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Filed	Document Description	Page	Docket Text
04/04/2022	35 Appellant Brief	2	Appellant's brief filed by Jim C. Beck. [21−13582] (ECF: Scott Grubman)

NO. 21-13582-AA

In the United States Court of Appeals
for the Eleventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JIM C. BECK,
Defendant - Appellant.

On Appeal from the United States District Court
For the Northern district of Georgia
No. 1:19-CR-184-MHC

BRIEF OF APPELLANT
JIM C. BECK

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following people and entities have an interest in the outcome of this appeal:

Anand, Hon. Justin, United States Magistrate Judge

Beck, Jim C., Defendant

Chalmers, Douglas, Former Attorney for Jim C. Beck

Chartash, Randy S., Attorney for Jim C. Beck

Cohen, Hon. Mark H., United States District Judge

Erskine, Kurt, Acting United States Attorney

Gray, Brent, Assistant U.S. Attorney

Grubman, Scott, Attorney for Jim C. Beck

Meki, Serreen, Attorney Jim C. Beck

Pak, Byung J., Former U.S. Attorney

Sneed, Sekret, Assistant U.S. Attorney

Thomas, William C., Former Attorney for Jim C. Beck

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

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a) and 11th Cir. Rule 34-3(c), counsel requests oral argument. This case requires the Court to resolve several important issues for which there is not yet any binding precedent in the 11th Circuit. These complicated and novel legal issues warrant a discussion between the parties and this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF JURISDICTION

This appeal is from a final judgment of conviction entered against the Defendant-Appellant Jim C. Beck on October 12, 2021, in the U.S. District Court for the Northern District of Georgia, Atlanta Division, by the Honorable Mark Cohen. Doc 137. The district court had subject matter jurisdiction, pursuant to 18 U.S.C. § 3231, because this was a criminal case alleging a violation of 18 U.S.C. §§ 1341, 1343, 1957 and 26 U.S.C. § 7206(2). Doc. 20. Jurisdiction in this appeal is invoked in this Court pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. A notice of appeal was timely filed on October 17, 2021. Doc. 138.

STATEMENT OF THE ISSUES

I. The District Court Erred in Failing to Suppress Two Successive Search Warrants for Mr. Beck's Personal Email Account.

II. The District Court Erred in Failing to Suppress Statements Mr. Beck Made While Represented by Counsel

III. The District Court Abused its Discretion by Giving a Jury Charge that Misstated the Law by Instructing that Mail and Wire Fraud Requires the Intent to "Deceive or Cheat," Rather than as the Supreme Court Commanded, Intent to "Deceive and Cheat."

IV. The District Court Abused its Discretion by Failing to Give the Defense Theory of the Case Instruction that was Supported by the Evidence.

V. The District Court Erred by Failing to Enter Judgment of Acquittal on the Money Laundering Charges because those Charges Merged into the Fraud Charges.

VI. The District Court Erred by Failing to Grant a Judgment of Acquittal on the Tax Counts Because there was No Proof that Appellant Aided and Assisted Anyone Identified in the Superseding Indictment in Filing of False Income Tax Returns.

VII. The District Court Erred in Failing to Grant a Motion for Judgment of Acquittal on Count 25 because the Mailing Was Not in Furtherance of the Alleged Scheme to Defraud GUA.

VIII. The District Court Erred by Ordering Restitution Due and Payable Immediately on The Tax Charges when Restitution is not Mandatory and Can Only be Imposed as a Condition of Supervision.

STATEMENT OF THE CASE

1. Course of Proceedings and Dispositions Below

The defendant, Jim C. Beck, was originally indicted on May 14, 2019, on 38 counts. Doc. 1. The Indictment charged Mr. Beck with wire fraud (Counts 1-12) in violation of 18 U.S.C. § 1343, mail fraud (Counts 13-24) in violation of 18 U.S.C. § 1341, and money laundering (Counts 25-39) in violation of 18 U.S.C. § 1957. *Id*. On August 14, 2019, the grand jury returned a Superseding Indictment ("the Indictment") adding Count 25, another mail fraud charge in violation of 18 U.S.C. § 1341, and Counts 40-43, charging Mr. Beck with aiding and assisting in the filing of false income tax returns in violation of 26 U.S.C. § 7206(2). Doc. 22. On July 12, 2021, a jury trial commenced in the Northern district of Georgia. Doc. 106. On July 22, 2022, the government moved to dismiss Counts 5, 9, 10, 12, and 34-35 for failure of proof. Doc. 115. On July 27, 2021, the jury returned a guilty verdict on the remaining counts. Doc. 122. Mr. Beck was sentenced on October 12, 2021, to 87 months incarceration. Doc. 137. Mr. Beck is currently incarcerated at FPC Montgomery. Doc. 144.

2. Statement of the Facts

The evidence at trial showed that Mr. Beck was a leader who transformed Georgia Underwriting Association (GUA) from an organization that was losing $16,000 dollars every business day to an organization making a profit of $20,000 dollars per business day. Doc. 154 at 133: 3-5; 125 at 68 and 74.

A. Georgia Underwriting Association (GUA)

GUA is what is known in the insurance industry as "a fair plan." Doc. 149 at 40:8-21. It is an association of Georgia insurance companies that provide funding to an insurance option to people who don't otherwise qualify for insurance. *Id.* at 37:23-38:3. It is the insurance plan of last resort. *Id*. at 39:3-5. Simply put, if a Georgia resident is unable to get insurance for a property in the voluntary market, that resident may obtain property insurance coverage from GUA. GUA is a private company. Doc. 154 at 135:25-136:1. One of GUA's business imperatives is to reduce its rolls and get individuals back into the voluntary market. Doc.154 at 166:10-24. GUA underwrites insurance policies. Doc. 149 at 76:14-24. Underwriting property insurance is all about understanding the details of the home. *Id*. at 186:7-188:23.

B. GUA Pre-Jim Beck

When Mr. Beck became the general manager of GUA, the board of directors informed him that GUA's prior manager had not taken any consistent or meaningful

steps to verify property values or any of the information on GUA's insurance applications. Doc. 154 at 133:114-134:3. Nor was there any commitment to regularly reexamine the data on the high-risk policies. GUA was also failing to collect updated information on the properties it was insuring. Doc. 154 at 105 - 112. As a result, the Board directed Mr. Beck to reinspect the risks on the book at GUA every three years.

Prior to Mr. Beck's arrival, GUA was "processing" applications for insurance only, but did not conduct basic underwriting. Doc. 154 at 143:25-144:3. Mr. Beck was hired to fix the mess. Doc. 154 at 133:114-136:18.

C. GUA: New Policies pre-Jim Beck

In addition to being operationally challenged, right before Mr. Beck took over the reins at GUA, GUA implemented several new business processes and procedures. Doc. 154 at 136:18. These new business processes and procedures created additional work for every employee at GUA. *Id*. at 159:3-10. Relevant to this case, before Mr. Beck took over, the board of GUA decided to implement the following changes:

i. New Computer System

GUA's Board voted to deploy a new policy management system for the purpose of capturing more data on the risks it was insuring. Doc. 154 at 136:19-137:23. GUA launched a project to transition from an aging and obsolete AS400 computer system to a new policy management system. *Id*.

ii. New Paper Policy for 30,000 Applications

GUA decided to request a new paper policy insurance application for each of the approximately 30,000 plus policyholders at the time. As a result, the same GUA team that had been processing approximately 7,500 new policies a year was now required to process over 30,000 in one year.

iii. Direct Bill Policyholders

At the same this was happening, GUA also ended the practice of directly billing insurance agents for insurance policies premiums GUA issued, opting instead to bill policyholders directly; policyholders receiving a bill directly from GUA, an insurance association of which they had never heard. Doc. 154 at 139:4-14. As a result, call volume went up exponentially. *Id*.

iv. New Payment Policies

GUA also decided to send bills for the insurance directly to policyholders via email and take credit cards and installment payments. Doc. 139 at 139:6-10. The GUA staff was overwhelmed. *Id*. at 139:11-14.

v. Jim Beck's Directive from The Board

Most importantly, when Mr. Beck took over as GUA's general manager, the Board directed him to expand the type and quantity of information being collected on the insurance application and this in turn necessitated working with third-party data. Doc. 154 at 146:4-14.

D. Reinsurance

Another major concern of the GUA Board was the cost of reinsurance. Doc 154 at 136:14-18. GUA buys insurance for itself on the marketplace to cover unexpected losses. *Id*. at 116-117:3. Mr. Beck was hired to lower those costs. *Id*. at 136:14:18.

When Mr. Beck started at GUA, the reinsurance cost per year was over $4 million dollars. Doc. 155 at 15:20-25. The Board directed Mr. Beck to bring that cost down and he did so by providing better and improved data on GUA's risk. Doc. 155 at 12:15-16; Doc. 125- 67. Providing reliable and better data to the reinsurance companies brings the cost of reinsurance down because it allows the reinsurance company to more accurately, and, more precisely, understand and manage the risk that it is insuring. Doc. 154 at 145-51.

E. Same With Insurance: Data Brings Costs Down

A property owner's insurance application is one-step in a complex, multi-step underwriting process. Retrieving more data, which includes getting more data on the property insured and, also, verifying the information provided on the insurance application by the independent insurance agents is the way to properly underwrite an insurance policy. Doc. 154 at 153.

The nature of GUA's mission is to insure high risk properties. Doc 149:21-22. Unlike most insurers, GUA could not hand-select the agent who would be

submitting applications for coverage. Doc. 154 at 134:8-135:1. These factors made verification of the accuracy of the information on the insurance application even more critical. Lack of autonomy in choosing agents meant limited quality control on the type of information used to underwrite the insurance policy. GUA had no control and had to take all applications from the registered agents in Georgia. *Id*.

F. The Impact on GUA's Bottom Line

Under Jim Beck's leadership at GUA, GUA went from losing $16,000 per business day, to making over $20,000 every business day. Doc. 125 ##68 and 74. The success story totaled an average of over $3.2 million annually. *Id*. Part of GUA's mission is to get individual policyholders back into the voluntary market; to affirmatively reduce the number of its customers and put them back into the regular insurance pool. Doc.154 at 166:10-24. To this end, Mr. Beck increased the profit for GUA while simultaneously reducing the number of policyholders on the books at GUA.

The evidence went unrefuted that during Mr. Beck's tenure at GUA, GUA turned a profit for the first time in 30 years. Doc. 153 at 81:5-8; Doc. 155 at 5:12. In addition, Mr. Beck reduced re-insurance costs by millions. Doc. 155 at 15:20-25. Since Mr. Beck left the company, the company has made approximately 65% less profit than when Mr. Beck was at GUA. Doc. 154 at 74:6-10.

G. The Solution

Before Jim Beck's arrival at GUA, success was measured by the speed that a policy application was processed through to issuance of that insurance policy. Doc. 154 at 143:14-19. Very little, if any, of the information on the application was verified independently by GUA's underwriters. Doc. 154 at 143:25-144:3

i. Greentech

After exploring several options, Mr. Beck conceived of a software program (Greentech) that would search tax assessor records as well as other databases like Google, Zillow, and real estate multi-listing sites to perform what is known as screen scrapes to capture data essential to basic underwriting. Doc. 154 at 163, 180, 184, and 212-214. Mr. Beck's program did searches which updated vital data points related to property values. *Id*. These data points verified and collected information including square footage, year built, type of roof covering and shape, and type of heating system, just to name a few. Doc. 154 at 205; Doc. 125 ##11 & 45. Initially, Greentech's primary role was to help keep Creative Consultant's books. Creative Consulting was a subcontractor of Greentech. Through Creative Consulting, Greentech provided the data that was being put in a computer system to verify all the data in a policy and to return any differences in the critical data. Doc. 154 at 177-182. Greentech's data software paid major dividends for GUA-revenue impact. Doc. 155 at 206:13-17.

The evidence at trial established that in December 2018, a report was generated on GUA policy data to calculate Greentech's impact on GUA's bottom line. Doc. 125 at #66. The report showed a total revenue uplift for the relevant years 2014-2018 of over $3 million dollars. Doc. 155 at 43

ii. Lucca Lu

Lucca Lu was a business formed by Sonya McKaig that performed underwriting services and assembled and lead a small re-underwriting group. Doc. 150 at 11:24-18:19. For the full benefit of the Greentech data to be realized, an underwriter had to review each policy and make risk specific changes to the policy. *Id*. In January 2013, employees at GUA began a modest program to order physical inspections on GUA's existing book of business. Doc. 150 at 8:25-9:7. JMI was the outside vendor used by GUA to physically inspect some of the properties that it was insuring. Doc. 155 at 34:1-3. The first JMI survey was done around November of 2013. Doc. 154 at 162:4-8. Though the percentage of policies being re-underwritten were tracked and reported monthly, there were many occasions when the physical inspection reports were not being reviewed in time to make appropriate surcharges or adjustments to the policy. *Id*. at 161:8-25. Subsequently, GUA was spending money ordering JMI surveys, yet GUA was missing the revenue lift. Doc. 154 at 219:8-11.

In the fall of 2015, Mr. Beck together with his wife traveled socially with Sonya and Steve McKaig. Doc 150. at 6:6-20; Doc. 154 at 219:12-15. Sonya McKaig had spent many years both on the company and agency side of the insurance business and appeared perfect to assemble and lead a small re-underwriting team that she would pay directly after marking-up their work to compensate her for supervising the group and billing GUA. Doc.150 at 3-4:17. Mr. Beck approached Ms. McKaig about the possibility of leading a project to completely re-underwrite the GUA book of business. Doc. 154 at 220:1-23:Doc. 150 at 11:24-18:19. In December 2015, Ms. McKaig visited GUA for training and started to work on the project in January 2016. Doc. 154 at 221:3-8: Doc. 150 at 18:16-21. She formed Lucca Lu which she operated under while working for Mr. Beck. Doc. 150 at 11:24-18:19.

Greentech stopped billing GUA directly for the data within a few months of Ms. McKaig starting work with GUA. Doc. 154 at 222:24-223:1. At that point, Greentech billed Ms. McKaig for the data that had been entered into the GUA system. *Id*. at 223:6-14. Ms. McKaig's work ended in March of 2018. Doc. 150 at 29:20-22.

iii. Mitigating Solutions

The evidence at trial showed that in 2013, claim auditors warned Mr. Beck of water mitigation companies "taking advantage" of Mr. Beck, GUA, and their

policyholders and suggested Mr. Beck "get a handle on the way they are charging for their services, as to infer that the mitigation companies were aggressive in what they were charging GUA and its policyholders. Doc. 154 at 232:15-24. Around 2016, after convening a meeting of GUA's outside adjusters where it was suggested that GUA change the water coverage form it was using, Mr. Beck requested that the Board vote to change the water coverage form to help eliminate the potential severity of water damage claims GUA would receive. *Id*. at 231:24-232:24.

Having been an agent for most of his life, Mr. Beck felt it fitting to ask Steve McKaig to jump on a water claim to contact policy holders early and work to gather loss information for the assigned adjuster, helping to mitigate losses. Doc. 154 at 233:21-243:3. Mr. McKaig formed Mitigation Solutions. Doc. 150 at 114:23-115:2.

For as problematic as the water coverage was for GUA, Mr. Beck was hopeful that if he could get a handle on losses and coverage types, he saw an opportunity for GUA to add revenue. Doc. 154 at 232:4-8. Thus, Mr. McKaig formed Mitigating Solutions to serve as early intervention to policy holders, giving them information to prevent them from being "ripped off." Doc. 150 at 114:23:115-2. The business offered mitigation advice to GUA customers who had potential water damage claims. Doc. 155 at 129; Doc. 154 at 233:21-243:3. Mitigating Solutions was created to reduce the severity of GUA's water losses and claims. *Id*.

iv. Paperless Solutions

As previously mentioned, the prior GUA manager made three decisions resulting in major disruptions to workflow. No single effort would address the volume of telephone calls or reduce confusion regarding payments. Unlike GUA, other insurers implemented various procedures for managing their policy renewals and payment reminders: for example, other insurers offered text reminders and online account access. Doc. 155 at 46:20-23. Paperless Solutions was a startup to try to move GUA into the space of e-delivery confirmation in order to provide policy holders with confirmation of receipt of their information. *Id*. at 47:12 -17. The creation of Paperless Solution was not only a way to help alleviate some of the calls but also to return policyholders to the voluntary market. Doc. 154 at 166:1-24.

To implement the new policy directives, GUA needed to obtain accurate and correct email addresses for all policyholders and agents. Doc. 155 at 46:8-14. The Telemate system being licensed to Paperless Solutions opened-up the possibility of using the system for outbound calling that Paperless Solutions hoped to do for GUA, as well as other clients. Doc. 155 at 65:10-66:15.

Mr. Beck had a 30-year friendship with Steve Gradick. Doc. 155 at 47:2-3. Mr. Gradick, a radio station owner, had been discussing for years the possibility of his selling his interest in his radio station network and turning his attention to another business. *Id*. at 47:4-6. Mr. Gradick's radio holdings included a station known as

"Rejoice," programming Christian music, as well as a station broadcasting news and talk. Doc. 155 at 69: 5-11. With online streaming by broadcasters, Mr. Gradick had a great opportunity to promote both stations on the Christian coalition website, and in the various e-newsletters being sent to over 50,000 Georgians every month. *Id*.

SUMMARY OF ARGUMENT

The district court committed various errors in this case. First, the district court erred by failing to grant Mr. Beck's motion to suppress the initial search warrant for his personal emails, which did not contain any temporal limitation. Doc.81. In the same order, the District Court denied Mr. Beck's motion to suppress a second search warrant for the identical email account based upon a "do-over" exception to the Fourth Amendment that is not supported by Eleventh Circuit case law. *Id*. The district court further erred in denying Mr. Beck's motion to suppress certain statements that he made to a cooperating government witness after the government knew that Mr. Beck was represented by counsel. Doc.51.

The district court also made a series of errors at trial. The district court gave several erroneous jury instructions, all revolving around the improperly worded mail and wire fraud instruction defining "scheme to defraud" by using the disjunctive phrase "intent to deceive *or* cheat" as opposed to "intent to deceive *and* cheat" as required by Supreme Court and Eleventh Circuit precedent. Doc.156 at 150: 21-24. This failure, together with the Court's refusal to give the defense theory of the case

instruction that was supported by the facts, seriously undermined due process and the jury's verdict.

The district court committed additional error by failing to grant the defendant's motion for judgment of acquittal on the money laundering counts and tax counts. Doc.156 at 62:4-5. The Superseding Indictment describes the scheme to defraud to include all the financial transactions identified in the money laundering counts. Doc. 22. Those money laundering counts, therefore, all merged into the fraud counts. On the tax counts, the government failed to prove that Mr. Beck aided and assisted the individuals alleged in the Superseding Indictment in willfully filing false income tax returns.

The district court also erred in failing to enter judgment of acquittal on Count 25 – a mail fraud charge – even though there was no evidence that the mailing in question was done in furtherance of the scheme to defraud alleged in the Superseding Indictment.

Finally, the district court erred by imposing restitution on the tax convictions to be due and payable immediately. Doc. 137 at 6. Restitution on the tax counts cannot be imposed as a condition of sentencing but only as a condition of supervision. Therefore, the district court did not have the authority to impose an order deeming restitution due and payable immediately.

STANDARD OF REVIEW

1. This Court reviews de novo the denial of a defendant's properly preserved motion for judgment of acquittal. *U.S. v. Holmes*, 814 F.3d 1246, 1250 (11th Cir. 2016). Rule 29 provides that the court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction" Fed. R. Crim. P. 29(a), so its requirements are mandatory. *Burks v. U.S.*, 437 U.S. 1, 11 n. 5 (1978).
2. "We review a district court's refusal to give a requested jury instruction for abuse of discretion." A district court abuses its discretion if "the requested instruction was a correct statement of the law," the "subject matter [of the instruction] was not substantially covered by other instructions," and the instruction "dealt with an issue in the trial court that was so important that failure to give it seriously impaired the defendant's ability to defend himself." *U.S. v. Gumbs*, 964 F.3d 1340, 1347 (11th Cir. 2020).
3. The defendant is entitled to have the court instruct the jury on his defense theory if the theory has foundation in evidence and legal support. To decide whether there is a proper evidentiary foundation, the evidence must be viewed in the light most favorable to the accused. *U.S. v. Williams*, 728 F.2d 1402, 1404 (11th Cir. 1984).

4. This Court reviews *de novo* the legality of a sentence, including the imposition of restitution. *U.S. v. McNair,* 605 F.3d 1152, 1217 n. 95 (11th Cir. 2020).

ARGUMENT AND CITATION OF AUTHORITY

I. The District Court Erred in Failing to Suppress the Two Search Warrants for Mr. Beck's Email Account.

On April 25, 2019, several weeks before the return of the original indictment, the Magistrate Judge issued a search warrant for the entire contents of the email address "jimcbeck@gmail.com" that was stored at premises, owned, maintained, controlled, or operated by Google, LLC. Doc. 31-1. The search warrant itself contained no temporal limitation whatsoever. Although the affidavit included dates of the alleged illegal conduct ranging from February 22, 2013, to June 15, 2018 (Doc. 31-1 at 4), the affidavit and other attachments were never incorporated into the search warrant. Doc. 31-1 The affidavit and attachments were also never supplied to Google. Doc. 64 at 11:7-13. When FBI Special Agent Steven Dunn, the affiant, served the April 25, 2019, search warrant on Google, he unilaterally expanded the request for "jimcbeck@gmail.com" information to the date range of January 1, 2013 (approximately three months prior to the first allegedly fraudulent payment from GUA to one of the alleged fraudulent companies, Greentech) to January 13, 2019 (the day before Jim Beck was sworn into office as Georgia's Insurance Commissioner). Doc. 64 at 12.

Google accepts service of search warrants through an Internet-based portal. The Google portal requires the law enforcement agent to enter a date range that the Magistrate Judge authorized in the granting of the warrant for the requested information. *Id*. at 11. Google produced pursuant to the search warrant the requested information on May 1, 2019. As a result of this search warrant, the government knew with absolute certainty that the "jimcbeck@gmail.com" email account was active, and that Google had responsive documents. Further, by this date, the government had now seized the defendant's entire email. Doc. 64.

On September 6, 2019, Mr. Beck filed a Motion to Suppress Evidence Pursuant to the Search Warrant Directed to Google. Doc. 31. Mr. Beck argued that the April 25, 2019, search warrant was unconstitutionally overbroad on its face because it contained ". . . no date restriction either in the information to be disclosed by the provider or the items to be seized." *Id*. at 11. Additionally, Mr. Beck argued that the good-faith exception to the exclusionary rule provided in *U.S. v. Leon*, 468 U.S. 897 (1984), did not apply. Doc. 31 at 17-18. Finally, the defendant argued that the two-step search procedure outlined in the search warrant ran afoul of *U.S. v. Blake*, 868 F.3d 960 (11th Cir. 2017). *Id*. at 19. After the government unlawfully seized the contents of the email account, it realized the merits of Mr. Beck's motion to suppress and the serious legal infirmity of the first search warrant and scurried to seek a "do-over" second search warrant. Doc. 36-1.

On September 13, 2019, another Magistrate Judge signed a second search warrant which again sought the "jimcbeck@gmail.com" information from Google. Doc. 36-1. The second search warrant had a date range of November 22, 2012, to September 15, 2018. *Id.* On September 26, 2019, Google responded to the second search warrant. On October 10, 2019, the government provided defense counsel with a copy of the second search warrant and made available the information produced by Google in response to the September 13, 2019, search warrant. On November 6, 2019, Mr. Beck filed a second motion to suppress and a second motion to suppress the "new" email search warrant. Doc. 43.

On October 16, 2020, the district court denied Mr. Beck's motion to suppress both search warrants. Doc. 81. The government at trial relied heavily on emails it retrieved from these searches. In fact, during its closing argument, the government described one of the improperly seized emails as "the smoking gun." Doc. 156 at 105:14-106:6; Doc. 127-290.

The initial warrant issued for Mr. Beck's email was fatally defective. Binding and well-settled precedent makes clear that the defect at issue here –the failure to specify a date range in the warrant itself—is not saved by the *Leon* good faith exception to the search warrant requirement. The Fourth Amendment requires "particularity in the warrant, not in the supporting documents," and, accordingly, "the fact that the warrant application adequately described the 'things to be seized'

does not save the warrant" from failure to satisfy that requirement. *Groh v. Ramirez*, 540 U.S. 551, 557 (2004),

Further, the Supreme Court in *Groh* explained that a temporal limitation unguided by a judicial officer and imposed unilaterally by a law enforcement agent, as was done here, makes for an unconstitutional warrant:

> The mere fact that the Magistrate Judge issued a warrant does not necessarily establish that [s]he agreed that the scope of the search should be as broad as the affiant's request. Even though petitioner acted with restraint in conducting the search, the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer.

Id. at 561. The first search warrant undisputedly failed to limit the items subject to seizure by reference to any relevant timeframe or dates of interest.

This case is not governed by the probable cause aspect of *Leon* but by its particularity aspect. In the particularity context, as the *Groh* Court acknowledged, it is irrelevant that the officer was no more than negligent. *Id.* at 565. "It is incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and lawfully executed." *Id.* at 563. This incorporates a "duty to ensure that the warrant conforms to constitutional requirements," *id*. at 563 n.6, including the particularity requirement. When, as here, "even a cursory reading of the warrant ... — perhaps just a simple glance — would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal," *id.* at 564, the law enforcement officer has failed in that duty and the exclusionary rule remains

in full force. When, as here, a warrant plainly fails to comport with well-settled particularity requirements, an officer's reliance upon it—especially in the absence of a credible circumstance-specific explanation—can hardly be deemed objectively reasonable. *See, e.g., U.S. v. George*, 975 F.2d 72, 78 (2d Cir. 1992).

Moreover, the first search warrant was in direct contravention of binding Eleventh Circuit law, *U.S. v. Blake*, 868 F.3d 960 (11th Cir. 2017). The language of the first warrant was far broader than in the Microsoft warrant that this Court found 'somewhat troubling' in *Blake*, and essentially the same as that in the Facebook warrant which this Court heavily criticized, and all but stated was overbroad. The first search warrant in this case was unconstitutionally overbroad and, considering the settled nature of the law concerning the failure for lack of particularity, and binding Eleventh Circuit precedent, it is the type of facially invalid warrant that could not have been relied upon in good faith because one who simply looked at the warrant would know it was invalid. The taint of the first warrant makes the second warrant flawed as well, and any effort, cannot resuscitate it. In denying the defendant's motion to suppress both warrants, however, the district court relied on a novel application of the "independent source" doctrine to justify its decision. The district court erroneously held that the second warrant was independent of, and not the fruit of, the first warrant, and, therefore, there is no basis to suppress the results of the second search warrant.

The "independent source" exception to the Fourth Amendment applies where a warrant-authorized search is preceded by a warrantless entry. The Supreme Court has explained that evidence would not be suppressed if

> [n]one of the information on which the warrant was secured was derived from or related in any way to the [unlawful] entry ... [and] the information came from sources wholly unconnected with the entry and was known to the agents well before the [illegal] entry.

Segura v. U.S., 468 U.S. 796, 814 (1984). Where a warrant-authorized search is preceded by a warrantless search,

> [t]he ultimate question [ ] is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue [ ]. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate Judge and affected his decision to issue the warrant.

Murray v. U.S., 487 U.S. 533, 542 (1988).

In this case, because the government sought the second search warrant based on the defective nature of the first search warrant, the second warrant was not "independently sourced." This Court should decline to apply the independent source exception in this case because its application would render the warrant protections of the Fourth Amendment meaningless.

> The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation.

Nix v. Williams, 467 U.S. 431, 443 (1984). Application of the independent source doctrine in this case would encourage law enforcement shortcuts whenever evidence may be more readily obtained by unlawful means—a result at odds with the purpose of the exclusionary rule to deter police from obtaining evidence in an illegal manner. This Court should not legitimize that type of investigatory practice.

Moreover, even if this Court were to apply the independent source doctrine, the second warrant is still invalid. *See*, *Murray v. U.S.*, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988), which illustrates the proper application of the independent source rule. The police unlawfully entered a private premises and observed marijuana. *Id*. The police left the scene and went to a magistrate judge and applied for a search warrant, not mentioning their observations of marijuana during their illicit entry. *Id*. The magistrate issued the warrant. *Id*. at 536. The Supreme Court held that the independent source rule exonerated the police for their misconduct and the evidence would not be suppressed. *Id*. at 535. However, the Supreme Court further held that if the police were motivated to seek the search warrant by their observations during the unlawful search, then the evidence would be suppressed because the search warrant would not constitute a wholly independent source for the discovery of the evidence. *Id*. at 543. *See also U.S. v. Barron-Soto*, 820 F.3d 409, 417 (11th Cir. 2016); *U.S. v. Bush*, 727 F.3d 1308 (11th Cir. 2013). Here, there is no question that Special Agent Dunn was solely motivated to seek the

second search warrant because of his knowledge of the infirmities of the first warrants. Therefore, the evidence should be suppressed because the second search warrant would not constitute a wholly independent source for the discovery of the evidence

This Court applies a two-part analysis "to determine whether evidence seized during the execution of the warrant was discovered independent of the initial [illegal search] and is therefore admissible regardless of whether the first entry violated the Fourth Amendment." *U.S. v. Noriega*, 676 F.3d 1252, 1260 (11th Cir. 2012). The first step is to excise from the search warrant affidavit any information gained during the alleged illegal entry and determine whether the remaining information supports a finding of probable cause. *Id.* The second step is to determine whether the officer's decision to obtain a search warrant was "prompted by" what he observed during the illegal entry. *Id.*

Here, the first warrant was defective because it does not have a temporal limitation. The second step of the independent source analysis asks whether law enforcement's decision to seek a search warrant, here a second search warrant, was prompted by what was observed during the warrantless search. *See Noriega*, 676 F.3d at 1260–61. At the evidentiary hearing, Special Agent Dunn conceded that he learned from the first search warrant that emails existed at the defendant Jim Beck's Google account. Special Agent Dunn also admitted that because of the first illegal

search warrant, he now knew for certain that there were emails that were responsive to the second search warrant. Doc. 64 at 33-34. This admission alone makes the independent source doctrine inapplicable to this case.

Further, to conclude that the initial search had no effect on the decision to obtain the second warrant, and thus that the second warrant search was an "independent source" of the challenged evidence, one would have to assume that even if Special Agent Dunn had received no emails from Google, he nonetheless would have gone to the duty Magistrate Judge, sworn that the FBI had probable cause to believe that responsive emails were at Google, and then returned to conduct another search. Special Agent Dunn provided the answer to that question: He would *not* have chosen to seek the second warrant to search for Mr. Beck's email had he not discovered evidence during the initial search. Doc. 64 at 35. Accordingly, both search warrants violate Mr. Beck's Fourth Amendment rights.

For this reason alone, this Court should reverse the judgment below and remand for a new trial where any evidence seized from Mr. Beck's email account is excluded.

II. The District Court Erred in Failing to Suppress Statements Mr. Beck Made While Represented by Counsel

In June of 2018, Mr. Beck learned that a grand jury had issued a subpoena to the GUA. Doc. 33 at 2. The subpoena sought documents related to Mr. Beck's employment at GUA and, therefore, Mr. Beck retained attorney William Thomas as

legal counsel. *Id*. Mr. Thomas contacted the Assistant United States Attorney listed on the subpoena and advised her of his representation of Mr. Beck. *Id*. at 3. Mr. Thomas also documented parts of the conversation in a letter that he sent to the prosecutor on July 16, 2018. In relevant part, the letter states:

> In our conversation ... [y]ou advised that [Mr. Beck] is the subject of an investigation as that term is defined by the United States Attorney's Manual.
>
> On a related note, and as we discussed in our conversation, I am not aware of any facts about Mr. Beck that would give rise to any criminal liability ... If the Government is willing to disclose the facts and circumstances which have apparently given rise to this matter, Mr. Beck is willing to address that through counsel.

Doc. 33-1. Later that same year, FBI agents, acting at the prosecutors' direction, secretly recorded conversations between Mr. Beck and a cooperating witness referred to in the Indictment as "M.B." Doc. 33 at 3. M.B. told Mr. Beck that the FBI had requested to speak with M.B. This was likely a part of a ruse designed by the prosecutors to see if Mr. Beck would say something incriminating in response. *Id*. at 3-4.

Applicability of Georgia's No-Contact Rule to Covert, Pre-Indictment, Investigative Activities

Georgia Rule of Professional Conduct 4.2(a) provides in relevant part that:

> A lawyer who is representing a client in a matter shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.

Ga. R. Prof. Conduct 4.2(a). This rule is substantively identical to the ABA Model Rule 4.2. The commentary to Georgia's Rule 4.2 states that, among the communications that are considered "authorized by law," and therefore outside of the prohibitions of the no-contact rule, are: "[C]onstitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable." Ga. R. Prof. Conduct 4.2(a), cmt. [2].

An analysis of Rule 4.2 requires an analysis of whether contact with a represented party was "authorized by law." There is not yet any published authority from the Eleventh Circuit that has considered whether pre-indictment, covert criminal investigative activities are authorized for purposes of Rule 4.2. Thus, the applicability of Rule 4.2 to such investigatory stages of a criminal prosecution have remained unclear.

In this case, Mr. Beck retained legal counsel specifically for any criminal investigation that specifically involved his work at GUA. Mr. Beck's counsel put the government on notice of such in his call with the prosecutor and by the letter sent to the same federal prosecutor. In its reply brief in opposition to Mr. Beck's Motion to Disqualify and Suppress Statements, the government essentially asserted the "no

contact rule" remains inoperative until the onset of adversarial criminal proceedings. Doc. 37.

Courts have often addressed concerns that applying the no-contact rule to covert, pre indictment, non-custodial investigations could handcuff law enforcement officers in their efforts to develop evidence. *United States v. Hammad*, 858 F.2d 834, 838 (2d Cir. 1988). While the right of law enforcement to conduct pre-indictment investigation is necessary, it is not unfettered. In this case, prosecutors were able to use their prosecutorial power to hold off on indicting Mr. Beck for the purpose of contacting him despite his legal representation.

The defendant *in Hammad* learned he was under investigation following a Medicaid audit and retained counsel. *Id.* at 835. After learning that Hammad had retained counsel, the government enlisted a confidential informant to record certain conversations with the defendant. *Id.* The court in *Hammad* held these actions were improper, concluding that construing the no contact rule as dependent upon an indictment, grants government attorneys the opportunity "to manipulate grand jury proceedings to avoid its encumbrances." *Id.* As such, the court in *Hammad* posed a principal question: "to what extent does [the no contact rule] restrict the use of informants by government prosecutors prior to indictment, but after a suspect has retained counsel in connection with the subject matter of a criminal investigation?" *Id.* To avoid hindering legitimate criminal investigations by government

prosecutors, the District Court had resolved this dilemma by limiting the rule's applicability "to instances in which a suspect has retained counsel specifically for representation in conjunction with the criminal matter in which he is held suspect, and the government has knowledge of that fact." *United States v. Hammad,* 678 F. Supp. 397, 401 (E.D.N.Y. 1987), rev'd, 846 F.2d 854 (2d Cir. 1988). Thus, the Judge reasoned, "the rule exempts the vast majority of cases where suspects are unaware, they are being investigated" reducing the likelihood of impeding on law enforcement investigations. *Hammad*, 858 F.2d at 839 (citing the lower court's opinion).

The district court in *Hammad* found the government "was clearly aware… that [Taiseer] had retained counsel in connection with this case." 678 F.Supp. at 399. The court further decided that the confidential informant was the government's "alter ego" during his discussions with Hammad. *Id.* at 400. Accordingly, the court held that the prosecutor had violated the no contact rule and suppressed the recordings and videotapes secured as a result of the violation. *Id.* at 400-401. This district court's ruling that prosecutors had violated the no contact rule was upheld on appeal. *Hammad*, 846 F.2d at 860 (2d Cir.), opinion corrected, 858 F.2d 834 (2d Cir. 1988). And while the circuit court overturned the district court's ruling as to suppression of the evidence, it only did so "in light of the prior uncertainty regarding the reach of [the no contact rule]." *Id*. at 861. The court reasoned that evidence gathered in violation of the rule would be appropriately suppressed moving forward.

Here, Mr. Beck retained Mr. Thomas as legal counsel specifically for the purpose of representing him in any criminal investigation by the federal government involving his employment with GUA. Federal prosecutors knew that Mr. Beck was represented by counsel in connection with this matter. Accordingly, the district court should have suppressed any of Mr. Beck's statements made to the government's informant after the government became aware of his legal representation. The district court erred in failing to do so.

III. The District Court Abused its Discretion by Giving a Jury Charge that Misstated the Law by Instructing that Mail and Wire Fraud Requires the Intent to "Deceive or Cheat" Rather than the Intent to "Deceive and Cheat."

Before trial, Mr. Beck submitted a proposed jury instruction defining "scheme to defraud" under 18 U.S.C. §§ 1341 and 1343, as the intent to "deceive *and* cheat," as opposed to the intent to "deceive *or* cheat" instruction found in the Eleventh Circuit's Pattern Criminal Jury Instructions O50 and O51. Doc. 103 at 37 and 47. Mr. Beck also requested a modified version of the Eleventh Circuit Pattern Criminal Jury Instruction on good faith to reflect "intent to deceive and cheat" rather than merely "intent to deceive." Doc. 103 at 28.

The Eleventh Circuit Pattern Instruction's disjunctive phrasing given by the trial court improperly broadened mail and wire fraud to cover actions in which no injury was intended, in violation of the Supreme Court's decision in *Cleveland v. U.S.*, 531 U.S. 12, 15 (2000). Under the disjunctive phrasing, a person could be

guilty of mail or wire fraud if he merely had an intent to deceive and did not also possess an intent to cheat. Here, the district court sustained the government's objection, giving the Eleventh Circuit Pattern Instruction with the scheme defined in the disjunctive, and, in the good faith instruction, as "intent to deceive" standing alone.

The disjunctive phrasing of the Eleventh Circuit Pattern Instruction is also in direct conflict with the Supreme Court's decision in *Shaw v. United States,* 137 S. Ct. 462 (2018), addressing a nearly identical issue in the bank fraud statute, 18 U.S.C. § 1344. In *Shaw*, the defendant ran a scheme that siphoned off funds of a bank depositor through online payment and PayPal. *Id.* The bank depositor and PayPal sustained losses; the bank had none. *Id.* The defendant argued that he had not defrauded the bank within the meaning of the statute because he had not intended any bank loss, nor had any such loss occurred. Although the Supreme Court affirmed the conviction, it nonetheless remanded on a different issue - the scheme instruction given in the disjunctive, defining a "scheme to defraud" as an intent to "deceive, cheat, or deprive" the bank of something of value. *Id*. at 469. The Supreme Court held that the instruction should have been in the conjunctive -- "the scheme must be one to deceive the bank *and* deprive it of something of value." *Id*. (emphasis in the original). In other words, the crimes of mail and wire fraud requires the specific

intent to utilize deception to deprive the victim of money or property, *i.e.*, to cheat the victim.

Not only has the Supreme Court has been clear on this point, but this Court has as well. As this Court has held, a defendant cannot commit mail or wire fraud based on "misrepresentations amounting only to a deceit." *See U.S. v. Takhalov*, 827 F.3d 1307 (11th Cir.), *modified on denial of reh'g*, 838 F.3d 1168 (11th Cir. 2016). The crime of mail or wire fraud requires the specific intent to utilize deception to deprive the victim of money or property, *i.e.*, to cheat the victim. Indeed, since *Takhalov* was handed down, several cases in this Circuit have applied the rule that fraud requires an intent to harm and not just an intent to deceive. *See*, *e.g.*, *U.S. v. Waters*, 937 F.3d 1344 (11th Cir. 2019) (federal wire fraud statute forbids only schemes to defraud, not schemes to do other wicked things, *e.g.*, schemes to lie, trick, or otherwise deceive; the difference is that deceiving does not always involve harming another person; defrauding does); *U.S. v. Wheeler*, 16 F.4th 805, 819 (11th Cir. 2021) (same); *U.S. v. White*, 848 F. App'x 830, 838 (11th Cir. 2021) (same); *U.S. v. Culver*, 822 Fed. Appx. 976, 980-81 (11th Cir. 2020) (same); *U.S. v. Fard*, 805 Fed. Appx. 618 (11th Cir. 2020) (same); *U.S. v. Masino*, No. 18-15019, 2021 WL 3235301, at *8 (11th Cir. July 30, 2021) (same).

In *United States v. Miller*, the Ninth Circuit addressed this precise issue and found that the Ninth Circuit Model Jury Instruction on wire fraud, which like the

Eleventh Circuit Pattern Instruction used the "deceive or cheat" construction, was improper considering *Shaw* and a long history of circuit court cases. *Shaw v. U.S.* 953 F.3d 1095, 1099 (9th Cir. 2020).

In light of *Shaw*, giving the Eleventh Circuit Pattern Instruction is clear error. Unlike the defendant in *Shaw*, Mr. Beck preserved this issue. It was, in fact, the crux of his defense - that he had not intended to cheat GUA of anything. To the contrary, because of the data provided to GUA via Greentech, Lucca Lu, Mitigating Solutions, and Paperless Solutions, GUA made money for the first time in years. Moreover, Mr. Beck testified, and presented documentary evidence, that he did not intend to cheat GUA and that his conduct benefitted GUA. Doc. 155 at 75:8-9. Further, the defense presented other evidence that GUA made a profit during Mr. Beck's tenure as General Manager for the first time in GUA's history.

In denying the defendant's proposed jury instruction, the district court posited that the jury instructions as a whole adequately conveyed the requirement of depriving the victim of something of value. The Eleventh Circuit Pattern Instruction was changed in 2019 to add,

> [p]roving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove intent to defraud.

Eleventh Circuit Pattern Instruction O50 and O51. However, the Pattern Instructions never changed the "intent to deceive or cheat" construction in the mail and wire fraud or "intent to deceive" wording in the good faith instruction to be consistent

with the intent to cause loss or injury language. The failure to give the requested instruction on intent to deceive and cheat was serious error which requires a remand for a new trial.

IV. The District Court Abused Its Discretion by Failing to Give the Defense Theory of the Case Instruction Even Though It Was Supported by the Evidence.

On July 21, 2021, Mr. Beck filed his proposed theory of the case jury instruction. Doc. 116. In the proposed jury instruction, Mr. Beck provided his fundamental theory of the case: On the wire and mail fraud charges, Mr. Beck did not dispute that vendor relationships were created with Greentech, Lucca Lu, Mitigating Solutions, and Paperless Solutions, or that he had a financial relationship with these vendors, and that he received payments from Greentech to Creative Consultants. *Id*. He contended that he was hired to turn GUA around and was given full authority to do as he saw fit. The evidence at trial established that Greentech and Paperless Solutions did, in fact, do work and that work, amongst other things, resulted in GUA gaining a profit for the first time in years. *Id.* The elements of the crime of mail fraud and wire fraud require the government to prove that Mr. Beck acted with the intent to defraud. *Id*. To act with "intent to defraud" means to act knowingly and with the specific intent to use false or fraudulent pretenses, representations, or promises to. Proving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove cause loss or injury intent to defraud.

There is no evidence that Jim Beck intended to cause GUA a loss or injury. *Id*. He further submitted that he acted in good faith with respect to each of his vendor relationships as the General Manager of GUA, and that Green Tech, Lucca Lu, Mitigating Solutions and Paperless Solutions performed legitimate work that added value and was legitimately billed, invoiced and paid by GUA. Mr. Beck contends that the vendors were created to address the unmet business needs of GUA and to make it a profitable business entity and he incurred legitimate business expenses in operating Creative Consultants and Georgia Christian Coalition. *Id.* With respect to the offenses charged in Counts 40, 41, 42 and 43, the tax charges, Mr. Beck submitted that those counts were fatally flawed as he did not aid and assist another person in filing fraudulent tax returns. *Id.* The proposed instructions would have further informed the jury that failing to keep records does not equate to willfully aiding and assisting in the filing of false tax returns. *Id*.

The trial court compounded the error of failing to give the correct mail and wire fraud instruction by failing to give the defense theory of the case instruction that was supported by the evidence presented in the case. This Court has long held that a criminal defendant has the right to have the jury instructed on his theory of defense, separate and apart from instructions given on the elements of the charged offense. *U.S. v. Opdahl*, 930 F.2d 1530 (11th Cir.1991); *U.S. v. Lively*, 803 F.2d 1124 (11th Cir.1986). A trial court may not refuse to charge the jury on a specific

defense theory where the proposed instruction presents a valid defense and where there has been some evidence adduced at trial relevant to that defense. *U.S. v. Middleton*, 690 F.2d 820, 826 (11th Cir.1982). The trial court is not free to determine the existence of such a defense as a matter of law. *Id.* The threshold burden is extremely low:

> [T]he defendant ... is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence.

Perez v. U.S., 297 F.2d 12, 15-16 (5th Cir.1961) (emphasis added); *U.S. v. Grady*, 18 F.4th 1275, 1294 (11th Cir. 2021). Importantly, in deciding whether a defendant has met his burden, this Court is obliged to view the evidence in the light most favorable to the accused. *U.S. v. Williams*, 728 F.2d 1402, 1404 (11th Cir.1984). Here, the district court abused its discretion in declining to give the defense theory of the case instruction.

Mr. Beck testified on his own behalf in order to prove his belief that he did not intend to cheat GUA of any money and that Greentech, Lucca Lu, Mitigating Solutions, and Paperless Solutions provided valuable information and data to GUA. Doc. 155 at 75:1-14. Mr. Beck testified that he was hired to turn GUA around and was given full authority to do as he saw fit, or, more specifically, on what vendors or employees he should or could use to make GUA a profitable enterprise. The Indictment alleges that Greentech and Paperless Solutions did not perform work for the money they were paid. Doc. 22 at ¶¶ 9, 12 and 21. However, the evidence

presented at trial, taken in the light most favorable to the accused, established that Greentech and Paperless Solutions did, in fact, do work and that that work, among other things, resulted in GUA being profitable for the first time in years.

Put another way, taken in the light most favorable to Mr. Beck, the evidence at trial did not show GUA suffered an injury or harm because of Mr. Beck's actions. In fact, the evidence at trial established that GUA made a profit for the first time in 30 years and that Mr. Beck would not have been paid money from any of the vendors, like Greentech, Lucca Lu, Mitigating Solutions, or Paperless Solutions, if those vendors did not provide a revenue uplift for GUA. Accordingly, Mr. Beck's actions could not have caused GUA a loss, injury, or harm.

The proposed defense theory of the case instructions was a substantially correct statement of the law that should have been given. It was clear error for the district court not to give this instruction.

V. The District Court Erred by Failing to Enter a Judgment of Acquittal on The Money Laundering Charges Because They Merge into The Fraud Charges.

Counts 26 through 39 charge Mr. Beck with violations of 18 U.S.C. § 1957. That statute criminalizes knowingly engaging in a monetary transaction in "criminally derived property" from "specified unlawful activity," which means "property constituting, or derived from, proceeds obtained from a criminal offense . . . ." 18 U.S.C. § 1957. The district court erred and should have acquitted

Mr. Beck on the money laundering charges because these counts merge with the underlying fraud counts in that they were charged as a core or central feature of the scheme to defraud.

Where, like here, the charged money laundering statute has a proceeds requirement, the government must show that the defendant (1) acquired the proceeds of a specified unlawful activity (SUA)—here, mail and wire fraud-- and then (2) engaged in a money laundering transaction with those proceeds. *U.S. v. Johnson*, 440 F.3d 1286, 1289 (11th Cir. 2006). The money laundering offense must be separate and distinct from the underlying offense as alleged in the Indictment that generated the money to be laundered.

In analyzing the merger issue in a complex fraud prosecution, the Ninth Circuit in *U.S. v. Van Alstyne*, 584 F.3d 803, 815-816 (9th Cir. 2009), was confronted with the issue of whether intermediate payments associated with a Ponzi scheme created a merger problem. The Ninth Circuit concluded:

> The Supreme Court has emphasized that 18 U.S.C. § 1341 prohibits "the 'scheme to defraud' rather than the completed fraud . . .," and that a mailing need only be "incident to an essential part of the scheme" to satisfy the second element. . .. This language indicates that our analysis of the "merger" problem in the mail fraud context must focus on the concrete details of the particular "scheme to defraud," rather than on whether mail fraud generally requires payments of the kind implicated in *[U.S. v.] Santos [*, 553 U.S. 507, 128 S. Ct. 2020, 170 L. Ed. 2d 912 (2008)].

The focus is thus on the particular scheme or criminal activity alleged in the Indictment. If the payments or transactions are a normal part of the cost of the doing business, or, in other words, part of the "core scheme" or a "central component" of the underlying criminal activity, charging those transactions as a separate money laundering offense creates a merger problem.

In *Van Alstyne,* the defendant operated a Ponzi scheme, selling interests in oil and gas properties he controlled to elderly and retired investors. *U.S v. Van Alstyne,* 584 F.3d 803, 808 (9th Cir. 2009). Funds from new investors were used to pay purported returns to the earlier backers. *Id.* The distributions were intended to convince investors that they had invested wisely and to encourage them to invest additional funds. *Id.* When the scheme began to collapse, Van Alstyne returned some or all the initial investments to complaining victims. *Id.* The defendant was convicted of mail fraud and money-laundering. *Id.* at 809. The money laundering convictions were based on mailing "distribution checks" periodically to individual investors and a transaction in which he refunded the full amount to a couple in response to their complaints after the scheme began to unravel. *Id.* at 815.

The Ninth Circuit reversed the convictions that were based on "lulling" payments concluding those convictions suffered from a merger problem. *Id.* at 816. The very nature of a Ponzi scheme as articulated in the Indictment, the Ninth Circuit remarked, requires some payments to investors for it to be at all successful. *Id.* at

815. Those distributions are necessary to inspire investor confidence in the Ponzi scheme and to attract additional investment. *Id.* Without the lulling payouts there would have been no Ponzi scheme. *Id.* at 816. Those distributions, the court held, were "a central component" of the scheme to defraud and ran squarely into the merger problem that troubled the Supreme Court in *U.S. v. Santos*. *Id.* at 815. S*ee also U.S. v. Cosgrove*, 637 F.3d 646, 646 (6th Cir. 2011) (in complicated fraud cases, courts analyze the merger issue by looking at the government's theory of the case as set out in the indictment and the proof at trial); *U.S. v. Olive*, 804 F.3d 747 (6th Cir. 2015) (same).

An analysis of the Indictment is where the merger analysis should begin. Counts 26 through 39 of the Indictment here charged violations of 18 U.S.C. § 1957. Section 1957 is commonly referred to as the "spending statute" because its purpose is to make the criminal's money worthless by making it a felony just to spend it. Transactions that are for personal benefit generally do not create a merger problem. Where a transaction involves more than $10,000 in proceeds, therefore, section 1957 generally provides a relatively straightforward way to charge money laundering and avoid any merger issue.

In this case, the Indictment does allege a bevy of transactions that could have been more logically charged under Section 1957. Specifically, the Indictment makes

a point of citing Mr. Beck's alleged spending of the proceeds of the scheme, alleging as follows:

> 24. BECK utilized the proceeds of the above-described fraud schemes for a variety of purposes. These purposes included paying thousands of dollars of personal expenses charged to a personal credit card and using thousands of dollars to fund personal investment and retirement accounts, personal savings accounts, and the "Jim Beck for Georgia, Inc." statewide election campaign account. BECK also utilized thousands of dollars of the illegal proceeds to purchase and improve personal rental property and to pay his personal state and federal income taxes.

Doc. 22 at ¶ 24. These are the sorts of transactions which one would expect to see charged under § 1957, *i.e.*, monetary transactions allegedly engaged in by the defendant after the completion of the scheme to defraud which was after he obtained control over the funds. Instead, the money laundering counts charged here all focus on intermediate financial transactions which were an "integral" or "core part" of the overall scheme to defraud.

Every one of the money laundering charges focuses on an intermediate monetary transaction Mr. Beck took to gain control of the funds. For example, the indictment accuses Mr. Beck of moving funds from GUA to Green Technology then to GA Christian Coalition or Creative Consultants (actually or constructively). Doc. 1. at 11-12. Though the government believed Mr. Beck gained control of the funds through GA Christian Coalition or Creative Consultants, none of the charges focused

on transactions Mr. Beck took after gaining control of the funds. Doc. 1. Thus, the money laundering counts and the fraud counts are based on the same facts.

Given the way that the government alleged and proved the alleged fraudulent scheme in the Indictment, the money laundering charges merge into the fraud counts, and they should have been dismissed. Having carried out an alleged fraudulent scheme of which various transactions were a central part, a defendant cannot be charged with the same transactions a second time, as if it were the sort of independent manipulation of the proceeds required for money laundering. Indeed, a comparison of the fraud scheme with the financial transactions alleged as the money laundering counts illustrates the insurmountable merger issue. A comparison of the indictment's money laundering charges and mail fraud charges is set out below:

The Scheme and Artifice to Defraud
The Company A (Greentech), Company B (Lucca Lu),
Company C (Mitigating Solutions) Scheme, and Company D[1]

Money laundering Counts 29 and 33, two $28,700 deposits of Lucca Lu funds into the Greentech account, are part of the $713,000 paid to Greentech that ¶¶14 and 17 identify as part of the scheme and artifice to defraud:

Paragraph 14

> 14. . .. In total, S.J.M. (Sonya McKaig) d/b/a Company B (Lucca Lu) invoiced **and collected** approximately $908,000 from GUA and **paid approximately $713,000 to M.B. (Matt Barfield) d/b/a**

[1] For the Court's convenience, where the Indictment uses initials or an alias, like Company A, the real name of the individual or company is provided parenthetically.

> **Company A (Greentech)**. Then, at BECK's direction, Company A (Greentech) **paid** 90% of the funds it received from Company B (Lucca Lu) to BECK through Creative Consultants.
>
> **Paragraph 17**
>
> 17. . .. With BECK's approval, GUA **paid** the Company B (Lucca Lu) invoices and, at BECK's direction, S.J.M. (Sonya McKaig) **paid** the corresponding Company A (Greentech) invoices.

Doc. 22 at ¶¶ 14 and 17.

Thus, money laundering Counts 29 and 33 are core, constituent parts of the very conduct alleged in paragraph 14 and 17 of the scheme and artifice to defraud:

> **Count 29** - 07/19/2016, $28,700.00 deposit of Company B (Lucca Lu) funds into Company A (Greentech) account at United Community Bank
>
> **Count 33** - 12/20/2016, $28,700.00 deposit of Company B (Lucca Lu) funds into Company A (Greentech) account at United Community Bank

Doc. 22 at ¶¶ 29 and 33.

Money laundering counts 32, 34, and 36, three $33,500 deposits of Mitigating Solutions funds into the Greentech account, are a portion of the total amount of $325,000 paid by Mitigating Solutions to Greentech that ¶15 of the Indictment identifies as part of the scheme and artifice to defraud:

> **Paragraph 15**
>
> 15. . .. In total, S.W.M. (Steve McKaig) d/b/a Company C (Mitigating Solutions) invoiced and collected approximately $370,000

> from GUA **and paid approximately $325,000 to M.B. (Matt Barfield) d/b/a Company A (Greentech).**

Doc. 22 at ¶ 15.

Thus, money laundering Counts 32 and 36 describe the very same conduct that is part of paragraph 15 of the scheme to defraud:

> **Count 32** - 12/08/2016, $33,500.00 deposit of Company C (Mitigating Solutions) funds into Company A (Greentech) account at United Community Bank
>
> **Count 36** - 10/23/2017, $33,500.00 deposit of Company C (Mitigating Solutions) funds into Company A (Greentech) account at United Community Bank

Doc. 22 at ¶¶ 32 and 36

Money laundering Counts 26 describes the very conduct alleged in paragraph 16 of the scheme and artifice to defraud:

> **Paragraph 16**
>
> 16. Between February 22, 2013, and May 30, 2018, at BECK' s direction, M.B. (Matt Barfield) prepared monthly Company A (Greentech) invoices that falsely and fraudulently stated that Company A (Greentech) had produced "online home inspections" and "data scans" for GUA. On approximately 47 occasions, these invoices were sent directly to BECK in an electronic format to his personal email address. **With BECK's approval, GUA paid the Company A (Greentech) invoices.**

Doc. 22 at ¶16.

> **Count 26** - 02/01/2016, $24,928.60 deposit of GUA funds into Company A (Greentech) account at United Community Bank

Doc. 22 at ¶ 26.

The deposit of GUA funds into the Greentech account charged as money laundering Count 26 is part of what GUA paid to Greentech that the Indictment identifies as part of the scheme and artifice to defraud.

1. Receipt and Deposit Money Laundering Counts

The deposit of the funds into the Creative Consultant account at the direction and for the benefit of Mr. Beck was an essential part of the scheme to defraud, an essential part of the specified unlawful activity. *See* Doc. 22 at ¶¶ 14 and 19. Transactions that consist of nothing more than depositing a check, representing proceeds of the SUA, into the defendant's bank account, are commonly referred to as "receipt-and-deposit" cases. Counts 28, 30, 37, 38 and 39 are "receipt and deposit" money laundering counts. They alleged deposit of Greentech funds into Creative Consultant account. However, these same deposits are described in the Indictment as an essential part of the scheme and artifice to defraud.

Paragraph 14

> 14 . . .. Then, at BECK's direction, **Company A paid 90% of the funds it received from Company B to BECK through Creative Consultants.**

Paragraph 19

> 19. . .. **Over the course of this scheme and artifice**, at BECK' s direction, **Company A (Greentech) paid BECK through Creative Consultants approximately 90% of all the payments Company A (Greentech) received.**

Money laundering counts 28, 30, 37, 38 and 39 all comprise the deposits of Company A (Greentech) paid to Mr. Beck through Creative Consultants, which were approximately 90% of all the payments Company A (Greentech) received.

> **Count 28** - 06/06/2016, $25,830.00 deposit of Company A (Greentech) funds into Creative Consultants account at SunTrust Bank
>
> **Count 30** – 07/19/2016, $22,441.86 deposit of Company A (Greentech) funds into Creative Consultants account at SunTrust Bank
>
> **Count 37** – 11/01/2017, $30,150.00 deposit of Company A (Greentech) funds into Creative Consultants account at SunTrust Bank ·
>
> **Count 38** – 12/18/2017, $25,830.00 deposit of Company A (Greentech) funds into Creative Consultants account at SunTrust Bank
>
> **Count 39** - 06/06/2018, $30,150.00 deposit of Company A (Greentech) funds into Creative Consultants account at SunTrust Bank

Doc. 22 at ¶¶ 28, 30, 37, 38, and 39.

The Indictment alleges twice, as part of the scheme, once in paragraph 14, and again in paragraph 19, that the scheme was completed when Company A (Greentech) paid 90% of the funds it received to Mr. Beck through Creative Consultants. Doc. 22 at ¶ 14. Therefore, while these transactions are receipt-and-deposit transactions, they are all described as part of the underlying scheme to defraud and, because of the merger issue, cannot be separately charged as money laundering under § 1957.

The Company D (Paperless Solutions) and GA Christian Coalition Scheme

Money Laundering Counts 27 and 31 describes the very conduct alleged in paragraph 22 of the scheme:

Paragraph 22

> 22. . .. In every instance, at BECK's direction, S.G. (Steve Gradick) **paid GA Christian Coalition invoices with money Company D (Paperless Solutions) had collected from GUA**.

Doc. 22 at ¶ 23 (emphasis added).

> **Count 27**- 05/31/2016, $10,299.47 deposit of Company D (Paperless Solutions) funds into GA Christian Coalition account at United Community Bank
>
> **Count 31** – 10/12/2016, $19,383.04 deposit of Company D (Paperless Solutions) funds into GA Christian Coalition account at United Community Bank

Doc. 22 at ¶¶ 27 and 31. In Money laundering counts 27 and 31, the indictment identifies two deposits of Paperless Solutions into GA Christian Coalition account at United Community Bank, as part of the scheme and artifice to defraud and cannot be separately listed as § 1957 money laundering charges.

2. The Overall Embezzlement Scheme

As if the Indictment was not clear enough that every money laundering count was part of the scheme and artifice to defraud, at the conclusion of the description of the scheme, the Indictment alleges:

> 23. All told, between February 2013 and August 2018, BECK, used the **above-described fraud schemes to embezzle** in excess of $2,000,000 from GUA.

Doc. 22 at ¶ 23.

All the 1957 financial transactions charged are part of the "fraud schemes to embezzle in excess of $2 million." Thus, the "embezzlement" schemes are not complete until the checks from Greentech are deposited into the Creative Consultant (Sun Trust bank account) or from Paperless Solutions into the GA Christian Coalition bank account (United Community account). Therefore, the fraud schemes to embezzle necessarily includes the depositing of GUA monies from Greentech into the Creative Consultant bank account and from Paperless Solutions to Georgia Christian Coalition bank account.

Convicting Mr. Beck of money laundering for the bank transfers inherent in the "scheme" and central to the mail and wire fraud charges presents an insurmountable "merger" problem. The district court erred by failing to grant the defendant's motion for judgment of acquittal on all the money laundering counts because the money laundering charges merged into the mail and wire fraud counts.

VI. The District Court Erred by Failing to Grant a Motion for Judgment of Acquittal on the Tax Counts Because There Was No Proof that Jim Beck Aided and Assisted Anyone Identified in the Indictment in Filing False Income Tax Returns.

This Court reviews *de novo* the denial of a defendant's properly preserved motion for judgment of acquittal. *U.S. v. Holmes*, 814 F.3d 1246, 1250 (11th Cir.

2016). Rule 29 provides that the court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction," Fed. R. Crim. P. 29(a), so its requirements are mandatory. *Burks v. U.S.*, 437 U.S. 1, 11 n. 5, 98 S. Ct. 2141, 2147 n. 5, 57 L. Ed. 2d 1 (1978).

At trial, the evidence established that Cleve Entrekin prepared and filed the charged 1040 false tax returns and associated schedules on behalf of Mr. Beck. Doc. 153 at 153:25-154:2. However, counts 40 through 43 of the Indictment ("the Tax Counts") fail to allege, either directly (*i.e.*, using Cleve Entrekin's initials or describing his position--tax preparer) or generally (*i.e.*, a person known or identified to the grand jury) that Cleve Entrekin was the person that Mr. Beck aided or assisted. Doc. 22. Therefore, any reliance on him when evaluating whether the district court erred in failing to grant the defendant's motion for judgment of acquittal as to the Tax Counts would constructively amend the Indictment and would be improper.

The Tax Counts allege that Mr. Beck violated 26 U.S.C. § 7206(2) by aiding and assisting the filing of false and fraudulent his own federal tax returns. Doc. 22. That statute requires the government to prove that the defendant did "knowingly aid and assist in, and procure, counsel, and advise" some other person in connection with the "preparation and presentation" of tax returns to the Internal Revenue Service. 26 U.S.C. § 7206(2). As this Court stated:

> To prove a violation of 26 U.S.C. § 7206(2), the government must show that the defendant (1) willfully and knowingly aided or assisted (2) in

> the preparation or filing of a federal income tax return (3) that contained false material statements.

U.S. v. Wilson, 788 F.3d 1298, 1309 (11th Cir. 2015). The statutory reference to "aided or assisted" necessarily refers to some third person. For that reason, the statute is known as the Internal Revenue Code's aiding and abetting provision. *See U.S. v. Williams*, 644 F.2d 696, 701 (8th Cir. 1981) (citation omitted). "[T]he 'willfully aiding, assisting, procuring, counseling, advising, or causing' language of § 7206(2) effectively incorporates into this statute the theory behind accomplice liability." *U.S. v. Searan*, 259 F.3d 434, 443 (6th Cir. 2001); *U.S. v. Sassak*, 881 F.2d 276 (6th Cir. 1989). Courts have interpreted Section 7206(2) as incorporating the complicity theory of criminal liability set forth more fully in 18 U.S.C. § 2 and its interpretive jurisprudence. *See Searan*, 259 F.3d at 443. One must aid or assist or procure someone else to commit an offense; one cannot aid, assist or abet oneself. *See U.S. v. Martin*, 747 F.2d 1404, 1407 (11th Cir.1984).[2] In other words, Mr. Beck must have aided or assisted someone else in the preparation of his allegedly false tax returns.

[2] It is for this reason that an indictment that alleges aiding and abetting is defective if it does not identify a principal or codefendant, specifically or generally. *U.S. v. Martin*, 747 F.2d at 1407–08; *U.S. v. Garcia–Paulin*, 627 F.3d 127, 133–34 (5th Cir. 2010) (finding indictment had insufficient factual basis where the government identified no co-conspirators or principal whom the defendant aided and abetted).

Pursuant to Rule 7(c) of the Federal Rules of Criminal Procedure, the government incorporated the factual recitations in paragraphs 1 through 24 of the Indictment into the Tax Counts. Those incorporated facts mention other individuals. Doc. 22 at ¶ 33. The other individuals specifically referenced and identified in the Tax Counts are MB (Matt Barfield) (Doc. 22 at ¶ 9), SJM (Sonja McKaig) (*Id.* at ¶ 10) and SM (Steve McKaig) (*Id.* at 11), and SG (Steve Graddick) (*Id*. at ¶ 12). As charged, to sustain a conviction or to overcome a motion for judgment of acquittal, those four individuals are the only ones Mr. Beck could have willfully aided, assisted, counseled, advised, or procured to submit false or fraudulent 1040 returns to the IRS. Put differently, any argument that defendant Jim Beck aided or assisted someone else other than those four individuals would constructively amend the Indictment and would violate the defendant's due process rights.

Section 7206(2) of Title 26 makes it a felony to

> [w]illfully aid [] or assist [] in . . . the preparation or presentation under . . . the internal revenue laws . . . of a return, . . . which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return . . . .

A defendant can only be liable on an aiding-and-abetting theory if the government proves that the offense, which the defendant allegedly aided and abetted, was committed by someone else. *See U.S. v. Hassoun*, 476 F.3d 1181, 1184 (11th Cir. 2007).

Association has been interpreted to mean that "the defendant shared in the criminal intent of the principal, ... that is, the state of mind required for the statutory offense must be shown for conviction as an aider and abettor." *U.S. v. Beck*, 615 F.2d 441, 449 (7th Cir. 1980) (citations omitted*); U.S. v. Smith*, 546 F.2d 1275 (5th Cir. 1977). Tellingly, in *U.S. v. Hornaday*, 392 F.3d 1306 (11th Cir.2004), this Court acknowledged that "[i]t is plausible to read" the first subsection of the aiding and abetting statute, *i.e.*, 18 U.S.C. § 2(a), "as including a requirement that someone other than the defendant be guilty of the crime which the defendant aids and abets." *Id.* Indeed, this Court concluded that "[t]he argument that someone else has to commit an offense for that particular statutory language to fit [18 U.S.C. § 2(a)] is a forceful one." *Id.*

Under § 7206(2), accomplice liability (*i.e.*, the causing section-§ 2(b))[3] is limited to those

> . . . with the knowledge or consent of the person authorized or required to present such return. . ..

[3] The parallel to this part of § 7206(2) is §2(b). It states:

> Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the U.S., is punishable as a principal.

18 U.S.C.A. § 2(b). The causing language of § 7206(2) is narrower than § 2(b) and is limited to only those "person(s) who are authorized or required to present such return, affidavit, claim, or document."

26 U.S.C. §7206(2). There was no evidence offered at trial that Matt Barfield, Sonya McKaig, Steve McKaig or Steve Graddick was a person(s) "authorized or required" to present such return. Therefore, to prove that any of those individuals aided or assisted Jim Beck in the filing of false tax returns, the evidence would have to had shown that one or more of those individuals willfully aided and assisted or were willfully aided and assisted by Jim Beck in the filing of false tax returns. There was no evidence at all that any of those individuals were involved in any way with the filing of Jim Beck's tax returns.

Here, the Tax Counts allege that the defendant Jim Beck aided and assisted either by Matt Barfield, Sonya McKaig, Steve McKaig or Steve Gradick in willfully filing false tax returns. Doc. 22. If these are not the four people whom aided and assisted Jim Beck, then the Tax Counts either must be construed that Jim Beck aided and assisted himself, a non-starter, or the Tax Counts are silent on the other individual who aided or assisted Jim Beck. Such counts do not state an offense and would have to be dismissed. In that the Tax Counts specifically identify these four individuals, and none other, to have aided and assisted in the filing of false income tax returns and contains no language indicating that there were unnamed or unknown aiders and assistors, the essential element of the offense is that one of these four individuals, either individually or collectively, with the necessary criminal intent, aided and assisted Jim Beck in willfully filing false tax returns. Taking the evidence

in the light most favorable to the government, the evidence at trial does not support the charges. Therefore, Courts 40-43 does not meet the Rule 29 standard and the district court should have dismissed those counts.

VII. The District Court Erred in Failing to Grant a Motion for Judgment of Acquittal on Count 25 Because the Mailing Was Not in Furtherance of The Alleged Scheme to Defraud GUA.

Count 25 of the Indictment alleges that the defendant committed mail fraud by having the Georgia Arson Control Program (GACP) improperly pay Adventures in Advertising Corp. (AIA), for signs for Mr. Beck's statewide campaign for Insurance Commissioner. *See* Doc. 22 at ¶¶ 28-30. The district court should have granted the defendant's Motion for Judgment of Acquittal on Count 25 because the government failed to prove that the mailing sent by GACP to AIA, which allegedly included a check from GACP to AIA to pay for signs for Mr. Beck's campaign for Insurance Commissioner, was in furtherance of the scheme alleged in the Indictment, which was to defraud the GUA not GACP. *See* Doc. 22 at ¶ 1 (alleging that Mr. Beck devised "a scheme and artifice to defraud the Georgia Underwriting Association" and making no similar allegation that Mr. Beck devised a scheme to defraud GACP).

The testimony elicited from GUA employees and others failed to establish the necessary corporate link between GUA and GACP. The fact that GUA provides funding to GACP and keeps their books is not sufficient of a link to somehow

support the conclusion that conduct designed to obtain a check from GACP was somehow in support of the embezzlement scheme to defraud GUA. Josh Mosley, who served as acting general manager of GUA, for example, testified that GACP is a separate legal entity from GUA, with separate boards of directors, and that they "do separate things." Doc. 152 at 172:12-20. In addition, the government questioned auditor Scott Barnett about Government Exhibit 421, an audit report which concluded that the finances of GACP and GUA should not be consolidated in part because "GACP and GUA are two separate entities." Doc. 153:12-22.Doc. 127-274. The report reasoned:

> Based on our understanding of GACP and its management have no control over the decision made by GACP and GUA [has] no equity interest in GACP. Therefore, we concluded that GACP and GUA are two separate entities. . ..

Id. The evidence elicited by the government at trial, therefore, demonstrated that GUA and GACP were separate, distinct legal entities.

"[T]o fall within the scope of 18 U.S.C. § 1341, a mailing must constitute part of the execution of the fraud. *U.S. v. Hill*, 643 F.3d 807, 858 (11th Cir. 2011). "To be part of the execution of the fraud, ... It is sufficient for the mailing to be incident to an essential part of the scheme or a step in [the] plot." *Schmuck v. U.S.*, 489 U.S. 705, 710–11, (1989). Even at this low bar, the government failed to prove that the mailing alleged in Count 25 was done in furtherance of the embezzlement scheme to defraud GUA. Taken in the light most favorable to the government, GACP mailed

a check to AIA to illegitimately pay for expenses for signs for Mr. Beck's statewide campaign for Insurance Commissioner. This action may have arguably defrauded GACP but did not defraud GUA. The mailing, therefore, was not in furtherance of the scheme alleged in the Indictment. The district court therefore should have acquitted Mr. Beck on Count 25.

VIII. The District Court Erred by Ordering Restitution on the Tax Charges Due and Payable Immediately When Restitution Is Not Mandatory and Can Only Be Imposed as A Condition of Supervision.

The Judgment and Commitment Order requires that

> [r]estitution in the total amount of $2,619,218.83 is owed in this case and is due in full immediately. . .. Funds will be distributed by the Clerk to victims outlined below:
>
> * * * *
>
> Internal Revenue Service
> Amount: $358,394.00
>
> You must pay interest on restitution unless the restitution is paid in full before the fifteenth day after the judgment. . . ."[4]

[4] The defendant is not contesting the restitution order to:

> Georgia Underwriting Association
> c/o Cincinnati Ins. Co. (insured for Georgia Underwriting Association)
> Amount: $2,260,824.83

The amount is correct, and the sentencing court had authority as a component of the sentence to order that the restitution be "due in full immediately" and that the defendant must pay interest. Doc. 137 at 6. *See* 18 U.S.C. § 3612(f)(1).

Doc. 137 at 6. The restitution order is unlawful as it relates to the IRS because the district court made the restitution amount on the tax counts due and payable immediately and that interest be paid on that amount unless paid in full before the fifteenth day after the judgment. *Id.*

It is clear that "[r]estitution to the IRS may be imposed as a condition of supervised release under [18 U.S.C.] § 3583[.]" *U.S. v. Nolen*, 472 F.3d 362, 382 (5th Cir. 2006). A restitution award due prior to the commencement of a term of supervised release, like here however, is a component of the sentence, not a condition of release, and is therefore unauthorized. *U.S. v. Bolton*, 908 F.3d 75, 97–98 (5th Cir. 2018) citing *U.S. v. Westbrook*, 858 F.3d 317, 328 (5th Cir. 2017). Here, the district court's condition that the restitution amount was due "immediately" was unauthorized. *Westbrook*, at 328 ("We thus conclude that the judgment contains an error in ordering that [the defendant] begin making payments while in prison—a timeline that exceeds the court's statutory authority."). The sentencing court certainly understood that it could impose restitution to the IRS only as a condition of release but nevertheless ordered the payment of restitution to the IRS due immediately. This was clear error.

In *U.S. v. Feast*, 614 Fed. Appx. 195, 197 (5th Cir. 2015), the Fifth Circuit vacated a restitution award in part because it was due "immediately," which was inconsistent with it being a condition of release. *Id*. at 196. *See also U.S. v.*

Hassebrock, 663 F.3d 906, 924–25 (7th Cir. 2011); *U.S. v. Dean*, 64 F.3d 660, 1995 WL 493006, at *4 (4th Cir. 1995). The trial court clearly erred in imposing restitution on the tax counts to be due and payable immediately.

CONCLUSION

For these reasons, Mr. Beck asks this Court to reverse the conviction and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the Court's Order of March 22, 2022, because this brief contains 13,853 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 in 14 point Times New Roman.

By: */s/ Scott Grubman*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of April, 2022, a true and correct copy of the foregoing brief has been filed and served electronically through the Court's CM/ECF system on all registered users.

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