United States Court of Appeals

for the

Third Circuit

Case No. 17-1817

UNITED STATES OF AMERICA,

– v. –

WILLIAM E. BARONI, JR.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY (WIGENTON, J.), CASE NO. 2-15-CR-00193-001

REPLY BRIEF FOR DEFENDANT-APPELLANT WILLIAM E. BARONI, JR.

MICHAEL A. LEVY
MICHAEL D. MANN
MATTHEW J. LETTEN
S. YASIR LATIFI
SIDLEY AUSTIN LLP
Attorneys for Appellant
787 Seventh Avenue
New York, New York 10019
(212) 839-5300

Table of Contents

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Other Authorities

INTRODUCTION

The government is not shy about its current theory of the case against Bill Baroni and Bridget Anne Kelly. It boldly draws a line in the sand, expressing a newfound, two-dimensional view of the distinction between legal and illegal conduct. According to the government, "[T]he jury repeatedly was presented with evidence of two, mutually exclusive situations. Either Defendants were advancing the interests of their employers with their scheme, or they were advancing a *personal* agenda." (Govt.Br.28-29 (emphasis added).) The latter purportedly is a crime, the former purportedly is not.

The problem with that is that even in the light most favorable to the government's case—indeed, accepting exactly what the government told the jury it proved—Baroni's conduct falls into neither of the government's two buckets. In the light most favorable to its case, the government proved that Baroni, a *political* appointee, transferred two lanes from the use of one constituency to the use of another constituency for the purpose of sending a punitive *political* message to a mayor who refused to endorse Baroni's *political* patron. Baroni's actions may not have been for a technocratic, apolitical purpose—an aspiration the government calls a public official's legal "responsibility … to make each and every decision in the best interest of the people" (JA5303)—but neither were they for a "personal" purpose. Baroni had no personal dispute with Mayor Sokolich.

The reason the government now seeks to divide all public decision-making into two ill-fitting categories—apolitical and technocratic (legal) and "personal" (illegal)—is obvious. As Baroni showed in his opening brief, allocating or reallocating public resources for political purposes—even politically punitive purposes—may produce political consequences, but it is not a federal crime under any of the statutes charged here.

Having no answer, the government tries to avoid the issue, arguing for the first time on appeal that Baroni's description of the conduct as "political" is a "euphemism[]" that Baroni has concocted to "obscure that Defendants … put [Port Authority property] to *personal* use[.]" (Govt.Br.4 (emphasis added).) Indeed, the government is so in love with its newfound conception of the supposed crime—that it was committed not for political reasons but for "*purely personal* reasons" and "to pursue a *purely personal* vendetta" (Govt.Br.2, 36 (emphasis added))—that it uses that formulation or something like it nearly two dozen times.

This is revisionist history. As the government explained in summation, its theory was always that this was politics run amok:

> *How did this happen?* Well, Bill Baroni, Bridget Kelly and David Wildstein shared an intense commitment to the *political* success of Governor Chris Christie. They saw themselves as his loyal lieutenants who were free to use their Government jobs to launch *political* attacks, and who never attempted to separate *politics* from their jobs in public service. They used their positions at the Port Authority and in the Governor's Office to execute a

> malicious scheme to punish a local Mayor by needlessly leading innocent travelers, adults and children who were pawns in a *political* game into a paralyzing traffic jam[.]

(JA5190-91 (emphasis added).)

Federal criminal law does not require state and local officials "to separate politics from their jobs in public service" (JA5190-91), and the government cannot avoid that through the sophistry of replacing the word "political" with the word "personal." Moreover, if a "purely personal" purpose is what supposedly made the conduct here criminal, the jury was never instructed to find that, and there is little reason to think it would have concluded that this inherently political conduct was "purely personal."

Ultimately, were the Court to accept the government's arguments in defense of these convictions, no state or local official could operate without constant fear of being indicted for offending federal prosecutors' sensibilities about the extent to which politics should be permitted in government. The government's position should be rejected and Baroni's convictions reversed.

POINT I

The Evidence Was Insufficient on the Section 666 Counts

In his opening brief, Baroni established that the evidence, viewed in the light most favorable to the government, showed that: (i) he transferred a public resource—use of two bridge access lanes—from one constituency to another; (ii) as

the Port Authority's Deputy Executive Director, he was authorized to order such lane realignments; and (iii) he did so to send a punitive political message to the first constituency's mayor. (Baroni.Br.27-33.) Baroni then showed that this was not a crime under Section 666, an anti-theft and anti-bribery statute whose text does not cover, and has never successfully been used to prosecute, such politically motivated official acts.

The government barely addresses Baroni's arguments. Instead, the government offers a view of Section 666, new on appeal and untethered from the statute, under which *any* political purpose underlying the allocation of public resources renders that decision "personal" and criminal. Nothing supports this position. "The idea that it is a federal crime for any official in state or local government to take account of political considerations when deciding how to spend public money is preposterous." *United States v. Thompson*, 484 F.3d 877, 883 (7th Cir. 2007).

A. The Government Does Not Meaningfully Contest Baroni's Argument About the Facts

The government argues that Baroni ignores "the overwhelming evidence against" him and "rehash[es] a version of events the jury rejected." (Govt.Br.22.) This is untrue. Baroni has recited government-cooperator David Wildstein's own testimony about the supposed offense and conceded that that testimony was "legally sufficient" for the jury to conclude "that the purpose of realigning the lanes was

political payback rather than to conduct a legitimate traffic study." (Baroni.Br.12-17 & n.4.) Thus, rhetoric aside, there is little disagreement over the relevant facts on appeal. Importantly, the government does not meaningfully challenge the facts underlying Baroni's legal argument.

1. Baroni Reallocated a Public Resource from One Constituency to Another

As Baroni has explained, the lane realignment was just that—a realignment. Officers traditionally set out traffic cones each morning to create Fort Lee's three Special Access Lanes. With Baroni's approval, they placed the cones two lanes to the right of the previous spot. Doing so reduced the number of lanes set aside for Fort Lee drivers to one, and increased the number of lanes for all other drivers to eleven. Baroni thus took a public resource away from Fort Lee and provided it to others.

The government does not materially dispute this. Playing word games, the government repeatedly refers to "the lane *reductions*" (*e.g.*, Govt.Br.3, 6, 11), but that description—like the decision to start calling the purpose "personal" rather than "political"—is calculated to obscure not enlighten. The number of lanes was not reduced.

Pursuing this false "reduction" theme, the government similarly plays with inapt analogies, saying that Baroni acted like a mayor who "directs city plows to create impassable mounds of snow at key intersections." (Govt.Br.3.) But Baroni

did not close the two lanes in question. The reallocated lanes continued to function properly, just for the benefit of a different set of drivers.

Thus, although the government accuses Baroni of employing "euphemisms" in describing the facts (Govt.Br.4), it is not Baroni whose terms and images are crafted to obscure reality. It is not Baroni who inaccurately calls it a "lane reduction" when every lane stayed in use. And it is not Baroni who now makes a fetish of substituting the word "personal" for the word "political" when the government's case has always been about Baroni's political purpose.

Ultimately, the government's wordplay and inapt analogies cannot alter the reality that the Fort Lee traffic resulted from a public official transferring a public resource from one constituency to another.

2. Baroni Had Authority to Realign Lanes at the Bridge

Baroni has further shown that, as Deputy Executive Director, he was authorized to realign the bridge lanes. (Baroni.Br.29-30.) The government itself opened by asserting that Baroni "had the power to operate the George Washington Bridge" (JA671), and various of its witnesses confirmed the breadth of Baroni's authority. Most importantly, Executive Director Foye testified that no "policy [had] ever [been] proposed or put in place at the Port Authority" to require the Deputy Executive Director to get the Executive Director's approval in order to make a "permanent change … of a lane configuration." (JA1113-14.)

The government does not dispute the testimony Baroni cites. Instead, in a footnote, it vaguely pronounces that "the buck stopped with Foye," and implies through parentheticals that Baroni lacked authority because Foye retained the power to overrule him. (Govt.Br.28 n.6 (quotation marks and alterations omitted).) But just because one official can later overrule another's decision does not mean the latter lacked authority to make that decision in the first place. If it did, only the chief executive of any organization would be "authorized" to do anything, since a chief executive can almost always overrule a subordinate. That Baroni could be overruled does not undermine the government's *own* arguments and proof that Baroni was authorized to realign the lanes in the first place.

The government also argues that "*[n]o* PANYNJ official was entitled to use PANYNJ facilities or resources as Defendants did." (Govt.Br.28.) That response is circular. Baroni's point is that he was generally empowered to realign the lanes, and that his reason for doing so here was permissible. The government's assertion that his purpose was impermissible does not mean Baroni lacked the authority generally.

Finally, the government claims the jury necessarily found that Baroni lacked authority because, in order to convict, the jury purportedly "needed to find Defendants used PANYNJ property 'knowing that the use is unauthorized[.]'" (Govt.Br.55 (selectively quoting JA5109).) But the government misrepresents the jury instructions. The instruction actually told the jury in the disjunctive that it could

convict if the Defendants used the property "knowing that the use is unauthorized *or* unjustifiable *or* wrongful." (JA5109 (emphasis added).)

3. The Proof Was Sufficient to Support the Government's Contention that Baroni's Purpose was Political

Of everything Baroni said in his brief, one might have expected the government to object least to his *concession* that there was sufficient evidence for the jury to find that the lane realignment had a politically punitive purpose. That was, after all, the central thrust of the government's case. (JA5190-91 (Govt. summation).) But incredibly, the government now rejects that concession, calling its once-favored term "political" a "euphemism[]" and a "fiction." (Govt.Br.4, 24.)

Regardless, there is no real disagreement about what the government proved. Although now barely capable of uttering the word "political," the government acknowledges its factual theory that Baroni acted "[t]o punish Fort Lee's Mayor for not endorsing [Baroni's] patron, New Jersey's Governor, for re-election." (Govt.Br.1.) The government has decided to defend this conviction by asserting that all political agendas are personal agendas—that it is a "fiction that [a] political agenda [is] not personal" (Govt.Br.24)—but nomenclature aside the essentially political purpose of the conduct is undisputed.

B. Section 666 Does Not Criminalize the Politically Motivated Reallocation of Public Resources

With little uncertainty about what was proved, the question is whether Section 666 makes it a crime to reallocate a public resource for a politically punitive purpose. The government answers with an emphatic yes, explaining that using public property for *any* political purpose is a "personal" use and, therefore, a Section 666 violation. But the government's answer is grounded in the practical objective of preserving this particular conviction, not in law or logic.

As an initial matter, no court has ever held the political distribution of public resources to be a crime under this statute. The government seemingly admits as much, but says it is because "Defendant's scheme was literally unprecedented[.]" (Govt.Br.24.) Every case is unprecedented at some level of specificity. But even at the most *generic* level, the government cannot find a single successful prosecution of a public official for using a public resource to favor or punish a constituency for a political reason.[1]

Nor is that for lack of opportunity. Public officials commonly use public resources as leverage against other public officials or to inflict political payback.

[1] The government identifies one Section 666 prosecution in which the word "political" appears. *United States v. Genova*, 333 F.3d 750 (7th Cir. 2003). But the defendant there had public employees perform purely political, non-employment tasks like "attending fundraisers." *Id*. at 754. Nothing similar happened here. Toll collectors collected tolls and police officers placed traffic cones. Nobody was sent to do something that was not their job.

(*See* Baroni.Br.32.) It is sufficiently common that Mayor Sokolich—a veteran politician—immediately recognized that political punishment was the *only* plausible reason why his town had suddenly lost two lanes. As he testified, "I knew that early on.… I mean, I'm Mayor of the town, I'd know it. The only feasible … cause of this is someone must be mad at me." (JA967.)

The absence of a successful prosecution has also not been for lack of trying. As Baroni has shown, prosecutors in two cases pursued public officials under Section 666 for basing decisions about the distribution of public resources on political considerations. *See United States v. Cicco*, 938 F.2d 441, 446 (3d Cir. 1991); *Thompson*, 484 F.3d at 884. Both times, courts (including this one) threw out the convictions.

In *Cicco*—similar to here—town officials punished two "special" police officers by taking away their jobs as retaliation for the officers' failure to "actively support[] the town's Democratic organization in the recent elections." *Cicco*, 938 F.2d at 443-44. The government says *Cicco* is distinguishable because it is not about taking away a public resource (government jobs) as political retaliation but, rather, about "trad[ing] municipal jobs as *rewards* for political service." (Govt.Br.38 (emphasis added).) That is not how this Court has described the facts of *Cicco*: "[N]either [defendant] ever asked for particular services in the future.… To the contrary, the evidence indicates that defendants' primary motivation in removing

[the officers] from the Specials list was in *retaliation* for their *past* failure to help out in the November 1988 election campaign." *United States v. Cicco*, 10 F.3d 980, 986 (3d Cir. 1993) (emphasis added).

The government also notes that *Cicco* was charged under Section 666's bribery prong, saying that the facts "potentially implicated" that prong but "ha[d] nothing to do with property obtained by fraud, converted or otherwise intentionally misapplied." (Govt.Br.38.) True, but that is Baroni's point. The government's predecessors (in the same U.S. Attorney's Office) apparently recognized what the government now observes—punishing political disloyalty by taking government resources (a salary) away from one set of constituents and giving them to another "has nothing to do with property obtained by fraud, converted or otherwise intentionally misapplied." (Govt.Br.38.) That is presumably why the government's predecessors did not charge the *Cicco* defendants under Section 666's anti-*theft* provision. They tried the bribery prong, and this Court rejected even that effort, holding that the conduct was "simply different in kind" from "the crimes Congress targeted when it created § 666." *Cicco*, 938 F.2d at 445. It is hardly a point in the government's favor that, on analogous facts, it is pushing the weaker theory.

As for *Thompson*, the government says the Seventh Circuit meant only "pork doling" and "[d]ispensing favors to supporters"—not penalizing non-supporters—when it labeled "preposterous" the idea that an official commits a crime by

considering politics when allocating public resources. (Govt.Br.39.) Dispensing favors, the government opines, is "an unfortunate cost of agency operations, but … does not amount to the unauthorized use of the agency's property[.]" (Govt.Br.39.)

Therein lies the *deepest* flaw in the government's search for a Section 666 offense here: its proposed offense has no definition or limits. Although the government seems to sense that it would be helpful to suggest some limit to its proposed offense,[2] the limit it proposes—that distributing public property as a political "favor[]" is merely "unfortunate" while taking public property away as political punishment is criminal—is pure *ipse dixit*. The government identifies no basis for that distinction in the statute or elsewhere.

Nor does the distinction fit the government's overall thesis. According to the government, all "political" agendas are "personal" agendas. (Govt.Br.24 (calling it a "fiction that [Defendants'] political agenda was not personal").) In particular, promoting the re-election of an incumbent is purportedly a "personal" agenda. (Govt.Br.17 (asserting Defendants had a "personal agenda: Promoting the

[2] The government contends that "Section 666, although broad, is not without limits," but the example it offers is this jury instruction: "*Misapplication includes the wrongful use of the money or property for an unauthorized purpose, even if the use actually benefited the Port Authority."* (Govt.Br.37 (government's emphasis).) An instruction that says something is criminal "even if" a circumstance is true is an *expansion* of criminal liability, not a limit.

Governor").)[3] Indeed, based on this, the government claims there is "no legal difference" between using Port Authority resources for the "personal" purpose of "Promoting the Governor" and "us[ing] a PANYNJ helicopter to ferry [one's] kids to school." (Govt.Br.17, 41.) There are simply "two, mutually exclusive situations"—public officials can legally "advanc[e] the interests of their employers … or … [illegally] advanc[e] a personal" (meaning, political) agenda. (Govt.Br.28.)

Thus, while the government pays lip-service to the commonsense notion that it would be preposterous to criminalize "[d]ispensing favors" for political purposes (Govt.Br.39), its theory permits no such distinction. The government views Section 666 as a federal prescription for state and local technocracies, pursuant to which public officials must "make each and every decision in the best interest of the people," free of distorting political (meaning, personal) interests. (JA5303.)

Even if the government believes there is some limiting principle, it offers no textual basis or rationale for predicting where it is. If Baroni had transferred away only one Special Access Lane, intending more modest disadvantage to Fort Lee as a political message to Mayor Sokolich, would that have been a criminal use of Port Authority property in service of a "personal" agenda? If Baroni had transferred a

[3] Unsurprisingly, this view has been expressly rejected. *See United States v. Blagojevich*, 794 F.3d 729, 735-38 (7th Cir. 2015) (procuring someone's appointment to public office is not a "private benefit").

fourth access lane *to* Fort Lee, disadvantaging Main Line drivers but benefiting Fort Lee drivers to encourage Mayor Sokolich's support for Governor Christie, would that violate Section 666? When Baroni helped authorize the Port Authority's purchase of $300,000 worth of shuttle buses for Fort Lee, partly to curry political favor with Mayor Sokolich (JA1589-92), did that violate Section 666, and if Mayor Sokolich participated knowing the purpose, was he a co-conspirator? The government's theory treats all of this as "personal" and therefore criminal, but reality suggests that cannot be so, and the government would likely concede as much. Nevertheless, once one indulges the government's claim that a political purpose is a personal purpose and a personal purpose violates Section 666, determining what uses of public property are not criminal is any public official's guess.

Nor can the government avoid this quandary by arguing that the foregoing would be permissible if it was for what the government vaguely defines as "PANYNJ purposes." (Govt.Br.4.) Public officials cannot decide resource allocations at their peril, hoping that prosecutors and juries later agree those allocations were consistent with agency purposes. Even here, the government relies only on a nebulous collection of Port Authority practices, not any actual rule, to assert that Baroni's conduct was inconsistent with "the [w]ay the PANYNJ [d]oes

[b]usiness." (Govt.Br.13.)[4] The realigned lanes and tollbooths functioned to let drivers onto the Bridge—a legitimate Port Authority purpose—and the government still calls it a crime.

Moreover, there were numerous examples at trial of politically-motivated favors (common to any government agency) that had no particular relationship with the Port Authority's mission, like $5,000 donated to Fort Lee's fire department (JA917), gifts of flags and framed prints (JA939, 1525, 1577), and World Trade Center tours staffed by salaried employees (JA924-29). The government does not say these expenditures were criminal, but it is hard to see how the government's theory excuses them.

Fortunately, the solution to these intractable problems is to consider Section 666 itself, along with the decisions controlling its interpretation. Baroni has done so at length, explaining that every applicable tool of statutory construction demonstrates that it is not a crime to allocate or reallocate public resources as political favoritism or punishment. (Baroni.Br.33-40.) The government either ignores these points, or offers only passing, unpersuasive responses, including:

[4] For this reason, among others, there is nothing to the out-of-circuit, outlier decisions the government cites for the unsettling proposition that public employees who spend funds for *legitimate* agency purposes should go to federal prison if their actions violate internal rules. (Govt.Br.40.) The government has never identified any Port Authority rule violated by the lane realignment.

Federalism: Baroni cited the Supreme Court's repeated instruction, seemingly written for this case, that "where a more limited interpretation of [a criminal statute] is supported by both text and precedent, [courts must] decline to construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of good government for local and state officials." *McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016). The government neither addresses these principles nor explains how they could permit federal prosecutors to use an inapposite anti-theft statute to referee what the government described as a local "political game" (JA5190-91).

Legislative History and Statutory Purpose: Baroni cited this Court's holding in *Cicco* that Section 666 has two specific legislative purposes, neither of which is implicated by this case, and that otherwise "'§ 666[] must be construed narrowly.'" (Baroni.Br.22-24 (quoting *Cicco*, 938 F.2d at 446).) The government responds by asking this Court to ignore its most detailed exposition on the history and purposes of Section 666 because the 1991 decision is too "old[]" (Govt.Br.44), and supposedly has been abrogated by two Supreme Court decisions. (Govt.Br.38.) But those decisions are fully consistent with *Cicco*. In each, the Supreme Court considered the expansiveness of the same motivating federal interests that the *Cicco* court had identified. Apart from advancing those legislative purposes—which are

irrelevant here—the Supreme Court did not say anything about construing the statute expansively.

Statutory Language and Title: With respect to Section 666's various verbs, Baroni disputed the government's overbroad claim in summation that the statute's alternatives all "more or less … get at the same thing, doing something that you're not suppose[d] to be doing with Government property." (JA5292-93.) Observing that the Supreme Court recently relied on the "the familiar interpretive canon *noscitur a sociis*" to "avoid the giving of unintended breadth" to criminal statutes, *McDonnell*, 136 S. Ct. at 2368 (internal quotation marks omitted), Baroni explained that the intent of Section 666's substantive prohibitions is to cover crimes like "embezzl[ing]" and "steal[ing]," 18 U.S.C. § 666(a)(1)(A). Consistent with that, Baroni observed that this Court relied on Section 666's title—"Theft or bribery concerning programs receiving Federal funds"—to conclude that "the language the drafters of § 666 chose is … consistent with an intention of focusing solely on offenses involving theft or bribery." *Cicco*, 938 F.2d at 444.

The government responds by citing a Clean Air Act case, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001), for the proposition that a statute's title is irrelevant. (Govt.Br.43-44.) But since *this* Court has looked to the title of *this* statute in interpreting its scope—as has the Seventh Circuit, *Thompson*, 484 F.3d at 881—the title is plainly relevant.

Similarly, the government ignores *noscitur a sociis*, which the *McDonnell* Court invoked *precisely* to avoid subjecting state and local officials to federal corruption prosecutions that Congress never intended. Instead, the government prefers the canon that all statutory language should be ascribed meaning to avoid redundancy, citing an inapposite case about the voluntariness of confessions. (Govt.Br.42 (citing *Corley v. United States*, 556 U.S. 303, 314 (2009).) And then the government unintentionally demonstrates the canon's inapplicability, arguing that "misapplication" means "[u]sing another's property for one's own benefit with intent to defraud" (Govt.Br.42), even though that is redundant to Section 666(a)(1)(A)'s prohibition on "obtain[ing] by fraud."

* * * *

In sum, the government abhors the conduct here, but would prefer to avoid close analysis of whether it is criminal. No successful precedent for this case exists, and two efforts to bring cases on similar theories were rejected by this Court and the Seventh Circuit. This is not because history lacks examples of political payback. The statute self-identifies as an anti-theft provision that this Court said must be construed narrowly. The Supreme Court has said statutes like this must be construed narrowly to avoid federalism problems, and their prohibitions must be read in context, lest federal prosecutors misuse them to impose their own standards of good government on states and localities.

The government asks this Court to ignore *all* of this in favor of an interpretation under which any use of public property in furtherance of a political agenda is the same as stealing the property for personal use. Such an interpretation cannot stand.

POINT II

The Evidence Was Insufficient on the Wire Fraud Counts

The government assures the Court that this is not an improper honest-services fraud case masquerading as a miniscule, $10,000 money-or-property fraud case. It says this even though it claimed in summation that Baroni's crime was failing to "separate politics from [his] job[] in public service" and using his "Government job[]to launch [a] political attack[]" in violation of his supposed duty "to make each and every decision in the best interest of the people of New Jersey." (JA5190-91, 5303.) And, indeed, the government needs to say this case is about money or property, because the honest-services fraud theory that it *sounds* like the government presented—"that purely political interests may have influenced a public official's performance of his duty," Br. for the United States 45, *Weyhrauch v. United States*, No. 08-1196 (U.S. Oct. 29, 2009), *available at* 2009 WL 3495337—has been firmly repudiated, in part because it "invites abuse by headline-grabbing prosecutors in pursuit of local officials [and] state legislators … who engage in any manner of

unappealing or ethically questionable conduct," *Sorich v. United States*, 555 U.S. 1204 (2009) (Scalia, J., dissenting from denial of *certiorari*).

But this case is transparently not about money or property. The U.S. Attorney's Office did not grab national headlines because Baroni, Kelly, and Wildstein deprived the Port Authority of money or property so incidental that the government never bothered to value it for the jury in summation, and belatedly claimed at sentencing (citing no evidence) was worth a little more than $10,000. (JA650-51.)

Indeed, seizing on an argument of Baroni's, the government brazenly claims that it only needs a "peppercorn" of money or property to transform an invalid honest-services case into something viable because Section 1343 has no "monetary threshold." (Govt.Br.65.) Noting Baroni's point that allowing this "will render the [Supreme Court's] limitations on honest services meaningless, because public officials inevitably make decisions involving at least a peppercorn of public money or property" (Govt.Br.65 (internal quotation marks omitted)), the government responds with shrugging indifference. The government says Congress might have avoided allowing this supposed loophole to turn *Skilling* into a dead letter by writing a "monetary threshold" into the wire fraud statute, but "Congress chose not to." (Govt.Br.65-66.)

Although the government apparently thinks it is onto something clever, courts are not so easily deceived. Indeed, although the notion that this is a money-or-property case is a subterfuge, it is not a novel one. Various cases have involved federal prosecutors attempting the ploy that the government tries here; namely, proffering a tortured theory of money-or-property loss—often involving the value of allegedly misappropriated salaries or the right to control government employees—and arguing that an otherwise impermissible honest-services case is actually a permissible money-or-property case. And various circuits have rejected it. As the First Circuit explained in rejecting a post-*McNally* attempt to recast an honest-services fraud as a money-or-property fraud: "[O]ld habits die hard. But we do not think courts are free simply to recharacterize every breach of fiduciary duty as a financial harm, and thereby to let in through the back door the very prosecution theory that the Supreme Court tossed out the front." *United States v. Ochs*, 842 F.2d 515, 527 (1st Cir. 1988).

United States v. Goodrich, 871 F.2d 1011 (11th Cir. 1989), is directly on point. In that case, the defendant participated in a scheme involving bribing county commissioners to approve zoning petitions. *Id*. at 1012. Initially, the case was brought on an honest-services theory. *Id*. When *McNally* invalidated that theory, the government superseded and recast the case as money-or-property fraud, arguing, among other things, that the defendant defrauded the county out of "the cost of sham

commission meetings," including the "salaries … and services of elected and appointed personnel … and the use of [county] equipment" in connection with "the analysis, review, revision … and consideration by the [county] Board … and various departments … [of] zoning petitions." *Id*. at 1012-13 & n.1. The government's theory—as in this case—was that "the various commission meetings at which zoning petitions were considered were a mere charade," and, as a result, "the commissioner's salaries were paid and incidental expenses were incurred in conducting sham meetings designed to reach a result foreordained by the payment of bribes." *Id*. at 1013. In short, although county commissioners and employees performed their functions and used county equipment to do so—just as Port Authority personnel here did their jobs and used lanes and tollbooths to collect tolls and permit entrance onto the Bridge—the government argued that the county had been deprived of property because the commissioners' undisclosed interests made the activity a charade. *Id*.

The district court dismissed the indictment, finding "no basis for distinguishing th[e] case from *McNally*." *Id*. at 1013. The Eleventh Circuit agreed, affirming the dismissal and explaining that the government's proffered "'property interest' is indistinguishable from the intangible right to good government described in *McNally* and cannot sustain the mail fraud count." *Id*. at 1013-14; *see also Toulabi v. United States*, 875 F.2d 122, 125-26 (7th Cir. 1989) (rejecting government's

"[b]elatedly … discovered" claim that honest-services scheme deprived city of "'property' interest[] … in the right to control the activities of the employees of the Division of Public Vehicle Operations," finding that "that's the intangible rights doctrine by another name").

As in these cases, the Court should reject the government's attempt to recast an invalid honest-services case as a miniscule money-or-property case by pointing to the incidental expenditure of employee time inevitably involved in making and executing any governmental decision.

* * * *

Moreover, even on its own terms, the government has not identified a money-or-property fraud because the Port Authority had already vested Baroni with the right to control the alignment of lanes on the Bridge. Whatever lies may have been told to subordinates were not for the purpose of obtaining control—Baroni already had control—and so were merely deceit, not fraud. (*See* Baroni.Br.41-43.) Importantly, when Baroni spoke to the Executive Director of the Port Authority—the only Port Authority officer to whom Baroni might have needed to lie to preserve his control—the government's position is that Baroni *told the truth*, acknowledging that the realignment was politically "directed by Trenton." (Govt.Br.28 (quotation marks omitted); *id*. at 54 (same).)

In his opening brief, Baroni observed that *United States v. Zauber*, 857 F.2d 137 (3d Cir. 1988), dictates this conclusion. (Baroni.Br.43.) In that case, like here, the government attempted to recharacterize an invalid honest-services prosecution as a money-or-property case by arguing that pension fund trustees vested with authority to make investment decisions deprived the fund of its right to control its money when they concealed the personal bases (kickbacks) for those decisions. *Zauber*, 857 F.2d at 143. This Court held that the defendants did not "deprive[] the pension fund of control over its money" because they had already been given "the power and the authority to invest the fund's monies with others" and so had not fraudulently "appropriated" anything. *Id*. at 146-47.

Seeking to sidestep *Zauber*, the government quotes this Court's statement that "'*Zauber* must be read carefully.'" (Govt.Br.59 (quoting *United States v. Osser*, 864 F.2d 1056, 1063 (3d Cir. 1988).) That sounds interesting until one sees that *Osser* was referring to a different and irrelevant part of the *Zauber* decision concerning "constructive trust[s]." *Osser*, 864 F.2d at 1063.

The government's other attempt to avoid *Zauber* is to offer a tortured misinterpretation of this Court's reasoning. The government says that the reason this Court found no deprivation of the right to control was because the defendants ultimately chose an investment that "guaranteed a rate of return" and thus "[b]ecause of the guarantee" there was no "risk of loss" to the fund and no deprivation of the

right to control. (Govt.Br.59.) The government should not ascribe to this Court such a patent misunderstanding of the right to control doctrine. As the government itself explains in the next paragraph of its brief, the right to control does not turn on whether the victim suffered a pecuniary loss, but on whether the defendant deprived the victim of "the right to control its assets by depriving it of information necessary to make discretionary economic decisions." *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015) (quotation marks omitted).

Thus, this Court did not reject the right-to-control theory in *Zauber* simply because the pension fund had a guaranteed investment and suffered no ultimate loss. Rather, this Court rejected the right-to-control theory because the defendants, "as trustees of the pension fund," had already been granted "the power and the authority to invest the fund's monies with others," and, therefore, even if they deceived the fund about the motivations for their decisions, they could not have "appropriated" a right to control that they already possessed. *Zauber*, 857 F.2d at 147. The same is true of Baroni, who had already been granted control over operations at the Bridge, and so could not have deprived the Port Authority of any right to control simply by concealing from his subordinates the purpose behind his decisions.

POINT III

Baroni's Conduct Did Not Violate Any Clearly Established Constitutional Right

For his reply on this point, Baroni relies on Kelly's reply brief.

POINT IV

The Jury Instructions Erroneously Omitted Intent to Punish

Nobody has suggested that Baroni was precluded under all circumstances from realigning the bridge lanes. Fort Lee's citizens have no constitutional or statutory right to a particular traffic pattern. Absent more, the Port Authority, at the Deputy Executive Director's direction, could freely reduce or increase Fort Lee's allotment of lanes. What allegedly made the conduct here illegal was Baroni's supposedly impermissible purpose: punishing Mayor Sokolich.

As Baroni has explained, the government recognized this essential aspect of the charges at almost every stage below. It charged the case by asserting that the illegal object of the conspiracy was to punish Mayor Sokolich, moved *in limine* based on that theory, submitted requests to charge on that theory, and opened before the jury on that theory. (Baroni.Br.58-60 (collecting government statements).) Critically, after trial, the government expressly asserted that the intent to punish Mayor Sokolich was an *essential* component of the charged *mens rea*, telling the District Court in connection with sentencing that "by disclaiming any awareness of

the punitive motive behind the lane reductions, Kelly did deny an 'essential factual element'—her *mens rea*." (JA654.)

The only time the government contended that punitive intent was *not* a component of the crime charged was when it came time to instruct the jury. At that point, the government successfully convinced the District Court over defense objection *not* to ask the jury to find the very thing the government had always claimed made realigning a traffic pattern a federal crime—punitive intent. The jury reacted with confusion, sending a note asking whether it could really convict without finding the defendants had been "intentionally punitive toward Mayor Sokolich?" (JA5547; JA648.) When the District Court confirmed that instruction—excusing the jury from resolving whether punitive intent had been proved—the jury returned with its guilty verdict.

Baroni made these points in his brief, explaining that this instructional error allowed the jury to convict for conduct that was lawful and, in any event, was not the unlawful conduct charged in the indictment. (Baroni.Br.57-71.) There is little to add in reply because the government largely ignores the specifics of Baroni's argument. (*See* Govt.Br.84-91.) The government does not acknowledge or address even *one* of the many instances below in which it described punitive intent as a component of the charged offense, much less the instance in which it stated *in haec verba* that "the punitive motive behind the lane reductions [was] … an 'essential

factual element'—[the defendant's] *mens rea*." (JA654.) What the government said then squarely contradicts its current assertion that Baroni is mistakenly "conflat[ing] the *mens rea* of intent … with the motive[.]" (Govt.Br.88.) But the government offers no explanation. Certainly, its seriatim quotation of disjointed parts of the jury instructions presents no coherent response to anything Baroni argued. (Govt.Br.85-87.)

Similarly evasive, the government still insists that punishing Mayor Sokolich was just Baroni's motive (Govt.Br.87-88), but ignores Baroni's point that "[m]otive is the reason a person commits a crime," and "[t]he intent to punish Sokolich is the thing that allegedly *made* this a crime." (Baroni.Br.70.) The government nowhere explains what would make realigning a traffic pattern illegal absent the punitive intent to which it always pointed. Instead, the government says abstractly that "overwhelming evidence showed Defendants engaged in conduct that went far beyond concealing political motives, and the jury repeatedly was instructed to consider all of it." (Govt.Br.85.) Who knows what conduct the government is calling illegal. But the government is right—without an instruction on the punitive intent charged in the indictment, the jury "was instructed to consider all of" Baroni's conduct (*id*.) and return a conviction if it found anything "unjustifiable or wrongful" (JA5109) or unrelated to the jury's conception of "legitimate government objectives"

(JA5128). That unfocused invitation to inspect everything and render a moral judgment is the problem.[5]

Ultimately, the government has evaded the specific arguments in Point IV of Baroni's brief, but that is likely because Baroni's arguments are correct. At the 11th hour, for unknown reasons, the government insisted that the jury *not* be asked to find a fact—Baroni's punitive intent—that was charged in the indictment, that the government previously claimed was part of the crimes, and that the government asserted it had successfully proven. That lapse in judgment is difficult to defend.

POINT V
The Erroneous Instruction Concerning the Center and Lemoine Traffic Study Was Not Harmless

As if the other problems with the Section 666 Counts were not enough, the government wants to dispense with Baroni's right to have a jury decide each element of the crime. Conviction under Section 666 requires that Baroni obtained by fraud, converted, or misapplied "property … valued at $5,000 or more." 18 U.S.C. § 666(a)(1)(A)(i). Over objection, the District Court told the jury that the value of that property could include "losses allegedly suffered by the Port Authority in connection with the Center and Lemoine [("C&L")] traffic study"—a study that,

[5] The government's new fixation on "personal" vs. "political" purposes suggests that maybe the government now believes the crime was acting for "purely personal reasons." (Govt.Br.36.) The jury was not asked to find that either.

unknown to the Defendants, was being conducting during the week of the lane realignment and was apparently spoiled. (JA5110-11.)

Below, the government principally defended the instruction by saying the $5,000 threshold is a jurisdictional element and defendants do not need to know jurisdictional facts. (JA4993.) After Baroni showed that the $5,000 threshold is not a jurisdictional element (Baroni.Br.72-73), the government has abandoned that argument. Instead, the government's current defense of the instruction—perhaps offered below, although it is difficult to tell (JA4993)—is that while the funds spent on the ruined C&L study are *not* property that Baroni obtained, converted, or misapplied by realigning the lanes, they inform the "value" of the property or employee services that Baroni *did* supposedly use. (Govt.Br.48-49.)

Now that the government has clarified what it is arguing, it is even clearer that the government is wrong. The cost of redoing an unrelated traffic study ruined by the lane realignment is *not* a measure of the "value" of the property that Baroni purportedly used to effect the lane realignment. The harm to the C&L study is simply consequential damage resulting from the lane realignment. While civil cases often consider whether to compensate plaintiffs for consequential damages like these, court do not confuse consequential damages *resulting* from a thing's loss or misuse with the *value* of the thing itself. *See, e.g.*, *United States v. Simmonds*, 235 F.3d 826, 834 (3d Cir. 2000) ("The victims' lost insurance premium discounts are

unquestionably a result of the defendant's criminal conduct … [but they] are consequential damages and do not in any way constitute or represent 'the value of the property' lost, damaged or destroyed as a result of [the defendant's] crimes."); *Atl. City Assocs., LLC, v. Carter & Burgess Consultants, Inc.*, 453 F. App'x 174, 179 (3d Cir. 2011) (distinguishing "loss in value" and "consequential damages"). Put differently, if Baroni used the exact same property and employee services to effect the lane realignment during a week when the C&L study was *not* underway, nobody would say what he used was worth less that particular week. Likewise, it was not worth more the week of the C&L study.

The government asks to be excused from the instructional error it invited, claiming it was harmless because "excluding the costs of that study results in Defendants having misapplied over $9,800 in pro-rated salaries of the PANYNJ employees, well above the statutory threshold." (Govt.Br.49.) That single sentence—effectively all there is—is the weakest harmlessness argument imaginable. The government does not identify or describe *any* trial evidence. (Govt.Br.44-49.) All the government cites is a summary chart from its *post-trial* sentencing submission, and that chart itself identifies *no* trial evidence. (Govt.Br.47 (citing JA650-51).)

"[A]n improper instruction on an element of [an] offense violates the Sixth Amendment's jury trial guarantee." *Neder v. United States*, 527 U.S. 1, 12 (1999).

Upon finding such a constitutional error, "the burden rests on the government" to show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States v. Turcks*, 41 F.3d 893, 898 (3d Cir. 1994) (quotation marks omitted). The remaining evidence supporting the element must be more than "sufficient"; it must be so "overwhelming" that the Court is convinced that "no rational jury" would fail to find the element satisfied beyond a reasonable doubt. *United States v. Korey*, 472 F.3d 89, 96-97 (3d Cir. 2007) (quotation marks omitted).

The government does not even attempt to carry its burden. It cites no evidence at all. And while it is not Baroni's burden to disprove the government's post-trial summary chart of unknown origin, it is not hard to do. Eliminating the C&L study expenses—the "Hardesty & Hanover" and "CHA Consulting, Inc." rows—leaves approximately $9,800 that the government now relies on. (JA650-51.) But of that, the only amount the government ever showed the jury is the $3,696.09 for toll collectors. (JA2901, 5808.) Even if the jury credited that whole amount—and it need not have because there was relevant cross-examination (JA2902-03)—the jury never saw any of the other non-C&L amounts on the chart (the supposedly misapplied wages of Port Authority employees Hwang, Chung, Patel, Baroni, and Wildstein). The government also did not address valuation in summation. It is unclear where the numbers come from. Just one example, it is unclear how the

government derives that Baroni spent 15 hours on the lane realignment, or that his and Wildstein's "hourly rates" were $153 and $79 respectively when they were not hourly employees. Nor need the jury have accepted that whatever time Baroni and Wildstein spent on the lane realignment deprived the Port Authority of anything, since they were annually salaried and the evidence was that they typically worked *far* more than 40 hours per week; *i.e.*, the Port Authority got a full week's, month's, or year's work from them regardless of a few hours they spent on the lane realignment.

Ultimately, the *only* figures that the government ever presented to the jury were $3,696.09 for the toll collectors (JA2901, 5808) and $4,494.42 for the C&L study (JA2771-82, 2794-99). Together, these exceeded the $5,000 threshold. But it is impossible to know how much of each the jury credited, and, removing the latter as erroneously considered, it is impossible to know what the jury would have done. The government has not carried its burden of showing that the error in instructing the jury to consider the C&L study was harmless beyond a reasonable doubt.

CERTIFICATE OF BAR MEMBERSHIP

In compliance with Third Circuit LAR 28.3(d), I certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit. Appellants' counsel Michael D. Mann, Matthew J. Letten, and S. Yasir Latifi are also members of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Michael A. Levy
MICHAEL A. LEVY

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Third Circuit LAR 31.1.(c), I certify the following:

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), Third Circuit LAR 32, and this Court's Order of February 28, 2018 because this brief contains 7,475 words as determined by the Microsoft 2016 word-processing system used to prepare the brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using the Microsoft Word 2016 word-processing system in 14-point Times New Roman font.

This brief complies with the electronic filing requirements of Third Circuit LAR Misc. 113 and Third Circuit LAR 31.1 because the text of the electronic brief is identical to the text of the paper copies. A virus scan was performed on the brief using the McAfee VirusScan Enterprise 8.8 program, and no viruses have been detected.

/s/ Michael A. Levy
MICHAEL A. LEVY

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2018, I electronically filed the foregoing Brief in PDF text format with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the Court's CM/ECF system, which will send notice of such filing to registered ECF users.

/s/ Michael A. Levy
MICHAEL A. LEVY

STATE OF NEW YORK)
) ss.: **AFFIDAVIT OF SERVICE**
COUNTY OF NEW YORK) **BY MAIL**

I, Maryna Sapyelkina, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age

On March 14, 2018

deponent served the within: **Reply Brief for Defendant-Appellant William E. Baroni, Jr.**

upon:

Mark E. Coyne, Esq.
United States Attorney's Office
970 Broad Street. Room 700
Newark, NJ 07102

the address(es) designated by said attorney(s) for that purpose by depositing **2** true copy(ies) of same, in a postpaid properly addressed wrapper in a Post Office Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York.

Sworn to before me on March 14, 2018

/s/ Maria Maisonet

MARIA MAISONET
Notary Public State of New York
No. 01MA6204360
Qualified in Queens County
Commission Expires Apr. 20, 2021

/s/ Maryna Sapyelkina

Maryna Sapyelkina

Job# 278052