23-6842-cr

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA,

Appellee,

– v. –

BRIAN KOLFAGE, AKA Sealed Defendant, STEPHEN BANNON, AKA Sealed Defendant 2, ANDREW BADOLATO, AKA Sealed Defendant 3,

Defendants,

TIMOTHY SHEA, AKA Sealed Defendant 4,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT

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JURISDICTIONAL STATEMENT

Defendant-Appellant TIMOTHY SHEA appeals the judgment filed July 16, 2023, by the Honorable Analisa Torres of the United States District Court for the Southern District of New York, in case 20-cr-412-04 (AT). Special Appendix ("SPA") at SPA-1. The District Court had jurisdiction under 18 U.S.C. § 3231. Appellant filed a timely notice of appeal on July 27, 2023 (A-490) This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

WHETHER the trial court erred in denying, in a written decision, appellant's motion to have a juror questioned after trial whose daughter was being mentored by one of the prosecutors in the case, who did not inform the Court of that connection with the prosecutors until after a verdict was rendered?

WHETHER the trial court erred in denying a post-verdict motion to dismiss count two of the indictment after the court and parties discovered a serious error in the manner in which the court instructed the jury on the elements of the count?

WHETHER the sentence imposed by the trial court was both procedurally and substantially unreasonable in light of the sentences imposed by the same court on the two co-defendants in the case where appellant was acknowledged by the prosecutors and the trial court to be the least culpable and yet received the longest

period of incarceration?

SUMMARY OF THE CASE

Appellant was charged in an indictment with three other defendants in an alleged scheme to raise money from the public by making false representations. The alleged scheme was basically to raise money on the internet to fund the construction of a border wall, or parts of it, along the Southern border of the United States to prevent immigrants from illegally entering the country. The co-defendants included Stephen Bannon, who was pardoned by President Donald Trump prior to the trial in this case, Brian Kolfage, a triple-amputee veteran who was the public face of the fund-raising effort, and Andrew Badolato, who allegedly took part in the execution of the scheme and of the project to build several miles of border wall.

The indictment charged all of the defendants in three counts: count one: conspiracy to commit wire fraud, count two: conspiracy to commit money laundering, and in a a third count against appellant only, of falsification of records. After Bannon was dropped from the case as a result of the presidential pardon the remaining two co-defendants, Brian Kolfage and Andrew Badolato, entered guilty pleas before trial (and did not testify for either side at the subsequent two trials). Appellant Timothy Shea has a trial from May to June , 2022 which ended in a

mistrial when the jury could not reach a verdict. The case was retried starting Monday, October 24, 2022 (jury selection) through Friday, October 28, 2022, when the jury returned a verdict of guilty on the three counts of the indictment.

On November 1, 2022 (the Tuesday after the Friday that the jury returned the guilty verdict) the government submitted a letter to the trial court and counsel stating that they had learned after the trial was completed that a law student who was being mentored by one of the members of the "prosecution team" was the daughter of one of the jurors in the case (who also happened to be an attorney), and that the juror (parent) had been communicating with the mentee (daughter) "all week" during the trial. It was not clear from the communication by the prosecutor when the juror first realized that her daughter was a mentee of one of the prosecutors, or why the juror did not reveal the connection with the government attorneys until after the trial was over, or what the communications "all week" consisted of, and whether they violated the trial court's direction to the jurors that they were not to discuss the case with anyone until deliberations were completed.

The defense attorney at the time (who passed away a few weeks after the trial, and was replaced by undersigned counsel by appointment pursuant to the Criminal Justice Act) immediately moved the trial court to question the juror to

resolve these issues and to determine whether the jury's verdict was free from any improper influence. The government opposed and the trial court denied the request. As a result, no answers to these questions or exploration of any impropriety was conducted and it remains unknown whether there was any improper influence on the juror, and therefore on the deliberations as a whole, because of the unrevealed relationship between the juror's family member and a member of the prosecution team who had a very active role in presenting the evidence against appellant at the trial.

The second issue was also raised when, prior to sentence, the prosecutors noticed an error of law in the manner in which the trial court instructed the jury on what comprised the elements of count two (money laundering), stating that they could convict if they found that the money being laundered was the proceeds of a conpiracy to commit fraud – specifically the conspiracy charged in count one – when in fact proceeds of a fraud conspiracy, as opposed to the proceeds of a substantive fraud, is not a prohibited by the statute. Because the instruction as the trial court gave it had been submitted by the parties jointly and nobody noticed the error until after the trial, there was no objection made and therefore the error is reviewable only as a matter of "plain error." Appellant submits that telling a jury that they can convict based on a finding that is not a basis for commission of the

crime is plain error and cannot be harmless, even if the trial court believes that there was sufficient evidence to support the proper basis for money laundering, namely that the laundered money was the proceeds of a substantive fraud.

Finally, appellant was the only defendant in the case to put the government to its proof at a jury trial, and he received a sentence of sixty-three months incarceration (the number requested by the government) where his co-defendants (Kolfage and Badolato) received sentences of 51 months and 36 months respectively. This was true even though the government conceded that appellant was the least culpable, and even though the sentencing court agreed that appellant had accepted responsibility after trial (removing any difference that could have existed because appellant did not plead guilty). The only unfavorable difference the sentencing court cited was that the other two defendants both had significant health issues, which was true. Appellant argues, however, that the health difference alone did not justify the substantial difference in the term of imprisonment for the defendant who was the least culpable in the case.

PROCEDURAL HISTORY

The procedural history of this case involves the filing of numerous motions and applications which are not relevant to the issues being raised on this appeal, and therefore will include only the procedural events relevant to the issues being

raised herein.

August 20, 2020: appellant Timothy Shea is arrested on sealed indictment, with three co-defendants. (Appendix, herein after "A-[page number], A-4).

August 31, 2020: initial appearance of appellant by video conference (due to covid-19 pandemic). (A-5-6).

March, 2021, co-defendant Steve Bannon dropped from case due to presidential pardon issued in January, 2021 (no docket entry because no action by the court).

April 21, 2022, superceding indictment filed. (A-16).(A-39).

May 3, 2022, joint proposed requests to charge filed by government (with objections or counter-proposals noted). (A-18, ECF 203)(A-46).

May 23, 2022 through June 7, 2022, trial held for appellant (as sole defendant), ends in mistrial because jury cannot agree. (A-20 – A-21).

October 24, 2022, jury selection for retrial of appellant. (A-29), A-169 (transcript).

October 25, 2022, trial of appellant, ends in jury verdict of guilty on all three counts of the indictment on October 28, 2022. (A-30 – A-31).

November 3, 2022, letter filed by government explaining juror connection with one of the prosecutors who handled the trial, (A-31, ECF 326).

November 14, 2022, letter motion from appellant's attorney requesting that juror referred to in ECF-326 be questioned by the court. (A-31, ECF-334).

November 15, 2022, government files letter in opposition to request to question juror. (A-31, ECF-336).

November 22, 2022, new counsel assigned to replace former counsel who died. (A-33).

November 30, 2022, Court issues order (appealed from here) denying motion to question juror as to possible impropriety. (A-33, ECF 354, A-).

April 3, 2023, Final Pre-Sentence report filed. (A-34).

April 12, 2023, (first) sentencing submission filed by appellant. (A-34).

April 14, 20223, (second or supplemental) sentencing submission filed for appellant. (A-34).

April 19, 2023, government sentencing submission filed for all three remaining defendants including appellant. (A-34).

June 12, 2023, letter from government advising of error in jury instructions on count two. (A-35, ECF-398)(A- 408).

June 12, 2023, supplemental sentencing submission submitted on behalf of appellant. (A-35, ECF 399).

June 26, 2024, notice of motion, declaration of counsel, and memorandum

of law filed by appellant to dismiss count two. (A-36, ECF 404-406)(A-418 – A-425).

July 7, 2023, government opposition to motion on count two. (A-36, ECF 408)(A-445).

July 14, 2023, court issues order denying motion to dismiss count two (order appealed from here). (A-36, ECF 409)(A-455).

July 25, 2023, appellant is sentenced to 83 months incarceration, three years supervised release, $300 special assessment. (A-485).

July 26, 2023, judgment filed. (A-37, ECF-411)(SPA-1).

July 27, 2023, Notice of Appeal filed by appellant. (A-37, ECF-412)(A-490).

STATEMENT OF FACTS

Because the facts necessary for the consideration of the issues being raised on this appeal do not directly involve the evidence produced at trial appellant will give a summary version of the evidence presented at trial drawn from one of the trial court's decisions [motion for acquittal after verdict] of the Federal Rules of Crim. Proc.), ECF document number [hereinafter, "ECF" and number] 357. The references to "GX" documents are government exhibits that are not on the docket sheet, and provided only if the government wishes to add them to the record in

response to any of the arguments raised by appellant herein.

The Trial

Appellant was first tried in May, 2022, which resulted in a mistrial because the jury could not agree. Atter some motion practice (not relevant to the appeal issues here), a second trial commenced with jury selection on October 24, 2022, and the presentation of evidence began the next day. Dkt. Entries 10/24/2022, 10/25/2022. The Government presented its case-in-chief over the course of three days, calling twelve witnesses and introducing over 400 exhibits. *See, e.g.*, ECF No. 347. (Trial day four), at 628.

The Government introduced text messages and other exhibits showing that appellant, along with his wife, and one of his co-defendants, Brian Kolfage, launched a GoFundMe page called "We The People Will Fund The Wall," which had the stated purpose of raising money to build a wall on the southern border of the United States. ECF No. 343, (Trial day two). at 68, 74, 185–86. Appellant and Kolfage then formed a non-profit entity called We Build the Wall, Inc. ("WBTW"), to receive the money from the GoFundMe campaign and build a southern border wall. ECF No. 343, (Trial day two) at 74–76. Kolfage was the president of WBTW and the public face of the GoFundMe campaign. GX 352. Kolfage and WBTW made representations to GoFundMe and the public that 100%

of the funds raised would go toward building the wall and that Kolfage would "personally not take a penny of compensation from these donations." GX 306; ECF No. 343, (Trial day two) at 83–84, 89, 122–32; ECF No. 345 (Trial day three) at 448–49, 468–69, 482–84, GX 352.

The Government's exhibits showed that less than a month after it launched the GoFundMe campaign had raised nearly $20 million. ECF No. 343, (Trial day two) at 74; GX 313. Several thousand of the donors resided in the Southern District of New York. *See* GX 312. The Government elicited the testimony of two donors (who were not from New York) who stated that Kolfage and WBTW's representations – that 100% of the funds would go to funding the border wall and that Kolfage would not receive any compensation from the donations – were material to their decision to donate. ECF 345 (Trial day three) at 449–50, 469–70. Although Appellant, Kolfage, and other individuals used portions of the WBTW donor money to build segments of the wall, they kept some of the money for themselves. ECF 345 (Trial day three) at 401–02. The Government introduced exhibits showing that appellant and his co-defendants kept several hundred thousand dollars from WBTW by setting up business intermediaries and transferring WBTW's donor funds to those intermediaries, which then retained some of the money and transferred some of it back to Kolfage. *See* GX 900. The

evidence showed that appellant created a company called Ranch Property Marketing and Management LLC ("RPMM"). ECF 343 (Trial day two) at 246–48; GX 501. Over several months, WBTW transferred funds to RPMM on multiple occasions, and portions of those transfers were sent to Kolfage. GX 900, 900-1. On one occasion, WBTW transferred money to appellant's personal bank account to serve as the intermediary. GX 901-C. By October 2019, RPMM had received hundreds of thousands of dollars from WBTW and forwarded approximately $250 million to Kolfage. GX 900.

The Government also presented exhibits and testimony intending to show that appellant and his co-appellants used phony or altered invoices and memo lines in checks and wire transfers to conceal the purposes of the money transfers. GX 906-C, 906-E, 906-F, 906-H. One of the Government's witnesses, Charles J. Ford, testified that his company Vision Quest Solutions provided security services to WBTW. ECF 345 (Trial day three) at 396–98. Vision Quest sent WBTW an invoice for approximately $20,000, but RPMM billed WBTW $50,000 for those services using a phony invoice. ECF 345 (Trial day three) at 405–11; GX 116A, 118A. From the $50,000, RPMM paid Vision Quest's invoice, paid Kolfage $20,000, and kept the remaining money for Appellant. GX 901-H.

The evidence also showed that in October 2019, the Government issued a

grand jury subpoena to Synovus Bank as part of its investigation into appellant and his co-defendants' actions; a Synovus Bank employee disclosed that subpoena to WBTW's lawyer. ECF 343 (Trial day two) at 144–53. After exchanging phone calls and text messages to discuss the subpoena at 305–15, appellant and co-defendants created backdated contracts to justify the money transfers, ECF 345 (Trial day three) at 316–34. This included a backdated "vendor services agreement" between WBTW and RPMM and a backdated letter memorializing an agreement between appellant and Kolfage regarding WBTW's donor list. *Id.*; GX 127–30, 129A, 130A, 907.

In his defense, appellant introduced exhibits and played a video for the jury. The exhibits documented the work that RPMM performed in building the wall. ECF 347 (Trial day four) at 602–08.

Post-Trial motion involving possible juror impropriety

On November 3, 2022 (five days after the jury returned the guilty verdict) the government submitted a letter to the trial court and counsel stating the following:

> "The Government respectfully submits this letter to inform the Court that, on October 29, 2022—after the jury returned a verdict on October 28, 2022—one of the undersigned Assistant United States Attorneys (the "AUSA") received a communication from an individual whom the Government has learned is the adult child of a juror" ("Person-1").

> "By way of background, over the past approximately three years, Person-1 and the AUSA have had periodic communications regarding Person-1's education and career, and in which Person-1 sought career-related advice. Person-1 and the AUSA attended the same college at different times. The AUSA has never met or communicated with Person-1's mother.
>
> "On October 25, 2022, Person-1, who is currently a law student outside of the New York City metropolitan area, emailed the AUSA to provide an update on Person-1's education and career, and sought career-related advice. Person-1 did not reference this case or Person-1's mother.
>
> "On October 29, 2022, after the trial in this matter was concluded, the AUSA responded to Person-1's email and, as is relevant here, noted that the AUSA had just finished the trial in this case. That same day, Person-1 responded, in pertinent part, as follows:
>
>> "'My mom was on the jury of your case! She was juror [redacted] row. <u>I've heard lots about it all week</u>, congratulations on the win! What a funny coincidence. Good thing my mom didn't make the connection beforehand and have to recuse herself. I know she enjoyed it.'" [Emphasis added.](Document 326 of the docket). (A-332.1 – A-332.3).

The government's letter went on to argue that no further action by the trial court was required, saying that 1) Person-1's email does not indicate that any juror misconduct has occurred, 2) the communication indicates that the juror "didn't make the connection" that the AUSA had previously been in touch with Person-1, 3) Person-1's statement about having "heard lots about" the trial from the juror is likewise not an indication of impropriety (despite repeated instructions by the court to the jury not to discuss the case with anyone outside of the court),

and 4) Courts are, in general, "reluctant to 'haul jurors in after they have reached a verdict in order to prove for potential instances of bias, misconduct or extraneous influences (with a citation). (A-331.2 – A-331.3).

Appellant's trial counsel responded in a letter-motion dated November 14, 2023, asking "the Court to set a date for a hearing at which the juror and Person-1 referenced in the Government's letter dated November 3, 2022, may be questioned about the representations outlined in the Government's letter" (A-353 – A354). The defense request went on to state that they were "concerned that Person-1, "heard lots about" the trial "all week," and that the juror did not, to the best of the Defense's recollection, disclose that her child was a law student who had received advice from one of the Assistant United States Attorneys who tried the case against Mr. Shea." (A-353).

On the following day, November 15, 2022, the government replied to the defense request continuing to oppose any questioning of the juror or of "Person-1" (the adult child of the juror), arguing that no question in the jury selection process called for an answer by the juror, when she was a prospective juror, that would have revealed that her adult child was "a law student," and that the evidence of improper communications between the juror and Person-1 was lacking. (A-335 – A-337).

A review of the documents related to jury selection shows that the parties did, indeed, ask the trial court prior to the voir dire of the jury panel to ask whether any juror, after identifying the members of the prosecution team, "Have you or your family member, friends, associates, or employers had any dealings directly or indirectly with any of the individuals I just mentioned, the United States Attorney's Office, or the United States Postal Inspection Service? (A-158). As it turned out, the Court did not ask the question in that way; instead, the transcript of the voir dire shows that the court, after identifying the specific members of the prosecution team (including the Assistant who had a mentoring relationship with the prospective juror's family member): "Please stand and face the jurors. The defendant in this case is Timothy Shea. [To the prosecutors:] You may be seated. Mr. Shea, please stand and face the jurors. You may be seated. Do any of you know Mr. Shea or any of the other individuals I have mentioned?" (A-204 – A-205). Undersigned counsel believes that the juror who later proved to have a daughter being mentored by one of the Assistant United States Attorneys in the case was the matrimonial attorney questioned at pp.117-118 of the transcript (A-286 – A-287) of the transcript. Although the trial court's questions, both in general concerning any juror knowing the attorneys for the parties, and specifically of that juror (who was an attorney) did not specifically ask whether any family member

had a relationship with anyone in the prosecutor's office, the juror did not volunteer that her daughter was a law student and was being mentored by one of the prosecutors in the case. Of course, because of the lack of questioning then or later, it is not known if the juror was aware of that mentoring relationship at the time.

Counsel notes here that this entire matter was handled by prior counsel (now deceased). There is no evidence that the full content of the email communications between Person-1 (the daughter) and the government was revealed to either the court or counsel (although counsel has no doubt that the significant portions are quoted in the government letters of November 3 and 14 of 2023).

On November 30, 2022, the trial court issued an order denying the defense request to question the juror or Person-1 in connection with the potential impropriety of the communications which had admittedly occurred during the trial between the juror and her adult child "all week." (A-338 – A-339). The trial court stated that the defense had failed to provide

> "...specific or nonspeculative basis to question the juror's adherence to that standard instruction—particularly where a number of innocent inferences may be drawn from the statement that Person-1 "'heard lots about' the trial 'all week,'" including that the juror generally discussed that she had been seated on a jury. And even assuming improper communications did occur, Defendant does not provide evidence to explain how such impropriety could have prejudiced the jury during its deliberations." (A-339).

Facts related to the Jury Instruction Error

After the time for making a post-verdict motion had run the government notified the Court and counsel, in a letter dated June 11, 2023 (A-408), that they believed that the jury instruction with respect to count two was erroneous because the "specified unlawful activity" as defined in 18 U.S.C. § 1956(c)(7)(A) does not include conspiracy to commit wire fraud in violation of 18 U.S.C. § 1343, even though it does include the substantive offense of wire fraud pursuant to that statute, and that the instruction that "as a matter of law" the conspiracy to commit wire fraud as charged in count one of the indictment was sufficient to meet the requirements of the element was therefore error. They argued that the error, however, is harmless and that it was waived by prior counsel when no objection to the jury instruction was made. (A- 408 – A-409).

Prior to the commencement of the second trial on these counts (the first had ended in a mistrial) the parties agreed to use the same set of jury instructions that had been used for the first trial. Prior to the court's delivering the jury instructions in the first trial the parties had submitted a "joint" proposal for jury instructions which did not show any difference on what the government drafted as a proposed instruction on the elements of money laundering. (A-46 – A-100). No objection was made prior to the Court's giving those instructions to both juries. Of course,

the instruction tracked the erroneous language of the indictment itself with respect to what would qualify as "specified criminal activity" which the government had drafted and presented to the grand jury. The instruction given with respect to the elements of money laundering included the following definition of the "specified criminal activity" as the source of the funds which are being laundered:

> The second element of concealment money laundering is that the financial transactions must involve the proceeds of "specified" unlawful activity. ... The term "specified unlawful activity" means any one of a variety of offenses descried in the statute. In this case the government has alleged that the money involved in financial transactions derived from the wire fraud conspiracy charged in Count One of the indictment. I instruct you, as a matter of law, that the charge in Count One meets the definition of "specified unlawful activity" but you must determine whether the funds involved in the financial transactions were the proceeds of that unlawful activity. [Emphasis added.] (A-100).

Appellant requested a postponement of the sentencing hearing and time to file a motion, which he did on June 28, 2023. (A-418). He moved to vacate the verdict on count two and to dismiss the count because it fails to state a crime, inasmuch as the count itself incorrectly states that the "specified unlawful activity" alleged is "the conspiracy charged in count one." Because proceeds of a "conspiracy" is not included in the statutory definition of the element of the crime charged the indictment failed to allege a source of the "proceeds" alleged to have been concealed, and therefore fails to state a violation of the statute. Even if it is

not necessary for the indictment to specify the source of the money, by specifying a source which is not a violation of law it (along with the trial court's instructions) misled the jury into believing that the evidence to convict appellant on count two would be sufficient if they found, beyond a reasonable doubt, that the proceeds derived only from the charged conspiracy to commit fraud, and not a substantive or completed fraud. The jury was never required to make a finding in connection with count one that the object of that conspiracy was completed the defect was not cured. Appellant argued that the fact that the government or the Court may have concluded that the object of the conspiracy was shown to have been fulfilled is not sufficient to substitute for the requirement that the jury reach a unanimous decision on the question. Finally, appellant's counsel moved for the relief even though the objection was not preserved as a matter of "plain error" as defined in Rule 52(b) and the "good cause" exception of Rule 12(c)(3). (A-438).

The trial court denied the motion finding first that the error in the indictment was harmless because, "An indictment need not specify details about how the offense was committed." (A-458). The trial court further opined that, "...the 'to wit' clause is properly understood to be illustrative rather than definitional of the core of the criminality charged by the grand jury...." [quoting a case], and concluded that the indictment still stated a chargeable offense. (A-459). The court

then held that appellant had waived any challenge to the jury instructions without dealing with appellant's "plain error" argument: "Here, Defendant has waived any objection to the jury instructions because the parties jointly submitted a proposed jury charge before the first and second trials, [citation omitted], and Defendant did not object to the Court's proposed jury charge at either trial." (A-460).

Facts Related to the Sentencing

Prior to sentencing the government submitted a sentencing memorandum making sentencing arguments and recommendations as to all three defendants remaining in the case (co-defendant Steve Bannon was pardoned by President Trump and no longer faced prosecution by the federal government). (A- 363 – A-407). In it the government recommended below-guidelines sentences for each of the defendants, but also that appellant be sentenced to a greater term of incarceration than his co-defendants because he had not accepted responsibility for his crimes. (A-399 – A-401). The memorandum noted that co-defendant Kolfage had entered a guilty plea to the same three counts as appellant was convicted of, but had also entered guilty pleas to three counts of a federal indictment filed in Florida which included wire fraud and tax violations. (A-371). The memorandum states that the Probation Department recommended a prison term of 36 months. (A-372). It was also clear from the description that Mr. Kolfage had committed

more criminal activity than appellant. (A-366 – A-371). Note that none of the three defendants had any criminal history.

The government memorandum also described the plea agreement and proposed stipulated guidelines levels, based on the same “loss amount” (between $550,000 and $1.5 million), and noted that the Probation Department recommended a prison term of 30 months for Mr. Kolfage. (A-373).

The government then went on to recommend a guidelines calculation for appellant based on the multiple counts and a loss amount of $1.5 million to $3.5 million, without any explanation for why this loss amount differed from that of the co-defendants, despite the fact that the actual losses were all caused by the same conduct by the three defendants. (A- 377). Of course, they noted that appellant, by having gone to trial, would not be awarded a point-reduction for acceptance of responsibility, but even if appellant had been awarded the points for acceptance of responsibility, the final guidelines level was far higher than that of the co-defendants. They concluded that the sentencing guidelines range was 108 to 135 months, even though appellant (like his co-defendants) had no prior criminal history. (A-375). They noted that the Probation Department recommended a term of incarceration of 54 months. (A-406).

In the memorandum they noted that co-defendant Kolfage – whom they

described as the most culpable of the defendants (A-394) – showed through his actions after entering his guilty plea that he had not, actually accepted responsibility. (A-380 et seq.). In nine pages of discussion, including screenshots of social media posts, they showed that Kolfage continued to deny guilt. (A- 380 – A-388) and criticize the government. Indeed, the only mitigating circumstances for Kolfage were an honorable record as a veteran who lost three limbs fighting in Iraq, and the fact that he was a triple-amputee. They also argued, however (and included a document from the Bureau of Prisons), that medical and treatment accommodations can be made for him within the Bureau of Prisons. (Discussed at A-391). The government recommended a term of imprisonment of 51 months (A-389), noting: "... Kolfage is substantially more culpable than both of his remaining co-defendants, Badolato and Shea. Were it not for (a) Kolfage's physical condition and (b) Shea's additional counts of conviction and lack of acceptance of responsibility, the Government likely would have sought a sentence substantially higher for Kolfage than for Shea." (A-394).

What is noteworthy (and what was also obvious from the facts at trial) is that they conceded that appellant was the least culpable of the three defendants:

> "Shea was an active and enthusiastic participant in the scheme who received substantial personal benefits, but he was not its organizer or public face. He certainly was less critical to the scheme than either Badolato or Kolfage. At the same time, Shea's co-defendants present

> multiple significant mitigating factors that Shea does not ... (citing Kolfage's war record and stating that Badolato recently suffered a stroke). (A-405).

The government recommended a sentence of incarceration of 63 months (which is exactly what the trial court imposed, see SPA-1, Judgment).

Appellant submitted a sentencing memorandum and a supplement to the memorandum in which he objected to the government's disparate recommendation between the defendants, and also attempted to provide – if not as a formal guidelines adjustment – the basis for the court to recognize that appellant does accept responsibility for what he did wrong (certainly far more that Kolfage did, as shown by the government's memorandum) and that the fact that he went to trial because he thought he had a legal defense was not a reason to differentiate him from the co-defendants who accepted plea agreements. (A-340 and A-410).

At the sentencing hearing the government noted that an amendment to the Sentencing Guidelines was going into effect in November of this year which would reduce appellant's "base offense level" by two points in light of his complete lack of a criminal record. (A-462). The prosecutor stated that if the court took that into consideration the adjusted guidelines sentencing range would be 87 yo 108 months, as opposed to 108 to 135 months. (A-469). The government said they would continue, however to recommend a sentence of 63 months despite this

change. The court said that she would take that theoretically-adjusted guidelines sentencing range into consideration. (A-479). The defense noted that the recommendation of the Probation Department, without any consideration of the prospective guidelines amendment, was that appellant be sentenced to 54 months incarceration. (A- 359).

The court sentenced appellant to the 63 months recommended by the government, noting that the sentences of the other two defendants – 51 months and 36 months respectively – represented a justified disparity because they both had "significant health issues." (A-484).

Argument

POINT I

THE TRIAL COURT ERRED IN DECLINING TO QUESTION A JUROR ABOUT POSSIBLE BIAS AND MISCONDUCT WHEN SUCH AN INQUIRY COULD HAVE BEEN VERY MINIMALLY INTRUSIVE BUT WHERE FAILURE TO DO SO RESULTS IN A LACK OF FAITH IN THE INTEGRITY OF THE VERDICT.

Summary of the Argument

The trial court declined to question a juror who, one day after the trial, was discovered by the prosecutors to have been the parent of a law student who was being "mentored" by a member of the prosecution team over the prior three years,

and who (even though the juror was herself a lawyer) did not reveal in the jury-selection process (or any time during the trial) the relationship, and who had been communicating about the trial in some way "all week" with her offspring about the trial,.

The government submitted a letter a few days after the jury returned a verdict and the jury was discharged stating that they had learned, via an email, that one of their "team" had been mentoring a law student who was, in fact, the daughter of one of the jurors in the case, and that neither the juror nor the government had revealed the relationship during jury selection or during the trial. There was no information available on whether the juror, either as a prospective juror during jury selection ("voir dire") or later had realized or known about the mentoring relationship or that the mentor was one of the prosecutors on the case. There was no suggestion that the prosecutor involved knew of the relationship between the juror and her mentee. This discovery was made when an email from the mentee was received by the government. In it the mentee said that she and her mother (the juror) had "heard lots about it all week [the trial occurred over a one-week period], congratulations on your win!"

Despite the reluctance to hold hearings after a verdict has been rendered when there is some evidence of improper juror contact or that a juror withheld

information during jury selection relevant to the fairness of the proceedings, where such an inquiry can be conducted by the court, rather than by counsel, in a minimally intrusive or embarrassing way, it is an abuse of discretion to refuse to do so in the face of evidence that impropriety may have occurred.

Standard of Review

This Circuit reviews a trial judge's handling of alleged jury misconduct for abuse of discretion. *United States v. Sabhnani*, 599 F.3d 215, 250 (2d Cir. 2010). *United States v. Baker*, 899 F.3d 123, 130 (2d Cir. 2018).

The Law

This Court in *United States v. Baker*, 899 F.3d 123, 130 (2d Cir. 2018), supra, held that "a post-verdict inquiry into allegations of [jury] misconduct is only required 'when there is clear, strong, substantial and incontrovertible evidence ... that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial of a defendant.'" (quoting *United States v. Moon,* 718 F.2d 1210, 1234 (2d Cir. 1983)). In *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989)) this Court stated that trial courts should refuse to allow questioning of jurors after the rendering of a verdict "merely to conduct a fishing expedition."

On the other hand, *Ianniello* itself cited and quoted *United States v. Moten*,

582 F.2d 654, 664 (2d Cir. 1978)): "...a defendant has a constitutional right to be tried by an impartial jury, 'unprejudiced by extraneous influence, and when reasonable grounds exist to believe that the jury may have been exposed to ... an [improper] influence, the entire picture should be explored. Often, the only way this exploration can be accomplished is by asking the jury about it." (Quoted in *United States v. Ianniello*, 866 F.2d 540, at 543. The Court in *United States v. Moten*, stated:

> The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ." In *Remmer v. United States*, 347 U.S. 227 ,,, (1954) ("*Remmer I*"), the Supreme Court said,
>
> In a criminal case, <u>any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial</u>, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but <u>the burden rests heavily upon the Government</u> to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." [Emphasis added.]

Thus the *Moten* Court, after recognizing the strong interests against doing so, stated that it was sometimes a necessity, by saying:

> On the other hand, the defendant has a right to a trial by an impartial jury, unprejudiced by extraneous influence, *Remmer I*, *supra*, and when reasonable grounds exist to believe that the jury may have been exposed to such an influence, "the entire picture should be explored,"

> *Remmer II*, supra, 350 U.S. [377] at 379 [(1956)], 76 S. Ct. at 426. Often, the only way this exploration can be accomplished is by asking the jury about it. See, e. g., *United States v. Winters*, 434 F. Supp. 1181 (N.D.Ind.1977). *Moten*, supra, at 664. [Emphasis added.]

This Court also stated, "...The rules relating to post-trial interviewing of jurors are less well-developed than the rules relating to the admission of juror testimony in order to impeach a verdict. Nevertheless, many of the same interests are implicated in both situations, and so the same sort of balancing is appropriate to both." *Moten*, supra, at 665, [Emphasis added]. Indeed, in *Ianniello* the Court stated: "The requirements of 'strong substantial and incontrovertible evidence"'do not demand that the allegations be irrebuttable; if the allegations were conclusive, there would be no need for a hearing. In a case such as this, 'the trial court should not decide and take final action *ex parte* ..., but should determine the circumstances ... in a hearing with all interested parties permitted to participate.' *Remmer*, 347 U.S. at 229-30." *Ianniello*, supra, at 543.

A question presented by these facts is how to reconcile the rule that states that questioning of a juror after the trial should be done only reluctantly with the statement in *Moten* that "[o]ften the only way this exploration can be accomplished is by asking the jury about it." (Id.)[Emphasis added]. The conundrum is presented because this Court also disfavors the defense(or either party) from engaging in their own investigation of the possible misconduct by

approaching the juror without court supervision. As this Court stated in *Moten*:

> It is well established in this Circuit that in order to insure that jurors are protected from harassment, a district judge has the power, and sometimes the duty, to order that all post-trial investigation of jurors shall be under his supervision. *Miller v. United States*, 403 F.2d 77, 81-82 (2d Cir. 1968). "Whether all investigations of jurors need be under judicial control from the onset is debatable. The American Bar Association's Code of Professional Responsibility permits investigations without court supervision but suggests that they be conducted "with circumspection and restraint.' " 3 Weinstein's Evidence P 606(03), at 606-27 (1976), Citing EC 7-30 (1969). Id., at 582 F.2d at 664.

The ABA's Standards Relating to the Administration of Criminal Justice suggest notice to opposing counsel and the court:

> After verdict, the lawyer should not make comments concerning an adverse verdict or ask questions of a juror for the purpose of harassing or embarrassing the jury in any way which will tend to influence judgment in future jury service. If the lawyer has reasonable ground to believe that the verdict may be subject to legal challenge, he may properly, if no statute or rule prohibits such course, communicate with jurors for that limited purpose, upon notice to opposing counsel and the court. Id., at 665.

Discussion

The appropriateness of conducting any kind of post-verdict inquiry of a juror, and the manner of handling the inquiry, should be determined on a case-by-case basis. Appellant submits that the test from *Baker*, supra, as stated by the trial court, oversimplifies the inquiry. What constitutes "clear, strong, substantial and

incontrovertible evidence ... that a specific, nonspeculative impropriety has occurred ...” will vary from case to case.

But it should also be “balanced” against the level of intrusion required to put the issue to rest, or, on the other hand, be certain that a violation of the rules has occurred. As *Moten* said, “Often, the only way this exploration can be accomplished is by asking the jury about it.” Id., 582 F.2d at 664.

The necessity of conducting this balancing of interests concerning whether to interview jurors was not addressed in the *Ianniello* case because there had already been interviews of the jurors conducted that resulted in affidavits being presented to the court. *Ianniello*, id., at 541. In our case the requested questioning would not have been a “fishing expedition” because the parameters of the possible misconduct were clearly delineated. Moreover the intrusiveness of the court making an inquiry could clearly have been balanced by using less intrusive methods of conducting “the hearing,” for example, out of the presence of the attorneys after their positions on what to ask had been ascertained. See, for example, *United States v. Calbas,* 821 F.2d 887, 894 and 896 (2d Cir. 1987) (court can question the juror outside of the presence of counsel and the parties after consulting with the parties on what to ask).

Clearly, rather than asking the trial court for permission to interview the

juror, the request which was made by defense counsel to have the court conduct such an inquiry was the far better approach. Indeed, on this appeal this Court should clarify the statements quoted here from *Moten* and the other cases which discourage, or essentially prohibit defense attorneys or their investigators from approaching jurors where the clearly less-intrusive approach is for the court to make the inquiry after an issue has been raised.

In this case there was clear evidence of possible misconduct, in particular, of the juror having a bias in favor of the government attorney who was prosecuting the case and of communications during trial between the juror and her offspring who had a relationship with one of the government attorneys who was trying the case against appellant. It was not the ""clear, strong, substantial and incontrovertible evidence" that the trial court demanded of defense counsel because there was no way for defense counsel to obtain it. Perhaps the government knew more: it is not known whether there was more information provided by the mentee to the government attorneys, or whether the government attorneys had any further conversations or communications with the mentee about the contact during the trial between the mentee and her juror mother. But the most appropriate way to have developed the knowledge of what may have transpired was for the court to conduct a minimally-intrusive inquiry of the juror, perhaps even by telephone or

without the presence of the attorneys, simply to either make sure there was nothing there, or alternatively to discover whether there was a violation of the court's direction to the jurors not to communicate with outsiders about the case while the trial was in progress, or whether the juror actually was completely impartial in light of the special relationship her daughter had with one of the prosecutors in the case.

Because it is too late to fairly root out what may have been impropriety in the jury deliberations appellant asks this Court to grant a new trial.

POINT II

COUNT TWO OF THE INDICTMENT SHOULD BE VACATED AND DISMISSED EITHER BECAUSE IT FAILED TO STATE AN OFFENSE UPON WHICH THE DEFENDANT CAN BE CHARGED OR THE COURT'S INSTRUCTIONS TO THE JURY, BY TRACKING THE ERRONEOUS LANGUAGE OF THE COUNT, PERMITTED THE JURY TO CONVICT ON A LEGALLY INVALID THEORY OF GUILT.

Standard of Review

We ask this Court to review the issue of whether count two of the indictment should be dismissed because of the erroneous and misleading language contained in it as a matter of "plain error" pursuant to Rule 52 of the Federal Rules of Criminal Procedure.

Until the Supreme Court decided *Cotton v. United States*, 535 U.S. 625

(2002) it was widely assumed that a defective indictment deprived the court of jurisdiction. For that reason the Federal Rules of Evidence, Rule 12(b)(3)(B)[prior to 2014] stated "...but any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense." After the *Cotton* case was decided, however, the rule was revised in 2014, specifically referring to the *Cotton* case, and moved the motion for "failure to state an offense" subsection into a list of motions that "must" be made pre-trial in 12(b)(3)(B)(v). For that reason most of the decisions of this Circuit and other courts that treated "failure to state an offense" as jurisdictional are not instructive.

A close look at the *Cotton* case, however, reveals what the 11th Circuit said about it in *United States v. Peter*, 310 F.3d 709, 713-714 (11th Cir. 2002), that the *Cotton* only really held that certain kinds of defects are not jurisdictional, particularly where they only affect the length of sentence that can be imposed, or where the defect is overcome by the overwhelming evidence of whatever might have been omitted in the indictment. As stated in by a District Court in Florida: "In *Peter*, the Eleventh Circuit Court of Appeals reaffirmed its ruling that a 'claim that the indictment failed to charge an offense is a jurisdictional claim not waived by the entry of a guilty plea.' Id. (quoting *United States v. Tomeny*, 144 F.3d 749,

751 (11th Cir. 1998)). Hence, if an indictment charges a non-offense, or fails to state an offense, the court lacks jurisdiction to accept a plea. Id.; see 18 U.S.C. § 3231 (providing that district courts have jurisdiction over 'offenses against the laws of the United States')." See, *United States v. Coiro*, 922 F.2d 1008, 1013 (2d Cir. 1991) (where defendant argued on appeal that indictment was defective, and the court of appeals held that it would review for "plain error" because the alleged defect "[went] to whether the conduct proved is punishable under the statute charged")[Emphasis added].

Because the failure to state an offense can be jurisdictional in its importance, even despite the overly-emphasized ruling in the *Cotton* case, this Court should be able to review the defect at any time it is raised so long as the case is pending, as stated in the pre-2014 form of Rule 12. Note that after the Rule was also amended in 2014 to replace the language of Rule 12(e)(when there was a failure to make a motion described as a "waiver"), which stated "For good cause the court may grant relief from the waiver. ..." with the current language in Rule 12(c)(3)(discussing motions that are "untimely") saying: "But a court may consider the defense, objection or request if the party shows good cause."

Summary of the Argument

The parties agree that the language in count two of the indictment was not a

correct statement of the law when it stated that the proceeds of a wire fraud conspiracy can be the basis of a money-laundering charge. Moreover the indictment did not allege any additional "correct" criminal sources of the money to which the jury could have turned to as an alternative. The error was emphasized by the trial court's saying that "as a matter of law" the jury is instructed that any proceeds of the conspiracy charged in count one was sufficient, leading the jury to believe that they need look no farther for any other "specified unlawful activity" that might have generated money to be laundered.

Whether the erroneous language of count two amounted to a "failure to state a crime," and whether the erroneous jury instructions on the count was "plain error," basically overlap, but there are differences in whether the issue was "waived" (allowing for "plain error" review) or "forfeited." See discussion in *United States v. Olano*, 507 U.S. 725, 733-34 (1993) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). The trial court, in issuing an order filed July 14, 2023 (A- 455) addressed the issue of whether the indictment language was faulty even after a verdict was rendered, but found that the challenge to the jury instruction on the same point was, in effect, forfeited – and therefore

not even subject to "plain error" review, because it was "invited error" brought on by the fact that both parties joined in the requested language. (A-460). In this case there was absolutely no evidence that the defense intentionally gave up the right to move to dismiss the count for some strategic reason, and therefore, because of the waiver of the objection, this Court still had the power to review whether the error was "plain."

Failure to State a Crime

The Federal Rules of Criminal Procedure require an indictment to be "a plain, concise and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c). The Rules permit the dismissal of a criminal indictment where the indictment "fail[s] to state an offense." Fed. R. Crim. P. 12(b)(3)(B)(v). "Since federal crimes are 'solely creatures of statute,' a federal indictment can be challenged on the ground that it fails to allege a crime within the terms of the applicable statute." *United States v. Aleynikov*, 676 F.3d 71, 75-76 (2d Cir. 2012) (citing *Dowling v. United States*, 473 U.S. 207, 213, 105 S. Ct. 3127, 87 L. Ed. 2d 152 (1985); *United States v. Pirro*, 212 F.3d 86, 91-92 (2d Cir. 2000)). Indeed, the holding in *United States v. Aleynikov*, supra, makes it very clear that if the language of the charge in the indictment is an erroneous statement of the law the charge is insufficient and must be dismissed, even after

the trial. Id. This is not an issue of clarity of the language, or the language being over-broad, or the indictment being duplicitous: if the language is plainly wrong the count must be dismissed, as the error affects substantive rights.

The trial court, in the post-verdict order, found that the offending language was basically unnecessary surplusage. (A- 455) . The court quoted *United States v. Agrawal*, 726 F.3d 235, 261 (2d Cir. 2013) when is said, "... the "to wit" clause is properly understood to be illustrative rather than definitional of the core of criminality charged by the grand jury...." The court, however, failed to note the following language in the *Agrawal* decision that clearly distinguished it from the case at bar, "The conclusion applies with more force here, where as part of a detailed and unaltered scheme, the indictment served notice of every means of theft referenced by the prosecution in urging conviction." Id. The trial court also cited *United States v. Stavroulakis,* 952 F.2d 686, 691 (2d Cir. 1992) to support the idea that the specified unlawful activity is not an essential element of the statute that needs to be proved in a money-laundering conspiracy case, as illustrated by *Stavroulakis*'s statement that the conspirators need not agree on what "specified criminal activity" is the source of the money, so long as they each believed that there was some such source. The court found that since the "specified criminal activity" was considered to be "ancillary" (citing *Stavroulakis*

at 952 F.2d at 690-691) that the error in the language was not important and that if it had been removed the count would have still stated an offense. Indeed, the count without the specification of the source of the money might have, in fact, been sufficient, but that is not what the jury here was presented with. By leaving the offending language in the count, and by emphasizing to the jury that "as a matter of law" any proceeds of the conspiracy charged in count one was sufficient to support a conviction, the jury was never given instructions to look for any alternative basis for even the belief by the alleged co-conspirators that the source of the money was from any of the types of criminal activity specified in the statute. Neither does the trial court's reference to *United States v. Neuman*, 621 F. App'x 363, 365-66 (9th Cir. 2015) support the alleged harmless effect of the error: even though the underlying criminal activity need not have been committed by the defendant charged, there still had to be a belief proved beyond a reasonable doubt that the defendant believed the source of the money was from one of the kinds of crime specified in the statute, and not some other kind of crime (like conspiracy).

The purpose of the indictment is, among other things, to inform the jury of what the government contends was the basis for believing a crime was committed. If it stated something that is simply not a crime, the theoretical excising of the offending language (which did not happen before the jury saw it) to make the

charge correctly state a crime is of no use: the jury relied on what the entire language was in order to find appellant guilty of count two.

Indeed, normally when the government recognizes that an indictment erroneously states the law on what elements of the offense are being alleged, it will withdraw their opposition to a dismissal of a count. As an example, the Solicitor General recommended a *vacatur* of the Third Circuit's judgment in *Murray Rojas v. United States*, 21-1504 (Order of Nov. 1, 2021) (summary disposition). In the decision by District Judge Kenneth Karas in *United States v. Post*, 950 F. Supp. 2d 519, 531-32 (S.D.N.Y. 2013), by contrast, the theoretical removal of the erroneously-stated language would still leave other bases for finding the correct kinds of "specified" activity, and thus the indictment in that case still stated an offense. Id., at 532.

Here, the problem is not whether the indictment, with the "to wit" language taken out, would still be sufficient to state an offense, but rather whether the indictment, with the offending language present, was completely wrong and misleading to the jury in what they could find as "specified criminal activity," and it gave no alternative correct examples the jury could have considered. The jury was required to make at least the minimal finding that the alleged conspirators believed that the source of the money to be laundered was one of the actual

"specified" forms of criminal activity required by the statute.

By presenting the jury with an indictment that simply instructed them that a finding of guilt on the conspiracy charged in count one (which was wrong) was as far as they needed to go in considering what unlawful activity was the source of the money, and by emphasizing the error with an instruction that told them that "as a matter of law" the conspiracy charged in count one was sufficient to establish a belief of what the source was, there was plain error caused by the language of the indictment, and thus the conviction on that count should be vacated and the count dismissed.

The Court should dismiss count two after vacating the conviction because jeopardy has attached. See *Martinez v. Illinois*, 572 U.S. 833, 834, (2014).

Erroneous Jury Instructions

When the jury instructions on an erroneously-stated count in an indictment track the language of the count and thereby carry forth the error the count must also be vacated and dismissed so long as the error is "plain." Here the trial court's instruction stated that the "conspiracy" charged in count one, as a matter of law, can be the basis for a finding for count two that the money being laundered was believed to be the proceeds of "specified unlawful activity," but because a conspiracy to commit fraud is not one of the specified forms of unlawful activity,

the instruction was wrong.

Waiver of the Objection vs. Forfeiture of the Objection
based on "Invited Error."

While the parties agreed, after the trial, that the jury instruction on "specified unlawful activity" was erroneous, the trial court refused to vacate the conviction on count two on that basis stating that because the parties had jointly proposed the jury instruction, that they had "invited" the error, and that therefore the error was not even reviewable as a matter of "plain" error.

The difference between an issue that is waived and an issue that is forfeited was discussed by the U.S. Supreme Court in *United States v. Olano*,, supra, as already stated. The *Olano* decision made the basis for this ruling clear as follows:

> Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938). [citations omitted] ... Mere forfeiture, as opposed to waiver, does not extinguish an "error" under Rule 52(b). ... If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an "error" within the meaning of Rule 52(b) despite the absence of a timely objection. Id., at 507 U.S. 733-34.

This Circuit elaborated on the application of these principles in *United States v. Quinones*, 511 F.3d 289, 321 (2d Cir. 2007):

> The law is well established that if, "as a tactical matter," a party raises no objection to a purported error, such inaction "constitutes a true 'waiver' which will negate even plain error review." [citations omitted]. ... A finding of true waiver applies with even more force when, as in this case, defendants not only failed to object to what they now describe as error, but they actively solicited it, in order to procure a perceived sentencing benefit."

Several cases from this Circuit give examples of when the party now objecting to a jury instruction has fully waived later review, even "plain error" review. In these cases it was clear that the defense attorney actively endorsed the erroneous language, thereby "inviting" the trial court to walk into the error. Cf., *United States v. Hertular*, 562 F.3d 433, 444 (2d Cir. 2009) :

> ...his counsel specifically "endorse[d]" it. Trial Tr. at 838 (stating, in response to government request to add highlighted language to charge, "With respect to that change, I endorse that change."). Such endorsement might well be deemed a true waiver, negating even plain error review. Id.

See also, *United States v. Giovanelli*, 464 F.3d 346, 351 (2d Cir. 2006):

> Giovanelli has waived his challenge to Judge Rakoff's jury charge. It was at Giovanelli's request -- and with his approval -- that Judge Rakoff omitted the "natural and probable" language from the jury charge. Both the government's proposed jury charge, and Judge Rakoff's draft jury charge, included the "natural and probable effect" phrase; only Giovanelli objected to the language. And when Judge Rakoff, responding to Giovanelli's

> objection, presented the parties with a revised draft jury charge that no longer included the "natural and probable effect" language, Giovanelli's counsel acknowledged that she was "happy about [that particular omission]." Thus, there was "approval or invitation" of the omission (indeed, both), Id.

Again, there is no evidence anywhere in the record of either trial that defense counsel for appellant had an ulterior strategic motive for intentionally waiving an objection to the charge. The only rational basis for finding that trial counsel intentionally withheld making a motion before trial was so that he would be able to make it after jeopardy had attached, for example, as part of a Rule 29 motion at the close of the government's case. Clearly, as counsel did not do that at either of Mr. Shea's two trials, he obviously did not have a strategic reason in mind for failing to make the motion before trial.

Most imporant, however, on the waiver issue, however, is that while the proposed jury charge request was made jointly, it was made by tracking the erroneous language of the indictment, which was not jointly prepared. The government created the issue by drafting the indictment that way, and the defense merely failed to notice the error either in the indictment or in the jury charge that incorporated the offending language from the indictment. There was no forfeiture here, and this Court should review the erogenous jury charge, particularly as it

compounded the effect of the erroneous language in the indictment.

For those reasons the conviction on count two should be vacated, and because jeopardy has attached, the count dismissed.

POINT III

THE SENTENCE IMPOSED, WHILE NOT"SHOCKING," WAS NEVERTHELESS UNREASONABLE IN LIGHT OF APPELLANT'S ROLE IN THE CASE, HIS COMPLETE LACK OF CRIMINAL HISTORY OR ANY NON-CHARGED BAD BEHAVIOR, AND CREATED A DISPARITY IN SENTENCING WITH HIS CO-DEFENDANTS WHICH WAS UNREASONABLE.

Standard of Review

This Court reviews a defendant's sentence for reasonableness, an inquiry that has both procedural and substantive dimensions. *See Gall v. United States*, 552 U.S. 38, 51 (2007); *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (*en banc*). Indeed, as this Court explained in *Cavera*, an appellate court's deference to a district court's sentencing determination is warranted only after and, indeed, because the sentencing court has demonstrated it has complied with its procedural obligations. *See Cavera*, 550 F.3d at 189–90 ("Given the broad substantive discretion afforded to district courts in sentencing, there are concomitant procedural requirements they must follow.") (quoting *In re Sealed Case*, 527 F.3d 188, 191 (D.C. Cir. 2008)). Among these procedural obligations

are the sentencing court's requirement under 18 U.S.C. § 3553(a) to impose a sentence "sufficient, but not greater than necessary," to comply with specific, enumerated sentencing purposes. See 18 U.S.C. § 3553(a)(1)–(7). Failure properly to consider the statutory sentencing factors is procedural error. *See, e.g., United States v. Wagner-Dano*, 679 F.3d 83, 88–89 (2d Cir. 2012).

First, a district court procedurally errs when it "fail[s] to adequately explain [emphasis added] the chosen sentence -- including an explanation for any deviation from the Guidelines range." *See Gall*, 552 U.S. at 51; *see also In re Sealed Case*, 527 F.3d at 191 ("When a district judge fails to provide a statement of reasons, as § 3553(c) requires, the sentence is imposed in violation of law.").

Section 3553(a)(6) of Title 18 requires a sentencing court to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *See* 18 U.S.C. § 3553(a)(6) (emphasis added). As this Court has explained, the disparities with which § 3553(a)(6) is concerned are *nationwide* disparities, rather than disparities between co-defendants in the same case. *See United States v. Frias*, 521 F.3d 229 (2d Cir. 2008) at 236. That being said, this Court has acknowledged that it "is not entirely clear what exactly it means for a district judge to consider the effects of an individual defendant's sentence on nationwide disparities," although, "in order to

avoid redundancy with § 3553(a)(4), it must require something different than mere consideration of the Guidelines." *See United States v. Wills*, 476 F.3d 103, 110 (2d Cir. 2007).

In addition to review for procedural reasonableness, this Court reviews a criminal sentence for substantive reasonableness, a standard "akin to review for abuse of discretion." *See Gall*, 552 U.S. at 46; *United States v. Fernandez*, 443 F.3d 19, 26–27 (2d Cir. 2006). Accordingly, the Court considers whether the sentencing judge "committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact." *See Fernandez*, 443 F.3d at 27 (quotation marks and brackets omitted). As reasonableness is a fact-specific inquiry, this Court will "examine the record as a whole to determine whether a sentence is reasonable in a specific case." *See id*. at 28.

In reviewing a sentence for substantive reasonableness, this Court has analogized to the standard of reviewing whether a guilty verdict is "manifestly unjust," or whether a state actor's intentional tort "shocks the conscience." *See United States v. Rigas*, 583 F.3d 108, 122–23 (2d Cir. 2009). Such review necessarily involves deference to the sentencing court, yet this and other Circuits have explicitly cautioned the reviewing court against merely "rubber-stamping" the sentencing court's opinion. *See United States v. Rattoballi*, 452 F.3d 127, 132

(2d Cir. 2006) ("Our review for reasonableness, though deferential, will not equate to a 'rubber stamp.'"); *see also Rigas*, 583 F.3d at 122 (citing Fourth and Tenth Circuit cases that similarly admonish the Court not to reduce appellate review of a sentence to a mere "rubber stamp"). Rather, substantive reasonableness review serves as a "backstop" for cases where "the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *See Rigas*, 583 F.3d at 123.

<u>Discussion</u>

Despite the focus on "nationwide" disparities in sentences imposed using the factors stated in 18 U.S.C. § 3553(a), this Court, and the court below, should have given more consideration of, and a more detailed explanation of, the disparities among the sentences imposed on appellant as compared with his co-defendants. In this case, the only such "similar conduct" (meaning the criminal conduct and level of culpability) is reflected in the conduct of the two co-defendants in this case, as the case itself presented a very unusual fact pattern. Indeed, the likely focus of the courts on disparities across different cases and different parts of the country is because it should not have to be articulated that fairness in the imposition of sentences on co-defendants within one case is a given.

In this case the three defendants were all white, middle-class men with no criminal records, but their roles in the offense were very different. Appellant was not the one who conjured up the fraudulent scheme, and was not the one who made a promise to the public not to be paid for his services. He was paid for actual services provided to the effort to build a portion of border wall. His crime was in helping Koffage get paid for his services to the project after Kolfage (and not appellant himself) had promised that he would not take any compensation, and then helping Kolfage cover up the money transfers. The court acknowledged that appellant was less culpable than the co-defendants in noting that "[t]he government states that Mr. Shea certainly was less critical to the scheme than either Mr. Badolato or Mr. Kolfage." (A-484). Nevertheless, the court – closely following the government's recommended sentences, sentenced appellant to 63 months incarceration while only imposing 51 months on Kolfage (the originator, leader, and prime beneficiary of the scheme) and 36 months on Badolato.

The other differences, except for the health issues of the co-defendants, were in appellant's favor: unlike both of the other two there was no hint that he had committed any other crimes, frauds, or tax-evasions (Kolfage was charged in a Florida indictment as well as in this case, and Badolato apparently have been investigated in the past but cooperated with the government to avoid prosecution

[the details were redacted from the record]. Although the other two defendants entered guilty pleas, the government presented sixteen pages of evidence that Kolfage had not actually accepted responsibility. Finally, appellant had family responsibilities and a stellar record of meeting them, to his three teen-age children and his wife for which there was no obvious equivalent in the other two defendants.

Here the trial court did give a lengthy explanation of the sentence she was imposing, but failed to explain how the one difference that she did find important – the health issues of the co-defendants, justified the disparity in prison time imposed. (See A- 23) It goes without saying that Kolfage, who was a triple-amputee, will have a difficult time in custody, and yet in his rather extreme case the proper response might well have been not to incarcerate him at all, but instead impose some other kind of confinement more suitable for a person in a wheelchair instead of sending him to prison for fifty-one months. Similarly, the only identified health issue the court mentioned for the other co-defendant (other than the usual health issues of advancing age such as high blood pressure) was that he had recently had a stroke. It would seen that would either be something that should make it too dangerous to incarcerate him at all, or be something that the Bureau of Prisons can handle and therefore not be a reason to reduce the sentence. The only

thing the sentencing court said about these differences, however, was: “The Court previously sentenced Mr. Kolfage to 51 months' imprisonment, and Mr. Badolato to 36 months' imprisonment. However, both Mr. Kolfage and Mr. Badolato had severe medical conditions which were extremely strong mitigating factors during their sentencings.” (A- 484).

Finally, the trial court acknowledged appellant’s efforts to accept responsibility and to explain why he nevertheless went to trial. (See A- 484). While not fully accepting responsibility because he had differences with the government over some of the facts in the case, detailed at A-340 – A-353 (initial Sentencing Memorandum), he did, as the court stated, make some effort to accept responsibility and did express remorse for his actions (See A-354 – A-355) (unlike Mr. Kolfage). See also, A-415 – A-417 (reply to government’s sentencing memorandum). Given Kolfage’s basic failure to accept responsibility (despite pleading guilty)(see government sentencing memorandum at A-380 – A-388), this should not have been a basis for the sentencing disparity that occurred. Instead the disparity leaves the strong impression that appellant was being punished for exercising his right to a jury trial.

Appellant asks this court to remand for resentencing so that the term of incarceration can be brought more in line with that imposed on the more culpable

co-defendants.

CONCLUSION

For the foregoing reasons this Court should vacate the conviction on all three counts in this case because if the failure to inquire into possible juror impropriety. In the alternative this Court should vacate the conviction on count two of the indictment and dismiss the count. Alternatively, this Court should remand the case for resentencing in light of the unreasonable sentencing disparity among the defendants in this case.

Dated: New York, New York
December 8, 2023

Respectfully submitted,

/s/ Thomas H. Nooter
THOMAS H. NOOTER
Attorney for Appellant

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPE-FACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 11,981 words, excluding parts of the brief exempted by Fed. R. App. P. 32(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 proportionately spaced typeface using Corel Word Perfect in Times New Roman 14-point font.

Dated: New York, New York
December 8, 2023

/s/ Thomas H. Nooter
THOMAS H. NOOTER
Attorney for Appellant

SPECIAL APPENDIX

SPECIAL APPENDIX
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AO 245B (Rev. 09/19) Judgment in a Criminal Case (form modified within District on Sept. 30, 2
Sheet 1

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 7/26/2023

UNITED STATES DISTRIC

Southern District of New Yor

UNITED STATES OF AMERICA
v.
Timothy Shea

JUDGMENT IN A CRIMINAL CASE

Case Number: 20 Cr. 412-4

USM Number: 05591-509

Thomas Nooter
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s)
which was accepted by the court.

☑ was found guilty on count(s) 1, 2, 3
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1349	Conspiracy to commit wire fraud	6/30/2020	1
18 U.S.C. § 1956(h)	Conspiracy to commit money laundering	6/30/2020	2
18 U.S.C. § 1519	Falsification of records	10/31/2019	3

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Count(s) all underlying counts ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

7/25/2023
Date of Imposition of Judgment

Signature of Judge

Analisa Torres, United States District Judge
Name and Title of Judge

7/25/2023
Date

DEFENDANT: Timothy Shea
CASE NUMBER: 20 Cr. 412-4

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
63 months on each count, to run concurrently

☑ The court makes the following recommendations to the Bureau of Prisons:
The Court recommends that the Defendant be detained at FCI Englewood.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at ________ ☐ a m. ☐ p.m. on ________ .
- ☐ as notified by the United States Marshal.

☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☑ before 2 p.m. on 10/23/2023 .
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on ________ to ________

at ________ , with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By ________
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Timothy Shea
CASE NUMBER: 20 Cr. 412-4

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

3 years on each count, to run concurrently

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   ☑ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Timothy Shea
CASE NUMBER: 20 Cr. 412-4

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature ______________________ Date ____________

DEFENDANT: Timothy Shea
CASE NUMBER: 20 Cr. 412-4

SPECIAL CONDITIONS OF SUPERVISION

You must provide the probation officer with access to any requested financial information.

You must not incur new credit charges or open additional lines of credit without the approval of the probation officer unless you are in compliance with the installment payment schedule.

You shall submit your person, and any property, residence, vehicle, papers, computer, other electronic communication, data storage devices, cloud storage or media, and effects to a search by any United States Probation Officer, and if needed, with the assistance of any law enforcement. The search is to be conducted when there is reasonable suspicion concerning violation of a condition of supervision or unlawful conduct by the person being supervised. Failure to submit to a search may be grounds for revocation of release. You shall warn any other occupants that the premises may be subject to searches pursuant to this condition. Any search shall be conducted at a reasonable time and in a reasonable manner.

If the probation officer determines, based on your criminal record, personal history or characteristics, that you pose a risk to another person (including an organization), the probation officer, with the prior approval of the Court, may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

It is recommended that you be supervised by the district of residence.

DEFENDANT: Timothy Shea
CASE NUMBER: 20 Cr. 412-4

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 300.00	$ 1,801,707.00	$	$	$

☐ The determination of restitution is deferred until ________. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ ________

☑ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Timothy Shea
CASE NUMBER: 20 Cr. 412-4

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

Defendant shall pay the victims pursuant to the consent order of restitution filed on the docket and the schedule of victims that has been filed under seal.

DEFENDANT: Timothy Shea
CASE NUMBER: 20 Cr. 412-4

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 300.00 due immediately, balance due

☐ not later than ______________, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal ________ *(e.g., weekly, monthly, quarterly)* installments of $ ________ over a period of ________ *(e.g., months or years)*, to commence ________ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal ________ *(e.g., weekly, monthly, quarterly)* installments of $ ________ over a period of ________ *(e.g., months or years)*, to commence ________ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within ________ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:
upon your release from prison, you shall commence monthly installment payments in an amount equal to 15% of your gross income, payable on the 1st of each month

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☑ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
20 Cr. 412-2, Andrew Badalato 20 Cr. 412-1, Brian Kolfage	25,601,615.00		

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:
any and all property used or intended to be used in any manner or part to commit and to facilitate the commission of the offense alleged in Count 1 of the Superseding Indictment, specifically a sum of money equal to $1,801,707

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.