APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:15CR404 HEA
MICHAEL GRADY and	)	
OSCAR DILLON,	)	
	)	
Defendants.	)	

OPINION, MEMORANDUM AND ORDER

This matter is before the Court on Defendants Dillon and Grady's Motion for Judgment of Acquittal, or in the Alternative, for New Trial, [Doc. No. 3320] and the Government's Motion for *In Camera* Inspection of Recorded Jail Phone Call and DEA Report, [Doc. No. 3435]. The Government's Motion is granted and for the reasons set forth below, Defendants' Motion will be denied.

Facts and Background

Defendants were charged in a 40-count superseding indictment alleging various conspiracy and narcotics related offenses. Specifically, Defendants were charged with one count of conspiring to distribute narcotics in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846, one count of conspiring to commit money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i) and 18 U.S.C. § 1953(h), and one count of attempting to obstruct justice in violation of 18 U.S.C. §

1512(c)(2). Defendant Grady was additionally charged with one count of attempted witness tampering, in violation of 18 U.S.C. § 1512(b)(1).

The indictment sets out that Defendants joined Derrick Terry and Stanford Williams' narcotics distribution conspiracy and conspired to launder drug proceeds. It further alleged that from January 2016 through July 27, 2016, Defendants attempted to obstruct justice by instructing Terry to flee the jurisdiction.

Defendants' trial was conducted from March 22, 2021 through April 7, 2021. Defendants orally moved for motion for judgement of acquittal on all counts under Federal Rule of Criminal Procedure 29(a), arguing that the government failed to present sufficient evidence to allow a reasonable, rational jury to convict them. The motion was denied.

The jury returned its verdict finding Dillon guilty of all three counts. Grady was found guilty of the first three counts and found not guilty of attempted witness tampering. Following the verdict, the Court entered a judgment of conviction.

Defendants now renew their motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure based on their argument that the evidence was insufficient. Alternatively, Defendants move for a new trial based on the sufficiency of the evidence, prosecutorial misconduct, and violations of the Speedy Trial Act.

Legal Standards

Rule 29(a) requires the Court, on a defendant's motion, to "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." However, "a district court has very limited latitude to do so and must not assess witness credibility or weigh evidence, and the evidence must be viewed in a light most favorable to the government." *United States v. Hassan*, 844 F.3d 723, 725 (8th Cir. 2016). When reviewing the sufficiency of the evidence to support a conviction, the Court must resolve evidentiary conflicts in the Government's favor and accept all reasonable inferences from the evidence that support the verdict. *See United States v. Weaver*, 554 F.3d 718, 720 (8th Cir. 2009). "A verdict will only be overturned if no reasonable jury could have found the defendant guilty beyond a reasonable doubt." *Id.*

Such motions "put[ ] in issue the sufficiency of the evidence to sustain the verdict." *United States v. Lincoln*, 630 F.2d 1313, 1316 (8th Cir. 1980). The Eighth Circuit has explained the nature of a motion for a judgment of acquittal:

> A post-verdict motion for a judgment of acquittal ... is ... precisely like an appeal from a judgment of conviction on the ground that the evidence was not sufficient to sustain the verdict on which the judgment was entered. The court reviewing the sufficiency of the evidence, whether it be the trial or appellate court, must ... view the evidence in the light most favorable to the verdict, giving the prosecution the benefit of all inferences reasonably to be drawn in its favor from the evidence. The verdict may be based in whole or in part on circumstantial evidence. The evidence need not exclude every reasonable hypothesis except that of guilt; it is sufficient if there is substantial evidence justifying an inference of guilt as found irrespective of

> any countervailing testimony that may have been introduced. If so, the issue of guilt or innocence has been properly submitted to the jury for its determination, and the motion for judgment of acquittal is properly denied.

Lincoln, 630 F.2d at 1316–17 (citations omitted). Courts will not lightly overturn a jury verdict, *United States v. Peneaux*, 432 F.3d 882, 890 (8th Cir. 2005), and will uphold a verdict as long as a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *United States v. Jirak*, 728 F.3d 806, 811 (8th Cir. 2013); *see also United States v. Peters*, 462 F.3d 953, 957 (8th Cir. 2006) (stating that the court "must uphold the jury's verdict even where the evidence 'rationally supports two conflicting hypotheses' of guilt and innocence" (quoting *United States v. Serrano-Lopez*, 366 F.3d 628, 634 (8th Cir. 2004))).

Alternatively, Rule 33(a) states that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." "[T]he court has broad discretion in deciding motions for new trial, and its decision is subject to reversal only for a clear and manifest abuse of discretion." *Hassan*, 844 F.3d at 725. "Also in contrast to Rule 29, in considering a motion for new trial, the court need not view the evidence in the light most favorable to the verdict and it is permitted to weigh the evidence and evaluate the credibility of the witnesses." *Id.* at 725–26.

"Nonetheless, motions for new trials based on the weight of the evidence generally are disfavored, and the district court's authority to grant a new trial

should rarely be exercised." *Id.* at 726. "The district court will only set aside the verdict if the evidence weighs heavily enough against the verdict that a miscarriage of justice may have occurred." *United States v. Serrano-Lopez*, 366 F.3d 628, 634 (8th Cir. 2004) (internal quotation marks omitted) (quoting *United States v. Rodriguez*, 812 F.2d 414, 417 (8th Cir. 1987)).

Rule 33(a) of the Federal Rules of Criminal Procedure provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Rule 33(b) similarly "allows district courts to vacate a conviction and grant a new trial on the basis of newly discovered evidence." *United States v. Meeks*, 742 F.3d 838, 840 (8th Cir. 2014). The decision to grant or deny a Rule 33 motion "is within the sound discretion of the [district] court." *United States v. Campos*, 306 F.3d 577, 579 (8th Cir. 2002). The court "can weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict[.]" *Id.* (citation and internal quotation marks omitted). But the court must allow the jury's verdict to stand unless the court determines a miscarriage of justice will occur. *Id.*; *see also United States v. Fetters*, 698 F.3d 653, 656 (8th Cir. 2012) ("Motions for new trials are generally disfavored and will be granted only where a serious miscarriage of justice may have occurred." (citation omitted)); *United States v. Worman*, 622 F.3d 969, 978 (8th Cir. 2010) ("A district court will upset a jury's finding only if it ultimately

determines that a miscarriage of justice will occur." (citing *Campos*, 306 F.3d at 579)).

For allegations of trial error, the court should "balance the alleged errors against the record as a whole and evaluate the fairness of the trial" to determine whether a new trial is appropriate. *United States v. McBride*, 862 F.2d 1316, 1319 (8th Cir. 1988). "The granting of a new trial under Rule 33 is a remedy to be used only 'sparingly and with caution.' " *United States v. Dodd*, 391 F.3d 930, 934 (8th Cir. 2004) (quoting *Campos*, 306 F.3d at 579).

Discussion

Judgment of Acquittal

Defendants argue that the Government's case against them rested entirely on the "unbelievable" testimony of Terry and Williams. Initially, when analyzing a Motion for a judgment of acquittal, this Court is not at liberty to assess the credibility of the witnesses. *United States v. Lewis* 976 F.3d 787, 794 (8th Cir. 2020. "This court has 'repeatedly upheld jury verdicts based solely on the testimony of conspirators and cooperating witnesses, noting it is within the province of the jury to make credibility assessments.' *United States v. Hamilton*, 929 F.3d 943, 946 (8th Cir. 2019) (rejecting defendant's attack on witnesses' credibility even though they testified in exchange for plea deals or sentence reductions and had previously lied to government officials)." *Id.*

Notwithstanding Defendants' claim the Government's case was based entirely on Terry and Williams' testimony, the record is replete with corroborating evidence as the Government has specifically detailed in its opposition. Not only did the Government's case in chief include the testimony of Terry and Williams but it also included phone records, physical evidence, and other circumstantial evidence. The Government did not solely rely on the co-conspirator's testimony.

Defendants further argue the Government failed to establish the essential elements of each charged offense, claiming that the Government relied on nothing more than impermissible inferences based on speculation and conjecture. Defendants urge the Government failed to prove Defendants joined the conspiracy and that they had no stake in whether Terry's drug trafficking organization (DTO) succeeded. To the contrary, the evidence presented established that Defendants provided Terry with information and opinions about court proceedings and who they believed might be working with law enforcement. Defendants were aware of the DTO through their conversations with Terry about the indictment against him. Defendants joined the conspiracy through continuing their relationship with Terry and by advising him what actions he should take in response to knowing of the pending indictment. Defendants clearly benefited from their participation in the conspiracy through the cash payments they received from Terry. They downloaded documents on Terry's behalf and sought out an attorney for him.

These ancillary functions furthered the DTO. See *United States v. Polk*, 715 F.3d 238, 276 (8th Cir. 2013)("But '[g]uilt may exist even when the defendant plays only a minor role and does not know all the details of the conspiracy.' *United States v. Perez–Tosta,* 36 F.3d 1552, 1557 (11th Cir.1994). '[A] drug conspiracy may involve ancillary functions (*e.g.,* accounting, communications, strong-arm enforcement), and one who joined with drug dealers to perform one of those functions could be deemed a drug conspirator.' *United States v. Garcia–Torres,* 280 F.3d 1, 4 (1st Cir.2002). '[A] variety of conduct, apart from selling [drugs], can constitute participation in a conspiracy sufficient to sustain a conviction.' *United States v. Burgos,* 94 F.3d 849, 859 (4th Cir.1996).")

Defendants also claim they are entitled to a judgment of acquittal with respect to the money laundering count because the Government failed to establish that the purpose was to conceal an attribute of the proceeds and failed to present evidence of an intent to conceal. The Government produced evidence that Terry gave Defendants large sums of cash at a time when Terry knew he was under indictment. Terry did not think Grady would divulge the source of the money. These facts, while they may be insufficient alone, when taken together are sufficient for the jury's conclusion that Defendants engaged in financial transactions with the proceeds of unlawful activity with the purpose of concealing or disguising the nature, source, ownership, control, or location of the funds in

violation of 18 U.S.C. § 1956(a)(1)(B)(i). *See United States v. Bowman*, 235 F.3d 1113, 1116 (8th Cir. 2000) (The "pattern and timing" of transactions can support an inference of money laundering by concealment); *United States v. Sainz Navarrete*, 955 F.3d 713, 719 (8th Cir. 2020).

Defendants argue that there was also insufficient evidence that they attempted to obstruct justice. The Government directs the Court's attention to the facts presented to the jury for its determination. Defendants knew there was an indictment pending against Terry, and a large number of individuals who were a part of the DTO. Defendants advised Terry to go somewhere far away for 18 months to two years to let the case be resolved as to the other defendants, the idea being Terry would be in a better position to defend the charges without all of the co-conspirators. Defendants also told Williams this plan.

Defendants argue that Terry testified that he had the idea to flee, not Defendants and they speculate that it is preposterous that Terry needed Defendants to tell him to get out of town. Again, it is a fundamental proposition that the credibility of any witness is not for this Court to ascertain in a motion for judgment of acquittal, rather, whether to believe a witness is strictly within the purview of the jury who are the fact finders at trial..

Motion for New Trial

Defendants argue the weight of the evidence requires a new trial, once again arguing that the Government's case rested on two material witnesses, Terry and Williams, both of whom had "insurmountable credibility issues." For the reasons set forth in the previous analysis, this basis for a new trial is without merit. The jury was presented with the testimony of Terry and Williams, who were both subjected to extensive cross examination. Their testimony was corroborated through other forms of evidence. The verdict was not contrary to weight of the evidence.

Defendants argue the Court should not have admitted evidence of the September 7, 2016 cocaine delivery. The Court previously articulated the reasoning for allowing this evidence. This evidence was admitted as intrinsic evidence and under Rule 404(b), as previously discussed in this Court's Order of March 1, 2021.

Likewise, evidence of Grady's conspiracy conviction was properly admitted for the reasons set out in the Court's Order of March 10, 2021. Defendant presents nothing to establish the Court's reasoning in the March 10, 2021 Order is not applicable to Defendant's conspiracy conviction.

Defendants argue that they are entitled to a new trial because the United States committed *Giglio, Brady*, and Jencks Act violations by failing to produce

government agent notes and the full content of the meetings between the Government and Terry and Williams.

Giglio* and *Brady

"Under [*Giglio*], the government must disclose matters that affect the credibility of prosecution witnesses. [F]or example, a defendant is entitled to know of a promise to drop charges against a key witness if that witness testifies for the government. However, the nondisclosure of *Giglio* evidence only justifies a retrial if the withheld information is deemed material." *United States v. Beckman,* 787 F.3d 466, 492 (8th Cir. 2015) (alterations in original) (citations and quotations omitted); *see also Giglio v. United States,* 405 U.S. 150, 153–55 (1972). "*Brady* requires the [United States] to disclose evidence that is both 'favorable to an accused' and 'material either to guilt or punishment.' " *United States v. Horton*, 756 F.3d 569, 753, 757 (8th Cir.2014) (quoting *United States v. Whitehill*, 532 F.3d 746, 753 (8th Cir. 2008)); *see also Brady v. Maryland*, 373 U.S. 83, 87 (1963). "To show a *Brady* violation, the defendant must establish that (1) the evidence was favorable to the defendant, (2) the evidence was material to guilt, and (3) the government suppressed evidence." *United States v. Ladoucer*, 573 F.3d 628, 636 (8th Cir. 2009) (quotations, alteration, and citations omitted).

"Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have

been different." *Id.* (quotation, alteration, and citation omitted); *see also United States v. Pulliam*, 566 F.3d 784, 787 (8th Cir. 2009) ("The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (quotation, alteration, and citation omitted)).

The Government provided extensive discovery to Defendants and has provided Defendants with interview outlines and grand jury testimony. Counsel for the Government has meticulously detailed all of the discovery provided to Defendants, including references to the record of where the discovery can be located. Indeed, counsel has searched the trial transcript and has been unable to find support that agents were taking notes during trial preparation.

Likewise, any discovery which Defendants argue was impeachment material was disclosed to Defendants.

Jenks Act

The Jencks Act requires that:

> After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

18 U.S.C. § 3500(b). The Act defines "statement" as: "(1) a written statement made by said witness and signed or otherwise adopted or approved by him; (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury." 18 U.S.C. § 3500(e).

The Government has disclosed all it was required to disclose. Defendants have not satisfied the Court that the Government failed to disclose any Jenks Act material in that all statements were disclosed or did not fit within the perimeters of the Jenks Act as detailed by the Government in its briefs.

The Court has examined *in camera* the telephone call of which Defendants seek disclosure. The Government correctly represents that the recording is not related to the subject matter to which Terry testified on direct examination. Nor is the telephone call material. This basis for a new trial is meritless

Speedy Trial

The Court has previously ruled there has been no violation of the Speedy Trial in its May 13, 2020 Order adopting Judge Baker's Report and Recommendation. For the reasons set forth in the Report and Recommendation, this basis for granting a new trial is denied.

Prosecutorial Misconduct

Likewise, the claim of prosecutorial misconduct has been addressed and denied in the Court's May 13, 2020 Order and Judge Baker's Report and Recommendation.

Jury Instructions

Defendants argue the Court erred in giving government-proposed instructions to which they objected. The Court overruled Defendants' objections in its instruction conference and articulated the reasons, therefore. Defendants present nothing new to establish error.

Cumulative Error

For the reasons articulated herein, Defendants' argument that the cumulative effect of the errors resulted in substantial prejudice is meritless

Conclusion

The Court finds that Defendants are not entitled to a judgment of acquittal under Rule 29 or a new trial under Rule 33.

Accordingly,

IT IS HEREBY ORDERED that the Motion for Judgment of Acquittal, or

in the Alternative, Motion for New Trial, [Doc. No 3320] is **DENIED.**

Dated this 9th day of June, 2022.

HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:15CR404 HEA
	)	
MICHAEL GRADY and OSCAR DILLON,	)	
	)	
Defendants.	)	

OPINION, MEMORANDUM AND ORDER

The matter before the Court on Defendant Dillon's Motion in Limine, [Doc. No. 2975]. The Government opposes the Motion and has filed a memorandum in support of its position. Defendant has filed his reply to the opposition of the United States. As such, the Motion is ripe for determination. For the reasons set forth below, the Motion is denied.

Relevant Procedural History

The Government has set forth the relevant history in its Response. As to Defendant Dillon, he is charged in the Fifth Superseding Indictment in Counts 31, 32, 33, and 34:

COUNT 31
(Drug Conspiracy)
[S4 Ct 3]

The Grand Jury further charges that:

Beginning at an exact time unknown to the Grand Jury, but including 2012, and continuing thereafter to the .date of this Indictment, in the Eastern District of Missouri and, elsewhere, the defendants,

MICHAEL GRADY, and OSCAR DILLON, III, a/k/a "Ant," "Chest," "Muscles,"

did knowingly and willfully conspire, combine, confederate and agree with each other and other persons known and unknown to this Grand Jury, including DERRICK TERRY, STANFORD WILLIAMS, and others, to commit offenses against the United States, to wit: to distribute and possess with intent to distribute a mixture or substance containing a detectable amount of cocaine, a . Schedule II controlled substance, and a detectible amount of heroin, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(l).

All in violation of Title.21, United States Code, Section 846; and

The amount of cocaine involved in the conspiracy and attributable to defendants **MICHAEL GRADY and OSCAR DILLON, III, a/k/a "Ant," "Chest," "Muscles,"** as a result of their own respective conduct, and the conduct of other conspirators, known or reasonably foreseeable to each individual, is five kilograms or more of a mixture or substance containing a detectable amount of cocaine, making the offense, punishable under Title 21, United States Code, Section 841(b)(l)(A)(ii)(II).

COUNT 32
(Obstruction of Justice)
[S4 Ct 28]

The Grand Jury further charges that:

Beginning at an exact time unknown, but including in or about January 2016 through July 27, 2016, within the Eastern District of Missouri and elsewhere, the defendants,

MICHAEL GRADY, and
OSCAR DILLON, III a/k/a "Ant," "Chest," "Muscles,"

acting together and with others including DERRICK TERRY, CHARDA DAVIS, and STANFORD WILLIAMS did knowingly corruptly obstruct, influence, and impede an official proceeding, namely, *United States v. Derrick Terry, et al,* Sl-4:15CR 404 HEA/NAB, and did knowingly attempt to obstruct, influence, and impede said official proceeding, and in furtherance thereof, each defendant took a substantial step, including the flight of DERRICK TERRY to Dallas, Texas, all in violation of Title 18, United States Code, Sections 2 and 1512(c)(2).

COUNT33
(Unlawful Flight to Avoid Prosecution)
[S4 Ct 29]

The Grand Jury further charges that:

Beginning at an exact time unknown, but including in or about January 2016 through July 27, 2016, within the Eastern District of Missouri and elsewhere, the defendants,

MICHAEL GRADY, and
OSCARDILLON, III a/k/a "Ant," "Chest," "Muscles,"

acting- together and with others including DERRICK TERRY, CHAR.DA DAVIS, and STANFORD WILLIAMS did knowingly travel, or cause, counsel, and command another to travel in interstate commerce with the intent to avoid prosecution for a felony offense, namely conspiracy to distribute cocaine charged in *United States v. Derrick Terry, et al,* Sl-4:15CR 404 -HEA/NAB, charged under the laws of the United States within the Eastern District of Missouri from which DERRICK TERRY fled, in violation of Title 18, United States Code, Sections 2 and 1073.

COUNT34
(Money Laundering)
[S4 Ct 51]

The Grand Jury further charges that:

Beginning around August 2015 and continuing thereafter until the date of this Indictment, in the Eastern District of Missouri and elsewhere, the defendants,

MICHAEL GRADY, and
OSCAR DILLON; III a/k/a "Ant," "Chest," "Muscles,"

did knowingly combine, conspire, and agree with. other persons known and unknown to the Grand Jury, including DERRICK TERRY, STANFORD WILLIAMS, and others, to commit offenses against ·the United States, to wit: knowingly conducted and attempted to conduct financial transactions affecting interstate or foreign commerce, which transactions involved the proceeds of specified unlawful activity, that is, the· distribution of cocaine, a Schedule II controlled substance, and heroin, a Schedule I controlled substance, and designed the transactions in whole or in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of specified unlawful activity, and that while conducting and attempting to conduct such financial transactions, the defendant knew that the property involved in the financial transactions represented the proceeds of some form of unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(l)(B)(i).

All in violation of Title 18, United States Code, Section 1956(h).

Discussion

Defendant seeks to preclude the Government from introducing evidence pertaining to specific events relating to Dillon's September 7, 2016 arrest because the intrinsically intertwined doctrine is not applicable, the Government failed to meet requirements under Fed.R.Evid. 404(b), and the presentation of acquitted conduct raises Double Jeopardy and due process violations. The Government argues this evidence is admissible as intrinsic or pursuant to Rule 404(b) to show Defendant's "knowledge and intent."

In discussing the nature of intrinsic evidence, the Eight Circuit has stated:

> Rule 404(b) "excludes evidence of specific bad acts used to circumstantially prove a person has a propensity to commit acts of that sort." *United States v. Johnson,* 439 F.3d 884, 887 (8th Cir. 2006). But this rule does not apply to evidence "intrinsic" to the charged offense. [*U.S. v.] Thomas*, 760 F.3d [879] at 883–84 [(8th Cir. 2014)]. "[I]ntrinsic evidence[ ] is evidence of wrongful conduct other than the conduct at issue offered for the purpose of providing the context in which the charged crime occurred." *United States v. Campbell*, 764 F.3d 880, 888 (8th Cir. 2014) (cleaned up). It "includes both evidence that is inextricably intertwined with the crime charged as well as evidence that merely 'completes the story' or provides context to the charged crime." *United States v. Young*, 753 F.3d 757, 770 (8th Cir. 2014). Intrinsic evidence need not be "*necessary* to the jury's understanding of the issues" to be admissible. *Id.* Of course, when admitting intrinsic evidence, "[t]he dictates of [R]ule 403 must still be applied to ensure that the probative value of this evidence is not outweighed by its prejudicial value." *United States v. Bass*, 794 F.2d 1305, 1312 (8th Cir. 1986). District courts have "broad discretion" in admitting intrinsic evidence and we will reverse "only if such evidence clearly had no bearing on the case and was introduced solely to prove the defendant's propensity to commit criminal acts." *Thomas*, 760 F.3d at 883 (quoting *United States v. Katz*, 445 F.3d 1023, 1029 (8th Cir. 2006)).

United States v. Guzman, 926 F.3d 991, 999–1000 (8th Cir. 2019) (emphasis added).

The Government argues its bases for admissibility as intrinsic and as 404(b) evidence in a combined discussion. It contends that Dillon's knowledge of complex drug trafficking, corresponding law enforcement investigative techniques, and the manner in which organized drug distribution cases are investigated is directly relevant to prove his knowledge and intent as to each count.

As to the conspiracy, the knowledge of drug trafficking and law enforcement methods of investigation is central to proving Dillon's intent to conspire with Terry to advance Terry's drug operations. By providing information to Terry, Defendant enabled Terry to avoid becoming involved in law enforcement investigations.

The knowledge is also indicative of Dillon's intent to obstruct, impede and influence an official proceeding with respect to the obstruction charge. By advising Terry to leave the area can establish his intent, knowledge, and lack of mistake.

The evidence is intrinsic to the charges as it establishes how the parties know each other, provides some context for their relationship, and establishes Dillon's knowledge of Terry's drug distribution activities. Further, it establishes Dillon's knowledge of drug trafficking, which is relevant.

The Court agrees that the evidence which provides the nature of the parties' relationships and establishes how the phones were legally obtained is intrinsic. It provides the background for the interrelationships between the alleged coconspirators. It provides contextual information, therefore, it is "inextricably intertwined" with—and completes the story of—how the parties are all a part of the alleged conspiracy.

Furthermore, the evidence is admissible pursuant to Rule 404(b). Rule 404(b) provides that evidence of other acts is not admissible to show a defendant's propensity to commit crime; however, such evidence may be admissible for

purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed.R.Evid. 404(b). "[Rule 404(b)] is a rule of inclusion, such that evidence offered for permissible purposes is presumed admissible absent a contrary determination." *United States v. Johnson,* 439 F.3d 947, 952 (8th Cir.2006). The Eighth Circuit Court of Appeals has adopted a four-factor test to determine the admissibility of Rule 404(b) evidence:

> To be admissible, Rule 404(b) evidence "must (1) be relevant to a material issue raised at trial, (2) be similar in kind and close in time to the crime charged, (3) be supported by sufficient evidence to support a finding by a jury that the defendant committed the other act, and (4) not have a prejudicial value that substantially outweighs its probative value."

Id. (quoting *United States v. Kern,* 12 F.3d 122, 124–25 (8th Cir.1993)).

First, the evidence is relevant under Rule 404(b) to show knowledge and intent to commit a current charge of conspiracy to distribute drugs." *United States v. Robinson,* 639 F.3d 489, 494 (8th Cir.2011) (quoting *United States v. Frazier,* 280 F.3d 835, 847 (8th Cir.2002)) (internal quotation mark omitted); *see also United States v. Hill,* 638 F.3d 589, 592 (8th Cir.2011) (holding that evidence of the defendant's prior distribution of cocaine was relevant to the material issues of the defendant's knowledge or intent to distribute drugs); *Johnson,* 439 F.3d at 952 (holding that evidence of defendant's prior drug dealing was "relevant to the

material issue [of] whether [the defendant] had the requisite intent to enter into a conspiracy with [another person] to distribute drugs"). Accordingly, the court finds that Defendant's prior activities are relevant to the material issues of his intent and knowledge.

Next, Defendant's is also similar in kind and close in time to the current charged offense. Defendant's actions and communications were very close in time to the charged offenses. The Court agrees that Defendant's involvement regarding the cocaine delivery conspiracy on September 7, 2016 is similar to the charged counts related to the Terry drug trafficking organization, which included a large scale cocaine conspiracy, thereby tending to demonstrate Dillon's intent to commit the charged criminal activity. Thus, the actions and communications not too remote in time and sufficiently similar in nature.

Under the third factor, evidence of the prior bad act must be supported by sufficient evidence. In this case, the government has provided a detailed description of what evidence establish Dillon's actions on September 16, 2016.

> Dillon's actions on September 7 at 3748 Delor are established by eyewitness testimony of officers conducting surveillance, further corroborated by pole camera footage depicting Dillon's actions. Following his arrest, investigators seized items including the five cellular phones referenced herein. As previously stated, the surrounding circumstances and contents of the phones, including device 562-330-3981 (System 4) (see Attachment A) establish Dillon to be the user of the devices.
>
> Dillon's knowledge of the drug deal is established by his extensive presence at the scene, repeated attempts to conduct countersurveillance, use of the

correct fake name to sign for the package, and the explicit communications contained in the phone. The communications contained in the phone are highly probative of strong drug dealer trade craft, knowledge, and intent. Tellingly, among the communications on September 7, Dillon texted, "nope still sitting u who is the carrier" Burris replied, "Brown" Consistent with law enforcement observations establishing Dillon's presence and exclusive control of the Camry and phones contained therein, Dillon responded, "been sitting here since 10" [See Attachment A, lines 103-05].

Dillon Arrived at 3748 Delor and Conducted Counter Surveillance

At approximately 9:58 a.m., DEA Task Force Officer James Gaddy (TFO Gaddy) observed a dark colored Toyota Camry (Camry) park in front of 3748 Delor. Shortly thereafter, investigators were able to determine that Defendant Dillon was driving the Camry. The Camry pulled away from the curb and then parked in the rear parking lot of an Imo's Pizza location, across the street from 3748 Delor.

Meanwhile, DEA Task Force Officer, Joseph Somogye (TFO Somogye), who was driving an unmarked police vehicle, arrived in the vicinity of 3748 Delor. TFO Somogye drove through the front parking lot of the Imo's Pizza, and thereafter, the Camry began to follow TFO Somogye's vehicle through various streets for several minutes. The Camry passed a slower moving vehicle in order to continue its counter surveillance of TFO Somogye. Eventually, TFO Somogye stopped at an electric signal, at which time the Camry pulled up alongside TFO Somogye's vehicle. TFO Somogye observed the driver of the vehicle, Defendant Dillon, look into TFO Somogye's vehicle, at TFO Somogye. TFO Somogye was familiar with Dillon, a subject of multiple DEA investigations. Dillon then terminated his apparent counter-surveillance of TFO Somogye and returned to 3748 Delor.

At approximately 10:17 a.m., TFO Gaddy observed Dillon again driving in the area of 3748 Delor. Dillon parked the Camry in a parking lot located to the west of 3748 Delor, exited the vehicle, and used a key retrieved from his pocket to enter 3748 Delor through the front door. Dillon eventually exited the building, entered the Camry, and then backed the vehicle into the mouth of the alley near 3748 Delor. Dillon exited his vehicle and returned to the front of 3748 Delor and removed the "For Sale" sign which was posted on the front of the building. Dillon returned to his vehicle and left the area. At approximately 10:49 a.m., Dillon returned to the area of 3748 Delor,

continued to drive the Camry in the vicinity, and eventually left the area. Due to Dillon's aggressive counter surveillance measures, investigators did not attempt to conduct mobile surveillance of Dillon and the Camry.

Dillon Returned and Took Possession of the Package from UPS

At approximately 5:30 p.m., investigators in the vicinity of 3748 Delor, observed Dillon, who continued to operate the Camry, circling the area of 3748 Delor. This was consistent with Dillon's continued effort to conduct counter surveillance. Investigators believed that Dillon was waiting for the package to be delivered to 3748 Delor Street.

At approximately 5:55 p.m., investigators and the UPS driver left UPS and traveled to the Delor address with the package. At approximately 6:00 p.m., investigators observed Dillon park the rental vehicle just east of 3748 Delor, on the opposite side of the street, exit the vehicle, and walk into the gangway of an apartment complex. Investigators observed Dillon standing in the gangway by himself, looking up and down the street as if he was looking for someone.
At approximately 6:10 p.m., the UPS truck arrived in the 3700 block of Delor, St. Louis, Missouri. The truck parked on the north side of the street directly across from 3748 Delor. The UPS driver exited the truck, removed the package from the truck, and placed it on a dolly.

At this time, investigators observed Dillon immediately walk from the gangway of 3743 Delor, St. Louis, Missouri, to the front of 3748 Delor. Investigators observed the UPS driver walk the package to the front of 3748 Delor, where Dillon contacted the driver and opened the front door of 3748 Delor with a key. Investigators observed the UPS driver place the package inside 3748 Delor. The investigation revealed that Dillon signed the UPS driver's computer pad in the name of David Russell to accept the package.

After the UPS driver left, investigators observed Dillon exit 3748 Delor, lock the door with a key, and walk back towards the Camry. TFOs Somogye and Gaddy approached Dillon and advised him of the investigation. TFO Somogye advised Dillon of his Miranda rights, and Dillon verbally stated that he understood and indicated he had nothing to say. Investigators detained Dillon. A search of Dillon revealed, among other things, keys to the Camry and a key to 3748 Delor. Investigators later photographed and seized the "Superman" T-shirt that Dillon was wearing during these events.

Investigators made entry into 3748 Delor and located the package inside the bar area. Investigators conveyed Dillon to the DEA building, and thereafter released him. On September 7, 2016, DEA investigators provided Dillon with two DEA Form 12 documents, "Receipt For Cash or Other Items," for property seized at 3748 Delor and for the Camry. Investigators had the Camry towed to the DEA building, where it was secured pending the application for a search warrant.

Subsequent Searches Revealed Incriminating Evidence

On September 8, 2016, investigators applied for and received additional search warrants to search the package (4:16 MJ 1267 JMB), the Camry (4:16 MJ 1268 JMB), and five cellular telephones located in the Camry (4:16 MJ 1270 JMB). The search of the package revealed welded metal containers that contained kilogram type packages of what was later determined to be 9912 grams of a mixture or substance that contained cocaine hydrochloride. The search of the Camry revealed, among other things (1) a payroll check in the name of Defendant Dillon; (2) an Imo's Pizza Box with a receipt for a purchase of September 7, 2016, consistent with Dillon's presence at 3748 Delor; (3) a Thrifty rental car contract for the Camry in the name of a female associated with Dillon for the period between August 31 and September 7, 2016; and (4) five phones.

The search of the phones revealed highly probative communications between Dillon and Burris, described below.

Communications Regarding the Drug Deal on September 7, 2016

The information contained on Dillon's phone establishes the timeline of the ten kilogram delivery on September 7, 2016 [See Attachment A, Timeline]. The search conducted of the phones seized from the Camry revealed, among other things, that one of the cellular devices using the number 562-330-3981 (Dillon) was in contact with 562-330-3979. 562-330-3979 was identified in the contacts section of 562-330-3981(Dillon) as "Glasses." "Glasses" is known to investigators as Roy Burris. The use of compartmentalized devices (562-330-3981 (Dillon) and 562-330-3979 (Burris) is entirely consistent with the manner in which high level drug traffickers conduct large scale drug transactions.

The following communications are illustrative of (1) the identity and degree of familiarity among the conspirators; (2) the drug dealing experience and prowess of the conspirators; and (3) the specific arrangements for the ten kilogram delivery. This is not a comprehensive inventory of all potentially relevant communications, but is offered as an illustration to the Court as to this component of the evidence.

Communications Preceding the Delivery

On July 25, 2016, at 7:14 p.m., and thereafter, Dillon (562-330-3981) texted Burris (562-330-3979) as follows, "**Silverling bar and grill 3748 Delor st louis mo 63111**" (emphasis added by United States). Dillon then texted, "Imos 129 north oaks plaza st louis mo 63121" Burris replied, "Got it" and "Im a hit you with details by noon 2morrow..." On July 27, 2016, Dillon texted Burris, "Hey have you heard anything" On July 30, 2016, Burris replied, "Checkin big homie. details top of the week."

On August 2, 2016, at 10:10 p.m., Burris texted Dillon, "He just called and said the escrow accounts are under way being processed in house. Order forms should be out by Thursday. He just called..." Dillon, at 10:20 p.m., responded, "Ok just let me know the times when to go to the title company to fill out the forms for wich houses" On August 4, 2016, following Dillon's inquiry, Burris replied, "Yea. They just pulled off. Said we still in the process department. Had to make the folders for the documents. I told him hit me when the ready to for@ signing... He said we should be cool in a few...@"

On August 25, 2016, Burris (562-330-3979) texted Dillon (562-330-3981), "Contracts done ... they just need a name ... Bar and grill one" Significantly, Dillon replied, "David Russell," the name he later signed when he contacted the UPS carrier.

On August 31, 2016, Burris (562-330-3979) texted Dillon (562-330-3981), "Ten documents. all hillary clinton's campaign media..." On September 2, 2016, Burris (562-330-3979) texted Dillon (562-330-3981), "Lands Tuesday morn 100 percent 4 sure. In transit now." On September 6, 2016, Burris (562-330-3979) texted Dillon (562-330-3981), "he called and said ETA is between Tuesday-Wednesday morning. Im a be on ya line bra... Have bra on point..."

Communications On September 7, 2016

On September 7, 2016, during the early morning hours, Burris (562-330-3979) texted Dillon (562-330-3981), "TOP OF THE MORNING BRA. HIT ME WHEN ESCROW CLEAR..." Burris further explained, "he gotta be there waiting on it..." to which Dillon replied, "OK can somebody else receive it if hes not there" Burris replied, "Yes" Thereafter, at 2:09 a.m., Dillon replied, "Ok will be there waiting"

At 10:42 a.m, Burris texted, "Top of the morning bra," to which Dillon replied, "So not today" Burris replied, "Yes today bra" Consistent with his presence at 3748 Delor, Dillon, at 10:50 a.m., replied, "Here waiting now" Shortly thereafter, Burris replied, "Just checked. Status is on the truck: out for delivery..."

On September 7, 2016, at approximately 2:02 p.m., Burris (562-330-3979) texted Dillon (562-330-3981), "Checkin now" to which Dillon replied, "Ok" On September 7, 2016, at approximately 2:09 p.m., Burris (562-330-3979) texted Dillon (562-330-3981), "They said it should be anytime now bra... Status says on the truck out for delivery..." Dillon replied, "Ok ill hit you soon as"

On September 7, Dillon texted, "nope still sitting u who is the carrier" Burris replied, "Brown" Consistent with TFO Gaddy's observations, Dillon responded, "been sitting here since 10" [See Attachment A, lines 103-05].

Finally, Defendant's actions are not so prejudicial that they outweigh their probative value. While the court does not doubt that Defendant will suffer some prejudice, the court cannot say that such prejudice outweighs the highly probative value of the evidence of Defendant's comings and goings on September 7, 2016. The standard for determination is unfair prejudice, not simply prejudice. "Unfair prejudice ... means an undue tendency to suggest decision on an improper basis." *United States v. Lupino*, 301 F.3d 642, 646 (8th Cir. 2002). *United States v.*

Betcher, 534 F.3d 820, 825 (8th Cir. 2008) ("Rule 403 does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to a party's case. The rule protects against evidence that is *unfairly* prejudicial." (quotation marks and citation omitted)).

The court further notes that any prejudice will be lessened by an appropriate jury instruction. *See United States v. Littlewind,* 595 F.3d 876, 881 (8th Cir. 2010) ("[T]he risk [of unfair prejudice] was adequately reduced by two cautionary instructions from the district court ...."); *United States v. Turner,* 583 F.3d 1062, 1066 (8th Cir.2009) ("[T]he district court's limiting instruction—clarifying that the evidence was admitted only for the purpose of showing knowledge and intent—minimized any prejudicial effect it may have had.").

Defendant argues that allowing this evidence will require a mini-trial on the September 7, 2016 events and he will again have to present evidence to establish the same evidence he had to present in defending the previous case in which he was acquitted. Certainly, this will take time and energy, but the issue is not so complex as to warrant its exclusion. Such is the nature of trials. The Court cannot ignore the fact the Government has the burden of proof beyond a reasonable doubt and is allowed to present evidence to prove each element of its case if all precautions discussed herein are taken and observed. Allowing this evidence will not unduly prejudice Defendant to the point it outweighs its probative value.

Defendant further argues that allowing the evidence of the events and actions violate the double jeopardy clause and due process. Defendant's argument is precluded by *Dowling v. United States,* 493 U.S. 342, 347-8 (1990).

> In *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), we recognized that the Double Jeopardy Clause incorporates the doctrine of collateral estoppel. In that case, a group of masked men had robbed six men playing poker in the basement of a home. The State unsuccessfully prosecuted Ashe for robbing one of the men. Six weeks later, however, the defendant was convicted for the robbery of one of the other players. Applying the doctrine of collateral estoppel which we found implicit in the Double Jeopardy Clause, we reversed Ashe's conviction, holding that his acquittal in the first trial precluded the State from charging him for the second offense. *Id.,* at 445–446, 90 S.Ct., at 1195. We defined the collateral-estoppel doctrine as providing that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.,* at 443, 90 S.Ct., at 1194. Ashe's acquittal in the first trial foreclosed the second trial because, in the circumstances of that case, the acquittal verdict could only have meant that the jury was unable to conclude beyond a reasonable doubt that the defendant was one of the bandits. A second prosecution was impermissible because, to have convicted the defendant in the second trial, the second jury had to have reached a directly contrary conclusion. See *id.,* at 445, 90 S.Ct., at 1195.
>
> Dowling contends that, by the same principle, his prior acquittal precluded the Government from introducing into evidence Henry's testimony at the third trial in the bank robbery case. We disagree because, unlike the situation in *Ashe v. Swenson,* the prior acquittal did not determine an ultimate issue in the present case. This much Dowling concedes, and we decline to extend *Ashe v. Swenson* and the collateral-estoppel component of the Double Jeopardy Clause to exclude in all circumstances, as Dowling would have it, relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted.

Dowling, 493 U.S. at 347-8.

Thus, each of the four 404(b) factors has been satisfied, the evidence does not offend the Double Jeopardy or Due Process clauses and, accordingly, the Court finds that the motion in limine will be denied.

Conclusion

Based upon the foregoing analysis, Defendant's Motion in Limine is not well taken.

Accordingly,

IT IS HEREBY ORDERED that Defendant Dillon's Motion in Limine, [Doc. No. 2975], is **DENIED**.

Dated this 1st day of March, 2021.

HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

No. 22-2415

United States of America

Plaintiff - Appellee

v.

Michael Grady

Defendant - Appellant

No. 22-2447

United States of America

Plaintiff - Appellee

v.

Oscar Dillon, III, also known as Ant, also known as Chest, also known as Muscles

Defendant - Appellant

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

Submitted: September 21, 2023
Filed: December 19, 2023

APPENDIX C

Before SHEPHERD, KELLY, and STRAS, Circuit Judges.

SHEPHERD, Circuit Judge.

Michael Grady and Oscar Dillon, III were convicted of (1) conspiracy to distribute and possession with intent to distribute cocaine and heroin, in violation of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A), (2) attempted obstruction of justice, in violation of 18 U.S.C. § 1512(c)(2), and (3) conspiracy to commit money laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i), (h). Grady and Dillon were sentenced to 226 and 187 months' imprisonment, respectively, and each to 5 years of supervised release. On appeal, they challenge the district court's[1] denial of their motion to dismiss the indictment on Speedy Trial Act grounds and admission of prior criminal history at trial. They also assert that the evidence was insufficient to support their convictions. Grady separately challenges the district court's denial of his motion to substitute counsel of his choice. Having jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

This case is the product of an investigation into a large-scale drug operation run by Derrick Terry that led to the indictment of 34 criminal defendants, including Grady and Dillon. Terry's organization bought and sold cocaine and heroin in St. Louis, Missouri. Grady and Dillon, who worked at a paralegal and consulting company, began aiding the organization in 2014 by drafting a motion for early termination of Terry's supervised release for a prior conviction. Thereafter, they would conduct intelligence about potential government informants by attending court proceedings and researching court and arrest records. This allowed them to counsel Terry about whom he should trust, and Terry used this information to enhance his relationships with other drug dealers.

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[1]The Honorable Henry E. Autrey, United States District Judge for the Eastern District of Missouri.

APPENDIX C

After Terry was indicted in January 2016, he met with Appellants at an Applebee's restaurant to discuss his best plan of action. Appellants encouraged Terry to throw his phones away and flee for 18 months to 2 years. They reasoned that by allowing the other defendants' cases to play out, the Government would likely have fewer cooperating witnesses against Terry for two reasons: his codefendants' plea deals would probably be solidified, and some defendants might fear that cooperating against Terry may lead him to hurt their families. The three men also discussed the possibility of retaining an attorney for Terry, which led to a series of financial transactions between Appellants and Terry. Terry made multiple payments to Appellants using drug proceeds with instructions that the money be delivered to Beau Brindley, an attorney, as a retainer securing his representation. Terry made one $50,000 payment to Grady shortly after Terry was indicted to prevent its seizure by law enforcement should he be arrested. Shortly thereafter, he directed his associate, Stanford Williams, to make another $10,000 payment through Terry's girlfriend, Charda Davis, to Appellants to give to Brindley.

Appellants, along with several others, were charged on December 1, 2016, in the Fourth Superseding Indictment, and a witness-tampering charge was later added against Grady in the Fifth Superseding Indictment on December 20, 2018. After each indictment in this case, including the Fourth and Fifth Superseding Indictments, the magistrate judge[2] continued the trial, with no objections, beyond the limits imposed by the Speedy Trial Act. She did so based on her finding that the case was complex and therefore the ends of justice outweighed the interest in a speedy trial.

On October 6, 2017, Dillon filed a motion to sever his case from his codefendants. The Government opposed the motion and recommended that a ruling on the motion be reserved for a later time when it was clear which defendants would be proceeding to trial. The magistrate judge took the motion under submission and

[2]The Honorable Nannette A. Baker, United States Magistrate Judge for the Eastern District of Missouri, now retired.

reserved a ruling on it until after a ruling was issued on Dillon's previously filed motion to dismiss the indictment.

At Appellants' arraignment on the Fifth Superseding Indictment on February 7, 2019, it became clear that the Government might seek to try Dillon and Grady together. At the same arraignment, the magistrate judge acknowledged her prior case complexity finding, and, in a subsequent order on February 11, 2019, reaffirmed the case's complexity, finding that the ends of justice necessitated continuing the trial. Recognizing that a significant amount of time had passed since Dillon's motion to sever, the magistrate judge later ordered the Government to file a supplemental brief on the severance motion by June 28, 2019, and ordered Dillon's response by July 5, 2019.

In its supplemental brief, the Government requested severance of Appellants' trial from the other codefendants, and Appellants filed no response. Before any ruling on the motion to sever, on November 26, 2019, Appellants jointly moved to dismiss the indictment, claiming violations of the Speedy Trial Act. The district court, adopting and incorporating the report and recommendation from the magistrate judge, denied that motion and granted the motion to sever Appellants from the remaining codefendants. In recommending denial of the motion to dismiss, the magistrate judge emphasized that Appellants had never objected to any of the prior complex-case designations, and the district court highlighted "[t]he volume of motion practice and briefing" and "the need for numerous hearings" in affirming that the case remained complex. In prior findings, the magistrate judge recognized several factors contributing to case complexity, including voluminous discovery with a "high volume of electronic data" from cell phones, evidence from a two-year investigation into this drug trafficking organization, 34 defendants and 56 counts, and the general nature of the conspiracy charges.

In December 2020, about three months before trial, Grady renewed a motion he previously brought in 2017 to substitute Brindley as his counsel. The magistrate judge had denied this motion in 2017, recognizing a serious potential conflict. In

ruling on the renewed motion, the district court found the potential conflict of interest unwaivable, despite Grady's conflict waiver, as Brindley previously represented Terry—the Government's primary cooperating witness against Grady. Moreover, the events surrounding Grady's money laundering conspiracy charge concerned a retainer that had been paid to Brindley on Terry's behalf. The district court also cited case management concerns with the trial date soon approaching. Thus, the district court denied Grady's motion.

During the trial in March 2021, the district court admitted evidence about Dillon's involvement with another drug organization that occurred after the conduct alleged in this case but before he was indicted. Dillon was caught signing for a package of cocaine on September 7, 2016, during an extensive investigation into a wholly unrelated drug organization. Upon his arrest, officers seized two cell phones that contained phone call records and text messages between individuals relevant to this case, internet browser history, and downloaded court documents. The cell phones and evidence of the investigation leading to the arrest and seizure of the phones were admitted against Dillon at trial. Additionally, the district court admitted under Federal Rule of Evidence 404(b) Grady's prior heroin conspiracy conviction where he purchased a large amount of heroin for a courier to transport from California to Missouri.

Grady and Dillon were convicted by a jury, and they were sentenced to 22(and 187 months' imprisonment, respectively. Appellants jointly moved for a judgment of acquittal or a new trial, which the district court denied. This appeal follows.

II.

We first address Appellants' challenge to the district court's denial of their November 2019 motion to dismiss the indictment on Speedy Trial Act grounds. They allege that over 120 nonexcludable days passed in violation of the Act's time limit. We review the "district court's legal conclusions de novo, its factual findings

for clear error, and its ultimate [Speedy Trial Act ruling] for an abuse of discretion." United States v. Porchay, 651 F.3d 930, 935 (8th Cir. 2011). Specifically, "[a] judge's finding that a continuance would best serve the ends of justice is a factual determination" reviewed for clear error. United States v. Villarreal, 707 F.3d 942, 953 (8th Cir. 2013).

Under the Speedy Trial Act, a federal criminal trial must "begin within 70 days of the filing of an information or indictment or the defendant's initial appearance." Zedner v. United States, 547 U.S. 489, 497 (2006); 18 U.S.C. § 3161(c)(1). However, the Act allows a district court to exclude certain periods of delay from this time limit. Zedner, 547 U.S. at 497. If, after delay is properly excluded under the Act, more than 70 days have passed without a trial, the district court must dismiss the indictment on the defendant's motion. United States v. Herbst, 666 F.3d 504, 509 (8th Cir. 2012).

Three statutory exclusions are relevant to this appeal. The first exclusion is 18 U.S.C. § 3161(h)(1)(H), which allows for a maximum of 30 days' delay to be excluded where such delay is "reasonably attributable to any period . . . during which any proceeding concerning the defendant is actually under advisement by the court." Next is § 3161(h)(6), which excludes "[a] reasonable period of delay" attributable to "a codefendant as to whom the time for trial has not run and no motion for severance has been granted." The final relevant exclusion is § 3161(h)(7)(A), which permits a district court to exclude:

> Any period of delay resulting from a continuance granted by any judge . . . 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.

The Act provides a non-exhaustive list of factors for a district court to consider in making its ends-of-justice finding, including:

> Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits . . . .

18 U.S.C. § 3161(h)(7)(B)(ii).

Appellants assert that a period of 120 nonexcludable days had passed between the Government's request to sever and Appellants' motion to dismiss the indictment based on Speedy Trial Act violations, after excluding 30 days under § 3161(h)(1)(H) while the magistrate judge took the Government's request under advisement. The Government asserts that this 120-day period was excludable based on both the then-extant ends-of-justice continuance granted under § 3161(h)(7) and the ongoing pretrial motion practice of codefendants, excludable under § 3161(h)(6). Appellants maintain, however, that neither § 3161(h)(6) nor § 3161(h)(7) could justify excluding those days.

Regarding § 3161(h)(6), Appellants explain that when the Government requested to sever Appellants' cases from the remaining codefendants, delay could not be excluded under § 3161(h)(6) because it was no longer reasonable to attribute any delay caused by those codefendants to Grady and Dillon. We address only the ends-of-justice continuance, as we find it dispositive, saving for another day the issue raised by Appellants with respect to § 3161(h)(6). Their argument against excluding time under § 3161(h)(7) is twofold: (1) when the Government requested to sever, the case was no longer complex, and thus, any reliance on the *prior* complexity of the case to justify excluding time under an ends-of-justice continuance was clearly erroneous, and (2) even if it was not clearly erroneous, the Speedy Trial Act does not permit the kind of open-ended ends-of-justice continuance issued by the district court; rather, there must be a defined end date. Thus, they maintain that 120 nonexcludable days had passed, in violation of the statute's 70-day limit.

APPENDIX C

This Court has never addressed whether ends-of-justice continuances granted under § 3161(h)(7) may be open ended, but we see no need to address the issue now. The continuances, while accompanied by no express end date, were effectively limited in time, as they were regularly reevaluated. Cf. United States v. Wasson, 679 F.3d 938, 948 (7th Cir. 2012) (finding no speedy trial violation for multiple ends-of-justice continuances because district court reassessed complexity and the need for a continuance throughout the case); United States v. Hill, No. 17CR310, 2020 WL 4819457, at *7 (E.D. Mo. July 27, 2020) (excluding delay from initial complex-case finding through trial commencement because the court "continued to evaluate whether the case continued to be appropriately designated as complex as well as the propriety of continuing the exclusion of delays due to complexity"); United States v. Lattany, 982 F.2d 866, 875-76, 880 (3d Cir. 1992) (finding no Speedy Trial Act violation with an open-ended continuance that was "extended" six months later with no additional explanation other than that given with the grant of the original continuance). Throughout this case, the district court reaffirmed the complexity, and thus the need for an ends-of-justice continuance, including two months after the Fifth Superseding Indictment, and again in ruling on the motion to dismiss.[3] Cf. Wasson, 679 F.3d at 948 (rejecting Appellant's argument that the district court relied on prior complexity finding in granting additional continuance and upholding multiple ends-of-justice continuances where the district court "assured itself not only that the case remained complex, but that the complexity and the changing nature of the case warranted the [additional] continuance").

We disagree with Appellants' contention that this was no longer a complex case, and we find no clear error with the district court's findings in this respect.

[3]Moreover, the district court continued, after denying Appellants' motion to dismiss, to acknowledge the need for an ends-of-justice continuance. Indeed, just one week after denying this motion, the district court set a trial date. The trial was continued again because of the threat to public health posed by the COVID-19 pandemic. While the issuance of these later continuances was not objected to or raised on appeal, they further highlight the district court's continuing consideration of whether ends-of-justice continuances were necessary and an understanding that ends-of-justice continuances require on-the-record factual findings.

While the district court certainly referenced its previous complexity findings, its reasons for finding that the case remained complex in its denial of Appellants' motion to dismiss—a high volume of discovery, motions, and hearings—reflect its understanding that a complicated trial would likely ensue. Indeed, this prediction was correct. Appellants' trial lasted 12 days and involved around 400 exhibits outlining Appellants' multi-year involvement in Terry's extensive drug operation—evidenced by the several dozen individuals initially indicted in this case, some with death-penalty eligibility—that sourced its drugs internationally. See, e.g., United States v. Fogarty, 692 F.2d 542, 546 (8th Cir. 1982) (agreeing with district court that a case was complex because it included several codefendants, unindicted coconspirators, and overt acts occurring in multiple states and countries); cf. United States v. Cooke, 853 F.3d 464, 472 (8th Cir. 2017) (suggesting, in the Sixth Amendment speedy trial context, that a case was complex where it involved "several coconspirator defendants, voluminous discovery, several requests from defendants for continuances, and motions for both [appellants'] counsel to withdraw"). Accordingly, the district court did not clearly err in designating this case as complex, and therefore its issuance of an ends-of-justice continuance was appropriate under these unique circumstances. Thus, the period of delay with which Appellants take issue was excludable under § 3161(h)(7). Finding no abuse of discretion, we affirm the district court's denial of the motion to dismiss on Speedy Trial Act grounds.

III.

Dillon and Grady both assert that the district court erred in admitting certain "bad act" evidence at trial. We review the district court's admission of this evidence for an abuse of discretion, United States v. Dorsey, 523 F.3d 878, 879 (8th Cir. 2008), and "will reverse only when the evidence clearly had no bearing on the case and was introduced solely to show defendant's propensity to engage in criminal misconduct," United States v. Walker, 428 F.3d 1165, 1169 (8th Cir. 2005).

APPENDIX C

A.

We turn first to Dillon's challenge. On September 7, 2016—after the conduct that led to his conviction in this case, but before he was indicted—Dillon was arrested for receiving a package of cocaine during an investigation into an unrelated drug operation. During a search incident to his arrest, officers found cell phones containing information pertinent to this case: call records, internet search history, and text messages to several individuals involved in the Terry organization, including Grady and Terry. Before he was tried in the instant case, Dillon was acquitted of the charges relating to his September 7 arrest.

The district court admitted exhibits and testimony about the investigation as well as relevant information obtained from the cell phones as intrinsic evidence, or alternatively under Federal Rule of Evidence 404(b) as probative of Dillon's knowledge and intent regarding drug conspiracies. Dillon argues that the evidence from the September 7 arrest was neither intrinsic nor admissible under Federal Rule of Evidence 404(b) because it was irrelevant, used for an improper propensity argument, and was unfairly prejudicial under Federal Rule of Evidence 403. While we agree that the evidence concerning the September 7 arrest is not intrinsic, we disagree with Dillon's Rule 404(b) and 403 arguments.

Other bad act evidence is generally admissible so long as it is intrinsic or being offered for a non-propensity purpose under Federal Rule of Evidence 404(b). United States v. Vaca, 38 F.4th 718, 720-21 (8th Cir. 2022). A bad act is intrinsic where the "act itself is part of the 'charged offense.'" Id. (citation omitted). Intrinsic evidence is that which "completes the story" of the charged crime, "logically . . . prove[s] any element," or in some cases, "shows consciousness of guilt." Id. at 721 (first alteration in original). Dillon's September 7 arrest for his involvement with an unrelated drug organization does not complete the story of the crime charged here, and it is therefore not intrinsic evidence.

Nevertheless, under Federal Rule of Evidence 404(b), extrinsic bad act evidence is admissible for a non-propensity purpose—that is, for any reason other than "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). Rule 404(b) allows for admission of "other act" evidence "if it is (1) relevant to a material issue; (2) similar in kind and close in time to the crime charged; (3) proven by a preponderance of the evidence; and (4) if the potential prejudice does not substantially outweigh its probative value." United States v. Vega, 676 F.3d 708, 719 (8th Cir. 2012) (citation omitted). Dillon challenges only the first and fourth elements.

Dillon briefly suggests that the September 7 cocaine delivery is irrelevant to his knowledge and intent because the delivery occurred after the conduct charged here. But the fact that Dillon's September 7 arrest occurred later is of no consequence because Rule 404(b) embraces not only prior acts but subsequent conduct. See United States v. Thomas, 593 F.3d 752, 758-59 (8th Cir. 2010) (permitting admission of subsequent drug activity occurring four years after the charged conduct because "[c]onsidering the similarities . . . we cannot say the mere passage of four years' time renders the evidence irrelevant to show knowledge or intent"); United States v. Johnson, 934 F.2d 936, 939-40 (8th Cir. 1991) (permitting the admission under Rule 404(b) of two drug transactions that occurred weeks after the charged conduct as probative of the defendant's knowledge and intent). Specifically, subsequent drug activity may be probative of an individual's knowledge or intent regarding a drug trafficking organization. Johnson, 934 F.2d at 940 (explaining that a subsequent drug deal could counter a defendant's assertion that he had no knowledge of drug distribution or did not possess the requisite intent).

Here, the evidence relating to Dillon's September 7 arrest was relevant to his knowledge of drug conspiracies and law enforcement investigations and his intent to participate in these types of organizations. While Dillon claims that his involvement in the unrelated organization was irrelevant because his roles were entirely different (i.e., on September 7, he signed for a drug shipment, and in this

case, he helped conduct intelligence operations), the evidence still largely reflects his general knowledge of drug distribution schemes and intent to join these organizations.

Indeed, the facts of this case show why. Dillon's defense was that he was a paralegal who assisted Terry but did not know about the drug operation itself. By signing for a drug shipment, even though it was unconnected to Terry's conspiracy, he showed that he knew about drug dealing, was involved in it personally, and knew that he was not assisting Terry with innocent activities. See United States v. Croghan, 973 F.3d 809, 824 (8th Cir. 2020) ("The threshold for relevance is quite minimal." (citation omitted)). In other words, it went to his knowledge that he was a participant in a drug conspiracy and he intended his actions to further it.

Finally, the prejudicial effect of the evidence surrounding Dillon's September 7 arrest did not substantially outweigh its probative value.[4] After a careful articulation of the probative value of this evidence, the district court determined that the potential prejudice did not outweigh the probative value. We agree, and "[t]he district court was in the best position to make this determination, particularly in light of its familiarity with the facts surrounding the subsequent transaction[]." Johnson, 934 F.2d at 941. Moreover, the district court's recitation of a limiting instruction to the jury "reduc[ed] the likelihood that such evidence would be improperly used." Id. (approving of a limiting instruction that "cautioned the jury to consider the subsequent act evidence only to evaluate [defendant's] state of mind or intent, not to determine his innocence or guilt of the charged offense"). Accordingly, the district

[4]We note that "[t]he same analysis applies to [Dillon's] claim that the evidence should be excluded under Federal Rule of Evidence 403 because its probative value is substantially outweighed by the danger of unfair prejudice." Johnson, 934 F.3d at 941 n.7; see also United States v. Maxwell, 643 F.3d 1096, 1102 (8th Cir. 2011) ("In cases in which a defendant argues that both rules prohibit the admission of certain evidence, there is no practical difference whether we analyze the Rule 403 claim separately or instead as a subpart of Rule 404(b).").

court did not abuse its discretion in admitting evidence relating to Dillon's September 7 arrest.

B.

Grady also challenges the admission under Rule 404(b) of his heroin conspiracy conviction in 2000, arguing that it was irrelevant, not similar in kind to the charged conduct, and too remote in time. We disagree.

First, Grady's prior conviction is relevant because "[i]t is settled in this circuit that 'a prior conviction for distributing drugs, and even the possession of user-quantities of a controlled substance, are relevant under Rule 404(b) to show knowledge and intent to commit a current charge of conspiracy to distribute drugs.'" United States v. Robinson, 639 F.3d 489, 494 (8th Cir. 2011) (citation omitted). Grady's prior conviction is similar in kind to the current offense because it also involved a cross-state drug conspiracy with participants of varying responsibility. His argument at trial was that he innocently provided services to Terry without appreciating the true nature of the business, which his prior drug trafficking conviction made less believable. Cf. United States v. Cassiere, 4 F.3d 1006, 1022 (1st Cir. 1993) (holding that evidence of "mastermind[ing]" a land flip was admissible under Rule 404(b) in a trial for fraudulent land flips in which the defendant played a different role). Introducing it, in other words, had a non-propensity purpose.

Regarding remoteness, while Grady was convicted 16 years before he was charged in the instant case, he had been out of prison for less than seven years when he began aiding Terry's drug organization, and thus we find the prior offense was not too remote in time to be admitted. See United States v. Walker, 470 F.3d 1271, 1275 (8th Cir. 2006) (finding that conduct occurring 18 years prior to the currently charged conduct not too remote where, after discounting the time defendant spent in prison, there were only eight years "separating the prior offense and the charged offense").

Finally, while all Rule 404(b) evidence may, by its nature, be prejudicial, United States v. Cook, 454 F.3d 938, 941 (8th Cir. 2006), Grady's prior conviction is not so prejudicial as to substantially outweigh its probative value. See United States v. Gaddy, 532 F.3d 783, 789-90 (8th Cir. 2008). Moreover, the district court instructed the jury that it should only consider this prior conviction for the limited purposes of intent, knowledge, or absence of mistake. United States v. Halk, 634 F.3d 482, 488 (8th Cir. 2011) (explaining that limiting instruction immediately before introduction of 404(b) evidence minimized risk of unfair prejudice). Accordingly, the district court did not abuse its discretion in admitting Grady's prior heroin conspiracy conviction in the instant case involving a drug conspiracy.

IV.

Appellants further argue that the district court erred in denying their joint motion for a judgment of acquittal because the evidence was insufficient to support their convictions. We address each of Appellants' convictions separately, reviewing the evidence de novo and "in the light most favorable to the verdict." United States v. Muhammad, 819 F.3d 1056, 1060 (8th Cir. 2016). Notably, though, we do not review the credibility of witnesses on appeal from the denial of a judgment of acquittal. Id.

A.

To be guilty of conspiracy to distribute drugs, the Government was required to prove "(1) that there was a conspiracy, i.e., an agreement to distribute the drugs; (2) that the [Appellants] knew of the conspiracy; and (3) that the [Appellants] intentionally joined the conspiracy." United States v. Polk, 715 F.3d 238, 246 (8th Cir. 2013) (citation omitted). Conspiracies may be proven with wholly circumstantial evidence or by inference from the parties' actions. United States v. Sparks, 949 F.2d 1023, 1027 (8th Cir. 1991).

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Appellants assert that there was insufficient evidence to support their convictions for conspiracy to distribute cocaine and heroin. They specifically argue that the Government failed to prove that they intentionally joined Terry's conspiracy because they had no stake in the drug organization; their provision of information to Terry was merely a buyer-seller agreement insufficient to tie them to the conspiracy. We disagree.

First, Appellants' reliance on precedent regarding buyer-seller agreements is misplaced. In those cases, we have specifically explained that evidence of a single *drug* sale, "without more, is inadequate to tie the buyer to a larger conspiracy." United States v. Conway, 754 F.3d 580, 591 (8th Cir. 2014); see also United States v. Shelledy, 961 F.3d 1014, 1019 (8th Cir. 2020) ("[W]e have emphasized that such 'buyer-seller' cases 'involve[] only evidence of a single transient sales agreement and small amounts of drugs consistent with personal use.'" (second alteration in original) (citation omitted)). Appellants' involvement with Terry was not a buyer-seller relationship as contemplated in Conway because documents and information were being exchanged for money, not drugs. Further, we disagree with Appellants' assertion that they had no stake in the drug organization because Terry paid them for their services, which aided him in his relationships with other dealers Thus, Appellants had a pecuniary interest in the organization's outcome. See United States v. Bewig, 354 F.3d 731, 736 (8th Cir. 2003) (finding that defendant had a stake in the organization's outcome sufficient to tie him to the conspiracy where he "made the supplying of a necessary ingredient to illegal drug production a continuing part of his business").

"[G]uilt may exist even when the defendant plays only a minor role and does not know all the details of the conspiracy." Polk, 715 F.3d at 246 (citation omitted). Moreover, "[a] drug conspiracy may involve ancillary functions (*e.g.*, accounting, communications, strong-arm enforcement), and one who joined with drug dealers to perform one of those functions could be deemed a drug conspirator." Id. (citation omitted). "[A] variety of conduct, apart from selling [drugs], can constitute participation in a conspiracy sufficient to sustain a conviction." Id. at 244, 246-47

(alterations in original) (citation omitted) (finding sufficient evidence for defendant's marijuana-conspiracy conviction where he "obtained and rented homes according to [the manufacturer's] specifications to sustain the [drug] operations" and assured the manufacturer that the owner of one of the homes "was cool" and could be trusted). Here, the evidence showed that Appellants provided Terry with information about individuals through various court documents and proceedings to counsel Terry on which individuals he could trust. In turn, this helped Terry cultivate important relationships to sustain the organization's drug distribution. Viewing this evidence in the light most favorable to the verdict, a reasonable jury could conclude that Appellants intentionally joined the conspiracy in ancillary, intelligence-gathering roles. Thus, there was sufficient evidence to support their drug conspiracy convictions.

B.

We turn next to Appellants' convictions for conspiracy to launder money. A money laundering conspiracy conviction requires the Government to show that Appellants "knowingly joined a conspiracy to launder money and that one of the conspirators committed an overt act in furtherance of that conspiracy." United States v. Pizano, 421 F.3d 707, 725 (8th Cir. 2005) (citation omitted). This requires a conspiratorial agreement that "need not be formal; a tacit understanding will suffice." Id. at 725-26 (citation omitted). Money laundering requires proof of four elements:

> (1) [D]efendant conducted, or attempted to conduct a financial transaction which in any way or degree affected interstate commerce or foreign commerce; (2) the financial transaction involved proceeds of illegal activity; (3) defendant knew the property represented proceeds of some form of unlawful activity; and (4) defendant conducted or attempted to conduct the financial transaction knowing the transaction was "designed in whole or in part [] to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of specified unlawful activity."

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United States v. Phythian, 529 F.3d 807, 813 (8th Cir. 2008) (second alteration in original) (quoting 18 U.S.C. § 1956(a)(1)(B)(i)).

Appellants argue that there was insufficient evidence to prove part of the fourth element—that the transaction's purpose was to conceal an attribute of the unlawful proceeds. See United States v. Slagg, 651 F.3d 832, 845 (8th Cir. 2011) ("[T]he statute's 'design' element 'requires proof that the purpose—not merely effect—of the [transaction] was to conceal or disguise a listed attribute' of the funds." (quoting Cuellar v. United States, 553 U.S. 550, 567 (2008))). Specifically, they allege that the Government's case rested entirely on the fact that Terry gave Appellants cash to pay Brindley's retainer.

Appellants correctly acknowledge that the use of cash alone is insufficient to establish the designed-to-conceal element and that the money laundering statute risks becoming a "money spending statute" if construed too broadly. See id. (citation omitted). Importantly, though, the statute explains that "concealment need not be the sole purpose of the transaction." Id. at 845 n.9 (citing 18 U.S.C. § 1956(a)(1)(B)). Our analysis in Slagg is helpful here. In Slagg, a bail-posting transaction using illicit funds was at issue. Id. at 844. We found that there was sufficient evidence for a reasonable jury to infer that the designed-to-conceal element was met, and we rejected the defendant's argument that the evidence only allowed an inference that the "purpose of the agreement was to bail him out of jail." Id. at 845-46. Specifically, there was evidence of recorded phone calls during which the defendant discussed the risks of the money disappearing, i.e., being seized as drug proceeds, and the use of a bail bondsman to post bail. Id. We found this evidence was sufficient to support an inference that the defendant "knew that his cohorts planned to conduct the transaction in such a way as to 'conceal or disguise the nature, . . . the source, the ownership or the control' of the money," id. at 846 (alteration in original), citing a First Circuit case that held "the use of a third party to disguise the true owner" was sufficient to prove intent to disguise or conceal, United States v. Cruzado-Laureano, 404 F.3d 470, 483 (1st Cir. 2005).

Here, Terry testified that the Government would seize drug money if it knew of its illicit nature and that he wanted to give the cash to Appellants before it could be seized. He also testified that he did not think Grady would tell police that the money came from him. Appellants were aware of Terry's indictment and need for an attorney, evidenced by the Applebee's meeting at which they discussed methods for Terry to evade law enforcement. Appellants then accepted multiple cash advances from Terry to pay Brindley, the chosen attorney. This evidence is sufficient for a reasonable jury to infer that Appellants knew that the purpose of their receipt of cash sums from Terry to be paid to the attorney was to conceal. Accordingly, we uphold their money laundering conspiracy convictions.

C.

Appellants were also convicted of attempting to obstruct an official proceeding, in violation of 18 U.S.C. § 1512(c)(2). This statute "makes it a crime to corruptly 'obstruct[], influence[], or impede[] any official proceeding, or attempt[] to do so.'" United States v. Petruk, 781 F.3d 438, 444 (8th Cir. 2015) (alterations in original) (quoting 18 U.S.C. § 1512(c)(2)).

Section 1512(c)(2) requires that Appellants knew their conduct would likely affect an official proceeding. See id. at 445; cf. United States v. White Horse, 35 F.4th 1119, 1122-23 (8th Cir. 2022) (holding that under § 1512(c)(1), which is analogous to § 1512(c)(2), a defendant must "know[] that he is likely to accomplish his intention to 'impair [an] object's integrity or availability for use in an official proceeding'" (second alteration in original) (citation omitted)). Implicit in this mens rea requirement is that their conduct would have the "natural and probable effect" of "obstruct[ing], influenc[ing], or imped[ing] any official proceeding." See Petruk, 781 F.3d at 444-45 (citing United States v. Aguilar, 515 U.S. 593, 599 (1995)); White Horse, 35 F.4th at 1122-23 ("[A] person cannot *know* that his action is likely to affect an official proceeding unless his action is, in fact, likely to affect an official proceeding.").

Appellants allege that the evidence was insufficient to prove that their conduct would impact an official proceeding. Specifically, they claim that because Terry was a sophisticated drug dealer with independent knowledge of methods to evade his criminal indictment, Appellants' advice to flee St. Louis could not have had the probable effect of causing Terry to flee. We disagree, as we have upheld a jury conviction under § 1512(c)(2) in circumstances analogous to those here. See United States v. Mink, 9 F.4th 590, 610 (8th Cir. 2021) (finding sufficient evidence for jury conviction where defendant instructed his father to destroy evidence in his home after a law enforcement search and to sign a false affidavit, and defendant "expressly acknowledged that the government was building a case against him . . . [and] explained how the affidavit would detrimentally affect the Government's case").

Terry testified that he learned about his indictment shortly before meeting Appellants at Applebee's. Prior to the meeting, Terry explained, he was so distraught by the charges that he planned to avoid criminal prosecution by engaging in gunfire with officers, hoping that he might be killed. At the Applebee's meeting, though, Appellants explained to Terry that he could fight the charges in court. They advised that it would be advantageous for Terry to leave town for 18 to 24 months to allow time for his numerous codefendants to enter into plea agreements with the Government. Moreover, Appellants advised that if Terry was not in the Government's custody, fewer witnesses might cooperate against him for fear that Terry might harm their families. Terry testified that upon Appellants' advice, he left town. Appellants also met with Stanford Williams, a close associate of Terry, and discussed this plan.

With this testimony in mind, Appellants' advice to Terry was not only likely to affect an official proceeding, but it ultimately *did* impact an official proceeding the advice caused Terry flee St. Louis, which allowed him to initially evade arrest. Moreover, Appellants showed up to the meeting with Terry's indictment and explained in detail the rationale for why Terry should leave St. Louis. Just as the defendant in Mink explained how signing a false affidavit would negatively impact the Government's case, Appellants explained how Terry absconding would

negatively impact the Government's case. Thus, we are persuaded that when viewed in the light most favorable to the verdict, Appellants' advice to Terry to abscond indicated that they knew their actions were likely to affect an official proceeding. Accordingly, there was sufficient evidence for the jury to convict Grady and Dillon.

V.

Finally, Grady asserts that the district court impermissibly denied him his constitutional right to counsel of his choice in denying his renewed motion to substitute counsel because of a serious potential conflict. We disagree and find that the district court did not abuse its discretion. See Wheat v. United States, 486 U.S. 153, 163-64 (1988) (suggesting deferential, abuse-of-discretion standard on review of a district court's denial of a substitution motion because of a conflict of interest)

While the Sixth Amendment guarantees a defendant the right to counsel of his choice, this right "is circumscribed in several important respects." Id. at 159. One such limitation arises with conflicts of interest. Id. at 159-60, 164 ("District [c]ourt[s] must recognize a presumption in favor of [defendant's] counsel of choice, but that presumption may be overcome . . . by a showing of a serious potential for conflict."). Where there are possible conflicts of interest, a court "must take adequate steps to ascertain whether the conflicts warrant separate counsel." Id. at 160. While a defendant may waive his right to conflict-free counsel, United States v. Edelmann, 458 F.3d 791, 807 (8th Cir. 2006), district courts are afforded "substantial latitude" to refuse a waiver when faced with a serious potential conflict, Wheat, 486 U.S. at 163-64 (finding that the district court did not abuse its discretion in refusing representation by counsel who represented or previously represented two coconspirators and would have likely needed to cross-examine a former client and noting that district courts must pass on the waiver issue without the "wisdom of hindsight after the trial has taken place"). This evaluation is "left primarily to the informed judgment of the trial court." Id. at 163-64 (concluding that the district court acted within its discretion to deny substitution of counsel where it "was confronted not simply with an attorney who wished to represent two coequal

defendants in a straightforward criminal prosecution" but instead "proposed to defend three conspirators of varying stature in a complex drug distribution scheme"). In evaluating the particular circumstances, a district court should "carefully balance" the right to counsel of choice with the "interest in 'the orderly administration of justice.'" United States v. Cordy, 560 F.3d 808, 815 (8th Cir. 2009) (citation omitted). Importantly, "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." Wheat, 486 U.S. at 160.

After previously being denied counsel of his choice, Grady renewed his motion to substitute Brindley as his counsel. In denying his motion, the district court recounted much of the magistrate judge's initial denial because several important facts remained relevant. Specifically, the nature of the money laundering conspiracy charges directly related to the payments Appellants made to Brindley as a retainer to represent Terry. Indeed, Brindley had represented Terry in the instant case for several months before Grady was indicted. Naturally, then, Terry's testimony at trial about the money-laundering charge repeatedly referenced Brindley by name. Brindley was eventually disqualified from representing Terry because of an unwaivable, serious potential conflict—namely, his and Grady's "long-standing professional relationship" in which Grady would refer clients to Brindley and Brindley would outsource investigative work to Grady. Shortly after that disqualification and Grady's eventual indictment, Brindley sought to represent Grady. He maintained that, despite representing Terry for several months and never returning his substantial retainer, he learned no confidential information that would impact his ability to represent Grady. Exactly one week after the hearing on the motion to represent Grady, Brindley entered his appearance in a separate case in which Grady was indicted, but this time for a different codefendant. Noting this "tangled web," the magistrate judge disqualified Brindley from representing Grady, despite Grady's conflict waiver.

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In addition to the ongoing potential conflict, the district court also acknowledged the practical difficulties with counsel substitution so close to trial where Grady had been appointed counsel. Because the trial was near and the case involved numerous defendants, some of whom might testify, and due to the need to expeditiously resolve the case because of the COVID-19 pandemic, substitution would interfere with the "orderly administration of this case." Grady makes much of the district court's discussion about the possibility of this attorney being called as a witness, explaining that the Government clarified that it had no intention to call him. But, as the Second Circuit noted:

> Even if the attorney is not called, however, he can still be disqualified, since his performance as an advocate can be impaired by his relationship to the events in question. . . . Moreover, his role as advocate may give his client an unfair advantage, because the attorney can subtly impart to the jury his first-hand knowledge of the events without having to swear an oath or be subject to cross-examination.

United States v. Locascio, 6 F.3d 924, 933 (2d Cir. 1993). We see no abuse of discretion with the district court's refusal to allow Grady to substitute counsel for Brindley, an attorney who was involved in the events leading to Grady's criminal charge. Evidence at trial suggested that Brindley accepted money that was proceeds of a drug trafficking organization. It appeared, therefore, that Brindley's loyalties were divided: his plan was to defend Grady at trial, yet he also needed to protect himself from accusations that might, at a minimum, affect his license to practice law. We echo the sentiments of the district court that "[a]n outsider looking at the proceedings thus far may query why [the attorney] so strenuously seeks to continue representation of [Grady]."

Relatedly, Grady argues that the district court could have alleviated any concern about attorney conflict by allowing the attorney to represent him, but accepting independent, conflict-free counsel to cross-examine Terry. But the district court was well within its discretion to deny this alleged "prophylactic" measure. While Grady is correct that we have previously held that "the chosen method for

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dealing with a potential conflict . . . is the one which will alleviate the effects of the conflict while interfering the least with defendant's choice of counsel," United States v. Agosto, 675 F.2d 965, 970 (8th Cir. 1982), we are skeptical that his proposed solution would truly alleviate all effects of the serious potential conflict. Indeed, given the potential conflict with Terry, the Government's primary cooperating witness, multiple phases of the trial could be impacted, not simply cross-examination. See, e.g., United States v. Bikundi, 80 F. Supp. 3d 9, 20-21 (D.D.C. 2015) (rejecting the proposition to employ independent co-counsel for cross examination because the "conflict extend[ed] beyond just the cross-examination . . . and infect[ed] every aspect of the trial presentation"). Brindley would likely have had to factor Terry's anticipated testimony into the overall defense, and it is implausible that he could have walled himself off from all trial strategy involving Terry. In sum, because of the attorney's myriad entanglements in this case, the district court was within its discretion to deny Grady's motion for substitution of counsel.

VI.

For the foregoing reasons, we affirm.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2447

United States of America

Appellee

v.

Oscar Dillon, III, also known as Ant, also known as Chest, also known as Muscles

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:15-cr-00404-HEA-30)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

The motion to supplement the record is denied.

February 02, 2024

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans