k), §1512(c)(2) obstruction of justice consisting of an alleged agreement to violate §1512(c)(2). See Indictment, Doc 1, PageID 82-84[EN10] (Indictment given to jury, but not in ROA (JAC 13932)).

Maxwell's jury, however, was instructed on two types of alleged obstruction "jury instructions." One charged in the indictment §1512(c)(2), and one not indicted on, §1512(b)(3)(JAC

12466-468). The Court's Jury Instructions were unconstitutional as to 18 U.S.C. §1512(b)(3) because Maxwell was not indicted on §1512(b)(3) and because §1512(b)(3) can not be subsumed in the charged conspiracy §1512(k), §1512(c)(2). As Justice Katsas noted in his dissent in Fischer, 15 separate subsections collapse into §1512(c)(2)(Maxwell arguing in the alternative), but §1512(b)(3) is not one of them.**EN11**

The trial court made the following jury instructions (in pertinent part) at (JAC 12378:13-15),

> "A person acts 'corruptly' if he or she acts with the purpose of wrongfully impeding the due administration of justice."

At (JAC 12466-468)

> "The offense of 'misleading obstruction of justice" [not charged in the indictment] has four elements:
> First, the defendant engaged in misleading conduct toward another person;
> Second, the defendant acted knowingly;
> Third, the defendant acted with the intent to hinder, delay or prevent the communication of information to a law enforcement officer of the United States or judge of the United States; and
> Fourth, such information related to the commission or possible commission of a violation of the conditions of a person's supervised release."

At (JAC 12466-468)(¶167)

> "The offense of corrupt obstruction of justice has two elements:
> First, the defendant attempted to obstruct, influence or impede an official proceeding; and
> Second, the defendant acted corruptly."

In the first instance, the Government, nor the Court for that matter, can add a charge or object to the purpose of the conspiracy charged by the grand jury (this is actionable herein based on Fischer's narrowing of the overbroad §1512(c)(2) application).

As the Supreme Court explained in Stirone v. United States, 361 U.S. 212, 218, 4 L.Ed.2d 252, 80 S.Ct. 270 (1960) the rule of constructive amendment is grounded in the recognition that "the very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to charges charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge."[EN12] The grand jury "belongs to no branch of the institutional government" but rather, "serves as a kind of buffer or referee between the Government and the people." United States v. Williams, 504 U.S. 36, 118 L.Ed.2d 352, 112 S.Ct. 1735 (1992). It is therefore "inappropriate for a court to speculate as to whether a grand jury might have returned an indictment in conformity with the available evidence." United States v. Thomas, 274 F.3d 365, 370 (2d Cir. 2001); c.f. Stirone, 361, at 217-19 ("The grand jury which found this indictment was satisfied to charge Stirone's conduct interfered with interstate importation of sand. But neither this nor any other court can know that the grand jury would have been willing to charge [the theory on which the conviction rested, namely] that Stirone's conduct would interfere with interstate exportation of steel....")(internal citation omitted) "Any other doctrine would place the rights of the citizen, which are intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney." Id. That is what happened in Maxwell's case.

This is the same position taken by this Court throughout the currently considered overbroad statutory interpretation cases -- where it struck down such overreach. See Ciminelli, 598 U.S. ___

(2023)(Generally); Dubin, 599 U.S. ___ (2023)(Generally); McNally, 483 U.S. 350 (_____)(Generally); Percoco v.United States, 598 U.S. 319, 332-333, 143 S.Ct. 1130, 215 L.Ed.2d 305 (2023)(Collectively asserting: "The Supreme Court's message in these and other cases has been 'unmistakable': courts should not assign federal criminal statutes a 'breathtaking' scope when a narrower reading is reasonable." (citing) Dubin, (See Gorsuch, J. Concurring)(generally)

The Supreme Court's understanding and instructions are all the more so when the jury instructions include statutory provisions, 18 U.S. §1512(b)(3), which were not charged by the grand jury as an object of the conspiracy.

The Supreme Court has accepted certiorari in Fischer, No. 23-5572 (2023). Maxwell relies, in particular part, on Justice Katsas dissent for his arguments herein.

Title 18 U.S.C. §1512(c)(1) prohibits "alter[ing], destroy[ing], mutilat[ing], or conceal[ing] a record, document, or other object or attempts to do so, with the intent to impair the objects integrity or availability for use in an official proceeding." Initially, none of the conduct alleged in the indictment or jury instructions consists of "altering, destroying, mutilating or concealing a record, document, or other object...." Rather, the Government alleges that co-counsel Manno [found not guilty at trial] sent a letter to co-counsel Maxwell, and that Scarfo, on three separate monthly reports to his probation officer was untruthful about his association with felons. (JAC 12466-468)**EN13**

Maxwell did not represent Scarfo (only consulted with co-counsel) in the supervised release early termination case. Not only are co-counsel's legal filings not Mr. Maxwell's, they are protected (subject to sanctions on counsel who submitted them) under the litigation privilege and they are not among the 4 actions alleged in the indictment. This demonstrates conclusively the overbroad scope employed by the Court under 18 U.S.C. §1512(k), §1512(c)(2).

Co-counsel, Gavin Linz, was not indicted in this case.

Judge Katsas, in the Fischer dissent, notes several constitutional issues with 18 U.S.C. §1512(c)(2). First, §1512(c)(2) must be read along with §1512(c)(1). "Section §1512(c)(2) applies only to obstruction acts related to specific acts of evidence spoilation covered by subsection (c)(1)." To reach this conclusion "otherwise" used in "(c)(2)" is read to mean "in a manner similar to" rather than "in a manner different from." Fischer, 64 F.4th at 363 (Katsas, J. dissenting). The Justice also relied on "normal linguistic usage" and interpretive canons to find that subsection (c)(2), a catch-all provision, must not render superfluous the larger, more complex list of examples in (c)(1). Id. The Justice found to do so differently causes (c)(2) to become unconstitutionally broad and vague. That is what happened in Maxwell's case. The term "otherwaise" in "(c)(2)" was unconstitutionally vague as used in Maxwell's case.

Justice Katsas, dissenting, notes that there is ambiguity in the relationship between §1512(c)(1) and (c)(2) based on the terms and phrases and that the statute must be resolved in favor of the defendant under the rule of lenity.

Justice Scalia, in his Scalia and Garner Reading the Law: Interpretation of Legal Terms 167 (2012)(discussing the "Whole-Text Canon") teaches that we do not look at "words and phrases" removed from their statutory context. See also United States v. Briggs, 141 S.Ct. 467, 470, 208 L.Ed.2d 318 (2020)("The meaning of a statement often turns of the context in which it is made, and that's no less true of statutory language." A complex list of examples, proceeding the word "otherwise" [18 U.S.C. §1512(c)(2)] makes the case stronger for giving the residual clause a contextual rather than an all-encompassing interpretation." Fischer, 64 F.4th at 363-365 (Katsas, J. dissenting). Title 18 U.S.C. §1512(c)(2) was unconstitutional as applied to Maxwell.

D. 18 U.S.C. §1512(c)(2) Unconstitutionally Vague

The Supreme Court instructs that vague laws are an unconstitutional violation of the Fifth Amendment. Supreme Court precedent teaches that "a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement" violates the Fifth Amendment's guarantee of due process. Johnson v. United States, 576 U.S. 591, 135 S.Ct. 2552, 2557, 192 L.Ed.2d 569 (2015).

"[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." United States v. Lanier, 520 U.S. 259, 267, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997).

Even more problematic, in Maxwell's case, the trial court instructed the jury that "the Government does not have to prove that all of these acts were criminal or that any of these acts were themselves illegal." (JAC 12467-458) This instruction invites the jury, under the Government's application of 18 U.S.C. §1512(c)(2) to let its imagination run wild in search of statutory violations.

The court's instruction, besides the fact that no spoilation of evidence in any way is even alleged, is flawed for several reasons.

First, communications between co-counsel during the pendency of the litigation can never be obstruction of justice. For example, counsel discussing several options before deciding on a particular course of action. The mere chilling effect would preclude counsel from discussing anything with co-counsel or the client, for fear, as here, of an obstruction charge for merely discussing options. See Arthur Anderson LLP v. United States, 544 U.S. 696, 161 L.Ed.2d 1008, 125 S.Ct. 2129 (2005). This Court in Arthur Anderson wrote:

> "We have traditionally exercised restraint in assessing the reach of a federal statute, both out of deference to the perrogatives of Congress, Dowling v. United States, 473 U.S. 207 (1985), and out of concern that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." McBoyle v. United States, 283 U.S. 25, 27 (1931), United States v. Aguilar, 515 U.S. 593, 600, 132 L.Ed.2d 520, 115 S.Ct. 237 (1995)
>
> "...[w]ithholding testimony or documents from a Government proceeding or Government official is not inherently malign. (footnote omitted) Consider, for instance, a mother who suggests to her son that he invoke his right against compelled self-incrimination

> ... Nor is it necessarily corrupt for an attorney to 'persuad[e]' a client 'with intent to ... cause' the client to 'withhold' documents from the Government. In Upjohn Co. v. United States, 449 U.S. 383, 66 L.Ed.2d 584, 101 S.Ct. 667 (1981) for example, we held that Upjohn was justified in withholding documents that were covered by the attorney-client privilege from the Internal Revenue Service (IRS). See Id. at 395. No one would suggest that an attorney who 'persuaded Upjohn to take that step acted wrongfully, even though he surely intended that his client keep those documents out of IRS hands."

Anderson, 544 U.S., at 704.

This would be the case (i.e., not obstruction) even if the court determined, at a later date, that attorney-client privilege did not apply. Otherwise the right to counsel would be destroyed.

At this point, in this case, Ciminelli and the obstruction charge intersect. As noted above in **EN3**, supra, the Texas Supreme court in Cantey Hangar, LLP held that under Texas law, Texas licensed attorneys are immune from suit for claims of fraud within their attorney-client relationship (no crime fraud exception). Cantey Hanger, 467 S.W.3d at 484; Proskauer Rose, LLP, 816 F.3d at 346. Here the Court and the Government have skipped over Texas law, which provides immunity in a civil context, for Texas licensed attorney and gone straight to obstruction of justice under §1512(k), §1512(c)(2).

The Government's reading of §1512(c)(2) as: (1) including a collapsing of the entire 21 subsections, is clearly erroneous; (2) as including subsection §1512(b)(3), upon which Maxwell was not indicted by the grand jury, is clearly erroneous; (3) as reaching not merely witness tampering or spoilation of evidence, but rather all manner of conjured actions within the fertile mind

of a prosecutor, which could be potentially obstructive -- whatever the reason -- collectively makes the Trial Court and Government's reading of §1512(c)(2) overbroad, vague, and unconstitutional.

IV. JURY INSTRUCTIONS ARE IMPROPER POST LAW CHANGES

A jury instruction is erroneous if it "mislead the jury as to the correct legal standard and does not adequately inform the jury on the law." Velez v. City of New York, 730 F.3d 128, 134 (2d Cir. 2013)(internal quotation marks omitted)

As the arguments herein, and as set forth in the Fischer dissent by Justice Katsas, the jury instructions in this case, to include the non-indicted 18 U.S.C. §1512(b)(3) and §1512(c)(2); §1512(k), are unconstitutionally broad and vague. This is so because the instructions allow all manner of cases to be conjured by an overzealous prosecutor and a permissive Court, without authorization and without notice to the public.

V. STRUCTURAL ERROR

The Supreme Court's Supervisory Power is needed when Courts abandon, for all intents and purposes, the Federal Rules of Evidence (FRE).

The FRE and the adversarial system of jurisprudence in the United States provide that evidence must not only be admissible and in admissible form, but that the evidence must be offered into evidence by the moving party, the opposing party having an opportunity to object, and finally, the Court rules on any objections before receiving and admitting the evidence. The

failure of the moving party to offer evidence and the failure by the court to admit evidence totally thwarts the trial practice and violates the due process clause of the fifth Amendment. See Mallory v. Norfolk Southern Ry., 216 L.Ed.2d 815, 838 (2023)(By its terms, the Due Process Clause is about procedure); McNabb v. United States, 318 U.S. 332, 347 (1943)(The "history of liberty has largely been the history of the observance of procedural safeguards").

In McCoy v. Louisiana, 138 S.Ct. 1500 (2018) this Court instructs that "structural error 'affects the framework within which the trial proceeds,' as distinguished from a lapse or flaw that is 'simply an error in the trial process itself'" (citing) Arizona v. Fulmonte, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), "an error might also count as structural when its affects are too hard to measure ... or where the error will inevitable signal fundamental unfairness...." McCoy, 200 L.Ed.2d at 833-34.

The question is therefore: How many material exhibits can be given to the jury for deliberation; and be relied upon by the trial court for its denials (in part) of Rule 29 motions and its denial of Rule 33 motions (using reasonable inferences drawn therefrom); and, be relied upon by the appellate panel to affirm the verdict (again using reasonable inferences drawn therefrom)? Even one material exhibit considered by the jury, trial court, or appellate panel would be too many.

In this case 276 material exhibits consisting of wire tap testimony and transcripts thereof compromising months of trial testimony were never offered for admission into evidence nor

admitted into evidence sua sponte by the trial court, nor admitted into evidence at all. See Appendix 2. These non-offered and non-admitted material exhibits were the core of the Government's case-in-chief. They fill Maxwell's P.S.R. Inferences from these non-offered and non-admitted wire taps and their transcripts, the jury was instructed, could be considered in support of their verdict.[EN14] (JAC 12304); (JAC 12326), (JAC 12327), (JAC 12304-12307), (JAC 12244:5-6), (JAC 1244:17)

Maxwell raised, on appeal, the sufficiency of the evidence and the Third Circuit considered these non-offered and non-admitted exhibits and inferences drawn therefrom in favor of the Government as a basis to affirm the convictions. Scarfo, ___ F.4th ___ (3d Cir. 2022)(Slip Op. at 3, fn. 2)("The following factual background is based on the evidence adduced at trial and is cast in the light most favorable to the prosecution.")(emphasis added)

A single material trial exhibit being erroneously tendered to the jury or considered by the Court for its ruling(s) might be considered a trial error based on the materiality of the exhibit (Maxwell cannot find a single case where even 10 non-offered and non-admitted trail exhibits were considered by a jury in deliberations, considered by the trial court for its rulings, and/or considered by the appellate panel for its rulings) and be subject to harmless error review. But here, 276 non-admitted material exhibits being considered constitute the type of error this Court defines as structural. See Sullivan v. Louisiana, 508 U.S. 225, 283, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). Harmless error review looks, this Court has said, to the basis on which

the "jury actually reached its verdict." Yates v. Eratt, 500 U.S. 391, 404 (1991). In Maxwell's case the error affected the manner in which the trial was carried out and the lack of adversarial structure and denial of due process. When the evidence was not offered for admission, the defense has no contextual or timely opportunity to interpose an objection.

Here, where the evidence was never offered for admission nor admitted by the trial court, the procedure by which it is determined that defense counsel can and should object to the evidence never becomes ripe and the entire process breaks down and trials effectively become standardless.

Further still, defense counsel objected pre-trial. (JAB 4090, line 15-4016) Unadmitted evidence tendered to the jury is prosecutorial misconduct (though unintentional -- as four prosecutors, the trial court, and defense counsel did not alert to the trial error (although the defense counsel objected pre-trial, prior to the first non-admitted exhibits being used)).

In any event, defendants objected pre-trial to the use of the unadmitted evidence in opening statements. (JAB 4090:15-4116). This was the first opportunity for defense counsel to object and the objection is preserved -- as at no time thereafter were the 276 exhibits ever moved into evidence or accepted into evidence by the Court. At pre-trial the defendants were objecting to the Government's plan to use six exhibits in power point slides during opening arguments that were not in evidence. Both the Court and the Government conceded that failing to get just these six exhibits into evidence "for any reason" could result in a mistrial

AUSA Gross: ... if [AUSA] Mr. Weiner talks about a

particular transcript in his opening and that transcript, that tape doesn't come into evidence for any reason, we're going to be sorry that we talked about it in the opening statement...."

The Court: It might also be grounds for a mistrial, wouldn't it?

AUSA Gross: That's true as well. So you Honor, we talk about these exhibits and quote from these transcripts at our peril. We understand that.

(JAB4102:14-4103:10)(emphasis added)

Here, not only were the exhibits used in the opening statement not admitted into evidence -- they were not even offered for admission into evidence. These six exhibits and their transcripts in the trial itself (collectively equalling 276) were not offered nor admitted into evidence -- but nevertheless were all given to the jury, considered by the trial court and appellate panel in their rulings and opinions.[EN15] This abdication of the trial procedure extinguishes the adversarial process that is foundational to our judiciary system and the basis of our due process rights (right to be heard). It is the offering of the evidence that allows opposing counsel to contextualize his objections, if any, and for the court to rule prior to admission. This structure is ubiquitous to our adversarial system.

Next, as acknowledged by all courts to consider it, inferences in favor of the Government are to be drawn solely from admitted evidence. Lockhart v. Nelson, 488 U.S. 33, 40-42, 102 L.Ed.2d 265, 109 S.Ct. 285 (1988)("It is quite clear from our opionion in Burks [Burks v. United States, 437 U.S. 1, 16-17, 98 S.Ct. 2141, 57 L.Ed. 201 (1978)] that a reviewing court must consider all of the evidence admitted by the trial court... The

basis for the Burks exception to the general rule is that a reversal for insufficiency of the evidence should be treated no differently than a trial court's granting a judgment of acquittal at the close of evidence. A trial court passing [on] such motions (here the Rule 29 and Rule 33 motions) considers all of the evidence it has admitted, and to make the analogy complete it must be this same quantum of evidence to be considered by the reviewing court.")(emphasis added); Warden v. Brown, 599 U.S. 120, 137, 130 S.Ct. 665, 175 L.Ed.2d 582 (2010)(Thomas, J. and Scalia, J. concurring)(sufficiency of the evidence limited to 'all evidence admitted by the trial court')(referring to Lockhart, supra)(emphasis added)

The use of unoffered and unadmitted exhibits eliminates due process and creates the untenable result as described in McCoy (structural error occurs "when it's effects are to hard to measure....") 200 L.Ed.2d at 833-34. Where the Court was alerted by defense counsels' objections, pre-trial, of the Government's intended use of evidence prior to its offer or admission into evidence -- and acknowledgment by both the Court and Government; that even a single exhibit so used, if not admitted, should result in a mistrial.

When the Government creates a "monster" trial, they should be subject to the pitfalls and error that they themselves advocated for and caused. Else fundamental fairness in an adversarial system ceases to exist (e.g., invited error).

VI. GVR

As an alternative to granting full briefing, this court on

occassion Grants certiorari, Vacates the conviction, and Remands for consideration by the Court below.

Title 28 U.S.C. §2106 appears to grant to the Court a broad power to GVR. This Court held in Lawrence v. Chater, 516 U.S. 163, 167, 133 L.Ed.2d 545, 116 S.Ct. 604 (1996):

> "This practice [GVR] has some virtues. In an appropriate case, GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary considerations, assists the court below by flagging a particular issue that it does not appear to have fully considered, assist the Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the 'potential for unequal treatment' that is inherent in our ability to grant plenary review of all pending cases raising similar issues." See United States v. Johnson, 457 U.S. 537, 556, n. 16, 73 L.Ed.2d 202, 102 S.Ct. 2579 (1982); cf. Griffith v. Kentucky, 489 U.S. 314, 323, 93 L.Ed.2d 649, 107 S.Ct. 708 (1987)("[W]e fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final." Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for fuller consideration...." Id.

As noted above, the Bruen, Ciminelli, Range, Rahimi, Dubin, Percoco, Fischer, (Rahimi and Fischer to be decided this term) have all been decided post panel decision (July 15, 2022) -- or in the case of Bruen, post counselled appellate filing. Further, the internal cases Cleveland and Kelly, made applicable by Ciminelli, were decided post trial.

Maxwell has a conviction for conspiracy to transfer a firearm to a non-violent felon, 18 U.S.C. §922(d)(1); §922(g)(1) which was impacted by Bruen and may be further clarified under Rahimi and Range. Maxwell has a conviction for wire fraud conspiracy, mail fraud conspiracy whose objective was alleged to

be information reasonably used to make an economic decision and FPFG board seats and thereby control. 18 U.S.C. §1343, §1349. Maxwell has a money laundering conviction for revenue streams far removed from the alleged conspiracy's objectives, 18 U.S.C. §1956(h), all of which are impacted by Ciminelli. Maxwell has a conviction for obstruction of justice conspiracy, 18 U.S.C. §1512(k), §1512(c)(2) that will be impacted by this Court's decision in Fischer.

The predicates impacted by Ciminelli, Bruen, Fischer also underlie the 18 U.S.C. §1962(d) RCIO conspiracy and therefore all counts of conviction have been disemboweled by this Court's decisions in Ciminelli. Bruen, Fischer, Rahimi and the Third Circuit's decision in Range. These decisions, all issued post panel's July 15, 2022 decision, and before Maxwell's filing his petition for certiorari, GVR may be appropriate under this Court's precedent, arguing in the alternative.

For example, in Robinson v. Story, 469 U.S. 1081, 83 L.Ed.2d 694, 105 S.Ct. 583 (1984) this Court GVR'd for additional consideration "in light of a Supreme Court decision rendered almost three months before the summary affirmance by the court of appeals that was the subject of the petition for certiorari." See Lawrence, 516 U.S., at 169. The Supreme Court asked: "Were those three months sufficient 'opportunity' for the court to apprise itself (or be apprised by the parties) of the new potentially relevant Supreme Court decision?"

In Maxwell's case there are four cases handed down (or to be handed down) that eviscerate the conviction. As Justice Gorsuch condemned the "maximalist approach" taken by the government in

Dubin's concurring opinion ("everyone is guilty"); or Justice Jackson and Justice Sotomayer, dissenting in United States v. Hansen, 599 U.S. ___, 143 S.Ct. ___, 216 L.Ed.2d 692, 727 fn. 10 (2023) who explained thusly:

> In its role as prosecutor, the Government often takes the maximalist position, only later to concede limits where the statute upon which it relies might be struck down entirely and the the Government finds itself on its back foot." Id. at fn. 10.

The Government, in Maxwell's case, took the maximalist approach expanding the statutes beyond the broadest acceptable interpretation.

To the extent that full briefing is not granted, GVR may be appropriate to allow the Third Circuit to weigh in on the cases announced by the Court post counseled briefing, post panel decision, and pre-petition application.

PRAYER

FOR THESE REASONS, Maxwell prays for certiorari to the Third Circuit Court of Appeals issue and full briefing be granted.

Alternatively, because this Court already spoke to these issues in Maxwell's favor, but did so post Maxwell's counseled brief being filed with the Third Circuit, and were issued post the Third Circuit's panel opinion (filed July 15, 20222), Maxwell would request GVR with the case remanded to the Third Circuit to address:

1) Ciminelli's holding's impact on the conviction in this case (i.e., intangible right to information to make economic decision, elected FPFG Board seats, and right to control);

2) Bruen and Rahimi's holding's impact on Maxwell's conviction under 18 U.S.C. §922(d)(1), §922(g)(1) for conspiracy to transfer a firearm to a non-violent felon;

3) Fischer's holding's impact on the scope of 18 U.S.C. §1512(k) conspiracy to commit obstruction of justice under 18 U.S.C. §1512(c)(2);

4) Because the above cases impact the predicate acts alleged under 18 U.S.C. §1962(d) RICO conspiracy, Maxwell would request that the Third Circuit address the §1962(d) conviction after the holdings in the above cases;

5) Because the jury instructions in the case used the same definitional provisions throughout, Maxwell requests the Third Circuit address whether it believes any conviction survives, post the above decisions;

Alternatively, Maxwell requests certiorari and full briefing of the structural error that occurs when the adversarial process breaks down by the Government's tendering to the jury of 276 material exhibits that were never offered into evidence nor admitted into evidence.

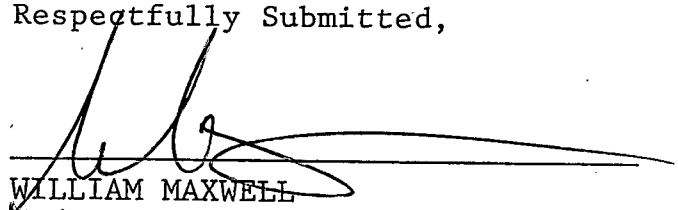
Maxwell requests full briefing and certiorari on the structural error that occurs when the trial court relies on the non-offered and non-admitted evidence for its denial of Rule 29 motions and Rule 33 motions.

Maxwell requests full briefing and certiorari on the structural error that occurs when the appellate panel relies on non-offered and non-admitted material exhibits when performing a de novo review of the evidence under a sufficiency of the evidence standard.

Maxwell requests such other and additional relief to which

Maxwell requests such other and additional relief to which he may be entitled, whether in equity or in law.

Respectfully Submitted,



WILLIAM MAXWELL
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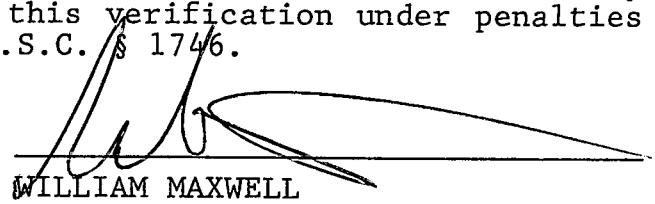
VERIFICATION

I hereby verify that all material facts contained in the foregoing petition are true and correct to the best of my knowledge and belief. I make this verification under penalties of perjury and pursuant to 28 U.S.C. § 1746.

Date: 4/24/24



WILLIAM MAXWELL
Fed. Reg. No.: 71944-279

ENDNOTES

EN1) The Government's case alleged that the Maxwell conduct which demonstrated Maxwell's illegal activity was filing a correct pro hac vice application (Maxwell, a then practicing Texas attorney, sought limited admission in New Jersey (motion granted)), and Maxwell's appearance on behalf of Scarfo, as counsel, at a hearing on a motion for summary judgment (due to Scarfo's personal attorney -- family attorney -- facing an emergency matter).(JAC 8901-8911)(JAC 13924-13925)(JAC 12438)

EN2) The materiality of the unindicted §1512(b)(3) charge being considered under §1512(k) obstruction charge, besides Maxwell not being indicted for this statute, as Justice Katsas, in dissent notes, §1512(b)(3) is not one of the subsections of the statute that collapse into §1512(c)(2) -- the subsection alleged in the indictment. See Fischer v. United States, 2023 U.S. App. LEXIS 8284, *92 (D.C. Cir. 2022)(Katsas, J. dissenting) now pending before this Court. See Cause No. 23-5572 ("The five provisions that would not collapse into subsection (c)(2) are ... (b)(3)....) Id. at 92.

(JAC 12368) "The false or fraudulanet representation or omission must relate to a material fact or matter. **A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision, such as the decision as to whether to invest in a public stock."** (emphasis added)

This means that if you find that a particular statement of fact was false, you must determine whether that statement was one that **a reasonable person or investor might have considered important in making his or her decision."**(emphasis added)

(JAC 12370) "Both Racketeering Act 2 of count one of the indictment as well as counts Three through Nineteen of the indictment relate to wire fraud. Count One alleges ... [that co-conspirators] agreed that a co-conspirator would commit wire fraud ... while count Three charges the same Defendants with conspiracy to commit wire fraud. Counts Four through Nineteen charge the Defendants actually committed wire fraud ... the instructions I give you will also relate to counts Three through Nineteen ...."

EN3) In Proskauer Rose LLP. et al. v. Samuel Troice, et al., 816 F.3d 341, 346 (5th Cir. 2016) held that the Texas Supreme Court in Cantey Hanger, LLP v. Boyd, 467 S.W.3d 477, 484 (Tex. 2015) ruled that Texas attorneys are immune from suit for conduct in the course and scope of their representation from liability to third parties. The Fifth Circuit wrote: [t]he policies underlying the attorney immunity doctrine, as the Texas Supreme Court has explained, suggest that immunity should be from suit." Proskauer Rose, LLP., 816 F.3d, at 346; cf. Storey v. Kellett, 849 F.2d 960, 963 (5th Cir. 1988). The doctrine "stem[s] from the board declaration ... that attorneys are authorized to practice their profession, to advise client and interpose any defense or supposed defense, without making themselves liable for damages." Cantey Hanger, 467 S.W.3d at 481 (quoting Krugel v, Murphy, 126 S.W. 343, 345 (Tex.Civ.App. - Dallas 1910)(writ ref'd). **This is all the more true for alleged criminal liability.**

"The purpose for attorney immunity [under Texas law] is thus quite similar to the purpose animating other immunities that Texas has recognized as providing true immunity. See e.g., B.K. v. Cox, 116 S.W.3d 351, 358 (Tex.App. - Houston [14th Dist.] 2003, no pet.)(judicial immunity); Miller v. Curry, 625 S.W.2d 84, 87 (Tex.App. - Ft. Worth 1981, writ ref'd., N.R.E.)(prosecutorial immunity); Reagan v. Guardian Life Ins. Co., 166 S.W.2d 909, 912 (Tex. 1942)(litigation privilege) ... Nothing indicates that Texas Courts view the protections afforded to attorneys in private practice as less important to that system than those afforded prosecutors, judges, and those making statements before judicial, quasi-judicial or legislative proceedings."

EN4) The term and phrase in context was "use" and "in relation to." The court initially looked at the words themselves and found them to be indeterminate. The Court in Dubin next looked at the surrounding words.

Title 18 U.S.C. §1343 reads, in pertinent part, "transmits or causes to be transmitted by means of ... any writings ... **for the purpose of executing such a scheme or artifice..."** (emphasis added). The example in Dubin is instructive. After analysis the Supreme Court held that it "has traditionally exercised restraint

in assessing the reach of a federal criminal statute." Dubin, (generally) "Time and again, this court has prudently avoided reading incongruous breadth into opaque language in criminal statutes." Dubin, (Slip Op. at 18)

Here, not requiring the purported fraudulent conduct to extend to behavior that was "for the purpose of executing the scheme or artifice" to defraud allows for an unlimited expansion in scope of the wire fraud statutes. For example, the jury instructions in this case provide for conviction for the broadest possible conduct and scope of actions. See (JAC 12368)("it is not necessary that the item mailed itself be false or fraudulent or contain a statement, representation, or promise, or contain any request for money or thing of value.") See also the jury instruction that allows the jury to imagine the criminal conduct. (JAC 12372-373)("However, as I explained, when you **consider whether each individual defendant agreed to the commission of wire fraud in furtherance of the alleged enterprise, you are not limited to considering only the specific acts alleged in the indictment.")**(emphasis added)

EN5) "The board entered into a 'legal services agreement' with William [Maxwell], who became FirstPlus 'special counsel'" (JAC 5315-16); (JAD at 1653, 1573-75). The "legal services] contract formally granted him significant power within the organization." Scarfo, (slip Op. at 4).

EN6) "That completely changed the direction of the [takeover] plan. (JAC at 1815) Seeing an opportunity, Pelullo, who was emerging as the leader of the takeover group, worked with [counsel] William Maxwell to send letters to Phillips and other board members [i.e. legal work]. The letters were purportedly written by [the former FPFG CEO] Draper [who signed the letters] and threatened that he would go to "the FBI, the IRS, the U.S. Attorney's [O]ffice][,] [FPFG's prior] Bankruptcy attorney at the SEC...."

[ ]

"Phillips swiftly persuaded the entire board to give up their positions rather than try to engage in what would be a messy and expensive fight with Pelullo's group [which included the former FPFG CEO Draper] ... The necessary formalities were followed and, on June 7 [2007], just four days after the letters, Pelullo and his cronies had total control of the company." Scarfo, (Slip Op. at 4)

EN7) McNally v. United States, 483 U.S. 350, 97 L.Ed.2d 292, 107 S.Ct. 2875 (1987) ("defacto control" ... "to defraud commonly refers 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chance or overreaching.'" Hammerschmidt v. United States, 265 U.S. 182, 188, 68 L.Ed. 968, 44 S.Ct. 511 (1924). The transfer of the elected board seats by Dan Philips does not meet this definition. Pelullo's alleged de facto control of the board of directors does not meet this definition. Scarfo, (Slip Op. at 4)

Cleveland v. United States, 531 U.S. 12, 148 L.Ed.2d 221, 121 S.Ct. 365 (2000) "We reject the Government's theories of property rights not simply because they stray from traditional concepts of property. We resist the Government's read of §1341 [and §1343] as well because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress...." Id. at 24.

[ ]

"Moreover, to the extent that the word 'property' is ambiguous as placed in §1341, we have instructed that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" Rowes v. United States, 401 U.S. 808, 812, 28 L.Ed.2d 493, 91 S.Ct. 1056 (1971). In deciding what is "property" under §1341, we think "it appropriate, before we chose the harsher alternative, to require that Congress should have spoke in language that is clear and definite." [citing] United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 222, 97 L.Ed. 260, 73 S.Ct. 277 (1952).

In Kelly v. United States, 590 U.S. ___, 140 S.Ct. ___, 206 L.Ed.2d 882 (2020), "[t]he question presented is whether the defendants committed property fraud ... and the employees' labor [as are the salaries of the board of directors] was just the incidental cost ... rather than itself and object of the ... scheme." 206 L.Ed.2d at 866.

Here, as the jury instructions inform the jury, the conspiracies object alleged by the government was control, Scarfo, (Slip Op. at 3-4), the salaries were incidental. All other wires were post the alleged objective of the conspiracy and not part of the scheme to defraud. "[P]roperty must play more than some bit part in a scheme [,] [i]t must be an 'object of the fraud.'" [citing] Pasquantino v. United States, 544 U.S. 349, 355, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005). A property loss conviction cannot stand when the loss is incidental by product of the scheme. Kelly, 206 L.Ed.2d at 891. See (JAC 12379:13-17)("The term 'property' [the only definition of property in the jury instructions] includes money and other tangible and intangible things of value. **The property at issue in Count One of the indictment [RICO] consists of the seats on the board of directors of FPFG, including the compensation due to those members, and thus control of FPFG.**" (emphasis added)

Scheidler, et al. v. NOW, Inc., et al., 537 U.S. 393, 154 L.Ed.2d 991, 123 S.Ct. 1057 (2003). "[W]e have construed the extortion provision of the Hobbs Act at issue in these cases to require not only the deprivation but also the acquisition of the property." Scheidler, 537 U.S. at 404, citing United States v. Emmons, 410 U.S. 396, 400, n. 16, 35 L.Ed.2d 379, 93 S.Ct. 1007 (1973). Board of director seats cannot be acquired ... they are elected positions. The Court notes the defference between coercion and extortion (one of the RICO predicates). Scheidler, 537 U.S., at 406. FPFG board seats are not covered by Hobbs Act (18 U.S.C. §1951) and not an element of RICO (18 U.S.C. §1961 et seq.) post Ciminelli.

In 18 U.S.C. §1343 the phrase "transmits or causes to be transmitted" modifies "any scheme or artifice to defraud, or for

obtaining money or property by means of false or fraudulent pretenses, representations, or promises" and not any incidental use of wire, radio, or television. The jury instructions here permitted overreach and are precluded in Ciminelli and Dubin. (Slip Op. at 12)("Under the familiar interpretive canon no seitur a sociis, "a word is known by the company it keeps." McDonnell v. United States, 579 U.S. 550, 558-569 (2016)(internal citations omitted). Here, the jury instructions "maximalist approach has simplicity on its side, yes: an everybody-is-guilty standard is no challenge to administer. But the Constitution prohibits the Judiciary from resolving reasonable doubts about a criminal statute's meaning [as was done in this case] by rounding up to the most punitive interpretation its text and context can tolerate." Dupin, 599 U.S. ___ (Slip Op. at 2)(Gorsuch, J. concurring). "[T]he Constitution's promise of due process means that criminal statutes must provide rules 'knowable in advance,' not intuitions discoverable only after an opinion." Dubin, (Slip Op. at 4); Percoco v. United States, 598 U.S. ___ (Slip Op. at 6)(Gorsuch, J. concurring).

EN8) Ciminelli, Dubin, Bruen, Fischer, Cleveland, Kelly, and Rahimi decided post trial during Maxwell's direct appeal.

EN9) The jury instructions and evidence at trial were that Pelullo was a non-violent felon and that the nature of Scarfo's conviction was immaterial. (JAC 12331)(Pelullo's convictions for bank fraud, securities fraud); (JAC 12333-334)(The nature of Scarfo's offense is of no concern to you.)(JAC 12274:18)("Court: Is Mr. Scarfo stipulating that he has a qualifying conviction for the purpose of the felony possession charge?" "Mr. Gelb [Scarfo's attorney]" Mr. Scarfo will stipulate.")

EN10) The record notes objections to the indictment going to the jury, the court overruled the objections. The indictment, though not an exhibit, and not in the ROA, went to the jury. (JAC 13932)

EN11) "The 15 provisions that would collapse into subsection (c)(2) are subsections ... The five provisions that would not collapse into subsections (c)(2) are ... (b)(3)...." Fischer, 64 F.4th 329 (D.C. Cir. 2022), 2023 U.S. App. LEXIS 8284, *92 (Katsas, J. dissenting)(emphasis added).

EN12) This court is considering the scope of 18 U.S.C. §1512(c)(2) in Fischer and as Justice Katsas explained in the Fischer dissent, §1512(b)(3) is not included or collapsible into §1512(c)(2), making the jury charge unconstitutional after Fischer. See fn. 11, supra.

EN13) AUSA D'Aguanno complaining of Scarfo's legal filings by another attorney (Gavin Linz), not Maxwell. (JAC 12567:4-7); (JAC 12567:10-19).

EN14) (JAC 12304) "The evidence from which you are to find the facts consists of the following: [ ] (2) Documents, audio recordings, video recordings and other things **received** as exhibits;" (emphasis added)

(JAC 12326) [Your concern, ... is to determine whether or not the evidence **admitted** in this trial proves the defendant's guilt beyond a reasonable doubt." (emphasis added)

(JAC 12327) "You have heard audio recordings that were **received in evidence**, and you were given transcripts of the recordings (emphasis added)

(JAC 12304012307)(¶7) "Sometimes different inferences may be drawn from the same set of facts. The Government may ask you to draw one inference, and the defendant may ask you to draw another. You ... must decide what reasonable inferences you will draw based on all the evidence [admitted] and you reason and experience and common sense."

EN15) (JAC 12244) "Court: I think the evidence except for the stipulations, I think this is the last piece of evidence." [ ] "Court: Okay. The evidence is all in."[No 276 exhibits admitted.]