IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	Criminal No. 03-632
	)	
v.	)	Hon. Eduardo C. Robreno
	)	
IAN P. NORRIS,	)	Violations: 18 U.S.C. § 371;
	)	18 U.S.C. § 1512(b)(1);
Defendant.	)	18 U.S.C. § 1512(b)(2)(B)

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR ACQUITTAL OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

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INTRODUCTION

On July 27, 2010, defendant was convicted of conspiring with others to obstruct justice by corruptly persuading and attempting to corruptly persuade other persons with intent to influence their testimony in an official proceeding, and by corruptly persuading and attempting to corruptly persuade other persons with intent to cause or induce those persons to alter, destroy, mutilate or conceal records and documents with intent to impair their availability for use in an official proceeding. (Count Two) He was acquitted of committing the substantive offenses that were the objects of the conspiracy. (Counts Three and Four). Following his conviction, defendant filed a motion for acquittal pursuant to Federal Rule of Criminal Procedure 29 or, in the alternative, for a new trial pursuant to Federal Rule of Criminal Procedure 33, claiming both insufficiency of the evidence and numerous trial errors. For the reasons set forth below, none of his claims has merit.

II

THE GOVERNMENT PRESENTED AMPLE EVIDENCE THAT DEFENDANT WAS GUILTY OF CONSPIRACY

Defendant asserts that the trial evidence was insufficient to establish a conspiracy to violate either 18 U.S.C. § 1512(b)(1) or 18 U.S.C. § 1512(b)(2)(B).[1] Alternatively, defendant claims he should be acquitted because the jury may have convicted him improperly based on a

[1] There need only be sufficient evidence regarding one or the other object of the conspiracy, not both. *See* Mod. Crim. Jury Instr. 3d Cir. 6.18.371C.

legally inadequate charge.[2]

A. Defendant's Motion for Acquittal

1. The Law Governing Rule 29 Motions

> In deciding a motion for judgment of acquittal pursuant to Rule 29, a court must view all of the evidence introduced at trial in the light most favorable to the Government and uphold the verdict so long as any rational trier of fact "'could have found proof of guilt beyond a reasonable doubt based on the available evidence.'" *United States v. Smith*, 294 F.3d 473, 476 (3d Cir. 2002) (quoting *United States v. Wolfe*, 245 F.3d 257, 262 (3d Cir. 2001)). "The court is required to 'draw all reasonable inferences in favor of the jury's verdict.'" *Id.* (quoting *United States v. Anderskow*, 88 F.3d 245, 251 (3d Cir. 1996)). The court may not "usurp the role of the jury" by weighing the evidence or assessing the credibility of witnesses. *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005) (citing *United States v. Jannotti*, 673 F.2d 578, 581 (3d Cir. 1982) (en banc); and 2A Charles A. Wright, Federal Practice & Procedure (Crim. 3d) § 467, at 311 (2000)). Thus, the defendant bears an "'extremely high'" burden when challenging the sufficiency of the evidence supporting a jury verdict, *United States v. Iglesias*, 535 F.3d 150, 155 (3d Cir. 2008) (quoting *United States v. Lore*, 430 F.2d 190, 203-04 (3d Cir. 2005)), and the Government "may defeat a sufficiency-of-the-evidence challenge on circumstantial evidence alone," *id.* at 156 (citing *United States v. Bobb*, 471 F.3d 491, 494 (3d Cir. 2006)). A finding of insufficiency therefore "should 'be confined to cases where the prosecution's failure is clear.'" *Smith*, 294 F.3d at 477 (quoting *United States v. Leon*, 739 F.2d 885, 891 (3d Cir. 1984)).

United States v. Johnson, Crim. No. 09-501, 2010 WL 2136551 at 1 (E.D. Pa. May 10, 2010) (Robreno, J.) Under this standard, defendant's argument fails.

Defendant's assertions that "special scrutiny is required where a defendant is acquitted of the substantive charges alleged to be the object of the conspiracy" (Def. Mem. at 12) and that "the jury's acquittal on the substantive offenses creates the substantial likelihood that they could

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[2] Although defendant seeks acquittal based on the possibility the jury convicted him of a non-offense, the appropriate relief would not be acquittal, but a new trial. *See United States v. Velasquez*, 885 F.2d 1076, 1091 (3d Cir. 1989) (Government permitted to seek new trial upon reversal of conviction).

not find sufficient evidence of the requisite intent" to conspire to commit those offenses (*id.* at 34) are simply wrong. Defendant has crafted his assertions to avoid his true meaning – that an inconsistent verdict is inherently suspect – but he knows that is not the law. *See United States v. Powell*, 469 U.S. 57, 65 (1984) (inconsistent verdict not inherently suspect); *United States v. Vastine*, 363 F.2d 853, 854 (3d Cir. 1966) (same). As the Court noted in *Powell*:

> [I]nconsistent verdicts – even verdicts that acquit on a predicate offense while convicting on the compound offense – should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is *equally possible* that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense.

Powell at 65 (emphasis added).[3] In *Vastine*, the Third Circuit summarily affirmed the defendant's conviction under circumstances nearly identical to those here. The defendant had been convicted under 18 U.S.C. § 371, but acquitted of the substantive offenses when his criminal intent was the only issue at trial. *Vastine*, 363 F.3d at 854-55.[4]

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[3] Thus, it is quite possible the jury's acquittals for the substantive offenses were the result of a compromise with a single holdout.

[4] The cases defendant cites do not support his assertion that the jury's acquittals on the substantive counts require special consideration of his motion either for acquittal or a new trial. In *United States v. Velasquez*, 885 F.2d 1076, 1091 & n.13 (3d Cir. 1989), a co-defendant's conspiracy conviction had been reversed on appeal for insufficient evidence that he had conspired with the defendant, so there could not have been sufficient evidence that the defendant had conspired with him. The Third Circuit specifically distinguished those facts from the situation here, noting as to a single defendant that "acquittal *should not mandate reversal of a finding of guilt on another charge which is dependent on the same factual allegations.*" (*Id.* at 1091 n.13) (emphasis added). In *United States v. Small*, 472 F.2d 818, 819-20 (3d Cir. 1972), the defendant's acquittal was relevant only to the court's determination that the trial court's failure to instruct that the jury had to find an overt act to convict for conspiracy constituted plain error, because there was no way to know that the jury found any overt act. In *United States v. Wicker*, 80 F.3d 263, 267 (8th Cir. 1996), the court simply held that the intent requirement for conspiracy to commit an offense is the same as that to commit the offense itself. Finally, *United States v. Alston*, 77 F.3d. 713, 718 (3d Cir. 1996), involved a non-jury trial in which the trial

2. Evidence was Sufficient to Establish a Conspiracy to Violate 18 U.S.C. § 1512(b)(1)

Defendant asserts that the evidence was insufficient to establish a conspiracy to corruptly persuade other persons with intent to influence their testimony because a reasonable jury could not have found (1) that defendant and his co-conspirators intended to influence grand jury testimony (Def. Mem. at 16), and (2) that defendant knew their actions were likely to affect grand jury testimony (*id.* at 33). Defendant's claim rests on a faulty understanding of both the intent element of the offense and the requisite nexus between the co-conspirators' actions and the grand jury proceeding. Applying the appropriate law, the evidence regarding the conspirators' efforts to influence individuals who had attended Morgan's meetings with competitors, including all of the Schunk and Hoffmann employees and several Morgan employees, was sufficient to meet both the nexus and intent requirements.

In *Arthur Andersen LLP v. United States*, 544 U.S. 696, 707 (2005), the Supreme Court made clear that a prosecution under 18 U.S.C. § 1512(b) requires both a consciousness of wrongdoing (*id.* at 706) and a nexus between the effort to persuade and a particular proceeding. *Id.* at 707-08. Defendant has not claimed the evidence was insufficient to establish his consciousness of wrongdoing in seeking to persuade others to lie. Rather, he claims an insufficient nexus between his efforts and the grand jury proceeding, and a lack of intent to affect testimony actually given in that proceeding. Defendant's reliance on *United States v. Aguilar*, 515 U.S. 593, 599-600 (1995), to support his assertions is misplaced. While in *Aguilar* the

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court incorrectly applied a different intent standard for conspiracy than for the substantive offense. Because the trial court had found lack of intent as to the substantive offense and acquitted, it could not convict on the conspiracy charge.

Government did have to prove that the defendant expected a federal agent to whom he had lied actually would testify before the grand jury, that was because the defendant was charged under the catchall provision of 18 U.S.C. § 1503 with attempting to impede the grand jury proceeding itself, not with conduct directed at an individual in violation of 18 U.S.C. § 1512(b)(1). In the context of persuading an individual to destroy documents in violation of § 1512(b)(2)(B), *Arthur Andersen* required only a showing that defendant foresaw an official proceeding as to which the documents "might be material." *Arthur Andersen*, 544 U.S. at 707-08.

Arthur Andersen does not require the Government to show a probability that any witness actually would testify in the official proceeding in a prosecution under § 1512(b)(1). Rather, it requires defendant's knowledge or contemplation of an official proceeding as to which the person persuaded has material information. The Court's citation to *Aguilar* was for the proposition that *some* nexus is required to violate § 1512, not that the same nexus is required as in a prosecution under § 1503. *See United States v. Vampire Nation*, 451 F.3d 189, 205-06 (3d Cir. 2006) (holding that trial court's instruction requiring "the jury to find *some* connection – i.e., a nexus" was consistent with *Arthur Andersen)* (emphasis added). *Arthur Andersen* does not invalidate the language of §1512(f)(1) which requires no proceeding at all, but to the contrary, acknowledges it while casting the question as whether the corruptly persuading defendant contemplated a particular official proceeding, even if it was not yet instituted. *Arthur Andersen*, 544 U.S. at 707-08.

To satisfy the requirements of §1512(b), the persons subject to defendant's corrupt persuasion can be actual or potential witnesses. *See United States v. DiSalvo*, 631 F. Supp. 1398, 1402 (E.D. Pa. 1986) (confirming that 18 U.S.C. § 1512 reaches "potential" witnesses as the

statute was explicitly changed from influencing the testimony of any "witness" to any "person" and eliminating the requirement that there be a "pending" official proceeding); *United States v. Misla-Aldarondo*, 478 F.3d 52, 69 (1st Cir. 2007) (key is whether [defendant] is intending to head off the possibility of testimony in an official proceeding); *United States v. Ho*, 651 F.Supp.2d 1191, 1195-98 (D. Haw. 2009) ("the plain language of § 1512(b)(1) does not appear to be limited to any particular scenario or timing"); 18 U.S.C. § 1512(f)(1) ("an official proceeding need not be pending or about to be instituted at the time of the offense").

Here, there is no issue as to nexus to a perhaps unforeseen official proceeding (the grand jury investigation) because it is uncontested there was, in fact, a grand jury investigation and that defendant was aware of it since he was provided the Morganite grand jury subpoena and discussed it with others. It was the issuance of the Morganite subpoena and subsequent investigation that prompted defendant's efforts to create the false story he asked his subordinates who had attended competitor meetings to tell. And even assuming *arguendo* that *Arthur Andersen* in conjunction with *Aguilar* somehow requires some likelihood of testimony, the evidence readily meets this standard because the persons defendant persuaded or attempted to persuade were the exact persons defendant knew had highly relevant knowledge of the criminal conduct the grand jury was investigating.[5] Whether any of them actually were called to testify is irrelevant. The crime occurred at the time the effort to persuade occurred, and did not depend on

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[5] Defendant's claim that he had to expect the persons he was persuading actually to testify would produce an absurd result. Applying his standard, an individual would be not guilty if he believed he could successfully persuade a potential witness to deny knowledge and thus minimize the likelihood that a proceeding would be instituted in the first instance or that the potential witness would ever be called to testify, but an individual who doubted his success would be guilty.

the Grand Jury taking some future action.[6]

The record contains ample evidence to establish defendant's participation in a conspiracy to corruptly persuade another person. Several witnesses testified that when defendant learned of the Grand Jury's investigation, he met with Kroef, Perkins and Macfarlane and agreed to fabricate a story regarding Morgan's meetings with competitors. He then directed his subordinates to create written summaries reflecting their false story to use as a basis of what they and others would say happened at those meetings. Perkins testified it was Norris who directed that meeting summaries be drafted and to be careful about what information was included, and that, under Norris's direction, they drafted summaries to "make it seem . . . as though they were joint venture meetings." *See* Tr. 7/14/10 p.m. at 113:4-116:5 (Perkins). Kroef testified they discussed "not say[ing] that these were cartel meetings, we should actually try to create evidence that it wasn't cartel meetings, that these were meetings on other topics which were allowed to take place," *see* Tr. 7/15/10 p.m. at 109:24-112:12 (Kroef). Kroef said "the purpose [of the written summaries] was to create a series of documents proving that what these meetings were about was joint ventures or acquisitions." Tr. 7/16/10 a.m. at 6:11-9:3 (Kroef). Macfarlane testified they collaborated "to prepare a set of notes . . . which were designed to mislead the . . . investigation by the U.S. Department of Justice." Tr. 7/20/10 a.m. at 28:14-18 (Macfarlane).

When defendant learned in Fall 2000 that the investigation was becoming more active, he and Kroef sought to persuade Schunk and Hoffmann employees who had attended the meetings

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[6] This is obvious from the fact that a proceeding "need not be pending or about to be instituted at the time of the offense." 18 U.S.C. § 1512(f)(1). Nor did it depend on the conspirators' technical knowledge of grand jury testimony as defendant has suggested. (*See* Def. Mem. at 41-42.)

to tell Morgan's false story. Kroef testified that he met with Weidlich on November 30, 2000 at Norris's direction to discuss how Schunk was responding to the investigation and to "encourage Dr. Weidlich to do things or to start doing things according to the way or similar to the way we did things." Tr. 7/16/10 a.m. at 39:8-10; 91:6-8 (Kroef). Kroef and Weidlich both testified that Kroef told Weidlich the fabricated story Morgan had told the Government, gave or later sent Weidlich copies of some of the fabricated meeting summaries Morgan had prepared, and tried to persuade Weidlich to have Schunk and Hoffmann employees who had attended meetings with Morgan tell the same story if questioned. Tr. 7/16/10 a.m. at 37-38 (Kroef); Tr. 7/20/10 p.m. at 7-10 (Weidlich). According to Weidlich, Kroef told him Morgan had a "protocol" of what Morgan had said happened at the meetings with competitors and wanted to send it to Weidlich "to make sure that the testimony that [Schunk and Hoffmann people] would be giving would be the same as or similar to what the Morgan people have said." Tr. 7/20/10 a.m. at 9:9-11:23 (Weidlich).

Mr. Kroef reported to Norris on his meeting with Weidlich and told Norris he had given Weidlich the meeting summaries. When Kroef told Norris that "Weidlich was not really on top of things, [Norris] said, then it's probably better that I talk to his boss, Dr. Kotzur." Tr. 7/16/10 a.m. at 39:23-40:1 (Kroef). Norris had Kroef arrange that meeting, which took place on December 17, 2000. Norris handwrote on his restaurant receipt a false exculpatory explanation for his meeting with Kotzur, falsely claiming he had met with Kotzur at Macfarlane's request to discuss an acquisition. GX-51; Tr. 7/20/10 a.m. at. 45 (Macfarlane). After the meeting, Norris told Kroef that the meeting had gone well, but that Norris and Kotzur wanted a followup meeting with Kroef and Weidlich present to continue the discussions. Tr. 7/16/10 a.m. at 39:24-40:6;

43:20-44:25; 47:8-22; (Kroef); *see also* GX-50. While there was no other testimony of what occurred during Norris's December 17th meeting with Kotzur, the jury could reasonably conclude based on the circumstances of the meeting and Norris's effort to conceal his real purpose that Norris met with Kotzur in a further effort to convince Schunk to corroborate Morgan's false story.

Kroef and Weidlich both testified that they met with Norris and Kotzur on February 26, 2001 and that Norris, who knew Kroef previously had provided Schunk with the fabricated meeting summaries, tried to persuade Weidlich and Kotzur to have Schunk and Hoffmann employees who had attended the meetings tell the same false story if questioned. Tr. 7/16/10 a.m. at 49-52 (Kroef); Tr. 7/20/10 a.m. at 15:15-21:11 (Weidlich). Weidlich testified that Norris discussed his concern regarding the U.S. brush investigation (Tr. 7/20/10 a.m. at 17:7-11 (Weidlich), and told them Carbone was cooperating with the U.S. investigation, and that Norris "saw a good chance to turn the table around on Carbone, in case that the Schunk people and the Morgan people would give the same testimony with respect to the carbon brush investigation," and that both companies could gain financially by discrediting Carbone. Tr. 7/20/10 p.m.at 19:14-20:7 (Weidlich). Weidlich further testified Norris told them "that he was aware that we, Schunk people, knew what the Morgan people had answered during the investigation" and "strongly suggested that we make sure that our people answer in the same way" because it would convince the U.S. authorities that Morgan's story was true. Tr. 7/20/10 a.m. at 20:8-20 (Weidlich). When Weidlich confirmed that Kroef had sent him the Morgan meeting summaries, Norris responded that he knew. Tr. 7/20/10 a.m. at 20:10-14 (Weidlich). Such evidence was more than sufficient to prove the defendant's participation in a conspiracy to corruptly persuade

Schunk and Hoffmann employees.[7]

The evidence also was sufficient to conclude that defendant conspired to influence Muller's, Cox's and Emerson's testimony regarding the meetings they had attended with Carbone. Muller testified that Norris, with Macfarlane present, told Cox and Muller about the investigation, told them Morgan "needed a story to put forth to the Justice Department of what happened at the Toronto meeting," and then told them to adhere to the false story that the Toronto meeting concerned the South America joint venture. Tr. 7/15/10 a.m. at 104:17-108:16; 109:21-23 (Muller). Later, Perkins faxed Macfarlane a copy of the false February 1995 meeting summary to review so Muller would "understand . . . what we were saying the story was going to be for the Toronto meeting." Tr. 7/15/10 a.m. at 108:17-112:11 (Muller). Perkins confirmed that he sent Muller a copy of the false "script draft of the very first meeting we had that Bruce

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[7] Defendant distorts the evidence in an attempt to provide innocent explanations for some of those events concerning Schunk. For example, defendant notes Kroef's testimony that Norris told Kroef he had been wrong to provide the summaries to Weidlich, but defendant fails to include the rest of Kroef's testimony on the subject – that Norris thought it was wrong to turn over the summaries only because "[t]he risk was too high, that [the summaries] would eventually turn up somewhere where they shouldn't be." Tr. 7/16/10 a.m. at 39:17-23 (Kroef). Defendant claims his December 2000 meeting with Kotzur must have been legitimate because Kotzur's lawyer son was present (he was there to act as a translator), but fails to note the false explanation defendant wrote on his restaurant receipt for the meeting. (GX-51) Defendant also claims Morgan counsel Sutton Keany authorized defendant's February 2001 meeting with Schunk, but the August 31, 2001 Keany email defendant cites as conclusive evidence that Keany had authorized the meeting six months earlier actually shows the opposite – that Keany had only recently learned from a third party that Norris had met with Schunk. (DX-68) ("I understand from [Coker] that you were able to make a contact with a Schunk representative after our telephone conversation with you from Philadelphia"). Keany testified he never authorized a meeting with Schunk, that Norris never told him he planned to meet with Schunk, and that Keany only learned about the February 2001 meeting around the time of the August 31 email when Norris and Coker tried to dissuade him from contacting Schunk's counsel to gain information about what Schunk (who at the time was cooperating) had told the Government. Tr. 7/19/10 p.m. at 13:20-16:18, 104;18-106:25 (Keany).

attended . . . so that Bruce would see – the script that we'd written for that meeting and or [sic] him to stick with that as the approach of what happened at the meeting," and believed it was Norris who told him to send Muller that script. Tr. 7/15/10 a.m. at 30:24–32:1 (Perkins). Cox, although denying the summaries were false, admitted that he went to Macfarlane's office, at Macfarlane's request, one to three weeks after Norris had told Muller and Cox about the investigation and had Cox review the summaries for the meetings Cox had attended.[8] Tr. 7/21/10 a.m. at 30-32 (Cox). Macfarlane testified that Cox and Muller were sent the summaries for the meetings they had attended. Tr. 7/20/10 a.m. at 30-31 (Macfarlane).

Although Emerson participated in creating a timeline of Morgan's meetings with competitors, he did not participate in crafting the false story as to what happened at those meetings. As with Muller, Perkins provided Emerson with a copy of the meeting summaries containing the false story. Tr. 7/14/10 p.m. at 13-14 (Emerson). Emerson looked at the first page of one script and told Perkins, "These are false minutes." Tr. 7/14/10 p.m. at 15 (Emerson). Attempts to persuade Emerson to tell the false story were not successful because, according to Macfarlane, Norris became concerned that Emerson would not tell it when questioned in connection with the investigation. Norris was concerned that Emerson "would perhaps not be

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[8] The jury had ample reason not to believe Cox's testimony that the summaries Macfarlane showed him accurately reflected that the purpose of the Toronto meeting Muller, Perkins and Cox had attended really was to begin joint venture exit discussions with Carbone. Both Muller and Perkins denied it and Norris's own notes show the purpose of the meeting was to fix prices. (*See* GX-1 ("Principle of Toronto was – How do we Increase Prices!" and "In Canada it was agreed by LCL they were predatory on [BEV] price. It was agreed we would list all our major accounts + prices to Robin and the LCL would request levels from Macon before quoting (Canada it was said that price would not be an issue)")). Moreover, Cox admitted that neither Muller, Perkins nor Cox had any involvement in the joint ventures. Tr. 7/21/10 a.m. at 42:10-43:17 (Cox).) Thus Cox's testimony that those three employees were tasked with starting the joint venture exit discussions was hardly credible.

able to stay to the story. He would . . . have to tell the truth." Concerned with their ability to influence what Emerson would say, Norris and Macfarlane sought Emerson's retirement because they believed his retirement would render Emerson inaccessible to the investigation. Tr. 7/20/10 a.m. at 43:14-44:3 (Macfarlane). Kroef testified that he walked in on Norris and Macfarlane while they were discussing Emerson and heard one of them say "it was better that Emerson would retire, sort of immediately" because they believed Emerson could not be required to testify if he no longer was employed by Morgan. Tr. 7/16/10 a.m. at 30:24-32:10 (Kroef). The effort to influence Emerson's testimony continued when Macfarlane sent him a letter in December 2000 referring to the Justice Department's investigation and Mr. Keany's desire to interview him. The letter read in part, "He [Keany] should simply like to *confirm with you your role in the many meetings we held to exit our joint ventures of Le Carbone."* GX-07 (emphasis added); Tr. 7/14/10 p.m. at 29 (Emerson). But Emerson had no role in forming or exiting the joint ventures with Carbone. Tr. 7/14/10 a.m. at 87 (Emerson), Tr. 7/14/10 p.m. at 29-30 (Emerson).

Defendant and Macfarlane also conspired to influence the testimony of Perkins and Kroef. Even if, as defendant claims, there was no effort to persuade at the time the false story was created because defendant, Macfarlane, Kroef and Perkins all mutually agreed to lie, defendant and Macfarlane sought to persuade Perkins and Kroef to stick to the false story when Perkins and Kroef waivered. Perkins testified the he became concerned with what they had done and wanted to "come[] a little further forward to what really happened at those meetings," so he called Macfarlane and said he wanted to be more truthful. Perkins' call to Macfarlane prompted defendant and Macfarlane to travel to meet with Perkins for "several hours" the next day. When Perkins "inform[ed] Mr. Norris and Mr. Macfarlane that I did not feel able to carry the party line

forward, and needed, in my terminology, to fess up," they responded by showing Perkins just how costly it would be if Perkins told the truth. Tr. 7/15/10 a.m. at 35-38; 69:3-5 (Perkins).

Kroef testified that once after he retired, defendant summoned him to England but had Kroef driven to Norris's home and not Morgan's offices. Once there, defendant and Macfarlane told Kroef that the U.S. investigation was "becoming a little bit more difficult for the group," but assured Kroef that "everything was going to be okay as long as everybody kept calm." They made a point of telling Kroef "that being a Dutch citizen, this could never hurt or do something bad for me because I could never be extradited for any of the [group's] activities." Tr. 7/16/10 a.m. at 57:24-58:17 (Kroef). The jury reasonably could infer that their statements were intended to persuade Kroef to stick to the story even if he started feeling threatened by the investigation, that they could avoid being charged as long as he and the others continued to lie and, even if they failed, Kroef could still avoid prosecution.

3. Evidence was Sufficient to Establish a Conspiracy to Violate 18 U.S.C. § 1512(b)(2)(B)

Defendant asserts that the evidence also was insufficient to establish a conspiracy to corruptly persuade other persons with intent to cause or induce them to alter, destroy, mutilate or conceal records to impair their availability for use in an official proceeding. Defendant claims he lacked the requisite intent to violate the law because: (1) there was no agreement to destroy documents located in the United States; (2) only European documents were destroyed and they were destroyed to keep them out of the hands of European authorities, not a U.S. proceeding; (3) the document destruction occurred before the Grand Jury issued a subpoena; and (4) the Grand Jury could not compel production of documents located in Europe. Points (1) and (4) are

irrelevant and point (3) is factually incorrect. The Court already has held that the location of the documents and whether the Grand Jury could have compelled their production are irrelevant. *See* June 22, 2010 Government's Mem. and Order Denying Def. Mot. Dismiss (Doc. No. 83). Section 1512 specifically applies to foreign conduct. 18 U.S.C. 1512(h) ("extraterritorial Federal jurisdiction."). Even assuming the Grand Jury could not compel the production of foreign-based documents, there are other ways for a grand jury to obtain them, thus efforts to conceal or destroy such documents could still be intended to impair their availability to a U.S. proceeding. Defendant's claim that the document destruction occurred before the Grand Jury began its investigation is based on the contents of a single document that mentions an effort Morgan took to cleanse its files, but the jury heard an abundance of testimony that Morgan also destroyed or concealed documents after the subpoena was issued. Thus, the only question before the Court is whether there is sufficient evidence that Norris's efforts to conceal or destroy documents were intended at least in part to impair their availability for use in the Grand Jury.

As set forth in *Arthur Andersen*, 544 U.S. at 706-08, a violation of 18 U.S.C. § 1512(b)(2)(B) requires a consciousness of wrongdoing and contemplation that the documents that are the object of the effort "might be material" to an official proceeding. Morganite Industries was served with a document subpoena in April 1999. The subpoena required the production of all documents wherever located (Para. III(D)) reflecting any communication with a competitor for the sale of carbon products (Paras. IV(C), V(C)(1)) anywhere in the world (Para. III(C)), including documents possessed by all Morganite Industries affiliates, including European affiliates (Para. IV(E)). (GX-05; *see also* Court's June 22, 2010 Mem. and Order Denying Def. Mot. Dismiss, (Doc. No. 83) at 17. Thus, it is beyond question that Norris was aware of the

grand jury proceeding and that records reflecting price communications with European competitors regarding the sale of carbon products were material to that proceeding.

Kroef testified that prior to receipt of the subpoena, in response to concern that European police might raid its offices, Morgan on occasion had cleansed the files of its European affiliates of records reflecting price communications with competitors. He testified that Norris directed him to do just that in response to the Grand Jury's subpoena. According to Kroef, Norris, "[t]riggered by the investigation . . . in the U.S.," told Kroef it was time again to cleanse the files. Kroef acted on Norris's instruction by directing Emerson, Van Zelm, and Snoek to search Morgan offices throughout Europe to destroy all records of price communications with competitors. Tr. 7/16/10 a.m. at 27:12-29:20 (Kroef). Emerson confirmed that after Morgan was subpoenaed, Kroef directed Snoek, Van Zelm and Emerson to search files "which might . . . confirm the existence of the cartel." Emerson "understood they were to be destroyed . . .." Tr. 7/14/10 p.m. at 16:23-18:22 (Emerson).

The subpoena specifically required production of the documents the task force destroyed, and their destruction was prompted by Norris's knowledge of the Grand Jury's subpoena. The documents were evidence of price fixing among the same companies (Morgan, Carbone, Schunk, and Hoffmann) and many of the same individuals (Norris, Emerson, and Kroef of Morgan; Nantier and Marquand of Carbone; Jeuck of Schunk; and Peter Hoffmann and Thomas Hoffmann of Hoffmann) for the sale of the same types of products as the Grand Jury was investigating. Tr. 7/14/10 a.m. at 58-61, 65-67, 79 (Emerson).[9] Even if, as Norris claims, the destroyed documents concerned sales only in Europe, they were material to the Grand Jury's

[9] Marquand incorrectly is identified as "Mackel" in the transcript of testimony.

investigation of whether Morgan, Carbone, Schunk or Hoffmann had conspired to fix prices of products sold in the United States. Evidence of price-fixing in Europe was relevant to determining whether subjects of the investigation had participated in a single, worldwide conspiracy or whether they had participated in a separate conspiracy in the United States involving the same companies and the same products.[10] Moreover, Emerson testified that while carrying out the mission of the task force, he destroyed not just documents concerning European sales, but also his own documents reflecting price communications regarding the U.S. market. Tr. 7/14/10 p.m. at 19:23-20:24, 50:9-13 (Emerson).[11]

In addition to evidence of the task force, the jury also had sufficient evidence to find Norris and Kroef conspired to induce Schunk to destroy records. Weidlich testified that during the February 2001 meeting when Norris and Kroef tried to persuade Weidlich and Kotzur to have Schunk and Hoffmann employees tell the false story about their meetings, Norris also told them "we should be very careful about all the documents which we have in our offices. And he suggested again that we should do the same thing as Morgan obviously had done. . . . [F]ilter through all the documents and take out those documents which might be compromising . . . and destroy them." Tr. 7/20/10 p.m. at 21:23-12 (Weidlich).

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[10] For example, even if there were no worldwide conspiracy, evidence of cartel activity in Europe would be relevant to an issue such as intent regarding similar conduct in the United States.

[11] Emerson's testimony, however, was inconsistent, saying he took notes at meetings regarding the United States and twice that he destroyed those notes, but later saying he had not taken notes. Nonetheless, the jury reasonably could conclude Emerson had taken notes regarding the United States market and destroyed them.

4. The Jury could not have Convicted Defendant Based on a Legally Inadequate Charge

Finally, defendant claims the jury may have convicted him based on a charge that, in his view, is not actually a crime – a "'conspiracy to attempt' to obstruct justice." (Def. Mem. at 55.)[12] But the case on which defendant primarily relies, *United States v. Meacham*, 626 F.2d 503 (5th Cir. 1980), is easily distinguished.

In *Meacham*, the relevant statutes prohibited any person from attempting or conspiring to violate substantive statutes making it unlawful to import marijuana or to possess marijuana with the intent to distribute. *Id.* at 506. The indictment charged the defendant with "conspiring to attempt" to violate those substantive drug statutes. As the court explained, "[i]n order successfully to prosecute a conspiracy, the government must be able to point to two separate provisions: one making the act of conspiring a crime and one making the object of the conspiring a crime." *Id.* at 507. Because the substantive drug offenses in *Meacham* did not make mere attempts illegal, the indictment's charge of a "conspiracy to attempt" to import or possess marijuana did not charge an offense. *Id.* at 508.

But the *Meacham* court recognized that the outcome is different when a defendant is charged with conspiring "in conjunction with *other statutes expressly making attempts criminal.*" *See id.* at 508 (emphasis added). Here, defendant was convicted under 18 U.S.C. § 371 of conspiring to violate two other federal statutes, 18 U.S.C. § 1512(b)(1) and 18 U.S.C. § 1512(b)(2)(B), both of which make it an offense not only to corruptly persuade another person,

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[12] Even if defendant were correct in his assertion, and he is not, the appropriate relief would not be acquittal, but a new trial. *See United States v. Velasquez*, 885 F.2d 1076, 1091 (3d Cir. 1989) (Government permitted to seek new trial upon reversal of conviction).

but also to attempt to corruptly persuade another person.

None of the other cases defendant cites, *United States v. Peter*, 310 F.3d 709 (11th Cir. 2002), *United States v. Alls*, 304 Fed. App'x 842 (11th Cir. 2008), or *United States v. Broskoskie*, 66 Fed. App'x 317 (3d Cir. 2003), even address the issue. *Peter* and *Alls* cited *Meacham* only for the proposition that a defendant who did not previously raise an issue may appeal his conviction if he claims the indictment failed to charge an offense, and *Broskoskie*, simply noted that the defendant had cited *Meacham*, but that *Meacham* was not relevant. And both *Peter* and *Broskoskie* involved convictions under 21 U.S.C. § 846 and substantive statutes that did not expressly criminalize attempts.

B. Defendant's Motion for a New Trial under Federal Rule of Criminal Procedure 33(a)

1. Introduction

Defendant has moved for a new trial under Rule 33(a) of the Federal Rules of Criminal Procedure on two grounds: (1) "a miscarriage of justice has occurred — that is, an innocent person has been convicted"; and (2) "one or more errors occurred during the trial and it is reasonably possible that such error, or combination of errors, substantially influenced the jury's decision." (Def. Mem. at 57.) The alleged trial errors are addressed elsewhere in the Governments's Memorandum. *See, infra,* Sections III, IV and V. Defendant's claim that " . . . the evidence shows that Mr. Norris engaged in lawful activity in responding to the Division's subpoena" is unfounded (Def. Mem. at 60). Rather, as set forth below, the jury received overwhelming evidence of defendant's guilt.

2. The Law Governing Rule 33 Motions

A defendant seeking a new trial pursuant to Rule 33 shoulders a heavy burden. The "decision to grant or deny a motion for a new trial lies within the discretion of the district court." *United States v. Vitillo*, 490 F.3d 314, 325 (3d Cir. 2007); *(quoting United States v. Cimera*, 459 F.3d 452, 458 (3d Cir. 2006)). The trial court "may set aside the verdict and order a new trial if it ascertains that the verdict constitutes a miscarriage of justice," and in the event of "[a]ny error of sufficient magnitude to require reversal on appeal." *United States v. Broadus*, No. Crim. A. 04-61, 2004 WL 2473422, at *2 (E.D. Pa. Nov. 2, 2004) (internal citations and punctuation omitted). A district court judge who presides over a trial has very limited authority to grant a new trial, pursuant to Rule 33, on the ground that the verdict is against the weight of the evidence. The District Court can "order a new trial on the ground that the jury's verdict is contrary to the weight of the evidence only if it believes that there is a serious danger that a miscarriage of justice has occurred--that is, that an innocent person has been convicted." *United States v. Davis*, 397 F.3d 173, 181 (3d Cir. 2005) (*quoting United States v. Johnson,* 302 F.3d 139, 150 (3d Cir. 2002)). Such power must be exercised very sparingly, for it is the very rare case where the evidence of guilt is so unconvincing, albeit legally sufficient, that the trial judge may, in effect, decide that 12 jurors, although properly instructed on the law, all mistakenly credited the testimony of the prosecution witnesses.

The Third Circuit even has suggested that the trial judge should not attempt to substitute his/her credibility findings for those of the jury:

> It is a basic tenet of the jury system that it is improper for a district court to substitute [its] judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a

> denigration of the jury system . . . . The trial judge cannot arrogate to himself this power of the jury simply because he finds a witness unbelievable. . . . Under our system of jurisprudence a properly instructed jury of citizens decides whether witnesses are credible. The trial judge is deemed to have no special expertise in determining who speaks the truth.

United States v. Haut, 107 F.3d 213, 220 (3d Cir. 1997) (internal citations and punctuation omitted). As a result, motions for a new trial based on the weight of the evidence "are not favored" and "are to be granted sparingly and only in exceptional cases." *United States v. Brennan*, 326 F.3d 176, 189 (3d Cir. 2003) (*quoting Government of Virgin Islands v. Derricks*, 810 F.2d 50, 55 (3d Cir. 1987). The overwhelming evidence in this case reveals that the jurors did not mistakenly convict an innocent man.[13]

C. <u>The Jury Based its Verdict on Overwhelming Evidence of Defendant's Guilt</u>

Defendant builds his argument that the jury convicted an innocent man on four principal pillars: (1) that there was no illicit purpose in connection with Mr. Emerson's retirement; (2) that the scripts were written at the request of counsel in an effort to marshal a legitimate defense and are not materially false; (3) defendant's efforts to contact Schunk were simply an attempt to discover what strategy Schunk was employing with respect to the grand jury investigation; and (4) the Government's witnesses were not credible because they were testifying pursuant to agreements with the Government. The evidence does not support any of these contentions.

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[13] Although defendant makes much of his acquittal on the two substantive offenses, there is no way to know, as the defendant argues, whether the jury found the evidence insufficient on those counts or whether it acquitted for other reasons, such as leniency in light of the irrelevant, but nevertheless admitted, evidence of defendant's health problems. Tr. 7/15/10 p.m. at 61-62 (Muller). *See United States v. Powell*, 469 U.S. 57, 65 (1984) (a jury can acquit for a number of reasons, including "mistake, compromise, or lenity".).

1. Mr. Emerson was "Retired" because of Concerns that He Could Not Stick to the Script

While defendant contends that there was no illicit purpose in Emerson's retirement, the facts loudly compel the conclusion that Norris's removal of Emerson demonstrated his intent to lead and participate in a conspiracy to obstruct the grand jury's investigation and prevent it from uncovering the price-fixing cartel in which defendant participated.[14]

Emerson was a pricing clerk. He did not work in the company headquarters in Windsor. He was at a very low level of the company compared to Norris, and he had no other occasion to speak to Norris except for cartel business. Tr. 7/14/10 a.m. at 77 (Emerson). As a pricing clerk, Emerson was responsible for providing quotes for the carbon block used by the joint ventures to make product, but he had no responsibility for forming or exiting joint ventures with Carbone. Tr. 7/14/10 a.m. at 86-87 (Emerson).

Nevertheless in 1999, Emerson and others were called to Windsor when the grand jury subpoena that threatened to expose the cartel was served. Emerson was called into Norris's office for a meeting where Norris showed him a copy of the subpoena. Tr. 7/14/10 p.m. at 3 (Emerson). Emerson was "Mr. Cartel" (Tr. 7/16/10 a.m. at 7 (Kroef)), and certainly was a potential grand jury witness who could bring down the cartel, and Norris with it, if he were to reveal what he knew about the criminal conduct at Morgan. Tr. 7/16/10 a.m. at 31-32 (Kroef).

From the first meeting with Norris in 1999 to Emerson's retirement from Morgan in July 2000, the evidence showed that Norris conspired to corruptly persuade Emerson to stick with the "justification" that the cartel meetings were really for the purpose of discussing an exit to certain

[14] *See e.g.,* Tr. 7/14/10 a.m. at 81:10-15, 98:9-25 (Emerson).

joint ventures. Tr. 7/14/10 p.m. at 10-16 (Emerson). Evidence also showed that uncertain of Emerson's ability to stick to the script, Emerson was hidden away where the likelihood he would be called upon by the grand jury to testify was reduced. Tr. 7/20/10 a.m. at 43:7-44:9 (Macfarlane); Tr. 7/20/10 p.m. at 21:7-22:6, 46:7-20 (Weidlich).

After calling Emerson to his office for a private meeting, Norris (the Chairman of the company) assured the pricing clerk "that if the situation got difficult for [me], [Norris] would ensure that me and my family were not disadvantaged." Tr. 7/14/10 p.m. at 11:18-20 (Emerson). While the meaning of this assurance is pretty clear from the context, Emerson elaborated that "[Norris] was speaking about the situation with regard to the possible indictment by the . . . Americans on . . . Morganite, and my position in relation to that." Tr. 7/14/10 p.m. at 11:22-24 (Emerson). So as early as 1999, Norris was concerned about an indictment of Morganite (the US subsidiary) stemming from the grand jury investigation. Norris, of course, knew who the principal witness in such a case against him might be, called him to his office, and gave him assurance that he would be taken care of if things became difficult.

From this meeting, Emerson then went on to assist the conspirators in creating the false minutes. He helped create the time line listing all the meetings that would be of interest to a price-fixing grand jury, which he started with Norris in Norris's office. Tr. 7/14/10 p.m. at 6-9 (Emerson). However, Emerson also had to review other records to re-create all the price-fixing meetings. Norris commented that there were quite a lot of meetings and that they would have to be accounted for — "justified." Tr. 7/14/10 p.m. at 8, 10, 13 (Emerson). Thereafter, Emerson was not included with the more senior members of Morgan in the actual drafting of the scripts. Tr. 7/14/10 p.m. at 14 (Emerson). But, he did find out later that the "justification" for the

meetings was to be joint ventures. Emerson knew this because Perkins gave him a script to review. Tr. 7/14/10 p.m. at 12-14 (Emerson). Emerson looked at the first page of one script and told Perkins, "[T]hese are false minutes" to which Perkins replied, "You're right. You're correct. They are false minutes." Tr. 7/14/10 p.m. at 15:13-15 (Emerson).

Emerson met yet again with Norris (and European lawyer, Chris Bright) in Norris's office and expressed his concern about having destroyed cartel-related documents. Tr. 7/14/10 p.m. at 21 (Emerson). Emerson was reassured by Norris that he "could not be forced to testify or interviewed by the Department of Justice, . . . if [he] was no longer an employee of the company." Tr. 7/14/10 p.m. at 22:11-13 (Emerson); Tr. 7/16/10 a.m. at 31-32 (Kroef). At this time, Emerson was not "retired".[15] Emerson was later told by Perkins that it would be "beneficial" if Emerson left the company. Tr. 7/14/10 p.m. at 23 (Emerson). Emerson did not recall asking Perkins why he should leave the company at that particular point, but that reason was later supplied by Macfarlane. Tr. 7/20/10 a.m. at 43 (Macfarlane).

Macfarlane testified that the summaries were written "to help each of us that were -- attended the meetings in terms of misleading the Department of Justice." Tr. 7/20/10 a.m. at 31 (Macfarlane). Rehearsals were held with the European counsel. Tr. 7/16/10 p.m. at 16 (Kroef). Norris told Macfarlane that Emerson would not withstand questioning:

> "[Emerson] had been questioned by — I believe it was a Mr. Chris Bright in — in a conference room on his potential involvement in cartel activities, and following those questions by I believe it was Mr. Bright, Mr. Norris emerged from that — I don't know that he was in the meeting or he was present, but he emerged saying

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[15] Defendant claims that Emerson's retirement was "consistent with the evidence demonstrating Mr. Norris's efforts to end the European cartel . . . " (Def. Mem. at 65.) Actually, the evidence shows that Norris never told Emerson to stop going to cartel meetings. Tr. 7/14/10 p.m. at 49:1-9 (Emerson).

> that Mr. Emerson would not stand the questioning of his role in any of these activities going forward." " . . . it was our feeling that it would be useful if he did retire . . . [because] if he were questioned by the Department of Justice either in Canada or yourselves on his role, he would perhaps not be able to stay to the story. He would — he would — he would have to tell the truth."

Tr. 7/20/10 a.m. at 43:9-16; 43:19-20; 44:1-4 (Macfarlane).

Emerson was not old enough to retire on a full pension, but he was told to name his terms. Tr. 7/14/10 p.m. at 23-26 (Emerson). The company met Emerson's conditions without negotiation, and Emerson retired on July 30, 2000. Tr. 7/14/10 p.m. at 25:15-22 (Emerson). *See also* GX-92.

Even after Emerson retired, the conspirators continued to try to influence him to stick with the joint venture cover story if questioned. In December 2000, Emerson received a letter from Macfarlane referring to the U.S. Department of Justice investigation and Mr. Keany's wish to interview him. The letter read in part, "He [Keany] should simply like **to confirm with you your role in the many meetings we held to exit our joint ventures of Le Carbone."** GX-07 (emphasis added); Tr. 7/14/10 p.m. at 29 (Emerson). Emerson had no role in forming or exiting the joint ventures with Carbone. Tr. 7/14/10 a.m. at 87 (Emerson). This was yet another attempt to keep Emerson from truthfully testifying about his cartel activities — either by keeping him from testifying, or if he did, reminding him that the cover-up story was "joint ventures." Emerson, knowing the cover story he was expected to tell to be a lie, declined to meet with Keany. Tr. 7/19/10 a.m. at 78:23-79:16 (Keany).

In his motion for a new trial, defendant states that "there was no illicit purpose in connection with Mr. Emerson's retirement and that the conduct fell within the lawful conduct

described in *Farrell*." [16]. (Def. Mem. at 63.) However, the testimony is clear, uncontradicted, and supported by the Government's exhibits. Emerson was shuttled out of Morgan at an inflated pension because of concern that he would not give a convincing reading of the script if he were questioned. Tr. 7/14/10 p.m. at 23-25 (Emerson); Tr. 7/20/10 a.m. at 43:7-44:9 (Macfarlane); Tr. 7/16/10 a.m. at 30:22-32:13 (Kroef).

Defendant makes very little attempt to undermine the credibility of Emerson, but his one attempt fails. Defendant alleges that Emerson could not have known that the scripts were false because he read only a portion of the first page of one script. However, a cursory review of even the first page of these scripts would inform anyone present at those meetings that the scripts were false. For example:

> Script for "Meeting September 20th 1995, LCL Office in Paris" listing Norris and Emerson as attendees (among others), **"Primary reason for meeting was to get the dialogue going on JV exits."** (GX-10-3) (emphasis added.)
>
> Script for "Meeting January 12th 1996 – Windsor" listing Norris and Emerson as attendees (among others) **"Continuation meeting at Morgan headquarters to carry on from previous JV**

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[16] Defendant cites *United States v. Farrell*, 126 F. 3d 484 (3d Cir. 1997), as support for the proposition that persuading Emerson to take early retirement to try to keep him from the reach of the grand jury was the equivalent of advising him to assert his Fifth Amendment privilege, and thus, not obstruction. Not only does *Farrell* not extend to conduct of this type (where Emerson was given an inflated pension to make himself scarce), but *Farrell* also makes clear that corruptly persuading a witness to lie is an obstruction. *Farrell*, 126 F.3d at 488. In this case, Emerson (1) was told by Norris they needed to create justifications for the cartel meetings, (2) was later made aware that the false joint venture story was to be used, (3) went through the rehearsal to practice the script (where he did not perform as well as Norris would have liked), and (4) in retirement, received a letter from Macfarlane stating Keany wanted to meet with him "to confirm with you, your role in the many meetings we held to exit our joint ventures with Le Carbone." This conduct is far beyond simply advising Emerson of his right not to cooperate, and is clearly an attempt to corruptly persuade Emerson to tell a false story if he were to be questioned.

> **discussions of September 20th 1995 in Paris."** (GX-10-8) (emphasis added.)
>
> Script for "Meeting April 23rd 1996 in Paris LaFayette Hotel" listing Norris and Emerson as attendees (among others) **"Next meeting to discuss J.V. topics and looks like a 'full set' of attendees."** (GX-10-10) (emphasis added.)

Far from undermining his credibility, Emerson's admitting the falsity of these scripts even upon a cursory reading of them, shows why Norris was concerned Emerson would not withstand questioning and had to be "retired."

2. The Scripts Were Not Created at the Request of Counsel and Are Materially False

Defendant next attempts to explain away the overwhelming evidence that the scripts were false by asserting that "the evidence shows an effort by the company to marshal a legitimate defense to an antitrust investigation without implicating itself in conduct abroad." (Def. Mem. at 60.) Defendant attempts to support this position with two specious arguments. First, defendant places the creation of the scripts in September 2000, and at the request of counsel. Second, defendant asserts the scripts are not materially false. However, defendant's distortion of the record is easily exposed by a review of testimony and documents introduced at the trial.

a. The Scripts Were Created in Late 1999 to Give Conspirators the False Lines They Were to Repeat When They Would Later Be Questioned

Much of defendant's Rule 33 Motion is devoted to an attempt to support his contention that the meeting summaries were created in early September 2000 in response to counsel's request for documentation. (Def. Mem. at 67.) First, it is of no legal consequence when or at whose request the scripts were created. It would only make defendant's actions even more

obstructionist if he directed subordinates to create the false meeting summaries specifically in response to a request by counsel for documentation of meetings which counsel intended to provide to the grand jury. More importantly, the testimony from all of the witnesses in the case, including defense witness Cox, is corroborated by the documentary evidence and, further, makes clear that the script writing began in late 1999 and continued into the early part of 2000.

Mr. Kroef testified that the script writing began in late 1999; "we should actually try to create evidence that it wasn't cartel meetings, that these were meetings on other topics which were allowed to take place." Tr. 7/15/10 p.m. at 110-112; 112:10-12 (Kroef). Mr. Macfarlane testified that "[t]he summaries were to help each of us that were – attended the meetings in terms of misleading the Department of Justice," and this process began in 1999. Tr. 7/20/10 a.m. at 31:21-23, 27-28, 69 (Macfarlane). Even the one witness called by the defense, Mr. Cox, testified that the script writing was undertaken in 1999. Tr. 7/21/10 a.m. at 26-31, 41 (Cox).[17]

Defendant also claims that the script writing was directed by counsel, but this claim is similarly unsupported by the evidence. Not a single witness testified that the scripts were created at the request of Keany. *See, e.g.,* Tr. 7/16/10 a.m. at 7:20-8:4 (Kroef). Moreover, the witnesses involved in drafting the scripts testified they were to follow the scripts in rehearsals with Eurpoean counsel, and these rehearsals took place before the Keany interviews. *See* Tr. 7/16/10

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[17] Defendant argues that witnesses could be mistaken about dates of events that occurred long ago. But, their reflection is corroborated by another fact about which they all agree — that Emerson was still employed by Morgan at the time the scripts were created. *See* Tr. 7/14/10 p.m. at 13-15 (Emerson); Tr. 7/15/10 a.m. at 92-93 (Perkins); Tr. 7/16/10 a.m. at 103 (Kroef); Tr. 7/20/10 a.m. at 43 (Macfarlane). *Compare* GX-41 (Keany's 9/8/00 email to defendant noting certain meetings identified by Government) *with* GX-10 (script listing cartel meetings not identified in Keany's email, which defendant claims triggered creation of scripts). Emerson retired from Morgan in July 2000, months before the defendant claims the scripts were drafted. *See* GX-92.

a.m. at 16 (Kroef) (Kroef took part in one of the rehearsals, after which Norris told Kroef that he did okay); Tr. 7/20/10 a.m. at 40 (Macfarlane) (Macfarlane told Norris he would stick to the notes that had been prepared and later reported that the rehearsal went well); Tr. 7/20/10 a.m. at 43-44 (Macfarlane) (Emerson's rehearsal did not go well and led to his retirement).

b. The Scripts are False and Evidence of an Intent to Obstruct the Grand Jury Investigation

There was ample evidence that showed that the scripts were created to corruptly persuade witnesses to give false testimony. Nevertheless, defendant bases his argument that an innocent man was convicted on the notion that:

> "The evidence adduced at trial, considered in light of the credibility of the witnesses, does not demonstrate falsity. Instead, the evidence shows that meeting summaries simply de-emphasized or omitted potentially incriminating information that Morgan had no legal duty to provide."

(Def. Mem. at 85 (*citing, inter alia, United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997).)[18] False scripts that are drafted non-contemporaneously for the purpose of misleading a grand jury investigation and that deceptively characterized meetings as pertaining to exiting joint ventures when their purpose was in fact to carry out price-fixing agreements is obstruction. The fact that at some point during a meeting, after a meeting, during a side conversation, or in a passing reference other topics (including joint ventures) may possibly have been mentioned does not make the scripts true. In any event, the testimony at trial from the first-hand witnesses was that the scripts were false. *See* Tr. 7/14/10 p.m. at 15:12-20 (Emerson); Tr. 7/15/10 a.m. at 30:10-20

[18] For a discussion of *Farrell* and its applicability to this case, *see, supra*, Section II and, *infra*, Section III.

(Perkins); Tr. 7/15/10 a.m. at 111:14-17, 113:10-24 (Muller); Tr. 7/16/10 a.m. at 6:7-15 (Kroef); Tr. 7/16/10 p.m. at 112:6-17, 114:1-8 (Volk); Tr. 7/16/10 p.m. at 82:14-84:6 (Hoffmann); Tr. 7/22/10 a.m. at 31:15-25 (Macfarlane). It is well recognized that "half of the truth may obviously amount to a lie, if it is understood to be the whole." *United States v. Skalsky*, 621 F.Supp. 528, 533 (D.N.J. 1985), *aff'd*, 857 F.2d 172 (3d Cir. 1988) (citation omitted). To credit the false scripts to be a "half-truth" would be far too generous. The joint venture cover story was the best rationale the Morgan men could create, but this distortion of the truth fails to make the scripts "not materially false." (Def. Mem. at 95.)

The most glaring demonstration of the falsity of the scripts comes from comparing them with Norris's own notes. Remarkably, in the defendant's brief alleging the jury perpetrated a miscarriage of justice, defendant neglects to even mention the damning evidence offered in Norris's own hand. (Def. Mem. at 57.) Compare the scripts' stated purpose of the meetings with Carbone, *i.e.*, to discuss exiting joint ventures (GX-10 to GX-27), with Norris's notes contained in GX-01:

> "Absolute commitment to talk before we quote.
> Losing opportunity every month to increase prices."
> (GX-01-1)
>
> "2. Delco — Supported by **LCL** on Starter business.
> P. Inc was +20% — gain $300,000"
> (GX-01-2)
>
> "BEV
> In Canada it was agreed by LCL they were predatory on Price.
> It was agreed we would list all our major accounts & prices
> to Robin [Emerson] and the LCL would request levels from Macon [Marquand]
> before quoting. (Canada it was said that price would not be an issue)."
> (GX-01-3)

> "Principle of Toronto was — 'How do we Increase Prices!'"
> (GX-01-4)

There are many other examples in Norris's handwritten notes that clearly indicate Morgan and LCL (Carbone) had reached a price-fixing agreement and this agreement was carried out in the meetings described in the script. Conversely, there is not a single notation in GX-01 (Norris's handwritten notes) relating to joint ventures with LCL. *See* GX-01. Furthermore, the only reference to Emerson is not in connection with joint ventures, but rather that he should contact Carbone to discuss pricing and, likewise, would be Carbone's price-fixing contact. Norris's own written statement leaves no doubt that the meetings with LCL were price-fixing meetings, and the attempt to recast these meetings as joint-venture meetings fails to render them as anything but false.[19]

Other written statements by Norris confirm that he was a member of the conspiracy to obstruct justice by falsely recasting these cartel meetings as joint venture meetings. The Government introduced into evidence documents in Norris's handwriting which appears to be his scripts for meetings he attended with Carbone. The topic headings for these meetings show a unity of purpose between Norris and his co-conspirators to obstruct justice by creating a false story about their meetings. In his handwritten notes, Norris covered each of the three meetings he attended with the following captions:

> "Sept 95 Meeting — Paris with LCL
> Objective — Remove all JV's with LCL to free
> us to compete head on."
> (GX-02-1)

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[19] The surest sign that there is no other reasonable interpretation of Norris's admissions in GX-01 is that he simply ignores this document. This glaring failure by the defendant corroborates the Government's witnesses, as there is no way to "spin" Norris's statements.

"Notes Meeting @ Office
with LCL Jan. 96
Objective — Follow up to meeting in France
in September. re eliminate all JV's with LCL"
(GX-03-1)

"April 1996 J.V. Meeting with LCL."
(GX-04)

Reviewing each page of these Government exhibits, the jury saw another attempt to re-cast these meetings as joint venture meetings by omitting their true purpose — to continue the price-fixing conspiracy. These exhibits are consistent with the other scripts, and defendant again fails even to address them. *Compare* GX-02, GX-03 and GX-04 *with* GX-10, GX-12 to GX-14.

Furthermore, defendant ignores yet another document which demonstrates beyond a reasonable doubt that the meetings with Hoffmann and Schunk also were price-fixing meetings, and not general market discussions or social events as falsely described in the scripts. Thomas Hoffmann testified that GX-53-2E is a report he prepared for his father, Peter Hoffmann, describing what had occurred at one such cartel meeting. Tr. 7/16/10 p.m. at 74-79 (Hoffmann). First, Hoffmann uses code names for certain companies, as was done in the European cartel.

He then writes the following:

- In principle no competition based on price should occur
- New projects should be individually agreed upon
- Given that no communication system exists at this time in the USA, everything should pass though Europe.

GX-52-2E. This document establishes beyond any doubt that the meetings discussed in the scripts were indeed price-fixing meetings. Defense's cross examination pointing out a couple of typographical errors (misspelling of Emerson's name and an obviously incorrect date) takes

absolutely nothing away from the compelling conclusion that the scripts about this Toronto meeting created by the Morgan men under defendant's direction and later presented to Schunk were false. Tr. 7/16/10 p.m. at 92 (Hoffmann).

The defendant's attempts to portray these scripts as "not materially false," and merely as perhaps misleading or omitting some incriminating information is legally deficient and requires a suspension of any common sense. For example, Keany testified that consistent with the scripts, Norris told him that Carbone had proposed price fixing, and Morgan had *rejected* it. Tr. 7/19/10 a.m. at 80-82 (Keany). Defendant's argument is essentially that this statement is not materially false because it mentions that Carbone proposed price fixing, and it simply omits the potentially incriminating fact that Morgan "*accepted* it."[20] Tr. 7/14/10 a.m. at 86-87 (Emerson); Tr. 7/14/10 p.m. at 83:24-85 (Perkins); Tr. 7/20 a.m. at 39:7-40:2, 124 (Macfarlane). The Court should reject this argument as the jury has done.

3. Norris Met with Schunk to Corruptly Persuade them to Follow the Script and Obstruct the Grand Jury Investigation

Perhaps the most incredulous statement in support of his claim that an innocent man has been convicted is this explanation about his contacts with Schunk — "Mr. Norris's efforts to contact Schunk in December 2000 and February 2001, viewed in the context of the defense efforts, may be viewed simply as an attempt to discover what strategy Schunk was employing with respect to the grand jury investigation." (Def. Mem at 79.) Previously in his opening, Mr. Curran gave a completely different explanation for the Schunk meetings, that defendant was

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[20] Defendant also argues that the scripts are not materially false because he had the right not to incriminate himself. While one has the right to not provide information that would be incriminating, one does not have the right to fabricate evidence to cover-up one's wrong doing.

attempting to determine if there had been any improprieties between the two companies. Tr. 7/14/10 a.m. at 39-40 (Curran Opening). However, the evidence regarding what happened at these Schunk meetings shows neither of defendant's explanations is true. First at Norris's instruction, Kroef met with Dr. Weidlich for the purposes of finding out if they were under investigation, determining their position, and explaining the Morgan strategy of justifying the meetings as joint ventures or general business discussions. Tr. 7/16/10 a.m. at 32-33; 37-39; 89-90 (Kroef). Norris instructed Kroef "to encourage Dr. Weidlich to do things, or to start doing things according to the way or similar to the way we did things." Tr. 7/16/10 a.m. at 91:6-8 (Kroef).

As instructed by Norris, Kroef met with Weidlich and then reported back to Norris that he had given Weidlich a copy of the scripts. But, Kroef was afraid Weidlich was not taking the matter seriously enough, as Weidlich's reaction gave Kroef "the impression that [Weidlich] wasn't really grasping the importance of what was happening." Tr. 7/16/10 a.m. at 39:10-12 (Kroef). While defendant quoted Kroef as saying Norris "felt it was wrong" for Kroef to have given Weidlich copies of the scripts (Def. Mem. at 27), defendant conveniently excludes the remainder of Kroef's testimony which explains why Norris felt it was wrong to give Schunk the scripts — "[t]he risk was too high, that these would eventually turn up somewhere where it shouldn't be, like your office."[21] Tr. 7/16/10 a.m. at 39:16-20 (Kroef).

Eventually, Norris met with Kotzur and Weidlich of Schunk with Kroef present. At this meeting Norris said, "he saw a good chance to turn the table around on Carbone, in case that the

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[21] Kroef pled guilty to obstruction based on his meeting with Weidlich. The evidence above demonstrates that Norris was a conspirator with respect to Kroef's activities.

Schunk people and the Morgan people would give the same testimony with respect to the carbon brush investigation." Tr. 7/20/10 p.m. at 19:14-16 (Weidlich). Norris strongly suggested that Schunk make sure its people answer in the same way as the Morgan people to stop the investigation from coming to Europe. Tr. 7/20/10 p.m. at 20 (Weidlich); Tr. 7/16 /10 a.m. at 49:2-10 (Kroef). The jury heard no evidence which contradicted the accounts of Kroef and Weidlich about Norris's complicity in the attempt to persuade Schunk to follow the script. The defendant simply asks the Court to disregard their testimony as unbelievable. But, the witnesses' testimony is supported by one damning piece of documentary evidence. After Kroef reported back to Norris that he did not think Schunk was taking the investigation seriously enough, Norris met personalty with Kotzur of Schunk in December 2000. Norris wrote on his expense report that his meeting in December 2000 with Kotzur was an "Acquisition Discussion on behalf of WEM." This was false.[22] Tr. 7/20/10 a.m. at 45:10-25 (Macfarlane). Defendant did not deny that this was a false exculpatory–he simply leaves this evidence out of his brief. This deception about the purpose of the meeting corroborates Weidlich and Kotzur that the meeting had a nefarious purpose–to persuade Schunk to follow the Morgan cover-up story. Norris's deceit on this invoice follows the pattern of the cover-up: cover-up criminal conduct at a meeting with a competitor by creating a document which gives a legitimate, but untrue, reason for the meeting.

D. <u>The Government Witnesses Were Credible</u>

Defendant's final attempt under Rule 33 for a new trial centers around the accusation that the Government improperly influenced witnesses who were testifying pursuant to an agreement

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[22] This demonstrates that not only did Norris create a false record to justify the meeting, he expected Macfarlane to go along with the story by stating the meeting was on Macfarlane's behalf.

with the Government. This charge is as outrageous as it is baseless. Because the Court had the opportunity to observe all the witnesses in the case, this brief will not comment directly on their credibility, except to suggest that documents in the case strongly corroborate the Government witnesses.[23]

There is absolutely no evidence in the record that the Government improperly influenced the testimony of any witness. All of the witnesses who testified in the case, with the exception of Mr. Keany, testified pursuant to some form of cooperation agreement with the Government, including defense witness Cox. Cooperation agreements, especially in conspiracy cases, are common, and it is baseless to charge the Government with improperly influencing witness solely on this fact. While defendant relies on the fact that Mr. Macfarlane refused to be interviewed by the defense, there is no evidence that the Government ever told, suggested or in any way

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[23] For example, as discussed, *supra*, the following documents provide evidence of guilt and corroborate the Government witnesses:

1) Norris's handwritten notes outlining the conspiratorial nature of the meetings with Carbone (GX-01); Norris's false exculpatory handwritten notes regarding the meetings with Carbone (GX-02, 03 and 04); and Norris's handwritten false exculpatory for his meeting with Schunk. (GX-51) ;
2) The letter from Gordon Cowie to Emerson confirming that Emerson retired in July 2000. (GX-92);
3) The December 8, 2000 letter from Macfarlane to Emerson stating that Keany wanted to meet with him to "confirm your role in the many meetings we held to exit our joint ventures with Le Carbone." (GX-07);
4) Hoffman fax re: meeting with Carbone and Morgan where it was agreed "in principle no competition based on price should occur". (GX-53);
5) The scripts themselves which falsely stated the purpose of the meetings as legitimate business meetings instead of meetings to carry out the conspiracy so accurately described by Norris in GX-01. (GX-10)

intimated that Mr. Macfarlane should not meet with them. Tr. 7/20/10 a.m. at 65 (Macfarlane).[24]

Because the evidence of defendant's guilt was overwhelming and supported by testimony and documents introduced at trial, including the defendant's own written admissions, defendant's motion for a new trial pursuant to Rule 33 should be denied.

III

THE COURT COMMITTED NO ERRORS IN ITS JURY INSTRUCTIONS THAT WARRANT A NEW TRIAL

Norris presents a number of purported mistakes in the Court's instructions to the jury which he claims warrant a new trial. None of his claims have merit.

A. The Law Governing the Adequacy of Jury Instructions

When analyzing jury instructions for error, this Court should consider "the totality of the instructions and not a particular sentence or paragraph in isolation." *United States v. Khorozian*, 333 F.3d 498, 507-08 (3d Cir. 2003) (quoting *United States v. Coyle*, 63 F.3d 1239, 1245 (3d Cir. 1995); *United States v. Street*, Crim. No. 06-659-1, 2008 WL 4560678, at *7 (E.D. Pa. October 10, 2008). A single jury instruction "may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *United States v. Park*, 421 U.S. 658, 674 (1975) (internal quotation and citation omitted). Moreover, the "charge itself" must be "view[ed] . . . as

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[24] In any event, certain witnesses did elect to meet with the defense. For example, Perkins testified that he met with defendant's counsel and that counsel asked Perkins to sign an affidavit which would have stated that the meetings he attended with Carbone were principally about joint ventures. When Perkins stated that he was not happy this sentence was inserted in his proposed affidavit, he was "told not to worry because it was not likely to be used in testimony anyway." Tr. 7/14/10 a.m. at 76:6-8 (Perkins). Mr. Perkins did not sign the affidavit. The Government did not tell Perkins he could not meet with counsel for the defense. The Government did not tell Perkins he could not sign an affidavit for the defense. Mr. Perkins did not sign the affidavit because it was not true.

part of the whole trial" because "'[o]ften isolated statements taken from the charge, seemingly prejudicial on their face, are not so when considered in context of the entire record of the *trial*.'" *Id.* at 674-75 (citation omitted) (emphasis in original). "Retrial is necessary only when the instruction given created an unfair trial and prejudiced the defendant." *United States v. Castillo*, Crim. No. 96-430, 1997 WL 539762, at *1 (E.D. Pa. Aug. 7, 1997). *See United States v. Dove*, 916 F.2d 41, 45 (2d Cir. 1990) ("In order to succeed when challenging jury instructions appellant has the burden of showing . . . 'that, viewing as a whole the charge actually given, he was prejudiced.'").

When a defendant did not properly object to a jury instruction prior to the jury's deliberations, a later objection is considered only for plain error. Fed. R. Crim. P. 30(d) and 52(b); *Government of the Virgin Islands v. Knight*, 989 F.2d 619, 630-31 (3d Cir. 1993); *United States v. Hoang*, Crim. No. 07-662-05, 2009 WL 2047895, at *4 (E.D. Pa. July 14, 2009). To object properly to any portion of the instructions or to a failure to give a requested instruction, the defendant must inform the court of the specific objection and the grounds for the objection. Fed. R. Crim. P. 30(d); *Knight*, 989 F.2d at 631. This "specificity requirement imposes a strict standard on defense counsel, but it is not a mere formalism." *Knight,* 989 F.2d at 631. "Without a clearly articulated objection, a trial judge is not apprised sufficiently of the contested issue and the need to cure a potential error to avoid a new trial." *Id.*

"Plain error exists if the Court determines that there was 1) an error, 2) that was 'plain,' and 3) the error affected substantial rights." *Hoang*, 2009 WL 2047895, at *3. A mistake should be characterized as plain error only "'sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *Knight*, 989 F.2d at 631 (citations omitted).

"Under the plain error doctrine, [reversal is required to correct] only 'particularly egregious errors,' which 'seriously affect the fairness, integrity or public reputation of judicial proceedings,' [Thus, t]o find plain error, the mistake must be sufficiently obvious that 'the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it.'" *Id.* at 631-32 (citations omitted).

B. The Court's Reference to the Overt Acts in the Indictment Does Not Warrant a New Trial

Defendant claims he is entitled to a new trial because the Court instructed that the jury must find an overt act alleged in the Indictment, but the jury was never informed what overt acts the Indictment alleged. (Def. Mem. at 110.) Because defendant did not object to the Court's instruction in a timely fashion, the standard of review is plain error.[25]

If any error occurred, it either benefitted defendant or was harmless. The Court correctly instructed the jury as to all the elements of the offense, including that it had to find beyond a reasonable doubt that an overt act was committed in furtherance of the conspiracy and that the jurors had to agree unanimously on an overt act. In claiming plain error here, defendant cites three cases in which jury instructions failed to require proof of an essential element or that an act was done within the statute of limitations. (Def. Mem. at 110-112 (citing *United States v. Small*,

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[25] Apparently recognizing that he did not object prior to the jury's deliberations, defendant concedes he must show "plain error." (*See* Def. Mem. at 110.) Nonetheless, defendant asserts he pointed out the problem during the charging conference (Def. Mem. at 113), but he only asked whether the Court would provide the jurors the Indictment in light of the instructions' reference to it. Tr. 7/21/10 p.m. at 21:18–22:24 (Colloquy). This inquiry was not an objection at all, let alone a specific one stating the grounds in support of it. Defendant also suggests the Court rejected a defense proposal to provide the jury with the Indictment, but what the Court rejected was his pretrial motion to redact the Indictment. (*See* Motion *In Limine* to Exclude Evidence Regarding or Relating to Conduct or Events Occurring after May 31, 2000 and for an Order Requiring Redaction of Indictment under the Principle of Specialty (Doc. No. 54.))

472 F.2d 818, 819-20 (3d Cir. 1972); *United States v. Head*, 641 F.2d 174, 177-78 (4th Cir. 1981); *United States v. Gallerani*, 68 F.3d 611, 618 (2d Cir. 1995)). But here the Court correctly instructed the jury that it had to find beyond a reasonable doubt that an overt act was committed in furtherance of the conspiracy and that the jurors had to agree unanimously on an overt act. Following the Third Circuit pattern instructions, the Court also instructed that the jury must find an overt act that was "alleged in the indictment," but that is not the law. To the contrary, the jury could properly convict based on an overt act that was not alleged in the Indictment. *See United States v. McDade*, 28 F.3d 283, 300 (3d Cir. 1994); *United States v. Adamo*, 534 F.2d 31, 38-39 (3d Cir. 1976); *United States v. Pugh*, 437 F. Supp. 944, 946 (E.D. Pa. 1977).

Defendant argues that because the jury was not instructed on what overt acts were alleged in the Indictment, it was left to speculate impermissibly as to the identity of those acts. But because the jury could convict based on an overt act not alleged in the Indictment, any speculation by the jury as to whether an overt act was or was not alleged in the Indictment would be harmless.

While conceding that "the prosecution may prove 'overt acts' other than those alleged in the indictment" (Def. Mem. at 112), defendant cites two out-of-circuit cases to argue the jury could not do so here because of the Court's more limited instruction. But unlike here, those trial courts had identified the specific acts alleged in the indictments and required the juries to find one of them (*i.e.*, they did not simply refer to "acts alleged in the indictment," but described the specific acts), and more significantly, in both cases, the evidence was insufficient to prove any of the alleged acts the courts told the juries they must find.

In *United States v. Negro*, 164 F.2d 168 (2d Cir. 1947), the trial court stressed the single

overt act alleged in the indictment, told the jury it must find that specific act to convict the defendant, and erroneously instructed the jury it could find that act by relying solely on inadmissible evidence when the Government conceded there was no other evidence of the act. The defect was instructing the jury it could find the alleged act based only on inadmissible evidence. *Id.* at 171-72. In *United States v. Morales*, 677 F.2d 1 (1st Cir. 1982), the trial court also repeatedly identified specific acts alleged in the indictment and instructed the jury it must find one of them. Holding that the jury's acquittals on the substantive counts amounted to its finding that none of the alleged acts had occurred, the First Circuit reversed the defendant's conspiracy conviction (citing *Negro*). *Id.* at 2-3.[26] Thus, the decisions in both *Negro* and *Morales* were based on findings that the trial courts had identified specific acts the juries had to find, but that the juries could not have found any of them. That was not the case here, where the Court identified no specific overt acts, and there was overwhelming evidence to find numerous overt acts alleged in the Indictment as well as acts not alleged in the Indictment.[27] *See e.g., supra*

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[26] The First Circuit has since recognized that *Morales*' holding regarding the significance of the acquittals on the substantive counts is "no longer viable" in light of *United States v. Powell*, 469 U.S. 57 (1984). *United States v. Bucuvalas*, 909 F.2d 593 (1st Cir. 1990). Likewise, as discussed in Section II.A.1. above, defendant's claim here that, "the acquittals strongly suggest the jury did not find that the 'overt acts' alleged in the Indictment were taken in furtherance of the conspiracy" (Def. Mem. at 111), has no merit.

[27] Defendant also criticizes the Court for failing to define "overt act," asserting the Court "left the jury with no meaningful guidance as to this essential element in the conspiracy charge." (Def. Mem. at 113.) But he cites no authority requiring the Court to define the term and has not claimed error in its failure to do so. Nor does he explain why the Court's reference to overt acts alleged in the Indictment would make its failure to define the term more significant than if it had not referred to the Indictment at all. In any event, examples of overt acts identified in the Government's closing argument, many of which were alleged in the Indictment, provided the jury with guidance as to the meaning of the term. Tr. 7/22/10 a.m. at 48:9–49:8 (McClain--Closing) *See United States v. Park,* 421 U.S. 658, 675 & n.16 (1975) (reviewing charge as part of whole trial and noting that prosecutor's summation helped to frame issue for jury's

Sections II.A.2, IIA.3., II.C (discussing overwhelming evidence of defendant's guilt from which jury could have found numerous overt acts).

C. The Court's Preliminary Instructions Were Neither Improper nor Prejudicial

Defendant also claims he is entitled to a new trial because the Court, during its preliminary instructions, summarized the Government's theory of the case as follows:

> The defendant and his alleged co-conspirators prepared what the Government calls a script, that is, some documents containing false information which was to be followed by anyone questioned by either the Antitrust Division or the Federal Grand Jury. Defendant Norris and his alleged co-conspirators contacted other persons who had information relevant to the investigation being conducted by the Antitrust Division or the Federal Grand Jury and distributed the so-called script to them with instructions to follow the – what the Antitrust Division calls the script when answering questions by either the Antitrust Division or the Federal Grand Jury.

(Def. Mem. at 115-116 (quoting Tr. 7/13/10, 11:24 a.m. at 28:20-29:6) (Preliminary Instructions).)[28] Defendant challenges these instructions concerning what the Government contended arguing that they constructively amended the Indictment by instructing the jury that it could convict even if it did not find that defendant intended to influence what another person might tell a grand jury, but only what he might tell the Antitrust Division. Because defendant did not object to that portion of the preliminary instruction in a timely fashion, the standard of review is plain error. *Government of the Virgin Islands v. Knight*, 989 F.2d at 631.

The Court committed no error, let alone plain error, in the challenged preliminary instructions. First, the preliminary instructions did not tell the jury that it could convict without

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determination where jury charge contained adequate statement of law, but could have been more precise).

[28] The Court's preliminary statement of the Government's contentions was essentially a recitation of Paragraphs 14 through 17 of the Indictment, the "Manner and Means" section.

finding defendant intended to influence testimony in a grand jury proceeding. As the Court informed the jury, the Government contended that the conspirators instructed other persons to lie to the Grand Jury if questioned by the Grand Jury and to lie to the Antitrust Division if questioned by the Antitrust Division, and that the conspirators agreed to do the same. The statement does not contend, as defendant claims, that the conspirators asked others to lie *only* to the Grand Jury *or* to the Antitrust Division.[29] The preliminary instructions said nothing about what the jury must find beyond a reasonable doubt in order to return a guilty verdict.

Moreover, the Court clearly was not providing a legal instruction when it made the contested statement, but simply informing the jury of the Government's version of events.[30] The Court specifically identified the portion of its preliminary instruction to which defendant now objects as the Government's theory of the case, introducing it by stating:

> I do not know any facts of this case. I do not know the circumstances, and anything that I may say now *is simply to help you place the case in context*, not that I'm relating to you any facts of the case, but I'm going to give you *the Government's theory of the case*, and then I'm going to give you the defendant's contention so that you get a sense of what is going to be happening in the case.

Tr. 7/13/10, 11:24 a.m. at 27: 24–28:5 (Preliminary Instructions) (emphasis added). The Court concluded by stating: "Now, *that's the Government's theory of the case. That's what the Government will contend.*" *Id.* at 29:14 -15. (emphasis added). It immediately followed its

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[29] The intent requirement under 18 U.S.C. § 1512 is addressed above at Section II.A.2.

[30] Defendant cites *United States v. Hernandez*, 176 F.3d 719, 734 (3d Cir. 1999), to show that an erroneous preliminary instruction may be the basis for dismissing a conviction, but in *Hernandez*, the Third Circuit found that the trial court made a significant error in a legal instruction when it incorrectly defined the term "reasonable doubt."

statement of the Government's theory of the case with a statement of the defendant's theory of the case. *Id.* at 29:18 – 30:13.

Most importantly, the Court's final instructions to the jury – the instructions that actually told the jury what elements it must find beyond a reasonable doubt in order to convict – made abundantly clear that they must find the defendant conspired to corruptly persuade others to influence testimony before the grand jury or to cause document destruction with intent to impair the availability of those documents from the grand jury. Tr. 7/22/10, 1:12 p.m. at 44:22-49:10 (Jury Charge). Juries are assumed to faithfully follow their instructions. *Government of the Virgin Islands v. Rosa*, 399 F.3d 283, 297 (3d Cir. 2005), and there is no reason to think the jury did not do so here. Thus, the defendant's claim that the "jury could choose to convict Mr. Norris if they believed beyond a reasonable doubt that he and his alleged co-conspirators agreed to provide false information to the Antitrust Division when they were interviewed" (Def. Mem. at 116-17), cannot be reconciled with the legal instructions actually given.[31] Because those instructions only permitted conviction for the charged offenses, the Indictment was not "impermissibly amended." (Def. Mem. at 115).[32]

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[31] The defendant's claim that the length of the jurors' deliberations shows prejudice, *i.e.*, that they convicted on an invalid legal theory (Def. Mem. at 117-19), is unfounded, if not absurd, speculation. His claim of prejudice based on the jury's interest in Macfarlane's testimony is equally speculative. There are numerous reasons the jury may have been interested in Macfarlane's testimony. Regardless, Macfarlane's testimony supports defendant's conviction.

[32] Defendant also asserts the Court erred by providing a general verdict form and not the five-page form he requested, claiming the general verdict form permitted the jury to convict based on the same legally invalid theory he claims was contained in the Government's version of events. "As a general proposition, special verdicts are generally disfavored in criminal cases," *United States v. Desmond*, 670 F.2d 414, 416 (3d Cir. 1982), and should be considered with "caution." *Black v. United States*, 130 S.Ct. 2963, 2968-69 (2010). For the same reasons the Court's preliminary instructions do not warrant a new trial, the jury was not presented with a legally impermissible theory on which it could convict. Consequently, there was no error in

D. Defendant was not Entitled to an Instruction Regarding Persuasion to Withhold Information

Relying on *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997), defendant claims the Court erred by refusing to adopt his proposed instruction that:

> it is not "corrupt persuasion" to persuade a co-conspirator to withhold, or fail to volunteer, information, no matter how important that information may be to the grand jury proceeding. In other words, you may not find someone has "corruptly persuaded" another person if all he did was to persuade co-conspirators to withhold incriminating information.

(Def. Mem. at 122.) Defendant was not entitled to his proposed instruction because it lacked any evidentiary support. *See United States v. Greenidge*, 495 F.3d 85, 93-95 (3d Cir. 2007).

Defendant's reliance on *Farrell* is misplaced. In *Farrell*, the defendant was charged specifically with influencing another to withhold information, and that was the sole basis for his conviction. It was in that context that the court discussed the potentially lawful reasons for withholding information. The Third Circuit stated that corrupt persuasion does not include an attempt to persuade another person to assert his Fifth Amendment privilege not to incriminate himself. 126 F.3d at 488. What the Third Circuit held, and the Supreme Court later confirmed in *Arthur Andersen LLP v. United States,* 544 U.S. 696 (2003), is that it is not unlawful to persuade someone to withhold information when that person has no legal duty to provide it.[33]

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providing the general verdict form. Moreover, defendant's assertion that his conviction must be reversed if the Court did err in its instructions is wrong. (Def. Mem. at 119.) Instruction on multiple theories of guilt, one of which is invalid, requires reversal only if "the flaw in the instructions had a substantial and injurious effect or influence in determining the jury's verdict.'" *Hedgpeth v. Pulido*, 129 S.Ct. 530, 530-31 (2008) (citations omitted).

[33] It is not clear defendant's proposed instruction is even correct because it fails to include a qualification that the proposed withholding of information must itself be lawful. *See Arthur Andersen*, 544 U.S. at 703-04; *Farrell,* 126 F.3d at 488. Defendant has cited no case in which a court gave his proposed instruction.

Here, defendant was not charged with influencing others to withhold testimony, but with influencing testimony. Specifically, Norris sought to persuade others to provide *false* information. To the extent defendant asked others to withhold information, it was only in the context of the false story he asked them to tell, *i.e.*, to tell a false story that included affirmative lies and also left out material information.

As set forth above in the recitation of evidence (*supra* II.A.2., II.C., and reflected in the written meeting summaries, GX-10 to GX-25), defendant did not simply tell others to withhold information about price discussions, he asked them to tell a false story about what had occurred at meetings with competitors when questioned about those meetings. Defendant also had false, written meeting summaries created to use as a basis to remember what they would say. As embodied in those summaries, defendant asked others to provide the following false information: (1) that the only purpose of Morgan's meetings with Carbone was to discuss exiting their joint ventures when that was not the purpose, (2) that there were extensive joint venture discussions at meetings with Carbone when those discussions had not occurred, (3) that the purpose of Morgan's meetings that included Schunk and Hoffmann was only to discuss the market generally when that was not the purpose, (4) that Morgan only attended the meetings with Schunk and Hoffmann because it was interested in acquiring one of them when that was not its purpose, (5) that at all of the meetings, only Carbone wanted to discuss price cooperation, and (6) that Morgan, Schunk and Hoffmann always rejected Carbone's overtures to discuss price cooperation when they had not. Even defendant's directive to leave out of the written meeting summaries any mention of price discussions, in the context of his other directives, amounted to a directive to deny any such conversations had occurred. Because the record could not support a finding that

defendant's activities amounted only to an effort to persuade others to withhold evidence, he was not entitled to his proposed instruction, which would only have misled or confused the jury.[34]

Moreover, the instructions the Court did give were completely accurate and adequately informed the jury on what it must find to convict. The Court informed the jury it had to find that the defendant knowingly corruptly persuaded another person with the intent to influence that person's testimony in the Grand Jury proceeding. It properly defined "to corruptly persuade" as meaning "to corrupt another person by persuading him or her to violate a legal duty, to accomplish an unlawful end or an unlawful result or to accomplish some other lawful end or lawful result by an unlawful manner."[35] Tr. 7/22/10 p.m. at 38-39 (Jury Charge). The Court said nothing about an effort to persuade others to withhold testimony, and nothing in its instructions would have permitted the jury to convict if it found only that defendant had urged others to withhold testimony.[36]

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[34] In his Memorandum, defendant ignores all the lies he asked others to tell, focuses only his instruction to exclude from the written summaries any mention of price discussions, then claims his efforts amounted only to the type of persuasion that *Farrell* and *Andersen* permit. But even if he had only instructed others not to mention their price discussions when answering question, to withhold such material information without asserting privilege while providing other information about the meetings would amount to a lie. *See United States v. Skalsky,* 621 F. Supp. 528, 533 (D.N.J. 1985), *aff'd,* 857 F.2d 172 (3d Cir. 1988) ("half of the truth may obviously amount to a lie, if it is understood to be the whole"). *Farrell* and *Andersen* permit efforts to persuade others to withhold information lawfully, not to tell half-truths.

[35] The Court's instructions were virtually identical to those provided in the Third Circuit's pattern jury instruction 6.18.1512B. *See also United States v. Fumo*, Crim. No. 60-319, 2009 WL 1688482, at *52-53 (E.D. Pa. June 17, 2009) (reaffirming use of the Third Circuit's instructions while holding that the language is consistent with *Arthur Andersen* regarding consciousness of wrongdoing).

[36] Defendant also complains that the Court added to the pattern language that "[t]o persuade" means "to cause or induce a person to do something or not to do something," but that definition was added only after defendant requested an instruction on the meaning of "persuade." *See* Ian P. Norris's Proposed Jury Instructions (filed June 1, 2010, Doc. No. 59, at 44). More

E. The Court Gave a Proper "Nexus" Charge

Defendant also claims the Court failed to instruct the jury adequately as to (1) his required knowledge regarding the likelihood that the object of his persuasion was a likely grand jury witness and (2) his intent to impair the availability of documents to the Grand Jury. Defendant does not claim the Court erred in its general instructions regarding nexus and intent, but bases his claim of error on three more specific instructions: (1) that the object of defendant's persuasion did not have to be under subpoena or scheduled to testify; (2) that "testimony in the context of this case is evidence that a witness gives or may give under oath;" and (3) that documents whose destruction defendant sought need not be under subpoena. (Def. Mem. 126-29.) Each of these specific instructions was proper, and the Court's instructions, read as a whole, properly instructed the jury as to defendant's intent and the requisite nexus between defendant's conduct and the grand jury proceeding.[37]

Because 18 U.S.C. § 1512 requires no existing grand jury proceeding, it is axiomatic that no subpoena need exist, and neither the object of persuasion nor the documents to be destroyed need be under subpoena. *See supra,* Section II.A.2. at 5-6 (citing 18 U.S.C. § 1512(f)(1), *see Arthur Andersen*, 544 U.S. at 707-08; *DiSalvo*, 631 F. Supp. at 1402; *Misla-Aldarondo*, 478 F.3d at 69; *Ho*, 651 F. Supp. 2d at 1195-1198). And because 18 U.S.C. § 1512(b)(1) does not require an actual proceeding, the Court's definition of testimony in the context of the statute also was correct.

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importantly, the instruction is accurate and defendant did not object to it.

[37] Defendant's claims regarding the likelihood of witness testimony and the relevance of the document subpoena, including the applicability of *Aguilar* and *Arthur Andersen*, are addressed above at Section II.A.2.

F. The Court Did Not Err by Refusing to Distinguish the Terms "Influencing" and "Preventing"

Defendant also claims the Court erred by rejecting his proposed instruction that preventing a person from testifying is not influencing testimony. (Def. Mem. at 130.) While it is true the two concepts are different, and both cases defendant cites hold that rendering a person physically unable to testify does not meet the definition of "persuasion," there was no evidence here that would support a finding that defendant sought physically to prevent anyone from testifying. Consequently, defendant's proposed instruction was unnecessary and would have served only to confuse the jury.

G. A Missing Witness Instruction was not Warranted

Finally as to the jury instructions, defendant claims the Court erred by refusing his request for a missing witness instruction regarding Emilio DiBernardo, Michel Coniglio, and Dagobert Kotzur. For various reasons, his requested instruction was not warranted.

A missing witness instruction is appropriate when a defendant has met four conditions:

(1) The witness was available to one party and not the other;

(2) The party to whom the witness is available does not call the witness and provides no explanation for that failure;

(3) The witness is not prejudiced against that party; and

(4) The witness would give relevant and non-cumulative testimony.

Comment to Third Circuit Inst. 4.16. *See also United States v. Vastola*, 899 F.2d 211, 235 (3d Cir. 1990) (A missing witness instruction is not appropriate when the witness is available to both the defense and the prosecution.) Defendant was not entitled to a missing witness instruction because he did not show that any of the three witnesses were unavailable to him, but available to

the Government (as set forth below, DiBernardo and Coniglio were equally unavailable to the Government), and almost all of the testimony the witnesses would have given would have been cumulative.

1. Defendant Generally Failed to Justify a Missing Witness Instruction

Defendant claims none of the witnesses were available to him simply because they were foreign citizens living outside the United States. But he has not shown they actually were unavailable because he made no effort to obtain their testimony, and he had no reason to conclude any effort would have been fruitless. The only effort defendant claims to have made was embodied in an April 30, 2010 discovery letter (attached hereto as Exhibit A). In that letter, defendant's counsel asked the Government to "make available individuals *that we identify* who have an obligation to cooperate with the Antitrust Division or whose employer has an obligation to cooperate with the division . . .," but he identified no specific individual. (Emphasis added). The Government responded, in a letter dated May 12, 2010 (attached hereto as Exhibit B), that if defendant identified specific witnesses whose testimony he sought, the Government would speak to the witnesses' counsel about defendant's request. Despite the Government's having identified more than 40 potential witnesses to defendant (including DiBernardo, Coniglio, and Kotzur) and providing interview notes and reports of interview for all of them, defendant never identified any of these three individuals as being of interest to him. Nor, to the Government's knowledge, did defendant make any effort to contact DiBernardo, Coniglio or Kotzur through counsel in an effort to obtain their testimony, even though the Government had identified their counsel to

him.[39]

In addition to refuting defendant's claim that DiBernardo, Coniglio and Kotzur were unavailable to him, defendant's failure to make any effort to obtain their testimony belies his claim that their testimony would have been useful and not merely cumulative. Had he believed that were true, he would have made some effort to obtain their testimony. Instead, he merely speculates as to some useful evidence DiBernardo and Kotzur may have provided while providing no basis for his speculation, and fails even to speculate as to any evidence Coniglio may have provided.

2. Defendant Failed to Justify a Missing Witness Instruction as to Each Specific Witness

Even assuming that none of the witnesses were available to defendant, defendant has failed to establish that he was entitled to a missing witness instruction with respect to any of the three witnesses he lists in his memorandum. (Def. Mem. at 130.)

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[39] In contrast to his complete lack of effort to obtain testimony from DiBernardo, Coniglio or Kotzur, defendant did try, with some success, to obtain testimony from various current and former Morgan employees by contacting Morgan counsel. Defendant acknowledges having made that effort. *See* Def. Mem. at 133-34.

Defendant also claims he sought the Court's assistance to obtain testimony from DiBernardo, Coniglio and Kotzur but was unsuccessful. But as with his request to the Government, defendant asked only for a blanket order requiring the Government to "secure the availability" of all current or former employees of Morgan, Carbone, and Schunk, without identifying a single individual, the testimony that individual might provide, or why his anticipated testimony might be useful. (Doc. No. 46-7 at 3 (Defendant's Proposed Order to his Motion to Compel Discovery by the Division as to its Cooperating Companies); *see* Doc. No. 46-1 at 11-12 (Defendant's Memorandum of Law in Support of his Motion to Compel Discovery by the Divison as to its Cooperating Companies)).

a. Emilio DiBernardo

DiBernardo cooperated during the Government's investigation pursuant to an April 10, 2000 plea agreement with his former employer (Carbone), but he refused to testify for the Government at defendant's trial. *See* July 16, 2010, Letter from J. Feld to L. McClain, attached hereto as Exhibit C.[40] As a Canadian citizen, the Government could not compel DiBernardo to testify. Nor could the Government threaten prosecution for prior illegal conduct because the statute of limitations had long since run on any crime DiBernardo may have committed.[41] Consequently, DiBernardo was unavailable to the Government.

Moreover, DiBernardo's testimony would have concerned only what was discussed at the Morgan/Carbone meetings. Because four other witnesses (Perkins, Emerson, Macfarlane, and Kroef) testified about those meetings, DiBernardo's testimony would have been cumulative. Defendant claims DiBernardo would have testified that there was no price-fixing agreement reached at the meetings, that joint ventures were discussed at the meetings, and that Morgan's written meeting summaries were accurate. (Def. Mem. at 142). But defendant bases his assertion only on an unsupported statement his counsel made during the charging conference, despite the availability of the Government's interview notes and a copy of DiBernardo's deposition testimony in a related civil suit. Regardless, defendant has identified several other

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[40] As defendant has noted, the Government identified DiBernardo as a Government witness. It did so because DiBernardo had agreed to a pretrial interview, and despite DiBernardo's insistence that he would not testify at trial, the Government hoped he would change his mind. Ultimately, he did not.

[41] The Carbone plea agreement does not contain a provision to toll the statute of limitations with respect to the crimes as to which the company pled.

witnesses who provided the testimony he expected to elicit from DiBernardo. (Def. Mem. at 3.)

b. Michel Coniglio

Coniglio cooperated during the Government's investigation pursuant to a personal plea agreement filed April 10, 2000, but neither the Government, the attorney who had represented him at the time, nor his former employer (Carbone) could locate him prior to trial.[42] Consequently, Coniglio, who is a French citizen, was unavailable to the Government.

Moreover, Coniglio's testimony would have concerned only what was discussed at the Morgan/Carbone meetings. Because four other witnesses (Perkins, Emerson, Macfarlane, and Kroef) testified about those meetings, Coniglio's testimony would have been cumulative. Despite the availability of the Government's interview notes, defendant identified no useful testimony he believed Coniglio might have provided.

c. Dagoburt Kotzur

Dr. Kotzur cooperated in the Government's investigation pursuant to a June 4, 2001 non-prosecution and cooperation agreement with the Government. The Government did not seek Kotzur's testimony, thus it does not claim he was unavailable, but for the reasons set forth above, defendant has failed to establish that Kotzur was not available to him.[43]

Moreover, the bulk of Kotzur's testimony would have concerned the February 2001

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[42] Coniglio retired from Carbone in 2005. In response to the Government's request for assistance, Carbone's counsel informed the Government he could not locate Coniglio, and that counsel in a related civil suit also had failed to locate Coniglio in an effort to obtain deposition testimony.

[43] The Government did not seek Kotzur's testimony in part because of the difficulty it had encountered with interpretation (Kotzur speaks German) when he was interviewed in June 2001.

meeting with Norris, Weidlich, and Kroef. Both Weidlich and Kroef testified about that meeting, thus Kotzur's testimony would have been cumulative. Additionally, Weidlich testified that Kotzur spoke only "very rudimentary English" and that the relevant discussion was conducted "more or less without [the] participation of Dr. Kotzur." Tr. 7/20/10 a.m. at 18-19 (Weidlich). While any testimony by Kotzur about his December 2000 meeting with Norris would not have been cumulative, neither the Government nor defendant presented any evidence of what actually occurred at that meeting. Rather, with respect to that meeting, the only evidence presented by the Government established that defendant lied as to its purpose. *See* GX-51 (defendant's written statement that he met at Macfarlane's request to discuss acquisition); Tr. 7/20/10 a.m. at 25:10–25 (Macfarlane) (contradicting defendant's statement as to the purpose of the meeting). The case did not focus on that meeting, and its significance was dwarfed by all the other evidence of defendant's guilt.[44] Thus, even if Kotzur had been unavailable to defendant and he had relevant, non-cumulative evidence, failure to provide a missing witness instruction as to Kotzur would have been harmless.

IV

THE COURT DID NOT ERR BY PERMITTING THE TESTIMONY OF SUTTON KEANY

The Court properly admitted testimony concerning Keany-Norris communications involving Europe because no attorney-client privilege protected those communications. Furthermore, defendant's objections to the testimony under Rules 402 and 403 are barred as

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[44] Although defendant claims Kotzur could have offered "crucial testimony" about the two meetings (Def. Mem. at 142), Government interview notes provided to defendant during discovery make no mention of either meeting.

untimely. Alternatively, the testimony is proper pursuant to Rules 402 and 403 because it is both intrinsic and relevant, and its probative value outweighs any prejudice. Finally, the testimony is admissible under Rule 404(b) because it was offered for a proper purpose, that is, to show intent.

A. Mr. Keany's Testimony Concerning Defendant's Lies Involving European Cartel Activity is not Barred by Attorney-Client Privilege

It is well settled that "the party asserting the privilege bears the burden of proving the existence of each element of the privilege." *United States v. Fisher*, 692 F.Supp. 488, 490-91 (E.D. Pa. 1988) (citing, *inter alia*, *In re Bevill,* 805 F.2d at 126). To determine when invocation of the attorney-client privilege is appropriate, the Third Circuit follows the traditional eight-part test.[45] Because Mr. Keany represented defendant's corporate employer, however, defendant bears the additional burden to prove: (1) that he approached Mr. Keany for the purpose of seeking legal advice; (2) that when he approached Mr. Keany he made it clear he was seeking legal advice in his individual capacity and not as a representative of Morgan; (3) that Mr. Keany saw fit to communicate with him in his individual capacity, knowing that a possible conflict could arise; (4) that his conversations with Mr. Keany were confidential; and (5) that the substance of his conversations with Mr. Keany did not concern matters within the company or the general affairs of the company. *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123-25 (3d Cir. 1986). Defendant's claim of privilege fails several prongs of that test as this Court correctly found following extensive briefing, an evidentiary hearing held on July 6,

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[45] Communications are protected under the attorney-client privilege when: (1) legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection may be waived. *In re Impounded*, 241 F.3d 308, 316 n.6 (3d Cir. 2001) (citations omitted).

2010, and argument on July 9, 2010. Central to this finding were the Court's following conclusions: (1) Norris did not approach Keany's law firm or Keany for legal representation. The evidence showed that Keany's law firm was contacted by Morgan to represent it during the grand jury investigation. Memorandum Supporting July 12, 2010 Order at 11 (Doc. No. 109). At no time did Norris ask Keany's law firm or Keany specifically to represent him personally during the grand jury investigation. *Id.* at 11-12; (2) at no time did Mr. Keany believe he represented the defendant individually. *Id.* at 12. Mr. Keany understood that he represented Morgan as a corporate entity, and not the defendant as an individual. *Id.* at 7. Mr. Keany told the defendant that he represented the company (Morgan) and did not represent the defendant individually. *Id.* He also advised the defendant to obtain independent counsel; *id.* at 12; and (3) at no time did the defendant ask Mr. Keany to represent him personally. *Id.* at 8. The defendant and Mr. Keany never discussed personal legal matters. Everything they discussed in connection with the investigation solely concerned Morgan/Morganite business and corporate matters. *Id.*

For the reasons identified above and set forth in the corresponding Government papers (Doc. No. 58, Doc. No. 76 and Doc. No. 103, each incorporated herein), Mr. Keany's testimony was properly admitted and did not violate the attorney-client privilege because defendant failed to demonstrate that attorney-client relationship existed between him and Mr. Keany.

B. Defendant is Barred from Raising Claims Under Rules 403 and 404(b)

Because defendant failed to make timely objections at trial to the admissibility of Keany-Norris communications involving Europe under Rules 403 and 404(b) of the Federal Rules of Evidence, he may not now raise these claims. "Rule 103(a)(1) of the Federal Rules of Evidence restricts . . . review of evidentiary errors to those in which the complaining party has 'stat[ed] the

specific ground of objection, if the specific ground was not apparent from the context. . . . Although the degree of specificity required by the Rule is not clear, it has been established that general objections, such as the characterization of the offending evidence as irrelevant, will not suffice." *United States v. Sandini*, 803 F.2d 123, 126 (3d Cir. 1986). "[T]he initiative in excluding improper evidence is left entirely to the opponent, who must object to disputed evidence in a specific, timely manner. This requirement is not a trap for the unwary, but is designed to alert the trial court to evidentiary defects so that the court and counsel may immediately remedy those defects." *Altman v. Bobcat Co.*, 349 Fed. App'x 758, 765 (3d Cir. 2009).

Defendant raises for the first time in his post-trial *Motion For Acquittal or, in the Alternative, For a New Trial* objections pursuant to Rules 403 and 404(b) to the Keany-Norris communications involving Europe. (Doc. No. 160 at 155). At no point during trial did defense counsel invoke Rule 403 or Rule 404(b), as required by Rule 103(a)(1) and Third Circuit law. *See* Tr. 7/19/10 a.m. at 48:10-50:2 (Curran Argument); *Sandini,* 803 F.2d at 126; *Carter v. Hewitt*, 617 F. 2d 961, 966 n.4 (3d Cir. 1980); *United States v. Long*, 574 F.2d 761, 766 (3d Cir.1978). Nor was defense counsel's reliance on either of these two Rules "apparent from the context." *Sandini,* 803 F.2d at 126 (*citing United States v. Gibbs,* 739 F.2d 838, 849 (3d Cir. 1984). The substance of the colloquy was whether the evidence was violative of the attorney-client privilege and whether the crime-fraud exception applied. Defense counsel's statements are bereft of even a hint that any part of his objection was based on Rules 403 and 404(b), Tr. 7/19/10 a.m. at 48:10-50:2 (Curran Argument), and were insufficient to put the Court on notice that an objection based on Rules 403 and 404(b) was at issue. *See id.* Defendant's failure to

make timely objections under Rules 403 and 404(b) of the Federal Rules of Evidence to the admissibility of Keany-Norris communications involving Europe, therefore, bars him from raising those claims now.

C. Keany-Norris Communications Involving Europe Are Admissible Under Rules 402 and 403

For the reasons stated *supra,* defendant is barred from objecting to the admissibility of the Keany-Norris communications involving Europe. Should the Court find differently, however, evidence that defendant provided false information when interviewed by Keany regarding cartel activity in Europe nonetheless is admissible under Federal Rules of Evidence 402 and 403.

1. Such Evidence is Intrinsic

The Indictment alleged that defendant conspired with others to corruptly persuade other persons to falsely characterize price-fixing meetings with competitors as lawful joint venture discussions if questioned by anyone in connection with the antitrust investigation. The Government properly elicited testimony that when defendant was interviewed by Morgan counsel in connection with the investigation, defendant, among other things, denied to counsel knowledge of Morgan's participation in European cartel activity.

This evidence was properly admitted to help the jury understand the scheme to obstruct devised by the defendant and others and how they implemented it. The Government's evidence showed that defendant, among other things, devised a plan to create and promulgate false explanations for meetings he and his co-conspirators had with competitors to discuss pricing in the North American market. As such, the fact that defendant actually provided false information to company counsel (about the European cartel that migrated to the North American market)

bears directly on the crimes charged in the instant case. Since the European conspiracy migrated to North America, defendant may have been justifiably concerned that if the European conspiracy was discovered, the discovery of its North American offspring would have been inevitable. Thus, lying about the existence of a European conspiracy was necessary to protect the North American one.[46] Furthermore, lying to counsel about a European conspiracy was necessary to prevent discovery of his efforts to persuade others to testify falsely about the price fixing and the falsehoods in the scripts. Finally, a jury reasonably could infer from this evidence defendant's intent to obstruct. Therefore, this evidence is intrinsic to the crimes charged and Rule 404(b) does not apply.

2. Such Evidence is Relevant

The Government merely needed to show that the evidence is relevant and that its probative value is not outweighed by any prejudice. For many of the same reasons this evidence is intrinsic, it is also relevant. Testimony regarding activities of defendant and others with respect to Mr. Keany's investigation of the price-fixing conspiracy and testimony that defendant provided false information to company counsel explains defendant's knowledge of and participation in the obstruction scheme that he orchestrated to throw off the grand jury. Indeed, this evidence showed that the defendant and his co-conspirators did what it is alleged they agreed to do. Such evidence also bears directly on defendant's intent to obstruct the grand jury's investigation. As such, this evidence is both relevant and admissible.

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[46] Also for these reasons, defendant's lies to counsel regarding the European conspiracy are distinguishable from his lies to Canadian investigators conducting a separate, parallel investigation.

3. The Probative Value of Such Evidence is Not Substantially Outweighed by Any Prejudice

Because this evidence was important to satisfy the Government's burden on an essential element of the crimes charged, *i.e.*, intent, it was an indispensable component of the Government's case. Moreover, while it may be prejudicial to the defendant, it is not inherently inflammatory and, as such, does not rise to the level of unfair prejudice. Accordingly, any potential prejudice does not substantially outweigh the highly probative value of this evidence. The Court properly admitted evidence that defendant actually provided false information to corporate counsel under Federal Rules of Evidence 402 and 403.

D. Such Evidence is Admissible Under Fed. R. Evid. 404(b)

Even if such evidence was not intrinsic to the crimes charged, it is admissible under Federal Rule of Evidence 404(b).

1. Defendant Received Sufficient Rule 404(b) Notice

Defendant complains that the Antitrust Division did not provide adequate notice of its intention to use this evidence. This claim is without merit. The text of Rule 404(b) requires the Government to only describe the general nature of the evidence it intends to introduce. Fed. R. Evid. 404(b); *see also* Fed. R. Evid. 404(b) Advisory Committee Note, 1991 Amendment ("[O]pt[ing] for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the extrinsic acts"). Indeed, courts have routinely denied defense requests for greater particularity in Rule 404(b) notice. *See, e.g., United States v. Kern*, 12 F.3d 122, 124 (8th Cir. 1993) (holding that government's statement that it "might use evidence from some local robberies" was sufficient to describe the general nature of the acts under Rule

404(b)); *United States v. Watt*, 911 F.Supp. 538, 556 (D.D.C. 1995) (citations omitted) (considering and rejecting defendant's argument for particularized Rule 404(b) notice, and instead "opt[ing] for a generalized notice provision which requires the prosecution to apprise the defendant of the general nature of the evidence of extrinsic acts"); *United States v. Schoeneman*, 893 F.Supp. 820, 823 (N.D. Ill.1995) (holding that the government need not turn over specific evidentiary detail of the other acts evidence in 404(b) notice); *United States v. Rusin*, 889 F.Supp. 1035, 1036 (N.D. Ill.1995) (rejecting defendant's arguments that Rule 404(b) notice requires the government to disclose "dates, places, and persons involved in the specific acts; documents that pertain to the acts, a statement of the issues to which the government believes such evidence may be relevant. . . .").

In the Government's Motion *In Limine* For An Order To Permit Testimony Of Sutton Keany, the Antitrust Division provided defendant its list of twelve anticipated areas of Mr. Keany's proposed testimony. (Doc. No. 58-1 at 12-14). Included among these areas was anticipated testimony that defendant and his subordinates were interviewed by Mr. Keany in connection with the price-fixing grand jury investigation and that they all denied participating in price-fixing meetings. Although the list delineates other areas of Mr. Keany's anticipated testimony, points 5, 7, 8, and 11 involve denials by defendant and his subordinates of their participation in price-fixing meetings. (Doc. No. 58-1 at 13-14). The general nature of the testimony the Government sought from Mr. Keany, therefore, involves defendant's denials of his and his company's participation in price-fixing activities. Such notice is sufficient to fulfill the requirement of Rule 404(b) that "the prosecution in a criminal case shall provide reasonable notice in advance of trial . . . of the general nature of any such evidence it intends to introduce at

trial."

2. The Evidence Was Offered for a Proper Purpose

Evidence that defendant actually provided false information to corporate counsel is not intended to prove defendant's character "in order to show action in conformity therewith." Fed. R. Evid. 404(b). Rather, the proffered evidence is highly probative of defendant's motive and intent and corroborates the testimony of co-conspirators, thereby enhancing their credibility.

a. Motive and Intent

"In order to admit evidence under the 'intent' component of Rule 404(b), intent must be an element of the crime charged and the evidence offered must cast light upon defendant's intent to commit the crime." *United States v. Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994). Because the Government must prove that defendant committed the charged obstruction offenses with the specific intent to obstruct, it was proper for the Government to introduce under Rule 404(b) evidence that defendant provided false information to corporate counsel investigating the underlying price-fixing conspiracy. As the Supreme Court has noted,

> [e]xtrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.

Huddleston v. United States, 485 U.S. 681, 685 (1988). The circumstances surrounding the commission of an offense include the circumstances during the commission of that offense and the circumstances shortly before and after the commission. *See* Fed. R. Evid. 401, 404(b). Indeed, "[t]he existence of an overarching scheme can provide circumstantial evidence of a defendant's guilt by explaining his motive in committing the alleged offense . . . . This is

especially important when the charged offense requires specific intent . . . ." *United States v. Cross*, 308 F.3d 308, 322-23 (3d Cir. 2002) (citations omitted). The Third Circuit has explained,

> [o]rdinarily, when courts speak of "common plan or scheme," they are referring to a situation in which the charged and the uncharged crimes are part of a single series of events. In this context, evidence that the defendant was involved in the uncharged crime may tend to show a motive for the charged crime and hence establish the commission of that crime, the identity of the actor, or his intention.

Government of the Virgin Islands v. Pinney, 967 F.2d 912, 916 (3d Cir. 1992).

In this case, the Government offered this evidence for the permissible purpose of showing motive and intent, and that evidence, therefore, was admissible under Rule 404(b). The fact that defendant told the false story to the Government through corporate counsel is evidence that he intended others to tell the same lie.

b. Corroborative Evidence

Evidence of other acts is admissible for the purpose of enhancing a witness' credibility. *See, e.g., United States v. Dansker*, 537 F.2d 40, 57 (3d Cir. 1976) (holding evidence of prior embezzlement admissible in bribery trial to demonstrate existence and nature of relationship between defendants and cooperating witness and to substantiate credibility of cooperating witness); *cf. United States v. O'Leary*, 739 F.2d 135, 136-37 (3d Cir. 1984) (finding cooperating witness could testify to prior drug transactions with the defendant, showing the relationship shared by the cooperating witness and the defendant because the prior crimes were similar and proximate in time); *United States v. Simmons*, 679 F.2d 1042, 1050 (3d Cir. 1982) (ruling that evidence of prior check-forging by defendant was admissible in check-forging prosecution to explain the relationship between defendant and testifying co-conspirator).

The testimony concerning defendant's lies to corporate counsel corroborated testimony of

co-conspirators who testified that they were to tell the false story to anyone who questioned them in connection with the investigation. Although corroboration is not a specified purpose in Rule 404(b), this evidence was admissible for that purpose since it was not being used to show bad character.

3. The Evidence is Relevant

As discussed *supra*, the proffered evidence is highly relevant to the crimes charged.

4. The Probative Value of the Evidence is Not Substantially Outweighed by the Danger of Unfair Prejudice

As discussed *supra*, the probative value of the evidence outweighs the danger of any unfair prejudice.

For the foregoing reasons, the testimony concerning Keany-Norris communications involving European cartel activity was proper.

V

THE GOVERNMENT COMPLIED WITH ITS DISCOVERY OBLIGATIONS

Defendant argues that he is entitled to a new trial because the Government failed to comply with its discovery obligations in essentially three ways: (1) not producing material possessed solely by third parties with which the Government has cooperation agreements; (2) not producing all foreign-located witnesses employed by these third parties with which the Government has cooperation agreements; and (3) redacting certain information relevant as witness impeachment in the notes of witness interviews the Government did provide defendant during discovery. Defendant's discovery arguments are essentially a rehash of what defendant argued at various times prior to trial and which the Court properly rejected. *See* Order dated June

25, 2010 (Doc. No. 88) (denying each of defendant's four discovery motions). For the reasons set forth below, the Government complied fully with its discovery obligations. As such, defendant's motion for a new trial on the basis of any *Brady* or other discovery violation should be denied.

A. The Government's Discovery Obligations

It is beyond dispute that there is no general right to discovery in a criminal case. *Arizona v. Youngblood*, 488 U.S. 51, 55 (1988); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *United States v. Agurs*, 427 U.S. 97, 109 (1976); *Diggs v. Owens*, 833 F.2d 439, 443 (3d Cir. 1987). "Criminal pretrial discovery is, of course, vastly different from discovery in civil cases." *United States v. Ramos*, 27 F.3d 65, 67 (3d Cir. 1994). "In contrast to the wide-ranging discovery permitted in civil cases, Rule 16 of the Federal Rules of Criminal Procedure delineates the categories of information to which defendants are entitled in pretrial discovery in criminal cases . . . ." *Id.* at *68.* The Constitution does not require the Government to share "all useful information" with the defendant during discovery. *United States v. Ruiz*, 536 U.S. 622, 629 (2002).

Separate and apart from its discovery obligations, the Government "must also honor the defendant's constitutional rights, particularly the due process right *Brady v. Maryland* [, 373 U.S. 83 (1963)] established." *United States v. Jordan*, 316 F.3d 1215, 1251 (11th Cir. 2003). The Government is obliged under *Brady* and its progeny, including *Giglio v. United States*, 405 U.S. 150 (1972), to turn over evidence in its possession that is both favorable to the defendant and material to his guilt or punishment. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987). But this obligation has limits. The Government is not required "to provide defense counsel with

unlimited discovery of everything known by the prosecutor . . . ." *Agurs*, 427 U.S. at 106, 109.

"A *Brady* violation has three components: the evidence at issue must be favorable to the defendant; it must be material; and it must have been suppressed by the prosecution." *United States v. Reyeros*, 537 F.3d 270, 281 (3d Cir. 2008). The Supreme Court has defined Brady's materiality standard as follows: "Evidence is material only if there is a reasonable probability that, [were] the evidence [to be] disclosed to the defense, the result of the proceeding would [be] different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Ritchie*, 480 U.S. at 57 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)); *see also Kyles v. Whitley*, 514 U.S. 419, 434 (1995). The "mere possibility" that an item of undisclosed information might help the defense, or might affect the outcome of the trial, "does not establish 'materiality' in the constitutional sense." *Agurs*, 427 U.S. at 109-10.

B. The United States' *Brady* and Rule 16 Discovery Obligations Do Not Extend to Evidence Unseen by the Government and in the Sole Possession of Cooperating Companies

The defendant argues for a new trial because the Government did not produce materials possessed solely by third parties with which the Government has cooperation agreements. As a threshold matter, because defendant has failed to demonstrate that the Government was in constructive possession of the materials at issue, his request for a new trial on this ground should be denied. Even assuming constructive possession by the Government, the defendant fails to demonstrate that the documents he sought were material to his defense.

1. The Government Is Not in Constructive Possession of Materials in the Sole Possession of Cooperating Companies

The Government's Rule 16 discovery obligations extend only to materials and

information that is "within the government's possession, custody, or control." Fed. R. Crim. Proc. 16(a)(1)(E). Its *Brady* obligations extend to information possessed by others who are acting on the government's "behalf" or are under the government's "control." *United States v. Risha*, 445 F.3d 298, 303-05 (3d Cir. 2006). The Third Circuit has directed a case-by-case analysis when evaluating a federal prosecutor's constructive knowledge and has "set forth three questions relevant to the analysis: (1) whether the party with knowledge of the information is acting on the government's 'behalf' or is under its 'control'; (2) the extent to which state and federal governments are part of a 'team,' are participating in a 'joint investigation' or are sharing resources; and (3) whether the entity charged with constructive possession has 'ready access' to the evidence." *Reyeros*, 537 F.3d at 282 (quoting *Risha*, 445 F.3d 298, 304 (3d Cir. 2006)).

Defendant's position calls for an unprecedented and unjustified expansion of these obligations by treating evidence never seen or possessed by any arm of the government, but possibly possessed by cooperating private companies as within the constructive knowledge and control of the Government and, therefore, subject to these obligations. Specifically, defendant argues that the Government's obligations under *Brady* and Rule 16 require the Government to produce documents in the possession of cooperating companies Morgan, Schunk, and Carbone because of the Government's cooperation agreements with those companies and his conclusory assertion that the documents would be favorable or material to his defense. This argument, however, is based on his erroneous reading of *United States v. Perdomo*, 929 F.2d 967 (3d Cir. 1991) and *Kyles v. Whitley*, 514 U.S. 419 (1995) (*see* Def. Mem.153), and should be rejected. Neither the Supreme Court nor the Third Circuit has held that the government's constructive knowledge or possession of evidence for present purposes extends to documents solely in the

actual possession of private companies cooperating with the government. Not a single case defendant cites here (or cited in support of his Motion to Compel, Doc. No. 46) has held otherwise.

The issue in *Perdomo* involved the prosecution's failure to provide the defendant with information about the Government informant's prior criminal record that was in the local Virgin Island criminal history records, but not in the national records. 929 F.2d at 969-70. Recognizing that the right to due process is denied under *Brady* by "the suppression by the prosecution of evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution," the *Perdomo* court rejected the government's argument that the prosecutor did not suppress evidence where he only checked the national records and thus did not know of the readily available local records in the Virgin Islands. *Id.* at 970-71. Instead, the Third Circuit expressly adopted the Fifth Circuit's approach that, "[i]n considering . . . whether the prosecution is responsible, [it] refused 'to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team' which includes both investigative and prosecutorial personnel.'" *Id.* (quoting *United States v. Antone,* 603 F.2d 566, 569 (5th Cir. 1979)). Thus, "a prosecutor's lack of knowledge does not render information unknown for Brady purposes" nor necessarily "excuse non-disclosure in instances where the prosecution has not sought out information readily available to it." *Id.* at 970 (citing *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980)).

Perdomo does not teach that the government must use all its investigatory tools, including cooperation agreements, to seek out information it does not have. Rather, its lesson is that knowledge of exculpatory evidence actually had by government actors and readily available to

the prosecutor can be imputed to that prosecutor. Accordingly, the teaching of *Perdomo* is that "the availability of information is not measured in terms of whether the information is easy or difficult to obtain but by whether the information is in the possession of some arm of the state." *Perdomo*, 929 F.2d at 971.

Kyles v. Whitley is no different. In response to the state's argument that there was no *Brady* violation for the suppression of evidence "known only to police investigators and not to the prosecutor," the Court observed that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." 514 U.S. at 437. Thus, regardless of actual knowledge, the prosecutor has constructive knowledge of the information actually known by the police, a government actor functioning as part of the prosecution team. *Accord Giglio*, 405 U.S. at 152-54 (holding that prosecutor's ignorance of the actions of his departed predecessor did not excuse the failure to know of and disclose the witness's plea agreement).

Neither of these cases justify extending constructive knowledge or possession of exculpatory information beyond the government actors functioning as part of the prosecution team. Moreover, there is nothing about the cooperation agreements with Morgan, Schunk, and Carbone that transform these private actors into an "arm of the state," and no court has held that they do.[47]

To the extent defendant seeks a new trial because the Government did not produce

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[47] Defendant's reliance on non-binding, out-of-circuit district court decisions also is unavailing. *See* Def. Mem. 161. In its June 25, 2010 Order, the Court declined to adopt the reasoning set forth in these district court decisions and properly applied the Third Circuit's three-prong analysis set forth in *United States v. Reyeros*, 537 F.3d 270, 283 (3d Cir. 2008).

materials in the sole possession of cooperating third parties, defendant's request should be denied. The defendant has failed to demonstrate that the Government was in constructive possession of the materials at issue and the Court properly held so in its June 25, 2010 Order (Doc. No. 88) denying defendant's motion to compel documents or witnesses solely in the actual possession or employ of private companies cooperating with the Government.

2. Defendant Has Not Made the Threshold Showing of Materiality Required by *Brady* or Rule 16

Assuming *arguendo* that the Government was in constructive possession of materials in the actual possession of cooperating third parties, the defendant also fails to meet the threshold showing of materiality required by *Brady* or Rule 16. In fact, defendant's efforts to show materiality is limited to the Morgan Board Minutes, which he actually received from Morgan during the trial.[48] In his memorandum, defendant seeks to fault the Government for his untimely motion for the issuance of a Rule 17(c) subpoena to Morgan and to mislead the Court as to the complete substance of the Board Minutes to which he refers. Because defendant failed to

[48] Defendant repeatedly tries to fault the Government and Morgan for the fact that he received these documents during trial. But the Government never actually or constructively possessed the materials at issue and thus never had an obligation under *Brady* or Rule 16 to provide these materials. *See* Court's June 25, 2010 Order n.3 (Doc. No. 88) (finding that "the Government is not in constructive possession of the materials at issue"). Second, defendant makes no attempt to demonstrate that he sought these materials from Morgan at any time before he filed his motion for the issuance of a Rule 17(c) subpoena on June 16, 2010. *See* Fed. R. Crim. P.17(c). Finally, defendant could have sought a delay in the trial to afford Morgan more time to comply with the Rule 17(c) subpoena that was issued to Morgan a mere three days before trial. In short, the Government had no part in these trial decisions and any blame for the timing of defendant's receipt of the documents lies with his lack of timely diligence to obtain them through proper channels.

exercise reasonable diligence to obtain the Board Minutes and because a full review of the Board Minutes in question demonstrates that they are not exculpatory, defendant is not entitled to a new trial on this basis.

Foremost, the Board Minutes in question, taken as a whole, do not meet the requisite materiality threshold. As stated above, to be material there must be a reasonable probability that had the evidence been disclosed to the defendant, the result of the trial would have been different. At best, the defendant contends that these minutes "could well have led to a different verdict," (Def. Mem. at 156), but *Brady* requires more than a possibility that the evidence could have affected the trial's outcome; it requires a reasonable probability that it would do so.

In any event, defendant fails to present the complete story told in those minutes. For example, defendant quotes from a preliminary report by the Independent Committee in the Morgan September 5, 2002 Board Minutes, that "it was recognized that the Company had not intentionally been involved in any obstruction of justice" (Def. Mem. 156), but fails to mention the Morgan October 29, 2002 Board Minute entry admitting that "there was substantial evidence in the hands of the Department of Justice that there had been attempts by the Company to influence the testimony of witnesses and that evidence was also held to show that documents which should have been in the files of one of its companies no longer existed and that instructions had been issued for documents to be removed from files." *See* October 29, 2002 Board Minutes attached hereto as Exhibit D; *see also* Exhibit 16-N, Curran Decl. Taken as a whole, the Morgan Board Minutes are more inculpatory than exculpatory and, as such, cannot be

deemed material for *Brady* purposes.[49]

C. The Defendant Was Not Denied Access to Foreign-Based Witnesses

Defendant also seeks a new trial because he claims he was denied access to foreign-based witnesses. Defendant's assertion simply is not true, and his request for a new trial on this basis should be denied.[50]

First, out of privacy concerns, the Government redacted personal information, such as social security numbers, dates of birth, addresses and telephone numbers of individuals, from material provided to the defendant. The Government believes that most of the individuals for whom personal information was redacted are represented by counsel. As such, defendant's counsel was required to communicate with these potential witnesses through counsel. *See* ABA Model Rule of Professional Conduct 4.2 (Communication with Person Represented by Counsel) (stating that lawyer should not communicate directly with individual represented by counsel without consent of counsel or authorization by law or court order). Although the Government declined to provide defendant with the redacted personal information, the Government did identify counsel for those individuals to enable defendant to contact them. (*See* McClain letter to Curran dated May 21, 2010, attached hereto as Exhibit E). There simply was no need for personal addresses. In fact, contrary to the implication in his papers, defendant never requested addresses or any other contact information of potential witnesses, only unredacted copies of

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[49] For the same reasons defendant's request for a new trial on the basis of redactions contained in Morgan's production under the Rule 17(c) subpoena should be rejected.

[50] Nor is defendant's representation that Mr. Hoffmann resides in Austria true. The record is clear (as brought out during direct and cross-examination) that Thomas Hoffmann resides in Pennsylvania. He is currently employed at Allegheny Bradford Corp. located in Bradford, PA. *See* Tr. 7/16/10 p.m. at 69:2-3, 85-87 (Hoffmann).

discovery that include personal information such as social security numbers and dates of birth. As the Court previously recognized, "Defendant does not indicate how the redaction of personal information has actually impeded his access to witnesses in preparation of his defense." Order dated June 25, 2010 n.4 (Doc. No. 88). Indeed, the defendant still does not claim he was unable to locate any potential witnesses.

Second, as discussed more fully in the section above that addresses the Court's denial of defendant's request for a missing witness jury instruction, the Government did not deny defendant access to foreign-based witnesses. In fact, other than a repeated blanket discovery request that the Government make available each and every foreign-based individual with a personal obligation to cooperate or whose employer has an obligation to cooperate, defendant did not seek the Government's assistance with respect to any specific foreign-based witness (with the exception of a few specified Morgan personnel, one of whom, David Coker, did make himself available in the United States to testify on the defendant's behalf). In any event, defendant has failed to mention, let alone satisfy, *Brady*'s materiality requirement, *i.e.*, that any of these unnamed foreign witnesses would have provided evidence resulting in a reasonable probability that the trial's outcome would have been different.[51]

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[51] Defendant also complains that the cooperation agreements prevented his access to witnesses because they provided a "markedly strong disincentive" to being interviewed by defense counsel. (Def. Mem. at 164.) Defendant's assertion simply is untrue. The Government never advised cooperating witnesses not to speak with defense counsel, nor is there language in the agreements that provides any consequence for speaking with defense counsel. In short, nothing in the cooperation agreements denied defendant access to potential witnesses and any declination to be interviewed by the defense was a decision made by the witness without any Government influence.

D. The Government Did Not Suppress Any Impeachment Material from Notes of Interviews

The defendant next claims that he should be afforded a new trial because the Government suppressed impeachment material from notes of interviews the Government produced during discovery. As the Government has maintained each time defendant has raised this claim, the Government has complied fully with its discovery obligations and has suppressed no such material.

In producing numerous pages of discovery to defendant, the Government redacted portions of documents for various reasons, including (1) work product; (2) protected personal information; (3) material that does not respond to a specific discovery request when that document was provided only pursuant to a specific request; and (4) material that does not contain the substance of a relevant oral statement made by a witness as reflected in interview notes or summaries. The Government already has explained the basis of these redactions to the Court (*see* Gov't Resp. Mot. to Compel Discovery, Doc. No. 66, filed June 2, 2010, at 12-14) and incorporates that response herein. Moreover, in considering the same redactions of information at issue here, the Court previously recognized, the "[d]efendant proffers mere speculation that the Government has exculpatory evidence and these speculations are insufficient to compel disclosure." Order dated June 25, 2010 n.4 (Doc. No. 88) (citing *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 202 (3d Cir. 1970)). Since that ruling, the defendant has not improved his speculation, shown any instance where exculpatory information has been withheld, nor explained how the Court erred in finding that the Government's declaration that it had provided all relevant information contained within the redacted portions of

the materials pursuant to *Brady* and Rule 16 - and its provision of that information - was "sufficient for the Court." *Id.*

Lastly, defendant's argument that the Government suppressed impeachment material, despite its disclosure of the relevant information, because "*Brady* requires 'evidence' to be turned over to the defense," (Def. Mem. at 166), is meritless. *Brady* and its progeny do not specify how, or in what particular form, information must be disclosed. *See, e.g., Brady*, 373 U.S. at 87 (requiring disclosure of material exculpatory evidence without specifying any particular form); *Giglio*, 405 U.S. at 154 (requiring disclosure of material impeachment evidence without specifying any particular form). There is nothing improper, or even unusual, about the government's meeting some of its *Brady* obligations by disclosing exculpatory information in letters to defense counsel because "[i]n no way can information known and available to the defendant be said to have been suppressed by the Government." *United States v. Brown*, 628 F.2d 471 (5th Cir. 1980); *see, e.g., United States v. Wooten*, 377 F.3d 1134, 1142 (10th Cir. 2004) ("*Brady* does not require the prosecution to disclose information in a specific form or manner."); *United States v. Grossman*, 843 F.2d 78, 85 (2d Cir. 1988) (concluding "[n]o *Brady* violation occurred" where government letter informed defendant that individual might have given the grand jury exculpatory evidence); *United States v. Milikowsky*, 896 F. Supp. 1285, 1307-09 (D. Conn. 1994), *aff'd* 65 F.3d 4 (2d Cir. 1995) (denying new trial motion based on non-disclosure of prosecutor's interview notes where government had provided defendant summaries of exculpatory statements made in those interviews); *cf.* Memorandum For Department Prosecutors from David W. Ogden, Deputy Attorney General 10 (Jan. 4, 2010) (permitting Brady disclosure of information contained in attorney notes and other materials in

form of letter to defense counsel rather than in original form) (available at http://www.justice.gov/dag/discovery-guidance.pdf).

Defendant's reliance on *Paradis v. Arave*, 240 F.3d 1169 (9th Cir. 2001) is misplaced because that decision did not create a rule that notes must be disclosed but rather involved a failure to disclose either the notes or, in some other form, the critical exculpatory information contained in them; it said nothing about the form of disclosure. *Id.* at 1173-74; *see also Paradis v. Arave*, 130 F.3d 385, 392-94 (9th Cir. 1997). And his similar reliance on two district court decisions is unavailing. The court in *United States v. Bergonzi*, 216 F.R.D. 487 (N.D. Cal. 2003), rejected the government's argument that a report was not material, but did not address the government's argument that "actual Interview Memoranda need not be produced, but merely exculpatory information contained in the memoranda be provided in a form and fashion that will be useful to the defense" because the defendant "state[d] that 'he will not contest at this time the Government's proposal' that [it] produce the Interview Memoranda in summary fashion." Id. at 499 & n.14. And *United States v. Park*, 319 F.Supp. 2d 1177, 1178-79 (D. Guam 2004), erroneously relied on *Bergonzi* and *Paradis* and is unpersuasive.

For the forgoing reasons, because the Government complied fully with its discovery obligations, the defendant is not entitled to a new trial on this basis.

VI

THE GOVERNMENT'S CLOSING ARGUMENT WAS PROPER

A. The Prosecutor's Closing Argument and Rebuttal Did Not Deprive the Defendant of a Fair Trial

In his *Motion for Acquittal or, in the Alternative, For a New Trial*, defendant claims that

several comments by the prosecutor during her initial closing and rebuttal arguments were improper and deprived him of a fair trial. Specifically, defendant claims that (1) "the Division decided to provide the first testimony about the grand jury through its closing" (Def. Mem. at 168;) (2) the "Division fabricated testimony" that Norris lied to David Coker, the company secretary, (Def. Mem. at 172;) (3) the prosecutor referred to facts not in evidence and spoke to the jury in "code," (Def. Mem. at 170-172;) and (4) the prosecutor "expressly equated a verdict of guilt or innocence . . . with a rejection or endorsement of the integrity of the prosecutor's work on the case." (Def. Mem. at 173.) In fact, none of these comments was error or prosecutorial misconduct. Moreover, none of the comments about which defendant currently complains were objected to below and are raised for the first time here in Norris's post-verdict motion. Accordingly, the "plain error" standard applies, and the defendant has failed to establish that he was prejudiced by any of these remarks.

Prosecutorial misconduct, such as inappropriate remarks during closing argument, rises to the level of constitutional error only "when the impact of the misconduct is to distract the trier of fact and thus raise doubts as to the fairness of the trial." *Marshall v. Hendricks,* 307 F.3d 36, 67 (3d Cir. 2002). The test for prosecutorial misconduct is whether the conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process" in light of the entire proceeding. *Darden v. Wainwright,* 467 U.S. 168, 181 (1986) (*quoting Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974)). In conducting this analysis, the court assesses the alleged improper actions by the prosecutor, the weight of the properly-admitted evidence, and any curative instructions given by the trial court. *Moore v. Morton,* 255 F.3d 95, 112-13 (3d Cir. 2001).

In this case, defense counsel failed to make a contemporaneous objection to any of the remarks about which they now complain. Under these circumstances, in the absence of a contemporaneous objection, an assertion of improper remarks in summation is reviewed only for plain error. *United States v. Saada,* 212 F.3d 210, 224 (3d Cir. 2000); *United States v. Walker,* 155 F.3d 180, 187-88 (3d Cir. 1998); *United States v. Pungitore,* 910 F.2d 1084, 1126 (3d Cir. 1990). The rationale behind the contemporaneous objection requirement is that it gives the Court the opportunity to correct mistakes in a timely manner, before the jury's deliberations have begun. *See United States v. Colletti,* 984 F.2d 1339, 1344 (3d Cir. 1992) (improper argument could have been readily corrected if it had been brought to the attention of the trial judge); *United States v. Brink,* 39 F.3d 419, 425 (3d Cir. 1994).

Under the plain-error test of Fed. R. Crim. P. 52(b), "before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *United States v. Cotton,* 122 S.Ct. 1781, 1785 (2002), *quoting Johnson v. United States,* 520 U.S. 461, 466-67 (1997), and *United States v. Olano,* 507 U.S. 725, 732 (1993). In order to "affect substantial rights," the error must be "prejudicial, i.e., it 'must have affected the outcome of the district court proceedings.'" *United States v. Nappi,* 243 F.3d 758, 762 (3d Cir. 2001), *quoting Olano*, 507 U.S. at 734. Even "[i]f all three conditions are met, an appellate court may exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Cotton,* 122 S.Ct. at 1785, *quoting Johnson,* 520 U.S. at 467, and *Olano,* 507 U.S. at 732. "[T]he defendant bears the burden of demonstrating that the error was prejudicial." *United States v. Barbosa,* 271 F.3d 438, 454 (3d Cir. 2001).

The Third Circuit has properly recognized that it is exceedingly unlikely that prosecutorial comments that would seriously undermine the essential fairness of a trial, and thus satisfy the "plain error" standard for reversal, will go unnoticed by experienced trial counsel. *See, e.g., United States v. Bethancourt,* 65 F.3d 1074, 1080 (3d Cir. 1995) (noting that articulate and experienced defense counsel lodged no objection to closing argument). Both Mr. Christopher Curran and Mr. Mark Gidley of the law firm of White & Case are experienced criminal defense attorneys. Yet neither Mr. Curran nor Mr. Gidley raised as a contemporaneous objection to the prosecution's closing argument or rebuttal any argument that they now raise for the first time here. The failure of these experienced attorneys to object to any of the remarks they now claim were error can be considered by this Court as further proof that there was no plain error in this case.

B. The Prosecutor did not Impermissibly Ask the Jury to Speculate About Facts Not in Evidence

Norris argues that the prosecutor made remarks during her closing argument that were not based on the record and that prejudiced his right to a fair trial. Specifically, Norris complains that "the Division decided to provide the first testimony about the grand jury through its closing," (Def. Mem. at 168.) The prosecutor's remarks, however, were proper argument based on reasonable inferences from the evidence in the record.

It is well settled that "[t]he prosecution is given considerable latitude during closing arguments to argue the evidence and to suggest that the jury may draw permissible inferences." *United States v. Hernandez,* 306 Fed. App'x 719, 723 (3d Cir. 2009). *See also, United States v. Green,* 25 F.3d 206, 210 (3d Cir. 1994); *United States v. Werme,* 939 F.2d 108, 177 (3d Cir.

1989). "In our adversary system, prosecutors are permitted to try their cases with earnestness and vigor, and the jury is entrusted within reason to resolve heated clashes of competing views. This is particularly true during closing argument – the time for energy and spontaneity, not merely a time for recitation of uncontroverted facts." *United States v. Johnson,* 587 F.3d 625, 632 (4th Cir. 2009) (internal quotation marks and citations omitted). Even ABA Standards for Criminal Justice recognize that a "prosecutor may argue all reasonable inferences from evidence in the record." *ABA Standards for Criminal Justice* 3-5.8 (3d ed. 1993).

Once a piece of evidence has been properly admitted, reference to it cannot be error, because the prosecution may "ask the jury to draw permissible inferences from anything that appears in the record." *Oliver v. Zimmerman,* 720 F.2d 766, 770 (3d Cir. 1983) (*per curiam*); *See also, United States v. Sullivan,* 803 F.2d 87, 91 (3d Cir. 1986).

In this case, defense counsel repeatedly elicited testimony from Government witnesses during cross examination that neither they nor any other witness had ever received a subpoena to testify before the grand jury. *See e.g.,* Tr. 7/16/10 a.m. at 78 (Kroef); Tr. 7/16/10 p.m. at 85 (Hoffmann); Tr. 7/14/10 p.m. at 45 (Emerson); Tr. 7/15/10 a.m. at 89 (Perkins); Tr. 7/19/10 a.m. at 13 (Volk); Tr. 7/20/10 p.m. at 47 (Weidlich); Tr. 7/19/10 p.m. at 94 (Keany). In response, the prosecutor asked the jury to use its common sense to determine why none of these witnesses testified before the grand jury noting that all of them, according to the scripts, had not been involved in price fixing, the conduct under investigation by the grand jury. The prosecutor's rhetorical question to the jury upon which the defendant bases his argument was nothing more than a response to defense counsel's attempt to confuse and mislead the jury by focusing on an issue that was of no consequence to the charges contained in the Indictment. Neither a pending

grand jury investigation nor a grand jury subpoena is an element of proof for the offenses with which Norris was charged. *See* Tr. 7/22/10 p.m. at 40:13-17 (Charge-Court). Yet Government witnesses were repeatedly questioned about that fact. In responding, the prosecutor did not rely on knowledge outside of the facts presented at trial. The prosecutor's observation was a reasonable inference based on the evidence before the jury. Thus, such an argument was completely proper. *See United States v. Sblendorio,* 830 F.2d 1382, 1391 (7th Cir. 1987).

Moreover, during the course of the trial, defense counsel hammered away at the fact that nobody was called as a witness before the grand jury even though, as defense counsel knew, calling a witness before the grand jury was not an element of the offense with which Norris was charged. Thus, defense counsel sought to raise doubts in the jurors' minds about the legitimacy of the charges brought against the defendant to support his attacks against the integrity of the prosecution and the credibility of the witnesses. By his trial tactics, the defense counsel invited the prosecutor to respond to his comments. *See Werts v. Vaughn,* 228 F.3d 178, 200 (3d Cir. 2000) (no error where prosecutor's "comments were invited and . . . went no further than required to 'right the scale.'").

Norris also argues that the "Division fabricated testimony" that Norris lied to David Coker, the company secretary. (Def. Mem. at 172.) But the jury heard and saw evidence from which it could infer that Norris did, in fact, lie to Coker.

The evidence established that in December 2000 Norris personally met with Dr. Kotzur, the CEO of Schunk, a Morgan competitor and co-conspirator company in the price-fixing conspiracy under investigation by the United States grand jury. Additionally, Government Exhibits GX-50, a fax received from Dr. Kotzur's secretary confirming Norris's meeting with Dr.

Kotzur at the Clivden Restaurant on December 17, 2000, and GX-51, a receipt from the Clivden Restaurant dated December 17, 2000, corroborated the December 2000 meeting between the two CEOs. Government Exhibit GX-51 also contained a handwritten note by Norris stating that the purpose of his December 2000 meeting with Dr. Kotzur was an "acquisition meeting on behalf of WEM [Bill Macfarlane]." The evidence admitted at trial, however, established that Norris's meeting with Dr. Kotzur in December 2000 was not an acquisition meeting and therefore established that Norris's handwritten notation was false.[52]

Moreover, Government Exhibit GX-86 documented a company directive issued by Norris in September 1999 which required that all contacts with competitors "be reported to the Company Secretary [David Coker] as soon as possible." Further evidence admitted at the trial established that Norris did, in fact, report his contact with Schunk to Coker. Defense Exhibit DX-68, an e-mail from Keany to Norris dated August 31, 2001, as well as the testimony of Sutton Keany established that Norris had a conversation with Coker in which Norris told Coker about his [Norris's] meeting with a Schunk representative prior to January 2001. *See* Tr. 7/19/10 p.m. at 105:18-106:25 (Keany). Given that Norris falsely characterized his meeting with Kotzur as an acquisition meeting on GX-51, it is reasonable to infer, and therefore proper for the

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[52] Kroef testified that after he met with Weidlich to discuss the grand jury investigation he reported back to Norris and told Norris that Weidlich "wasn't really grasping the importance of what was happening," and in response Norris told Kroef that he would contact Weidlich's boss, (Kotzur). *See* Tr. 7/16/10 a.m. at 39:9 - 40:6 (Kroef). Kroef also testified that after Norris met with Kotzur, Norris told him that he and Kotzur "agreed that they wanted to have another meeting to continue their discussion." *See* Tr. 7/16/10 p.m. at 47:12-14 (Kroef). (emphasis added). And both Kroef and Weidlich testified that at the follow-up meeting among Norris, Kroef, Dr. Kotzur and Weidlich in February 2001 they discussed the grand jury investigation and Norris attempted to persuade the Schunk officials to follow the Morgan script and help Morgan shut down the grand jury investigation. *See e.g.,* Tr. 7/16/10 a.m. at 39-53; 7/16/10 p.m. at 4-7 (Kroef); Tr. 7/20/10 p.m. at 15-22, 37-49 (Weidlich).

prosecutor to argue, that when reporting on his meeting with Dr. Kotzur to Coker, Norris lied to Coker about the purpose of this meeting.

Additionally, Defense Exhibit DX-40 refers to a schedule of interviews to be conducted by Keany at Morgan and also refers to a debriefing session among Keany, Norris and Coker at the conclusion of those interviews. Keany testified that Norris lied to him about his (Norris's) knowledge of and role in a price-fixing conspiracy, telling Keany that the meetings he attended with competitors were meetings to discuss joint ventures, *(see* Tr. 7/19/10 a.m. at 79-85; Tr. 7/19/10 p.m. at 13, 8-13 (Keany)), and that Morgan had not participated in any price-fixing conspiracies. *See* Tr. 7/19/10 p.m. at 82 (Keany). Keany also testified that all the Morgan employees he interviewed told him the same story. *Id.* at 81.

Kroef testified that he and the other Morgan executives were interviewed by Morgan's lawyers, that during his interview he followed the script that was created to explain away their meetings with competitors, and that after his interview with company counsel Norris told him there was a "summary meeting" at which Norris was informed that Kroef had done well during the interview, but that some other Morgan executives needed "to rehearse their story a bit more" and they had to have "another session later." Tr. 7/16/10 a.m. at 16:19-24 (Kroef).

Keany also testified that after he interviewed the Morgan executives and learned about the existence of the scripts, he had lunch with Norris and Coker and asked them if he could turn over the scripts to the Government. Keany testified that they both gave him permission to do that. Tr. 7/19/10 p.m. at 3:15-6:5, 65:18-21, 71:1-72:16 (Keany).[53] There is no reason to believe

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[53] The defendant did not dispute these facts. *See* Tr. 7/22/10 a.m. at 78:8-20 (McClain Closing).

that Coker would have agreed to Keany's suggestion to turn the scripts over to the Government unless Norris told Coker that the scripts were true and/or that the meetings he and Morgan had with competitors were joint venture meetings instead of pricing meetings. Based on this evidence, it is reasonable to infer that when discussing Morgan's and Norris's role in and knowledge of a price-fixing conspiracy with Keany and Coker (either individually or together) that Norris stuck to the script and lied to both Keany and Coker. Thus, there is ample evidence in the record to allow the prosecutor to argue this reasonable inference to the jury.

Norris also complains that the prosecutor's closing argument was "testimony disguised as a closing argument" because "[i]n the eyes of the jury it was Ms. McClain, together with Mr. Rosenberg, who had conducted the investigation, who had interviewed the key witnesses, who had signed the grand jury subpoena, who had negotiated the document subpoena with Morgan's lawyer Mr. Keany, so presumably Ms. McClain, the jury might naturally conclude, would have personally handled the grand jury." (Def. Mem. at 169.) (emphasis added).

Although defendant makes this argument, he offers no legal support for the conclusions that he draws. In fact, it is equally likely that the jurors drew no such conclusion. *See Donnelly v. DeChristoforo,* 416 U.S. 637, 647 (1974) ("a court should not lightly infer that . . . a jury . . . will draw [a damaging] meaning from the plethora of less damaging interpretations."). At no time did Government counsel even mention their role as agents of the grand jury. In fact, in her closing argument the prosecutor took great pains to avoid any suggestion that she had personal knowledge of the grand jury investigation: *See, e.g.,* Tr. 7/22/10 a.m. at 41-42 (McClain Closing). Accordingly, the defendant's argument on this issue lacks merit.

In any event, it was the defense counsel, not the Government prosecutor, who connected

Ms. McClain and Mr. Rosenberg to the grand jury investigation that was the subject of the defendant's obstruction conduct. *See e.g.,* Tr. 7/15/10 p.m. at 5:4-7, 71:17-24; 93:6-25 (Muller); Tr. 7/15/10 p.m. at 71:2-5 (Perkins); Tr. 7/16/10 a.m. at 80:2-9, 82:23-24; 7/16/10 p.m. at 25:6-26:16, 28:22-24, 29:4-12, 50:7-18 (Kroef); Tr. 7/16/10 p.m. at 86:5-7, 94:18-20 (Hoffmann); Tr. 7/19/10 p.m. at 24:9-14, 26:2-22, 30:25-31-1, 31:18-34: 9, 36:13-16, 37:1-5, 37:12-18, 43:6-44:7, 45:11-47:25, 48:15-49:25, 53: 8-15, 55:18-56:6, 56:18-58:20, 63:16-23, 76:12-25, 77:16-78:5, 79:1-25, 81:2-17, 84:2-11, 85:5-86:2, 86:8-12, 87:3-7, 90:7-13, 91:6-15, 92:23-93:11, 98:4-24, 99:10-25, 102:24-103:16, 104:8-12, 106:1-18 (Keany); Tr. 7/20/10 a.m. at 74:22-75:5 (Macfarlane). And it was the defense counsel who repeatedly attacked Ms. McClain and Mr. Rosenberg for the way in which they conducted the grand jury investigation. *See e.g.,* Tr. 7/14/10 a.m. at 24:17-20 (Opening); Tr 7/22/10 a.m. at 57:24-58:2, 58:21-24, 59:2-4, 60:16-19, 60:23-61:2, 61:8-11, 66:15-16, 67:21-24; 69:17-19, 76:2-4 (Closing). Under these circumstances, if the jury drew the inferences that the defense counsel now claim prejudiced the defendant, defense counsel have only themselves to blame.

C. The Prosecutor Did Not Refer to Facts Not in Evidence and Did Not Speak to the Jury in "Code"

Norris also complains that the prosecutor referred to facts not in the record when, during closing argument, she "invited speculation about the Morgan 'big executive office.'" (Def. Mem. at170.) But in making this argument, defendant fails to mention that the prosecutor prefaced her remarks by saying that she was setting the stage for the jurors before she began her closing argument. *See* Tr. 7/22/10 a.m. at 19 (McClain Closing). There is nothing improper in using such a rhetorical device. *See Donnelly v. DeChristoforo,* 416 U.S. at 646. *See also, Abela*

v. Martin, 380 F.3d 915, 929 (6th Cir. 2004) (Although the court reversed the denial of habeas corpus relief for the defendant, it found no prejudice to the defendant where prosecutor articulated a hypothetical conversation between the defendant and another individual to explain the defendant's actions when the prosecutor properly prefaced the conversation by informing the jury it was just a hypothetical.)

The defendant also falsely accuses the Government of knowing "full well" that "Mr. Norris was sacrificed by the new management of Morgan and carved out of the protections of the November 2002 Morgan corporate guilty plea with the Division just as Robin Emerson and Jack Kroef were." (Def. Mem. at 171). The Division has no knowledge of Norris being "sacrificed" by Morgan. The Division prosecuted Norris because the evidence established that he violated federal law by orchestrating and implementing an elaborate scheme to obstruct a grand jury investigation.

Norris also complains that the prosecutor spoke to the jury "in code" and made a "thinly veiled reference to the best-selling account of the Enron scandal" when she said that Robin Emerson became "the smartest guy in the room" when he told the defendant that he wanted out of the conspiracy. (Def. Mem. at 173.) The prosecutor, however, made no such connection to the jury – either directly or indirectly -- at any time during the trial or during her closing argument, and there is nothing in the record to suggest that was her intent. To accuse the prosecutor of speaking "in code" when she did nothing more than utter a long-used and popular

phrase that is applied to many different individuals in a variety of contexts[54] is clear evidence that the defendant is grasping at straws and has no substantive arguments with which to support his motion to overturn his conviction.

D. The Prosecutor's Rebuttal Argument was a Proper "Invited Response" and did not Deprive the Defendant of a Fair Trial

1. There was Nothing Improper in the Prosecutor's Closing Remarks

Finally, defendant argues that the Division's rebuttal argument was a "Parthian shot" and "expressly equated a verdict of guilt or innocence . . . with a rejection or endorsement of the integrity of the prosecutor's work on the case." (Def. Mem. at173.) The prosecutor's comments, however, were a proper "invited response" to defense counsel's personal, inflammatory, and unfounded attacks on her integrity and did not deprive the defendant of a fair trial. Clearly, "defense counsel may not suggest that the Government has engaged in prosecutorial misconduct, *such as subornation of perjury,* unless there is a foundation in the record to support such charges." *United States v. Pelullo,* 964 F.2d 193, 218 (3d Cir. 1992) (emphasis added). Moreover, "[i]t is not enough that the prosecutor's remarks were undesirable or even universally condemned." *Darden v. Wainwright,* 477 U.S. 168, 181 (1986). The touchstone of the court's inquiry is "not the culpability of the prosecutor," but rather "the fairness of the trial." *Smith v. Phillips,* 455 U.S. 209, 219 (1982). Therefore, the court must determine whether the misconduct complained of "so infected the trial with unfairness as to make the resulting conviction a denial

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[54] *See e.g.,* LeMaster Davis, The Bleacher Report, "Scott Boras: The Smartest Guy in the Room," July 31, 2008, http://bleacherreport.com/article/43027-scott-boras-the-smartest-guy-in-the-room; Romney: Smartest Guy in the Room, Chicago Tribune, October 9, 2007, http://www.chicagotribune.com/features/chi-071009romney-story; Keith Green, New York Times Book Review, "The Smartest Guy in the Room," (a biography of Edmund Wilson), August 14, 2005, http://nymag.com/nymetro/arts/books/reviews/12446.

of due process in light of the entire proceeding." *United States v. Morena,* 547 F.3d 191, 194 (3d Cir. 2008) (internal quotations omitted).

"In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo. Thus, the import of the evaluation has been that if the prosecutor's remarks were "invited" and did no more than respond substantially in order to "right the scale," such comments would not warrant reversing a conviction." *United States v. Young*, 470 U.S. 1, 12-13 (1985).

In the case at bar, defense counsel personally attacked the integrity of the prosecutor by arguing that she suborned perjury, tampered with witnesses, and was motivated to prosecute the defendant by personal ambition. *See, e.g.,* Tr. 7/22/10 a.m. at 72, 77, 80, 86. These comments were clearly intended to arouse the jury's passion and ire against the prosecution. As the Supreme Court said in *Young,* "[t]he kind of advocacy shown [by the defense counsel in this case] has no place in the administration of justice and should neither be permitted nor rewarded." *Young* at 9.

The prosecutor's responding comments about which the defendant now belatedly complains were fair and made simply as an attempt to explain the propriety of her conduct and undo some of the damage done by defense counsel's inappropriate remarks. *See United States v. Torres,* 809 F.2d 429, 437 (7th Cir. 1987) ("In light of defense counsel's arguments that the Government's witnesses were *coached, programmed,* and *intimidated,* the prosecutor's statements were fair responses."). A prosecutor is not a potted plant doomed to absorb any abuse heaped on it by defense counsel. Rather, she can defend both her integrity and ethics by responding to the attacks of defense counsel. And while a personal attack by defense counsel is

not a license to say anything in response, the careful, measured remarks of the prosecutor in this case were appropriate and, in any event, not prosecutorial misconduct. *See Id.* at 440 ("to hold that an attorney accused of inducing perjured testimony cannot explain that he was merely doing what an ethical attorney was required to do . . . would undermine the concept of fairness which underlies the American system of justice.").

As noted above, the dispositive issue under the holdings of the Supreme Court is not whether the prosecutor's remarks amounted to error, but whether they rose to the level of plain error when she responded to defense counsel. In this setting and on this record, the prosecutor's response was not plain error warranting the court to overlook the absence of any objection by the defense.[55]

Moreover, given the fact that the jury acquitted Norris of two of the counts with which he was charged, it is clear that the jury was not influenced to stray from its responsibility to be fair and unbiased and reinforces the conclusion that the prosecutor's remarks did not undermine the jury's ability to view the evidence independently and fairly.

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[55] There is another reason the court should not overlook the absence of an objection by the defense. Here, before delivering her rebuttal, the prosecutor asked for and received a side bar conference at which she alerted the court and defense counsel that she considered defense counsel's remarks a personal attack which she could not let go unchallenged. During the bench conference, the court asked defense counsel for his response, but he offered none of substance. Even if he had no response to offer at the time of the bench conference, the bench conference alerted the defense counsel and put him on notice that the prosecutor was prepared to respond to his personal attacks. Consequently, he should have been prepared to object to her comments if he thought them inappropriate. Given that defense counsel made no objection, even after being alerted that the prosecutor was going to respond to his attacks in her rebuttal, the defense's newly-raised argument that the prosecutor's comments were prejudicial and denied him a fair trial lacks merit.

2. The Weight of the Evidence is Strong and the Curative Instructions Adequate

An examination of "[t]he quantum or weight of the evidence is crucial to determining whether . . . prosecutorial misconduct was so prejudicial as to result in a denial of due process." *Moore v. Morton,* 255 F.3d 95, 111 (3d Cir. 2001). "When the evidence is strong, and the curative instructions adequate, the Supreme Court has held the prosecutor's prejudicial conduct does not deprive a defendant of a fair trial." *Id.* at 113. The Third Circuit has held that if its review of the record "convinces [it] that the jury would have convicted the defendant even had it not been exposed to the allegedly improper prosecutorial comments, [it] must conclude that no actual prejudice accrued." *Government of the Virgin Islands v. Joseph,* 770 F.2d 343, 350 (3d Cir. 1985). The same result should follow here where the evidence against Norris is strong.

As detailed more fully in Sections II and III above, there was overwhelming evidence of the defendant's participation in a conspiracy to obstruct justice. At trial, the Government introduced evidence through testimony and documentary evidence (some of which was written in the defendant's own hand) that proved that Norris participated in a conspiracy to obstruct justice and that he committed numerous overt acts in furtherance of that conspiracy. Such overwhelming evidence eliminates any lingering doubt that the prosecutor's remarks unfairly prejudiced the jury's deliberations or exploited the government's prestige in the eyes of the jury.

Finally, and perhaps most importantly, both in the Preliminary Instructions given to the jury before the trial started and in the Final Instructions given to the jury immediately after closing arguments, the court charged the jury that none of the statements of counsel were evidence. *See* Tr. 7/13/10 a.m. at 34, Tr. 7/22/10 p.m. at 16.

Viewing the proceedings as whole, it is clear that the defendant has failed to meet his

burden of proof, and the defendant's motion for acquittal based on prosecutorial misconduct should be denied.

VII

CONCLUSION

For the reasons set forth herein, the Defendant's Motion for Acquittal or, in the Alternative, for a New Trial should be denied.

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Respectfully submitted,

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