No. 10-4658

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

v.

IAN P. NORRIS,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR APPELLANT IAN P. NORRIS

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I. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONSPIRACY TO VIOLATE 18 U.S.C. §§ 1512(B)(1) OR 1512(B)(2)(B)

Unable to identify substantial evidence that Norris and the alleged co-conspirators agreed to "the specific unlawful purpose[s] charged in the indictment," *Schramm*, 75 F.3d at 159, the Division can only ask this Court to impermissibly accept "inference upon inference," *Klein*, 515 F.2d at 753.

A. No Rational Jury Could Find An Agreement To Corruptly Persuade Others To Influence Their Grand Jury Testimony

1. The Division's Brief Fails To Identify Substantial Evidence Establishing Specific Intent

The Division does not and cannot dispute that not a single witness at trial testified about any conspiracy to influence anyone's grand jury testimony. The Division also does not and cannot dispute that these alleged conspirators testified uniformly that they did not know what a grand jury was. Norris Br. at 19-20. Given the utter absence of any true evidentiary support for an alleged conspiracy to influence grand jury testimony, the Division can only point to the vaguest, most attenuated evidence and ask that the most unreasonable inferences be drawn. These efforts do not come close to satisfying the demands of *Schramm* and other controlling cases.

First, the Division refers repeatedly to evidence that Norris agreed with a suggestion by Keany to offer up witnesses to testify before the grand jury. Div. Br. at 12, 29, 30, 34, 66. But the Division fails to state a crucial undisputed fact

undermining the relevance of this exchange between Norris and Keany: it *occurred in August 2001*, at the end of the alleged conspiracy period and after all of the alleged conspiratorial conduct.

This crucial fact of timing is not apparent on the face of the Division's brief. The Division's brief creates the distinct (but false) impression that the exchange occurred in the midst of the alleged conspiracy, for the Division refers to the exchange in the middle of what appears to be a chronological discussion of the facts. A glaring example of this is the Division's first reference to the exchange, on page 12, where an unsuspecting reader would never know that the exchange was being described out of sequence, sandwiched between events occurring months or years earlier.

The trial record is so devoid of references to grand jury testimony that the sole reference to grand jury testimony in the Division's factual recitation (Div. Br. 4-18) is the Division's misleading reference to the August 2001 exchange between Keany and Norris. Div. Br. at 12. Perhaps to create the illusion of substantial evidence, when referring to the August 2001 exchange between Keany and Norris, the Division's brief sometimes refers to the record cites for relevant emails, while at other times refers to Keany's testimony about those emails. Div. Br. at 29 (citing JA-1538-40, 3279-80), *id*. at 30 (citing JA-1542, Keany's testimony regarding his 8/17/01 email (JA-3279/GX-46)); *id*. at 34 (citing JA-3279-80

(8/17/01 and 8/19/01 email chain)); *see also id*. at 12 (citing JA-1534-36, 1538-40, 3279-80).

Thus, the Division asks that this Court infer *backwards in time* that Norris and his co-conspirators possessed knowledge that grand jury testimony was possible at the time of the alleged agreement, which under the Division's theory of the case, *was 1999*. But knowledge acquired in August 2001 cannot give rise to an inference that Norris and his co-conspirators formed the specific intent to conspire to influence grand jury testimony in 1999. Yet there is no evidence that any of the other alleged co-conspirators were aware of the exchange between Keany and Norris.

With similar slight of hand, the Division's brief suggests that the Court could infer the requisite specific intent from one word uttered by Kroef when asked at trial to explain the purpose behind the summaries. Div. Br. at 28. On its face, the testimony excerpted by the Division reveals that Kroef seemed unsure to whom he was supposed to tell the information. *Id*. at 28 (quoting JA-1229-30) (Tr. 12:23-13:3). He testified: "it could be anybody." *Id*. Kroef did not testify that he or the other Morgan executives *agreed* to persuade other persons to influence their grand jury testimony. The Division's brief repeats the word "anybody" (and its synonyms) with artistic license throughout its brief as though it had great probative value, when it does not. *Id*. at 20, 27, 28, 29, 32, 33, 34.

Kroef's overall testimony—that the summaries were to be used in interviews with lawyers or the Division—undermines any inferences that the "anybody" testimony meant questioning under oath before the U.S. grand jury. (JA-1334-35) (Tr. 13:19-14:2 (Kroef)) (testifying that the summaries were to be used in "rehearsal meetings" with Morgan's "British lawyers"); (JA-1335) (Tr. 14:6-20 (Kroef)) (testifying that the rehearsals were in preparation for interviews with the Division); (JA-1232-33) (Tr. 15:3-16:8 (Kroef)) (testifying that he used the summaries in his interviews with Morgan's corporate counsel). Additionally, Kroef's testimony that he did "not really" know what a grand jury was makes wholly unreasonable any inference that questions by "anybody" included testimony before the grand jury. (JA-1377) (Tr. 56:20-21).

In short, the "could be anybody" testimony, in context, is insufficient to establish the specific intent required to conspire to violate Section 1512(b)(1). *See* 18 U.S.C. § 1512(b)(1); *see generally Pierre v. Attorney General*, 528 F.3d 180, 189 (3d Cir. 2008) ("Specific intent requires not simply the general intent to accomplish an act with no particular end in mind, but the additional deliberate and conscious purpose of accomplishing a specific and prohibited result.").

The Division seeks yet another unreasonable inference (at 29) that there was an agreement to influence Schunk's grand jury testimony, this time from Weidlich's testimony. Weidlich, a German witness (at times assisted by an

interpreter) in describing what Kroef said during their November 30, 2000 meeting, used the word "testimony"—never "grand jury testimony"—towards the end of his answer. Weidlich's complete answer, however, established that Kroef was focused on the possibility that the "Schunk people will be interviewed" by lawyers, or, at most, by the Division. (JA-1783) (Tr. 9:6-18); (JA-1784) (Tr. 10:16-19). Indeed, Weidlich mentioned the concept of "interviews" several times. *Id*. Weidlich testified that Kroef told him "the Morgan people had been interviewed by the United States authorities already," that "certainly at some given time the Schunk people will be interviewed as well," and "for that, he told me that they have made a kind of protocol after those interviews." (JA-1783) (Tr. 9:6-18). As of November 2000, the Morgan executives had only been interviewed by European and U.S. counsel. (JA-1516-1517) (Tr. 77:24-78:22). Thus, when Kroef "expressed his hope" that Schunk would "say the same" as Morgan, he necessarily referred to interviews with lawyers or possibly the Division. (JA-1785) (Tr. 11:12-18). In addition, the focus on interviews makes sense given that Weidlich told Kroef that Schunk was not even under investigation. (JA-1254) (Tr. 37:12-15).

According to Weidlich's testimony concerning the February 2001 meeting, Norris similarly referenced interviews—not grand jury testimony. Norris suggested that Schunk identify individuals who might be "interviewed" and retire them to prevent the company from having to produce them for interviews. (JA-

1795) (Tr. 21:9-22); *see also* (JA-876-77) (Tr. 21:17-22:5). (This echoed advice legal counsel Chris Bright of Clifford Chance gave to Norris. *Id*.)

No rational jury could conclude that Kroef or Norris met with Schunk pursuant to an agreement to influence grand jury testimony. And, Kroef did not request that they use the summaries with "anyone who asked," as the Division states without support (at 29).

Finally, the subpoena check box, as explained in the opening brief (at 21), also does not supply sufficient evidence of the knowledge required to form the requisite specific intent, because there was no evidence that anyone saw the check box, discussed the box, or understood it to mean that there could be grand jury testimony in this investigation. (JA-3177); *see, e.g.*, *Schwarz*, 283 F.3d at 107 (declining to impute knowledge of pending proceeding to co-conspirators, despite newspaper coverage and evidence that one conspirator received a subpoena). None of the witnesses was asked to identify the subpoena at trial as a document they had reviewed during the investigation.

* * *

The Division, bearing the burden of proof, failed to elicit from any of Norris's alleged co-conspirators—all testifying with obligations to cooperate with the Division—testimony that the group agreed to use the summaries to influence other persons' grand jury testimony. *See, e.g.*, *United States v. Pinckney*, 85 F.3d

4, 5, 7 (2d Cir. 1996) (vacating conviction and finding it significant that prosecutor did not ask witness key question to establish nexus). It is truly remarkable that none of these cooperating witnesses uttered even the notion that they took any actions in contemplation of the possibility of grand jury testimony. In fact, no alleged co-conspirator—not Perkins, Macfarlane, Kroef, or anyone else—even mentioned grand jury testimony, except to say that they were never called or asked to testify. Norris Br. at 27.

In short, the trial record is devoid of any evidence that the alleged co-conspirators agreed to influence other persons' grand jury testimony, or even knew, at the time of their alleged conspiratorial agreement, that there was such a thing as grand jury testimony. In the absence of substantial evidence of specific intent or "the specific unlawful purpose charged in the indictment," a conspiracy conviction cannot stand.

2. Evidence Of An Agreement Regarding Misleading Lawyers Or Investigators Does Not Preordain The Existence Of An Agreement Regarding Grand Jury Testimony

Despite the Division's various machinations to marshal evidence supporting the charged conspiracy, the evidence showed, at most, that the co-conspirators agreed to use the summaries in interviews with company lawyers or, potentially, Division investigators. As stated in the defense's opening brief (at 8-9), Kroef and Macfarlane testified that this agreement was formed after the Division, in

September 2000, identified specific competitor meetings to Keany. *See* (JA-2646) (9/8/00 email) (identifying meeting dates); (JA-2309-11) (9/7/00 Keany email for "minutes of those meetings or reports on their contents"); (JA-1317) (Tr. 100:11-15); (JA-1716) (Tr. 72:2-19); Norris Br. at 8-9. Perkins, Macfarlane, and Kroef—who drafted the summaries—testified that the summaries were to be used "[i]n discussions with our lawyers" with the expectation that the lawyers would "tell the Department of Justice" that the investigation was "unfounded." (JA-1675-76) (Tr. 31:20-32:15 (Macfarlane)); *see also* (JA 967-68) (Tr. 113:21-114:12 (Perkins) (the summaries were "potentially needed . . . for discussion with attorneys")); (JA-1232-33, 1334-35) (Tr. 13:19-14:20, 15:3-16:8, (Kroef) (same)). The label of "Attorney Privileged Information" on most summaries further corroborates that they were intended for lawyers, a fact the Division ignores. (JA-3217-3244) (JA-1716, 1765) (Tr. 72:17-22, 121:16-23). And the Division abandons the District Court's novel "outside-lawyer-as-conduit" theory. Div. Br. at 36-37 n.9.

The Division claims it defies "common sense" that there would not also exist an agreement regarding grand jury testimony, and that the evidence "does not preclude" the possibility that the charged agreement also existed. Div. Br. at 26-29. Thus, the Division effectively asks this Court to sustain the conviction based on impermissible speculation. *See, e.g.*, *Klein*, 515 F.2d at 753 ("charges of

conspiracy are not to be made out by piling inference upon inference") (quoting *Direct Sales*, 319 U.S. at 703).

"[C]ommon sense" does not in fact support the Division's conclusion. First, if alleged conspirators foresee attorney interviews, but have no contemplation of any grand jury testimony, it would make perfect sense that their agreement would be limited to the former. Second, even where conspirators have some contemplation of grand jury testimony, reaching an agreement to persuade others to give false grand jury testimony necessarily involves different considerations and a different decision point from an agreement to persuade others to mislead lawyers or the Division in interviews, particularly among foreign laypersons who may not appreciate that there might be legal consequences even for unsworn statements to lawyers or investigators. *See* Norris Br. at 25. Interviews with lawyers or investigators are less formal and do not involve the solemn trappings of giving testimony under oath. Obviously, Congress made corrupt persuasion as to influencing testimony a violation distinct from corrupt persuasion of investigators. Moreover, controlling law dictates that evidence of one agreement will not, without more, suffice as evidence of the other. *See Aguilar*, 515 U.S. at 600-01; *Schramm*, 75 F.3d at 160-61; *Schwarz*, 283 F.3d at 109-110; *see, e.g.*, *Floresca*, 38 F.3d at 710 (overturning conviction where defendant was indicted under Section 1512(b)(1), but where jury instructed on Section 1512(b)(3)).

Aguilar effectively forecloses the Division's common-sense theory, for there the Supreme Court held that it was far too "speculative" for any rational jury to find that a defendant who lies to federal investigators (who "might or might not testify before a grand jury") intends for his false statements to be provided to the grand jury "in the form of false testimony." 515 U.S. at 600-01. This was true even though the defendant was a federal judge aware of a pending grand jury investigation. It follows from *Aguilar* that evidence of an *agreement* to mislead company attorneys or at most Antitrust Division investigators does not, without more, establish an *agreement* to persuade others to provide false grand jury testimony. Asserting that *Aguilar* is inapposite, the Division ignores the defense's observation (at 28) that the metes and bounds placed on a Section 1503 case by *Aguilar* are the precise requirements mandated by the statutory language of Section 1512(b)(1), namely, requiring evidence of specific intent to affect grand jury testimony.

This Court rejected a similar argument, couched in common sense, in *Schramm*. 75 F.3d at 160-61. There, the government argued that the defendant "must have been" a member of the charged conspiracy to evade *retail* taxes because the evidence established his membership in a conspiracy to evade *wholesale* taxes. *Id*. at 160. The government reasoned that the defendant had to be deemed a member of both conspiracies, otherwise the inconsistencies in the audit

record would have exposed the wrongdoing and the scheme would have failed. *Id*. The Court rejected this *sine qua non* argument, finding that the testimony of the alleged co-conspirator implicated only an agreement concerning wholesale taxes and could not be extended to establish participation in the retail tax conspiracy. *Id*. at 160-61; *see also Schwarz*, 283 F.3d at 109-110 (overturning conviction and finding that evidence of a Section 1001 conspiracy did not establish a Section 1503 conspiracy).

Thus, although the evidence here, viewed in the light most favorable to the Division, may suggest an agreement to persuade others to mislead lawyers or investigators, without more that same evidence is insufficient to sustain the conviction for conspiring to persuade others to give false grand jury testimony. And, as explained, there was nothing more.

B. No Rational Jury Could Find An Agreement To Corruptly Persuade Others To Keep Documents From The U.S. Grand Jury

As to the alleged document-destruction conspiracy, the Division relies almost entirely upon Kroef's testimony, on direct, that the U.S. investigation "triggered" a discussion between Kroef and Norris about doing another file check in Europe. Div. Br. at 37-43. While the Division repeatedly emphasizes Kroef's statement that the discussion was "triggered" by the U.S. investigation, neither Kroef nor anyone else ever testified that the intent of the file check was to keep documents *from the U.S. grand jury*. The Division apparently believes that one

may infer from the "trigger" comment that the ensuing EU-file check had the intent to keep the documents from the U.S. grand jury, but that is not a reasonable or permissible inference.

First, Kroef's testimony itself reflects that the EU-file check was done in contemplation of a possible EU "dawn raid" rather than concern about the U.S. grand jury. Norris Br. at 35-38 (citing (JA-1311) (Tr. 94:11-24)). Kroef testified that such EU-file checks were a regular, periodic practice, done long before the U.S. investigation. (JA-1240-45, 1311) (Tr. 23:17-28:1, 94:23-95:15). Kroef merely testified (on direct) that this particular EU-file check discussion was prompted by the U.S. investigation. (JA-1245) (Tr. 28:2-10). That the U.S. investigation may been an impetus or reminder of the need to do another EU-file check does not transform the intent behind the longstanding EU-file check practice.

The Division, acknowledging the EU motive for the file check, asserts (at 40) that it would not be "inconsistent" for there to have been a U.S. motive as well. Again, the Division engages in sheer speculation rather than identifying evidentiary support. In fact, the evidence forecloses any speculation that there was an intention to keep the EU documents from the U.S. grand jury.

The Division does not challenge the undisputed evidence that U.S. attorney Keany had unequivocally informed Norris and other Morgan executives that the

U.S. document subpoena did not reach documents in Europe. Norris Br. at 32-34. The Division speculates (at 40-42) about ways the EU documents theoretically could have come to the United States, but there is no evidence at all that any of these theoretical possibilities were known to or considered by Norris or any alleged co-conspirator. The only evidence is precisely to the contrary: Norris and others were told by counsel that the EU documents were beyond the reach of the U.S. grand jury. *Id*. at 32-33.

That Morgan, in December 2000, later voluntarily produced some foreign-located documents is of no moment, because what matters is the intent of the alleged conspirators at the time of their conspiratorial agreement. Furthermore, Keany even then obtained the Division's agreement that the production would proceed "without in any way waiving the *normal position* that subpoenas cannot reach documents located outside of the US." Norris Br. at 32-33 (quoting JA-2315); (JA-2320-21).

The Division does not challenge the undisputed evidence that Norris categorically instructed Morgan executives to comply with the obligations of that U.S. subpoena. Norris Br. at 34-35. This evidence is directly inconsistent with any speculation that Norris intended the EU-file check to deprive the U.S. grand jury of documents.

The Division also appears to argue that the nexus and intent elements of the charged conspiracy are met because, as a *by-product* of destroying documents with intent to keep them from European authorities, the documents necessarily became unavailable to the U.S. grand jury. Div. Br. at 41. This is flawed reasoning. First, the evidence established, as discussed above, that the co-conspirators believed the U.S. grand jury did not want, could not have, and would not get European-located documents. Norris Br. at 32-34. And, second, procuring a by-product effect when carrying out an act with a *different* specific intent is insufficient to establish the knowing corrupt intent required to conspire to violate Section 1512(b)(2)(B). *See Pierre*, 528 F.3d 180, 189; *Schramm*, 75 F.3d at 160-61. The documents shredded in *Arthur Andersen* were, in any event, rendered unavailable to the official proceeding. 544 U.S. at 707-08. But that was not enough. For there to be a violation, the employees had to have shredded the documents with intent to keep them from the official proceeding and not just to comply with a document retention policy. *Id*.

Kroef's testimony on direct that the U.S. investigation "triggered" the EU file-check discussion is also insufficient because he admitted on cross that he ultimately could not recall when—or even what year (JA-1315)—the discussion took place. *See* Norris Br. at 38-39. The Division, failing to dispute this recantation by Kroef, seeks refuge (at 39) in Emerson's testimony that the

European-document destruction occurred in "2000, probably in April." As evidenced by his complete testimony, Emerson was, however, equally incapable of dating the exercise after the service of the subpoena, because he could not recall whether he received the call from Kroef in 1999 or 2000. (JA-872) (Tr. 17:3-11). And again, even if the Norris discussion occurred in response to the U.S. subpoena, such evidence is still insufficient to establish specific intent to keep the documents from the U.S. rather than the E.U. *See Schramm*, 75 F.3d at 160-61.

Weidlich's testimony regarding the February 2001 meeting, cited by the Division (at 39), only confirms that Norris and Kroef were, at most, concerned about protecting their files from European authorities—not from the U.S. grand jury. Given that Morgan had "check[ed]" its European files with intent to keep documents from European authorities, the suggestion that Schunk "do the same as Morgan had done" established, at most, the same intent under which Morgan had conducted its file check (JA-1795) (Tr. 21:9-10 (Weidlich)).

Finally, the Division asserts (at 40-41) that there is no concern regarding extraterritoriality in this case. The conviction, however, rests upon Section 371 which unlike Section 1512 contains no extraterritorial provision and thus does not criminalize solely extraterritorial conduct. *See Morrison v. Nat'l Australia Bank*, 130 S. Ct. 2869, 2877 (2010).

II. FUNDAMENTAL ERRORS IN THE JURY CHARGE WARRANT A NEW TRIAL

A. The District Court Erred By Failing To Correctly Instruct The Jury On The Meaning Of "Corruptly Persuades"

1. The "Corruptly Persuades" Instruction Failed To Properly Instruct On The Law

Contrary to the Division's assertion, this Court exercises plenary review over the "corruptly persuades" instruction, because that instruction failed to provide the correct legal standard under *Farrell*, 126 F.3d at 488. *See Flores*, 454 F.3d at 156; *see* Norris Br. at 13, 45-46; (JA-1957-59) (Tr. 45:19-47:21) (defense counsel explained that the jury cannot be presumed to know what is or is not a "legal duty"). Without further explanation, the jury could easily have believed that the alleged co-conspirators had a legal duty to provide incriminating information to authorities, or that persuading a co-conspirator to withhold such information was corrupt. (JA-1959); *Farrell*, 126 F.3d at 488; *see Curran*, 20 F.3d at 571 (jury may not be "misled into considering as unlawful the omission of an act that the defendant [was] under no duty to perform"); *see generally United States v. Johnstone*, 107 F.3d 200, 204 (3d Cir. 1997) (stating that instruction must be structured "to avoid confusing or misleading the jury").

The District Court also abused its discretion by failing to give the defense's proposed instruction. *Hoffecker*, 530 F.3d at 176. The defense's instruction included a correct statement of the law under *Farrell*, 126 F.3d at 488, and *Arthur*

Andersen, 544 U.S. at 703-704 & 704 n.8, and was supported by the evidence. (JA-335); (JA-1959) (Tr. 47:9-21); *see Hoffecker*, 530 F.3d at 167, 176.

First, the Division's mistakenly contends (at 46) that the defense's *Farrell* instruction does not apply in a Section 1512(b)(1) case because *Farrell* was a Section 1512(b)(3) case. In *Farrell*, this Court interpreted the phrase "corruptly persuades" as it applies to subsections 1512(b)(1) through (3), and the Supreme Court has expressly noted that *Farrell*'s interpretation of "corruptly persuades" applies to Section 1512(b)(1). 126 F.3d at 485-86; *Arthur Andersen*, 544 U.S. at 703-704 & 704 n.8.

Relying on the *Law of Torts* (which cites to civil cases regarding commercial disclosure obligations), the Division asserts (at 48-49) that "half of the truth may obviously amount to a lie, if it is understood to be the whole," and concludes that the Fifth Amendment does not protect such "lies of omission." The Division cites no support for this conclusion and *Farrell* specifically holds that the right against self-incrimination protects omissions where there is no legal duty to speak. 126 F.3d at 488.

Most fundamentally, the Division fails to identify any legal duty requiring that the non-contemporaneous summaries, or anyone answering questions from those summaries, provide a complete statement of everything that occurred. Although the Division notes (at 48 n.13) that immunizing a grand jury witness can

require a duty of full disclosure, the point is irrelevant to the defense's right to its instruction because, here, there was no evidence that any individual had such immunity or was subpoenaed, or that any alleged co-conspirator acted with awareness of these scenarios. With no legal duty to provide an incriminating version of events, the failure to give the defense's instruction (coupled with the circular instruction on "corruptly persuades") prejudiced Norris's substantial rights. (JA-2136, 2138-39) (Tr. 39:11-17, 41:21-42:2); *Farrell*, 126 F.3d at 488; *Arthur Andersen*, 544 U.S. at 703-704 & 704 n.8.

As stated in the opening brief (at 43-45), the trial evidence supported the proposed instruction. Specifically, the jury could have credited the testimony of the several witnesses who testified that the summaries were inaccurate only because they omitted potentially incriminating information, and that individuals were retired to prevent them from revealing potentially incriminating information from lawyers or Division investigators. Norris Br. at 43-45 (citing (JA-968-70, JA-971) (Tr. 114:13-116:1, 117:9-12) (Perkins) (testifying that summaries omitted details on pricing discussions); (JA-1673, 1768) (Tr. 29:12-18, 124:1-7 (Macfarlane)) (testifying same); (JA-1688) (Tr. 44:5-9 (Macfarlane)) (testifying that if Emerson retired the company could not be required to produce him as a witness to the Department of Justice.); (JA-1795) (Tr. 21:7-22 (Weidlich)). Under *Farrell*, as endorsed by *Arthur Andersen*, none of this testimony established

corrupt intent, and the defense's instruction would have permitted the jury to reach this conclusion if it was so persuaded. 126 F.3d at 488; 544 U.S. at 703-704 & 704 n.8.

Even the Division's own theory of the case supported the proposed instruction. (JA-1959-60) (Tr. 47:22-48:7). At the charging conference, the Division stated that this case was about "what's on the scripts and *what's not on the scripts* . . . ." *Id*. (emphasis added). The Indictment supported the instruction, alleging that the case was based on omission or withholding information, and the Division informed the jury in its opening statement that the case was about an agreement of the Morgan executives to withhold from the Division that the "central purpose" of the competitor meetings was to discuss pricing. (JA-187-88) (Indict. ¶19(k)) ("the summaries would purposely *exclude* mention of pricing discussions"); (JA-755-56) (Tr. 14:22-15:7).

The Division fails to refute any of the defense's record support, dismissing it conclusorily (at 46) as "selective and misleading." But the defense was entitled to "select" evidence to illustrate its right to the instruction, and its description of that evidence was not "misleading." Rather than respond substantively, the Division presents (at 46-48) its *own* selected evidence that purportedly predetermined the jury's conclusion as to material falsity rather than legal omission. The Division's argument (at 42), however, "boils down to a claim that the jury would probably not

have believed [Norris's] account of what transpired," and should be rejected. *United States v. Flores*, 968 F.2d 1366, 1372 (1st Cir. 1992). The District Court erroneously denied the Rule 33 motion upon the same rationale. (JA-110-111). But a court cannot pretermit the jury's consideration on such a fundamental issue simply because the court "would have rejected the theory in a bench trial or because it believed that a discriminating jury would have been likely to follow the same course." *Id*. Yet, that is exactly what happened here.

2. The Evidence Did Not Establish Falsity As A Foregone Conclusion

The Division's selected evidence does not establish falsity as a foregone conclusion. The Division relies on Emerson's conclusory testimony that the minutes were "false." Emerson did not draft the summaries (JA-1224) (Tr. 7:9-19 (Kroef)) (JA-870) (Tr. 15:3-4) and only saw the "top of one" (JA-869) (Tr. 14:2-4) which he admitted could have been for a meeting he did not attend. (JA-903) (Tr. 48:19-25). Similarly, in relying on Kroef's testimony to establish falsity, the Division ignores that he attended only three meetings, had no personal knowledge of the other eleven, and denied involvement in any U.S. price-fixing. (JA-1213, 1377) (Tr. 113:14-17, 56:6-16). And the Hoffmann testimony (cited at 47) only supports the defense's instruction as he testified the summary *omitted* statements. (JA-1404) (Tr. 83:12-22).

In fact, the record evidence supports the accuracy of statements contained in the summaries that the Division claims were false. *See* (JA-1664, 1665, 1708-10) (Tr. 20:7-15, 21:3-5, 64:15-66:14); (JA-3195); (JA-1766-67) (Tr. 122:17-123:25); (JA-934-35, 1021-22, 1024, 1031-32) (Tr. 80:22-81:11, 41:7-42:5, 44:9-15, 51:4-52:23); (JA-1726-27) (Tr. 82:14-83:12) (evidencing that joint-ventures were discussed, were a purpose and were only not the "main topic" because Carbone's complaints derailed the meetings); (JA-3286); (JA-1444-45) (Tr. 5:24-6:25) (evidencing that Schunk and Hoffmann meetings involved "general market discussions"); (JA-1767) (Tr. 123:9-25) (evidencing accuracy of statements of rejections of cooperation contained in summary).

The Division's real contention (at 5-7) is that the summaries were false because they fail to state that the meetings were U.S. price-fixing meetings. But, as the opening brief detailed and the Division ignores, the summaries omitted any mention of U.S. price-fixing agreements with Carbone because no such agreements were reached and there was no duty to state otherwise. (JA-893) (Tr. 38:2-10); (JA-1033-36) (Tr. 53:2-56:11); (JA-1157) (Tr. 57:2-9); (JA-1281, 1377) (Tr. 64:15-21, 56:3-16); (JA-1889) (Tr. 33:16-20). And, as repeatedly demonstrated at trial, some of DiBernardo's pricing complaints and requests *are* reflected in the meeting summaries. *See* Norris Br. at 9-10.

B. The District Court Erred By Requiring That The Jury Find One Of The "Overt Acts" Alleged In The Indictment, But Not Identifying Those Acts

On the "overt acts" instruction, contrary to the Division's assertion (at 51 n.15) defense counsel timely raised the issue—during the charging conference—and it is clear that counsel need not utter the specific word "objection" in order to preserve the issue for appeal. *See Flores*, 968 F.2d at 1369 (rejecting government's claim of plain error review; "the word 'objection' does not have talismanic significance"). Defense counsel inquired whether the District Court planned to provide the Indictment and, when told "No," called the Court's attention to the draft instruction incongruously containing a reference to the jury looking at the Indictment to identify the "overt acts." (JA-1933) (Tr. 21:18-25). The District Court appeared to understand the comment as an objection to be given further consideration. (JA-1934) (Tr. 22:6-9) ("Well, lets cross reference that . . . . I don't know."). This objection was sufficient, and harmless error review applies. *See Flores*, 968 F.2d at 1369.

The Division's waiver argument is, in any event, academic, because *Small*, 472 F.2d at 820, requires *vacatur* even under plain error review. Despite the Division's argument otherwise (at 52), *Small* is directly relevant here, because the District Court's limiting instruction on the essential overt acts element achieved the same result as in *Small*. Here, although the District Court instructed that the jury

must find at least one overt act, it prevented the jury from any ability to comply. The upshot of the instruction here and in *Small* was the same—the jury necessarily jettisoned the essential overt-act element of the conspiracy offense.

In *Schurr*, this Court explained that even where a court (albeit unnecessarily) limits a jury's consideration to the overt acts listed in an indictment, a conviction must be reversed if, as in that case, it was "impossible for the jury to find any overt, *listed* act within the five year statute of limitations period." *United States v. Schurr*, 794 F.2d at 908 (3d Cir. 1986) (emphasis added). This conclusion is mandated by the rule that: "It is axiomatic that a person may not be convicted on the basis of acts that the parties had been told could not support a conviction." *Schurr*, 794 F.2d at 908 n.5. There is no question in this case that it was impossible for the jury to find at least one overt act listed in the Indictment where it was not given, shown, or read the Indictment. Thus, under *Schurr*, the Division's argument that the jury's verdict could rest upon an overt act proved outside the Indictment *in this case* is incorrect.

The Division argues (at 53) that *Schurr* is inapplicable *unless* Norris argues that he detrimentally relied upon the District Court's limiting instruction in deciding what issues he should appeal. The Division misreads *Schurr* (as well as misapprehending that it was decided *en banc*), as *Schurr*'s axiomatic principle cannot be read with such constraint. *Schurr*, 794 F.2d at 908 n.5.

The Division's effort to distinguish the same rule in other circuits (at 53-54) is also unavailing. *Morales* was not overruled on the holding relevant here. 677 F.2d at 2 (holding that if instructions refer to overt acts alleged in the indictment, a conspiracy conviction cannot be sustained on unalleged overt acts). Furthermore in *Negro*, as in *Schurr*, the appellate court was constrained by the trial court's instruction. *Negro*, 164 F.2d at 171 ("the judge in his instructions referred solely to the overt act alleged in the pleadings, we would, if we held this error harmless, be ignoring the 'harmless error doctrine . . ."). While overt acts beyond these in an indictment may form the basis for a conviction without fatal variance, a conviction may not rest upon overt acts beyond those specified in the jury charge.

Although the Division also makes the blanket contention (at 57) that there was "ample evidence of overt acts," it was for the jury to determine whether any of the acts listed in the indictment occurred and whether they were taken *in furtherance of* the conspiracy. *Schurr*, 794 F.2d at 906, 908 (if sole remaining overt act listed in the indictment was not in furtherance of the conspiracy, conviction would have to be reversed). Thus, for example, even if the Division had proved that Norris called a meeting to discuss the antitrust investigation, as alleged in the Indictment at 19(i), the jury may not have concluded that this action was taken in furtherance of the conspiracy. Such speculation cannot be the basis for finding harmless error.

III. THE DISTRICT COURT ERRONEOUSLY PERMITTED INVASIONS OF NORRIS'S ATTORNEY-CLIENT PRIVILEGE

A. Norris Established A Personal Attorney-Client Relationship

First, and conspicuously, the Division offers no justification whatsoever for its prosecutors having substantive communications with Keany—long before Morgan waived its privilege (JA-3415) and long before the District Court's pre-trial hearing—about his communications with Norris. The prosecutors indisputably knew that Keany and his firm had represented Morgan, and also had been told by Keany in July 2001 that his firm represented Morgan's "current employees," something Keany then confirmed to them in writing. (JA-3418) (7/30/01 email); (JA-3419) (7/31/01 Keany Letter). Nonetheless, the prosecutors approached Keany at a February 2002 ABA conference to ask Keany questions "critical to [their] investigation," which Keany inexplicably answered. (JA-383). The prosecutors had similar exchanges with Keany after indictment and closer to trial. (JA-379-81). These communications were improper and tainted the indictment. Proposed Findings of Fact (DE 101). Morgan did not waive its privilege with Keany until June 1, 2010. (JA-3415).

The Division does purport to address the evidence that the defense presented at the pre-trial hearing, but the Division minimizes or ignores various components of this compelling body of evidence. Norris Br. 59-64. For example, the Division asserts that "[t]here is no evidence that Norris approached Keany or his firm . . . for

personal legal representation" (at 61), but this assertion is contradicted by Peppers's recollection that Norris asked for the personal legal documentation confirming that Winthrop represented him and advising him on how to react if stopped for questioning about the grand jury investigation. (JA-535-36) (Hrg. Tr. 116:5-117:25). The Division also asserts that "[a]t no time did Keany think that he was representing Norris individually" (at 61), but that assertion is contradicted by Keany's statements to the Division about representing Morgan's "current employees," Keany's acknowledgement that he represented Norris in some "sense," Keany's admitted representation of Norris at a Canadian DOJ interview (provided to the Division), Keany's representation of Norris before the FTC, and Keany's participation in advising Norris personally on what to do if stopped for questioning. (JA-3418-19); (JA-468, JA-471-72, JA-475, JA-503) (Hrg. Tr. 49:18-22, 52:21-53:13, 56:3-5, 84:5-20) (Keany).

The Division is dismissive of Keany's July 31, 2001 letter to the Division (JA-3419), but the context and content of that letter is highly probative. The Division expressly asked for "formal notification" of what "individuals" Keany and his firm represented (JA-3416), and Keany first responded orally that "of course" his firm represented the "current employees" (JA-3418) and then confirmed in writing that his firm represented not only the Morgan corporate entities but "[w]e presumptively also represent all current employees" (JA-3419).

Keany's statements were essentially notices of appearance in the investigation, and should be binding as such, particularly as to a "current employee" crucially involved in the investigation like CEO Norris. Keany's assertion—nearly a decade later—that he only intended to be the contact person for subpoenas cannot be squared with what he actually said at the time.

Peppers's testimony that his firm personally represented Norris was consistent with Keany's 2001 response to the Division, as well as with the memoranda addressed personally to Norris by Peppers, Keany, and their firm. The Division brushes off Peppers's testimony as an "apparent assumption" but Peppers was Winthrop's relationship partner, was actively involved in the representation, and was as well suited as anyone to know whether his firm represented Norris personally. (JA-522) (Hrg. Tr. 103:8-18); (JA-2308-2311, 2313-2324, 2644, 2647, 2650) (correspondence).

The Division (at 63-64) is even dismissive of the three 1999 documents provided by the Winthrop firm to Norris, upon his request, for dealing with possible interrogations, but these documents unmistakably establish a personal attorney-client relationship. (JA-407-11); (Norris Br. at 59-61). The first document is addressed solely to Norris individually, without any reference to his employer, refers to the possibility of a "personal grand jury subpoena" and provides advice on his personal constitutional rights to remain silent and to

counsel. (JA-407). The other two documents unequivocally state that Norris is a client of the firm, specifically in connection with any investigation by the Division. (JA-409-11).

In short, the evidence demonstrated that in 1999—before Keany met with Norris in connection with the investigation—the Winthrop firm advised Norris that it represented him personally in relation to the investigation, in July 2001 Keany responded consistently to a formal inquiry from the Division and in September 2001 Norris evidenced his understanding that Keany represented him personally when he asked Peppers if that representation could continue. (JA-409-11); (JA-3418-19); (JA-538-39) (Hrg. Tr. 119:4-120:16). Peppers's testimony fully corroborated this evidence of personal representation. (JA-523-24) (Hrg. Tr. 104:22-105:19). Thus, despite the Division's contrary assertion (at 63 n.20), this decidedly is "a case in which a corporate executive is misled into making statements to corporate counsel thinking that counsel also represented him individually."

B. *Bevill* Does Not Override Norris's Privilege

Contrary to the Division's argument (at 58-60), the powerful evidence establishing a personal attorney-client relationship is not somehow overridden by some harsh application of *Bevill*. *Bevill* dealt with whether a corporate officer can assert attorney-client privilege as to communications with counsel, where the

counsel has been expressly retained by the corporation *and not* expressly retained by the corporate officers. 805 F.2d at 124. In considering the issue, the *Bevill* district court drew a distinction between the period before March 31, in which counsel was considering who it would represent—the corporation, the individuals or both—and the period after March 31, when counsel had been expressly engaged by the corporation and was still considering the individual representation. 805 F.2d at 121-22. As this Court recounted, the *Bevill* district court held that all communications during the period prior to March 31 were privileged, and the corporate trustees did not appeal. 805 F.2d at 123. The *Bevill* district court drew a distinction because it recognized that once the corporation had engaged counsel "the law firm's duties were solely to its clients, and if there were any conflict between the client corporations and the principals, the interests of the corporations had to prevail." Transcript of District Court Op. at 18 (D.N.J. Oct. 28, 1985). When, however, the individual principals' and the corporation's relationships with counsel were on the same footing, as in the period before March 31, 1985, the individuals' communications were privileged. Here, Norris was personally represented at the same time as Morgan was, and his privilege must be honored.

Contrary to the Division's assertion (at 58), this Court did not affirmatively adopt the five-part test in *Bevill*; while affirming, this Court merely referred to the district court's use of the test. 805 F.2d at 123. In any event, *Bevill* certainly does

not establish the five-part test should apply where, as here, both the individual and the corporation have an express attorney-client relationship with counsel. *See, e.g.*, *In re Benun*, 339 B.R. at 125 (*Bevill* not precedential where the facts demonstrate actual co-representation by a single attorney). Indeed, it is not at all clear that this Court intended for its analysis to apply outside the specific context of bankruptcy presented in *Bevill*. 805 F.2d at 125.

Here, the facts would satisfy *Bevill* in any case, as the evidence establishes that Norris sought and received personal legal advice, the Winthrop attorneys considered conflict issues and went forward in representing Norris, confidential communications ensued, and these communications concerned Norris's personal conduct and legal exposure. The Division seems to dispute the fifth *Bevill* factor in particular, but Keany's trial testimony plainly related to Norris's personal conduct, including his interactions with competitors, which of course give rise to potential personal criminal liability under the Sherman Act. Norris Br. at 64 (identifying Keany testimony on privileged communications with Norris); *In re Grand Jury Proceedings*, 156 F.3d 1038, 1041-42 (10th Cir. 1998) (finding the fifth *Bevill* factor is satisfied where communications relate to employee's personal exposure). In short, the Winthrop lawyers, including Keany, were Norris's criminal defense counsel, and Keany never should have been permitted to disclose Norris's confidential and privileged communications.

CONCLUSION

For the foregoing reasons, the judgment of conviction should be vacated and judgment of acquittal entered.

Dated: February 25, 2011

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify pursuant to Third Circuit Local Appellate Rule 28.3(d), that I was duly admitted to the Bar of the United States Court of Appeals for the Third Circuit and that I am presently a member in good standing.

DATED: February 25, 2011

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6864 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 with 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I, Christopher M. Curran, hereby certify that on this 25th day of February, 2011, ten paper copies of the foregoing Reply Brief for Appellant Ian P. Norris were sent by courier next business day delivery to the Clerk of the Third Circuit Court of Appeals and five paper copies of the foregoing Reply Brief for Appellant Ian P. Norris were served by Federal Express next business day delivery on:

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