No. 10-4658

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

v.

IAN P. NORRIS,
Appellant.

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

BRIEF FOR APPELLANT IAN P. NORRIS

Christopher M. Curran
J. Mark Gidley
Eileen M. Cole
Claire A. DeLelle
WHITE & CASE
701 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 626-3600

Counsel for Appellant Ian P. Norris

CORPORATE DISCLOSURE STATEMENT

Ian P. Norris, the former Chief Executive Officer of Morgan Crucible Company plc and a natural person, is not required to file a corporate disclosure statement under Rule 26.1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE **PAGE**

STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction over this criminal prosecution under 18 U.S.C. § 3231.

This Court has appellate jurisdiction over the final judgment of conviction under 28 U.S.C. § 1291.

Norris complied with Rule 4(b)(1) of the Federal Rules of Appellate Procedure by filing his Notice of Appeal on December 15, 2010, within fourteen days of the entry of final judgment (December 13, 2010). (JA-150).

STATEMENT OF ISSUES PRESENTED FOR APPEAL

1. Whether the District Court erred in denying Norris's motions for acquittal, finding that the evidence was sufficient to support the conviction for conspiracy to violate 18 U.S.C. § 1512(b)(1) or § 1512(b)(2)(B). *See* Mem. in Supp. of Mot. for Acquittal or, in the Alternative, for a New Trial at 8-57 ("Acquittal Mem.") (DE 160); (JA 62-92) (11/30/10 Op.).

2. Whether the District Court made fundamental errors by instructing the jury on (a) the statutory language "corruptly persuades" (JA-1957-60) (Tr. 45-48 (Charge Conference)), (JA-2155) (Tr. 58 (Colloquy)), and (b) the overt-act element of conspiracy, (JA-1933-34) (Tr. 21:18-22:23 (Charge Conference)).

3. Whether the District Court erred in permitting attorney Sutton Keany to testify about privileged communications he had with Norris. *See* Division's Mot. *in Limine* (DE 58); Opp'n (DE 70); (JA-33-47) (7/12/10 Op.); Mot. for Reconsideration (DE 123); (JA-49-55) (7/19/10 Ruling); Acquittal Mem. (DE 160); (JA 119-126) (11/30/10 Op.); Proposed Findings of Fact (DE 101).

STATEMENT OF RELATED CASES AND PROCEEDINGS

The following closed cases arose in connection with the price-fixing investigation underlying this case: *United States v. Robin D. Emerson*, 2:03-cr-00631-RBS-01 (E.D. Pa.); *United States v. F. Scott Brown*, 2:03-cr-00628-AB-1 (E.D. Pa.); *United States v. Jacobus Kroef*, 2:03-cr-00627-MK-01 (E.D. Pa.); *United States v. Morganite, Inc., et al.*, 2:02-cr-00733-JG-1 (E.D. Pa.).

STATEMENT OF THE CASE

This is an appeal from a final judgment of conviction against Ian P. Norris, the former Chief Executive Officer of Morgan Crucible Company plc, a publicly-held corporation based in the United Kingdom. Norris faced three counts at trial, two alleged substantive violations of particular witness-tampering statutes and one alleged conspiracy to violate those witness-tampering statutes. All three counts related to alleged conduct after Morgan's U.S. subsidiary, Morganite, Inc., received a federal grand jury subpoena. The jury acquitted Norris of both substantive counts, but found Norris guilty on the conspiracy count. The district judge denied Norris's post-trial motions for acquittal or for a new trial.

* * *

The Second Superseding Indictment alleged four counts against Norris: (1) Count One alleged a violation of the Sherman Act, 15 U.S.C. § 1 (JA-178-82) (Indict. ¶¶1-10); (2) Count Two alleged a violation of 18 U.S.C. § 371 for

conspiring to violate 18 U.S.C. § 1512(b)(1) and § 1512(b)(2)(B) (JA-183-84) (Indict. ¶13); (3) Count Three alleged a violation of 18 U.S.C. § 1512(b)(1) for "corruptly persuad[ing]" or attempting to "corruptly persuade[]" other persons with the intent to "influence their testimony in an official proceeding" (JA-192-93) (Indict. ¶21); and (4) Count Four alleged a violation of 18 U.S.C. § 1512(b)(2)(B) for "corruptly persuad[ing] 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." (JA-193) (Indict. ¶23). The Indictment specified that the "official proceeding" in question was a federal grand jury proceeding in the Eastern District of Pennsylvania. (JA-183-84) (Indict. ¶13).

On March 23, 2010, Norris was extradited from the United Kingdom to the United States to face trial on Counts Two, Three, and Four only. Under the U.K. Extradition Order, Norris could not be prosecuted on Count One based on a lack of dual-criminality for the crime in the United Kingdom. *See Norris v. Government of the United States of America and others*, [2008] UKHL 16, at 3. Norris posted bail on condition of U.S.-home confinement.

On June 1, 2010, the Antitrust Division filed a Motion *In Limine* seeking to call as a witness in their case-in-chief, attorney Sutton Keany, formerly of Pillsbury Winthrop. (JA-160) (DE 58). The defense opposed the Motion, and

observed that the Division already had consulted with Keany in violation of the attorney-client privilege. (JA-161) (DE 70). Following a July 6 evidentiary hearing and July 9 argument, the District Court ruled on July 12, that Keany could testify. (JA-48) (7/12/10 Order). Norris moved for reconsideration on July 15, and the District Court denied the motion from the bench on July 19. (JA-49-55) (7/19/10 Ruling).

Trial began on July 14, 2010. The Division presented nine witnesses, each of whom, except Keany, had cooperation obligations under plea or non-prosecution agreements. (JA-794) (Tr. 53:14-16 (Emerson)); (JA-924) (Tr. 780:6-9 (Perkins)); (JA-1077) (Tr. 97:5-7 (Muller)); (JA-1204-05) (Tr. 104:23-105:13 (Kroef)); (JA-1388) (Tr. 67:13-16 (Hoffmann)); (JA-1419) (Tr. 98:8-11 (Volk)); (JA-1657-58) (Tr. 13:25-14:6 (Macfarlane)); (JA-1778) (Tr. 4:20-22 (Weidlich)). The defense moved for judgment of acquittal following the close of the Division's case on July 20, with the Court denying that motion on July 21. (JA-1859) (Tr. 3:2-10 (Decision)).

The case was submitted to the jury on July 22, at the conclusion of the defense's case. On July 26, the jurors delivered a note declaring that they reached an "impasse, and neither side will budge." (JA-2194) (Tr. 6:2-4 (Jury Questions)). The Court denied Norris's motion for a mistrial, delivered a modified "*Allen*" charge, and directed the jurors to deliberate further. (JA-2195-96) (Tr. 7:15-8:20

(Charge)). On July 27, the jury returned a split verdict, acquitting Norris of Counts Three and Four (the substantive counts) and convicting him of Count Two. (JA-2208-10) (Tr. 3:3-5:4 (Verdict)). Norris was immediately imprisoned, over defense objection.

On August 13, Norris filed post-trial motions under Rules 29 and 33. The Court denied those motions on November 30. (JA-57, 143) (11/30/10 Op. and Order). On December 13, final judgment of conviction was entered. Norris was sentenced to 18-months incarceration, three-years supervised release, and fined $25,000. (JA-144) (Judgment).

Norris filed a notice of appeal on December 15, 2010 (JA-150). Norris remains in prison, where he has been since the verdict.

STATEMENT OF THE FACTS

This case concerns the response of Ian Norris, a foreign citizen, to a U.S. criminal price-fixing investigation. From January 1998 to October 2002, Norris was the CEO of Morgan, a company headquartered in Windsor, England, with subsidiaries worldwide. (JA-181) (Indict. ¶6).

The U.S. Grand Jury Investigation

On April 27, 1999, a federal grand jury sitting in the Eastern District of Pennsylvania issued a subpoena *duces tecum* to Morgan's U.S. subsidiary, Morganite, Inc., in its price-fixing investigation. (JA-3177). Morgan engaged

Winthrop to handle the investigation. (JA-1507-08) (Tr. 68-69 (Keany)). No fact witness testified before the grand jury. (JA-726-27) (Tr. 40:25-41:1 (Rosenberg Colloquy)).

In April 1999, Winthrop partner Sutton Keany informed Morgan and its executives that the subpoena only required production of documents in the United States and that European documents were beyond the subpoena's "legal reach." (JA-1558, 1559, 1557, 1510) (Tr. 28:20-25, 29:5-8, 27:24–28:3-7, 71:15-20 (Keany)). From April 1999 to July 1999, Keany worked with Morgan's U.S. subsidiaries to produce a substantial number of U.S. located documents. (JA-1560-72) (Tr. 30:13-42:7 (Keany)); *see also* (JA-2648, 3160, 3161, 3162) (Production Letters).

The investigation appeared dormant until in August 2000, when Keany received a call from the Division's Lucy McClain. (JA-1572-73) (Tr. 42:24-43:8); (JA-2308) (email). McClain told Keany that she had information about "price-fixing meetings" between Morgan and its competitors in the 1990s concerning the carbon-brush industry for traction and transit. (JA-1572-74) (Tr. 42:24-44:7 (Keany)); (JA-2308) (email). Over the next few days, McClain provided meeting dates and identified Norris, Bill Macfarlane, Jacobus Kroef, Mike Cox, Bruce Muller, Mel Perkins, and Robin Emerson as Morgan attendees. (JA-1573-88) (Tr. 43:3-58:20 (Keany)); (JA-2308, 2644, 3278) (emails).

On September 7, 2000, Keany sent Norris, Coker, and others an email regarding "further steps" and requested documents relating to competitor meetings. (JA-2309-10) (email); (JA-1580) (Tr. 50:9-25 (Keany)). Keany stated: "It would be most useful if there were minutes of those meetings or reports on their contents, etc." (JA-2309-11) (email); (JA-2312) (email); (JA-1580, 1588-91) (Tr. 50:2-25, 58:21-61:6 (Keany)).

In September 2000, before conducting interviews, Keany told the Division that the competitor meetings involved joint ventures but that Le Carbone had tried to discuss pricing. (JA-2309, 2645) (emails); (JA-1515-16, 1583-86) (Tr. 76:14-77:17, 53:5-56:6 (Keany)). Keany reported that McClain "breezily dismissed" the joint venture topic saying "they always say that." (JA-2646) (email); (JA-1586-87) (Tr. 56:7-57:20 (Keany)).

Morgan Executives Draft Non-Contemporaneous Summaries

After these developments, Norris, Perkins, Kroef, and Macfarlane met in Windsor and worked on Keany's request. (JA-1672-75, 1716) (Tr. 28:3-31:25, 72:2-22) (Macfarlane)); (JA-1527) (Tr. 88:19-25 (Keany)); *see also* (JA-967-68) (Tr. 113:21-114:12 (Perkins)). At Norris's request, Perkins, Emerson, Macfarlane, and Kroef had reviewed travel and expense records to try to create timelines of competitor meetings. (JA-863-65, 887) (Tr. 8:24-10:5, 32:1-9 (Emerson)); (JA-

1712-15) (Tr. 68:13-71:10 (Macfarlane)); (JA 1220-21) (Tr. 3:21-4:10 (Kroef)); (JA-3256-62) (Spreadsheet, Draft Summaries).

Because there were no contemporaneous notes of the competitor meetings at issue (some having occurred over six years earlier), Norris, Kroef, Macfarlane, and Perkins, decided to try to create summaries, relying on attendee recollections. (JA-967-68) (Tr. 113:24-114:20 (Perkins)); (JA-1675-76, 1716, 1718-19) (Tr. 31:20-32:15, 72:2-22, 74:9-75:9) (Macfarlane)); (JA-1534, 1603) (Tr. 4:14-19, 73:17-25 (Keany)); (JA-3194-3216) (Perkins Summaries), (JA-3217-3244) (Macfarlane Summaries)). Macfarlane labeled his summaries "Attorney Privileged Information" to reflect the attorney request. (JA-3217-3244) (Summaries); (JA-1716, 1765) (Tr. 72:17-22, 121:16-23 (Macfarlane)).

There were multiple drafts of the summaries, and the Morgan executives, including Norris, provided comments. (JA-971-72) (Tr. 117:13-118:23 (Perkins)); (JA-1674-75) (Tr. 30:21-31:19 (Macfarlane)). The executives emphasized joint ventures and "de-emphasize[d]" pricing discussions. (JA-968-70) (Tr. 114:13-116:1 (Perkins)); (JA-1672) (Tr. 28:14-25) (Macfarlane)). The summaries included references to pricing discussions, including repeated vehement complaints from Emilio DiBernardo—an executive of Morgan competitor, Le Carbone—regarding pricing and Carbone's loss of "critical mass" in the U.S.

market. (JA-3059-78) (Fax); (JA-1719-40) (Tr. 75:10-96:10 (Macfarlane Cross)); (JA-1084) (Tr. 104:14-25 (Muller)); JA-1869-70 (Tr. 13:19-14:21 (Cox)).

Although the summaries omitted information, (JA-968-71) (Tr. 114:13–117:12 (Perkins)); (JA-1767-68) (Tr. 123:9-124:7 (Macfarlane)); (JA-1403-05) (Tr. 82:17-84:6 (Hoffmann)), by definition, they never purported to be a complete recitation of everything that occurred at each meeting, but were drafted to use with Keany. (JA 967-68) (Tr. 113:21-114:12 (Perkins). Finally, the meeting summaries omitted any mention of U.S. price-fixing agreements with Le Carbone because no U.S. price-fixing agreements were reached. (JA-893) (Tr. 38:2-10 (Emerson)); (JA-1033-36) (Tr. 53:2-56:11 (Perkins)); (JA-1157) (Tr. 57:2-9 (Muller)); (JA-1281, 1377) (Tr. 64:15-21, 56:3-16 (Kroef)); (JA-1889) (Tr. 33:16-20 (Cox)).

Keany Decides To Produce The Summaries To The Division

In approximately November 2000, Keany traveled to Windsor to review the joint venture documentation collected by Coker, Morgan's company secretary, and to conduct interviews. (JA-1528) (Tr. 89:7-21 (Keany)); (JA-2647) (email).

During the first interview, the Morgan executive openly used the meeting summaries. (JA-1527, 1599-1600) (Tr. 88:1-18, 69:1-70:25 (Keany)). Keany asked to review the document, and the executive gave him the summaries. (JA-1527, 1600) (Tr. 88:7-18, 70:15-17 (Keany)). The executive explained that the

notes were non-contemporaneous and had been created collectively. (JA-1527, 1533-34, 1600) (Tr. 88:19-25, 3:15-4:19, 70:20-25 (Keany)).

Following the interview, attorney Keany proposed to Coker and Norris providing the summaries to the Division. (JA-1535-36) (Tr. 5:2-6:1 (Keany)). Coker and Norris left that decision to Keany. Keany decided to produce them, but ensured that the Division agreed that this voluntary production of U.K.-based documents would not waive the normal position that subpoenas cannot reach documents located outside of the U.S. (JA-2317-18) (Letter); (JA-2316) (Letter); (JA-2315) (email); (JA-1615-17, 1613-14, 1610-12) (Tr. 85:23-87:23, 83:8:84:18, 80:7-82:2 (Keany)). By letter dated December 21, 2000, Keany produced documents showing the unwinding of the Carbone-Morgan joint ventures, as well as the summaries. (JA-2317-18) (Letter); (JA-1615-17) (Tr. 85:23-87:23 (Keany)). At a January 23, 2001 meeting with the Division, Keany informed the Division that the summaries were non-contemporaneous and prepared in response to a request from counsel. (JA-1621-23) (Tr. 91:6-93:11).

Morgan-Schunk Meetings

In November 2000, Norris asked Kroef to meet with Kroef's counterpart at Schunk, a Morgan competitor, to determine whether Schunk was under U.S. investigation and how it was handling it. (JA-1250) (Tr. 33:5-21 (Kroef)); (JA-1278) (Tr. 61:12-15 (Kroef)); (JA-1781) (Tr.7:1-10 (Weidlich)). On his own

initiative, Kroef provided Weidlich with summaries of the Schunk-Morgan meetings. (JA-1292) (Tr. 75:3-10). Later, Norris and Kroef had a follow-up meeting with their Schunk counterparts on February 26, 2001. (JA-1264-65) (Tr. 47:23-48:4 (Kroef)). The Schunk executives did not agree to take any action. (JA-1796) (Tr. 22:10-13).

Morgan Obtains European Amnesty

In parallel with the U.S. investigation, but unbeknownst to U.S. counsel Keany, there was an effort, under the direction of Norris and European antitrust counsel, Christopher Bright of Clifford Chance, to end Morgan's involvement in a European cartel (an instruction Kroef ignored). (JA-1742-46, 1751-52) (Tr. 98:10-102:1, 107:8-108:16 (Macfarlane)). Morgan took steps to preserve documents for a European-amnesty application. (JA-1690 (Tr. 46 (Macfarlane)). Upon Bright's advice in fall 2001, Morgan applied for and obtained European amnesty. (JA 1744-46, 1756-57) (Tr. 100:24-102:1, 112:15-113:6 (Macfarlane)); (JA-1279-80) (Tr. 62:19-63:6 (Kroef)). Kroef alone produced over four meters of documents in support of Morgan's successful amnesty application. (JA-1280-81) (Tr. 63:7-64:21).

STATEMENT OF THE STANDARDS OF REVIEW

This Court exercises plenary review over a court's "denial of a motion for acquittal based on sufficiency of the evidence, applying the same standard as the district court." *United States v. Silveus*, 542 F.3d 993, 1001 (3d Cir. 2008). The question "is whether there is substantial evidence, viewed in the light most favorable to the Government" to uphold the decision. *United States v. Camiel*, 689 F.2d 31, 36 (3d Cir. 1982) (internal citations omitted). If the Court concludes "that a reasonable doubt must exist in the mind of a reasonable juror, acquittal must be granted." *Gov. of Virgin Islands v. Joseph*, 770 F.2d 343, 345 (3d Cir. 1985).

Refusal to give a particular jury instruction is reviewed for abuse of discretion. *Gov. of the Virgin Islands v. Isaac*, 50 F.3d 1175, 1180 (3d Cir. 1995). Whether an instruction "correctly stated the appropriate legal standard," however, is given plenary review. *United States v. Hernandez*, 176 F.3d 719, 728 (3d Cir. 1999); *United States v. Korey*, 472 F.3d 89, 93 (3d Cir. 2007).

This Court "exercise[s] de novo review over issues of law underlying the application of the attorney-client privilege." *United States v. Doe*, 429 F.3d 450, 452 (3d Cir. 2005). De novo review also applies to "the legal issues underlying the application of the crime-fraud exception to the attorney-client privilege." *In re Impounded*, 241 F.3d 308, 312 (3d Cir. 2001). Factual determinations in applying the attorney-client privilege are reviewed for clear error. *Id.*

Denial of a motion for reconsideration is generally reviewed for abuse of discretion. *Max's Seafood Cafe v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). If denial is on an issue of law, it is reviewed *de novo*; if based upon a factual finding, it is reviewed for clear error. *Id.*

SUMMARY OF THE ARGUMENT

The trial evidence was insufficient for a rational jury to find Norris guilty of conspiracy to corruptly persuade others as to grand jury testimony or as to destroying documents with intent to withhold them from the grand jury. First, the trial was devoid of any evidence that Norris or his alleged co-conspirators engaged in any conduct targeting grand jury testimony. Indeed, the trial was devoid of any evidence that Norris or his co-competitors (all foreign nationals) even knew that there was such a thing as grand jury testimony. In the absence of any evidence that Norris or his co-conspirators ever mentioned or contemplated grand jury testimony by anyone, there was insufficient evidence for a jury to conclude that they formed (or could have formed) the requisite corrupt intent to influence anyone's grand jury testimony. With all evidence considered in the light most favorable to the Antitrust Division, the most that can be said is that Norris and his alleged co-conspirators agreed to mislead their U.S. counsel and Division investigators. But such conduct is not the "specific unlawful purpose charged in the indictment,"

United States v. Schramm, 75 F.3d 156, 159 (3d Cir. 1996), nor a violation of the statutory obstruction-of-justice provisions underlying the conspiracy charge, *Arthur Andersen LLP v. United States*, 544 U.S. 696, 707 (2005); *United States v. Aguilar*, 515 U.S. 593, 599 (1995).

The trial was also devoid of evidence that Norris was a party to any conspiracy to corruptly persuade others to destroy documents to keep them from the grand jury. Indeed, the evidence established that Norris directed his subordinates to comply fully with the requirements of the documentary subpoena served upon Morgan's U.S. subsidiary, and that they did so. Any suggestion that there was an effort to destroy documents in Europe to keep them from the U.S. grand jury is untenable, given that Norris and his colleagues were told that European documents were beyond the reach of the U.S. grand jury and would not be produced, and given that any destruction that may have taken place in Europe lacked any nexus to the U.S. grand jury.

Separately, the Court's jury instructions were erroneous in two important ways that prejudiced Norris substantially. First, the Court declined to provide an instruction faithful to this Court's ruling in *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997), that corrupt persuasion does not include the non-coercive persuasion of an alleged co-conspirator not to volunteer incriminating information. The absence of this instruction was crucial, as a key issue at trial was whether

meeting summaries prepared by Norris's alleged co-conspirators were affirmatively false or merely carefully drafted to omit incriminating information.

The Court also erred in its "overt acts" instruction, by expressly directing the jury to consider whether the evidence established any of the "overt acts alleged in the indictment," but inexplicably failing to inform the jury what those alleged "overt acts" were. This error effectively read out any "overt act" requirement, a terribly prejudicial consequence in a case where the "overt acts" also formed the basis for the substantive counts upon which Norris was acquitted. *United States v. Small*, 472 F.2d 818 (3d Cir. 1972).

Lastly, the Court erred in permitting the invasion of Norris's attorney-client privilege, by authorizing the Division to call Norris's criminal defense attorney as a witness and to elicit privileged communications made by Norris. Documentary and testimonial evidence strongly established that the attorney represented Norris personally, and there was no sound basis to invade Norris's privilege.

ARGUMENT

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

In reviewing convictions under 18 U.S.C. § 371, this Court has repeatedly warned that "the sufficiency of the evidence in a conspiracy prosecution requires close scrutiny." *United States v. Schramm*, 75 F.3d 156, 159 (3d Cir. 1996) (directing acquittal on conspiracy conviction); *United States v. Coleman*, 811 F.2d 804, 807 (3d Cir. 1987) (affirming grant of acquittal motion). Accordingly, in conspiracy prosecutions, the Third Circuit has consistently required "substantial evidence" establishing "unity of purpose, intent to achieve a common goal, and an agreement to work together toward that goal." *Schramm*, 75 F.3d at 159; *see United States v. Idowu*, 157 F.3d 265, 268 (3d Cir. 1998) (reversing conspiracy conviction due to insufficient evidence).

Critically here, this Circuit has rigorously required evidence that the defendant agreed to "the specific unlawful purpose charged in the indictment." *Schramm*, 75 F.3d at 159 (quoting *United States v. Scanzello*, 832 F.2d 18, 20 (3d Cir. 1987)); *see United States v. Cartwright*, 359 F.3d 281, 287 (3d Cir. 2004); *Idowu*, 157 F.3d at 268; *United States v. Terselich*, 885 F.2d 1094, 1097 (3d Cir. 1989) (citing *United States v. Cooper*, 567 F.2d 252, 253 (3d Cir. 1977)); *United States v. Wexler*, 838 F.2d 88, 91 (3d Cir. 1988) (same). In *Schramm*, this Court

emphasized that this rigorous requirement protects important constitutional rights arising under the Sixth and Fifth Amendments, including a defendant's right to indictment only upon a sufficient finding of probable cause, and the right to sufficient notice of the charges against which a defendant must defend and to which he may plead double jeopardy. 75 F.3d at 162-63.

Furthermore, knowledge of the conspiracy's "specific unlawful purpose" must be "clear, not equivocal . . . because charges of conspiracy are not to be made out by piling inference upon inference." *United States v. Klein*, 515 F.2d 751, 753 (3d Cir. 1975) (reversing conspiracy conviction) (quoting *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943)). Often, when a defendant has been acquitted of the substantive offenses, the intent supporting the conspiracy count is lacking. *See United States v. Alston*, 77 F.3d 713, 718 (3d Cir. 1996) (reversing Section 371 conviction) (quoting *United States v. Feola*, 420 U.S. 671, 686 (1975)).

The Indictment charged Norris with conspiracy to commit one of two offenses against the United States. Specifically, Indictment Paragraph 13 charged that, between April 1999 and August 2001, Norris and others knowingly and willfully conspired:

> (a) to corruptly persuade and attempt to corruptly persuade other persons known to the Grand Jury *with intent to influence their testimony in an official proceeding*; and (b) to corruptly persuade and attempt to corruptly persuade other persons known to the Grand Jury

> with intent to cause or induce those other persons to alter, destroy, mutilate or conceal records and documents *with the intent to impair their availability for use in an official proceeding*; that is, a federal grand jury sitting in the Eastern District of Pennsylvania, conducting a price-fixing investigation of the carbon products industry, contrary to Title 18, United States Code, Section 1512(b)(1) and Section 1512(b)(2)(B), respectively.

(JA-183-84) (emphasis added). Thus, the Indictment required proof that the conspirators agreed to corruptly persuade other persons with intent to (a) *influence their testimony* before the grand jury, or (b) *conceal or destroy documents* with intent to keep those documents from the U.S. grand jury. (JA-183-84). Importantly, the charge *was not* an agreement to persuade others with intent to (a) influence their interviews with Morgan lawyers or the Division, or (b) conceal or destroy documents with intent to keep those documents from European authorities.

A. NO RATIONAL JURY COULD FIND AN AGREEMENT TO CORRUPTLY PERSUADE OTHERS TO INFLUENCE THEIR GRAND JURY TESTIMONY

1. No Rational Jury Could Find Evidence That The Alleged Co-Conspirators Even Knew That There Was Such A Thing As Grand Jury Testimony

Not a single trial witness testified that they or anyone else agreed to persuade others to provide false *grand jury testimony* in violation of Section 1512(b)(1). Not one alleged co-conspirator—almost all foreign nationals resident overseas—uttered even the notion that any one of them knew of the possibility that witnesses might be or could be called to testify before the U.S. grand jury.

In fact, the Division's witnesses, Kroef, a Dutch national, Perkins, a dual U.K.-U.S. citizen, Weidlich, a German national, and Emerson, a U.K. national, did not even know what a grand jury was. (JA-1377) (Tr. 56:17-21 (Kroef) ("Q. Sir, did you ever testify before the federal grand jury in connection with this matter? A. I don't know the answer to that question. Q. Sir, do you know what a grand jury is? A. Not really.")); (JA-1070) (Tr. 90:6-24 (Perkins)); (JA-1821) (Tr. 47:7-11 (Weidlich)); (JA-900-01) (Tr. 45:16–46:13 (Emerson)). Keany, the attorney, testified that he believed Norris, Macfarlane, Perkins, and Kroef had never previously been exposed to a U.S. grand jury matter. (JA-1582-83) (Tr. 52:25–53:4 (Keany)). Moreover, their countries do not have grand juries. *United States v. Stuart*, 489 U.S. 353, 363-64 (1989) (no grand juries in civil-law countries); Howard W. Goldstein, *Grand Jury Practice* § 1.01 (Law Journal Press 2010) (no grand jury in England). Without even a basic understanding of what the grand jury was or could do, *i.e.*, hear sworn testimony, it was necessarily impossible for a rational jury to conclude that the alleged co-conspirators could have formed the specific intent required to conspire to violate Section 1512(b)(1).

The Court misunderstood the defense to be arguing that the Division was required to prove that the conspirators possessed a "technical understanding" of the grand jury. (JA-78) (11/30/10 Op. at n. 7). Certainly, technical knowledge of the intricacies of Rule 6 of the Federal Rules of Criminal Procedure was not required.

But the Division was at least required to prove that the alleged co-conspirators possessed an elemental understanding of what a grand jury was and that it could hear witness testimony.

The Morganite documentary subpoena did not constitute evidence that the alleged conspirators knew that there could be grand jury testimony. The Court erroneously concluded that an unchecked box on the face of the Morganite subpoena—indicating that the subpoena could have been for testimony—was sufficient evidence to permit a rational jury to conclude that the co-conspirators knew that grand jury testimony was possible. (JA-78) (11/30/10 Op. n.7). But there was no evidence that any alleged co-conspirator saw this page of the subpoena, saw the check box, discussed the box, or understood it.

Moreover, the only evidence cited by the Court in support of this argument was Emerson's testimony, which only refers to the "document subpoena" and concerned which Morgan company should *produce documents*, *i.e.*, Morganite. (JA-858-60) (Tr. 3:11-5:9). No inference could be gleaned from this testimony that any—much less *all*—of the co-conspirators knew grand jury *testimony* was possible. *See United States v. Davis*, 183 F.3d 231, 244 (3d Cir. 1999).

2. The Evidence, At Most, Established An Agreement To Mislead Lawyers Or Investigators And That Does Not Constitute An Agreement Targeting Grand Jury Testimony

Even if *all* the alleged conspirators knew that grand jury testimony was possible, it would be of no moment to the charged conspiracy, because the evidence, at the very most, established an agreement to "mislead" Morgan counsel, who in turn might provide an incomplete version of competitor meetings to prosecutors. But an agreement with that purpose was not the "specific unlawful purpose" charged in the Indictment, or an agreement to violate Section 1512(b)(1). *Schramm*, 75 F.3d at 159.

For example, Macfarlane testified that he "collaborated with [his] colleagues" to prepare the summaries in response to attorney Keany's request for information regarding the meetings identified by the Division. (JA-1672) (Tr. 28:14-18 (Macfarlane)). Macfarlane testified unequivocally that the summaries were for use with Keany and the Division; he made no mention of influencing grand jury testimony:

> Q. What was the purpose of creating the summaries?
> A. The summaries were to help each of us that were -- attended the meetings in terms of misleading the Department of Justice.
> Q. How did you intend to use them?
> A. In discussions with our lawyers.
>
> * * *
>
> Q. And what did you expect your lawyers to do?

> A. Oh, to tell the Department of Justice that their – their subpoena and their investigation is really unfounded.

(JA-1675-76) (Tr. 31:20-32:15 (Macfarlane)). Likewise, Perkins linked the summaries to a need to provide Morgan's lawyers with information:

> Q. Why was there concern that there were no notes or reports of this meetings?
> A. I think because from my -- my perspective that in terms of going forward with the investigation, it was felt that we -- we needed some sort of documentation of who was at what meetings, who they were, where they were and what was discussed and *we potentially needed that for discussion with attorneys*.

(JA 967-68) (Tr. 113:21-114:12 (Perkins) (emphasis added)). Kroef testified that they drafted the summaries using joint-venture discussions as "an argument" for the competitor meetings. (JA-1222-23) (Tr. 5:8-6:15 (Kroef)). Kroef testified that the summaries were to be used in "rehearsal meetings" with Morgan's "British lawyers," (JA-1334) (Tr. 13:19-22 (Kroef)), and in preparation for interviews by the Division. (JA-1335) (Tr. 14:6-20 (Kroef)), (JA-1225-26, 1229-1230) (Tr. 8:23-9:2, 12:7-13, 12:23-13:3 (Kroef)); *see also* (JA-1233) (Tr. 16:4–8 (Kroef)).

Nor does the testimony of the alleged objects of the persuasion—Weidlich and Emerson—establish that the alleged co-conspirators intended to influence grand jury testimony. (JA-81-84). Weidlich's testimony similarly established, at most, an effort by Kroef to persuade Weidlich to persuade Schunk executives to answer any prospective questions from *their lawyers* or in Division interviews in

the "same" or "similar" way as Morgan. (JA-1794-95) (Tr. 20:16-21:6). Similarly, Emerson's testimony related to questioning from the Division—not the grand jury. (JA-876-77) (Tr. 21:17-22:13).

* * *

The Indictment specifically alleges conduct targeting grand jury testimony. It does not charge conduct aimed at misleading counsel or investigators. While the Indictment could have charged a conspiracy to violate a U.S. statutory provision that addresses misleading U.S. investigators, it did not. *E.g.*, 18 U.S.C. § 1001 (false statements); 18 U.S.C. § 1512(b)(3) (corrupt persuasion as to communication to a "law enforcement officer," including federal prosecutors (18 U.S.C. § 1515(a)(4))). The Fourth Circuit in *United States v. Floresca*, 38 F.3d 706 (4th Cir. 1994), explains the difference between an offense under 1512(b)(3) (uncharged here) and 1512(b)(1) (offense targeted by the charged conspiracy) and underscores that the Division's evidence targeted, at most, the elements of an uncharged offense. *Floresca*, 38 F.3d at 710-11 (reversing conviction where jury instructed that the prosecution met its burden for 1512(b)(1) offense if jury found that defendant approached witness with intent to *either* affect his cooperation in the investigation *or* his trial testimony).

Although acknowledging *Floresca* made the distinction between Section 1512(b)(1) and (b)(3) "undeniable," the District Court concluded that the same set

of facts can violate more than one statute. (JA-72) (11/30/10 Op. at n.4). While this general proposition is true, it does not apply here. It is one thing to say that this evidence may have established an agreement to mislead attorneys or investigators in interviews. But it is quite another to say that the same evidence also established an agreement to persuade individuals to lie on the stand before the grand jury.

Schramm makes abundantly clear that this Circuit will not sustain a conspiracy conviction upon evidence that fails to prove the specific conspiratorial object charged in the Indictment. The Second Circuit followed this same principle in *United States v. Schwarz*, 283 F.3d 76, 107 (2d Cir. 2002), a similar obstruction case. Reversing the conviction, the Court held that, while the trial evidence was "plainly sufficient" that the defendants "agreed to generally to impede state investigators," that was not the object charged. *Schwarz*, 283 F.3d at 106. Rather, the object of the conspiracy was a "precise one"—Section 1503—by impeding the federal grand jury, not a violation of Section 1001 by lying to federal investigators or prosecutors. *Id*.

3. The Supreme Court Has Held That Evidence Of Lies To Investigators Does Not Establish Sufficient Evidence Of Intent To Influence Grand Jury Testimony

(a) *Aguilar* Is Analytically Indistinguishable From This Case

United States v. Aguilar, 515 U.S. 593 (1995), is dispositive, as it demonstrates that evidence of lies to investigators, without more, does not establish an intent to influence grand jury testimony. Vacating a conviction, the Court rejected the Government's argument that because Aguilar knew of the pending grand jury investigation, his lies to federal investigators were "analogous to those made directly to the grand jury itself, in the form of false testimony or false documents." 515 U.S. at 601.

Here, the trial evidence, viewed in the light most favorable to the Division, is analytically indistinguishable from the facts in *Aguilar* and is likewise insufficient to establish the required intent to influence grand jury testimony, here required under Section 1512(b)(1). The evidence, at most, established an intent to lie to lawyers or investigators. There was an awareness of the existence of a grand jury investigation but insufficient evidence that the defendant knew that his conduct was likely to affect grand jury testimony.

There was no evidence that Norris or any alleged co-conspirator had knowledge that statements made to their lawyer, the lawyer's statements to the Division, or any interviews anyone (including Schunk executives) might have with

their lawyers or the Division would somehow morph into false testimony before the grand jury.

Indeed, the case against Norris is even weaker than the case against Aguilar, as here the evidence showed that the alleged co-conspirators—mostly foreign nationals—did not even know that there was such a thing as grand jury testimony. Aguilar, on the other hand, was a federal judge who would surely have known that the FBI agents could be called for grand jury testimony and repeat his statements.

Additionally, as in *Aguilar*, no relevant actor was under testimony subpoena or ever testified before the grand jury made the possession of the requisite intent to affect grand jury testimony even more suspect. (JA-901) (Tr. 46:7-16 (Emerson)); (JA-1069-70) (89:24–90:10 (Perkins)); (JA-1377-78) (Tr. 56:24–57:8 (Kroef)); (JA-1406) (Tr. 85:2-4 (Hoffmann)); (JA-1452) (Tr. 13:1-12 (Volk)); (JA-1542-43) (Tr. 12:25–13:2 (Keany)); (JA-1821) (Tr. 47:4-11 (Weidlich)). *See also* (JA-726-27) (Tr. 40:25-41:1 (Rosenberg Colloquy)); *Aguilar*, 515 U.S. at 601 (fact that the FBI agents were not under subpoena but were simply individuals who "might or might not testify before the grand jury" insufficient and too speculative to establish Aguilar's knowledge that his lies would likely be repeated in the form of grand jury testimony); *compare United States v. Vampire Nation*, 451 F.3d 189, 205 (3d Cir. 2006) (defendant's email to target of corrupt persuasion—referencing defendant's knowledge of the target's grand jury subpoena—indicated that

defendant was "well aware" his obstructive act would affect the official proceeding).

(b) The District Court Rendered Proof Of Specific Intent Superfluous

The Court's sufficiency conclusion is premised upon a failure to require proof of both the "knowing" (*i.e.*, conscious awareness of wrongdoing) and specific-intent elements required by 1512(b)(1). *See United States v. Farrell*, 126 F.3d 484, 490 (3d Cir. 1997) (stating that 18 U.S.C. § 1512(b) expressly requires proof of "both 'knowing' conduct and some specific intent, described in subsections (1) through (3)"). Contrary to the Court's finding, *Aguilar* applies here despite the fact it deals with Section 1503's broad provisions. (JA-75). In placing metes and bounds on this catchall clause, the Supreme Court required that the Government prove that Aguilar lied to federal investigators with the knowledge and intent that those investigators would repeat his statements in grand jury *testimony*. *Aguilar*, 515 U.S. at 599-600. Here, that limiting feature—intent to affect grand jury *testimony*—is the precise statutory language of Section 1512(b)(1), and the object of the conspiracy charged. 18 U.S.C. § 1512(b)(1) ("knowingly . . . corruptly persuade[] another person . . . with intent to -- (1) influence . . . the testimony of any person in an official proceeding").

The Court's opinion rendered *proof* of intent to influence *grand jury testimony* superfluous. Conflating counsel or Division interviews with grand jury

testimony, the Court appeared to find that it was sufficient for the Division to have proved only that the co-conspirators intended to generally mislead, directly or indirectly, the Division's price-fixing investigation. (JA-81) (11/30/10 Op.) But that was not the charged conspiracy, nor does evidence of that conduct give rise to an inference of intent to commit the precise object charged and violate Section 1512(b)(1).

(c) The District Court Misconstrued The Defense's "Nexus" Argument

The Court also appeared to reject *Aguilar*'s applicability based on a misperception of the defense's position on "nexus." (JA-73-78) (11/30/10 Op.). The defense did not contend that the Division was required to prove that Norris and his co-conspirators knew that their actions "*will* end up affecting the relevant official proceeding," *i.e.*, knowledge of the certainty of success of the obstructive endeavor. *Id*. (emphasis added)). The evidence must be sufficient to establish knowledge that the obstructive endeavor will "'*likely* to affect the judicial proceeding.'" *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005) (quoting *Aguilar*, 515 U.S. at 599) (emphasis added). The Supreme Court adopted this "nexus" standard from *Aguilar* in *Arthur Andersen*, a Section 1512(b) case. *Arthur Andersen*, 544 U.S. at 707 (reciting *Aguilar*'s nexus standard and reversing conviction "[f]or these reasons"). Here, there was no evidence that the conspirators possessed *any* knowledge that their conduct would likely—or even

possibly might—affect grand jury testimony. Unlike in *Aguilar*, a case under 1503, this case under 1512(b)(1) statutorily requires intent to influence testimony, which the Division failed to prove.

(d) The District Court's "Conduit" Theory Is Legally Flawed And Factually Unsupported

The Court further erred in finding that a so-called "conduit" theory would support a Section 1512(b)(1) violation in this case. (JA-71-72) (11/30/10 Op.). The Court posited that a Section 1512(b) violation might exist where there was an agreement to use "such parties," *i.e.*, outside counsel Keany or the Division, to influence grand jury testimony. *Id*. at 71. Although the Court's hypothesis was not supported by any evidence as to *whose testimony* that might be, the Indictment precluded such a theory because it required evidence of an agreement to persuade "*other persons* . . . with intent to influence *their* testimony." (JA-183-84 (Indict. ¶13)) (emphasis added); *Schramm*, 75 F.3d at 159.

There was no evidence that Norris or any co-conspirator had knowledge that Keany or any investigator was likely to repeat the information they received as their own grand jury testimony. More fundamentally, there was no evidence that Keany warned Norris that anything Norris said to Keany would be repeated to the grand jury.

Accepting the viability of such a "conduit" theory would effectively criminalize advocacy based on the mere fact a client withholds information from his lawyer and allows him to proffer one set of plausible facts to the government when another set

might also be possible. Repackaging such defense advocacy as witness tampering—here, the characterization of competitor meetings as "joint venture" discussions—will have a chilling effect on the adversarial system and trigger undesirable corollary effects, including an attack on the attorney-client privilege, as discussed further below. *E.g.*, *United States v. Zolin*, 491 U.S. 554, 562 (1989) ("open client and attorney communication [essential] to the proper functioning of our adversary system of justice . . . ."). The Court's "conduit" theory converts any lie made to counsel into a lie against the state, at odds with the adversary system. *United States v. Cronic*, 466 U.S. 648, 655-56 (1984) ("[T]he adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate.") (internal quotations and citations omitted). Nor did Congress intend such a result. 18 U.S.C. § 1515(c) ("[t]his chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding").

B. NO RATIONAL JURY COULD FIND AN AGREEMENT TO CORRUPTLY PERSUADE OTHERS TO KEEP DOCUMENTS FROM THE U.S. GRAND JURY

There was also insufficient evidence to sustain the conspiracy conviction on the grounds of a conspiracy to destroy documents with the intent to impair their availability to the grand jury. Indeed, the District Court's denial of the defense's motion for acquittal rested almost exclusively on Kroef's testimony about a "very, very short" and undated discussion he had with Norris about "check[ing]" files in

Europe to protect those files from European authorities. (JA-1245) (Tr. 28:10-16). No rational jury could have found this testimony sufficient to support the charged conspiracy.

1. No Rational Jury Could Find The Charged Agreement Where Keany Testified That His Clients Knew That The U.S. Grand Jury Subpoena Did Not Reach European-Located Files

Keany testified unequivocally that he understood that the "subpoena required only production of documents in the United States at the time the subpoena was served" and that "in the end, [the Division] could only compel documents in the U.S." (JA-1558, 1559, 1557, 1510) (Tr. 28:20-25, 29:5-8, 27:24–28:3-7, 71:15-20 (Keany) (subpoena required only U.S.-based documents). Keany testified, and the documentary evidence confirmed, that he repeatedly conveyed this understanding to Morgan's executives, including Norris and informed them that the Division *agreed*. (JA-1577) (Tr. 47:16-25 (Keany)); (JA-2644) (email from Keany to Norris, *et al.*, stating: "I then told [Division attorney McClain] that . . . I did not anticipate bringing any UK documents into the US. She said she understood the latter point *and that she would not expect us to*.") (emphasis added).

When Keany decided to voluntarily provide the Division with some overseas documents regarding joint-venture meetings, Keany took steps to ensure that this would not affect the extraterritorial restrictions that both sides agreed governed the

subpoena. *See* (JA-1602) (Tr. 72:17-24 (Keany)); (JA-2314) (Keany email informing Norris of Division call working "out an understanding" regarding "producing documents from beyond the 'legal reach' of the subpoena"); (JA-2315) (Keany email informing Norris that the Division agreed to production "without in any way waiving the *normal position* that subpoenas cannot reach documents located outside of the US") (emphasis added). Keany testified that the Division *never* requested documents outside the United States. *See* (JA-3189) (cover letter); (JA-1559) (Tr. 29:1-4 (Keany)) ("Q. [T]he Antitrust Division never sought to compel the production of documents from outside the United States, correct? A. That is correct.").

The Court erroneously dismissed Keany's testimony as irrelevant, relying on the same rationale used to deny Norris's Rule 12(b) motion to dismiss. (JA-86, 88-89) (11/30/10 Op. at 30, 32-33, n.9). The Court ruled that conduct directed at foreign-based documents could form the basis of a Section 1512(b)(2)(B) offense if the Division could prove the intent to "impair [the foreign-based documents'] availability in the grand jury investigation." (JA-86) (11/30/10 Op. at 30) (quoting 719 F. Supp. 2d 557, 567 (E.D. Pa. 2010)). Even if theoretically this might have been possible on a pretrial motion to dismiss, the evidence did not develop that way at trial.

The Court further erred by relying upon the language of the subpoena itself—seeking documents "without regard to the physical location of said documents"—to support its conclusion. (JA-87) (11/30/10 Op. at 31). First, the subpoena cover letter expressly stated that the Division would "not seek to enforce the subpoena to compel the production of documents that were located outside the United States." (JA-3189) (subpoena cover letter). Second, there was no evidence that Norris and Kroef ever read this subpoena language and acted unlawfully as a result. Third, there was uncontradicted evidence from Keany that they understood the complete opposite to be true, *i.e.*, that the "normal position" was that the U.S. grand jury could not reach documents in Europe. (JA-2315).

2. No Rational Jury Could Find The Charged Conspiracy Where The Evidence Established That Norris Instructed That Responsive Documents Be Preserved And Produced

There was no evidence adduced at trial of *any* document destruction in the United States. U.S.-based documents were the only documents that Morgan's executives, including Norris, believed were responsive to the Morganite subpoena. With no evidence of document destruction or concealment *in the United States*, the Division failed to adduce sufficient evidence of the charged documents conspiracy.

Perkins testified that: "Certainly no document destruction took place in any of the time that I was [at Morganite]." (JA-1066) (Tr. 86:8-9 (Perkins)). Morganite's Muller testified that he did not order anyone to destroy documents and

that Norris never asked him to destroy documents. (JA-1104) (Tr. 4:14-19 (Muller)). Cox, a U.S.-based employee, testified that Norris did not instruct him to destroy documents. (JA-1888) (Tr. 32:9-12 (Cox)). Emerson testified that he did not destroy any documents in the United States, he was unaware that anyone else did, and Norris never instructed him to destroy documents. (JA-890-91) (Tr. 35:3-5, 36:2-9 (Emerson)).

In fact, Morgan's executives testified that Norris ordered documents *preserved* and *produced* in response to the subpoena. Perkins testified that: (i) "Mr. Norris ordered that the subpoena be complied with and no documents be destroyed," (ii) he believed that Norris's order was "taken seriously," and (iii) Norris sent out a written order to that effect. (JA-1066-67) (Tr. 86:4–87:4 (Perkins)). Emerson, an executive described as "Mr. Cartel," testified that Norris insisted upon compliance with the U.S. subpoena:

> Q. Okay. And sir, isn't it the case that . . . Mr. Norris instructed the company executives to provide all the documents that were required by that subpoena?
>
> A. Yes.

(JA-885) (Tr. 30:20-24 (Emerson)).

3. No Rational Jury Could Find The Charged Agreement Where Kroef Testified That The File "Check" Targeted A Potential European Investigation

The Court erroneously found sufficiency of the evidence lay almost exclusively in a tiny fragment of Kroef's testimony about a "very, very short

discussion" he had with Norris about "check[ing]" files in Europe. (JA-1245) (Tr. 28:10-16 (Kroef)). No rational jury could have found this sufficient, because Kroef testified that the file "check" was done with the specific intent of preventing *European authorities* from taking these files in a "dawn raid" for a European investigation. (JA-1311) (Tr. 94:11-24 (Kroef)). The only role the U.S. investigation played in this file check was that it merely "triggered" the idea to take steps necessary to protect against a possible parallel EU investigation. (JA-1245) (Tr. 28:10-16 (Kroef)). Destroying documents to keep them from European authorities does not satisfy the intent elements of 1512(b)(2)(B) or the charged conspiracy, which require intent to affect the U.S. grand jury. *See Arthur Andersen*, 544 U.S. at 708 ("If the defendant lacks knowledge that his actions are likely to affect the judicial proceeding . . . he lacks the requisite intent to obstruct."); *Schramm*, 75 F.3d at 159 (trial evidence must establish "the specific unlawful purpose charged in the indictment"); (JA-183). Consequently, intent to conspire is lacking. *See Alston*, 77 F.3d at 719 (conspiracy conviction could not stand upon failure to prove specific intent for substantive offense).

Kroef explained that it was concern about a European investigation that prompted Norris to query whether it was a good "idea" to check the European files, as Morgan had regularly done in the past:

> Q. And then after the Grand Jury subpoena was served on Morgan, was it a -- was that an occasion to go -- did you use it as an occasion to go look for -- for documents?
>
> A. One of the arguments used was that, if something -- if you're going to be subpoenaed in the United States -- so if you're under investigation on something very minor in the United States, that could be a serious risk of things coming to Europe. And of course, in Europe, we had an elaborate cartel system. So, I recall a very, very short discussion with Mr. Norris, where he said, what was the last time you did a check on the -- on the files in the companies? And I said, ooh, that's been a long time. And he said, do you think it's wise to do another one? And I said, yeah, not a bad idea. That was triggered by the investigation here in the U.S.

(JA-1245) (Tr. 28:2-10).

Immediately preceding this testimony, Kroef explained that the European cartel members had a practice of keeping their meeting documents offsite and that file "cleaning" was only necessary to ensure that the local European company sales documents did not reflect customer discussions. (JA-1240-44) (Tr. 23:17-27:18). Kroef testified that he had carried out such European file "cleaning" about five times during his twenty years in the European cartel, and that all cleanings were undertaken due to concerns regarding "dawn raids" by European authorities. (JA-1244-45, 1311) (Tr. 27:19-28:1, 94:23-95:15). Kroef confirmed that the "cleaning," supposedly prompted by his "very, very short" discussion with Norris, was an "exercise similar to the prior ones." (JA-1311, 1244-45) (Tr. 94:14-25, 27:10-28:1).

Kroef's testimony is far too tenuous to support an inference that Norris conspired to persuade others with intent to deprive the *U.S. grand jury* of documents. Kroef did not testify that Norris mentioned the U.S. grand jury subpoena or even the U.S. investigation. That the U.S. investigation even triggered the discussion was merely Kroef's own speculation.

Contrary to the Court's finding, Emerson's testimony that Kroef recruited him to check European files does *not* support the charged conspiracy. (JA-62) (11/30/10 Op.). Specifically, Emerson did not testify what the intent was behind the "task force." Emerson testified only that he was doing what Kroef had told him to do and, as far as Emerson was aware, Norris was not involved. (JA-889) (Tr. 34:12-17).

4. No Rational Jury Could Find The Charged Agreement Where Kroef Could Not Date The File "Check" Discussion

On cross-examination, Kroef directly undercut his comment that the U.S. investigation somehow "triggered" the Norris discussion because he testified that "ultimately" he could not remember "when or what year this brief discussion took place." (JA-1315) (Tr. 98:7-16). This testimony on cross was far more than a failure to place the conversation on a specific date; it was a recanting of his testimony on direct that the "very, very short" conversation occurred after the U.S. grand jury subpoena. Kroef was not rehabilitated on redirect. The Court erred by sweeping this aside. (JA-62) (11/30/10 Op.). Without, at a minimum, placing this

conversation after the U.S. subpoena, his testimony was insufficient to establish a "nexus" between the alleged formation of conspiratorial or obstructive intent and the U.S. grand jury.

In fact, the trial evidence established that this file "check" conversation took place *prior to* the grand jury subpoena's issuance, April 27, 1999. Specifically, DX-619, a memorandum summarizing an April 8 and 9, 1999 European cartel meeting established that the Norris-Kroef discussion took place before that meeting and thus well before Morganite received a subpoena on April 30, 1999. (JA-3278). This memorandum references a report from Morgan's Jacques Snoek that Morgan had already removed European-cartel documents from its files. (JA-1751-52) (Tr. 107:8–108:16 (Macfarlane) (identifying Snoek as attendee)). Snoek was an executive recruited for Kroef's European "task force" to "check" Morgan's European files, and Kroef sent Snoek to that April 8-9 European cartel meeting. (JA-1245, 1291-92, 1309) (Tr. 28:19-23, 74:5-75:2, 92:2-5 (Kroef)).

When describing the Norris discussion, Kroef testified that, in response to Norris's question, "what was the last time you did a check on the -- on the files in the companies," Kroef responded, "ooh, that's been a long time." (JA-1245) (Tr. 28:11-14). If the Norris-Kroef discussion had indeed taken place after the subpoena was served on April 30, 1999, Kroef would not have told Norris that it had been a "long time" since Morgan last checked the European files, because

three weeks earlier Snoek had reported to the European-cartel attendees that Morgan had just performed this task, *i.e.*, before April 8, 1999. All told, no rational jury could base a conviction on Kroef's testimony.

5. No Rational Jury Could Find That The Alleged Co-Conspirators Had Knowledge That European Documents "Might Be Material" To The U.S. Grand Jury

Finally, there was no evidence that Norris and Kroef knew that the documents culled by Kroef's "task force" were likely to be "material" to the U.S. grand jury proceeding—as required under *Arthur Andersen*. 544 U.S. at 708 ("'a knowingly . . . corrup[t] persuade[r]' cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents *might be material*.") (emphasis added). The Court made no finding on knowledge of *materiality*. Instead, the Court's finding rested on a "responsive[ness]" standard—a lower standard than required by the Supreme Court. (JA-87-88) (11/30/10 Op. at 31-32). But the evidence was insufficient even under that standard. Instead, the evidence established the opposite given that (a) Kroef testified that Norris told him the U.S. investigation and subpoena related to "cartel activities in the United States" not worldwide (JA-1209) (Tr. 109:12-20), and (b) Keany testified that Norris viewed European cartel activities as separate from the U.S. investigation. (JA-1547-48) (Tr. 17:12-18:8). In fact, the trial evidence

established that in contrast to Europe, there was no U.S. price-fixing, and, under Norrs, Morgan sought European amnesty. *See* Statement of Facts, *supra*.

Emerson's testimony does not change this conclusion for two reasons. First, while Emerson initially admitted destroying U.S.-market related notes located in the United Kingdom, his testimony was clear that this was not part of the "task force" supposedly prompted by the Norris-Kroef file "check" discussion. (JA-852-53) (Tr. 111-112). Rather, Emerson did this before leaving Morgan upon Perkins's instruction. (JA-853) (Tr. 112:22-25). Second, on redirect, Emerson expressly disavowed this testimony and clarified that he *never* had notes on the U.S. market to destroy. (JA-909-10) (Tr. 55:24-56:7)). Ignoring Emerson's disavowal, the Court erred by relying only upon Emerson's earlier direct testimony to find that responsive documents were destroyed. (JA-88) (11/30/10 Op. at 32) (citing Tr. 17:1-19:25, 50:9-12).

Finally, according to Kroef, the documents removed from Morgan's European offices as part of the file "check" were documents showing price discussions on specific customers at the local European level. (JA-1241-42, 1244) (Tr. 24:20-25:12, 27:4-18). There was no evidence that these documents related to the limited carbon products under investigation in the U.S. grand jury proceeding. (JA-1240-44) (Tr. 23:5-27:18).

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

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

The Court erred by refusing to give the defense's proposed instruction regarding the meaning of "corruptly persuades," as used in Section 1512(b). A new trial is warranted because the requested instruction "was correct, not substantially covered by the instructions given, and was so consequential that the refusal to give the instruction was prejudicial to the defendant." *United States v. Hoffecker*, 530 F.3d 137 (3d Cir. 2008) (internal citation and quotation omitted). Defendant's instruction read in pertinent part:

> [I]t 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 persuade[d]" another person if all he did was to persuade co-conspirators to withhold incriminating information.

(JA-335) (Def.'s Proposed Instr.). *Arthur Andersen*, 544 U.S. at 703-04, and *United States v. Farrell*, 126 F.3d 484, 487-488 (3d Cir. 1997), directly support defendant's instruction. In *Farrell*, this Court addressed the meaning of the "ambiguous" phrase "corruptly persuades" in light of an individual's right not to incriminate himself. 126 F.3d at 487. The Court held that the "'corruptly persuades' clause":

> does not include a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators.

126 F.3d at 488. Consistent with *Farrell*, the Supreme Court in *Arthur Andersen*, stated that "persua[sion] is by itself innocuous." *Id*. at 703. Indeed, '"persuad[ing]' a person 'with intent to . . . cause' that person to 'withhold' testimony or documents from a Government proceeding or Government official is not inherently malign." *Id*. at 703-04.

The Division's evidence squarely implicated this issue. A crucial question at trial was whether the jury believed that the non-contemporaneous summaries were false or whether they simply omitted incriminating information. (JA-187-88) (Indict. ¶19(k) ("the summaries would *purposely exclude* mention of pricing discussions") (emphasis added). According to the Division, the conspirators agreed to answer questions from the Division consistent with the summaries. If the summaries simply *omitted* price-fixing information, the jury should have found that Norris lacked intent to violate or conspire to violate Section 1512(b)(1). The jurors should have been instructed accordingly; failure to do so prejudiced Norris's right to a fair trial.

Specifically, Perkins testified that the relevant Morgan executives were instructed "to be very careful" in writing the summaries, in how they "phrased things," and what they "included in the drafts." (JA-968) (Tr. 114:14-20

(Perkins)). The jury could easily have found that this caution was to avoid admissions by being careful to "de-emphasize a pricing involvement" and to emphasize joint-venture discussions. (JA-968-70) (Tr. 114:13-116:1 (Perkins)). Macfarlane similarly testified that the summaries "focus on acquisitions rather than price agreements or discussions" and were inaccurate only because they omitted certain information:

> Q. Were your notes accurate, Mr. Macfarlane?
> A. No.
> Q. Well how were they inaccurate?
> A. They were inaccurate to the extent that, where Nantier and Emerson were present, they were discussing either European cartel activities or business, done separately from the meeting.

(JA-1673, 1768) (Tr. 29:12-18, 124:1-7 (Macfarlane)). This testimony indicates that the summaries were "inaccurate" only in omitting mention of some side discussion when two particular individuals were present, Emerson and Carbone's Nantier.

Separately, witnesses testified that they discussed taking steps to have price-fixing conspirators withhold cooperation and statements from the Division (not the grand jury). (JA-1688) (Tr. 44:5-9 (Macfarlane)) ("It was our view that as a retired employee, [Emerson] would be inaccessible" to the Department of Justice.); (JA-1795) (Tr. 21:7-22 (Weidlich)). Emerson testified that U.K. legal counsel "reassured me that if I was no longer an employee of the company, I couldn't be

forced to testify to the Department of Justice." (JA-877) (Tr. 22:3-13 (Emerson)); *see Arthur Andersen*, 544 U.S. at 703-04 (an attorney who persuades his client "'with intent to . . . cause' that client to 'withhold' privileged documents from the Government" cannot be guilty of the inherently malign conduct under 1512(b)(1)).

Over defense counsel's objection, the Court gave a "corruptly persuades" instruction derived from Section 6.18.1512B of the Third Circuit Model Criminal Jury Instructions:

> As to the first element, to corruptly persuade, that means to corrupt another person by persuading him or her to violate a legal duty, to accomplish an unlawful end or unlawful result or to accomplish some other lawful end or lawful result by an unlawful manner. To persuade, that means to cause or induce a person to do something or not to do something.

(JA-2136, 2138-39) (Tr. 39:11-17, 41:21-42:2 (Charge)).

This Court has not approved the pattern instruction in any reported decision. At the charging conference, defense counsel argued that the phrase "legal duty" required further explanation to guide the jury and, specifically, to explain that there was no legal duty to volunteer information. (JA-1959) (Tr. 47:9-21 (Colloquy)); *see United States v. Curran*, 20 F.3d 560, 571 (3d Cir. 1994) ("The essence of conspiracy is an agreement to commit an act that is illegal. If a jury is misled into considering as unlawful the omission of an act that the defendant is under no [legal] duty to perform, then a finding of conspiracy based on such conduct cannot stand."). Without clarification, the jury had no guidance regarding the meaning of

"legal duty" and that persuading a co-conspirator to withhold incriminating information in the absence of a duty to disclose is not corrupt persuasion.

Nor was the ambiguity in "corruptly persuades" resolved by reference to equally obscure terms, such as "unlawful end or unlawful result." The circular and uninformative first sentence left the jury bound to rely only on the last sentence, which more clearly spoke in lay terms, stating that persuade "means to cause or induce a person to do something or not to do something." (JA-2136) (Tr. 39:15-17 (Charge)). But this conduct alone is precisely the conduct the Supreme Court ruled is not "inherently malign." *Arthur Andersen*, 544 U.S. at 703-704.

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

The Court instructed the jury that, to find Norris guilty of conspiracy, the Division was required to prove beyond a reasonable doubt that "at least one member of the conspiracy performed at least one of the overt acts *alleged in the indictment*, for the purpose of furthering or helping to achieve the objectives of the conspiracy." (JA-2133) (Tr. 36:10-13 (Charge)) (emphasis added). Although the jury was specifically instructed to consider overt acts "alleged in the indictment," the Court did not provide the jury with the indictment, a problem identified by defense counsel during the charge conference. (JA-1933-34) (Tr. 21:18-22:23). Nor did the Court otherwise identify for the jury the "overt acts alleged in the

indictment." Because it was thus impossible for the jury to comply with the Court's instruction on this essential element of conspiracy, the conviction must be reversed under either a harmless or plain error standard. *United States v. Schurr*, 794 F.2d 903, 908 & n.5 (3d Cir. 1986) (conviction would have to be reversed if it was impossible for jury to find overt-act element as instructed); *see also United States v. Small*, 472 F.2d 818, 820 (3d Cir. 1972) (reversing conspiracy conviction upon a finding of plain error where court failed to properly charge essential overt-act element); *see also Gov't of V.I. v. Toto*, 529 F.2d 278, 284 (3d Cir. 1976) (new trial must be granted unless it is "highly probable that the error did not contribute to the judgment").

In *Small*, the jury instruction, while mentioning overt acts, failed to require the jury to find at least one overt act was committed. The defendant, as here, was acquitted of the substantive crimes, but found guilty of conspiracy. *Small*, 472 F.2d at 819. This Circuit stated: "Acquittal on the substantive counts emphasizes the substantial importance to defendant's rights of the failure by the trial judge to instruct properly on the elements of the conspiracy count." *Id*. The Court stressed:

> The failure to instruct on overt acts cannot be assumed to have been unimportant to defendant's due process rights. Twelve overt acts were charged in Allen's indictment. Seven of the alleged overt acts involved driving to, robbing, and leaving the bank. As Allen was acquitted on the substantive counts of the indictment, there must be some doubt as to whether the jury found proof of these acts.

Id. at 819-20. Proper instructions on "overt acts" were similarly crucial here, as the "overt acts" alleged in the Indictment doubled as the basis for the substantive charges, upon which Norris was acquitted. (JA-192, JA-193) (Indict. ¶¶20, 22). Particularly given that the substantive charges included an "attempt" to commit the substantive offenses, the acquittals strongly suggest that the jury did not find that the "overt acts" alleged in the Indictment were taken in furtherance of the conspiracy.

By failing to give the Indictment, describe the "overt acts alleged in the indictment" or even define the term, the Court prevented the jury from complying with its instruction and put the jury at sea assessing this essential element of conspiracy. The jury necessarily ignored the "overt act" element or engaged in impermissible speculation. Coupled with the directed return to deliberations after impasse, the error cannot be deemed "harmless." *See United States v. Varoudakis*, 233 F.3d 113, 127 (1st Cir. 2000) (guilty verdict returned after jury sent back following declaration of impasse weighs against finding that erroneously admitted bad-act evidence was harmless).

The Court appeared to misapprehend the defense's position, finding that the instruction actually benefited Norris. (JA-105) (11/30/10 Op.). An instruction limiting the overt acts to those in the Indictment, can only benefit the defendant if the jury is provided with the Indictment or the overt acts listed therein, which was

not the case here. *Schurr* (relied upon by the Court) holds that once proof of the "overt acts" is restricted to those in the indictment, a defendant's conviction cannot be sustained based on unalleged "overt acts." 794 F.2d at 908 n.5; *United States v. Morales*, 677 F.2d 1, 2 (1st Cir. 1982) (where instructions refer "repeatedly only to the specific overt acts alleged in the indictment, the absence of any evidence with respect to those alleged acts is grounds for reversal of the conspiracy conviction, even where there is evidence of other, nonalleged overt acts"), *overruled on other grounds, United States v. Bucuvalas*, 909 F.2d 593, 594 (1st Cir. 1990); *United States v. Negro*, 164 F.2d 168, 171-72 (2d Cir. 1947) (same).

Finally, earlier in the proceedings, the defense proposed a redacted indictment, and the parties each provided a definition of "overt acts" that may have prevented the error. (JA-273) (Proposed Redacted Indict.); (JA-239) (Gov't Proposed Instr.); (JA-358) (Def.'s Proposed Instr.). The Court rejected this because there was "no good reason the term ought to be defined." (JA-106) (11/30/10 Op. at n.14). The Court erred, because jurors cannot reasonably be expected to know the meaning of legal terms of art, and "overt acts" is undisputedly such a term. *See United States v. Bowen*, 414 F.2d 1268, 1273 n.8 (3d Cir. 1969) ("it should not be supposed that the ordinary juror understands the complexity of that legal term of art" ("presumptions")).

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

The Court failed to enforce Norris's attorney-client privilege, despite persistent and strenuous defense objections. Glaringly, the Court permitted the Division to call, as a critical trial witness, one of the lawyers who represented Norris in connection with the antitrust investigation, and to elicit testimony revealing privileged communications by Norris. These unwarranted invasions of the privilege were highly prejudicial and tainted the entire trial.

On June 1, 2010, the Division revealed for the first time that it sought to call at trial Sutton Keany, formerly a partner of the Winthrop (later Pillsbury Winthrop) law firm (JA-160) (DE 58). In its motion *in limine*, the Division wrote that Keany could provide "important testimony" supportive of the "essential element" of "specific intent." (Mem. at 6, 5). The Division proposed to elicit testimony about confidential communications between Norris and Keany on the most sensitive subjects relating to the investigation. (Mem. at 9) (Item 5: what Norris allegedly told Keany about competitor meetings; Item 6: what Norris allegedly permitted Keany to tell the Division; Item 7: what Keany told Norris about the views of U.S. investigators, and how Norris abided by his account of competitor meetings, Item 9: what Norris allegedly allowed Keany to do with the meeting summaries; Item 11: what Norris allegedly did not tell Keany). The Division maintained that these communications were not privileged, arguing that any privilege belonged solely to

Morgan (Mem. at 15-17), and that Morgan had expressly waived the privilege, apparently that very day (JA-3415) (waiver). Alternatively, the Division relied upon the crime-fraud exception, asserting that Keany "became a conduit for passing the falsehoods to investigators." Mem. at 19.

The defense opposed the motion, arguing that Keany represented Norris personally and protesting that the Division had already invaded Norris's privilege through improper substantive communications with Keany. (JA-161) (DE 70). As evidence that Keany represented Norris personally, the defense attached documents authored by Keany expressly confirming that he represented not only the Morgan companies but also their employees. (JA-378) (Keany email reporting conversation with Division confirming Winthrop represented Morgan employees); (JA-386) (Keany letter to Division explaining Winthrop represented Morgan "current employees"). As evidence that the Division had already improperly invaded Norris's privilege, the defense attached documents reflecting substantive communications between the Division and Keany predating the Division's motion. (JA-383) (2002 Internal memorandum memorializing pre-indictment discussion between Division and Keany (by then no longer counsel in matter): "Specifically we told Sutton it was critical to our investigation to know whether or not the Morganite employees knew that the statements were being turned over to the government . . . . Sutton also told us that it was his understanding that the

Morganite employees knew he would be turning the statements over to us."); (JA-381) (2010 Keany-Division email providing information about Keany's discussions in 2000 with Norris: "Both Coker and Norris, after very brief discussion, told me to go ahead and produce the notes if I thought it would be useful. I did think it was potentially useful. The notes were produced as a result of the direction by Norris and Coker."); (JA-379) (April 2010 Division-Keany email exchanges disclosing Keany discussions with Norris). The defense requested an evidentiary hearing on these privilege issues, and the Court set one for July 6, the week before trial (JA-31). At the evidentiary hearing, the Winthrop partner who had been responsible for the Morgan relationship, Jerry P. Peppers, testified that Winthrop represented Norris personally. (JA-524-25) (Hrg. Tr. 105:16-106:1(Peppers); *see also* (JA-433) (Hrg. Tr. 14:10-18 (Keany)) (testifying Winthrop hired through Peppers). Peppers also recalled Winthrop providing Norris a letter stating that the firm represented Norris, so Norris could show it to any government officials who might confront him. (JA-525) (Hrg. Tr. 106:2-16). Peppers testified that he thought Norris asked for the letter through a company secretary. (JA-535) (Hrg. Tr. 116:22-25). Peppers also testified that in late September 2001 Norris expressly asked Peppers (outside of Keany's presence) if Keany could "continue to" represent Norris. (JA-538-39) (Hrg. Tr. 119:4-120:16).

Keany, who is no longer employed at Winthrop, initially testified that he did not represent Norris (or any other employees) (JA-449-50) (Hrg. Tr. 30:24-31:25), but this testimony was in irreconcilable conflict with the documentary record, and Keany eventually conceded that he had represented Norris (and other employees) at least in some "sense." (JA-475) (Hrg. Tr. 56:3-5 (Keany)). When the Division formally inquired of Keany in July 2001 as to which individuals Winthrop represented in the investigation, Keany wrote an email to Morgan reporting on what he said to the Division attorney: "I told her that there was no mystery at all: this firm represents the parent company, its affiliates and its current employees, including but not limited to, Mike and Bruce. She expressed no surprise (one wants to say 'of course') but asked me to confirm that information in writing." (JA-3418) (7/30/01 email). At the evidentiary hearing Keany testified that this email accurately reflects what he told the Division attorney: "I believe that, in words or substance, that's exactly what I said to Lucy McClain." (JA-468) (Hrg. Tr. 49:18-22). *See also* (JA-466) (Hrg. Tr. 47:1-2 (Keany) ("So in response to her question, I said sure, I represent them."); (JA-467) (Hrg. Tr. 48:8-9 (Keany)) ("All I wanted to do here [in the email] was to report what had occurred. And this is what occurred in the conversation.") Peppers, who was copied on the email, testified that Keany's email accurately reflected who the firm represented. (JA-523-24) (Hrg. Tr. 104:22-105:9).

In his confirming letter to the Division, Keany again stated that his firm's representation went beyond the companies:

> We presumptively also represent all current employees of the companies in connection with the matter. Only Messrs. Cox and Muller were at one time identified as individuals that you would like to have appear before the grand jury; when that occurred, we acted on their behalf. We continue to do so.
>
> Should you wish to call other current employees, I assume that we would also represent those individuals.

(JA-3419) (7/31/01 Keany Letter). Keany testified: "What I wanted to achieve with this letter was to convey to Lucy McClain the idea that, if she were to serve subpoenas on any of these people, I should be notified." (JA-448) (Hrg. Tr. 29:13-15).

Despite Keany's repeated statements—first to a Division attorney by phone, then in a client email, and then in a confirming letter to the Division—that his firm represented Morgan's employees, Keany seemed to deny doing so at the evidentiary hearing: "My belief was that I could not represent any of the individuals with respect to the subject matter of the investigation. The reason I could not was that I couldn't have a relationship of confidence with them, because my confidence had already been placed, I thought, with the company." (JA-450) (Hrg. Tr. 31:2-7). He testified that he was concerned about a "conflict." (JA-450) (Hrg. Tr. 31:21-25)). On cross-examination, Keany attempted to explain the

obvious tension between his 2001 statements about representing employees and his present insistence that he had not:

> Q. Mr. Keany, maybe I'm misunderstanding your testimony, but are you saying that, when you wrote that letter to Ms. McClain, and when you wrote this email to your client representatives, that you were stating a falsehood?
> A. No, it's not —
> Q. In that you didn't represent the employees but you were saying you did?
> A. I represented them for this purpose. I wanted to be advised if they were notified of — if they were served with a subpoena.
> Q. Okay. But your email to your client representatives doesn't say anything about a limited purpose of a representation, does it?
> A. No.

(JA-467-68) (Hrg. Tr. 48:23-49:11).

Keany's confused understanding of his representation crystallized in his testimony about whether he had represented Michael Cox and Bruce Muller, the two individuals identified by name in both Keany's email and his confirming letter. While this fact was never presented at trial, those individuals were scheduled to appear before the grand jury in 2001:

> Q. And you represented them in connection with that, correct?
> A. I did.
> Q. All right. So as to those employees you were – you got comfortable that there wasn't a debilitating conflict, correct?
> A. No. Never.
> Q. So you represented them while you were conflicted?
> A. I didn't represent them, in the sense of taking confidential communications from them. I told them that at the first meeting, and that was always clear.

(JA-474-75) (Hrg. Tr. 55:21-56:5). In fact, confusion, not clarity, characterized Keany's position on who he represented and in what "sense" he represented them.

Keany also acknowledged at least a limited representation of Norris. When Canadian Antitrust Officials, conducting an investigation parallel to the Division's, traveled to the U.K. to interview Norris, Keany represented Norris:

> Q: Did you represent Mr. Norris in connection with that appearance?
> A: In — in the sense that I've explained, yes.

(JA-503) (Hrg. Tr. 84:18-20). Keany added that he would have done the same if Norris had been subpoenaed by the Division. (JA-503-04) (Hrg. Tr. 84:23-85:6). In fact, Keany later authorized the Canadian authorities to share their interview of Norris with the Division, and he also offered up Norris to the Division for a grand jury appearance. (JA-3348); (J-3351); (JA-504-08) (Tr. 85:12-89:9). Keany also acknowledged representing Norris in connection with an unrelated sworn FTC appearance. (JA-471-72) (Hrg. Tr. 52:21-53:13)).

While Keany asserted that he had a "practice" of advising employees that his firm represented the company and that the employee should consider retaining his own counsel (JA-292) (Keany Aff. ¶4); (JA-441) (Hrg. Tr 22:2-21), this supposed practice fell substantially short of clarifying matters. First, Keany's practice apparently was to deliver this advice orally, without any documentary memorialization. Second, the contents of the advice, as described by Keany himself, omitted critical issues such as whether the confidentiality of

communications with the employee would be maintained from governmental officials and others. Beyond the perfunctory nature of the advice—far below customary *Upjohn* warnings—the record is clear that Keany and his firm did represent employees, as Peppers's testimony as well as Keany's own testimony and documents establish.

In a post-hearing submission, the defense marshaled the relevant facts and law establishing that Winthrop represented Norris personally and that Keany should not be permitted to testify about confidential communications with Norris or at all. (Proposed Findings) (DE 101). Furthermore, the defense argued that the Division's substantive communications with Keany after he was terminated violated Norris' constitutional rights, because the Division had previously been informed by Keany, back in 2001, that he represented not only the Morgan companies but employees such as Norris. Nonetheless, the Court ruled that the defense had failed to establish that Keany represented Norris personally (JA-33) (7/12 Op.).

In finding that Winthrop did not represent Norris personally, the Court acknowledged much of the evidence to the contrary, but misapplied this Court's decision in *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120 (3d Cir. 1986). While the District Court found *Bevill* to be "controlling" (JA-41) (7/12 Op. at 9), in fact *Bevill* is inapposite.

In *Bevill*, this Court expressly identified the issues presented there: "The dispute centers on whether the individuals' assertion of an attorney-client privilege can prevent the disclosure of corporate communications with corporate counsel when the corporation's privilege has been waived." 805 F.2d at 124. That issue was not present here, as the defense did not seek to prevent the disclosure of corporate communications with corporate counsel. The defense here merely sought to prevent the disclosure of Norris's own personal communications with his own counsel. *In re Benun*, 339 B.R. 115, 125 (D.N.J. 2006) (distinguishing *Bevill* where facts demonstrated actual co-representation by shared counsel); *Montgomery Acad. v. Kohn*, 82 F. Supp. 2d 312, 320 (D.N.J. 1999) (finding, based on evidentiary hearing, that corporate official was represented by counsel).

The District Court cited a series of cases, pre- and post-dating *Bevill*, in support of its application of the five-part test, but the District Court failed to appreciate the decisive factors in such cases. Where the corporate officer demonstrably had a personal attorney-client relationship with counsel (such as in connection with an investigation or proceeding), that relationship was recognized and the privilege respected, even if that counsel also represented the corporation. *See, e.g.*, *In re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 1029, 1033 (S.D.N.Y. 1975) ("It is clear that H&H's representation of [Robert] Vesco as a respondent in the SEC investigation established a bona fide lawyer-client

relationship in respect of that matter, entitling Vesco to assert an attorney-client privilege in this proceeding.") (citations omitted); *In re Grand Jury*, 211 F. Supp. 2d 555, 559 (M.D. Pa. 2001) (holding CEO's communications privileged, despite corporate waiver where attorney had represented both CEO and corporation in litigation.). In contrast, where a corporate officer, not personally represented in an investigation or proceeding, was consulting corporate counsel but later claims personal privilege, the courts will apply the demanding five-part test. Here Norris's privilege should be respected because Winthrop expressly represented him and the Morgan companies jointly in connection with the investigation.

Because Norris never waived his personal attorney-client privilege, he still maintains his privilege, irrespective of any waiver by Morgan. *See In re Teleglobe Commc'n*, 493 F.3d 345, 362-63 (3d Cir. 2007) (waiving the joint-client privilege requires the consent of *all* joint clients) (citing the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §75 cmt e).

Three days after the Court's ruling permitting Keany's testimony, the defense moved for reconsideration and provided the Court with three additional documents, all from 1999, further corroborating Winthrop's representation of Norris personally. The first document, a memorandum to Norris dated October 29, 1999 from Peppers, Keany, and another Winthrop attorney, provided detailed

personal legal advice to Norris in connection with the antitrust investigation at the core of this criminal action:

> It is possible that the U.S. Department of Justice ('DOJ') may issue a personal grand jury subpoena to you in connection with one or more grand jury investigations. If so, your name could trigger a computer alert the next time you fly into the U.S. . . . . If this happens, and you are asked to accompany the officer to another area to receive service of a subpoena, or to participate in any questioning . . . here is what you can do . . . . [A]dvise that you are represented by counsel, and that you are respectfully requesting an opportunity to contact him for anything beyond routine travel questions. Give us a call, and we'll handle it from there.

See (JA-407) The memorandum expressly states that the attorneys represent Norris: "It is entirely proper and appropriate for you to simply advise that . . . you are represented by counsel and expect to cooperate and communicate solely through counsel and [] your lawyers are Jerry Peppers, Sutton Keany and Stephen Weiner of Winthrop, Stimson, Putnam & Roberts." *Id.* The attorneys followed up with two letters that Norris could hand to any federal government agent if he were detained. One letter states: "As you have now been informed by our client, Ian Norris, we represent him as his lawyers here in the United States and outside the U.S. This representation specifically includes, but is not limited to, matters of any nature, in connection with any investigation by the U.S. Department of Justice ('DOJ') Antitrust Division." *See* (JA-409) (Letter from S. Keany et al. to U.S. Government Officials). The other letter states: "You are hereby notified that our client, Ian P. Norris, who is presenting you with this letter, has authorized us to

accept service on his behalf of any grand jury subpoena addressed to him. . . . Mr. Norris (a) wishes to remain silent, (b) he wants to speak to the undersigned attorneys and (c) you are prohibited by law from interrogating him at this time." (JA-411) (Letter from S. Keany, *et al.*, to U.S. Government Officials) (emphasis added).

These three documents confirmed Peppers's testimony and laid to rest any doubt that Winthrop represented Norris personally. And there was ample justification for the District Court to reconsider its ruling in light of these documents, as Norris's confinement in the United States (for the entire period of the dispute over Keany testifying) constrained his ability to locate the documents and as reconsideration was necessary to correct an erroneous ruling and to prevent a manifest injustice. *See Max's Seafood Café by Lou Ann v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999) (setting forth grounds warranting reconsideration). Nonetheless, after argument (JA-1457-91) (Tr. 18:3-52:2 (Argument)), the District Court declined to reconsider (JA-49-52) (7/19/10 Ruling), thereby abusing its discretion and showing inappropriate insensitivity to the critical attorney-client issues at stake.

The Court went on to state that, even with the three documents, the defense "fails to meet the central tenet of *Bevill*," that is, "Mr. Norris did not seek legal advice or representation from the law firm in general, or from Mr. Keany

specifically, as it related to the Grand Jury Investigation, which is at issue in this case." (JA-52) (7/19/10 Ruling). The District Court's conclusion simply cannot be squared with the extensive documentary and testimonial evidence of an attorney-client relationship, including Peppers's testimony that he thought Norris asked for the advice reflected in the three documents. (JA-533) (Hrg Tr. 116:21-24).

Finally, the District Court added that, even if an attorney-client relationship had been established, the crime-fraud exception to the privilege would permit Keany's testimony. (JA-53-55) (7/19/10 Ruling). But the Court, ruling from the bench, provided an extraordinarily vague and conclusory analysis of the application of the crime-fraud exception: "Specifically, Mr. Keany—Mr. Norris—strike that. Mr. Norris authorized Mr. Keany to turn over false scripts to the United States Antitrust Division." (JA-54) (7/19/10 Ruling).

The evidence was that Keany wanted to provide the meeting summaries (pejoratively termed "scripts" by the Division), and Norris, the U.K. executive, left it up to Keany, the U.S. antitrust lawyer, to decide what to do. Keany testified: "I told [Norris and Coker] that the language contained in the handwritten materials was very helpful. It spoke directly about the meetings that I had been told were of interest to Ms. McClain. They were not called for by the subpoena, because the subpoena could not reach them. They were in England. . . . But this is—this is

good stuff. This is interesting stuff. And I don't remember much, this—you know, it—the reaction was, fine. If that's what you want to do, go ahead and do it." (JA-458-59) (Hrg. Tr. 39:14-40:5); *see also* (JA-500-01) (Hrg. Tr. 81:7-82:8 (Keany)). Keany admitted that he did not warn Norris that there could be criminal consequences if the summaries were found to be inaccurate. (JA-502) (Tr. 83:7-23).

In the absence of any evidence of criminal intent on Norris's part in allowing Keany to provide the summaries, there was no basis for the District Court's conclusory finding that the crime-fraud exception applied. *See, e.g.*, *United States v. Doe*, 429 F.3d 450, 454 (3d Cir. 2005) ("Only when a client knowingly seeks legal counsel to further a continuing or future crime does the crime-fraud exception apply."). Furthermore, even if the exception somehow applied, that would not allow Keany to make a blanket disclosure of all of Norris's privileged communications, but merely those that could be shown to be in furtherance of some crime or fraud. *See, e.g., In re Grand Jury Investigation,* 445 F.3d 266, 280 (3d Cir. 2006) (stating that court must "closely scrutinize" evidence and "properly tailor[] its order to cover only those subjects implicated by the crime-fraud exception.").

All told, with the District Court's blessing, the Division called Keany and elicited extensive testimony disclosing Norris's privileged communications. *See,*

e.g., (JA-1518-20, 1521, 1524, 1535-36, 1537, 1540, 1542, 1543, 1545-50) (Tr. 79:17-81:13, 82:8-21, 85:4-12, 5:23-6:1, 7:4-14, 10:12-22, 12:14-19, 13:20-25, 15:5-20:2). In this testimony, Keany portrayed Norris as a manipulator and a liar, severely damaging Norris's case and providing considerable fodder for the Division to exploit in its closing argument (*see, e.g.*, (JA-2035-37) (Tr. 40:15-42:9 (McClain Closing)). That testimony never should have been heard by the jury, given the attorney-client privilege.

CONCLUSION

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

Dated: January 21, 2011

Respectfully submitted,

WHITE & CASE LLP

/s/ Christopher M. Curran
Christopher M. Curran [ID 408561]
J. Mark Gidley
Eileen M. Cole
Claire A. DeLelle
701 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 626-3600

Counsel for Appellant Ian P. Norris

CERTIFICATE OF BAR MEMBERSHIP

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

DATED: January 21, 2011

/s/ Christopher M. Curran
Christopher M. Curran [ID 408561]

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,991 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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

3. The text of the electronic brief, filed in accordance with Local Appellate Rule 31.1, is identical to the text in the paper copies.

4. A virus protection program, Symantec Endpoint Protection, has been run on the file pursuant to Local Appellate Rule 31.1, and no virus was detected.

DATED: January 21, 2011

/s/ Christopher M. Curran
Christopher M. Curran [ID 408561]

CERTIFICATE OF SERVICE

I, Christopher M. Curran, hereby certify that on this 21st day of January, 2011, ten paper copies of the foregoing Brief for Appellant Ian P. Norris were sent by courier next business day delivery to the Clerk of the Third Circuit Court of Appeals and five paper copies of the foregoing Brief for Appellant Ian P. Norris were served by Federal Express next business day delivery on:

Lucy P. McClain
Richard S. Rosenberg
Kimberly A. Justice
U.S. Department of Justice
Antitrust Division
The Curtis Center, Suite 650W
170 S. Independence Mall West
Philadelphia, PA 19106
(215) 597-1131

John J. Powers, III
Kristen C. Limarzi
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-2435

Counsel for the United States of America

DATED: January 21, 2011

/s/ Christopher M. Curran
Christopher M. Curran [ID 408561]