No.

In the Supreme Court of the United States

MAHMOUD ALDISSI AND ANASTASSIA BOGOMOLOVA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS' APPENDIX (Volume 2 of 2)

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TABLE OF CONTENTS

Document **Tab**

Volume One

Volume Two

No. 15-14193 & 15-14194

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MAHMOUD ALDISSI and ANASTASSIA BOGOMOLOVA,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division
Case No. 8:14-cr-217, Hon. Virginia M. Hernandez Covington

APPELLANTS' BRIEF OF MAHMOUD ALDISSI AND ANASTASSIA BOGOMOLOVA

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case.

1. Adams, Natalie Hirt – Assistant United States Attorney;
2. Aldissi, Dr. Mahmoud ("Matt") – Defendant-Appellant;
3. Bentley, A. Lee, III – United States Attorney;
4. Bodnar, Roberta – Assistant United States Attorney, Appellate Division;
5. Bogomolova, Dr. Anastassia – Defendant-Appellant;
6. Burns, P.A. – Appellate counsel for Defendant-Appellant;
7. Burns, Thomas A. – Appellate counsel for Defendant-Appellant;
8. Cannons, Andrew – Victim;
9. Covington, Virginia M. Hernandez – United States District Judge;
10. Defense Advanced Research Projects Agency – Victim;
11. Department of Homeland Security – Victim;
12. Douglas, John – Victim;
13. Foster, Todd Alan – Trial counsel for Mahmoud Aldissi;
14. Gauthier, Ted – Victim;
15. Gershow, Holly L. – Assistant United States Attorney, Appellate Division;

16. Goudie & Kohn, P.A. – Trial counsel for Anastassia Bogomolova;

17. Goudie, Lyann – Trial counsel for Anastassia Bogomolova;

18. Gusev, Alex – Victim;

19. Jenkins, Elizabeth A. – United States Magistrate Judge;

20. Krigsman, Cherie – Assistant United States Attorney, Appellate Division;

21. Krishnaiyer, Ramesh – Victim;

22. Madonna, Bobbi – Trial counsel for Mahmoud Aldissi;

23. Mazyck, David – Victim;

24. Mills, Howard – Victim;

25. Missile Defense Agency – Victim;

26. NASA Office of General Counsel – Victim;

27. National Science Foundation – Victim;

28. O'Connor, Frank – Victim;

29. Office of the Secretary of Defense – Victim;

30. Palermo, Thomas Nelson – Assistant United States Attorney;

31. Peluso, Ernest F. – Trial counsel for Mahmoud Aldissi;

32. Rector, Ashley Nicole – Trial counsel for Mahmoud Aldissi;

33. Rhodes, David P. – Assistant United States Attorney, Chief, Appellate Division;

34. Rothstein-Youakim, Susan H. – Former Assistant United States Attorney, Appellate Division (now District Judge for the Second District Court of Appeal for the State of Florida);

35. Todd Foster, PLLC – Trial counsel for Mahmoud Aldissi;

36. U.S. Air Force Research Laboratory – Victim;

37. U.S. Army Aviation & Missile Command – Victim;

38. U.S. Department of Energy, Office of Science – Victim;

39. U.S. Department of Health & Human Services – Victim;

40. U.S. EPA Headquarters – Victim;

41. U.S. Naval Surface Warfare Center – Victim;

42. Valsarj, Kalliat – Victim;

43. Van Dort, Pamela L. – Assistant United States Attorney.

No publicly traded company or corporation has an interest in the outcome of this appeal.

February 21, 2017

/s/ Thomas Burns
Thomas A. Burns

STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellants Dr. Mahmoud "Matt" Aldissi and Dr. Anastassia Bogomolova ("the Scientists") request oral argument.

This appeal arises from an 18-day jury trial involving dozens of witnesses and reams of scientific evidence. It raises a novel issue: whether it is wire fraud to submit materially deceptive research proposals when the agencies always received the benefit of the bargains they solicited (i.e., the Scientists fully performed) and lost only their "right to control" which proposals to fund.

Other issues include: the refusal to give a conjunctive wire fraud instruction; the refusal to dismiss aggravated identity theft counts based on unconstitutional vagueness and insufficient evidence; the denial of a *Franks* motion and a motion to reopen *Miranda* and *Franks* hearings; sentencing enhancements based on loss calculation, number of victims, acting on behalf of educational institutions, special skill and sophisticated means, and obstruction of justice, the calculation of restitution, and unwarranted sentencing disparities; the denial of motions for mistrial; and the sufficiency of falsification-of-records evidence. Oral argument will assist the Court.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page(s)**

Statutes **Page(s)**

Regulations **Page(s)**

Rules **Page(s)**

Other Authorities **Page(s)**

TABLE OF ABBREVIATIONS

DCAA	Defense Contract Audit Agency;
EPA	Environmental Protection Agency;
NASA	National Aeronautics and Space Agency;
NSF	National Science Foundation;
OIG	Office of Inspector General;
PI(s)	Principal Investigator(s);
PSR	Pre-Sentence Investigation Report;
R&R	Report and Recommendation;
SBIR	Small Business Innovation Research;
STTR	Small Business Technology Program;
The Scientists	Defendants-Appellants Dr. Mahmoud "Matt" Aldissi and Dr. Anastassia Bogomolova.

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The District Court had subject-matter jurisdiction. 18 U.S.C. § 3231. This Court has appellate jurisdiction because the judgments (Docs. 337; 339) were timely appealed (Docs. 349; 350). 18 U.S.C. § 3742(a); 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Was the wire fraud evidence sufficient when the Scientists always intended to and did fully perform, the United States received the benefit of its bargains, the agencies lost only their "right to control" which scientists to fund (which is not itself a property interest), and Dr. Bogomolova did not prepare nonscientific parts of the proposals?

2. Did the District Court abuse its discretion when its disjunctive wire fraud instruction allowed the jury to find specific intent if the Scientists acted either for personal gain or to harm the United States?

3. Did the District Court err when it denied a motion to dismiss the indictment because the aggravated identity theft statute is unconstitutionally vague, and if not, was the evidence sufficient?

4. Did the District Court err when it denied the *Franks* motion or abuse its discretion when it denied a motion to reopen the *Miranda* and *Franks* hearings?

5. Did the District Court procedurally or substantively err by: allowing enhancements based on loss calculation, number of victims, acting on behalf of educational institutions, special skill and sophisti-

cated means, and obstruction of justice; miscalculating restitution; or creating unwarranted sentencing disparities?

6. Did the District Court abuse its discretion when it refused to strike "Mahmoud" from the indictment and other evidence or denied motions for mistrial about "fraud money" email headers, debarment, a "totally fraudulent" signature, and anthrax?

7. Was the falsification evidence sufficient?

STATEMENT OF THE CASE

This appeal is unique. Ordinarily, wire fraudsters trick victims to part with money or property, then abscond with the loot. But here, whenever the Scientists submitted materially deceptive proposals for research grants and contracts, they nevertheless always intended to and did fully perform.

Generally, schemes to *deceive* victims (i.e., without harming them) are different from schemes to *defraud* victims (i.e., by depriving them of the benefit of their bargains). The former is not wire fraud, whereas the latter is. Instead of prosecuting the Scientists for false statements in violation of 18 U.S.C. § 1001, however, the Government prosecuted them for wire fraud, aggravated identity theft, and falsification of records.

Course Of Proceedings

A. Indictment And Superseding Indictment

Dr. Aldissi was a highly esteemed polymer chemist who obtained more than 25 patents, published more than 100 peer-reviewed articles, earned a Ph.D. equivalent from the University of Limoges in France, performed his postdoctoral work on conductive polymers at the University of Pennsylvania, and worked at Los Alamos National Laboratory for a Nobel laureate. *E.g.*, Docs. 378.5 at 28-29, 41. Similarly, Dr. Bogomolova also was a highly esteemed molecular biologist who earned her Ph.D. in molecular biology from the Engelhardt Institute of Molecular Biology in Russia. Doc. 378.5 at 250. Together, the Scientists devoted their careers to researching conductive polymers (i.e., plastics that conduct electricity), which have important military and aeronautical applications. *E.g.*, Doc. 378.5 at 163.

Notwithstanding the married couple's impressive credentials and accomplishments, a grand jury returned a 15-count superseding indictment against them:

> **Count One:** Conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349;

> **Counts Two through Eight:** Wire fraud in violation of 18 U.S.C. § 1343;
>
> **Counts Nine through Thirteen:** Aggravated identity theft in violation of 18 U.S.C. § 1028A; and
>
> **Counts Fourteen and Fifteen:** Falsification of records involving federal investigations in violation of 18 U.S.C. § 1519.

Doc. 134 at 1-11.

The original indictment's wire fraud counts asserted fraudulent inducement and fraudulent performance. Doc. 1 at 13. But the superseding indictment's wire fraud counts did not assert fraudulent performance (e.g., failing to perform or submitting false invoices). Doc. 134 at 5-6. Instead, it asserted fraudulent inducement only. Doc. 134 at 5-6. The Scientists pled not guilty. Docs. 162; 164.

B. Motions Practice

The parties engaged in substantial motions practice, including:

1. Motion To Dismiss Aggravated Identity Theft Counts

The Scientists moved to dismiss the aggravated identity theft counts because 18 U.S.C. § 1028A was unconstitutionally vague. Doc. 42. The Government opposed. Doc. 56. The Scientists replied. Doc. 67. The Government sur-replied Doc. 72. It was denied. Doc. 80.

2. Motions To Strike "Mahmoud"

Dr. Aldissi moved to strike the name "Mahmoud" from the indictment because he had legally changed his name to Matt. Doc. 44. The Government opposed. Doc. 53. It was denied. Doc. 69. After the ISIS terrorist attack on *Charlie Hebdo* in Paris, he sought reconsideration. Doc. 202. The Government opposed. Doc. 211. It was denied. Doc. 221.

3. *Miranda* And *Franks* Motions

The Scientists moved to suppress statements and evidence obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966) (Doc. 45) and *Franks* v. *Delaware*, 438 U.S. 154 (1978) (Docs. 46; 68). The Government opposed. Docs. 58; 65. The Scientists replied. Doc. 82. The Government sur-replied. Doc. 88.

A magistrate convened evidentiary hearings. Docs. 79 (*Miranda*); 112 (*Franks*). She recommended the *Miranda* motion be denied. Doc. 113. The Scientists did not file objections, and the District Court adopted her report and recommendation ("R&R"). Doc. 131. The magistrate also recommended denial of the *Franks* motion. Doc. 142. The Scientists objected (Doc. 156), and the Government responded (Doc. 160). The District Court overruled the objections and adopted the R&R. Doc. 173.

When new testimony emerged during trial, which contradicted the agents' prior *Miranda* testimony that no agent had patted Dr. Aldissi down while executing the search warrant (as Dr. Aldissi had testified, but the magistrate had rejected on credibility grounds), the Scientists moved to reopen the *Miranda* and *Franks* hearings. Doc. 263. The Government opposed. Doc. 260. It was denied. Docs. 266; 378.15 at 232.

C. Trial

During trial, the Scientists orally moved for judgment of acquittal at the close of the Government's case and their case. Docs. 278; 279; 378.14 at 113-154, 156-157; 378.15 at 126-127. The District Court initially reserved ruling (Docs. 378.14 at 156-157; 378.15 at 127), then denied the motions after trial (Doc. 273).

After the 18-day trial, a jury returned guilty verdicts on all counts. Docs. 270; 271. The Scientists filed post-trial Rule 29 motions. Docs. 283; 285. The Government opposed. Docs. 286; 288. They were denied. Docs. 291; 294.

D. Sentencing

Before sentencing, the Scientists sought a continuance to allow new sentencing guideline amendments to take effect. Doc. 318. The

Government opposed. Doc. 319. It was denied. Doc. 320 ("defendants are free to raise any of these arguments at sentencing").

At sentencing, the District Court overruled objections to enhancements for loss calculation, number of victims, acting on behalf of educational institutions, special skill and sophisticated means, and obstruction of justice. Doc. 379 at 27-28, 34, 38-39, 45, 50, 54. The District Court also overruled an objection to the restitution calculation. Doc. 379 at 46-50. Accordingly, the guideline range was "324 to 405 months as to Counts 1 through 8, 14 and 15; two years consecutive, Counts 9 to 13; one year to three years supervised release." Doc. 379 at 55.

Based on the prosecutor's recommendation and the newly amended sentencing guidelines that had not yet taken effect, the District Court varied downward and sentenced Dr. Aldissi to 15 years' imprisonment (13 years on wire fraud and falsification consecutive to 2 years on aggravated identity theft) and Dr. Bogomolova to 13 years' imprisonment (11 years on wire fraud and falsification consecutive to 2 years on aggravated identity theft). Docs. 337 at 2; 338 at 2; 379 at 56-65, 86, 89-91. The District Court ordered the Scientists to pay $10,654,969 in restitution. Doc. 379 at 87-88. They are currently incarcerated.

Statement Of Facts

A. Trial

The trial primarily involved the Scientists' materially deceptive research proposals for grants and contracts in response to agencies' solicitations under the Small Business Innovation Research ("SBIR") and Small Business Technology Program ("STTR") initiatives, *see* 15 U.S.C. § 638, and subsequent federal investigations. Ultimately, between 1997 and 2011, the Scientists obtained 44 SBIR or STTR contracts or grants collectively worth approximately $10.5 million. Doc. 378.14 at 66.

1. The SBIR And STTR Programs

Eleven federal agencies[1] participate in the SBIR and STTR programs. Doc. 378.2 at 103. The SBIR program requires all agencies with budgets over $100 million to set aside 2.9 percent to SBIR research. Doc. 378.2 at 105. Its purpose is to "stimulate research and innovation, to make sure that small businesses have the opportunity to participate in research with federal dollars, to encourage participation by women and those in socially and economically disadvantaged groups, and also

[1] The Environmental Protection Agency ("EPA"), the National Aeronautics and Space Agency ("NASA"), the National Science Foundation ("NSF"), and the Departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, and Transportation.

to encourage the private sector to piggyback on the federal research and try to commercialize that federal research." Doc. 378.2 at 105, 139. SBIR awards are made directly to small businesses. Doc. 378.2 at 108.

The STTR program is "similar," but instead it governs all agencies with budgets over $1 billion. Doc. 378.2 at 107. Those agencies must set aside 0.4 percent to STTR research. Doc. 378.2 at 108. STTR awards are also made directly to small businesses, but unlike SBIR awards, they require partnerships with research institutions. Doc. 378.2 at 108.

SBIR and STTR awards have three phases: Phase 1, Phase 2, and Phase 3. Doc. 378.2 at 117. Phase 1 involves "initial research on a given topical area to show that agency what [the small business] can do in moving forward through other phases in the program." Doc. 378.2 at 118. In other words, it is "just sort of scratching the surface." Doc. 378.2 at 118. When an agency solicits Phase 1 proposals, the process is highly competitive: it may receive many proposals and can make numerous awards. Doc. 378.2 at 119. Phase 1 awards normally do not exceed $100,000 or $150,000 for 6 months. Doc. 378.2 at 174-175. Phase 1 awards are typically on a fixed-price basis. *See* Doc. 378.7 at 182.

Phase 2 continues the research efforts initiated in Phase 1. Doc. 378.2 at 144. Funding is based on the results achieved in Phase 1, the scientific and technical merit, and the commercial potential proposed in Phase 2. Only Phase 1 awardees are eligible for Phase 2 awards. Doc. 378.2 at 144. Phase 2 awards normally do not exceed $1,000,000 total costs for 2 years.

Phase 3 involves commercialization. Doc. 378.2 at 105-106. The SBIR program does not fund Phase 3. Small Business Administration, *About SBIR*, https://www.sbir.gov/about/about-sbir (last visited February 20, 2017). None of the Scientists' proposals involved Phase 3.

To be eligible for Phase 1 or Phase 2 awards, awardees must qualify as small business concerns, principal investigators must be primarily employed with the small business concern when awarded and while researching the proposed project, and (absent written permission) the research must be performed domestically. Doc. 378.2 at 141-144, 199-202. Phase 1 applicants must honestly disclose detailed descriptions of their physical facilities' availability, location, and instrumentation. Doc. 378.2 at 145.

Additionally, applicants must certify all information in proposals was "true and correct as of the date of this submission" and acknowledge potential administrative, civil, and criminal sanctions, including crimes for which the Scientists were not prosecuted, such as false statement (18 U.S.C. § 1001) or false claims (18 U.S.C. § 287). *E.g.*, Docs. 378.2 at 156-157; 387.4 at 221. These certifications typically did not acknowledge potential criminal exposure for wire fraud. *Compare* Docs. 378.2 at 156-157; 387.4 at 221, *with* Doc. 378.7 at 231-232, 248. The truthfulness of all information contained in proposals was material. *E.g.*, Docs. 378.2 at 159, 224-225; 378.4 at 225-244.

While performing research, awardees had to submit monthly reports to be evaluated by technical monitors and a final voucher. *E.g.*, Doc. 378.4 at 16. "[A]t the end of the day," agencies were "looking to get performance." Doc. 378.2 at 185-186, 226.

2. Conspiracy And Wire Fraud

a. Deception Evidence

The Scientists' proposals were deceptive as follows:

- they forged letters of support using crude cut-and-paste methods and Photoshop;[2]

- they lied about their access to lab space and its square footage, equipment, and address;[3]

- they falsely listed inflated price quotes from consultants and subcontractors they did not intend to use and did not use; [4]

- they misrepresented Dr. Aldissi's and Dr. Komarova's eligibility to serve as principal investigators (because they were employed elsewhere and Dr. Aldissi took a sabbatical in France);[5]

- they misrepresented their companies' number of employees;[6] and

- they misrepresented their relationships with research institutions and commercial partners.[7]

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[2] *E.g.*, Docs. 378 at 110-114, 133-134; 378.3 at 46-50; 378.4 at 22-24, 29, 80-81, 92-93, 100-101; 378.5 at 160; 378.6 at 32; 378.6 at 95, 208-215; 378.7 at 28-40, 97-98, 100-101, 118-124, 144, 164; 378.9 at 141-142; 378.13 at 17-24, 45-51, 81-117, 180-181, 190-191, 214-218; 378.14 at 83-84, 87-92; U.S. Ex. 52.

[3] *E.g.*, Docs. 378.3 at 38-39, 41, 43; 378.5 at 113-120, 146-147, 192-194, 232, 246-36; 378.6 at 190; 378.8 at 56-67; 378.11 at 83.

[4] *E.g.*, Docs. 378.3 at 41, 173-174; 378.4 at 82, 93, 101-102; 378.5 at 9, 143-144; 378.6 at 215, 217; 378.7 at 164; 378.13 at 82, 87-88, 186.

[5] *E.g.*, Docs. 378.5 at 189-190, 194-195; 378.6 at 192-196; 378.7 at 216-218; 378.9 at 143; 378.10 at 106-108, 114-115; U.S. Ex. 81A.

[6] *E.g.*, Docs. 378.5 at 145; 378.9 at 141; 378.10 at 52; 378.14 at 56-58.

[7] *E.g.*, Docs. 378.3 at 40, 44-45; 378.4 at 82, 94; 378.5 at 111, 158-160, 195-196, 199-200, 235-236, 240; 378.6 at 137-138, 188-189; 378.7 at 36, 41-42; 378.9 at 141-142; 378.11 at 81-117, 230-243.

Additionally, these deceptions were material such that without them, the agencies would not have funded the Scientists. *E.g.*, Docs. 378.3 at 61, 70; 378.5 at 10, 163-164, 193-194, 227, 243-244; 378.6 at 32, 42; 378.7 at 155-156, 166, 219-220; 378.8 at 128; 378.9 at 55. Instead, the agencies would have funded other scientists. *E.g.*, Doc. 378.3 at 61 ("we had plenty of other well-qualified companies that we would given that money to").

b. Performance Evidence

Nevertheless, the testimony and evidence unequivocally showed the Scientists always intended to and did fully perform each contract and grant on time and within budget. *E.g.*, Docs. 378.3 at 221; 378.4 at 69-70; 378.10 at 168, 217, 245-246. Moreover, the agencies always promptly paid all invoices, accepted the Scientists' deliverables as highly satisfactory, and even reported that if the agencies solicited proposals for the same research today they would still select the Scientists' proposals. *E.g.*, Docs. 378.3 at 181-183; 378.9 at 99-100. Additionally, the Scientists published many of their research projects in peer-reviewed scientific journals. *E.g.*, Docs. 378.4 at 202-204.

Indeed, not one snippet of testimony or shred of evidence showed the Scientists either never intended or failed to fully perform each contract and grant. *See* Docs. 378; 378.1; 378.2; 378.3; 378.4; 378.5; 378.6; 378.7; 378.8; 378.9; 378.10; 378.11; 378.12; 378.13; 378.14. Nor did the prosecutor make any such argument during closing. *See* Docs. 378.15 at 129-193; 378.16 at 75-103; *see also* Doc. 378.15 at 197 (prosecutor "never" used the word "'performance'").

3. Aggravated Identity Theft

a. The Forgeries

The testimony and evidence showed the proposals contained forged letters of support that appeared to be from 19 victims. *E.g.*, Docs. 378 at 110-114, 133-134; 378.1 at 10-12; 378.4 at 128-129; 378.1 at 12-16; 378.1 at 14-15; 379 at 30; U.S. Exs. 42.5A; 52.

On the other hand, no testimony or evidence showed the Scientists stole or manipulated anyone's driver license number, social security number, passport number, bank account number, credit card number, debit card number, or any other personal financial data. *E.g.*, Docs. 378.2 at 96; 378.11 at 37-38, 58, 156-157.

b. Dr. Bogomolova's Involvement

No testimony or evidence showed Dr. Bogomolova prepared non-scientific parts of the proposals or was aware that Dr. Aldissi had forged letters of support or made other materially deceptive statements.

Notably, the District Court denied Dr. Bogomolova's supplemental post-trial Rule 29 motion (Doc. 285) only "after careful consideration." Doc. 291 at 13. In doing so, the District Court pointed to only one proposal: Dr. Bogomolova (not Dr. Aldissi) had "signed"[8] an EPA proposal (U.S. Ex. 7.2A) that contained false representations regarding A.C. serving as a consultant, the involvement of Ultrafast Systems, LLC, and "the corresponding collection of false letters," two of which were "specifically addressed to Defendant Bogomolova." Doc. 291 at 13. Additionally, the District Court ruled the jury "could also surmise" from Dr. Bogomolova's "participation in the rest of the conspiracy and scheme," including her obstructive conduct regarding backdated timesheets, "that the identity theft was foreseeable and attributable to her as a con-

[8] There was no evidence Dr. Bogomolova had "prepared" nonscientific parts of that proposal, drafted its material misrepresentations, or otherwise assembled the forged letters. Indeed, all proposals used Dr. Aldissi's idiosyncratic language and were electronically signed and submitted.

spirator and schemer" under *Pinkerton* v. *United States*, 328 U.S. 640 (1946). Doc. 291 at 13. In contrast, Dr. Komarova testified she was never involved with fake letters. Doc. 378.10 at 154-155.

4. Falsification Of Records Involving Federal Investigations

The testimony and evidence showed the Scientists gave the NSF's Office of Inspector General ("OIG"):

- a backdated joint venture agreement between Dr. Aldissi's company, Fractal Systems, Inc., and Dr. Bogomolova's company, Smart Polymers Research Corporation (Docs. 378.1 at 165-169; 378.2 at 89-91; U.S. Exs. 14.5E; 54X);
- backdated time sheets, which accurately recreated the hours worked, prepared and signed by Dr. Komarova (Docs. 378.10 at 131-145, 220-227; U.S. Ex. 56E); and
- a backdated employment contract between Smart Polymers and Dr. Komarova (Docs. 378.10 at 145-148).

Although they were backdated, no testimony or evidence showed there was no oral joint venture agreement between the companies, the hours were not worked, or that Smart Polymers orally employed Dr. Komarova. *See* Docs. 378.10 at 239; 378.16 at 20-21.

5. Motions For Mistrial And Acquittal

During trial, the District Court denied motions for mistrial about "fraud money" email headers, debarment, a "totally fraudulent" signa-

ture, and anthrax. Docs. 378.2 at 243-251; 378.5 at 43-47; 378.6 at 95-100, 111-112; 378.10 at 4-15.

The Scientists made extensive oral Rule 29 motions. Doc. 378.14 at 113-145. They contended the wire fraud evidence was insufficient because the Government proved only material false statements in violation of 18 U.S.C. § 1001. Doc. 378.14 at 115. Unlike a § 1001 prosecution, however, the Scientists contended the Government was required to prove specific intent to harm and actual harm to the United States. Doc. 378.14 at 114-115. In contrast, the Scientists argued the agencies "got what they bargained for," which was cutting-edge ideas for novel scientific research regarding how to make better batteries or sensors, among other things. Doc. 378.14 at 114-116. The prosecutor responded, and the District Court took the motions under advisement. Doc. 378.14 at 145-154. After trial, the District Court denied the motions. Doc. 273.

6. Charge Conference

During the charge conference, the Scientists sought to alter the wire fraud instruction. Docs. 378.14 at 295-298; 378.15 at 52-80. In doing so, the Scientists explained, "[T]here's a disconnect here between myself and the government, and I hope it doesn't exist between myself

and the Court. My argument isn't no harm, no foul. My argument is no intent to harm, no foul." Doc. 378.15 at 64. After conferring, the prosecutor and the Scientists largely agreed on a modified wire fraud instruction, but continued to disagree whether its specific intent component should be conjunctive or disjunctive. Doc. 378.15 at 77-79 ("the motive can be for personal gain, but the intent has to be to cause financial loss or to cause harm to the United States").

The District Court understood the Scientists' "argument is that it's in the disjunctive because it's 'or' as opposed to 'and.'" Doc. 378.15 at 79-80. But it denied the request and gave a disjunctive wire fraud instruction: "the 'intent to defraud' is the specific intent to deceive or cheat the United States, usually for personal gain *or* to cause financial loss to the United States." Doc. 269 at 15 (emphasis added).

7. Closing Arguments

After the prosecutor's closing (Doc. 378.15 at 129-193), Dr. Aldissi's closing (Docs. 378.15 at 193-229; 378.16 at 7-27) analogized the case to a roofer who misrepresented his references and use of consultants, but did a great job. Doc. 378.15 at 193-196. Dr. Aldissi explained that was not wire fraud "because the job as promised was delivered," the

"payment made was for the work done," and "both sides got what they bargained for":

> A wire fraud requires a lot more than a false statement or a lie. A wire fraud requires an intention on the part of the contractor to cause damage or to injure. And in those hypotheticals just like here, it doesn't exist because here [because] what Matt Aldissi promised to deliver to the government was delivered. Not only satisfactory, but beyond satisfactory. And the government got the value for every dollar that they extended. There's just no wire fraud.

Doc. 378.15 at 196; *see also* Docs. 378.15 at 217-219; 378.16 at 9-11.

Dr. Bogomolova's closing (Doc. 378.16 at 27-75) reiterated there was no "grand scheme to cheat and take from the United States Government property and money without the intent to perform." Doc. 378.16 at 72. Instead, "The intent was always to perform. They did perform…. They performed on time and within budgets." Doc. 378.16 at 72.

In rebuttal (Doc. 378.16 at 75-101), the prosecutor contended the performance argument was "irrelevant" because "you never get to performance because they should never have received the awards" and was "flat out wrong" because "the government did not get what it paid for," such as "eligible PIs." Doc. 378.16 at 86. Instead, the agencies "paid for consultants and subcontractors and facilities that didn't exist and key personnel who weren't actually involved." Doc. 378.16 at 86.

B. *Miranda* And *Franks* Proceedings

At the pretrial *Miranda* and *Franks* hearings, the magistrate had received extensive testimony and evidence from federal agents, the Scientists, and their expert, Leigh Owen, a former government contracting attorney with over 30 years' experience. Docs. 114; 157; 375; 389.

1. The *Miranda* Hearing And Order

During the *Miranda* hearing, Agents Mazzella, Galle, and Searle repeatedly testified no agent ever conducted a pat down of the Scientists. Doc. 114 at 24, 98, 102, 137-138, 181, 190-192, 199. But Dr. Aldissi testified an agent patted him down when he returned with his son from school. Doc. 114 at 280-281, 284, 290. Importantly, the agents' and the Scientists' testimony diverged in many other ways.

For instance, Dr. Aldissi testified nobody explained his noncustodial rights before questioning began, he had "never heard such screaming before," the agents refused his wife's request to remain with him, his interrogating agents got "too close for comfort," Agent Galle raised her voice "[s]everal times" and "would become frustrated and grind her teeth in a way that showed her real frustration," and nobody read or

explained the consent forms to him. Doc. 114 at 257, 260, 261, 262, 264-265, 280, 291.

Similarly, Dr. Bogomolova testified nobody explained her noncustodial rights before questioning began, she heard "banging and some yelling," agents said they "need[ed] to question [her] separately," Agent Krieger "raised his voice" and appeared "very personally upset," and her husband did not speak to her during the interrogation. Doc. 114 at 300, 305-306, 310, 315, 317-318, 333.

In contrast, Agent Krieger testified that Agent Jones advised Dr. Bogomolova of her noncustodial rights, he told her "to keep her chin up" and suggested she leave and "go to a coffee shop," he did not remember telling her she could not remain with her husband, he did not recall raising his voice at her (although he conceded it was a "possibility"), and officers did not "pound" on the door. Doc. 114 at 20, 24-25, 49, 66, 72.

After the *Miranda* hearing, the prosecutor argued Dr. Aldissi's supposedly false claim of a pat down undermined his credibility. *See* Doc. 375 at 6. Ultimately, in recommending denial of the *Miranda* motion, the magistrate made virtually every credibility determination in favor of the agents and against the Scientists:

- "At no time from their encounter with Defendants to when they left the house, did the agents pat down, handcuff Defendants, display their weapons, or otherwise subject them to physical restraint."

- "Prior to commencing the interviews, agents told both Defendants it was a voluntary interview, they could leave at any time, and they did not need to answer any questions."

- "During their interviews, agents repeatedly asked Defendants if they were comfortable or if they needed to use the restroom or get a drink. The interviews were not conducted in a hostile manner, and Defendants responded calmly to the agents' questions."

- Agents "request[ed]" to interview the Scientists rather than commanded them.

- Agents "explained" the consent forms to Dr. Aldissi.

Doc. 113 at 5, 6, 9.

Given those factual findings, the magistrate concluded the interrogations were noncustodial and the Scientists' consent to search electronic media and storage units was free and voluntary. Doc. 113 at 9-18. Notably, a thumb drive seized from the storage units featured prominently at trial; it contained forged letters of support, emails from Dr. Aldissi to Craig Johnson, proposals, and timesheets. *See* U.S. Ex. 54X.

2. The *Franks* Hearing And Order

During the *Franks* hearing, the Scientists' expert, Ms. Owens, testified extensively (Doc. 157 at 16-200), as did the search warrant's author, Agent Tara Jones (Docs. 157 at 202-333; 389 at 7-93).

In her R&R, the magistrate explained the alleged falsities in Agent Jones's affidavit fell into six categories:

- "the 'over-arching lie' that Defendants had to pay invoices as per the negotiated costs in their proposals";
- "that if Defendants' certifications are false, the Government will not award a contract or it will cancel a contract if it discovers the certifications are false";
- "that letters of support are not material to the awarding of a contract";
- "that Defendants completed and/or bid for duplicate work";
- "that Defendants made false statements regarding their companies' size and number of employees"; and
- "that Defendants received payments that were not utilized in a manner consistent with their companies' federal contract proposals and negotiations (the 'table of fraud')."

Doc. 142 at 6.

a. The Magistrate Rejected Categories One, Two, And Three On Purely Legal Grounds

The magistrate rejected the first category because she concluded Agent Jones's conclusion was "at least a reasonable interpretation of

the regulations governing Defendants' contracts." Doc. 142 at 17. She did not distinguish between reasonable mistakes of fact (permissible) and reasonable mistakes of law (impermissible). *See* Doc. 142 at 17.

The magistrate rejected the second category because Ms. Owens's contrary testimony was based on her expertise on the Federal Acquisition Regulations ("FAR"), which the magistrate construed as something different from the regulations that govern SBIR or STTR contracts. Doc. 142 at 18. The magistrate did not recognize, however, that by definition, SBIR and STTR contracts are subject to the FAR. *See* Doc. 142 at 18.

The magistrate rejected the third category because she apparently disagreed with Ms. Owens's legal interpretation of the FAR as it applied to SBIR and STTR contracts. Doc. 142 at 18-19.

b. The Magistrate Rejected Categories Four, Five, And Six On Factual Grounds

The magistrate rejected the fourth category because she concluded Agent Jones's assertion that certain proposals were duplicative was not false. Doc. 142 at 19. Similarly, she rejected the fifth category because it concluded Agent Jones's assertion that the proposals misrepresented the companies' laboratory facilities and number of employees was not

false. Doc. 142 at 19. Finally, she rejected the sixth category on factual grounds as well. Doc. 142 at 20-21.

c. The Magistrate Rejected The Scientists' Contention That Material Omissions Undermined Probable Cause

The magistrate rejected the Scientists' contention that material omissions regarding relevant FAR provisions, clearing audit through Defense Contract Audit Agency ("DCAA"), their record of performance, downward adjustments on cost contracts to stay within budget, and their unique credentials undermined probable cause. Doc. 142 at 22.

3. The Motion To Reopen The *Miranda* And *Franks* Hearings

During trial, Agent Conley,[9] who did not testify at the *Miranda* hearing, informed the prosecutor (and subsequently testified) that he had patted down Dr. Aldissi while executing the search warrant, as Dr. Aldissi had testified. Docs. 256 at 5-7, 11, 32-33; 378.9 at 119-129.

In response, the Scientists moved to reopen the *Miranda* and *Franks* hearings. Doc. 263. The Government opposed. Doc. 260. Instead of addressing the chain reaction that would ensue from reconsidering all credibility determinations in favor of the Scientists rather than the

[9] Agent Conley was the agent who supposedly did not brandish his shotgun. Doc. 256 at 12.

agents, the District Court denied the motion and concluded the pat down made it a "closer call" but did not change the totality of circumstances. Docs. 266 at 5-16; 378.15 at 232.

C. Sentencing

Probation calculated:

- a 22-level enhancement under U.S.S.G. § 2B1.1 for an intended loss of $24,522,386 (which included funded and unfunded proposals);
- a 4-level enhancement under U.S.S.G. § 2B1.1 because there were 77 victims of aggravated identity theft;
- a 2-level enhancement under U.S.S.G. § 2B1.1(b)(9)(A) for acting on behalf of educational institutions;
- a 2-level enhancement under U.S.S.G. § 2B1.1(b)(10)(C) for using special skill and sophisticated means;
- a 2-level enhancement under U.S.S.G. § 3C1.1 for obstruction of justice; and
- restitution of $10,654,969.

Docs. S322 at 22-25, 32; S324 at 23-25, 33.

The Scientists objected and filed sentencing memoranda addressing Probation's calculations and avoidance of unwarranted sentencing disparities. Docs. S322 at 49-56; S324 at 52-74; 328 at 15-25, 32; 330 at 6-14. Probation did not alter its calculations (Docs. S322 at 40-48; S324 at 41-51), and the District Court adopted them (Doc. 379 at 54-55).

Standard Of Review

1. Sufficiency is reviewed de novo. *United States* v. *Capers*, 708 F.3d 1286, 1296-97 (11th Cir. 2013). Rule 29's snapshot provision applies. *United States* v. *Moore*, 504 F.3d 1345, 1346-47 (11th Cir. 2007).

2. The denial of a jury instruction is reviewed for abuse of discretion, but the instruction's legal correctness is reviewed de novo. *United States* v. *Takhalov*, 827 F.3d 1307, 1311 (11th Cir. 2016).

3. The refusal to dismiss an indictment is reviewed for abuse of discretion, without deference to errors of law. *United States* v. *Thompson*, 25 F.3d 1558, 1562 (11th Cir. 1994); *United States* v. *Barner*, 441 F.3d 1310, 1315 n.5 (11th Cir. 2006).

4. The denial of a *Franks* motion after an evidentiary hearing is reviewed as a mixed question of law (de novo) and fact (clear error). *United States* v. *Wuagneux*, 683 F.2d 1343, 1355 (11th Cir. 1982); *United States* v. *Suarez*, 601 F.3d 1202, 1213 (11th Cir. 2010). The denial of a motion to reopen *Miranda* and *Franks* hearings based on newly discovered evidence is reviewed for abuse of discretion. *United States* v. *Simms*, 385 F.3d 1347, 1356 (11th Cir. 2004).

5. Sentences are reviewed for abuse of discretion, reviewing factual questions for clear error and legal questions de novo. *United States* v. *Irey*, 612 F.3d 1160, 1189 (11th Cir. 2010) (en banc); *Suarez*, 601 F.3d at 1220-21.

6. The refusal to declare a mistrial is reviewed for abuse of discretion. *United States* v. *Ramirez*, 426 F.3d 1344, 1353 (11th Cir. 2005). The "'cumulative effect' of multiple errors" may require a new trial *Id.*

7. Sufficiency is reviewed de novo. *Capers*, 708 F.3d at 1296-97. Rule 29's snapshot provision applies here. *Moore*, 504 F.3d at 1346-47.

SUMMARY OF THE ARGUMENT

1. The Government did not introduce sufficient evidence of wire fraud because the Scientists always intended to and did fully perform, the United States received the benefit of its bargains, the agencies lost nothing more than their "right to control" which scientists to fund (which is not itself a property interest), and Dr. Bogomolova never prepared any nonscientific parts of the proposals. The Court should reverse all wire fraud, conspiracy, and aggravated identity theft convictions and remand for resentencing on falsification.

2. The District Court abused its discretion when its disjunctive wire fraud instruction allowed the jury to find specific intent to harm if the Scientists acted either for personal gain or to harm the United States. In contrast, the Scientists' request for a conjunctive instruction was legally correct, dealt with the central issue at trial, and was not substantially covered by any other instruction. Its denial was not harmless. The Court should vacate the judgment and remand for a retrial on the wire fraud and aggravated identity theft counts.

3. The District Court erred when it denied a motion to dismiss the indictment because the aggravated identity theft statute is unconstitutionally vague. Alternatively, the evidence was not sufficient because the only means of identification used were names. Lastly, Dr. Bogomolova never prepared nonscientific parts of the proposals, so evidence was insufficient as to her. The Court should reverse the aggravated identity theft convictions and remand for resentencing.

4. The District Court erred by denying the *Franks* motion and abused its discretion by denying a motion to reopen the *Miranda* and *Franks* hearings. The District Court misinterpreted the FAR and misconceived how they applied to SBIR and STTR projects. Additionally,

the District Court failed to reconsider the Pandora's box of credibility questions that Agent Conley opened. The Court should vacate the judgment and remand with instructions either to grant the *Franks* motion outright or reopen the *Miranda* and *Franks* hearings.

5. The District Court procedurally and substantively erred at sentencing when it: overruled objections to sentencing enhancements; miscalculated restitution; and created unwarranted sentencing disparities with similarly situated defendants. More specifically, it employed the wrong methodology for loss calculation (and restitution), incorrectly treated individuals whose names were used as "victims" although they suffered no pecuniary harm or bodily injury, wrongly concluded the Scientists acted on behalf of educational institutions although they never sought to obtain benefits for those institutions, mistakenly concluded their crude cut-and-paste and Photoshop forgeries constituted special skill and sophisticated means, and double counted obstructive conduct. The Court should vacate the judgments and remand for resentencing.

6. The District Court abused its discretion when it denied motions for mistrial about the refusal to strike "Mahmoud" from the indictment and other evidence, "fraud money" email headers, debarment,

a "totally fraudulent" signature, and anthrax. These disclosures to the jury, including their cumulative effect, prevented a fair trial. The Court should vacate the judgments and remand for further proceedings as permitted by the Double Jeopardy Clause.

7. The evidence of falsification of records involving federal investigations was insufficient. Although the timesheets, joint venture agreement, and employment agreement were backdated, the information contained therein was otherwise true. The Court should reverse the falsification convictions and remand for resentencing.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE EVIDENCE OF WIRE FRAUD AND AGGRAVATED IDENTITY THEFT WAS NOT SUFFICIENT

The Government did not introduce sufficient evidence of wire fraud. First, the Scientists always intended to and did fully perform the research while the agencies received the benefit of their bargains and lost nothing more than their "right to control" which scientists to fund (which is not itself a property interest). Second, Dr. Bogomolova never prepared nonscientific parts of the proposals.

A. The Evidence Against Both Of The Scientists Was Insufficient

1. A Scheme To Deceive A Victim, Which Receives The Benefit Of Its Bargain, Is Not Fraud

It is a common misconception that the fraud statutes criminalize any deception transmitted through mail or wires. *Cf.* John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117, 126 (1981) ("when in doubt, charge mail fraud"). But a scheme to deceive is different from a scheme to defraud.

That is important, because fraud "forbids only schemes to *defraud,* not schemes to do other wicked things, e.g., schemes to lie, trick, or otherwise deceive." *United States* v. *Takholov*, 827 F.3d 1307, 1310 (11th Cir. 2016) (emphasis in original). The difference "is that deceiving does not always involve harming another person; defrauding does." *Id.* As such, if a defendant "merely 'induce[d] [the victim] to enter into [a] transaction' that he otherwise would have avoided," but the victim nevertheless received the benefit of his bargain (i.e., suffered no harm to a property interest), that would be "'insufficient' to show wire fraud." *Id.*

2. The Supreme Court Has Substantially Narrowed The Scope Of The Fraud Statutes And The Property Interests They Protect

Over time, the Supreme Court has substantially narrowed the scope of mail and wire fraud and the property interests they protect.[10]

a. The Wire Fraud Statute Protects Property Rights, But Not Other Intangible Rights

McNally v. *United States* involved a public official and a private citizen prosecuted for mail fraud. 483 U.S. 350, 352 (1987). "The prosecution's principal theory of the case, which was accepted by the courts below, was that petitioners' participation in a self-dealing patronage scheme defrauded the citizens and government of Kentucky of certain 'intangible rights,' such as the right to have the Commonwealth's affairs conducted honestly." *Id.* Their convictions were affirmed because existing precedent held mail fraud proscribes schemes to defraud citizens of intangible rights to honest and impartial government. *Id.* at 355. Under those cases, "a public official owe[d] a fiduciary duty to the public, and misuse of his office for private gain [wa]s a fraud." *Id.*

[10] Aside from "their jurisdictional basis," mail and wire fraud have "identical" substantive elements. *Beck* v. *Prupis*, 162 F.3d 1090, 1095 & n.9 (11th Cir. 1998); *compare* 18 U.S.C. § 1341, *with* 18 U.S.C. § 1343.

The Supreme Court reversed. *Id.* at 356. "The mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." *Id.* Indeed, for over a century, the Supreme Court had recognized that the statutory language, "any scheme or artifice to defraud," 18 U.S.C. § 1343, should be "interpreted broadly insofar as property rights are concerned," but had "no more extensive reach." *Id.* at 356 (citing *Durland* v. *United States*, 161 U.S. 306, 312-13 (1896)). "Congress codified the holding of *Durland* in 1909, and in doing so gave further indication that the statute's purpose is protecting property rights." *Id.* at 357.

That codification "criminalized schemes or artifices 'to defraud' or 'for obtaining money or property by means of false or fraudulent pretenses, representation, or promises.'" *Id.* at 358-59. Its disjunctive wording suggested it could criminalize schemes "to deprive individuals, the people, or the government of intangible rights, such as the right to have public officials perform their duties honestly." *Id.* But the Supreme Court rejected that interpretation under the Rule of Lenity. *Id.* Still, the Supreme Court noted the jury was not "charged that to convict it must

find that the Commonwealth was deprived of control over how its money was spent," and left that issue for another day. *Id.* at 360.

b. The Wire Fraud Statute Protects Property Rights Whether Those Rights Are Tangible Or Intangible

Carpenter v. *United States* involved a financial reporter who schemed with two stockbrokers to disclose (but not alter) confidential information he obtained before publication, to trade stocks on that inside information, and to share profits. 484 U.S. 19, 22-23 (1987). Critically, the newspaper's "official policy and practice" was that "prior to publication, the contents of the column were the [newspaper's] confidential information." *Id.* at 23. "Over a 4-month period, the brokers made prepublication trades on the basis of information given them by [the reporter] about the contents of some 27 'Heard [on the Street]' columns. The net profits from these trades were about $ 690,000." *Id.* The brokers and the reporter were charged with violating § 10(b) of the Securities Exchange Act of 1934, mail and wire fraud (on the theory that the newspaper was the victim), and conspiracy, and their convictions were affirmed on appeal. *Id.* at 20, 23-24.

The Supreme Court affirmed the mail and wire fraud convictions (and by a divided court let stand the securities fraud convictions). *Id.* at 24. The defendants asserted "their activities were not a scheme to defraud the [newspaper] within the meaning of the mail and wire fraud statutes; and that in any event, they did not obtain any 'money or property' from" the newspaper as required by *McNally*. *Id.* at 25. Alas, the Supreme Court was "unpersuaded by either submission." *Id.*

First, the Supreme Court concluded the newspaper "was defrauded of much more than its contractual right to his honest and faithful service, an interest too ethereal in itself to fall within the protection of the mail fraud statute." *Id.* at 25. Instead, the newspaper "had a property right in keeping confidential and making exclusive use, prior to publication, of the schedule and contents of the 'Heard' column." *Id.* at 26. Put otherwise, "*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights." *Id.* at 25.

Second, the Supreme Court rejected the argument that the reporter's "conduct in revealing prepublication information was no more than a violation of workplace rules and did not amount to fraudulent activity that is proscribed by the mail fraud statute." *Id.* at 27. Instead, it con-

cluded the reporter deprived the newspaper of its property, and "the employee manual merely removed any doubts on that score and made the finding of specific intent to defraud that much easier." *Id.* at 28.

c. The Wire Fraud Statute Does Not Protect The Regulatory Interest To Issue Licenses, Because That Interest Is Not Property In The Hands Of The Victim

Cleveland v. *United States* involved a mail fraud conviction for materially false statements made in an application for a state license to operate video poker machines. 531 U.S. 12, 15 (2000). The Fifth Circuit affirmed because "Louisiana video poker licenses constitute 'property' in the hands of the State" before they are issued. *Id.* at 17-18.

But the Supreme Court reversed. *Id.* at 15. "We conclude that permits or licenses of this order do not qualify as 'property' within § 1341's compass." *Id.* at 15. Moreover, the Supreme Court clarified it "does not suffice" that "the object of the fraud may become property in the recipient's hands." *Id.* Instead, "for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim." *Id.*

At the outset, the Supreme Court noted there was no assertion that the licensing scheme implicated the intangible right to honest services under 18 U.S.C. § 1346. *Id.* at 20. Additionally, the Supreme Court

held the interest in issuing licenses was not a property right because "the State's core concern is *regulatory*." *Id.* (emphasis in original).

In making the latter ruling, the Supreme Court rejected arguments that Louisiana had a property interest in its licenses because (1) it received substantial revenue from their issuance and renewal, and (2) the defendant's conduct frustrated its "right to control" the issuance, renewal, and revocation of video poker licenses. *Id.* at 21-25. The first argument did not fly because Louisiana "receives the lion's share of its expected revenue not while the licenses remain in its own hands, but only *after* they have been issued to licensees." *Id.* at 22. And the second argument faltered because that "right to control" was not itself a species of property. *Id.* at 23-25.

In that regard, the Supreme Court rejected the attempt to analogize Louisiana's interest in issuing video poker licenses to those of patent holders or franchisors. *Id.* at 23-24. For instance, although both patents and the issuance of licenses involved the right to exclude, "the congruence ends there": patents protect a holder's right to "use, make, or sell the invention," whereas Louisiana "may not sell its licensing authority." *Id.* at 23. Similarly, the franchise analogy faltered because "a

franchisor's right to select its franchisees typically derives from its ownership of a trademark, brand name, business strategy, or other product that it may trade or sell in the open market." *Id.* at 24. In contrast, Louisiana's licensing authority "rest[ed] on no similar asset"; rather, it rested on its "sovereign right to exclude applicants deemed unsuitable to run video poker operations." *Id.* Finally, the Supreme Court noted those positions contradicted the Rule of Lenity. *Id.* at 24-25.

d. The Victim's Loss Of Money Or Property Must Supply The Defendant's Gain, With One The Mirror Image Of The Other

Congress responded to *McNally* by redefining a "'scheme or artifice to defraud'" to "include[] a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. *Skilling* v. *United States* concerned whether that statute was unconstitutionally vague. 561 U.S. 358, 400 (2010). The Supreme Court construed § 1346's reference to "honest services" as prohibiting only "fraudulent schemes to deprive another of honest services through bribes or kickbacks." 561 U.S. at 404. Confined to those "core" applications, § 1346 was not unconstitutionally vague. *Id.* at 409.

In so holding, the Supreme Court concluded § 1346 excluded a second category of cases: those involving "schemes of non-disclosure and concealment of material information." *Id.* at 410. As an example of such a scheme, *Skilling* cited *United States* v. *Mandel,* 591 F.2d 1347, 1361 (4th Cir. 1979), in which the defendant concealed the identity of the owners of a racetrack to induce a government body to take action favorable to that track. That sort of nondisclosure scheme was beyond § 1346's reach: "a reasonable limiting construction of § 1346 must exclude this amorphous category of cases." *Id.* at 410. *Mandel* is a variant of the disfavored purchaser problem, in which the purported victim ends up doing business with a party it might otherwise have avoided.

e. A Victim's Deprivation Does Not Qualify As Property Protected By The Wire Fraud Statute Unless It Was Transferable

Sekhar v. *United States* involved a Hobbs Act conviction[11] for attempted extortion. 133 S. Ct. 2720, 2723 (2013). The defendant was indicted for sending several emails to the New York State Comptroller's

[11] Like wire fraud, the Hobbs Act requires proof that a defendant "obtain[ed] … property." 18 U.S.C. § 1951(b)(2). There is no reason why "obtaining money or property" under the fraud statutes would have a different meaning from "obtaining of property" under the Hobbs Act; in both situations, "Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Sekhar*, 133 S. Ct. at 2724.

Office's general counsel and demanding he reverse an internal, non-binding recommendation against investing in his fund. *Id.* The jury returned a special verdict that the "property" the defendant attempted to extort was the "General Counsel's recommendation." *Id.* at 2723-24.

The Supreme Court reversed and held the defendant did not "obtain[] property." *Id.* at 2726. Instead, the common-law meaning of obtaining property requires "not only the deprivation but also the acquisition of property." *Id.* at 2725. "The property extorted must therefore be *transferable*—that is, capable of passing from one person to another." *Id.* (emphasis in original). Because an internal recommendation was not transferable, it was not obtainable property. *Id.* at 2726.

3. A Mature Circuit Split Exists Whether A Scheme To Defraud A Victim Of Its "Right To Control" How To Spend Its Money Constitutes A Sufficient Property Interest For Wire Fraud

Given this *McNally-Carpenter-Cleveland-Skilling-Sekhar* rubric, there exists a mature circuit split whether the deprivation of a victim's "right to control" how to spend its money or to make informed economic decisions, viewed alone, constitutes a sufficient property interest upon which a mail or wire fraud conviction can stand.

The Third, Sixth, and Ninth Circuits reject the "right to control" theory of wire fraud prosecution.[12] In contrast, the Second, Fourth, Seventh, Eighth, and Tenth Circuits adopt it.[13]

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[12] *United States* v. *Zauber*, 857 F.2d 137, 147 (3d Cir. 1988) (rejecting "right to control" theory because it is "too amorphous to constitute a violation of the mail fraud statute as it is currently written"); *United States* v. *Sadler*, 750 F.3d 585, 591 (6th Cir. 2014) (wire fraud "is 'limited in scope to the protection of *property rights*,' and the ethereal right to accurate information doesn't fit that description," and it cannot "plausibly be said that the right to accurate information amounts to an interest that 'has long been recognized as property'"); *United States* v. *Bruchhausen*, 977 F.2d 464, 468 (9th Cir. 1992) ("the manufacturer may have an interest in assuring that its products are not ultimately shipped in violation of law, but that interest in the disposition of goods it no longer owns is not easily characterized as property").

[13] *E.g.*, *United States* v. *Binday*, 804 F.3d 558, 570 (2d Cir. 2015) ("a cognizable harm occurs where the defendant's scheme 'den[ies] the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions'"); *United States* v. *Gray*, 405 F.3d 227, 234 (4th Cir. 2005) ("the mail fraud and wire fraud statutes cover fraudulent schemes to deprive victims of their rights to control the disposition of their own assets"); *United States* v. *Fagan*, 821 F.2d 1002, 1010 n.6 (5th Cir. 1987) ("there is sufficient evidence that the scheme here was one to deprive Texoma of its property rights, *viz*: its control over its money, as it parted with its rental payments on the basis of a false premise"); *United States* v. *Shyres*, 898 F.2d 647, 652 (8th Cir. 1990) ("the right to control spending constitutes a property right"); *United States* v. *Welch*, 327 F.3d 1081, 1108 (10th Cir. 2003) ("the intangible right to control one's property is a property interest within the purview of the mail and wire fraud statutes"); *United States* v. *Madeoy*, 912 F.2d 1486, 1492 (D.C. Cir. 1990) ("An FHA insurance commitment, by which the Government promises to pay the lender if the borrower defaults on the loan, is a 'property interest,' not an 'intangible right' under *McNally* and *Carpenter*, because it involves the Gov-

4. This Court Should Adopt The Minority Rule and Reject The "Right To Control" Theory

This Court should reject the "right to control" theory, which is poorly reasoned, incompatible with the *McNally-Carpenter-Cleveland-Skilling-Sekhar* rubric, and contrary to the Rule of Lenity.

a. The "Right To Control" Spending Is Not Property

Generally speaking, there are three species of property: real, chattels, and intellectual. *See, e.g.*, *G.S. Rasmussen & Assocs.* v. *Kalitta Flying Serv.*, 958 F.2d 896, 903 n.14 (9th Cir. 1992). Each type of property interest includes a bundle of rights, such as rights to possess, exclude, transfer, seek legal or equitable remedies (such as actions to eject, for trespass, for damages, for injunction), and so forth. *City of Orlando* v. *MSD-Mattie, LLC*, 895 So. 2d 1127, 1130 (Fla. 5th DCA 2005) ("property is a bundle of rights analogous to a bundle of sticks").

The agencies' "right to control" spending does not encompass those rights. For example, the agencies cannot: exclude or enjoin researchers from conducting unfunded research because they could still proceed with other funds; prevent such researchers from obtaining intellectual

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ernment's 'control over how its money [is] spent.'"). Some decisions from those circuits, however, appear to reject the "right to control" theory.

property rights to the fruits of such research; or transfer their "right to control" spending to other sovereigns or private entities, etc.

More specifically, the "right to control" is not tangible property under *McNally*. It does not qualify under *Carpenter* or *Cleveland* because it is not intangible property in the hands of the victims (i.e., the agencies). It is also not transferable under *Cleveland* or *Sekhar*. Instead, the "right to control" is merely a regulatory aspect of the agencies' "sovereign right to exclude applicants deemed unsuitable." *Cleveland*, 531 U.S. at 24. Finally, because it would not qualify as honest services fraud under *Skilling* (because it involves neither bribery nor kickbacks), it cannot be repackaged as property fraud.

b. The "Right To Control" Theory Is Incompatible With The Rule Of Lenity

The "right to control" theory is also incompatible with the Rule of Lenity, which provides that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States,* 401 U.S. 808, 812 (1971); *accord United States* v. *Wright*, 607 F.3d 708, 716 (11th Cir. 2010) (courts must "construe ambiguous criminal statutes narrowly in favor of the accused"). For that reason, *McNal-*

ly, *Cleveland*, *Sekhar*, and *Skilling* all read the wire fraud and extortion statutes narrowly.

Here, however, the "right to control" doctrine would impermissibly rewrite the federal fraud statutes, which require both a material misrepresentation, *Bullock* v. *BankChampaign, N.A.*, 133 S. Ct. 1754, 1760 (2013), and that the defendant obtain transferable property from the victim, *McNally*, 483 U.S. at 356-57. But if the "right to control" spending or to make an informed economic decision were a type of property, then establishing the deception element would automatically (and impermissibly) establish the property element as well. *E.g.*, *United States* v. *Novak*, 443 F.3d 150, 159 (2d Cir. 2015) (reversing wire fraud convictions despite material deceptions because "contractors received all they bargained for, and Novak's conduct did not affect an essential element of those bargains").

Left unchained, a parade of horribles would ensue. Suppose a 5'11 high school basketball player materially misrepresented his height to recruiters as 6'1, proceeded to earn an athletic scholarship from a major university, and performed so well he became an All American and turned professional. Or suppose a 2L at a top law school materially mis-

represented her grades and references while applying for federal clerkships, got the job offer, and performed so well she obtained a Supreme Court clerkship and a job with a top law firm. In either case, would the university or federal judge be the victim of wire fraud?

If the "right to control" theory were viable, the answer would be yes, and the only bulwarks guarding such individuals from up to 20 years' imprisonment on mail or wire fraud charges would be prosecutorial discretion and jury nullification. But that provides little comfort. *Cf.* *McDonnell* v. *United States*, 136 S. Ct. 2355, 2372 (2016) (rejecting similarly "expansive interpretation" of honest services fraud because "nearly anything a public official accepts … counts as a *quid*," and "nearly anything a public official does … counts as a *quo*"). Prosecutorial discretion occasionally malfunctions. *E.g.*, *Yates* v. *United States*, 135 S. Ct. 1074 (2015) (fish prosecution). And jury nullification is unlawful. *United States* v. *Funches*, 135 F.3d 1405, 1409 (11th Cir. 1998).

5. There Was No Scheme To Defraud Because The Agencies Received The Benefit Of Their Bargains While Losing Nothing More Than Their "Right To Control" How To Spend Money

Upon discarding the "right to control" theory, it becomes clear there was no "scheme to defraud" because the Scientists always intend-

ed to and did fully perform the research while the agencies received the benefit of their bargains and lost nothing more than their "right to control" which scientists to fund (which is not itself a property interest).[14] In other words, the Government failed to prove specific intent to harm or harm itself (i.e., the deprivation of a property interest).

To understand why, it is imperative to understand the agencies were going to spend their money to fund their research solicitations whether or not the Scientists submitted research proposals, because that is precisely what the SBIR and STTR programs required them to do. Doc. 378.2 at 105, 108. Relatedly, "at the end of the day," agencies were "looking to get performance." Doc. 378.2 at 185-186, 226. Finally, the superseding indictment alleged and the Government conceded at trial that the only conceivable wire fraud victims were the agencies themselves, not other researchers. Docs. 134 at 1-6; 378.15 at 68.

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[14] The wire fraud convictions cannot rest on proof of fraudulent performance, instead of fraudulent inducement, because that would improperly vary or amend the superseding indictment. *United States* v. *Keller*, 916 F.2d 628, 633 (11th Cir. 1990); *see also* 378.4 at 33 ("we should have been put on notice of [fraudulent performance], because we could put on a stream of scientists from all over the planet talking about how everything that they did on every single one of these contracts is absolutely done, it's documented, it's valid science, it's good science, it's cited"); 378.13 at 269.

Of course, the Scientists' proposals were materially deceptive. Had they absconded with the loot, they surely would have committed wire fraud. But because they always intended to and did fully perform, they had no specific intent to harm and committed no harm to the United States; ultimately, the agencies received the benefit of their bargains, which included license-free access to technical data. *E.g.*, 48 C.F.R. § 52.227-20(d)(1).

For instance, the fact that the Scientists manufactured fake sub-contractor quotes did not result in any harm or specific intent to harm, because the agencies still agreed to pay that contract price on a fixed-price basis and received the full benefit of that bargain. *E.g.*, *Takholov*, 827 F.3d at 1310. For the same reasons, the forgeries and misrepresentations about facilities, equipment, employees, and relationships with educational institutions and commercial partners, though material, did not prevent the agencies from receiving the benefit of their bargains.

6. *United States* v. *Maxwell* Does Not Change This Result

Attempting to avoid this result, the prosecutor and District Court relied heavily on *United States* v. *Maxwell*, 579 F.3d 1282 (11th Cir. 2009). *Maxwell* cannot, however, bear the weight placed upon it.

Maxwell involved a different contract program with different aims. Specifically, the set aside programs in *Maxwell* existed to support "socially and economically disadvantaged" small businesses. *Id.* at 1287. A large company obtained such contracts, for which it was otherwise ineligible, by misrepresenting the scope of work to be performed by otherwise eligible small businesses. *Id.* at 1289-90. Despite full performance, this Court affirmed those wire fraud convictions because the large company was "not eligible" for the small-business contracts. *Id.* at 1302-03. In other words, because those misrepresentations went to the core purpose of the set aside programs, those agencies were defrauded and did not receive the benefit of their bargains. *See id.*

Here, however, the SBIR and STTR programs exist to "enable" "small-business concerns" to "undertake and to obtain the benefits of research and development in order to maintain and strengthen the competitive free enterprise system and the national economy." 15 U.S.C. § 638(a). Setting aside their proposals' material misrepresentations, the Scientists' small businesses were certainly "eligible" to submit proposals in response to solicitations for SBIR and STTR awards: the Scientists were respected researchers, became naturalized U.S. citizens,

and incorporated and operated their small businesses in Florida. In other words, those agencies were deceived, not defrauded. *See Takholov*, 827 F.3d at 1310 (distinguishing deceit from fraud).

Perhaps recognizing this problem, the prosecutor tried to mend the disconnect between *Maxwell* and this case by asserting some of the Scientists' misrepresentations went to eligibility (e.g., proposals in which Dr. Aldissi served as principal investigator while on sabbatical in France or while fully employed elsewhere). Doc. 378.14 at 145-146. But those misrepresentations, though material, did not go to eligibility in the same sense as the misrepresentations in *Maxwell* because they did not undermine the core purpose of the SBIR and STTR programs, *see* 15 U.S.C. § 638(a), or "the nature of the bargain itself," *Takholov*, 827 F.3d at 1313. Put otherwise, eligibility is the wrong metric; the question for wire fraud is whether the misrepresentation went to "the nature of the bargain itself." *Id.* And even if *Maxwell* did criminalize those eligibility misrepresentations, it would apply only to the specific awards and proposals for which Dr. Aldissi was ineligible.

Finally, to the extent *Maxwell* cannot be distinguished, it has been ""undermined to the point of abrogation by the Supreme Court" such

that it no longer constitutes the prior panel precedent. *United States* v. *Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). *Maxwell* predates *Sekhar* and *Skilling* (and did not cite *McNally*, *Cleveland*, or *Carpenter*). At minimum, *Maxwell* should be reconsidered en banc.

B. The Evidence Against Dr. Bogomolova Was Insufficient

The wire fraud evidence against Dr. Bogomolova was insufficient: even when "viewed in the light most favorable to the prosecution," it gave "equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged." *Cosby* v. *Jones*, 682 F.2d 1373, 1383 (11th Cir. 1982).

No testimony or evidence showed Dr. Bogomolova prepared non-scientific parts of the proposals or was aware Dr. Aldissi had forged letters of support or made other materially deceptive statements. The facts that Dr. Bogomolova "signed" one EPA proposal (U.S. Ex. 7.2A) and two of its forged letters were addressed to her does not mean she "prepared" the proposal, drafted any material misrepresentations, or otherwise assembled the forged letters. And *Pinkerton* liability is particularly inappropriate here because Dr. Bogomolova could not have reasonably foreseen that, given her husband's credentials, he would have any need to

prepare deceptive proposals, and her employee, Dr. Komarova, was never involved with fake letters. Doc. 378.10 at 154-155; *see also Saudi Arabian Airlines Corp.* v. *Dunn*, 438 So. 2d 116, 120 (Fla. 1st DCA 1983) ("absence of monetary consideration does not preclude the existence of … employer-employee relationship").

C. Absent The Wire Fraud Convictions, Conspiracy And Aggravated Identity Theft Must Also Fail

If the wire fraud convictions fall, so must the parasitic conspiracy and aggravated identity theft counts. *McNally*, 483 U.S. at 361; 18 U.S.C. § 1028A(a)(1).

II. The District Court Abused Its Discretion When It Refused To Give A Conjunctive Wire Fraud Instruction

The disjunctive wire fraud instruction was an abuse of discretion.

A. The Conjunctive Instruction Was Legally Correct

A conjunctive instruction, which would have required the jury to find specific intent both to harm the United States and to enrich themselves instead of permitting self-enrichment alone, was legally correct.

"[T]here is a difference between deceiving and defrauding: to *defraud,* one must intend to use deception to cause some injury; but one can *deceive* without intending to harm at all." *Takholov*, 827 F.3d at 1312. "Thus, deceiving is a necessary condition of defrauding but not a

sufficient one." *Id.* "But if a defendant does not intend to harm the victim," he "has not intended to defraud the victim." *Id.* at 1313. Accordingly, "a schemer who tricks someone to enter into a transaction has not 'schemed to defraud' so long as he does not intend to harm the person he intends to trick." *Id.* Ultimately, "if there is no intent to harm, there can only be a scheme *to deceive,* but not one *to defraud*." *Id.* (emphasis in original).

Because the *sine qua non* of wire fraud is specific "intent to harm" the victim, not specific intent to "deceive" the victim and personally enrich oneself, a conjunctive instruction was required.

B. The Conjunctive Instruction Dealt With The Central Issue At Trial

Moreover, the instruction dealt with the central issue at trial: whether the Scientists specifically intended their deceptions to harm and in fact harmed the United States. Indeed, that was the main focus of the Scientists' closing arguments and the prosecutor's rebuttal. Docs. 378.15 at 193-196; 378.16 at 72, 86.

C. The Conjunctive Instruction Was Not Substantially Covered By Any Other Instruction

This instruction was not substantially covered by any other instruction, because it alone allowed the jury to return its verdict on specific intent to enrich instead of specific intent to harm.

D. The Error Was Not Harmless

Finally, the fact that the Scientists made this point during closing arguments did not render the error harmless. "Without an instruction supporting the defendant's theory, the jury was not required to believe [it]" and could instead "believe what the government argued in its closing" and "convicted the defendants … based on" the prosecutor's theory. *Id.* at 1322-23. Additionally, even if the deception evidence were overwhelming, that also would not render the error harmless: there was no evidence about specific intent to harm or actual harm to any property interest. *See supra* Argument I.

III. The District Court Erred Either When It Denied A Motion To Dismiss Aggravated Identity Theft Counts Or When It Found That Evidence Sufficient

The District Court erred when it denied a motion to dismiss the aggravated identity theft counts as unconstitutionally vague. Alternatively, the evidence of aggravated identity theft was insufficient.

A. The Aggravated Identity Theft Statute Is Unconstitutionally Void For Vagueness

18 U.S.C. § 1028A imposes criminal liability on anyone who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person," such as "any name," "during and in relation to" wire fraud. 18 U.S.C. §§ 1028(a)(7), 1028A(a)(1), (c)(5). Criminal statutes must "define the criminal offenses with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling,* 561 U.S. at 402-03. In that regard, the Rule of Lenity serves as a backstop for unconstitutional vagueness. *Id.* at 410-11. While reviewing statutes for unconstitutional vagueness, courts must limit their review to the face of the indictment. *United States v. Sharpe*, 438 F.3d. 1257, 1263 (11th Cir. 2006).

Here, the indictments' use of the phrase "any name" was unconstitutionally vague because it "elevate[d] simple name dropping to the level of aggravated identity theft." Doc. 42 at 11. In this regard, the Rule of Lenity demands that a defendant does not "'use' a means of identification within the meaning of § 1028A by signing a document in his own name which falsely stated that [other individuals] gave him authority"

to "act on [their] behalf." *United States* v. *Miller*, 734 F.3d 530, 542 (6th Cir. 2013). Similarly, it also provides that "another" does not "specify every person other than the defendant," but only "a person whose information has been misappropriated." *United States* v. *Spears*, 729 F.3d 753, 755 (7th Cir. 2013) (en banc).

B. Alternatively, Insufficient Evidence Supported The Aggravated Identity Theft Counts

For related reasons, insufficient evidence supported the aggravated identity theft counts. The evidence established Dr. Aldissi forged letters of support from 19 other individuals from educational institutions and companies without their authority. But other than using their names, there was no evidence that he misappropriated other personal data. *E.g.*, Docs. 378.2 at 96; 378.11 at 37-38, 58, 156-157. Under *Miller*, 734 F.3d at 542, that evidence was insufficient. And Dr. Bogomolova was not involved. *See supra* Argument I.B.

IV. The District Court Erred By Denying The *Franks* Motion And Abused Its Discretion By Denying A Motion To Reopen The *Miranda* And *Franks* Hearings

The District Court erred when it denied the *Franks* motion and abused its discretion when it denied a motion to reopen the *Miranda* and *Franks* hearings.

A. It Was Legal Error To Deny The *Franks* Motion

The Scientists do not challenge the District Court's rejection of categories four, five, and six or the affidavit's material omissions, because those factual findings were not clearly erroneous. Nevertheless, the District Court legally erred when it denied the *Franks* motion.

First, the magistrate's determination that Agent Jones had "at least a reasonable interpretation of the regulations governing Defendants' contracts" (Doc. 142 at 17) "misses the mark"; although reasonable mistakes of fact are permissible, reasonable mistakes of law are not. *United States* v. *DeGasso*, 369 F.3d 1139, 1144 (11th Cir. 2004).

Second, the magistrate legally erred when she construed the FAR as something different from the regulations that govern SBIR or STTR contracts. Doc. 142 at 18. By definition, SBIR and STTR contracts are subject to the FAR, which were "established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies." 48 C.F.R. § 1.101.

Third, the magistrate's apparent disagreement with Ms. Owens's legal interpretation of the FAR as it applied to SBIR and STTR contracts (Doc. 142 at 18-19) was mistaken. *See* Doc. 157 at 16-200.

With categories one, two, and three back in play, Agent Jones either swore a false affidavit made it in reckless disregard for its lacked probable cause, and it failed to establish probable cause to search. *See United States* v. *Sims*, 845 F.2d 1564, 1571 (11th Cir. 1988).

B. It Was An Abuse Of Discretion To Deny A Motion To Reopen The *Miranda* And *Franks* Hearings

The District Court abused its discretion when it denied the motion to reopen *Miranda* and *Franks* hearings because "new evidence" had "create[d] a genuine factual dispute on an outcome determinative fact." *United States* v. *Watson*, 391 F. Supp. 2d 89, 92 (D.D.C. 2005) (quoting *United States* v. *Mercadel*, 75 Fed. App'x 983 (5th Cir. 2003)).

When Agent Conley confirmed Dr. Aldissi had testified truthfully about his pat down, it called into question all credibility determinations the magistrate made in the agents' favor. Instead of considering the pat down's impact in isolation, the District Court should have considered the chain reaction that would have ensued had the magistrate made her credibility determinations in the Scientists favor.

If so, the "totality of the circumstances"—including Agent Conley's brandished shotgun—would have indicated there was a custodial interrogation because "reasonable [persons] in [their] position[s] would feel a

restraint on [their] freedom of movement to such extent that [they] would not feel free to leave." *United States* v. *Brown*, 441 F.3d 1330, 1347 (11th Cir. 2006); *see also United States* v. *Street*, 472 F.3d 1298, 1309 (11th Cir. 2006) (considering whether officers "brandished weapons, touched the suspect, or used language or a tone that indicated that compliance … could be compelled"); *accord United States* v. *Craighead*, 539 F.3d 1073, 1084 (9th Cir. 2008); *United States* v. *Revels*, 510 F.3d 1269, 1275 (10th Cir. 2007); *United States* v. *Mittel-Carey*, 493 F.3d 36, 39 (1st Cir. 2007); *Sprosty* v. *Buchler*, 79 F.3d 635, 641 (7th Cir. 1996); *United States* v. *Griffin*, 922 F.2d 1343, 1348-49 (8th Cir. 1990).

Additionally, the Scientists' consents to search were not knowing and voluntary. Consent is involuntary unless it is "the product of an essentially free and unconstrained choice," *United States* v. *Garcia*, 890 F.2d 355, 360 (11th Cir.1989), rather than "a function of acquiescence to a claim of lawful authority," *United States* v. *Hidalgo*, 7 F.3d 1566, 1571 (11th Cir.1993). Here, the Scientists were separated, isolated, denied access to each other, and interrogated for four hours each. *See Fernandez v. California*, 134 S. Ct. 1126, 1128 (2014); *Georgia* v. *Randolph*, 547 U.S. 103, 114-16 (2006). Additionally, the Scientists were born, raised,

and educated abroad; lacked any strong understanding of the American criminal justice system; were questioned harshly; were not *Mirandized*; and were not advised they could refuse consent. Doc. 45 at 12-21.

V. The District Court Procedurally And Substantively Erred At Sentencing

The District Court procedurally and substantively erred by overruling objections to sentencing enhancements, miscalculating restitution, and causing unwarranted sentencing disparities.

A. The District Court Procedurally Erred When It Overruled Objections To Sentencing Enhancements And Miscalculated Restitution

It was procedural error to overrule the Scientists' sentencing objections and an abuse of discretion to deny the continuance to allow newly amended guidelines to take effect. *See Fowler* v. *Jones*, 899 F.2d 1088, 1094 (11th Cir. 1990).

1. Loss Calculation

This was not a "pecuniary harm" case under U.S.S.G. § 2B1.1 n.3(A)(i) because the Scientists fully performed and the deceptions did not go to the nature of the bargain. Accordingly, loss should have been limited to "reasonably foreseeable administrative costs … of repeating or correcting the procurement action affected, plus any increased costs

to procure the … service involved that was reasonably foreseeable." U.S.S.G. § 2B1.1 n.3(A)(v)(II). Even if this were a pecuniary harm case, the loss "'shall be reduced by ... the fair market value of ... the services rendered ... to the victim before the offense was detected.'" U.S.S.G. § 2B1.1 n.3(E)(i). Either way, the loss should have been $0. Alternatively, loss should have been limited to average profits for these types of contracts (i.e., 6%). *See Maxwell*, 579 F.3d at 1305-07 (6% loss calculation was not clear error).

Additionally, it was clear error to conclude the intended loss was $24,522,386 without taking any testimony at sentencing. First, the summary witness's trial testimony about $10.5 million in awards (Doc. 378.14 at 66) did not establish any amounts that were not funded or derived from fraud. *See* Fed. R. Crim. P. 32(i)(3)(B). Second, the District Court did not "make *independent* findings establishing the factual basis for its Guidelines calculations." *United States* v. *Hamaker*, 455 F.3d 1316, 1338 (11th Cir. 2006) (emphasis in original). Third, several of the funded and unfunded awards occurred outside 18 U.S.C. § 3282(a)'s five-year limitations period. *But see Hamaker*, 455 F.3d at 1336.

2. Number Of Victims

None of the 77 aggravated identity theft victims qualified as "victims" under U.S.S.G. § 2B1.1 n.1 because they did not "sustain" any "reasonably foreseeable pecuniary loss" or "bodily injury" as a result of the offense. *United States* v. *Lam Thanh Pham*, 545 F.3d 712, 722 (9th Cir. 2008); *United States* v. *Yagar*, 404 F.3d 967, 971 (6th Cir. 2005). Additionally, it was a clear error of fact to count approximately 36 individuals, whose letters were not subsequently forged, as victims. *See* U.S. Ex. 54X.

3. Acting On Behalf Of Educational Institutions

The Scientists were not acting on behalf of educational institutions within the meaning of U.S.S.G. §2B1.1(b)(9)(A) & n.8. Instead, they were acting on behalf of their own companies rather than seeking to obtain benefits on behalf of those educational institutions. *United States* v. *Bollin*, 73 Fed. App'x 316, 317 (9th Cir. 2003); *United States* v. *Ellisor*, 522 F.3d 1255, 1275-76 (11th Cir. 2008).

4. Special Skill And Sophisticated Means

The Scientists did not use special skill or sophisticated means because their scientific knowledge was not used to perpetrate any offenses via crude cut-and-paste and Photoshop techniques. *United States* v.

Gandy, 36 F.3d 912, 915 (10th Cir. 1994) (remanding to determine whether podiatrist used special skill to commit Medicare fraud); *United States* v. *Hemmingson*, 157 F.3d 347, 359-60 (5th Cir. 1998) (attorney did not use special skills to facilitate crime). Additionally, Dr. Bogomolova was "not involved in the nonscientific aspects of the proposals" and merely downloaded a joint venture agreement from Law Depot. Doc. 328 at 22.

5. Obstruction Of Justice

The 2-level enhancement for obstruction of justice under U.S.S.G. § 3C1.1 was improper because the obstruction counts were already grouped with other counts, which resulted in double counting. Docs. 328 at 25; 330 at 13-14. *See United States* v. *Thomas*, 193 Fed. App'x 881, 890 (11th Cir. 2006) (obstruction enhancement was "probably" clear error because it double counted defendant's "underlying conviction," which "itself" was "an obstruction offense").

6. Restitution

Restitution was miscalculated at $10,654,969. The agencies had already received the benefits of their bargains, so further restitution improperly resulted in a windfall or punish the Scientists. *E.g.*, *United*

States v. *Bane*, 720 F.3d 818, 828 (11th Cir. 2013) ("district court erred when it failed to exclude the value of medically necessary goods victims actually received in its restitution calculation").

B. The District Court Substantively Erred When It Caused Unwarranted Sentencing Disparities

The Scientists compared themselves to white collar defendants who received lenient sentences (e.g., Jeffrey Skilling, who caused a $1 billion loss and received 14 years), and set forth lesser guideline calculations for more serious crimes, including murder, treason, and espionage. Docs. 328 at 25-32; 330 at 18-23. By diverging from those exemplars, the sentences caused substantively unreasonable disparities in violation of 18 U.S.C. § 3553(a)(6). *Cf. United States* v. *Plate*, 839 F.3d 950, 956-58 (11th Cir. 2016) (vacating substantively unreasonable sentence).

VI. The District Court Abused Its Discretion When It Denied Motions For Mistrial

The District Court abused its discretion when it denied motions for mistrial about the refusal to strike "Mahmoud," "fraud money" email headers, debarment, a "totally fraudulent" signature, and anthrax.

Docs. 69; 221; 378.2 at 243-251; 378.5 at 43-47; 378.6 at 95-100, 111-112; 378.10 at 4-15.

The refusal to strike Dr. Aldissi's former legal name, "Mahmoud," from the superseding indictment and pieces of evidence deprived him of a fair trial. *Cf. United States* v. *McLain*, 823 F.2d 1457, 1459-60 (11th Cir. 1987) (vacating for new trial). This is not a situation involving a harmless alias, such as "Gargoyle" or "Pig." *United States* v. *Raphael*, 487 Fed. App'x 490, 507 n.11 (11th Cir. 2012); *United States* v. *Satterfield*, 743 F.2d 827, 847-48 (11th Cir. 1984). Instead, Islamophobia is a well-known phenomenon, *cf. Washington* v. *Trump*, 2017 U.S. App. LEXIS 2369, at *31 (9th Cir. Feb. 9, 2017) (discussing "serious allegations" and "significant constitutional questions" regarding alleged Muslim travel ban), and the prejudice to Dr. Aldissi given the *Charlie Hebdo* attack was all too real.

Relatedly, the refusal to declare mistrials regarding "fraud money" email headers, debarment, a "totally fraudulent" signature, and anthrax was also an abuse of discretion. When that harmful evidence emerged, cautionary instructions could not possibly unring the bell and remedy the prejudice. *E.g.*, *United States* v. *Blakey*, 14 F.3d 1557, 1559-

60 (11th Cir. 1994) (cautionary instruction could not remedy closing argument that defendant was "professional criminal"). Cumulative error also required a new trial. *See Ramirez*, 426 F.3d at 1353.

VII. THE RECORD FALSIFICATION EVIDENCE WAS NOT SUFFICIENT

"Whoever knowingly … falsifies [a] document" with "intent to impede, obstruct, or influence" a federal investigation is criminally liable. 18 U.S.C. § 1519. Here, the Scientists and Dr. Komarova "knowingly" created a backdated joint venture agreement, employment contract, and timesheets "with the intent to impede, obstruct, or influence" a federal investigation. But no evidence, other than the backdating itself, established the information contained therein was falsified.

"Congress uses words … as they are commonly understood." *United States* v. *Frank*, 599 F.3d 1221, 1234 (11th Cir. 2010). To "falsify" means to "make something false; to counterfeit or forge." BLACK'S LAW DICTIONARY 619 (7th ed. 1999). Because the backdated documents contained no false, counterfeited, or forged information, they were insufficient under § 1519's plain language or the Rule of Lenity. *Cf. Yates*, 135 S. Ct. at 1088-89 (fish was not "tangible object").

CONCLUSION

The Court should reverse the judgments or vacate them and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 12,990 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century font.

February 21, 2017

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 21st day of February, 2017, to:

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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 21st day of February, 2017, to:

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No. 15-14193-EE

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MAHMOUD ALDISSI AND ANASTASSIA BOGOMOLOVA,
Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
NO. 8:14-CR-217-T-33EAJ

BRIEF OF THE UNITED STATES

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June 26, 2017

United States v. Mahmoud Aldissi and Anastassia Bogomolova
No. 15-14193-EE

Certificate of Interested Persons and Corporate Disclosure Statement

In addition to the persons and entities identified in the Certificate of Interested Persons and Corporate Disclosure Statement in Mahmoud Aldissi and Anastassia Bogomolova's principal brief, the following persons and entities have an interest in the outcome of this case:

1. Defense Threat Reduction Agency, victim;

2. Muldrow, W. Stephen, Acting United States Attorney; and

3. Porcelli, Hon. Anthony E., United States Magistrate Judge.

No publicly traded company or corporation has an interest in the outcome of this appeal.

Statement Regarding Oral Argument

The United States does not request oral argument.

Table of Contents

Table of Citations

Cases

Rules

Statutes

Other Authorities

Statement of Jurisdiction

This is a consolidated appeal from final judgments in a criminal case. The district court had jurisdiction. *See* 18 U.S.C. § 3231. The judgments were entered on September 14, 2015, D337, D339; the defendants timely filed notices of appeal on September 17, 2015, D349, D350. *See* Fed. R. App. P. 4(b). This Court has jurisdiction, *see* 28 U.S.C. § 1291, and authority to examine the defendants' challenges to their sentences, *see* 18 U.S.C. § 3742(a).

Statement of the Issues

I. Whether the evidence established that the defendants engaged in a scheme to defraud, not just to deceive.

II. Whether the district court abused its discretion by refusing to give the defendants' proposed instruction when it was incorrect.

III. Whether the defendants used others' means of identification when they used forged letters of support in their proposals.

IV. Whether the district court clearly erred in finding that the search warrant affidavit was truthful or abused its discretion in denying the defendants' motion to reopen their suppression motion.

V. Whether ample evidence supports the defendants' convictions for submitting false records to the National Science Foundation ("NSF)" (defendants' VII).

VI. Whether the district court abused its discretion in denying the defendants' motions for mistrial or Aldissi's motion to strike his name from the indictment.

VII. Whether the district court clearly erred in calculating the guidelines or abused its discretion in determining reasonable sentences (defendants' V).

Statement of the Case

Mahmoud Aldissi and his wife, Anastassia Bogomolova, submitted fraudulent scientific-research proposals to obtain $10.6 million in federal funds through competitive set-aside programs that Congress designed to enable eligible small businesses to research and commercialize new technology. The defendants lied about their facilities, equipment, subcontractors, employees, and eligibility, forged endorsements from highly respected scientists and industry specialists, and later submitted falsified business records to officials investigating the fraud. The defendants now challenge their convictions and sentences on legal grounds, admitting that they lied about material matters but claiming that they are not guilty of fraud because they performed research, arguing that forging endorsement letters to exploit professionals' names and reputations without their knowledge does not constitute identity theft, and broadly complaining about the district court's discretionary decisions.

Course of Proceedings

A jury found the defendants guilty of conspiracy to commit wire fraud under 18 U.S.C. § 1349 (count one); wire fraud under 18 U.S.C. §§ 1343 and 2 (counts two through eight); aggravated identity theft under 18 U.S.C. §§ 1028A and 2 (counts nine through thirteen); and falsification of records involving federal investigations under 18 U.S.C. §§ 1519 and 2 (counts fourteen and

fifteen). D134, D270-271. The district court sentenced Aldissi to serve 180 months' imprisonment, comprising concurrent terms of 156 months on counts one through eight, fourteen, and fifteen, followed by 24-month terms on counts nine and ten, concurrently with one another but consecutively to all other counts. D337. The district court sentenced Bogomolova to serve 156 months' imprisonment, comprising concurrent terms of 132 months on counts one through eight, fourteen, and fifteen, followed by 24-month terms on counts nine and ten, concurrently with one another but consecutively to all other counts. D339.

Statement of the Facts

A. Targets for Fraud: the Small Business Innovation Research ("SBIR") and Small Business Transfer Technology Research ("STTR") programs.

Congress established the SBIR and STTR programs to assist qualified small businesses with the expense of researching and developing innovative technology "in order to maintain and strengthen the competitive free enterprise system and the national economy." *See* 15 U.S.C. § 638(a); D378-2/101-05.[1] Under the programs, each federal agency with a research-and-development

[1]"D378-2" refers to the volume as designated by the automated docket entry header. The numbers after the slash refer to the page numbers of that volume.

budget must set aside a percentage of that budget to fund research by qualifying small businesses. D378-2/139. The programs do not fund "research for the sake of research"; rather, they stimulate research, allow small businesses to participate in research with federal funding, and encourage private companies to commercialize the research with an actual product or service. D378-1/51; D378-2/101-05; D378-3/59. Commercialization—getting new technology out and sold in the marketplace—"is the main goal." D378-3/46, 59, 212; D378-6/141-42; D378-9/18-25. The programs generate roughly seven patents a day and have produced important innovations, including laser eye surgery and the Qualcomm chips found in cellphones. D378-9/18, 23.

Awards under the programs typically are capped at $100,000 for a six-month Phase I award and begin at $225,000 for a Phase II award, which can encompass up to a two-year term. D378-2/118-19; D378-3/62. Phase I "is proof of concept," which involves "testing out" an idea that appears to have commercial potential. D378-3/62; *see also* D378-2/118-19; GX53D/2. A business that receives a Phase I award may later apply for a Phase II award to "continue developing the Phase I technology, but really focus on commercializing it." D378-3/62; *see also* D378-2/118-19.

The Small Business Administration issues policy directives that govern

the programs.[2] D378-2/104-05, 109; GX53B-D. Under the directives, federal agencies publish a formal solicitation as notice of the research topics they are interested in funding that year. D378-2/115; D378-3/67-68. In a highly competitive process, researchers electronically submit detailed proposals outlining their research and identifying the principal investigator ("PI"), key employees, facilities, equipment, consultants, budget, profits, workplan, and other information. D378-2/109, 116-18, 151; D378-3/60-61; D378-4/277; D378-6/122, 133-34, 141.

The agency screens all proposals, eliminating any that are ineligible. D378-4/168, 209-11. A proposal generally is ineligible, for example, if the PI is not primarily employed (at least 51 percent) by the small business or is employed full-time elsewhere, or if the work will not be performed in the United States. D378-2/109, 128-32, 141-42; D378-3/103; D378-4/168, 209-10; D378-6/25; GX53D/15-16.

The agency then provides the proposals to a panel of experts, who score them for technical merit, considering whether the business has the appropriate personnel, consultants, facilities, equipment, and industry partners to perform the research and achieve the commercialization goal. D378-4/186; *see, e.g.*,

[2]The SBIR and STTR programs operate in the same manner, but STTR requires the small business to work in partnership with a research institution, such as a university. D378-2/108.

D378-5/143-49, 194-204, 219-44; D378-6/20-21, 139-42; D378-11/136, 145; GX4.5J; GX6.4B. The budget within the proposal is important to the process, because it permits the evaluator to understand how the company intends to use the funds if the company receives an award. D378-2/186; D378-3/33-35; D378-6/26.

Ultimately, the agency incorporates winning proposals into a contract with the business, and a supervising reviewer monitors the business's periodic reports (which document the business's performance) and approves the business's corresponding requests for payment. D378-5/62-64. Although some of the contracts are subject generally to the Federal Acquisitions Regulations ("FAR"), the SBIR legislation and policy directives continue to apply to the awards through the performance period. D378-2/170-76, 213-16; GX53D. Awards may be terminated at any time. D378-2/137.

The policy directives and solicitation instructions address the need to prevent fraud, waste, and abuse, providing, as examples, "misrepresentations or material, factual omissions to obtain or otherwise receive funding," GX53D/29, because misrepresentations prevent the agency from funding a competing, legitimate proposal, D378-2/154, 224-26; D378-6/122, 133-34, 141, 189. In submitting each proposal, and later, in requesting payment, the business official certifies that the information in the proposal is true and

acknowledges that submitting false information is a criminal offense. *E.g.*, D378-4/221; D378-5/8; D378-9/157-66; D378-11/138-39; D378-12/197-201; GX2.2C; GX4.2A; GX17.4E; GX18.2. Agency officials rely on the truthfulness of the submissions in evaluating which proposals to fund, assessing the extent to which the progress reports for funded projects comply with the proposal/contract, and paying funds upon receipt of the final report. D378-3/33; D378-4/167, 188, 190-96; D378-5/8, 23-25, 63, 168; D378-6/189.

The company is required to perform the research consistently with the proposal. D378-2/136-7, 180-85; D378-5/23-26, 62-63; D378-9/76-78. If a company spends less on consultants or materials than the proposal's budget provides, the company is not free to retain the excess funds as profit, because, generally, the percentage of profit the company may make is capped at either 7 or 10 percent (depending on the agency). D378-2/136-7; D378-3/103-04; D378-9/76-78. The company may not use the funds on other costs unless its PI notifies and obtains permission from the agency program director. D378-9/76-78. Likewise, if a company wishes to change the workplan by using different key personnel, it must first obtain permission from the program director. D378-4/172, 199; D378-5/22-24; D378-7/203. Ultimately, performance—delivery of a final report—would not excuse fraudulent statements in a proposal. D378-2/224-26; D378-6/84.

B. Using proposals full of material lies and forgeries, the defendants applied for $24,522,386 in awards.[3]

In 1998, Aldissi incorporated Fractal Systems, which, at one point, operated a small laboratory out of a strip mall in Safety Harbor, Florida, with some employees, including Bogomolova and her friend, Elena Komarova.[4] D378-14/48-52; D378-7/17, 25, 50-52, 209; D378-10/50-52, 55, 166-67; D378-14/55; GX1A-B. In 2004, Bogomolova incorporated Smart Polymers Research Corporation ("Polymers") using the couple's home address, but Polymers did not have any employees. D378-14/48-52, 58-59; GX1A-B. By 2008, Fractal had run out of work and fired its employees, so the defendants closed the strip-mall space and began using their home address for Fractal, also. D378-14/48-52, 62-63; D378-7/209; D378-10/25, 50-52, 151; GX1A. (Komarova, meanwhile, moved to North Carolina and in March 2008 obtained a full-time job with another company. D378-10/23-27.) Before 2008 and for years afterward, however, Aldissi and Bogomolova used Fractal and Polymers as mills to submit SBIR and STTR proposals full of material lies, supporting the proposals with forged letters of enthusiastic support from highly respected academics and industry professionals.

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[3] *See* Presentence Investigation Report ("PSR") ¶ 49.

[4] Aldissi went by the name "Mahmoud" at the time and continued to use the name in other contexts through 2015. GX1A; *see* D53, D211.

(1) Potable water in space—counts two, eight, nine, and thirteen.

In August 2009, Aldissi submitted an SBIR proposal to NASA for a Fractal project involving a system for generating potable water in space, designating himself as PI and describing Bogomolova as Fractal's "Senior Staff Scientist." D378-4/213-17; D378-6/260-64; GX2.2A-C; *see* D134 (count two). Aldissi claimed to have "assembled a highly capable team" that included professors from Louisiana State University and the University of Florida as budgeted consultants and "a water filtration manufacturer to facilitate commercialization of the technology." D378-4/223; GX2.2A. Using his home address in Belleair Beach, Florida, Aldissi claimed to have a "fully equipped," 2500-square-foot laboratory staffed by four full-time employees, and to have "access to equipment" at the University of South Florida "through the State-sponsored I-4 Corridor Program" and the university laboratories of "consultants" LSU chemical-engineering professor Dr. Kalliat Valsaraj and UF environmental-engineering professor Dr. David Mazyck. D378-4/213-17, 230; GX2.2A/16. Aldissi included an image of a photo-reactor, claiming, "We will use the photo-reactor designed and built in our laboratory in collaboration with our consultant, … Valsaraj[.]" D378-11/160; GX2.2A/11. Aldissi attached an email and a letter, purportedly from Valsaraj and Mazyck, respectively, in which the scientists praised the project and agreed to assist with

the research, and a letter purportedly from John Douglas, President of Paragon Water Systems, which said that Douglas would be willing to assist in commercializing the technology. GX 2.2A/20-22; *see* D134 (count three).

But Fractal did not have a team, consultants, or a potential commercial partner; the letters and email were forgeries. D378-6/100-02, 110, 202-26, 249; D378-11/160-79. Although Valsaraj had written one support letter for a Fractal employee in 2004, he had told Aldissi in 2006 that he would not work on further projects with Aldissi and had not written or authorized the emails Aldissi used. D378-11/155-57. Mazyck, too, had provided Fractal with a letter of support for a 2004 proposal, but he had never written another one, he had never authorized Aldissi to use his name, professional credentials, or university affiliation, and he had not agreed to do any work on the 2009 project. D378-6/202-03, 213-220. And Douglas had retired from Paragon in 2005; he did not write or authorize his signature on the 2009 Paragon letter, although he had, in 2005, written Komorova a letter of support. D378-6/92, 100-02, 110; D378-10/149-50.

Fractal did not have a 2500-square-foot laboratory in Belleair Beach; the defendants' home was there, and it did not contain a laboratory. D378-1/40, 55, 76; D378-8/100-02. Nor did Fractal have access to laboratory space at LSU or UF (and the facilities at UF were not even equipped for the work

Aldissi had described); and the photo-reactor, which had been built in Valsaraj's laboratory at LSU, had been disassembled in 2005 and no longer even existed. D378-6/202-03, 213-220; D378-11/160-61. The I-4 High Tech Corridor was an entity that provided Florida university professors with matching grants when private companies funded university research; it did not give private companies access to equipment or facilities, as Aldissi had claimed. D378-8/53-78. Finally, Fractal did not have four employees; it maintained payroll records for only Aldissi and Bogomolova, and it paid Komorova—a full-time employee of a North Carolina company—on an hourly basis. D378-10/27, 50-52, 151; D378-14/57.

Relying on the truthfulness of the proposal, NASA evaluator Karen Pickering advocated funding it. D373-5/226-27. Pickering knew that Mazyck is "a very well-respected authority in … photochemistry" and that LSU "has an excellent program in chemical engineering and environmental processes[,]" so Mazyck's and Valsaraj's involvement "lent credibility to the proposal." D378-5/222-23. Likewise, the letter from Douglas demonstrated "the commercialization collaboration," which increased the likelihood that the project would succeed. D378-5/225. If Pickering had known, however, that Aldissi's representations about the facilities, personnel, budget and commercialization strategy were untrue, she would not have advocated

funding the project; instead, she would have referred the matter to the Office of the Inspector General ("OIG") for investigation. D378-5/220-234, 243-44. Likewise, if NASA's SBIR/STTR program manager, Carlos Torrez, had known Aldissi's proposal was untruthful, Torrez would not have authorized the funding and the award would have gone to another business. D378-4/277-78; D378-5/6-10.

Fractal received $99,999. D378-4/247; D378-5/6, 19; GX 2.3. Neither Valsaraj nor Mazyck worked on the project, even though the workplan, which was incorporated into the contract conditions, included $6000 for their work. D378-6/206; D378-11/155; GX2.3. And, although Aldissi certified that he—the PI—was primarily employed by Fractal in the United States, GX2.2C, he actually was employed by a French university in July 2010, when he submitted the final project summary to NASA, D378-6/192; D378-10/113-14; GX2.5F; GX2.5L; GX55L-T; GX81A.

In January 2014, Aldissi submitted a $124,997 proposal to NASA for another Fractal project involving water purification in space, again designating himself as PI and describing Bogomolova as Fractal's "Senior Staff Scientist." D378-4/213-17; D378-6/260-64; GX8.2A-B; *see* D134 (count eight). Aldissi again: claimed to have four research personnel and the same "highly capable team"—Valsaraj, Mazyck, and Douglas; claimed to have a fully equipped,

2500-square-foot laboratory in Belleair Beach and access to more equipment at USF through the I-4 Corridor Program and at the university laboratories of his "consultants"; budgeted fees for Valsaraj and Mazyck; stated that he would use the same photo-reactor; and attached forged and unauthorized letters purportedly from Valsaraj, Mazyck, and Douglas. D378-4/213-17, 230; D378-6/101, 210-17; D378-11/166-68; GX8.2A; *see* D134 (count thirteen).

Pickering did not have access to the 2009 proposal, so she did not notice that Aldissi had recycled the language and letters. D378-5/243-44. Relying on the truthfulness of the 2014 proposal, Pickering advocated for it, also. D378-5/244. She would not have had she known that the proposal was false. *Id.*

(2) Biotoxin sensors—counts seven and twelve.

In May 2009, Bogomolova, as PI, submitted an SBIR proposal to the Environmental Protection Agency for a Phase I project by Polymers involving a sensor to detect anthrax and ricin toxins, describing Komarova as a "Staff Scientist" and Aldissi as a "senior staff scientist" at Polymers with a "prior appointment[]" at Fractal. *See* D378-3/27; GX22.2A. Bogomolova claimed to have four research personnel and a fully equipped, 2500-square-foot laboratory in Belleair Beach. GX22A/16. She attached letters purportedly from Dr. Andrew Cannons, Scientific Director of the USF Center for Biological Defense, confirming his "interest and intent" in collaborating on the "exciting

and timely project"; Dr. Alex Gusev, Director of Ultrafast Systems, confirming his interest in collaborating with her on development and commercialization; Howard Mills, President of Sensidyne, a company that produces gas-detection devices, agreeing to help develop models and prototypes and to manufacture the completed product; and Frank O'Connor, President of Defentect, a security-technology firm, offering assistance in marketing and commercialization. D378-3/31, 42-46; GX22.2A/23-26. Bogomolova claimed to have "access to" equipment at her "consultants' laboratories" and at USF generally through the I-4 Corridor Initiative, and she budgeted $2800 for Dr. Cannons's work. D378-4/213-17, 230; GX22.2A/15.

Like the NASA proposals, Bogomolova's EPA proposal was untruthful. Polymers did not have any employees, let alone four; Komarova was employed full-time elsewhere; Aldissi was still employed at Fractal; Polymers did not have a laboratory, much less access to laboratory space through Cannons or a state-supported program; and the letters from Cannons, Gusev, and Mills that Bogomolova submitted were forgeries. D378-1/40, 55, 76; D378-2/128-29; D378-7/7-47, 93-124; D378-8/53-78, 100-02; D378-10/26, 62-63; D378-13/76-79, 83, 114-15, 125, 129; D378-14/62-86.

Relying on the truthfulness of the proposal, EPA's SBIR Progam Manager April Richards approved it, and Polymers received $69,999. D373-

3/58; GX22.3; GX22.4A. If Richards had known that Bogomolova's representations were false, she would have funded a different business. D373-3/63, 65, 104. Cannons never performed any work on the project. D378-13/81-82.

In October 2010, Bogomolova, as PI, submitted a Phase II proposal to the EPA for additional work on the biotoxin sensor, again describing Komarova as a "Staff Scientist" and Aldissi as a "Senior Staff Scientist" at Polymers with a "prior appointment[]" at Fractal. *See* D378-3/27, 32, 76-83, 89-101; GX7.2A/2, 20-22. Bogomolova again claimed to have four research personnel and a fully equipped, 2500-square-foot laboratory in Belleair Beach; access to more equipment through the I-4 Corridor Initiative; and "a working relationship with the Center for Biodefense at USF-Tampa[,]" none of which was true. GX7.2A/60. Bogomolova recycled and attached forged and unauthorized letters purporting to be from Cannons, Gusev, Mills, and O'Connor. D378-7/7-47, 93-124; D378-12/22; D378-13/86-91; GX7.2A/27-30; *see* D134 (count twelve).

Relying on the truthfulness of the proposal (and the underlying Phase I project), Richards approved it for $225,000 in funding. D378-3/104; GX7.2A/32; GX7.3. If Richards had known that Bogomolova's proposal was false, she would have funded a different business. D373-3/63, 65, 104.

Bogomolova's proposal, including her representations concerning key employees, was incorporated into an EPA contract. D378-4/172, 193-99; GX7.3. Cannons, however, never performed any work on the project. D378-13/81-82. Moreover, Bogomolova was living in France or traveling in Russia during several months of the performance period, which rendered the project ineligible for funding, yet she still reported labor costs for herself and Aldissi on the project during that time. D378-10/113-14, 125; GX7.4B; GX7.5P/2, 181. Aldissi emailed the final report and voucher for payment. D378-2/241-43; D378-4/141-44; GX7.6A; *see* D134 (count seven). EPA relied on the truthfulness of the reports in paying the award. D378-4/167, 188, 190-99; GX7.6A.

The defendants executed the scheme in other proposals for products to detect biotoxins. In December 2006, 2007, and 2008, Bogomolova submitted proposals from Polymers to the National Science Foundation and received funding for three $99,999 projects. D378-9/134-35, 153, 164-82, 220; GX16.2A; GX16.3; GX17.2; GX17.3; GX17.4E/4; GX18.2; GX18.3. She certified that the work would be conducted in the fully equipped, 2500-square-foot laboratory in Belleair Beach and that Polymers had access to more equipment through the I-4 Corridor Initiative and its relationships with collaborators and commercial partners. GX16.2A/18; GX17.2/19. In the 2006

and 2007 proposals, Bogomolova listed Komarova as PI and certified that Komarova was primarily employed by Polymers. D378-9/134-35, 220; GX16.2A; GX17.2; GX17.4E/4. In the 2008 proposal, Bogomolova represented Komarova and Aldissi as Polymers employees. GX18.2.

For the 2006 proposal, Bogomolova attached a forged letter, purportedly from Dr. Ted Gauthier, expressing Gauthier's interest in serving as a consultant and his belief that the project "show[ed] great promise in rapid detection of Botulinum toxin contamination." D387-12/112; GX16.2A/19. But Gauthier did not even know about the Polymers proposal, and he never worked on it. D378-12/102-13; GX52. (He had written a letter to Komarova in 2004 agreeing to synthesize protein sequences for a Fractal Botulinum toxin project, but that letter expressed no opinion concerning the merits of even that Fractal proposal. D378-12/102-12; GX52.)

Bogomolova attached forged letters to the 2007 and 2008 proposals also, using Mills and Cannons in 2007 and Mills, Cannons, O'Connor, and Gusev in 2008. D378-7/19-24, 28-30; D378-13/125; GX17.2; GX18.2. The performance period for the 2007 proposal was July 1 through December 31, 2008, GX17.3, after Komarova had begun working full-time for another company, D378-9/158-59; D378-10/23-27. Aldissi and Bogomolova, moreover, were living in France for four months of that period. GX17.5AB-T;

GX17.5AD-T. In her final report, however, Bogomolova certified that she, Aldissi, and Komarova each had worked more than 160 hours on the project, that their work had been consistent with the award terms (which did not permit work outside the United States), and that Komarova had been primarily employed by Polymers. D378-9/158-59; GX17.4E.

In March 2008, Aldissi (as president of Fractal) and Komarova (as PI) submitted a forged, unauthorized Gauthier letter in a $98,999 STTR proposal to the Department of Defense. D378-6/26-30; D378-12/102-08; D378-10/152; GX19.2. The project budget included $27,750 for Gauthier as a subcontractor and described work for him that neither he nor his laboratory would have been able to do. D378-12/102-08; GX19.2. The Gauthier letter was accompanied by forged letters purportedly from Cannons and Mills, D378-7/31-34, 75-78; D378-13/76-77, 114-15, 125, 129; GX19.2/20-21, and it misrepresented Fractal's staff and facilities and Komarova's eligibility as PI, GX19.2. The misrepresentations, particularly those relating to Gauthier and Mills, were critical to the evaluator who recommended the project for funding. D378-5/188-202; GX19.2; GX19.4D.

(3) High-capacity energy storage—counts three, four, six, ten, and eleven.

Aldissi electronically submitted a number of proposals relating to energy storage, including a $100,000 proposal to the Department of Homeland

Security in December 2009; a $149,999 proposal to the NSF in June 2010; and a $69,999 proposal to the Army in June 2010. *See* GX3.2A/2; GX3.3; GX4.2A; GX4.5Q; GX6.2; *see also* D134 (counts three and four). Aldissi designated himself as PI and represented Bogomolova as "Senior Staff Scientist," even though he was employed full-time in France and they were living there during the performance period. *See* D378-6/192; D378-8/48; D378-10/114-15, 124-25; D378-11/138-46; GX3.2A/2; GX3.3; GX3.5J; GX4.2A; GX4.6A; GX6.2. Consistently with the defendants' overall scheme, Aldissi misrepresented Fractal's size, laboratory, and access to equipment at USF, and falsely claimed to have "collaborative agreement[s]" with three specified commercial partners. D378-4/78-98; D378-6/184-85; D378-14/82-84; GX3.2A/2, 15-21; GX3.3; GX3.4A; GX4.2A/31; GX6.2/19. The proposals incorporated forged documents purporting to be subcontractor bids or letters of support from high-level employees of the commercial partners, but, by the dates of the respective documents, one of those employees had died and two others no longer worked for the commercial partners. D378-4/78-98; D378-6/184-85; D378-14/82-84; GX3.2A/21; GX4.2A/31; GX6.2/19. If the government evaluators had known that the proposals were untruthful, they would not have recommended funding them. D378-7/156-71, 215-17, 219-20; D378-11/137-44; D378-6/131-44, 189, 196. The final payment on the Army

contract was wired to Fractal's account on June 27, 2011. D378-8/109, 113; *see* D134 (count six).

C. When NSF OIG investigated, the defendants created false documents to cover up their fraud.

In October 2010, an OIG compliance investigator asked Bogomolova via email to provide information and documents concerning the three NSF biotoxin awards. D378-2/43-44, 47; D378-14/10; GX14.5A-X. The investigator requested, among other things, copies of contracts and financial documentation for work performed by Gauthier, Cannons, Sensidyne, and USF, or for the use of their equipment; contracts or leases relating to the facilities in which Polymers conducted the research; the physical address of Polymers' 2500-square-foot facility and all other facilities in which Polymers performed the research; and a list of all individuals who worked on the awards, with supporting timesheets. GX14.5B. Explaining that the laboratory was closed and that she was overseas, Bogomolova requested additional time to collect the documents. GX14.5D.

The next day, Bogomolova obtained a form-fillable joint-venture-agreement form from lawdepot.com. D378-1/163-69; D378-2/125-26; GX14.5Y-Z; GX14.5AA-AB; GX14.5AE. She completed the form to show an agreement between Fractal and Polymers for the use of facilities, equipment, and payroll services, altered the form to delete the automatically-generated

October 2010 time-stamp, and backdated it to January 1, 2007. D378-1/163-69; GX14.5H; GX14.5Y-Z; GX14.5AA-AB; GX14.5AE. She and Aldissi then signed the agreement. GX14.5H.

Bogomolova also prepared an employment contract and blank timesheets for the periods covered by the awards, emailed them to Komarova, and asked Komarova to fill them out and backdate them. D378-1/255-60; D378-10/131-46; GX54X; GX77G. Komarova signed the backdated employment contract, filled in fifteen months' worth of timesheets at once using different-colored pens to make it appear that she had made the entries at different times, and sent the documents back to Bogomolova. D378-10/131-46; D378-14/11; GX15.5L; GX56E. Bogomolova later asked Komarova for additional information to make it appear that the employment contract—which Bogomolova characterized as having been "supposedly signed" in 2007—was genuine. GX77G.

On October 18, 2010, Aldissi sent an email to Craig Johnson, owner of Field Forensics, asking Johnson to "write a short letter to help make someone go away." D378-1/173-74; D378-14/324; GX5A; *see* D134 (count five). Explaiing that Polymers had "somehow" been "picked" for NSF review, Aldissi stated that they had done the work at their home (and in North Carolina) but wanted to be able to "provide a local address where some of the

work is supposed to be done rather than [at their home]." GX5A. Aldissi asked Johnson to write a letter "along these lines" on Field Forensics letterhead:

> [T]o whom it may concern: Smart Polymers Research Corp. has been given access to our facilities which measure X square feet, since June of 2008 where they could use their equipment, available fume hoods, refrigeration, bench space, and storage to conduct the work on projects awarded by NSF on biodetection technologies. I can be reached at (e-mail address) for any other details. Sincerely, name, position, signature.

GX5A. Johnson wrote the letter exactly as Aldissi had scripted it. GX14.5I.

On October 27, 2010, Bogomolova sent to the NSF-OIG the backdated joint-venture agreement, *see* D134 (count fourteen), Johnson's letter, a brief monthly time-and-effort summary for each award, and various other documents. GX14.5E-X. In March 2011, when an NSF-OIG investigator asked for "additional detailed documentation" showing "when work was conducted and by whom on a weekly basis," GX15.5H, Bogomolova sent the timesheets that Komarova had falsified along with similar timesheets for herself and Aldissi, D378-14/11; GX15.5J-L; *see* D134 (count fifteen).

D. Criminal proceedings.

(1) Initial search warrant and the defendants' Franks challenge.[5]

In January 2014, Special Agent Tara Jones of the Defense Criminal

[5] *Franks v. Delaware*, 438 U.S. 154 (1978).

Investigative Service, as coordinator for nine federal criminal-investigative agencies, obtained a search warrant for the defendants' home. *See* D54; D157/202-10. In her affidavit, Agent Jones described the SBIR/STTR programs generally and explained that the defendants had submitted proposals misrepresenting their employees, subcontractors, costs, and facilities, had fabricated letters of support, and had submitted duplicative proposals for funding. D54-1/5, 11-20. Agent Jones added that, although the defendants had obtained funding under the programs, they had failed to use the funding as proposed and instead had used the funds for their personal enrichment. D54-1/5-6, 20-28.

The defendants moved to suppress evidence obtained from the warrant, arguing that Agent Jones had misrepresented facts relating to the programs. D46. Characterizing Agent Jones's assertion that they were required to perform the research and expend the awarded funds consistently with the proposal and its budgeted costs as an "overarching" lie, Leigh Owens, a former attorney advisor for the Defense Contract Management Agency, testified as a defense expert in government-procurement fraud. D157. According to Owens (who had never been a contracting officer for SBIR/STTR awards or been trained in their administration), because some of the awards were governed by the FAR and the government was paying for "research and development

services," the defendants were free to use themselves for labor instead of the employees, subcontractors, or consultants described in their proposals. D46/9, 11, 14-15, 26-29, 42, 48, 96; D157/22-25, 32-37, 45-46, 88, 111-13, 160-62.

The defendants challenged Agent Jones's statements that, in deciding which projects to fund, agencies relied on letters from industry experts and would not select a proposal for funding or would cancel funding if it learned that the proposals contained misrepresentations. D46/16-17; D157/67, 79-80. According to Owens, that the defendants misrepresented the location and availability of laboratory space or the availability of consultants was inconsequential, provided they could "perform the work." D157/94-108. Finally, the defendants asserted that they had not submitted duplicate proposals or misrepresented the number of their employees. D46/19; D157/49, 68, 73-75.

Agent Jones testified at the hearing (and numerous other witnesses later testified at trial) that businesses are required to perform SBIR/STTR contracts consistently with the award proposal and that SBIR/STTR policy directives apply even to contracts administered under the FAR. D157/275-76, 302; D389/51. Similarly, Agent Jones testified that, if a defendant had made material false statements to obtain the contract, that the contract was a fixed-price contract or governed by the FAR would not mean that the defendants

had not committed a fraud. D389/76-77.

The district court denied the defendants' motion, D173, adopting the magistrate judge's report and recommendation, D142, and concluding that Owens's testimony did not establish that the affidavit contained misstatements. To the contrary, the court found that several of the awards Agent Jones described in the affidavit were not even subject to the FAR, that the SBIR/STTR imposed additional requirements, and that there was no Fourth Amendment violation because it was reasonable for Agent Jones to have concluded that the defendants' conduct was illegal. D142/16-18 (citing *Heien v. North Carolina*, 135 S. Ct. 530, 539 (2014)).

Similarly, the court rejected Owen's testimony that forged letters of support were not material, finding that, while "such letters might not be important in programs regulated exclusively by the FAR, the SBIR program relies on such letters given the particularized nature of the program and desire to promote research with small businesses and other research institutions." D142/18-19. Finally, the court concluded that statements in the affidavit that the defendants had submitted duplicate proposals in order to be paid twice for the same work and had misrepresented the size of their companies and availability of laboratory space were not false. D142/19-20.

Evidence obtained during the warrant search established that, from as

early as 1999, the defendants had produced forged letters by collecting letters from professionals, then cutting and taping new text into the letterhead and signatures. *See* GX52; *e.g.*, D378-14/73-74, 257, 261-62. Eventually, the defendants used more sophisticated techniques, obtaining logos and other details from the Internet or social media and producing documents with computer software. *See, e.g.*, D378-1/191-216; D378-7/219-20; D378-13/18-24; GX54X. In total, the defendants collected information and produced false letters of support from 77 individuals. D379/31-32; GX52; GX54X. At trial, 20 witnesses, including 6 university professors, testified that the defendants had used their names and professional credentials without their permission. D379/32.

(2) The defendants' motions to suppress statements and other evidence and mid-trial motions to reopen those motions.

During the execution of the search warrant, both defendants agreed to talk with agents, who interviewed them separately. D114/15-19, 96-98. While explaining the lack of scientific equipment in their home, Aldissi said that they kept some equipment at a storage unit, which he agreed to permit the agents to search, and directed agents to the keys in his desk. D114/102-04, 140-44. Agents retrieved the keys, provided Aldissi with a consent-to-search form—which Aldissi signed—and then sent a team to search the storage unit, where they photographed equipment stored there. D114/102-04, 140-44; GX54B;

DX82. After his interview, Aldissi left to pick up his son from school; he returned to the home with his son while agents were concluding the search. D114/106-07, 270.

The warrant permitted agents to search for and seize "business records, computer(s), and electronic media," but the issuing magistrate had instructed the agents to "image" electronic media on-site and to return to him for a supplemental warrant if they needed to remove any media to image it off-site. D113/2-3; D114/145-46. While executing the warrant, agents collected external media that they were unable to image on-site. D114/129, 145. Although the defendants consented to the search and seizure of the additional media, the agents returned to the magistrate for a supplemental warrant anyway, because the magistrate had instructed them to do so. D114/145-46, 201-02.[6]

The defendants moved to suppress their statements and the evidence recovered at the storage unit. D45. They claimed to have been intimidated by the arrival of armed agents (one of whom had a shotgun that he carried in a sling across his chest), complained that the agents had not advised them that they were not under arrest and did not have to answer questions, and argued

[6]The defendants also challenged—unsuccessfully—the facial sufficiency of the search warrants and their lack of a protocol for searching electronic media. D47, D143, D172.

that their statements and Aldissi's consent to search the storage unit had been involuntary. D45; D114/275, 281, 301-11. At the hearing on the motion, Aldissi testified that the agents had not asked him for consent to search the storage unit but had simply demanded the keys, and that, when they had later presented him with a consent form, he had signed it without reading it because he had felt like he did not "have a choice" and had "wanted to cooperate." D114/270-73, 287. Aldissi also complained that, when he had returned to the house after picking up his son, an agent had patted him down in the garage before allowing him to re-enter the house. D114/280-84.

After an extensive hearing, the magistrate judge concluded that the totality of the circumstances established that the defendants had not been in custody and that their statements were voluntary. D113. The magistrate credited the agents' testimony, including that they had told the defendants that they were free to leave and that they had never patted Aldissi down. D113. The magistrate also considered various undisputed facts in support of her ruling, including that, "although an officer held a shotgun across his chest at the knock and announce phase, there is no other evidence that any of the agents unholstered their firearms"; the defendants had been in their own home; they had had access to water and the bathroom; there was no evidence that they had been threatened with arrest for not speaking with the agents; they

were not handcuffed or otherwise constrained; Aldissi had left to pick up his son from school and then brought him home while the agents were still there; and Bogomolova had remained there even after her interview ended. D113/4-14. Similarly, the magistrate concluded that Aldissi had voluntarily consented to the search of the storage unit. D113/14. The defendants did not object to the magistrate's report and recommendation, and the district court adopted it. D131.

At trial, the district court admitted photographs of the storage unit: three contained in an exhibit that the United States offered and six in an exhibit that Aldissi offered. D378-7/257-58, 266; D378-8/35-47; GX54B; DX82. The United States did not offer either of the defendants' statements, and none of the extensive documentary and electronically-maintained evidence admitted had come from the storage unit. *See* D378-12/265; D260; D266/8-9.

During the third week of trial testimony, the prosecutor learned for the first time that NASA-OIG Agent Norman Conley had been in the garage when Aldissi returned home with his son, had waited for Aldissi's son to go inside and then, with Aldissi's consent, had patted Aldissi down. D378-9/119-22, 127-29; D378-12/236, 243-45, 255, 264. Because Agent Conley had not been at the suppression hearing and the agents who had testified had not been in the garage during the pat-down, those agents had testified that Aldissi had not

been patted down at any time. D114/102, 138, 181; D378-12/242-43. The prosecutor, therefore, advised the defendants and the district court. D378-9/119-22.

The defendants moved to reopen their motions to suppress "any and all evidence," including evidence seized under the warrants, contending that the court had based its orders on credibility findings and that Agent Conley's testimony undermined the agents' credibility. D263. After considering the new evidence, the court denied the defendants' motion. D266.

(3) Theory of defense.

The defendants claimed to have performed research, arguing that agency contractors had accepted their final reports and pointing to journal articles that they had published. *E.g.*, D378-3/125-26, 219-22; D738-4/14, 200-04. Agency personnel, however, testified that they do not have the funding to replicate research or visit researchers' facilities, that they would not attempt an inspection unless they were alerted that something was "severely wrong," that results and photographs can be fabricated, and that the individuals responsible for approving payment can be misled. D378-4/28, 188, 190-91-96; D378-5/24-25, 63. In addition, notwithstanding Komarova's testimony that her timesheets accurately reflected the hours she had spent on research, the projects awarded had had overlapping terms, Komarova had reported the same number of hours

on both, and she had been simultaneously employed full-time by another company. D378-11/58-80. Finally, although the defendants' proposals represented that they would accomplish their research in their "fully equipped" laboratory using state-of-the-art instruments and safety equipment, *e.g.*, D378-9/244-50; GX7.2A; GX16.2A/18; GX17.2/19; GX18.4B; GX18.4E, in emails to Komarova, Bogomolova described her frustration with "working in a bathroom" and responded to Komarova's suggestion that she perform some tasks in a darkroom by stating that, although a darkroom was "a great idea," it would mean using a walk-in closet or laundry room or "building a small darkroom out of a cardboard box," GX77B; GX77D.

(4) Jury instructions.

Arguing that they had not personally benefitted from the fraud, that an intent to defraud requires proof of intent "to cause a financial loss or a property loss to the United States," and that any "financial gain has to be a consequence of creating a loss to the" United States, the defendants requested that the court alter the standard jury instruction for wire fraud to state that an "intent to defraud is the specific intent to deceive or cheat the United States usually for personal gain by … intending to cause a financial loss to the United States." D378-15/52, 65-74, 77-79. The court ruled that the standard instruction—modified to refer to the United States—accurately stated the law. D378-15/79.

So the court instructed the jury that a "scheme to defraud includes any plan or course of action intended to deceive or cheat the United States out of money or property by using false or fraudulent pretenses, representations or promises" and that "[h]ere the intent to defraud is the specific intent to deceive or cheat the United States usually for personal financial gain or to cause financial loss to the United States." D378-16/112-13. The court also gave the standard good-faith instruction. D378-16/117.

(5) Sentencing.

The probation office recommended that the court calculate the defendants' sentencing-guideline range based on a $24 million intended loss, which included all of the SBIR/STTR awards they had applied for, including those that had not been funded. Aldissi's Presentence Investigation Report ("PSR") ¶¶47-48, 73.[7] The probation office recommended a four-level increase because there had been more than 50 victims (13 government agencies and 77 victims of identity theft); a two-level increase because the defendants had misrepresented that they were acting on behalf of educational institutions; and a two-level increase because the offense had involved sophisticated means. PSR ¶73. The probation office also recommended increases for the defendants' use of a special skill, PSR ¶77, and for their obstruction of justice, PSR ¶78.

[7]The defendants' guidelines calculations are identical.

The recommended total offense level of 41, with a criminal-history category I, produced a sentencing range of 324-405 months' imprisonment for the fraud and obstruction counts (plus a mandatory, consecutive two years for the aggravated-identity-theft counts). PSR ¶¶124-26.

The defendants objected to the loss calculation and to the enhancements and also requested that the court delay their sentencings so that they might benefit from the expected amendments to the guidelines. PSR addenda; *see* D326. Bogomolova requested a sentence of no more than two years and a day, D328, and Aldissi requested a sentence of no more than 120 months. D326; D379/72.

Noting that sentencing already had been delayed for months, the court denied the motion to continue. D379/29. The court ruled that the intended loss was correctly based on the entire amount of the contracts for which the defendants had applied and, similarly, that restitution was appropriate for the $10.6 million that they had received, without any offset for research they allegedly had performed, because from 1999 the defendants had defrauded a government set-aside program using forged letters to receive funds that they would not otherwise have obtained. D379/22-28, 46-50. The court also overruled the defendants' remaining objections, finding that they had created phony letters of support for "more than 50" victims, that they had created

phony subcontractor bids to obtain funds that would have been paid to a university if they had been legitimate, that they both had doctoral degrees and had used their special skills to facilitate the fraud, that an enhancement for obstruction of justice was not double-counting, and that the totality of their scheme, including their creation of forged letters, had been sophisticated. D379/34, 38, 54-55.

The defendants thus faced a guideline range of 324-405 months' imprisonment and a mandatory, consecutive two years for the aggravated-identity-theft counts. PSR ¶¶124-26; D379/55. The prosecutor recommended a sentence of roughly one-half of the midrange, suggesting a total of 180 months for Aldissi and "something less" for Bogomolova, based on his view that Aldissi had been more culpable. D379/64-66.

The court sentenced Aldissi to serve a total of 180 months and Bogomolova to serve a total of 156 months, concluding that the sentences were necessary "to promote respect for the law, to provide a just punishment for the offense, to afford adequate deterrence to criminal conduct, protect the public from further crimes of the defendant[s]." D379/89. The court described the sentences as "incredibly reasonable," acknowledging that the defendants had no other criminal record and family who had expressed their support, but balancing those factors against the seriousness of the offense. D379/60, 90.

The court found that the United States had entrusted the defendants with important projects, but the defendants had broken that trust and "made a lot of money." D379/72. The court emphasized the scheme's impact on the professionals whose identities the defendants had stolen, noting "how much it mattered to each and every one of those professionals that had worked so hard in their career" and stating that "all of us who are professionals recognize the most important quality that we have as individuals is our reputation" and, "once that is taken from you, it can take years to rebuild; … in some cases, it's just simply not possible[.]" D379/60, 90. The court concluded, "I think in a lot of respects you both deserved a higher sentence; but considering all of the circumstances here, particularly in light of the fact that sentencing guidelines are going to be amended in November, I exercised my discretion to try to be as fair and as just as I could be." D379/91.

Standard of Review

I, III, V. This court reviews de novo the sufficiency of the evidence supporting the jury's guilty verdict, viewing the evidence in the light most favorable to the United States. *U.S. v. Ortiz*, 318 F.3d 1030, 1036 (11th Cir. 2003).

II, VI, VII. This Court reviews for abuse of discretion the district court's refusal to give a requested jury instruction, its evidentiary decisions, denial of a

motion for mistrial, and the reasonableness of its sentencing decision. *See U.S. v. Takhalov*, 827 F.3d 1307, 1311 (11th Cir.) (instructions), *as modified on denial of reh'g*, 838 F.3d 1168 (11th Cir. 2016); *U.S. v. Mateos*, 623 F.3d 1350, 1366 (11th Cir. 2010) (sentencing); *U.S. v. Newsome*, 475 F.3d 1221, 1226 (11th Cir. 2007) (mistrial); *U.S. v. Brown*, 415 F.3d 1257, 1264-65 (11th Cir. 2005) (evidence).

IV. This Court reviews a district court's denial of a motion to suppress as a mixed question of law and fact, reviewing rulings of law de novo and findings of fact for clear error, considering the entire record and construing the facts in the light most favorable to the United States. *Newsome*, 475 F.3d at 1224.

VII. This Court reviews the district court's fact findings under the sentencing guidelines for clear error and its legal conclusions de novo. *U.S. v. Crawford*, 407 F.3d 1174, 1177-78 (11th Cir. 2005).

Summary of the Argument

I. Overwhelming evidence established that the defendants engaged in a scheme to defraud, not just to deceive. The defendants' material lies and forgeries radically altered the nature of the bargain and circumvented the fundamental purpose of the SBIR/STTR programs: commercialization. And, by lying about matters central to commercialization, the defendants deprived

the United States of the opportunity to fund legitimate proposals that would have brought a commercial product to the marketplace. Moreover, Bogomolova is guilty of the fraud even if she did not create the forged letters.

II. The district court did not abuse its discretion in failing to give the defendants' proposed instruction because it did not accurately state the law. Moreover, the defendants' proposed instruction did not address their theory of defense, anyway, while the court's instructions did.

III. Under the plain and unambiguous language in section 1028(d)(7), use of a name, alone or in conjunction with any other information, constitutes a means of identification. Further, overwhelming evidence established that both defendants used forged documents to exploit the professionals' reputations, making it appear that the professionals enthusiastically supported their work.

IV. Overwhelming evidence establishes that Agent Jones's affidavit was entirely truthful. The defendants, therefore, have not shown that the district court clearly erred in denying their *Franks* motion. Likewise, the defendants have not shown that the district court clearly erred in finding, even in light of Agent Conley's testimony, that Aldissi had voluntarily consented to the search of the storage unit. In any event, because the evidence admitted at trial did not derive from the search of the storage unit, this Court need not

consider whether the district court abused its discretion in denying the defendants' motion to reopen the suppression motions.

V. Because the jury was entitled to conclude that the backdated documents the defendants created were false, they are not entitled to relief on their challenges to the sufficiency of the evidence to support their convictions for falsification of records.

VI. The defendants have not demonstrated that the district court abused its discretion in its evidentiary rulings or in denying their motions for mistrial. None of the evidence they complain of was unfairly prejudicial, and, in light of the overwhelming evidence, any alleged error was harmless.

VII. The defendants have not shown that the district court clearly erred in its guidelines calculations, which were supported by reliable and specific evidence. Likewise, they have not shown that their sentences, which are substantially less than the guidelines range, are unreasonable.

Argument and Citations of Authority

I. The evidence established that the defendants engaged in a scheme to defraud, not just to deceive.

Conceding that they submitted proposals full of material lies and forgeries to obtain money, the defendants contend that they performed research and that, therefore, the evidence established that they executed only a

scheme to deceive rather than a scheme to defraud. Brief at 12-13, 31-50. Building on that theme, they contend that, because the United States had to award the SBIR money to someone, the money is not "property" within the meaning of the wire-fraud statute and their receipt of it based on their phony proposals was not a crime.

Contrary to the defendants' assertions, overwhelming evidence established that they committed fraud, not just deceit. The United States did not receive the benefit of its bargains, because the defendants' lies radically altered the nature of the bargain and circumvented the fundamental purpose of the SBIR/STTR programs.

To prove wire fraud under 18 U.S.C. § 1343, the United States must establish that the defendant intentionally (1) participated in a scheme or artifice to defraud and (2) used the interstate wires to carry out that scheme. *U.S. v. Langford*, 647 F.3d 1309, 1320 (11th Cir. 2011); *U.S. v. Maxwell*, 579 F.3d 1282, 1299 (11th Cir. 2009); *U.S. v. Hasson*, 333 F.3d 1264, 1270–71 (11th Cir. 2003).[8] "A scheme to defraud requires proof of a material misrepresentation, or the omission or concealment of a material fact calculated to deceive another out of money or property." *Maxwell*, 579 F.3d at 1299; *see also U.S. v. Svete*, 556

[8]This Court construes the "scheme or artifice to defraud" and "for the purpose of executing" language in the mail- and wire-fraud statutes identically. *Hasson*, 333 F.3d at 1271 n.7.

F.3d 1157, 1161 (11th Cir. 2009).

Although the statute does not define "a scheme to defraud," the Supreme Court has explained that the words "refer to wronging one in his property rights by dishonest methods or schemes, and usually signify the deprivation of something of value by trick, deceit, chicane or overreaching." *McNally v. U.S.*, 483 U.S. 350, 358 (1987) (internal quotation marks and citation omitted). The statute requires "the object of the fraud to be 'property' in the victim's hands[.]" *Cleveland v. U.S.*, 531 U.S. 12, 23-26 (2000) (video-poker license is not "property"; although the government has an interest in permitting and regulating, "unlike an entrepreneur or business partner who shares both losses and gains arising from a business venture, [the government] cannot be said to have put its labor or capital at risk through its fee-laden licensing scheme").

This Court has recognized a distinction between a scheme to defraud and schemes that merely deceive. *See Takhalov*, 827 F.3d at 1312–13. A scheme to defraud "refers only to those schemes in which the defendant lies about the nature of the bargain itself." *Id.* at 1313. "That lie can take two primary forms: the defendant might lie about the price (e.g., if he promises that a good costs $10 when it in fact costs $20) or he might lie about the characteristics of the good (e.g., if he promises that a gemstone is a diamond when it is in fact a

cubic zirconium). In each case, the defendant has lied about the nature of the bargain and thus in both cases the defendant has committed wire fraud." *Id.* at 1313-14. "But if a defendant lies about something else—e.g., if he says that he is the long-lost cousin of a prospective buyer—then he has not lied about the nature of the bargain, has not 'schemed to defraud,' and cannot be convicted of wire fraud on the basis of that lie alone." *Id.* at 1314.

The defendants concede that they forged letters of support, lied about their eligibility for funding, their relationships with the research institutions and commercial partners, and their number of employees, facilities, and access to lab space and equipment, and fabricated price quotes from consultants and subcontractors that they never used or intended to use. Brief at 12. And they concede that their lies were material because, "without them, the agencies would not have funded" their proposals and instead would have funded other well-qualified companies. Brief at 13. *See U.S. v. Merrill*, 685 F.3d 1002, 1012 (11th Cir. 2012) (material misrepresentation is one that has natural tendency to influence decisionmaker).

The defendants' boundless lies were not simple deceit, as they contend, because the lies changed the nature of the bargain. *See Takhalov*, 827 F.3d at 1313-14. SBIR and STTR are not jobs programs for unemployed scientists; they do not fund "research for the sake of research." D378-3/59. As described

in the Statement of Facts above, the programs stimulate commercial development. They exist to permit small businesses in the United States to commercialize their research and get an actual product into the marketplace. The defendants' lies, forgeries, and fabricated price quotes struck at the heart of that purpose, because the facilities, employees, access to equipment, and academic and industry relationships that they falsely claimed to have were "key" ingredients for successful commercialization. *See, e.g.,* D378-6/137-42. By engaging in this scheme to "obtain[] contracts and substantial payments from the ... United States for which [they were] not eligible" and to "dishonestly circumvent the worthy purpose of the ... programs," *Maxwell*, 579 F.3d at 1302-03, the defendants defrauded the United States.

The defendants, however, argue that the evidence "unequivocally" showed that they always intend to and did perform the research and that the United States received the benefit of its bargain. Brief at 13, 47-48. Their related assertion is that grants under the SBIR/STTR set-aside programs are not property. But in *Maxwell*, this Court rejected that very argument. 579 F.3d at 1303 (rejecting defendant's "claims that he did not deprive the County or the United States of money or property, because, in the end, the County and the United States received the electrical work they sought").

In any event, the defendants' premise is incorrect. They did not just

receive contracts; they received millions of dollars. Sometimes, they lied about their residency or full-time employment and obtained money when they were ineligible under the rules of the programs. Sometimes, they padded their proposals with fees for consultants and subcontractors to obtain extra money. And, although the defendants claim that the United States got the benefit of its bargain, the defendants were required to perform the research consistently with their proposals, but, as they admit, brief at 12, they never intended to and did not use the facilities, equipment, and personnel they had promised. Certainly, the United States did not bargain for research performed in a bathroom or cardboard box. *See* GX77B; GX77D. Moreover, given the defendants' skill at fabricating convincing proposals, that they produced convincing final reports and published articles does not mean that they actually conducted that research as promised. Indeed, the jury was entitled to conclude that their research results were as fake as their proposals; the credibility of the research is only as credible as the researchers themselves.

In the end, by taking that money from the United States while not disclosing that they had no commercial connections or prospects, the defendants were not merely keeping eligible scientists from getting that money; they were defeating the whole purpose of the programs: to foster small businesses and research projects that satisfied the programs' requirements and

their objectives of commercial promise. That's what the United States agreed to pay for, and that's what the defendants' lies promised the United States it would get. Yet for years, the defendants served up Old Crow, not the Pappy Van Winkle they promised. *See Takhalov*, 827 F.3d at 1313.

Finally, Bogomolova is not entitled to relief based on her assertion that only circumstantial evidence establishes that she knew the proposals were phony. The United States was not required to offer direct proof of Bogomolova's intent to defraud, but was entitled to prove it by inferences raised from her activities. *See U.S. v. Munoz*, 430 F.3d 1357, 1369 (11th Cir. 2005). This Court will apply the same standard to evaluate the sufficiency of the evidence, whether direct or circumstantial. *Langford*, 647 F.3d at 1319-20; *U.S. v. Hersh*, 297 F.3d 1233, 1254 n.31 (11th Cir. 2002).

Bogomolova, moreover, is guilty of fraud if she aided or abetted it. *See* 18 U.S.C. § 2; *U.S. v. Sosa*, 777 F.3d 1279, 1292 (11th Cir. 2015) (defendant is guilty by aiding and abetting if (1) someone committed the offense; (2) defendant contributed to and furthered it; and (3) defendant intended to aid in its commission). Evidence supporting her conviction under an aiding-and-abetting theory may be direct or circumstantial, and she is guilty of aiding and abetting even if she did not personally commit all the acts constituting the fraud. *See id.* at 1293.

Bogomolova submitted proposals containing the same lies about facilities, equipment, and personnel as the proposals that Aldissi submitted. *See, e.g.,* GX2.2; GX7.2A; GX8.2A; GX22.2A. Even if, as she claims, she did not prepare the forged letters, Bogomolova certainly used them. *See, e.g.,* GX16.2A; GX17.2; GX18.2. She knew, moreover, that her bathroom was not a laboratory, that a cardboard box is not a darkroom, and that the proposals she certified were phony. And, as the district court observed, D291/13, she asked Komarova to create falsified records, and then submitted them, further evidencing her guilt.

II. The district court did not abuse its discretion by refusing to give the defendants' proposed instruction because it was incorrect.

The defendants asked the court to instruct the jury that intent to defraud "is the specific intent to deceive or cheat the United States[,] usually for personal gain[,] … by intending to cause a financial loss to the United States." D378-15/77-78. To show that the district court abused its discretion, the defendants must show that the requested instruction was correct; that the court did not address the instruction's substance in its charge; and that the failure to give the instruction seriously impaired their ability to present an effective defense. *Maxwell,* 579 F.3d at 1303.

The proposed instruction, however, was not a correct statement of the

law, because the statute does not require that a defendant intend to cause a financial loss. As this Court explained in *Maxwell*, "[f]inancial loss is not at the core of" mail and wire fraud. 579 F.3d at 1302. "Instead, the statutes also seek to punish the intent to obtain money or property from a victim by means of fraud or deceit." *Id.* As a result, this Court upheld Maxwell 's conviction for doing a version of what the defendants did here—lying to the government to obtain electrical-work contracts that he was not eligible for and that otherwise would have gone to someone else, even though "the County and the United States received the electrical work they sought." *Id.* Because the defendants' specific-intent instruction—that a specific intent to deceive or cheat requires proof that the defendants had intend to cause a financial loss to the United States—was incorrect, the district court did not abuse its discretion in refusing to give it. *Id.* And, unlike the defendants' proposed instruction in *Takhalov*, which addressed "what kind of deception could constitute wire fraud[,]" *see* 827 F.3d at 1317, neither the defendants' proposed instruction nor the instruction as they now state it addresses the distinction between schemes to defraud and schemes to deceive.

Nor have the defendants shown that the failure to give their proposed instruction seriously impaired their ability to present an effective defense. *See Maxwell,* 579 F.3d at 1303. The court's instruction that a "scheme to defraud

includes any plan or course of action intended to deceive or cheat the United States out of money or property by using false or fraudulent pretenses, representations or promises" addressed the defendants' theory of defense—that they lacked the intent to cheat the United States because they had performed research and given the United States the benefit of their bargain. *See, e.g.,* D378-15/218-19 (arguing that a scheme to defraud includes a plan "intended to deceive or cheat the government out of money or property … by using false or fraudulent pretenses" and that Aldissi did not intend to cheat because the agencies "got what … they bargained for"). No specially crafted instruction was necessary to convey that to the jury, because, as counsel for Bogomolova stated in closing, "[W]e all know what cheating somebody out of property or money is. You're trying to get something from somebody and you're not going to give them in return what they asked for." D378-15/228-29.

III. The defendants used others' means of identification when they used forged letters of support in their proposals.

The defendants complain that, if use of a name is identity theft, 18 U.S.C. § 1028A is unconstitutionally vague because it elevates "simple name dropping to the level of aggravated identity theft." Brief at 55-56. Alternatively, they argue that they did not commit identity theft because they did not misappropriate personal data other than the professionals' names. These

arguments are meritless.

Section 1028A is not vague. In *U.S. v. Wilson*, 788 F.3d 1298, 1310 (11th Cir. 2015), this Court held that under the "plain and unambiguous" language in section 1028(d)(7), "use of a name, alone or in conjunction with any other information, clearly constitutes a means of identification so long as the name could be combined with other information to identify a specific individual." Moreover, the statute does not criminalize name dropping, as the defendants contend, it prohibits the "use" of a means of identification, "without lawful authority" "during and in relation to" an enumerated felony. 18 U.S.C. § 1028A.

In any event, the defendants did not merely drop names or state that the professionals had authorized them to act on the professionals' behalf, as they contend. As set forth extensively above, both defendants used forged documents bearing the names of numerous trusted professionals, their titles, letterhead, and signatures to exploit their reputations without their permission, making it appear that the professionals enthusiastically supported their work. Indeed, by exploiting the victims' professional reputations—products of years of education and effort—the defendants effectively converted the victims' most important assets to their own use. The evidence, therefore, overwhelmingly supports both defendants' convictions.

IV. The district court did not clearly err in finding that the search warrant affidavit was truthful or abuse its discretion in denying the defendants' motion to reopen their suppression motion.

Reiterating their theme that their contracts were controlled by the FAR and that they were not required to perform consistently with their proposals, the defendants argue that the district court clearly erred in concluding that the search warrant affidavit was not false. And incorrectly stating that the district court admitted electronic evidence from the search of the storage unit, they also assert that the court abused its discretion in denying the motion to reopen the motion to suppress.

In *Franks*, the Supreme Court held that an agent's inclusion in an affidavit of deliberately or recklessly false information necessary for a finding of probable cause violates the Fourth Amendment. 438 U.S. at 155-56. But the district court found that Agent Jones's representations about SBIR/STTR proposals and contract administration were truthful, and the defendants have not demonstrated that those factual findings were clearly erroneous. Indeed, viewing the evidence, including the trial testimony, in the light most favorable to the United States, overwhelming evidence establishes that Agent Jones's affidavit was entirely truthful.

Likewise, the district court did not abuse its discretion in denying the

defendants' motion to reopen the hearing. As an initial matter, Agent Conley's testimony about the pat-down had nothing to do with the court's resolution of the *Franks* motion, so their complaint on appeal that the district court abused its discretion in failing to reopen that motion is groundless. In any event, the district court ruled that Agent Conley's testimony did not change its conclusion that Aldissi had voluntarily consented to the search of the storage unit, *see* D266, and the defendants have not shown that finding to be clearly erroneous, either.

This Court need not even consider the district court's findings regarding Aldissi's consent, however, because it may affirm on any basis supported in the record. *See U.S. v. Sparks*, 806 F.3d 1323, 1334 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 2009 (2016). Other than photographs of equipment—most of which the defendants introduced, waiving their right to complain on appeal, *see U.S. Jernigan*, 341 F.3d 1273, 1290 (11th Cir. 2003)—the district court did not admit any evidence from the storage unit, D378-7/257-58, 266; D378-8/35-47; D378-12/265; GX54B; GX82; *see also* D260, D266/8-9. Bluntly stated, the defendants' statement, brief at 22, that GX54X was obtained from the search of the storage unit is false, *see* D378-1/155. GX54X was a composite exhibit the United States prepared in advance of trial and presented to the jury on a thumbdrive; all of the electronic evidence on it was obtained under the search

warrants. *See* D378-1/155; D378-12/265; D260; D266/8-9.

V. Ample evidence supports the convictions for submitting false records to the NSF (defendants' VII).

The defendants argue that, "other than the backdating itself," no evidence showed that the documents they had created and backdated contained false information, and ask this Court to reverse their convictions under 18 U.S.C. § 1519. The defendants were charged with having falsified or made false entries in a record or document with the intent to obstruct. D134. The backdating alone was a falsification of those documents: a false representation that the joint-venture agreement and timesheets had been made on the date represented. *See U.S. v. Magoti,* 352 F. App'x 981, 983 (6th Cir. 2009). Even beyond that, the jury was entitled to reject Komarova's testimony that she actually had worked the hours she claimed years later. *See U.S. v. Cochran*, 683 F.3d 1314, 1322 (11th Cir. 2012). The hours that she claimed to have worked for Fractal and Polymers overlapped, and she admitted that she had never been an employee of Polymers. D378-10/131-46; D378-11/58-80. Indeed, the jury was entitled to conclude that the opposite of her testimony was true. *See U.S. v. Brown*, 53 F.3d 312, 314 (11th Cir. 1995).

VI. The district court did not abuse its discretion in denying the defendants' motions for mistrial or Aldissi's motion to strike his name from the indictment.

With no context and only nominal argument, the defendants assert that the district court abused its discretion in failing to strike Aldissi's name from the indictment or to grant a mistrial following the introduction of evidence that they claim was inflammatory. The defendants have established no basis for relief.

The district court did not abuse its discretion in declining to strike "Mahmoud" from the indictment or documents in evidence. As the court found, D377/51-52, that was Aldissi's name at the beginning of the offense, and that name was on various relevant documents. And, throughout the trial, everyone referred to him by his last name, anyway. Certainly, no one mentioned religion or terrorist attacks.

Likewise, a witness's reaction that the defendants' use of the witness's name and signature was "absolutely fraudulent" was factually accurate, D378-6/95-100; the references to "fraud" and "money" appeared on the emails as a result of a spam filter, *see* GX7.6A; the defendants' proposals did concern anthrax and anthrax simulants, GX22.2A; and the possibility of debarment was one of the remedies mentioned in the SBIR fraud warnings, GX53C.

These subjects and their context were fully explained to the jury, *e.g.*, D378-2/233; D387-2/202, 212; D378-7/239, which are presumed to have followed the court's instructions, *see U.S. v. Roy*, 855 F.3d 1133, 1186 (11th Cir. 2017). In short, none of the evidence was unfairly prejudicial. *See U.S. v. Tobon-Builes*, 706 F.2d 1092, 1102 (11th Cir. 1983) ("Of course, most relevant evidence is prejudicial to an accused.").

In any event, in light of the overwhelming evidence, discussed thoroughly above, any alleged error would have been entirely harmless. Moreover, having failed to demonstrate even one error, the defendants have not shown a right to relief based on cumulative error. *See, e.g., U.S. v. Gamory*, 635 F.3d 480, 497 (11th Cir. 2011).

VII. The district court did not clearly err in calculating the guidelines or abuse its discretion in determining reasonable sentences (defendants' V).

Reiterating arguments the district court rejected, the defendants challenge the calculation of the guidelines and assert that their well-below-guideline-range sentences were unreasonable. They are not entitled to relief.

A. Loss and restitution.

Loss is the greater of actual or intended loss, and, when a case involves government benefits, the loss is "not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses[.]" USSG §2B1.1,

comment. (n.3(A), (F)(ii)). Accordingly, when the unintended recipient is a contractor who fraudulently obtains funding, the appropriate loss amount is the entire value of the contract, regardless of the value of the work performed. *Maxwell*, 579 F.3d at 1306-07; *U.S. v. Blanchet*, 518 Fed. App'x 932, 956-57 (11th Cir. 2015). The district court is required to make only a reasonable estimate of the loss. USSG §2B1.2, comment. (n.3(C)); *see U.S. v. Ford*, 784 F.3d 1386, 1396 (11th Cir. 2015).

The district court appropriately calculated the loss in this case based on the total value of the contracts since 1999, D379/27, despite the defendants' continued refrain that they performed research. As argued extensively above, the defendants lied about ingredients that were key to commercialization, circumventing the purpose of the SBIR/STTR programs and depriving the United States of the opportunity to fund proposals that might have brought an actual product to the marketplace.

Moreover, the district court based its factual findings on reliable and specific evidence. The indictment alleged that the defendants had engaged in the scheme since 1999, and the evidence established their use of forged letters from that time, D134; D379/22; GX52; GX54X. Accordingly, as the district court found, the appropriate intended loss amount is the entire value of the contracts for which the defendants applied. *See Maxwell*, 579 F.3d at 1306-07.

Likewise, restitution is appropriate for the total funds they received.

B. Number of victims.

The defendants argue that the district court erred in applying a four-level increase for an offense involving more than 50 victims, because the identity-theft victims did not suffer a pecuniary loss. Victims, however, includes both "any person who has sustained any part of the actual loss determined under subsection (b)(1)" and "any individual whose means of identification was used unlawfully or without authority." USSG §2B1.1, comment. (n.1), (n.4(E)(ii)); *see Ford*, 784 F.3d at 1397. And the district court's conclusion that the offense had involved more than 50 victims was based on reliable and specific evidence. D379/31-34; GX52; GX54X.

C. Acting on behalf of an educational institution.

The defendants claim that the district court clearly erred in finding that they were acting on behalf of an educational institution within the meaning of USSG §2B1.1(b)(9)(A) because they were attempting to obtain funds under their own company names. Brief at 62. As the court correctly found, however, the enhancement was appropriate because the defendants submitted proposals that included fake bids and consulting fees from university professors, whose fees—had they been real—would have been paid to their universities, but were instead kept by the defendants. D379/37-38; GX2.2A; GX7.2A; GX8.2A; *see*

U.S. v. Ellisor, 522 F.3d 1255, 1259 (11th Cir. 2008).

D. Special skill and sophisticated means.

Attacking the enhancements for use of sophisticated means and for use of a special skill in tandem, the defendants argue that their use of cut-and-taped and Photoshopped letters and downloaded forms from the Internet was not sophisticated and that they did not use scientific knowledge to carry out their fraud. As the district court found, however, there is "no doubt" that the defendants used their special skills as scientists to significantly facilitate the fraud, D379/45, because they could not have prepared the proposals and reports or targeted the identity-theft victims as they had without that knowledge. *See* USSG §3B1.3, comment. (n.4) (special skill "refers to a skill not possessed by members of the general public and usually requiring substantial education"). Likewise, as the district court also found, the enhancement for sophisticated means was appropriate because the offense as a whole was sophisticated, even if a portion of it—the defendants' use of scissors, tape, Photoshop, and the Internet—was not. D379/54; *see U.S. v. Ghertler*, 605 F.3d 1256, 1267 (11th Cir. 2010) (enhancement applies if totality of scheme was sophisticated).

E. Obstruction of justice.

The defendants claim that the obstruction-of-justice enhancement

resulted in double-counting because their obstruction counts were grouped with the fraud counts. Brief at 63 (citing *U.S. v. Thomas*, 193 Fed. App'x 881, 890 (11th Cir. 2006) (involving defendant convicted of two counts of perjury and sentenced under USSG §2J1.4). But the district court here properly applied USSG §3C1.1, comment. (n.8), which provides that, for a defendant convicted of obstruction and the underlying offense, those offenses are grouped and the group's offense level is the greater of the offense level for the underlying offense *increased by the two-level obstruction-of-justice enhancement* (which is what the district court did here) or the offense level for the obstruction offense alone. *See U.S. v. Riquene*, 552 Fed. App'x 940, 945-46 (11th Cir. 2014).

F. Substantive reasonableness.

The defendants complain that their sentences are substantively unreasonable, reiterating their arguments to the district court that other white-collar defendants have received lesser sentences. The district court, however, considered the defendants' arguments, and the defendants have not shown that the court abused its discretion.

A sentence is substantively unreasonable if "it (1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors." *U.S. v. Irey*, 612 F.3d

1160, 1189 (11th Cir. 2010) (internal quotation marks omitted). Due to its "institutional advantage" in making sentence determinations, a district court has "considerable discretion" in deciding whether the 18 U.S.C. § 3553(a) factors justify a variance from the guidelines and in deciding the extent of that variance. *U.S. v. Pugh*, 515 F.3d 1179, 1190-911 (11th Cir. 2008). This Court commits the weight to be accorded any factor "to the sound discretion of the district court" and "will not substitute [its] judgment in weighing the relevant factors." *U.S. v. Amodeo*, 487 F.3d 823, 832 (11th Cir. 2007). That a sentence falls within the guidelines is one indicator of its reasonableness. *U.S. v. Hunt*, 526 F.3d 739, 746 (11th Cir. 2008).

The defendants' sentences are substantially less than their correctly-calculated guideline range and, as the district court stated, were necessary "to promote respect for the law, to provide a just punishment for the offense, to afford adequate deterrence to criminal conduct, [and] protect the public from further crimes of the defendant[s]." D379/89. Indeed, given the pervasiveness of the defendants' fraud and its impact on the professional reputations of their identity-theft victims, even higher sentences would have been reasonable. *See* D379/60, 90-91.

Conclusion

The United States requests that this Court affirm the judgments and sentences of the district court.

Respectfully submitted,

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Certificate of Service

I certify that a copy of this brief and the notice of electronic filing was sent by CM/ECF on June 26, 2017, to:

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gkpr no 6/21/17

No. 15-14193 & 15-14194

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MAHMOUD ALDISSI and ANASTASSIA BOGOMOLOVA,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division
Case No. 8:14-cr-217, Hon. Virginia M. Hernandez Covington

CORRECTED REPLY BRIEF OF MAHMOUD ALDISSI AND ANASTASSIA BOGOMOLOVA

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case. Additions are noted in italicized text.

1. Adams, Natalie Hirt – Assistant United States Attorney;
2. Aldissi, Dr. Mahmoud ("Matt") – Defendant-Appellant;
3. Bentley, A. Lee, III – Former United States Attorney;
4. Bodnar, Roberta – Assistant United States Attorney, Appellate Division;
5. Bogomolova, Dr. Anastassia – Defendant-Appellant;
6. Burns, P.A. – Appellate counsel for Defendant-Appellant;
7. Burns, Thomas A. – Appellate counsel for Defendant-Appellant;
8. Cannons, Andrew – Victim;
9. Covington, Virginia M. Hernandez – United States District Judge;
10. Defense Advanced Research Projects Agency – Victim;
11. *Defense Threat Reduction Agency – Victim;*
12. Department of Homeland Security – Victim;
13. Douglas, John – Victim;
14. Foster, Todd Alan – Trial counsel for Mahmoud Aldissi;
15. Gauthier, Ted – Victim;

16. Gershow, Holly L. – Assistant United States Attorney, Appellate Division;

17. Goudie & Kohn, P.A. – Trial counsel for Anastassia Bogomolova;

18. Goudie, Lyann – Trial counsel for Anastassia Bogomolova;

19. Gusev, Alex – Victim;

20. Jenkins, Elizabeth A. – United States Magistrate Judge;

21. Krigsman, Cherie – Assistant United States Attorney, Appellate Division;

22. Krishnaiyer, Ramesh – Victim;

23. Madonna, Bobbi – Trial counsel for Mahmoud Aldissi;

24. Mazyck, David – Victim;

25. Mills, Howard – Victim;

26. Missile Defense Agency – Victim;

27. Muldrow, W. Stephen – Acting United States Attorney;

28. NASA Office of General Counsel – Victim;

29. National Science Foundation – Victim;

30. O'Connor, Frank – Victim;

31. Office of the Secretary of Defense – Victim;

32. Palermo, Thomas Nelson – Assistant United States Attorney;

33. Peluso, Ernest F. – Trial counsel for Mahmoud Aldissi;

34. Porcelli, Hon. Anthony E. – United States Magistrate Judge;

35. Rector, Ashley Nicole – Trial counsel for Mahmoud Aldissi;

36. Rhodes, David P. – Assistant United States Attorney, Chief, Appellate Division;

37. Rothstein-Youakim, Susan H. – Former Assistant United States Attorney, Appellate Division (now District Judge for the Second District Court of Appeal for the State of Florida);

38. Todd Foster, PLLC – Trial counsel for Mahmoud Aldissi;

39. U.S. Air Force Research Laboratory – Victim;

40. U.S. Army Aviation & Missile Command – Victim;

41. U.S. Department of Energy, Office of Science – Victim;

42. U.S. Department of Health & Human Services – Victim;

43. U.S. EPA Headquarters – Victim;

44. U.S. Naval Surface Warfare Center – Victim;

45. Valsarj, Kalliat – Victim;

46. Van Dort, Pamela L. – Assistant United States Attorney.

No publicly traded company or corporation has an interest in the outcome of this appeal.

July 24, 2017

/s/ Thomas Burns
Thomas A. Burns

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page(s)**

Statutes **Page(s)**

Regulations **Page(s)**

Rules **Page(s)**

Other Authorities **Page(s)**

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE GOVERNMENT TAKES NO POSITION ON THE "RIGHT TO CONTROL" THEORY, MISUNDERSTANDS THE NATURE OF ITS BARGAINS, AND MISPLACES ITS RELIANCE ON A PERFORMANCE THEORY IT DID NOT CHARGE OR ARGUE TO THE JURY

In their brief, the Scientists meticulously set forth a simple syllogism that explained why the wire fraud evidence was insufficient.[1] The major premise was that there exists no "right to control" theory of wire fraud, so material deceptions do not constitute wire fraud unless they undermine the nature of the bargain. *See* Scientists' Br. 31-46. The minor premise was that the Scientists' material deceptions did not undermine the nature of the bargain. *See* Scientists' Br. 46-50. And the conclusion, of course, was that the wire fraud evidence was insufficient.

The Government does not dispute the major premise; indeed, it takes no position whatsoever with respect to the "right to control" theory.[2] *See* U.S. Br. 40 (acknowledging "distinction between a scheme to

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[1] The Government mistakenly asserts the Scientists "admit[] that they lied about material matters." U.S. Br. 2. To be clear for post-conviction purposes, the Scientists made no such admission and maintain their innocence. Instead, for purposes of this direct appeal, the Scientists merely admit the evidence was sufficient for a reasonable jury to conclude they lied about material matters.

[2] Hence, the Government has waived any such arguments and cannot present them for the first time at oral argument because, even for an appellee, that "'comes too late.'" *Hamilton* v. *Southland Christian*

defraud and schemes that merely deceive"). Instead, the Government disputes only the minor premise, arguing the Scientists' material deceptions "radically altered the nature of the bargain and circumvented the fundamental purpose of the SBIR/STTR programs." U.S. Br. 39.

If that assertion were true, then the wire fraud convictions could stand. But the Government's assertion is incorrect because it is based on (1) its misplaced reliance on a performance theory it never charged, argued to the jury, or instructed the jury, and (2) its misunderstanding of the nature of the bargains it struck and the purpose of the SBIR/STTR programs.

A. The Government Misplaces Its Reliance On A Performance Theory It Never Charged Or Argued To The Jury And About Which The Jury Never Received Instructions Or A Special Verdict Form

The Government misplaces its reliance on a performance theory it not only never indicted or argued to the jury, but expressly disavowed in the District Court both to the judge and to the jury.

Specifically, the Government initially had indicted the Scientists with fraudulent inducement and fraudulent performance. *See* Doc. 1 at

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Sch., Inc., 680 F.3d 1316 (11th Cir. 2012) (appellee waived argument by failing to include it in answer brief) (citation omitted); *La Grasta* v. *First Union Sec., Inc.*, 358 F.3d 840, 847 n.4 (11th Cir. 2004) (same).

13. But then, for whatever reason, the Government had a change of heart and indicted the Scientists with fraudulent inducement alone. *See* Doc. 134 at 5-6.

Based on those amended charges, the Scientists prepared a defense that took their full performance as undisputed. *See* Docs. 378.4 at 33 ("we should have been put on notice of [fraudulent performance], because we could put on a stream of scientists from all over the planet talking about how everything that they did on every single one of these contracts is absolutely done, it's documented, it's valid science, it's good science, it's cited"); 378.13 at 269 ("When we read the superseding indictment, what we're talking about are false certifications, these false letters of support, material reliance by the government, and then the awarding of the contracts. There is nothing about performance or anything else.").

When the Scientists began presenting their performance defense to the jury through cross-examination, the prosecutor told the judge the focus on performance was "absurd" because "I said from day one it isn't relevant." Doc. 378.4 at 34. Indeed, that had been the position the prosecutor had consistently taken since the first status conference, when he

explained, "we are just arguing that they obtained the contract through fraud," and "I don't think the nature of the science matters at all. It's just a lie to get money." Doc. 36 at 6, 8. Moreover, the prosecutor had notice since that date that the Scientists intended to present a performance defense, because Dr. Aldissi's trial lawyer explained:

> I think what we are going to find out is that the government accepted and agreed with everything that was given the government and they got everything they bargained for. There are some differences, and we will hash that out; but *this is not, in like many defense contract cases or fraud cases, where the government bargains for one thing and they get something which is substandard or completely different*. I don't think that's the case at all.

Doc. 36 at 10 (emphasis added).

Moreover, consistent with his position, the prosecutor expressly argued to the jury during his rebuttal that it should ignore the Scientists' performance defense as "irrelevant" because "you never get to performance because they should never have received the awards." Doc. 378.16 at 86. In making that argument, however, the prosecutor never contended the Scientists had not fully performed their research. *See* Doc. 378.16 at 86-88.

Had the prosecutor wanted to try a fraudulent performance case, he could have attempted to obtain a superseding indictment presenting

such charges, given the Scientists notice that the validity of their science was in question, presented such evidence at trial, made such argument to the jury, and obtained such jury instructions. He did not. For those reasons, the Government cannot defend the verdict by asserting, without any authority, "the jury was entitled to conclude that their research results were as fake as their proposals." U.S. Br. 43. And the lack of authority is no surprise, because that is quite simply not how a verdict works.

"Jury decision-making is designed to be a black box." *United States* v. *Benally*, 546 F.3d 1230, 1233 (10th Cir. 2008). Although "the inner workings and deliberation of the jury are deliberately insulated from subsequent review," the "inputs (evidence and argument) are carefully regulated by law and the output (the verdict) is publicly announced." *Id.* As a corollary, the scope of the "output" obviously cannot exceed the scope of the "inputs," *see id.*, which is why this Court "cannot affirm a criminal conviction based on a theory not contained in the indictment or not presented to the jury," *United States* v. *Elkins*, 885 F.2d 775, 782 (11th Cir. 1989).

And that is the problem here: the Government is asking this Court to interpret the verdict's "output" to include "inputs" that the prosecutor not only never provided to the judge and the jury, but expressly told the judge and the jury to ignore. Indeed, the District Court never instructed the jury to determine whether the Scientists' performance was fraudulent, nor did the jury receive any such special verdict form. *See* Docs. 270; 271; 378.16 at 103-130. As such, the Government's belated invitation for this Court to find fraudulent performance on appeal despite presenting such evidence, making such arguments, or so instructing the jury is simply not how verdicts work.

For those reasons, the Government's belated performance argument is incorrect. The law is clear: "This Court cannot affirm a criminal conviction based on a theory not contained in the indictment or not presented to the jury." *Elkins*, 885 F.2d at 782. And it is therefore necessary to reverse a wire fraud conviction for insufficient evidence, even though the evidence could have been sufficient if the prosecutor had charged or argued alternative theories of conviction. *United States* v. *Takhalov*, 838 F.3d 1168, 1170 (11th Cir. 2016) (granting petition for

panel rehearing to reverse wire fraud conviction as based on insufficient evidence despite plausible alternative charges or theories of conviction).

B. The Government Misunderstands The Nature Of The Bargains The Agencies Struck And The Purpose Of The SBIR/STTR Programs

Relatedly, the Government misunderstands the nature of the bargains it struck and the purpose of the SBIR/STTR programs.

For instance, the Government contends the Scientists "l[ied] about matters central to commercialization, [which] deprived the United States of the opportunity to fund legitimate proposals that would have brought a commercial product to the marketplace." U.S. Br. 36-37. To support this assertion, the Government contends the Scientists (1) "ke[pt] eligible scientists from getting [SBIR/STTR] money," and (2) "never intended to and did not use the facilities, equipment, and personnel they had promised." U.S. Br. 43-44.

The first point is easily dispatched because the prosecutor conceded at trial that such other scientists were not victims of wire fraud; instead, only the affected agencies were victims. Docs. 134 at 1-6; 378.15 at 68. The second point is also easily dispatched because it is merely a variant of the nonviable fraudulent performance theory the prosecutor

never charged or argued to the jury.[3] *See supra* Argument I.A. But more fundamentally, both points misconceive the nature of the bargains struck between the affected agencies and the Scientists and the purpose of the SBIR/STTR programs themselves.

First of all, contrary to the Government's implicit suggestions (*see* U.S. Br. 4, 36-37, 42), commercialization is not the sole purpose of the SBIR/STTR programs. Rather, their purpose is "to stimulate research and innovation, to make sure that small businesses have the opportunity to participate in research with federal dollars, to encourage partici-

[3] For instance, the Government makes a rhetorical point when it asserts the agencies "did not bargain for research performed in a bathroom or cardboard box," so the Scientists "served up Old Crow, not the Pappy Van Winkle they promised." U.S. Br. 43-44 (alluding to a bourbon analogy this Court drew in *Takhalov*). But that rhetorical point relates to the Government's belated, nonviable performance theory, so it is incorrect.

An example is illustrative: when a client hires an appellate attorney, he or she is paying for his or her ultimate work product: i.e., the attorney's briefs and oral argument. It simply does not matter whether the attorney assembled that work product in a gilded K Street office using the finest computers and printers money can buy or in a local coffee shop on a crusty old typewriter; either the work product is good or it is not. Here, if the Government felt it was fraudulent performance to conduct research in a bathroom or cardboard box, it should have charged that in an indictment, presented at least one witness who could testify such research was invalid, argued it to the jury, and sought such instructions. *Elkins*, 885 F.2d at 782; *Takhalov*, 838 F.3d at 1170. It did not. As such, the Government's rhetorical point is merely "sound and fury, [s]ignifying nothing." WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5.

pation by women and those in socially and economically disadvantaged groups, and also to encourage the private sector to piggyback on the federal research and try to commercialize that federal research." Doc. 378.2 at 105, 139. Moreover, commercialization occurs only during a Phase 3 award, whereas Phase 1 and Phase 2 awards merely involve initial research and an exploration of commercial potential. Doc. 378.2 at 105-106, 117-118, 144. None of the Scientists' research projects involved a Phase 3 award.[4] *See* Scientists' Br. 10.

For those reasons, the Government cannot contend that the Scientists' materially deceptive proposals for Phase 1 and Phase 2 research projects deprived it of the ability to bring commercial products to the marketplace. To make that showing, the Government would need to charge and prove fraudulent performance. Its assertion here that it lost the ability to bring commercial products to the marketplace is merely speculation, which can never rescue a verdict. It does "not satisfy the [Constitution] to have a jury determine that the defendant is *probably*

[4] The Government's concerns about profit margins (U.S. Br. 7) are also misplaced: "Just as actual costs may vary from estimated costs, the contractor's actual realized profit or fee may vary from negotiated profit or fee, because of such factors as efficiency of performance, incurrence of costs the Government does not recognize as allowable, and the contract type." 48 C.F.R. § 15.404-4(a)(1).

guilty." *Sullivan* v. *Louisiana*, 508 U.S. 275, 278 (1993) (emphasis in original). Juries are permitted to draw only "reasonable inferences" based on "reasonable constructions of the evidence"—"not mere speculation." *United States* v. *Mieres-Borges*, 919 F.2d 652, 657 (11th Cir. 1990); *United States* v. *Kelly*, 888 F.2d 732, 740 (11th Cir. 1989); *United States* v. *Perez-Tosta*, 36 F.3d 1552, 1557 (11th Cir. 1994).

C. The Government Misplaces Its Reliance On *United States* v. *Maxwell*

The Scientists already explained at length why *United States* v. *Maxwell*, 579 F.3d 1282 (11th Cir. 2009), cannot support the wire fraud convictions. Scientists' Br. 48-51. The Government never addressed those arguments (*see* U.S. Br. 42), so it has waived the opportunity to do so. *See supra* note 2.

D. In Arguing The Wire Fraud Evidence Against Dr. Bogomolova Was Sufficient, The Government Raises A Straw Man Argument And Misplaces Its Reliance On An Aiding-And-Abetting Theory

In the appellants' brief, Dr. Bogomolova asserted her wire fraud evidence was insufficient because it gave "equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged." *Cosby* v. *Jones*, 682 F.2d 1373, 1383 (11th Cir. 1982).

Instead of distinguishing *Cosby*, the Government asserted circumstantial evidence is sufficient and Dr. Bogomolova aided and abetted the wire fraud. U.S. Br. 44-45.

The Government's circumstantial-evidence argument is a straw man. Dr. Bogomolova does not dispute that circumstantial evidence can be sufficient. Instead, Dr. Bogomolova relies on *Cosby* to argue that when the circumstantial evidence is at or nearly at equipoise, "a reasonable jury must necessarily entertain a reasonable doubt." *Cosby*, 682 F.2d at 1383. Additionally, the Government's aiding-and-abetting theory is also flawed because no testimony or evidence showed Dr. Bogomolova prepared nonscientific parts of the proposals or was aware Dr. Aldissi had forged letters of support or made other materially deceptive statements. *United States* v. *Louis*, 2017 U.S. App. LEXIS 12298, at *6 (11th Cir. 2017) ("we can infer that Louis's presence and flight are evidence that he knew he was involved in something criminal," but "[w]e cannot find … the government proved beyond a reasonable doubt [he] knew the boxes placed in his car contained a controlled substance").

E. Absent The Wire Fraud Convictions, The Conspiracy And Aggravated Identity Theft Must Also Fail

The Government does not dispute the Scientists' argument that if the wire fraud convictions fall, so must the parasitic conspiracy and aggravated identity theft counts. *See* Scientists' Br. 52.

II. THE GOVERNMENT'S DEFENSE OF THE DISJUNCTIVE WIRE FRAUD INSTRUCTION MISINTERPRETS *MAXWELL* AND IS INCONSISTENT WITH *UNITED STATES* V. *TAKHALOV*

In contending the conjunctive wire fraud instruction was legally incorrect, the Government misinterprets *Maxwell*. *See* U.S. Br. 45-47. It is true *Maxwell* said "financial loss is not at the core of these mail and wire frauds," but it said so in the context of explaining that the defendant deprived the county and national sovereign of the benefit of its bargain because those contracts had been set aside for "CSBE [i.e., local businesses] and DBE [i.e., businesses owned by socially and economically disadvantaged individuals] electrical subcontractors." 579 F.3d at 1302. In contrast, this is a case where financial loss necessarily must be at the core of the wire fraud if the convictions are to stand.

Additionally, the Government contends "neither the defendants' proposed instruction nor the instruction as they now state it addresses the distinction between schemes to defraud and schemes to deceive."

U.S. Br. 46. The Government is mistaken. When the District Court gave an instruction that allowed the a jury to convict based on a finding that the Scientists were acting solely for their own economic benefit rather than with an intent to harm the Government, it invited the jury to convict the Scientists for engaging in a scheme to deceive rather than a scheme to defraud. *United States* v. *Takhalov*, 827 F.3d 1307, 1312 (11th Cir. 2016) ("to *defraud,* one must intend to use deception to cause some injury; but one can *deceive* without intending to harm at all" (emphases in original)).

Finally, the Government incorrectly argues the Scientists did not "show[] that the failure to give their proposed instruction seriously impaired their ability to present an effective defense." U.S. Br. 46. The Government's argument is incorrect for three reasons.

First, the burden of demonstrating harmlessness always rests solely on the Government's shoulders, not a defendant's: "under harmless-error review, the government has the burden of establishing harmlessness beyond a reasonable doubt." *United States* v. *Turner*, 474 F.3d 1265, 1276 (11th Cir. 2007); *accord United States* v. *Silver*, 2017 U.S. App. LEXIS 12493, at *24-43 (2d Cir. 2017) (vacating conviction due to

improper instruction in light of *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016)).

Second, the fact that the Scientists presented their defense without the benefit of a legally correct instruction did not render the error harmless: "Without an instruction supporting the defendant's theory, the jury was not required to believe [it]" and could instead "believe what the government argued in its closing" and "convicted the defendants ... based on" the prosecutor's theory. *Takhalov*, 827 F.3d at 1322-23.

Third, and most importantly, the Government never addressed whether the record contained evidence that could rationally lead a jury to find that the Scientists lacked the intent to defraud. *Id.* at 1321. Here, there was no evidence about specific intent to harm or actual harm to any property interest. *See supra* Argument I. Accordingly, had it been correctly instructed, a reasonable jury could have returned a verdict of acquittal.

III. In Defending The Aggravated Identity Theft Convictions, The Government Misplaces Its Reliance On Obiter Dictum From *United States* v. *Wilson*

Without belaboring the parties' disagreement about aggravated identity theft (compare Scientists' Br. 54-56, *with* U.S. Br. 47-48), it is

necessary to point out that the Government misplaces its reliance (U.S. Br. 48) on dictum from *United States* v. *Wilson*, 788 F.3d 1298, 1310 (11th Cir. 2015).

In *Wilson*, this Court upheld 18 U.S.C. § 1028A(d)(7)'s "any name" language from a vagueness challenge on clear error review because no case from the Supreme Court or this Court had previously held it was vague. *Id.* Then, in dictum, the *Wilson* panel proceeded to explain why it did not believe the statute was vague. *Id.* Because that portion of the opinion was not necessary, it is dictum rather than holding, and it has no precedential force other than its persuasive value. BLACK'S LAW DICTIONARY 1100 (7th ed. 1990) (defining "obiter dictum" as a "judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)").

Additionally, the Government also does not address the circuit split that could arise by following *Wilson*'s dictum, *see United States* v. *Miller*, 734 F.3d 530, 542 (6th Cir. 2013); *United States* v. *Spears*, 729 F.3d 753, 755 (7th Cir. 2013) (en banc), so it has again waived those arguments, *see supra* note 2.

IV. If The Court Is Inclined To Agree With The Scientists' Substantive *Miranda* Arguments, The Appellate Remedy Is To Retain Jurisdiction While The District Court Convenes An Evidentiary Hearing About Harmlessness

Again, there is no need to belabor the parties' disagreement about the *Franks* and *Miranda* issues. *Compare* Scientists' Br. 56-60, *with* U.S. Br. 49-51. It is necessary, however, to discuss the appropriate appellate remedy with respect to the *Miranda* issue.

The Government states "the district court did not admit any evidence from the storage unit," because the materials on U.S. Ex. 54X (a thumb drive) were not obtained by searching the storage unit, but rather were seized pursuant to the search warrants. Of course, if the Government's assertion is correct, the Scientists agree any *Miranda* error would be harmless.

But the problem is the Government supports its assertions merely by pointing to similar assertions the prosecutor had made at trial rather than a finding of fact made by the District Court after an evidentiary hearing. The Scientists' *Miranda* motion indicated the storage unit contained "laboratory notebooks, accounting documents, workshop and course documentation, textbooks, and photographs of the contents of the storage unit." Doc. 45 at 1-2. Based on that description, it is unclear

whether the storage unit contained research proposals, copies of forged letters, or other documents that were introduced at trial. As such, perhaps the prosecutor's statement that no evidence introduced at trial had derived from the storage unit was correct, and perhaps it was not.[5]

If this Court is inclined to agree with the Scientists' substantive *Miranda* arguments, the safest course would be for a panel of this Court to retain jurisdiction while remanding the issue to the District Court so it could hold a brief evidentiary hearing to confirm the location where the materials on U.S. Ex. 54X originated. *E.g.*, *Pettway* v. *Am. Cast Iron Pipe Co.*, 681 F.2d 1259, 1269 (11th Cir. 1982) ("We retain jurisdiction so that if either party is dissatisfied with the district court's order, on remand the matter can come back to the same panel."). After that remand, the same panel of this Court could take up the harmlessness inquiry anew, which would "promote efficiency and spare three other members of this Court the task of wading through the thousands of pages of record that this dispute has engendered." *Id.* Alternatively, if

[5] The Scientists' appellate counsel was not involved with pretrial discovery, but it was his understanding while performing appellate trial support during the 18-day trial that the Government had compiled U.S. Ex. 54X in part based on materials it seized from the storage unit.

this Court is inclined to disagree with the Scientists' substantive *Miranda* arguments, it need not reach harmlessness at all.

V. THE GOVERNMENT MISPLACES ITS RELIANCE ON LOSS-CALCULATION CASES, FAILS TO IDENTIFY THE SPECIFIC EVIDENCE IN SUPPORT OF THE $24,522,386 LOSS CALCULATION, AND FAILS TO DISTINGUISH *UNITED STATES* V. *BANE*

Three points bear mention with respect to sentencing.

First, in defending the District Court's loss calculation, the Government misplaces its reliance on dictum from *Maxwell*, 579 F.3d at 1306-07, and the regurgitation of that dictum as a holding in an unpublished case, *United States* v. *Blanchet*, 518 Fed. App'x 932, 956-57 (11th Cir. 2015), when it asserts, "the appropriate loss amount is the entire value of the contract, regardless of the value of the work performed." U.S. Br. 54.

But the actual holding of *Maxwell* was that a district court did not commit clear error when it calculated loss based on the defendant's 6% profit margin on the government contracts. 579 F.3d at 1305-07. And because *Blanchet* is unpublished, it is "not binding precedent," *Bravo* v. *United States*, 532 F.3d 1154, 1164 n.5 (11th Cir. 2008); rather, it is merely persuasive authority, 11th Cir. R. 36-2. Moreover, *Blanchet*'s persuasive force is quite limited, because it is nothing more than a re-

gurgitation of *Maxwell*'s dictum: an unpublished opinion is persuasive "only to the extent that a subsequent panel finds the rationale expressed in that opinion to be persuasive after an independent consideration of the legal issue." *Twin City Fire Ins. Co.* v. *Ohio Cas. Ins. Co.*, 480 F.3d 1254, 1260 n.3 (11th Cir. 2007); *accord Bonilla* v. *Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 n.7 (11th Cir. 2007) ("Unpublished opinions … are persuasive only insofar as their legal analysis warrants.").

Second, the Government still does not identify the specific evidence upon which the District Court could have relied in finding all research applications since 1999 were materially deceptive. *Compare* Scientists' Br. 61, *with* U.S. Br. 54. As the Scientists previously indicated in their Federal Rule of Appellate Procedure 28(j) supplemental authority letter, the District Court needed to make specific findings based on actual evidence to make the loss calculation. *See United States* v. *Stein*, 846 F.3d 1135, 1151-56 (11th Cir. 2017) (vacating loss calculation). The summary witness did not satisfy this standard, and the Government did not address *Stein*.

Third, the Government enigmatically asserts without authority that "restitution is appropriate for the total funds they received." U.S. Br. 55. But the Government never distinguishes *United States* v. *Bane*, which held a district court "erred when it failed to exclude the value of medically necessary goods victims actually received in its restitution calculation." 720 F.3d 818, 828 (11th Cir. 2013).

VI. The District Court Abused Its Discretion When It Denied Motions To Strike "Mahmoud" Or The Motions For Mistrial

There is nothing to add to the parties' disagreement about the denial of the motions to strike "Mahmoud" or the motions for mistrial. *Compare* Scientists' Br. 64-66, *with* U.S. Br. 52-53.

VII. The Government Misplaces Its Reliance On Unpublished And Distinguishable Cases When Asserting The Record Falsification Evidence Was Sufficient

Only two points bear mention with respect to falsification.

First, relying on an unpublished Sixth Circuit decision that affirmed a false statement conviction under 18 U.S.C. § 1001 (rather than a falsification conviction under 18 U.S.C. § 1519), *United States* v. *Magoti*, 352 Fed. App'x 981, 983 (6th Cir. 2009), the Government contends backdating alone renders a document false. U.S. Br. 51. But that non-

precedential opinion involving a different statute lacks persuasive force because it abuses the English language and ignores the Rule of Lenity.

To "backdate" means to "put a date earlier than the actual date on (something, as an instrument)," whereas to "falsify" means to "make something false; to counterfeit or forge." BLACK'S LAW DICTIONARY 133, 619 (7th ed. 1990). "Congress uses words ... as they are commonly understood." *United States* v. *Frank*, 599 F.3d 1221, 1234 (11th Cir. 2010). If Congress wanted to criminalize backdating under § 1519, it easily could have said so. *E.g.*, *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000) ("Had that been Congress's intention, it could easily have used the formulation just suggested."); *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 197 (1985) ("Congress could easily have [so provided] had that been its intention."); *United States* v. *Rodgers*, 461 U.S. 677, 707 (1983) (rejecting statutory interpretation where Congress "could have easily expressed that intention more clearly by [more direct] language"). But it did not. Accordingly, the Rule of Lenity requires interpreting § 1519 in the Scientists' favor.[6]

[6] For instance, Dr. Aldissi's company, Fractal Systems, was common paymaster for itself and Dr. Bogomolova's company, Smart Poly-

Additionally, the Government misplaces its reliance on *United States* v. *Brown*, 53 F.3d 312, 314 (11th Cir. 1995), when it asserts the jury was entitled to conclude the opposite of Elena Komarova's testimony was true. U.S. Br. 51. *Brown* involved a jury's rejection of a defendant's testimony as substantive evidence, not the rejection of a government witness's testimony as substantive evidence. 53 F.3d at 314.

CONCLUSION

The Court should reverse the judgments or vacate them and remand for further proceedings.

Respectfully submitted,

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mers Research Corporation. *See* 26 C.F.R. § 31.3121(s)-1. The backdated joint venture agreement truthfully set forth that arrangement.

CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 4,502 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century font.

July 24, 2017

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 24th day of July, 2017, to:

David J. Smith, Clerk of Court
U.S. COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT
56 Forsyth Street N.W.
Atlanta, GA 30303

I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 24th day of July, 2017, to:

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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via regular mail on this 24th day of July, 2017, to:

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VIA CM/ECF

May 26, 2017
File: 004-004

David J. Smith, Clerk of Court
U.S. Court of Appeals for the 11th Circuit
56 Forsyth St., N.W.
Atlanta, GA 30303

RE: Federal Rule of Appellate Procedure 28(j) Citation of Supplemental Authority for *United States* v. *Aldissi*, Nos. 15-14193 & 15-14194 (11th Cir.)

Dear Mr. Smith:

Drs. Aldissi and Bogomolova argue the District Court's loss calculation at sentencing was speculative because the Government never presented evidence that established which unfunded awards were derived from fraud, and the District Court never made such "'independent findings.'" Appellants' Br. 62 (citation omitted). In that regard, the Court should consider *United States* v. *Stein*, 846 F.3d 1135, 1151-56 (11th Cir. 2017). In *Stein*, this Court vacated a defendant's sentence because his loss calculation was speculative:

> The record contains no direct, individualized evidence of reliance for each investor. And the circumstantial evidence in the record is far too limited to support a finding that 2,415 investors relied on the fraudulent information Mr. Stein disseminated. The only evidence arguably supporting the reliance finding was: (1) trial testimony from one investor that he relied on one of Mr. Stein's false press releases; (2) a victim impact statement from another investor to the same effect; (3) a number of victim impact statements suggesting that the investors relied on press releases and other publicly available information generally, but not specifically the fraudulent information Mr. Stein disseminated; and (4) testimony that, because the only place to get information about Signalife stock was from press releases and public filings, at least some investors likely relied on this type of information. This evidence standing alone is insufficient to support the inference that all 2,415 investors relied on Mr. Stein's fraudulent information when deciding to purchase Signalife stock. On this thin record, the district court "engage[d] in the kind of speculation forbidden by the Sentencing Guidelines." Accordingly, the district court's actual loss calculation was in error.

Id. at 1154 (citations omitted).

Stein is relevant to Argument V.A.1 in the appellants' brief.

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Warm regards,

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VIA CM/ECF

April 9, 2018
File: 004-004

David J. Smith, Clerk of Court
U.S. Court of Appeals for the 11th Circuit
56 Forsyth St., N.W.
Atlanta, GA 30303

RE: Federal Rule of Appellate Procedure 28(j) Citations of Supplemental Authority for *United States* v. *Aldissi*, Nos. 15-14193 & 15-14194 (11th Cir.)

Dear Mr. Smith:

On appeal, the parties have disputed the District Court's loss calculation and restitution award. Specifically, the parties dispute whether the Scientists are entitled to an offset for the research they delivered. *Compare* Appellant's Br. 60-62, *and* Reply Br. 18-20, *with* U.S. Br. 54.

To that end, the Scientists submit as supplemental authority this Court's unpublished decision in *United States* v. *Near*, 708 Fed. App'x 590, 603 (11th Cir. 2017), and the Fifth Circuit's decision in *United States* v. *Harris*, 821 F.3d 589, 604-08 (5th Cir. 2016) ("the loss amount should have reflected not the total contract price, but rather the contract price less the fair market value of services rendered by the Joint Venture to the procuring agencies"). In *Near*, this Court distinguished *United States* v. *Maxwell*, 579 F.3d 1282 (11th Cir. 2009), as follows:

> …. The government is correct that *Maxwell* declined to offset losses under the Government Benefits Rule, but *Maxwell* involved funds received by an unintended recipient. It makes sense that such losses could not be offset by the value of services provided because those services should never have been provided by that recipient in the first place.
>
> But *Maxwell* does not speak to whether the value of services provided by an intended recipient can be credited against losses caused by that recipient's unintended use of funds. *We are persuaded that such losses can be offset by the value of service provided.*

Near, 708 Fed. App'x at 603 (emphasis added).

Near also affirmed a district court's decision to impose restitution award of $0: because the defendants delivered research, "we agree with the district court's finding that neither NSF nor NASA suffered monetary harm, so the agencies are not entitled to restitution." *Id.* at 604.

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Harris held "the loss amount should have reflected not the total contract price, but rather the contract price less the fair market value of services rendered by the Joint Venture to the procuring agencies." 821 F.3d at 605. In reaching that conclusion, the Fifth Circuit canvassed the sentencing guidelines and cases from other jurisdictions. *Id.* at 604-08.

Warm regards,

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Reply to: Ocala

April 13, 2018

David J. Smith, Clerk of Court
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56 Forsyth St., N.W.
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Re: *United States v. Aldissi et al.,* Nos. 15-14193-EE & 15-14194-EE
Fed. R. App. P. 28(j) Supplemental Authority Letter

Dear Mr. Smith:

The United States responds as follows to the defendants' supplemental authority: *United States v. Near*, 708 F. App'x 590, 603 (11th Cir. 2017), and *United States v. Harris*, 821 F.3d 589, 604–08 (5th Cir. 2016).

In *Near*, the defendant's wire fraud was based on his use of SBIR grant funds for personal expenses; he performed research and used the subcontractors described in his proposals, but failed to pay the subcontractors for their work. 708 F. App'x at 593–95. Based on extensive testimony from a forensic accountant concerning the monetary value of the research performed, the district court found that the United States had gotten the full benefit of its bargains and that the value of the research was greater than any loss to the United States. *Id.* at 595–96. In addition, the court concluded that the Government Benefits Rule, USSG §2B1.1, comment. (n.3(F)(ii)), did not apply because Near was not an unintended recipient of the SBIR program.

This Court affirmed, holding that the district court did not clearly err in its factual findings concerning the value of Near's research and the services provided by his subcontractors or its finding that Near was not an unintended recipient. *Near*, 708 F. App'x at 603–04. And, because Near was not an unintended recipient, *United States v. Maxwell*, 579 F.3d 1282, 1306 (11th Cir. 2009)—which held that the value of services provided by an unintended recipient are not credited against losses—was distinguishable. 708 F. App'x at 604.

Near is inapposite. Here, the district court found that the defendants were not intended recipients, that they were ineligible for SBIR awards, that their fraud circumvented the commercialization goals animating the SBIR, and that the United States did not receive the benefit of its bargains. Doc. 379 at 25–28. Given these findings, which are fully supported in the record, this Court is bound by *Maxwell* to affirm the defendants' sentences. And the defendants' other supplemental authority, *Harris*, 821 F.3d at 604, expressly conflicts with *Maxwell*, so it affords them no relief.

Very truly yours,

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Chief, Appellate Division

By: *s/ Roberta Josephina Bodnar*
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Certificate of Service

I certify that a copy of this letter and the notice of electronic filing was sent by CM/ECF on April 13, 2018, to:

THOMAS A. BURNS, ESQ.

Counsel for Mahmoud Aldissi & Anastassia Bogomolova

s/ Roberta Josephina Bodnar
ROBERTA JOSEPHINA BODNAR
Assistant United States Attorney

APPENDIX O

The mail and wire fraud statutes, which provide:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, … for the purpose of executing such scheme or artifice or attempting so to do, [utilizes mail or wire], shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud).

The Due Process Clause of the Fifth Amendment, from which the Rule of Lenity derives, which provides: "No person shall be … deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The sentencing statute, which provides:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> …
>
> (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> …
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.
>
> ….

18 U.S.C. § 3553(a)(2), (6).

The ordinary loss calculation rule permitting offsets, which provides: "Loss shall be reduced by … the fair market value of … the services rendered[] by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected." U.S.S.G. § 2B1.1 cmt. 3(E)(i) (2014).

The special government benefits rule forbidding offsets, which provides: "In a case involving government benefits (*e.g.*, grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be." U.S.S.G. § 2B1.1 cmt. 3(F)(ii) (2014).

The Mandatory Victims Restitution Act, which provides:

> The order of restitution shall require that such defendant … return the property to the owner of the property or someone designated by the owner; or if return of the property … is impossible, impracticable, or inadequate, pay an amount equal to the greater of the value of the property on the date of the damage, loss, or destruction; or the value of the property on the date of sentencing, *less the value (as of the date the property is returned) of any part of the property that is returned*.

18 U.S.C. § 3663A(b)(1) (emphasis added).

The restitution guideline, which provides: "In the case of an identifiable victim, the court shall enter a restitution order for the full amount of the victim's loss…." U.S.S.G. § 5E1.1(a)(1) (2014).