No. ____

IN THE

Supreme Court of the United States

IAN P. NORRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The circuits are expressly split on a fundamental issue under the Federal witness-tampering statute (18 U.S.C. § 1512(b)): whether a person "corruptly persuades" another in violation of the statute by persuading him or her to decline to provide incriminating information to authorities, where the other person enjoys a privilege or right to so decline. In *Arthur Andersen LLP v. United States*, 544 U.S. 696, 702 & n.7 (2005), this Court granted certiorari to resolve this split, but then disposed of that case without doing so. Since then, the split has persisted and, indeed, deepened.

Here the District Court's jury instructions, affirmed by the Third Circuit, allowed the jury to convict a corporate CEO for conspiring to persuade others, who possessed a Fifth Amendment privilege against self-incrimination, not to disclose potentially incriminating information. The District Court—relying upon a "conduit" theory—even allowed the jury to convict the CEO for conspiring to persuade others to withhold information from defense counsel, while knowing defense counsel would be communicating with the authorities. And the District Court permitted prosecutors to call that defense counsel as a prosecution witness, despite the attorney-client privilege.

The central question presented is: Whether a person "corruptly persuades" another by persuading him or her to decline to provide incriminating information where the other person enjoys a privilege or right to decline to provide the information.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the court whose judgment is the subject of this petition are as follows:

Petitioner in this Court, appellant below, is Ian P. Norris. Respondent in this Court, appellee below, is the United States of America.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

PAGE

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

PAGE

TABLE OF AUTHORITIES

CASES

PAGE(S)

TABLE OF AUTHORITIES—Continued

PAGE(S)

CONSTITUTIONAL PROVISIONS

STATUTES AND RULES

TABLE OF AUTHORITIES—Continued

PAGE(S)

OTHER

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ian P. Norris respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App.1a-10a) is not reported.

The District Court opinion denying Norris's Motion for Acquittal or for a New Trial is reported at 753 F. Supp. 2d 492 (App.13a-97a). The District Court opinion denying Norris's Motion to Dismiss the Indictment is reported at 719 F. Supp. 2d 557. The District Court opinion granting the Government's Motion to Permit the Testimony of Attorney Sutton Keany and denying Norris's Motion to Suppress the So-Called Scripts is reported at 722 F. Supp. 2d 632 (App.98a-112a). The District Court opinion denying Norris's Motion For Reconsideration of the Court's Order Permitting the Testimony of Attorney Sutton Keany is not reported (App.113a-19a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 23, 2011. A timely petition for rehearing en banc was denied on April 19, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, in pertinent part:

> No person … shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ….

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defense.

Chapter 73 of Title 18 of the United States Code contains statutory provisions concerning obstruction of justice. One such provision is the federal witness-tampering statute, 18 U.S.C. § 1512, which provides, in pertinent part:

> (b) Whoever knowingly … *corruptly persuades* another person, or attempts to do so … with intent to—
>
> (1) influence … the testimony of any person in an official proceeding; [or]
>
> (2) cause or induce any person to—
>
> …
>
> (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding; … shall be [fined or imprisoned or both].

(emphasis added). Other pertinent provisions of

obstruction-of-justice statutes, including 18 U.S.C. §§ 1503 and 1505, as well as § 1512 in its entirety, are set forth in the Appendix (120a-28a).

STATEMENT OF THE CASE

The Fifth Amendment guarantees a person the right to refrain from self-incrimination. In light of this constitutional guarantee, one would never suggest that a person could be prosecuted for obstruction of justice for declining to disclose potentially self-incriminating information to investigating authorities. But, under the current law of certain circuits, it *is* obstruction of justice—specifically witness tampering in violation of 18 U.S.C. § 1512(b)(1)—for one person to persuade another (such as an alleged co-conspirator) to exercise his or her Fifth Amendment rights and thereby decline to disclose incriminating information to authorities. This interpretation of the Federal witness-tampering statute not only conflicts with the law in other circuits, but is deeply flawed and inconsistent with the adversary system of justice. This Court should resolve the circuit split, provide potential defendants with fair notice, and impose national uniformity on this important issue.

In *Arthur Andersen LLP v. United States*, 544 U.S. 696, 702 & n.7 (2005), this Court found this circuit split worthy of certiorari, but then did not resolve the split in its ruling. In the ensuing years, the split has only worsened, and the need for clarity has only increased. *See United States v. Doss*, 630 F.3d 1181, 1186 (9th Cir. 2011) (recognizing continuing split and joining no-liability side of split). Indeed, since *Arthur Andersen*, Congress has doubled

the maximum sentence for a violation of § 1512(b) to twenty years, thereby increasing the intolerability of a split in which some circuits permit the conduct in question while other circuits criminalize it. App.122a-23a.

As the present case demonstrates, there is need for clarification even in those circuits that have held it is *not* witness tampering under § 1512(b) to persuade a co-conspirator to refrain from disclosing incriminating information. This case was tried in the Third Circuit, where *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997), unequivocally held that § 1512(b) does not criminalize such conduct. Nonetheless, that unequivocal holding was not reflected in the jury instructions in this case, despite the strenuous efforts of defense counsel. The result was a deeply fractured jury that announced an "impasse" and, after being instructed to continue their deliberations, rendered a divided verdict acquitting the defendant of all substantive counts but finding him guilty of conspiracy to witness-tamper. A Third Circuit panel summarily affirmed, in a perfunctory decision that acknowledged *Farrell*'s holding but failed to apply it faithfully. App.7a. The need for authoritative guidance from this Court is compelling.

Indictment And Extradition

This petition arises from the criminal prosecution of Ian P. Norris, the former Chief Executive Officer of Morgan Crucible plc, a publicly held company headquartered in the United Kingdom. Norris was the first foreign national ever extradited to the United States upon application of the Antitrust

Division of the U.S. Department of Justice. This case has been closely followed in legal, business, political, and diplomatic circles—on both sides of the Atlantic and elsewhere.

Norris was indicted on September 24, 2003, in the Eastern District of Pennsylvania. A four count Second Superseding Indictment (the "Indictment") charged Norris with one count of price fixing under the Sherman Act (15 U.S.C. § 1), two substantive counts of witness tampering, and one count of conspiracy to witness-tamper. R.178-95 (citations to "R" refer to the joint appendix filed in the Third Circuit). The District Court had subject-matter jurisdiction under 18 U.S.C. § 3231.

The witness-tampering counts alleged violations 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" and 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." R.193. The Indictment specified that the "official proceeding" was a federal grand jury proceeding in the Eastern District of Pennsylvania. R.193. The conspiracy count (18 U.S.C. § 371) charged a conspiracy to commit either of the two substantive witness-tampering counts. R.183-92.

On March 23, 2010, Norris was extradited to the United States to face trial on the witness-tampering and conspiracy counts, after years of contested proceedings in the United Kingdom that reached the

House of Lords twice. Under the U.K. Extradition Order, Norris could not be prosecuted on the Sherman Act count because the alleged conduct did not constitute a criminal offense under the laws of the United Kingdom at the time of the alleged conduct. *Norris v. Government of the United States of America and others*, [2008] UKHL 16, at ¶62 (appeal taken from Eng.). Antitrust Division attorneys continued to handle the prosecution, notwithstanding the absence of antitrust charges.

The Antitrust Division's prosecution was based on the Indictment's scandalous-sounding allegations that Norris orchestrated an elaborate scheme to obstruct a U.S. grand jury investigation into price fixing in the carbon brush industry. Most prominently, the Indictment alleged that Norris led an effort to prepare false and fictitious "scripts" to be followed by his colleagues and others if they were questioned about certain competitor meetings either by the Antitrust Division or before the grand jury. According to the Indictment, the "scripts" mischaracterized U.S. price-fixing meetings as "joint venture" meetings and omitted information regarding pricing discussions. R.187-88 (Indict. ¶19(k)) (alleging Norris and colleagues agreed "that the summaries would falsely characterize the meetings as joint venture meetings; and that the summaries would purposely exclude mention of pricing discussions"); (Indict. ¶19(n)) (alleging Norris and his colleagues "did in fact prepare a materially false and fictitious script that intentionally omitted all references to pricing discussions"); (Indict. ¶19(o)) (alleging the summaries "failed to include significant aspects of the pricing discussions"). The Indictment

also alleged that Norris ordered a "task force" to "conceal or destroy" relevant documents. R.185 (Indict. ¶19(c)).

The defense categorically denied these allegations. As to the alleged "scripts," the defense maintained that they were summaries prepared upon the express request of defense counsel in the price-fixing investigation, who was gathering support for the defense that the meetings at issue related to the unwinding of various joint ventures. The defense observed that the summaries were legended as privileged. The defense also contended that the summaries were fair and accurate accounts of the meetings, which did deal with joint ventures. The summaries accurately reported some discussions of pricing and requests for improper cooperation, but did not report U.S. price-fixing agreements because none were reached at the meetings. (In contrast, there had been a long-standing cartel in Europe.) Regardless, if the summaries were inaccurate in any way, it was simply that they omitted information. And the summaries never misled Government investigators.

Furthermore, the defense contended that the summaries had no nexus to any grand jury "testimony" (§ 1512(b)(1)), which was not even in contemplation at the time the summaries were created. Therefore the summaries could not have been intended to influence anyone's grand jury "testimony" as charged.

As to the alleged document-destruction "task force," the defense disputed that any documents were directed to be destroyed in reaction to the U.S. grand

jury investigation. In fact, upon Norris's express direction all responsive documents in the United States were dutifully produced. R.1066-69, 1564-65.

Pre-Trial Motions

On April 22, 2010, Norris filed a motion to dismiss the Indictment based on a failure to state an offense under § 1512(b). In the motion, the defense argued that because the alleged falsity of the summaries was premised on alleged *omissions*, the Indictment's allegations failed to state an offense under *Farrell*, 126 F.3d at 487-88, in which the Third Circuit held that the "corruptly persuades" clause of § 1512(b) includes a noncoercive attempt to persuade a coconspirator to give false testimony but "does not include a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information … to refrain … from volunteering information to investigators." The District Court denied Norris's motion on June 22, 2010. *United States v. Norris*, 719 F. Supp. 2d 557 (E.D. Pa. 2010).

On June 1, 2010, the Antitrust Division filed a motion *in limine* for an order allowing it to call at trial, as a prosecution witness, attorney Sutton Keany to provide evidence of Norris's "specific intent." Gov't Mot. *In Limine* at 5-6, No. 03-632 (E.D. Pa. 2010), ECF No. 58. Keany, of the Winthrop, Stimson, Putnam & Roberts law firm, was defense counsel in connection with the antitrust investigation that Norris allegedly obstructed. On the day the Division filed its motion, Morgan Crucible, cooperating with the Division, waived its corporate privilege. Norris opposed the motion, arguing that

Keany had also represented Norris personally and that Norris had not waived his personal privilege. The defense also observed that the Division had already violated Norris's attorney-client privilege by interviewing Keany about his communications with Norris—even before Morgan Crucible waived its privilege. App.187a-93a.

During a pre-trial evidentiary hearing, Keany initially testified that he did not represent Norris (or any other employees) (R.449-50), but this testimony irreconcilably conflicted with the documentary evidence, and Keany eventually conceded that he had represented Norris (and other employees) at least in some "sense." R.471-75. The documentary evidence showed that, during the investigation and in response to the Division's request to "specifically identify … those individuals … that you represent in the grand jury investigation," Keany told the Division and Morgan orally and in writing that Winthrop represented not only Morgan's corporate entities but also Morgan's "current employees" regarding "matters related to the investigation." App.181a-86a.

Jerry Peppers, the senior Winthrop partner hired directly by Morgan Crucible for this engagement, testified that Winthrop and Keany personally represented Norris. R.521-25. Additionally, the defense produced documentation provided to Norris in 1999 confirming that Winthrop (including Keany) represented Norris personally in connection with the investigation. App.172a-74a (memo advising Norris that if stopped by government officials, he should advise them that he is "represented by counsel" and "your lawyers are Jerry Peppers, Sutton Keany and Stephen Weiner" of Winthrop); App.175a-78a (11/1/99

Letter to U.S. Officials) ("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 … Antitrust Division."); App.179a-80a. Despite this powerful evidence, the District Court ruled that Keany and his firm did *not* represent Norris personally and that Keany would be permitted to testify as to his confidential communications with Norris. App.98a-119a.

The Evidence At Trial

The following highlights some of the key trial evidence relevant to the question presented.

1. Before trial, the parties stipulated that beginning as early as 1937, various industry competitors (including Morgan Crucible and Carbone, among others) participated in an elaborate cartel in Europe to coordinate the prices of certain carbon products in Europe, including brushes. Limit on Government's Evidence of Price-Fixing In Europe at 1, No. 03-632 (E.D. Pa. 2010), ECF No. 117.

2. Before April 1999, Morgan's new CEO, Norris, ordered Morgan executives to stop their participation in the European cartel. R.1742-45, 1758-60, 3164. Morgan's European competition counsel, Christopher Bright of the law firm Clifford Chance, had advised Morgan to terminate its involvement in the European cartel and to seek amnesty from administrative fines once the European authorities had finished establishing their amnesty program. R.1742-47. As this strategy depended upon keeping the European

cartel secret from authorities until the European amnesty program was established, Bright and Morgan's executives took steps to avoid the premature disclosure of the cartel. *See* R.1547-48, 1626, 1637, 1690, 1743-53, 1756-57, 1278-80, 1311, 1336-38. Upon Bright's advice, Norris eventually had Morgan apply for and obtain European amnesty in the fall of 2001. R.1279-81, 1756-57.

3. Separate from any European cartel dealings, over the years Morgan and competitor Carbone had entered into a number of legitimate joint ventures throughout the world. During the second half of the 1990s, unhappy with the performance of the joint ventures, Morgan worked to unwind the joint ventures with Carbone. R.1693-707.

4. On April 27, 1999, a U.S. federal grand jury issued a subpoena *duces tecum* to Morgan's U.S. subsidiary, Morganite, Inc. R.3177-88. Morgan hired the Winthrop firm as U.S. counsel, and Keany of that firm handled compliance with the subpoena. R.1507-08. Keany informed Morgan and its executives that the subpoena only required production of documents present in the United States and that European documents were beyond the subpoena's "legal reach." R.1557-59, 1510, 2314, 2644. In June and July of 1999, Morgan's U.S. subsidiary produced documents. R.1567-72. It is undisputed that all required documents were produced.

5. Neither U.K. attorney Bright nor anyone else informed Keany that there had been a cartel in Europe or that Morgan had a strategy for obtaining amnesty in Europe. R.1546-48; *see also* R.1683-84. Indeed, U.S. counsel, Keany, did not know about

attorney Bright's involvement until the fall of 2001. R.1637-38.

6. In late August 2000, after a period of apparent dormancy in the U.S. investigation, the Division contacted Keany concerning a new "development." R.2308, 1572-73. The Division asked about certain meetings in the 1990s between Morgan and its competitors. R.1573-76, 2308, 2644, 3278, App.162a-65a. According to the Division, these meetings were to expand the long-standing European cartel to the United States. In response, Keany sought to review documentation in Europe and conduct interviews there. R.2308. On September 7, 2000, Keany sent Norris and others an email regarding "Further Steps." App.157a-61a, R.1578-80. The last two paragraphs requested information to substantiate the defense that the meetings in question related to joint ventures:

> We are particularly interested in all documents related to the Canadian and Paris meetings …. It would be most useful if there were minutes of those meetings or reports on their contents, etc.
>
> Finally, as we discussed, it might be very helpful if documents could be located which discuss the desirability of ending the Carbone joint ventures, as well as any documents reporting on the gradual implementation of that strategy which resulted in the last of the joint ventures being dissolved in 1999.

App.161a. Keany's associate followed-up: "Ideally, from our point of view, there would be memos summarizing some or all of the meetings in question

that would document their legitimate purposes." App.166-67a.

7. Following the contact from the Division and counsel's request for information about the meetings, Morgan executives Ian Norris, Melvin Perkins, William Macfarlane, and Jack Kroef met at Morgan's United Kingdom headquarters. As there were no preexisting minutes or memos of the meetings at issue, they decided to collectively create summaries of the meetings. R.967-68, 1674-75, 1716-19, 1527-28, 1603-04, 3193-244. The labeling of the summaries as "Attorney Privileged Information" reflected that they were prepared for defense counsel. R.1716, 1765, 3217-44, 3060-61; *see e.g.*, 168a-71a.

8. Perkins testified that "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." R.968. Macfarlane testified that the purpose of creating the summaries was to use them "[i]n discussions with our lawyers" thinking that their lawyers would "tell the Department of Justice that their -- their subpoena and their investigation is really unfounded." R.1675-76. Kroef, on the other hand, testified that the executives "had to memorize those notes as being the truth. … [t]o be used later, if [they were] questioned. … [b]y -- it could be anybody" with respect to the Division's investigation. R.1229-30.

While the meeting summaries they created reported frequent discussions of joint ventures, in some instances the summaries acknowledged that joint ventures were "not even mentioned," or that no

progress in this regard was made. R.3216, 3218. The summaries also included references to pricing discussions, including repeated complaints from competitor Carbone regarding Morgan's pricing. R.3193-244, 1719-40, 1869-70.

9. None of the trial witnesses testified that they had agreed to lie to the grand jury. None testified that they agreed to persuade others to lie to the grand jury. In fact, none ever *testified* before the grand jury, none were ever *subpoenaed* to testify before the grand jury, and none testified that they had discussed or even *contemplated* grand jury testimony. R.726-27, 901, 1069-70, 1377-78, 1406, 1452, 1820-21. Indeed, not one alleged co-conspirator—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 alleged co-conspirators' testimony revealed that they did not even know what a grand jury was. *See, e.g.*, R.1377 (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.")); R.900-01, 1070, 1821.

10. In September 2000, before conducting interviews, Keany told the Division that the competitor meetings involved joint ventures but that competitor Carbone had tried to discuss pricing. R.1515-16, 1583-87, App.157a-62a. The Division's lead prosecutor "breezily dismissed" the joint-venture defense saying "they always say that." R.1586-87, App.163a-65a.

11. Some time before Keany began conducting employee interviews, U.K. attorney Bright interviewed the Morgan employees. Kroef called these interviews "rehearsals." R.1331.

12. In November 2000, Keany traveled to the United Kingdom to review the joint-venture documentation he had requested and to conduct interviews. R.1592-96, 2647. During his first interview, Keany noticed that the Morgan executive was looking at a copy of the summaries and asked the executive what it was. R.1527. The executive showed Keany the summaries and explained that "Macfarlane had been asked to help the people who were going to be interviewed by [Keany], prepare for those interviews, and they had gotten together in a room -- in a conference room, and tried to recall, to reconstruct, what had occurred at these various meetings[.]" R.1527. Following the interview, Keany proposed that Morgan provide the summaries to the Division and Norris left it up to Keany. R.1535-36 (Keany: "The gist of it was well, okay, you're in charge of that. If you want to do that, in substance, go ahead.").

13. Keany elected to produce the summaries to the Division. R.2315-18, 1610-18. On December 21, 2000, Keany produced documents from the 1990s showing the unwinding of the Carbone/Morgan joint ventures as well as the meeting summaries. R.1613-21, 2317-18, 2327-643. At a January 23, 2001 meeting, Keany informed the Division that the summaries were non-contemporaneous and prepared in response to a request from counsel. R.1621-23.

14. At trial, there was substantial testimony demonstrating that the meeting summaries' characterizations of the meetings as relating to joint ventures and general market discussions were truthful and that, at most, the summaries omitted potentially incriminating information regarding some pricing discussions. Ample evidence showed that joint-venture discussions did occur at most of the meetings in question and, when such discussions did not occur, the summaries reflected this. R.1664-65, 1708-10, 1719-40.

Macfarlane, who was heavily involved in the unwinding of the Carbone joint ventures, testified that a primary reason for the meetings was to discuss joint ventures. R.1664, 1708-11. Indeed, according to Macfarlane, the reason joint-venture discussions tended to veer from being the "main topic" was as a result of the extensive complaints of Carbone executive, Emilio DiBernardo, regarding Carbone's loss of U.S. market share. R.1766-67. Moreover, as demonstrated repeatedly at trial, DiBernardo's pricing complaints and requests for cooperation in the United States *are* reflected in the meeting summaries. R.1021-22, 1024, 1031-32, 1084, 1719-40, 1766-67. 1869-70, 3193-244.

Some cooperating witnesses testified that the summaries omitted other potentially incriminating information. When asked what actually happened at the meetings that was left out of the summaries, Perkins testified that he left out "[a] commitment to get involved in looking at specific customers, specific part numbers and exchanging price levels." R.971. Macfarlane similarly testified that the summaries focused on joint ventures 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." R.1768.

Finally, the meeting summaries omitted any mention of U.S. price-fixing agreements with Carbone because no such agreements were reached at the meetings. R.893, 1033-36, 1157, 1281, 1377, 1889. Moreover, Macfarlane testified that the statements in the summaries indicating that Morgan had rejected Carbone's specific cooperation overtures were truthful. R.1767.

The Jury Charge

The District Court's proposed instruction on "corruptly persuades" reflected the Third Circuit Model Criminal Jury Instruction, with the addition of a final sentence:

> 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.

At the charging conference, defense counsel objected to the proposed instruction:

> [DEFENSE]: Okay. I think Your Honor is -- familiar with the Farrell case, Third Circuit, relating to Section 1512, and that case holds that it is not corrupt persuasion for one co-conspirator to persuade another to withhold information from the authorities.
>
> [PROSECUTION]: I guess the Government position is that I don't believe there is any changes necessary to -- to this paragraph based off the concerns raised about the -- in the United States v. Farrell case. I don't believe there is a reason to -- to bring that issue into this paragraph.
>
> [DEFENSE]: Well, Your Honor, our position is paragraph 73 [defining "corruptly persuades"] as it is invites the jury to conclude that persuading a co-conspirator not to volunteer information could be a violation of 1512.

R.1958; *see also* R.1957-60, 1968-69, 2011. The defense also argued that the phrase "legal duty" required further explanation:

> [DEFENSE]: And our -- our concern is, particularly the term in this instruction, it says legal duty. For a lay jury -- a lay jury easily might conclude that there is a legal duty to provide information to investigators or to a grand jury.
>
> THE COURT: So you are proposing what?
>
> [DEFENSE]: A -- an additional sentence saying --
>
> …

> [DEFENSE]: -- that says it is not corrupt persuasion to persuade someone else not to volunteer information.

R.1959. Defense counsel also directed the District Court's attention to its previously proposed jury instruction which closely tracked *Farrell*'s holding. R.1960, App.144a-45a, 148a. In response, the Division acknowledged that trial evidence supported the accuracy of the contents of the summaries:

> [Y]our Honor, the Government reiterates our objection to that proposed change, particularly in the context of this case where at least one of the issues deals with the scripts and what's on the scripts and what's not on the scripts, and, you know, it's the government's position that, you know, even assuming certain facts the defense seems to have -- to come out during the case, that having somebody give half of the truth, not the whole truth could still be a lie, and in which case, I think that could add -- given that set of facts, it could add confusion to -- if that additional sentence is added, among other reasons.

R.1959-60. Thus, from the Indictment through the end of trial, the prosecution contended that the omission of incriminating information made the summaries false.

Rejecting defense counsel's arguments and proposals, the District Court delivered the instruction on "corruptly persuades" as it proposed without any change. App.132a-34a. Counsel for Norris again objected. R.2155.

Jury Deliberations And Verdict

On July 26, 2010, the jurors delivered a note declaring that they had reached an "impasse, and neither side will budge." R.2194. The District Court denied Norris's motion for a mistrial, delivered a modified "*Allen*" charge, and directed the jurors to deliberate further. R.2195-96. After resuming deliberations, the jury asked for, and received shortly before retiring for the day, a transcript of the testimony of Macfarlane. R.2199-200. Before lunch the next day, on July 27, 2010, the jury returned a split verdict—issuing a general verdict on each count—acquitting Norris of the two substantive obstruction counts and convicting him of the conspiracy to obstruct count only. R.2208-10.

Post-Trial Motions

Norris filed post-trial motions under Rules 29 and 33 of the Federal Rules of Criminal Procedure, contending, among other things, that there was insufficient evidence to sustain the verdict, that the District Court violated Norris's attorney-client privilege in permitting Keany's testimony, and that the definition of "corruptly persuades" included wholly innocent conduct and the District Court should have given his proposed instruction in accordance with *Farrell*.

The District Court upheld the verdict. App.97a. In rejecting Norris's request for a new trial, the District Court incorrectly stated that Norris "recogniz[ed] that the instructions given were legally accurate …." App.65a-66a. To the contrary, in the first sentence of Norris's argument on this point, Norris stated that his "conviction should be reversed

and a new trial granted based on the deficient legal charge defining the key phrase 'corruptly persuades' contained in Section 1512(b) …." Def.'s Mem. in Supp. of Mot. for Acquittal or New Trial at 120, No. 03-632 (E.D. Pa. 2010), ECF No. 160. In finding the evidence sufficient to support the verdict, the District Court also adopted a novel "conduit" theory—finding a § 1512(b)(1) violation where a defendant uses company attorneys or Division investigators "as a conduit to ultimately influence testimony at contemplated grand jury proceedings."

The District Court sentenced Norris to 18 months imprisonment with 3 years supervised release and a $25,000 fine. Judgment at 2-5, No. 03-632 (E.D. Pa 2010), ECF No. 211.

Proceedings On Appeal

On appeal to the Third Circuit, Norris renewed his challenges to the sufficiency of the evidence, the violation of Norris's attorney-client privilege, and the "corruptly persuades" instruction. The Third Circuit affirmed the District Court, without oral argument, in an unpublished decision that can charitably be called perfunctory. App.1a-10a. Norris filed a petition for rehearing en banc, which was denied. App.11a-12a.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE EXPRESSLY SPLIT OVER WHETHER ONE "CORRUPTLY PERSUADES" ANOTHER IN VIOLATION OF SECTION 1512(b) BY PERSUADING HIM OR HER NOT TO DISCLOSE INCRIMINATING INFORMATION.

In *Arthur Andersen LLP v. United States*, this Court acknowledged that the circuits are split as to whether one "corruptly persuade[s]" in violation of § 1512(b) when one persuades another to refrain from providing incriminating information to authorities. 544 U.S. 696, 702 & n.7 (2005) (*comparing United States v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998), *with Farrell*, 126 F.3d at 489-90). Ironically, this Court identified *Farrell* as placing the Third Circuit on the side of the split holding no violation. This Court did not find it necessary to resolve the circuit split in deciding *Arthur Andersen*, 544 U.S. at 706, and the split has persisted and deepened.

A. The Introduction Of "Corruptly Persuades" Into 18 U.S.C. § 1512(b)

As both sides of the circuit split trace their reasoning back to the evolution of § 1512(b), a brief recitation of this history provides necessary context.

Prior to 1982, federal witness tampering was prosecuted under 18 U.S.C. § 1503 (App.126a-27a), the general obstruction-of-justice provision, which subjected to punishment "[w]hoever corruptly, or by threats or force, or by any threatening letter or communication, endeavor[ed] to influence, intimidate, or impede" any, witness, juror, or court

officer. In 1982, § 1512 was enacted to provide additional protection to witnesses in federal cases as part of the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 4, 96 Stat. 1248, 1249-50. At the same time, any references to witnesses in § 1503 were deleted.

As originally enacted, § 1512 prohibited the use of force, threats, intimidation, or deception with the intent to interfere with a federal proceeding. Consequently, at least one circuit concluded that the section did not criminalize non-forcible, non-threatening, non-intimidating, and non-deceptive attempts to have a person give *false* information to the government. *See, e.g.*, *United States v. King*, 762 F.2d 232, 238 (2d Cir. 1985).

In response, in 1988 Congress amended § 1512 to add the words "corruptly persuades" in an attempt to "close the gap." Anti-Drug Abuse Act (ADAA) of 1988, Pub. L. No. 100-690, 102 Stat. 4181. Senator Biden, the ranking minority member of the Judiciary Committee who had taken the lead in drafting the criminal provisions of the ADAA, stated: "'Corrupt persuasion' of a witness is a non-coercive attempt to induce a witness to become unavailable to testify, or to testify falsely. Examples include preparing false testimony for [a] witness, or offering a witness money in return for false testimony." 134 CONG. REC. S17,369 (daily ed. Nov. 10, 1988).

B. The Pre-*Arthur Andersen* Circuit Split

The Second Circuit in *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996), addressed the meaning of "corruptly persuades" under § 1512(b). The Second Circuit adopted the meaning of

"corruptly" from prior cases under § 1503(a), i.e., motivated by an improper purpose. *Id.*

In *United States v. Morrison*, 98 F.3d 619, 630 (D.C. Cir. 1996), the D.C. Circuit reached a different conclusion. Relying on its prior reasoning in *United States v. Poindexter*, 951 F.2d 369, 378 (D.C. Cir. 1991), where the court had considered the meaning of "corruptly" in 18 U.S.C. § 1505 (prohibiting obstruction of agency or department proceedings) (App.128a), the D.C. Circuit concluded that a conviction for "corruptly persua[ding]" under § 1512(b) requires proof that the persuader either used wrongful means like bribery, or urged another to violate the law. 98 F.3d at 630.

Unlike in *Thompson* and *Morrison*, which involved defendants who encouraged another to provide false information, in *Farrell*, 126 F.3d at 486, the Third Circuit faced a defendant who had been convicted under § 1512(b) for persuading another to *withhold* information. In considering the meaning of "corruptly persuades" under § 1512(b), the Third Circuit, in a 2-1 panel decision, expressly rejected the Second Circuit's conclusion that the same meaning attributed to "corruptly" under 18 U.S.C. § 1503—i.e., "motivated by an improper purpose"—should be attributed to "corruptly" under § 1512(b). 126 F.3d at 488. The Third Circuit explained:

> This interpretation of "corruptly" in § 1503 is entirely appropriate given the structure of that statute, which broadly prohibits "corruptly … influencing, obstructing or impeding, or endeavoring to influence, obstruct, or impede, the due administration of

> justice." Indeed, if "corruptly" were not so construed in § 1503, the statute would have no element of *mens rea*. In § 1512(b), however, both "knowing" conduct and some specific intent, described in subsections (1) through (3), are expressly required. Thus, because the "improper purposes" that justify the application of § 1512(b) are already expressly described in the statute, construing "corruptly" to mean merely "for an improper purpose" (including those described in the statute) renders the term surplusage, a result that we have been admonished to avoid.

Id. at 490 (citations omitted).

The Third Circuit in *Farrell* "read the inclusion of 'corruptly' in § 1512(b) as necessarily implying that an individual can 'persuade' another not to disclose information to a law enforcement official with the intent of hindering an investigation without violating the statute, i.e., without doing so 'corruptly.'" *Id.* at 489. The Third Circuit reasoned that "more culpability is required for a statutory violation than that involved in the act of attempting to discourage disclosure in order to hinder an investigation." *Id.*

The Third Circuit concluded that "both attempting to *bribe* someone to *withhold* information and attempting to *persuade* someone to provide *false* information to federal investigators constitute 'corrupt persuasion' punishable under § 1512(b)." *Id.* at 488. The Third Circuit, however, reversed Farrell's conviction holding 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." *Id.*

Approximately a year later, in *United States v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998), the Eleventh Circuit reached the opposite result from *Farrell* on similar facts. The Eleventh Circuit held that a defendant with an improper purpose in attempting to persuade a witness to remain silent and not cooperate with an investigation falls within the meaning of corrupt persuasion under § 1512(b). *Shotts*, 145 F.3d at 1301.

At trial, Shotts's administrative assistant testified that Shotts "said just not [to] say anything and I wasn't going to be bothered." *Id.* The Eleventh Circuit affirmed Shotts's conviction, finding that the jury "could reasonably have inferred from this testimony that Shotts was attempting with an improper motive to persuade [his assistant] not to talk to the FBI." *Id.*

The Eleventh Circuit considered both the reasoning of the Third Circuit in *Farrell* and the Second Circuit in *Thompson* regarding the meaning of "corruptly persuades" under § 1512(b). *Id.* at 1300-01. The Eleventh Circuit adopted the Second Circuit's reasoning, finding "[i]t is reasonable to attribute to the 'corruptly persuade' language in Section 1512(b), the same well-established meaning already attributed by the courts to the comparable language in Section 1503(a), i.e., motivated by an improper purpose." *Id.* at 1301.

C. *Arthur Andersen*'s Failure To Resolve The Circuit Split

In *United States v. Arthur Andersen LLP*, 374 F.3d 281, 296 (5th Cir. 2004), the Fifth Circuit agreed with the reasoning of the Second and Eleventh Circuits and defined the meaning of "corruptly persuades" under § 1512(b) as "improper purpose." Acknowledging "a split of authority regarding the meaning of § 1512(b)," this Court granted certiorari in *Arthur Andersen LLP v. United States*, 544 U.S. at 702 & n.7 ("Compare, *e.g.*, *United States v. Shotts*, 145 F.3d 1289, 1301 (CA11 1998), with *United States v. Farrell*, 126 F.3d 484, 489-490 (CA3. 1997).").

In a unanimous opinion, this Court in *Arthur Andersen* explained that "'persuading' 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 Court gave examples, including "a mother who suggests to her son that he invoke his right against compelled self-incrimination, see U.S. Const., Amdt. 5, or a wife who persuades her husband not to disclose marital confidences," or an attorney who persuades his client to withhold responsive documents that were covered by the attorney-client privilege. *Id.* at 704.

Noting that "Section 1512(b) punishes not just 'corruptly persuading' another, but '*knowingly* … corruptly persuading' another," this Court focused on the meaning of that phrase and found that "[o]nly persons conscious of wrongdoing can be said to 'knowingly … corruptly persuade.'" *Id.* at 704, 706 (citations omitted). The Court reversed the

conviction "because the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing." *Id.* at 706.

Given its holding that the instruction permitted a conviction even in the absence of the requisite consciousness of wrongdoing, this Court in *Arthur Andersen* did not find it necessary to resolve the circuit split illustrated by *Farrell* and *Shotts*, although some of the Court's statements—such as its examples of "not inherently malign" persuasion—seemed to suggest that the Court was inclined toward the *Farrell* position.

D. The Continuing—And Deepening—Circuit Split

Since *Arthur Andersen* two additional circuits have addressed the issue, and they have reached opposite conclusions, thereby bolstering the ranks on each side of the circuit split.

The Second Circuit in *United States v. Gotti*, 459 F.3d 296, 343 (2d Cir. 2006), relied on its pre-*Arthur Andersen* holding in *Thompson* to find that corrupt persuasion includes a defendant who has a self-interested "improper purpose" in persuading another to exercise his or her Fifth Amendment right. In *Gotti*, the Second Circuit upheld a conviction under 18 U.S.C. § 1512(b) because the jury could have concluded that the defendant "indeed had an improper purpose in 'suggesting' to [the witness] … to plead the Fifth Amendment" because the defendant "wanted to ensure that [the witness] did not implicate him." *Id.* at 343; *see also United States v. Kaplan*, 490 F.3d 110, 126 (2d Cir. 2007) (considering *Arthur Andersen* and reaffirming that "corruptly

persuades" under § 1512(b) means an "improper purpose"). In so holding, the Second Circuit joined the Eleventh Circuit's view in *Shotts*.

In *United States v. Doss*, 630 F.3d 1181, 1189 (9th Cir. 2011), the Ninth Circuit expressly rejected the reasoning of the Second and Eleventh Circuits and reached the opposite result, siding with the Third Circuit's holding in *Farrell*. Specifically, the Ninth Circuit noted that "the Second and Eleventh Circuits relied heavily on prior interpretations of the word 'corrupt' in § 1503, the Supreme Court [in *Arthur Andersen*] found analogies to this section unhelpful because" unlike § 1512(b), § 1503 does not "contain the modifier 'knowingly.'" *Id.* at 1189. The Ninth Circuit found *Arthur Andersen*'s analysis "quite similar to the Third Circuit's observation that, unlike § 1503, § 1512 already has a mens rea element, 'knowingly,' and thus 'corruptly persuades' must have an additional meaning." *Id.* at 1189 (citing *Farrell*, 126 F.3d at 489-90).

The Ninth Circuit also agreed with the Third Circuit's recognition "that construing 'corruptly' to mean 'for an improper purpose'—especially if that improper purpose is to hinder an investigation or prosecution (which is already required by the statute)—is circular, essentially rendering the term 'corruptly' surplusage." *Id.* (citing *Farrell*, 126 F.3d at 489). The Ninth Circuit found that this Court "echo[ed] this concern in *Arthur Andersen*" when it pointed "out that persuading someone with intent to cause them to withhold testimony is not 'inherently malign.'" *Id.* at 1189.

Thus, the Ninth Circuit joined the Third Circuit in holding that corrupt persuasion does not include persuading someone not to testify when they have a right or privilege not to do so. The Second and Eleventh Circuits hold to the contrary.

Post *Arthur Andersen*, the district courts in the Second, Fifth, and Eleventh Circuits have all recognized this continuing split. *See United States v. Jefferson*, Crim. Act. No. 08-0085, 2009 WL 4547691, at *4 (E.D. La. Nov. 30, 2009) (recognizing circuit split between the Eleventh and Second Circuits and the Third Circuit); *United States v. Siegelman*, No. 2:05-cr-119, 2008 WL 45531, at *9 (M.D. Ala. Jan. 2, 2008) ("[T]he Eleventh Circuit [in *Shotts*] explicitly … rejected the approach … taken by the Third Circuit in *United States v. Farrell*"); *United States v. Cain*, No. 05-CR-231A, 2007 WL 119292, at *6 (W.D.N.Y. Jan. 10, 2007) ("*Farrell* is inconsistent with the Second Circuit's understanding of 'corrupt persuasion' as explicated [in] *United States v. Thompson*, 76 F.3d 442 (2d Cir.1996).").

II. THIS CASE IMPLICATES THE CIRCUIT SPLIT AND PRESENTS IMPORTANT AND RECURRING ISSUES AS TO THE USE OF OBSTRUCTION-OF-JUSTICE STATUTES.

A. The Third Circuit Affirmed A Jury Instruction That Permitted A Guilty Verdict For Persuading Another Not To Disclose Incriminating Information

Norris's defense at trial rested substantially upon the contention that the meeting summaries were accurate and truthful in their content, and at worst

merely omitted potentially incriminating information. This defense expressly relied upon the Third Circuit's holding in *Farrell* that one does not "corruptly persuade[]" another in violation of § 1512(b) by persuading him or her to refrain from volunteering incriminating information. 126 F.3d at 488. But Norris was effectively deprived of this defense due to the District Court's improper instruction, which allowed—and even encouraged—the jury to convict Norris for conduct that is not criminal under *Farrell*. App.129a-41a. And the Third Circuit, in its perfunctory opinion, likewise failed to faithfully apply *Farrell*. App.7a.

Over the defense's repeated objections, the District Court gave a "corruptly persuade" instruction that was nothing more than circular and opaque gibberish, stating that the term means "to corrupt another person by persuading him or her to violate a legal duty, to accomplish an unlawful end or an unlawful result or to accomplish some other lawful end or lawful result by an unlawful manner." App.133a; *see also* App.135a. In other words, the jury was told that it is corrupt persuasion to encourage someone to violate the law, but the jury was never told what the law was.

The District Court gave the jury utterly no guidance whatsoever as to what might be a relevant "legal duty," "unlawful end," "unlawful result," or "unlawful manner." It left the jury completely uninformed as to whether it was legal or illegal to persuade another to refrain from providing information to counsel, investigators, or a grand jury. The District Court did not even tell the jury that a target of persuasion had a Fifth Amendment right

against self-incrimination. *See Bollenbach v. United States*, 326 U.S. 607, 613-14 (1946) ("[I]t is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it ….").

Here, the jury could easily have believed that the alleged co-conspirators had a "legal duty" to provide incriminating information to authorities, or that persuading a co-conspirator not to provide such information was an "unlawful end" or a "lawful end" accomplished in an "unlawful manner." There was no reason why the District Court could not have told the jury, in plain English, what the law was under *Farrell*. Indeed, the defense proposed such an instruction. App.144a-45a, 148a-49a.

Compounding the unnecessary confusion, the District Court instructed the jury that "[t]o persuade" means "to cause or induce a person to do something or *not to do something*," thereby seemingly supporting the notion that persuading someone "not to" provide incriminating information was criminal. App.133a, 135a (emphasis added). Thus, the "corrupt persuasion" instruction failed to limit the jury's consideration to the culpable conduct forbidden—i.e., persuading co-conspirators to give false testimony (rather than omitting facts). *See Farrell*, 126 F.3d at 488. In light of the vague and singularly unhelpful "corruptly persuades" instruction, it was hardly surprising that the jury had great difficulty agreeing upon a verdict, ultimately issuing an inconsistent one that smacked of an unprincipled compromise.

The effect of this error was compounded in the context of the charge as a whole. Although no explanation was given in the "corruptly persuades"

instruction as to what was "unlawful" under the circumstances, in the very next instruction, on specific intent, the District Court explained that "Norris must have acted with *the unlawful intent to influence the testimony of another person* in the Grand Jury proceedings." App.133a (emphasis added). Thus, the only guidance the jury was provided on what was "unlawful" was that an "intent to influence the testimony of another person" is unlawful. As a result, the jury was permitted to convict Norris based on *any* effort—benign or otherwise—to "influence" another person's testimony, perhaps even by encouraging another to tell the *truth*. Persuading a co-conspirator to withhold self-incriminating information, moreover, while surely "influencing" that person's testimony, is perfectly lawful under *Farrell*. 126 F.3d at 489.

In affirming, the Third Circuit acknowledged that Norris could not properly be convicted under *Farrell* solely for persuading others to withhold information, App.8a, but the Court failed to appreciate that the District Court's instruction allowed that precise result. The Third Circuit observed that the instruction "did not refer to an effort to persuade others merely to withhold testimony," and asserted that "nothing in the instruction would have permitted the jury to convict solely on this ground." *Id.* In fact, the instruction's lack of any reference to "withhold[ing] testimony" was the instruction's main flaw, as the jury was not alerted to the distinction between persuading to withhold (legal conduct) and persuading to lie (illegal conduct). Furthermore, the instruction *did* permit the jury to convict solely for persuading to withhold, as the jury was never told

that a target of persuasion had no "legal duty" to provide incriminating information. And the District Court instructed the jury that "[t]o persuade" means "to cause or induce a person … *not to do something*" App.133a, 135a (emphasis added).

The Third Circuit also asserted that Norris was charged with persuading others "to give false testimony, not withhold testimony," and that the evidence at trial "established" that charge. App.8a. In fact, the District Court instructed the jury that Norris was charged with corruptly persuading others "to influence their testimony." App.132a. Contrary to the Third Circuit's misimpression, the jury was *not* instructed that Norris was charged with persuading others to give "false" testimony. The word "false" appears nowhere in the jury instructions—even though the Division proposed it. App.151a. In fact, the concept of falsity only appears in the witness credibility instruction. While "false" did appear in the Indictment (R.178-95), the jury was never given or read the Indictment. And, as to what the evidence at trial "established," the Third Circuit cited no evidence and ignored the acquittals on both substantive counts. App.7a-9a. In fact, substantial evidence indicated that the summaries were accurate and truthful or merely had omissions.

Several witnesses testified, consistent with the summaries, that joint ventures were either discussed at, or were the purpose of, the competitor meetings. R.1722-37 (Macfarlane's testimony that joint ventures were discussed at the competitor meetings); R.1872 (Cox's testimony that the purpose of the meetings he attended was the joint ventures); R.1058

(Perkins testimony identifying meetings at which joint ventures were discussed).

While conclusory testimony by government witnesses testifying pursuant to cooperation agreements posited that the summaries were "false," when questioned further, the witnesses either admitted a lack of personal knowledge or acknowledged that the summaries were only inaccurate to the extent that they omitted information. R.1768. ("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."); R.871, 903 (Emerson testifying that the summaries were "false minutes" but admitting he was not involved in their drafting and had only looked at the top of one page which could have been a meeting he didn't even attend).

Macfarlane's testimony is particularly critical, given that the jury, during its third day of deliberation (after only six days of trial testimony) requested Macfarlane's transcript little more than an hour after declaring deadlock and being sent back for deliberations. If the jury believed, as permitted by the District Court's instruction, that agreeing to withhold information from the summaries (and under the Division's theory, later questions based on the summaries) constituted an offense under § 1512, the erroneous instruction likely altered the outcome of the trial, and is by no means "harmless." Indeed, the jury received Macfarlane's testimony fifteen minutes prior to adjourning for the day on July 26

(R.2199-200), and returned the verdict three hours after they were scheduled to return the following morning. R.2200, 2204, 2208. Properly instructed, the jury could have credited the testimony and given a complete acquittal.

In opining as to what the evidence "established," the Third Circuit panel effectively usurped the role of the jury. The question is not whether the jury, properly instructed, may still have found Norris guilty, but whether the mischaracterization of the "corruptly persuades" element of the offense was harmless beyond a reasonable doubt. *Neder v. United States*, 527 U.S. 1, 15-16 (1999) ("That test, we said, is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"); *see also Bollenbach*, 326 U.S. at 614 ("[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."). Here there is substantial reason to believe that the improper jury instruction contributed to the guilty verdict on the one count.

B. The Government's Aggressive Use Of The Obstruction-Of-Justice Statutes Is At Odds With The Adversary System

As is apparent from the daily headlines, a common feature of the criminal justice system is the aggressive use of obstruction-of-justice charges by prosecutors who may be frustrated by an inability to pursue or prove a more conventional primary charge. *See generally* Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes*

as Case Study, 96 J. CRIM. L. & CRIMINOLOGY 643, 677 (2006) ("[W]hite-collar prosecutors are increasingly electing to rely on obstruction charges in high-profile cases …."); Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1477 (2009) ("[W]hatever the frequency of obstruction prosecution, novelty and innovation in its breadth of application seem beyond dispute."). This case illustrates how the aggressive use of the obstruction statutes can threaten constitutional rights and important interests such as the attorney-client privilege and the adversary system of justice.

The prosecution here blurs the lines between defense advocacy and illegal obstruction. Here, the centerpiece of the Antitrust Division's prosecution was written summaries prepared by corporate executives upon the express request of defense counsel, who at least appeared to be jointly representing the executives as well as their corporate employers. When defense counsel made the strategic decision to produce the summaries to the Division prosecutors, counsel disclosed that the summaries were non-contemporaneous notes collectively prepared upon the request of counsel.

There was never any evidence or suggestion that prosecutors were deceived. The Division's lead prosecutor "breezily dismissed" the suggestion that the competitor meetings under investigation related to joint ventures, stating "they always say that." R.1586-87, App. 163a-65a. But this common defense contention became the basis for obstruction charges.

When building an obstruction case against Norris, moreover, the prosecutors found it necessary to enlist defense counsel Keany as an essential ally. First, in their pre-indictment case-building, they probed Keany informally about the circumstances surrounding the delivery of the summaries to the prosecutors. App.187a-88a. Then, with the District Court's erroneous authorization, they called Keany as a key witness against Norris at trial—a witness the prosecution said it needed to show Norris's "specific intent." Gov't Mot. *In Limine* at 5-6, No. 03-632 (E.D. Pa. 2010), ECF No. 58. The prosecution was, in short, fully reliant upon intrusion into the attorney-client privilege.

In defending against the witness-tampering charges, Norris contended that the evidence lacked any nexus to grand jury testimony. *See United States v. Aguilar*, 515 U.S. 593, 600-01 (1995) (holding that providing false information to federal investigators, even while knowing of the pendency of a grand jury, "would not enable a rational trier of fact" to find that the defendant intended those lies to be provided to the grand jury "in the form of false testimony"); *Arthur Andersen*, 544 U.S. at 707-08 (applying *Aguilar*'s nexus requirement to 18 U.S.C. § 1512(b)). There was simply no evidence that Norris or any alleged co-conspirator contemplated that statements made to Keany or Keany's statements to prosecutors would somehow morph into false "testimony" before the grand jury.

Nonetheless, the District Court found that defense counsel could be used "as a conduit to ultimately influence testimony at contemplated grand jury proceedings." App.29a-31a. The Third

Circuit affirmed the decision without comment. App.1a-10a.

Such a "conduit" theory effectively criminalizes common advocacy and will have a chilling effect on both attorney-client communications and the adversarial system. *See, e.g.*, *United States v. Cronic*, 466 U.S. 648, 656 (1984) ("[T]he adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate." (quotations and citations omitted)).

Beyond the intolerable invasions of the sacred attorney-client privilege, the prosecution theory here undermines the privilege against self-incrimination, another "essential mainstay of our adversary system." *Miranda v. Arizona*, 384 U.S. 436, 460 (1966). Allowing witness-tampering charges for encouraging others to exercise their rights has the effect of undermining an important component of the adversary system: the strategic decision of criminal targets to agree to remain silent, leaving government prosecutors and investigators to make their case without voluntary self-incrimination.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the conviction should be reversed.

Respectfully submitted,

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JULY 18, 2011

APPENDIX

APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-4658

UNITED STATES OF AMERICA

v.

IAN P. NORRIS,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(No. 2:03-cr-00632)
District Judge: Hon. Eduardo C. Robreno

Submitted Under Third Circuit LAR 34.1(a)

March 15, 2011

Before: RENDELL, BARRY, AND CHAGARES,
Circuit Judges.

(Filed: March 23, 2011)

OPINION

CHAGARES, Circuit Judge.

[2011 WL 1035723, at *1] Appellant Ian P. Norris ("Norris") was convicted following a jury trial and now appeals the sufficiency of the evidence supporting his conviction, the propriety of certain jury instructions, and the District Court's denial of his asserted attorney-client privilege. We will affirm.

I.

We write for the parties' benefit and recite only the facts essential to our disposition. Because this appeal comes to us following a jury's guilty verdict, we set forth the facts in the light most favorable to the Government.

Norris is the former Chief Executive Officer of the Morgan Crucible Company ("Morgan"), a publicly-held corporation based in the United Kingdom. On September 28, 2004, a grand jury sitting in the Eastern District of Pennsylvania returned a four-count indictment against Norris. The indictment charged Norris with conspiring to fix prices with competitors and engaging in a scheme to mislead and obstruct a United States grand jury investigation. More specifically, the indictment alleged that Norris met with various competitors in a price-fixing scheme that eventually expanded into the United States market. The indictment further alleged that after a federal grand jury initiated an investigation into this behavior by issuing a subpoena *duces tecum* in April

1999, Norris created false minutes or "scripts" for his employees to memorize in the event that they were ever questioned about the meetings with competitors. Norris also allegedly directed his subordinates to destroy incriminating documents in order to ensure that those documents would not be produced in the grand jury investigation.

Count One of the indictment charged Norris with conspiring to fix prices for certain products sold in the United States, in violation of 15 U.S.C. § 1. Count Two charged Norris with a violation of 18 U.S.C. § 371 by conspiring to violate 18 U.S.C. §§ 1512(b)(1) and 1512(b)(2)(B). Counts Three and Four charged Norris with violating the underlying statutes: Count Three alleged a violation of 18 U.S.C. § 1512(b)(1) for corruptly persuading or attempting to corruptly persuade other persons with intent to influence their testimony in an official proceeding and Count Four alleged a violation of 18 U.S.C. § 1512(b)(2)(B) for corruptly persuading 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. The indictment specified that the "official proceeding" in question for purposes of 18 U.S.C. §§ 1512(b)(1) and 1512(b)(2)(B) was the federal grand jury investigation into Norris's and Morgan's alleged anticompetitive behavior.

Norris was extradited from the United Kingdom on March 23, 2010 to face trial on Counts Two, Three, and Four of the indictment.[1] On June 1, 2010, the

[1] Pursuant to the United Kingdom Extradition Order, dated September 22, 2008, Norris could not be prosecuted on Count One.

Government moved *in limine* for an order permitting Sutton Keany—former counsel to Morgan—to testify at trial. After holding an evidentiary hearing on July 6, 2010 and hearing argument on July 9, 2010, the District Court granted the Government's motion to permit the testimony on July 12, 2010. On July 19, 2010, the District Court denied Norris's motion for reconsideration. **[2011 WL 1035723, at *2]**

Norris's trial began on July 14, 2010 and lasted seven days. On July 27, 2010, the jury convicted Norris on Count Two and acquitted Norris on Counts Three and Four. On November 30, 2010, 2010 WL 4872987, the District Court denied Norris's motion for acquittal, or, in the alternative, for a new trial.

On December 10, 2010, the District Court sentenced Norris to eighteen months of imprisonment and three years of supervised release. The District Court also imposed a $25,000 fine and a $100 special assessment. The final judgment of conviction was entered on December 13, 2010. This timely appeal followed.

II.

The District Court had jurisdiction under 18 U.S.C. § 3231 and we have jurisdiction pursuant to 28 U.S.C. § 1291.

We exercise plenary review over Norris's sufficiency challenge. *United States v. Bornman*, 559 F.3d 150, 152 (3d Cir. 2009). "'The burden on a defendant who raises a challenge to the sufficiency of the evidence is extremely high.'" *United States v. Iglesias*, 535 F.3d 150, 155 (3d Cir. 2008) (quoting *United States v. Lore*, 430 F.3d 190, 203–04 (3d Cir. 2005)). The Court "'must consider the evidence in the light most favorable to the [G]overnment and affirm

the judgment if there is substantial evidence from which any rational trier of fact could find guilt beyond a reasonable doubt.'" *Id.* (quoting *Lore*, 430 F.3d at 204). "'This review should be *independent* of the jury's determination that evidence on another count was insufficient.'" *United States v. Vastola*, 989 F.2d 1318, 1331 (3d Cir. 1993) (quoting *United States v. Powell*, 469 U.S. 57, 67, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984)). The Government may meet its evidentiary burden "entirely through circumstantial evidence," *United States v. Bob*b, 471 F.3d 491, 494 (3d Cir. 2006), and a reviewing court "must credit 'all available inferences in favor of the [G]overnment,'" *United States v. Sparrow*, 371 F.3d 851, 852 (3d Cir. 2004) (quoting *United States v. Gambone*, 314 F.3d 163, 170 (3d Cir. 2003)). "[T]he evidence need not unequivocally point to the defendant's guilt as long as it permits a finding of guilt beyond a reasonable doubt." *United States v. Davis*, 183 F.3d 231, 238 (3d Cir. 1999). This deferential standard thus places a very heavy burden on a convicted defendant to demonstrate that there is insufficient evidence to support his conviction. *United States v. Rawlins*, 606 F.3d 73, 80 (3d Cir. 2010).

Generally speaking, we "review the refusal to give a particular instruction or the wording of instructions for abuse of discretion." *United States v. Flores*, 454 F.3d 149, 156 (3d Cir. 2006). If a defendant fails to object to an instruction during trial, however, this Court reviews such unpreserved objections for plain error. *United States v. Lee*, 612 F.3d 170, 191 (3d Cir. 2010). For an error to be "plain," it must not only impact the defendant's substantial rights by affecting the outcome of the district court proceedings, but must also seriously affect the fairness, integrity, or public reputation of judicial proceedings. *United*

States v. Heckman, 592 F.3d 400, 404 (3d Cir. 2010). **[2011 WL 1035723, at *3]**

The legal issues underlying the District Court's application of the attorney-client privilege are subject to *de novo* review. *United States v. Doe*, 429 F.3d 450, 452 (3d Cir. 2005). We review the District Court's factual determinations in applying that privilege for clear error. *In re Impounded*, 241 F.3d 308, 312 (3d Cir. 2001).

III.

Norris raises three challenges on appeal. First, Norris contends that there was insufficient evidence to support his conviction. Second, Norris posits that the charge to the jury contained two fundamental errors. Third, Norris argues that the District Court erroneously permitted Sutton Keany to testify during trial. We will discuss each of these objections in turn.

A.

Norris first challenges the sufficiency of the evidence supporting his conviction. As noted above, a jury convicted Norris of a conspiracy that had two objects: corruptly persuading others with intent to influence grand jury testimony and corruptly persuading others to destroy documents with the intent to keep those documents from the grand jury. We hold that there is sufficient evidence to uphold the conviction in regard to the first of these objects, and therefore do not need to consider the second. *Cf. Griffin v. United States*, 502 U.S. 46, 56–57, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991).

Norris argues that "there was insufficient evidence for a jury to conclude that [Norris and his co-conspirators] formed (or could have formed) the

requisite corrupt intent to influence anyone's grand jury testimony." Norris Br. at 14. We disagree. The federal grand jury issued a subpoena *duces tecum* in April 1999. According to the evidence adduced at trial, Norris showed this subpoena to various Morgan employees, met with those employees to discuss the subpoena, and agreed to draft the false scripts. These scripts were to be used by Morgan's employees if "questioned . . . by anybody" about the meetings with competitors. Appendix ("App.") 1229–30. Viewing the evidence presented at trial in the light most favorable to the Government and construing all available inferences in the Government's favor, a rational trier of fact could certainly conclude that Norris corruptly persuaded others with intent to influence their grand jury testimony.

B.

Norris next contends that the District Court improperly instructed the jury in two respects: by refusing to adopt Norris's proffered instruction regarding the meaning of the statutory language "corruptly persuades" and by failing to identify for the jury the overt acts alleged in the indictment.

1.

First, Norris argues that the District Court abused its discretion in refusing to give the following proposed instruction regarding the meaning of "corruptly persuades" as used in 18 U.S.C. § 1512(b):

> [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. **[2011 WL 1035723, at *4]**

App. 335 (second alteration in original). The District Court instead provided the jury with the following instruction:

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

App. 2136.

Norris posits that the District Court's instruction permitted the jury to convict solely on the ground that Norris attempted to persuade co-conspirators to withhold testimony, which would be contrary to our holding in *United States v. Farrell*, 126 F.3d 484, 488 (3d Cir. 1997). The District Court's instruction, however, did not refer to an effort to persuade others merely to withhold testimony. Furthermore, nothing in the instruction would have permitted the jury to convict solely on this ground: Norris was charged with conspiring to corruptly persuade others to give false testimony, not withhold testimony, and the evidence adduced at trial established that Norris conspired to corruptly persuade others to give the false testimony set forth in the various scripts created by Norris and his co-conspirators. Accordingly, the District Court did not abuse its discretion in instructing the jury regarding the

meaning of "corruptly persuades" as used in 18 U.S.C. § 1512(b).

2.

Second, Norris argues that the District Court erred in failing to identify the "overt acts" alleged in the indictment necessary to find Norris guilty of conspiracy. Norris failed to object regarding this issue at trial, and we therefore review the District Court's purported failure pursuant to a plain error standard.

We see no plain error in the District Court's instruction on this point. Norris's argument that "[t]he jury necessarily ignored the 'overt act' element or engaged in impermissible speculation," Norris Br. at 48, is itself nothing more than speculation. The District Court specifically and correctly instructed the jury that the Government was required to prove beyond a reasonable doubt that at least one member of the conspiracy performed an overt act in furtherance of that conspiracy. The possibility that the jury convicted Norris based on overt acts not alleged in the indictment neither impacted the outcome of the proceedings nor seriously affected the fairness, integrity, or public reputation of the proceedings, in light of the fact that we have held that a jury may properly convict based on an overt act not alleged in the indictment. *United States v. Adamo*, 534 F.2d 31, 38–39 (3d Cir. 1976). The District Court therefore did not plainly err by failing to identify the overt acts alleged in the indictment.

C.

Finally, Norris argues that the District Court erred in permitting Sutton Keany to testify at trial. "[I]t is clear, in this Circuit, that a party who asserts

a privilege has the burden of proving its existence and applicability." *In re Grand Jury Investigation*, 918 F.2d 374, 385 n. 15 (3d Cir. 1990). The District Court in this case held an evidentiary hearing and ultimately determined that Norris failed to meet his burden in asserting his privilege pursuant to the five-factor test set forth in *In the Matter of Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 123 (3d Cir. 1986). The District Court did not legally err in applying this test, and we see no clear error in the District Court's holding based on the facts elicited in the evidentiary hearing.

IV.

[2011 WL 1035723, at *5] For the reasons stated above, we will affirm the judgment of conviction.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-4658

UNITED STATES OF AMERICA

v.

IAN P. NORRIS,
Appellant

SUR PETITION FOR REHEARING

Present: McKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR. and VANASKIE, Circuit Judges

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

[Slip Op. 2]

By the Court,

MICHAEL A. CHAGARES

Circuit Judge

DATED: April 19, 2011

tmm/cc: Claire A. DeLelle, Esq.
Eileen M. Cole, Esq.
Lucy P. McClain, Esq.
Kimberly A. Justice, Esq.
Richard S. Rosenberg, Esq.
J. Mark Gidley, Esq.
John J. Powers, III, Esq.
Kristen C. Lamarzi, Esq.
Christopher M. Curran, Esq.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

No. 03 Cr. 632 (ECR)

IAN P. NORRIS,

Petitioner

v.

UNITED STATES,

Respondent.

[753 F. Supp. 2d 492]

***

[753 F. Supp. 2d 498]

MEMORANDUM

Eduardo C. Robreno, U.S.D.J. NOVEMBER 30, 2010

TABLE OF CONTENTS

[753 F. Supp. 2d 499]

I. INTRODUCTION

Defendant, Ian Norris ("Defendant"), is a national of the United Kingdom who is subject to prosecution in the United States under an extradition agreement. On September 28, 2004, a federal grand jury returned the second superseding indictment ("Indictment") against Defendant. The Indictment followed an investigation of an international conspiracy to fix the price of carbon products. It charged Defendant with four counts: (1) Count One—violating the Sherman Act; (2) Count Two—conspiring, in violation of 18 U.S.C. § 371, to violate 18 U.S.C. § 1512(b)(1) and 18 U.S.C. § 1512(b)(2)(B); (3) Count Three—violating 18 U.S.C. § 1512(b)(1); and (4) Count Four—violating 18 U.S.C. § 1512(b)(2)(B). Because Defendant's extradition order barred prosecution under the Sherman Act, Defendant was only tried on Counts Two, Three, and Four. Following a seven day trial, the jury found Defendant guilty on Count Two, but acquitted Defendant on Counts Three and Four. Presently before the Court is Defendant's motion for a judgment of acquittal or, in the alternative, a new trial.

For the reasons discussed below, the Court will deny Defendant's motion.

II. BACKGROUND

Because the Court has already outlined the background surrounding this case, *see United States v. Norris*, 719 F. Supp. 2d 557 (E.D. Pa. 2010) ("*Norris I*"), it is unnecessary to recite those facts at any length. In short, Defendant was charged with obstructing justice in violation of Section 1512(b)(1)

and Section 1512(b)(2)(B) and conspiring to do the same:

> The Indictment alleges that, in carrying out this conspiracy, the Defendant and his co-conspirators: (1) provided false and fictitious relevant and material information in response to the grand jury investigation; (2) prepared a written "script" which contained false information which was to be followed by anyone questioned by either the Antitrust Division or the federal grand jury; and (3) distributed the script to others who had information relevant to the grand jury investigation with instructions to follow the script when answering questions posed by either the grand jury or the Antitrust Division. Moreover, the Indictment alleges that the conspirators removed, concealed, or destroyed from business files any documents which contained evidence of an anticompetitive agreement or reflected contacts between or among competitors, and persuaded, **[753 F. Supp. 2d 500]** directed and instructed others to do the same.

Id. at *2. The scripts Defendant participated in creating sought to cast as legitimate price-fixing meetings between Morgan, the carbon products company for whom Defendant served as CEO during the time in question, and three of its competitors; namely, (1) Carbone; (2) Schunk; and (3) Hoffman.

Defendant's trial began on July 13, 2010. The Antitrust Division called nine witnesses in support of its case: (1) Robin Emerson; (2) Melvin Perkins; (3) Donald Muller; (4) Jack Kroef; (5) Thomas Hoffman; (6) Heinz Volk; (7) Sutton Keany; (8) William MacFarlane; and (9) Helmut Weidlich. Perkins, Kroef, Muller, MacFarlane and Emerson were

Morgan employees who worked with Defendant in varying capacities. Volk and Weidlich were Schunk employees. Hoffman was responsible for Hoffman's United States operations. Keany was the attorney who conducted an investigation into Morgan's price-fixing involvement after Morgan's United States subsidiary, Morganite, was served with a grand jury subpoena on April 27, 1999.

After the Antitrust Division rested, Defendant moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a). The Court denied Defendant's motion. Thereafter, Defendant called one witness, Michael Cox, who was also a Morgan employee during the time in question. On July 22, 2010, the Court charged the jury. As to Count Two, the verdict form the Court provided asked the jury to determine whether Defendant was guilty of conspiracy to obstruct justice for either of the following two reasons:

> (a) knowingly corruptly persuading or knowingly attempting to corruptly persuade other[] persons with intent to influence their testimony in the grand jury proceeding in the Eastern District of Pennsylvania; or (b) knowingly corruptly persuading or knowingly attempting to corruptly persuade other persons with intent to cause or induce those other persons to destroy or conceal records and documents with the intent to impair the availability of those records and documents for use in the grand jury proceeding.

(Doc. no. 149.)

Three business days later, on July 27, 2010, the jury returned a verdict finding Defendant guilty on Count Two of the Indictment. Thus, the jury found

Defendant conspired to violate either Section 1512(b)(1) or Section 1512(b)(2)(B). The jury, however, acquitted Defendant on the substantive charges of violating both of those statutes as charged in Counts Three and Four. Pointing to this apparent inconsistency and raising a variety of other issues for this Court to resolve,[1] Defendant **[753 F. Supp. 2d 501]** now moves for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure or, alternatively, a new trial under Rule 33 of the Federal Rules of Criminal Procedure. The respective arguments are addressed in turn.

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1. Defendant's opening memorandum contains 175 substantive pages totaling roughly 60,000 words. Defendant has also moved for leave to file a reply memorandum, submitting a proposed memorandum containing 105 substantive pages totaling roughly 35,000 words. This type of indiscriminate advocacy, lacking a sense of priority or proportion, has not been helpful to the Court in clarifying the issues subject to post-trial review. *See Marson v. Jones & Laughlin Steel Corp.*, 87 F.R.D. 151, 152 n. * (E.D. Wis. 1980) ("(1) The story of the creation of the world is told in the book Genesis in 400 words; (2) The world's greatest moral code, the Ten Commandments, contains only 279 words; (3) Lincoln's immortal Gettysburg address is but 266 words in length; (4) The Declaration of Independence required only 1,321 words to establish for the world a new concept of freedom. Together, the four contain a *mere 2,266 words*." (emphasis added)). Nevertheless, in the interests of justice and given that the Antitrust Division was afforded an opportunity to surreply, the Court will grant Defendant's motion for leave to file the reply memorandum and consider the arguments advanced therein.

III. MOTION FOR A JUDGMENT OF ACQUITTAL UNDER RULE 29

A. *Legal Standard*

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

Where, as here, the indictment charges a conspiracy to commit several federal crimes, the jury's verdict will be upheld so long as the jury could rationally find the defendant conspired to commit at least one of the crimes at issue. *See Griffin v. United States*, 502 U.S. 46, 59–60, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991) (concluding a general guilty verdict on a multiple-object conspiracy charge may stand even if there is insufficient evidence as to one object of the alleged conspiracy); Mod. Crim. Jury Instr. 3d Cir. 6.18.371C ("The government . . . must prove that [the conspirators] agreed to commit at least one of the object crimes. . . ."). Thus, to prevail on his motion for a judgment of acquittal, Defendant must establish that no rational jury could find beyond a reasonable doubt that Defendant conspired to violate either Section 1512(b)(1) or Section 1512(b)(2)(B). That is, that Defendant conspired to either (1) knowingly corruptly persuade or knowingly attempt to corruptly persuade other persons with the intent to influence their testimony in the relevant grand jury proceedings; or (2) knowingly corruptly persuade or knowingly attempt to corruptly persuade other persons with the intent to cause or induce those persons to destroy or conceal records and documents for use in the relevant grand jury proceedings.

B. *Discussion*

Defendant contends that no rational jury could find him guilty for conspiracy under this standard. Defendant advances **[753 F. Supp. 2d 502]** three overarching arguments in support of this contention: (1) that Defendant's conviction is inherently suspect in view of the jury's acquittals on the two substantive counts comprising the objects of the conspiracy; (2) that the evidence does not suffice to establish

conspiracy convictions for the objects of the charged conspiracy; and (3) that the jury may have convicted Defendant of a legally inadequate charge. These arguments are considered in that order.

1. *Import of Defendant's Acquittal on the Objects of the Charged Conspiracy*

As a preliminary matter, Defendant argues that "special scrutiny is required where a defendant is acquitted of the substantive charges alleged to be the object of the conspiracy" because such acquittals suggest the government did not fulfill its obligation "to prove the intent necessary to commit the underlying substantive offense." (Def.'s Mot. for Acquittal or, in the Alternative, a New Trial, at 12, 13.) Defendant urges this is particularly true in this case because the overt acts of the conspiracy charged in the Indictment are similar to the facts supporting the substantive offenses for which Defendant was acquitted. In essence, then, Defendant suggests the Court should be skeptical of the jury's verdict because it is inconsistent.

However, it has never been the case that an inconsistent jury verdict is, in itself, cause for judicial skepticism. On the contrary, it is well settled that inconsistent jury verdicts in criminal cases are not subject to a heightened standard of review. *See United States v. Powell*, 469 U.S. 57, 64, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984) ("'[T]he most that can be said . . . is that the [inconsistent] verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt.'" (quoting *Dunn v. United States*, 284 U.S. 390, 393, 52 S. Ct. 189, 76 L. Ed. 356 (1932))); *see also*

United States v. Vastola, 989 F.2d 1318, 1329 (3d Cir. 1993) ("[J]ury verdicts cannot be set aside solely on the ground of inconsistency.").

Indeed, in *United States v. Powell*, the Supreme Court held that acquittals on charges of cocaine possession and conspiracy to possess cocaine did not require reversal of the defendant's conviction for "using the telephone in 'committing and in causing and facilitating'" the conspiracy and possession for which the defendant was acquitted. 469 U.S. at 60, 69, 105 S. Ct. 471. In so holding, the Court noted:

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

Id. at 65, 105 S. Ct. 471.

This rule is no different in conspiracy cases. In *United States v. Vastine*, for example, the defendant attacked the jury's verdict arguing that a conspiracy conviction should be set aside insofar as the defendant was found not guilty on the substantive offenses. 363 F.2d 853, 854 (3d Cir. 1966). As in this case, the conspiracy charge in *Vastine* charged the defendant with conspiracy to commit the substantive offenses for which the defendant was acquitted. *Id.* Nevertheless, the *Vastine* Court refused to reverse the jury's verdict and rejected the defendant's chal- **[753 F. Supp. 2d 503]**lenge. Thus, the fact that the jury acquitted Defendant on the objects of the

charged conspiracy neither triggers any heightened standard of review nor requires this Court to enter a judgment of acquittal.

2. *Sufficiency of the Evidence to Establish a Conspiracy Conviction for Either of the Charged Objects*

Defendant next argues that the evidence was not sufficient for a rational jury to find Defendant guilty on the conspiracy charge. The grounds raised by Defendant are substantially similar to those made in the Rule 29 motion this Court denied after the Antitrust Division rested. Although the Court's denial of that motion does not preclude the Court from granting the instant Rule 29 motion, *see generally* Fed. R. Crim. P. 29, the Court will deny Defendant's motion for the same reasons it denied Defendant's earlier motion for a judgment of acquittal; namely, because the facts at trial sufficiently support the conclusion that Defendant conspired, within the meaning of 18 U.S.C. § 371, to violate either Section 1512(b)(1) or Section 1512(b)(2)(B).

Under Section 371, a defendant is guilty of conspiracy where:

> [T]wo or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more such persons do any act to effect the object of the conspiracy. . . .

18 U.S.C. § 371. Accordingly, to convict a defendant of conspiracy, the jury must find beyond a reasonable doubt: (1) "an agreement, either explicit or implicit"; (2) "to commit an unlawful act"; (3) "with intent to

commit an unlawful act"; and (4) "intent to commit the underlying offense." *Brodie*, 403 F.3d at 134 (internal marks omitted) (quoting *United States v. Kapp*, 781 F.2d 1008, 1010 (3d Cir. 1986)). With these elements in mind, the analysis that follows considers whether, viewing the facts at trial in the light most favorable to the Antitrust Division, a rational jury could find beyond a reasonable doubt that Defendant conspired to violate either Section 1512(b)(1) or Section 1512(b)(2)(B).

i. *The Evidence Pertaining to Section 1512(b)(1)*

The Indictment charged Defendant with conspiring to violate Section 1512(b)(1) by agreeing with others "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." (Indictment ¶ 13.) Defendant asserts that the evidence was insufficient to establish such a conspiracy because the evidence did not show (1) an agreement to influence grand jury testimony; or (2) the requisite intent to commit the underlying offense. Relying on *United States v. Schramm*, 75 F.3d 156 (3d Cir. 1996), Defendant principally contends that he could not be guilty because the evidence at trial demonstrated-at most-an agreement to lie to the Antitrust Division or to Morgan's lawyers. This evidence, Defendant reasons, does not suffice because it does not show that Defendant targeted the grand jury investigation in the Eastern District of Pennsylvania. *See id.* at 159 (holding that a defendant subject to a conspiracy prosecution must know that the agreement "had the specific unlawful purpose charged in the indictment").

Although presented as a novel legal issue for this Court's consideration, Defendant's argument boils down to how one interprets the facts proven at trial: Defendant believes they do not tend to show the conspiracy charged. This belief is rooted, in part, in a faulty conception of what a **[753 F. Supp. 2d 504]** violation of Section 1512(b)(1) entails. The Court thus begins by laying out the appropriate legal standard.

a. *Appropriate legal standard*

Defendant's first argument that there was no evidence of an agreement is based on the terms "other persons" and "Grand Jury" as used in the Indictment. (*See* Indictment ¶ 13.) Emphasizing these terms, Defendant asserts that the evidence at trial merely demonstrated an agreement amongst the co-conspirators as to what they would say if questioned by the Antitrust Division or their own lawyers. Thus, according to Defendant, there was no evidence of an agreement to corruptly persuade other persons to influence the grand jury proceedings in the Eastern District of Pennsylvania.

Defendant's second argument that the evidence did not sufficiently demonstrate the intent necessary to commit the underlying offense is grounded in Defendant's insistence that *United States v. Aguilar*, 515 U.S. 593, 115 S. Ct. 2357, 132 L. Ed. 2d 520 (1995) governs and requires a defendant to know his or her actions will affect an official proceeding for a Section 1512(b) violation to lie.[2] In that case, the

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2. For ease, this memorandum refers to the intent and nexus required for a "Section 1512(b)" violation when discussing that required for a violation of Section 1512(b)(1) or Section 1512(b)(2)—the two statutes Defendant was convicted of

Supreme Court held that the intent required for a violation of 18 U.S.C. § 1503 was not established where the defendant made a false statement to an investigating agent who had alerted the defendant to the existence of a grand jury investigation. The Court held as much because the connection between

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conspiring to violate—because courts have generally applied the same requirements to both. *See infra* note 5. However, it is not necessarily the case that all of the offenses in Section 1512(b) require the same nexus required for a violation of either Section 1512(b)(1) or Section 1512(b)(2).

Section 1512(b)(3), which punishes defendants who "knowingly use[] intimidation, threaten[], or corruptly persuade[] another person . . . with intent to . . . hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States," 18 U.S.C. § 1512(b)(3), does not—as Sections 1512(b)(1) and 1512(b)(2) do—require the obstruction at issue to relate to an "official proceeding." Based on this, some courts have concluded that the nexus required for a Section 1512(b)(3) violation differs from that which applies to a violation of subsections (1) and (2). In *United States v. Ronda*, for example, the Eleventh Circuit distinguished the nexus required for a violation of the two statutes, concluding that the nexus requirement the Supreme Court enunciated in *Arthur Andersen LLP v. United States*, 544 U.S. 696, 125 S. Ct. 2129, 161 L. Ed. 2d 1008 (2005) with respect to Section 1512(b)(2) does not apply to a Section 1512(b)(3) violation:

> [T]he federal nexus required under § 1512(b)(2) is distinct from that required under § 1512(b)(3). Unlike the stricter "an official proceeding" requirement that appears in § 1512(b)(2), § 1512(b)(3) requires only that a defendant intended to hinder, delay, or prevent communication to any "law enforcement officer or judge of the United States."

Ronda, 455 F.3d 1273, 1288 (11th Cir. 2006) (quoting *United States v. Veal*, 153 F.3d 1233, 1248 (11th Cir. 1998)).

the defendant's statement and the grand jury investigation was tenuous; the statement was a mere lie to an investigating agent who had "not been subpoenaed or otherwise directed to appear before the grand jury." *Aguilar*, 515 U.S. at 601, 115 S. Ct. 2357. Applying *Aguilar*, Defendant contends he could not have had the intent required because he and his co-conspirators did not know their actions would influence grand jury testimony.

As noted, the legal underpinnings upon which both of Defendant's Section 1512(b)(1) arguments depend are flawed. First, Defendant's contention that there was no agreement to corruptly persuade another person to influence grand jury **[753 F. Supp. 2d 505]** proceedings draws too narrow an interpretation of Section 1512(b)(1). Indeed, by stating the conspiracy charge cannot lie because the evidence merely showed that Defendant and his co-conspirators agreed to mislead the company lawyers or the Antitrust Division, Defendant appears to assume that Section 1512(b)(1) cannot be violated by deliberately using such parties as a conduit to ultimately influence testimony at contemplated grand jury proceedings.[3] But there is no reason it could not be.

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3. At oral argument, however, Defendant conceded that a Section 1512(b)(1) violation could lie under these circumstances. Nevertheless, Defendant claimed the Indictment in this case was more restrictive than the statute because it charged Defendant with conspiring to corruptly persuade "*other persons* . . . with intent to influence *their testimony*." (Indictment ¶ 13 (emphasis added).) The Court disagrees with Defendant's interpretation of the language in the Indictment. By its terms, it permits a conviction where the defendant uses an

After all, the statute expressly provides "an official proceeding need not be pending or about to be instituted at the time of the offense." 18 U.S.C. § 1512(f)(1). For this reason, a defendant violates Section 1512(b)(1) when he or she corruptly persuades another person with the intent to influence testimony in an official proceeding—not when the testimony of the party in question is actually used in the official proceeding.[4] *Cf. United States v. DiSalvo*, 631 F. Supp. 1398, 1402 (E.D. Pa. 1986) (discussing statutory change in Section 1512 from proscribing persuasion of "any witness" to "any person"), *aff'd*, 826 F.2d 1057 (3d Cir. 1987). And, as the statute itself reveals, a defendant who seeks to influence testimony at a proceeding by corruptly persuading

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intermediary to corruptly persuade another person with the intent to influence their testimony.

4. Defendant, reasoning that the evidence at trial more neatly establishes a violation of Section 1512(b)(3) than a violation of Section 1512(b)(1), seems to base his interpretation of Section 1512(b)(1) on the existence of Section 1512(b)(3)—a different crime for which Defendant was not indicted. As mentioned *supra* note 2, Section 1512(b)(3) provides for criminal sanctions where one corruptly persuades another with the intent to "hinder, delay, or prevent the communication to a law enforcement officer." 18 U.S.C. § 1512(b)(3). It is undeniable that the offenses in the two subsections are different. *See United States v. Floresca*, 38 F.3d 706, 709, 710 n.9 (4th Cir. 1994) (reversing the defendant's conviction because the district court inappropriately instructed the jury on Section 1512(b)(3) where the defendant had actually been charged with a violation of Section 1512(b)(1)). However, the existence of Section 1512(b)(3) does not preclude a conviction under Section 1512(b)(1) where the defendant engages in activity that is punishable under the latter statute.

that person through another could be guilty under the statute. *See* 18 U.S.C. § 1512(b)(1) (defendant violates the statute if he or she "corruptly persuade[s] *another person* . . . with intent to . . . influence, delay, or prevent the testimony of *any person* . . . ." (emphasis added)).

Second, although the parties vigorously argue over whether *United States v. Aguilar* is controlling as to the nexus required in the instant case, the Court need not conclusively resolve this issue because Defendant misconstrues *Aguilar* to require a greater knowledge of likelihood to affect official proceedings. In *United States v. Aguilar*, the defendant was charged with violating Section 1503 by lying to an FBI agent. The Court ruled that a violation under Section 1503 required a "nexus" with judicial proceedings—namely, that the defendant's criminal conduct "have a relationship in time, causation, or logic with the judicial proceedings" such that there is a "natural and probable . . . interfer[ence] with the due administration of **[753 F. Supp. 2d 506]** justice." 515 U.S. at 599, 115 S. Ct. 2357 (internal marks omitted) (quoting *United States v. Wood*, 6 F.3d 692, 695 (10th Cir. 1993)).

In reaching this conclusion, the Court rejected the government's contention that the defendant in *Aguilar* had the knowledge required for a Section 1503 violation based on a conversation between the defendant and an FBI agent in which the agent stated, in response to the defendant's inquiry concerning a grand jury investigation, that a grand jury would indeed be convening. *Id.* at 600, 115 S. Ct. 2357. According to the Court, this conversation did not demonstrate that the defendant "knew his false statement would be provided to the grand jury."

Id. at 601, 115 S. Ct. 2357. Thus, the Court concluded the probability of the defendant's lie reaching the grand jury was too speculative as to have the required relationship with the proceeding in question. *Id.*

Defendant, pointing to the language in *Aguilar* concerning the defendant's lack of knowledge that the false statement to the FBI agent would be conveyed to the grand jury, appears to read *Aguilar* to impose a nexus whereby a defendant must know grand jury testimony will be impacted by his or her conduct. *Aguilar*, however, quite clearly held the nexus merely requires a "'natural and probable effect' of interfering with the due administration of justice." *Id.* A defendant, therefore, need not—as Defendant suggests—affirmatively "kn[ow] that his conduct would affect grand jury testimony." (Def.'s Mot. for Acquittal or, in the Alternative, a New Trial, at 35; *see also id.* ("There was no evidence that Mr. Norris or any alleged co-conspirator *had knowledge* that the statements they made . . . would somehow morph into testimony before the grand jury.").) It is enough for that to be the defendant's intention where he or she acts in a way that is likely to achieve the desired objective. *See United States v. Kumar*, 617 F.3d 612, 621 (2d Cir. 2010) (interpreting Section 1503 and explaining "a defendant does not need to know with certainty that his conduct would affect judicial proceedings"); *United States v. Macari*, 453 F.3d 926, 940 (7th Cir. 2006) (applying *Aguilar* in evaluating defendant's motion for a judgment of acquittal and holding the evidence sufficed because the defendant "made the statements with the intention of obstructing the grand jury's investigation because there was a logical relationship between his knowing conduct . . . and the effect it was likely to have").

Moreover, it is not clear that the nexus articulated in *Aguilar* applies to the instant statute at all. In *Arthur Andersen LLP v. United States*, the Court determined that Section 1512(b) requires a nexus as a condition precedent to criminal punishment. 544 U.S. at 708, 125 S. Ct. 2129.[5] In support of this conclusion, the Court cited *Aguilar* and clarified that the *Aguilar* decision had "required something more—specifically, a 'nexus' between the obstructive act and the proceeding." 544 U.S. at 708, 125 S. Ct. 2129 (citing *Aguilar*, 515 U.S. at 599–600, 115 S. Ct. 2357). Some courts have concluded the nexus required by *Arthur Andersen* is substantially similar to that in *Aguilar*. *See United States v. Hayes*, No. 09–397, 2010 WL 2696894, at *4 (M.D. Pa. July 7, 2010) (stating *Arthur Andersen* requires "essentially the nexus mandated by *Aguilar*"). However, the *Arthur Andersen* Court did not **[753 F. Supp. 2d 507]** adopt precisely the same nexus requirement—it merely stated that one is required and that the defendant must have some contemplation of the official proceeding he or she is charged with obstructing. *See Arthur Andersen*, 544 U.S. at 708, 125 S. Ct. 2129 (explaining there must be some "contemplation [of an] official proceeding"); *United States v. Byrne*, 435 F.3d 16, 25 (1st Cir. 2006) ("[T]he *Arthur Andersen* court did not elaborate on the particularity required by the nexus requirement in subsection (b)(2).").

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5. The *Arthur Andersen* Court applied the nexus requirement to Section 1512(b)(2). However, courts have interpreted the nexus requirement to apply with equal force to Section 1512(b)(1). *See, e.g., United States v. LeMoure*, 474 F.3d 37, 44 (1st Cir. 2007) ("[S]ection 1512(b)(1) requires proof of a nexus with 'an official proceeding' . . . .").

Based on the considerable difference between the two statutes, it is debatable whether the nexus required for a Section 1512(b) violation is the same as that associated with a Section 1503 violation. For one, as Section 1512 expressly instructs, "an official proceeding need not be pending or about to be instituted at the time of the offense." 18 U.S.C. § 1512(f)(1). There is no such statutory prescription with respect to Section 1503. Indeed, in ruling that a nexus was required for a Section 1512(b) violation, the *Arthur Andersen* Court acknowledged this very point. *See Arthur Andersen*, 544 U.S. at 707–08, 125 S. Ct. 2129 ("It is, however, one thing to say that a proceeding 'need not be pending or about to be instituted at the time of the offense,' and quite another to say a proceeding need not even be foreseen.").

In addition, the provision of Section 1503 dealt with in *Aguilar* is considerably broader than Section 1512(b) in terms of what it allows the government to punish. *See Aguilar*, 515 U.S. at 598, 115 S. Ct. 2357 (explaining that the Section 1503 provision being interpreted "serves as a catchall" and contains portions that are "general in scope"). This breadth, which Section 1512(b) plainly does not share,[6] was one of the reasons the *Aguilar* Court required the nexus that it did. *See id.* at 600, 115 S. Ct. 2357 ("We have traditionally exercised restraint in assessing the

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6. Section 1503 criminalizes a defendant's conduct where he or she "corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." 18 U.S.C. § 1503(a). Section 1512(b), by contrast, is—as defense counsel acknowledged at oral argument—more targeted.

reach of a federal criminal statute. . . . We do not believe that uttering false statements to an investigating agent . . . who might or might not testify . . . is sufficient to make out a violation of the catchall provision.").

Thus, the Court disagrees with Defendant's interpretation that the *Aguilar* nexus requires a defendant to have actual knowledge that his or her actions will end up affecting the relevant official proceeding. However, to the extent *Aguilar* requires such a nexus, the Court deems it inapplicable here because Defendant was charged with violating (and conspiring to violate) Section 1512(b) rather than Section 1503. Consequently, Defendant and his co-conspirators need not have known with certainty that their actions would influence grand jury testimony for a violation of the statute to lie.[7] **[753 F. Supp. 2d 508]**

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7. Defendant also asserts that the knowledge required for a Section 1512(b)(1) violation was lacking because Defendant and his co-conspirators lacked a technical understanding of what a grand jury is and therefore could not have known that the people influenced could be called to testify. Defendant is mistaken to the extent his argument implies that a technical understanding is required for a Section 1512(b)(1) violation. Instead, as noted, a defendant violates Section 1512(b)(1) where his or her illegal actions are undertaken in contemplation of an official proceeding with the purpose of influencing testimony in it.

Moreover, the evidence presented belies Defendant's theory that he and his co-conspirators did not know people could be called to testify before the grand jury. Testimony was heard that Defendant had a subpoena in his possession at the conception of Defendant's obstruction scheme. (Tr. 4:20–22

b. *Sufficiency of the evidence based on the applicable legal standard*

With the appropriate legal framework in mind, it is evident that a rational jury could, viewing the facts in the light most favorable to the Antitrust Division, find beyond a reasonable doubt that Defendant conspired to violate Section 1512(b)(1). The evidence produced at trial readily demonstrates that, after learning of the grand jury investigation, Defendant and others agreed to misrepresent Morgan's meetings with competitors via false non-contemporaneous scripts they and others were to parrot when questioned. Thus, a rational jury could find these scripts were for the express purpose of influencing testimony that might be presented to the grand jury.

It could do so because the script production described by the Antitrust Division's nine witnesses is traceable to the April 27, 1999 grand jury subpoena that was served on Morganite. The subpoena, titled "SUBPOENA TO TESTIFY BEFORE GRAND JURY" indicated that the company was to turn over responsive "documents or object(s)." (*See* GX–05.) After the subpoena was served, a meeting was arranged in Defendant's office to discuss the subpoena. (*See* Tr. 4:7–11 (July 14, 2010 P.M.).)

(July 14, 2010 P.M.).) This subpoena was titled "SUBPOENA TO TESTIFY BEFORE GRAND JURY" and had a box to check indicating whether the subpoena was for a "person" or for "documents or objects." (*See* GX-05.) Consequently, the alleged cultural misconceptions of the grand jury process that Defendant cites are of no moment; a rational jury could conclude Defendant and his co-conspirators were aware people could be called to testify in the grand jury proceedings.

Several Morgan employees attended this meeting and, upon arriving, were shown a copy of the subpoena. (*See id.* 4:20–22.)

As Perkins, Morganite's Vice President of Sales and Marketing stated, he met with Defendant, MacFarlane, and Kroef after the issuance of the subpoena and was told "the potential problem . . . was the investigation, and the concern that there were no written notes or documents . . . relative to the meetings." (*Id.* 113:24–114:3.) To remedy this problem, Defendant suggested that false meeting summaries be manufactured:

> There was a decision taken that we should draft some notes of the meetings which involved really digging—digging a lot of information up first of all to find out when the meetings were, who the potential attendees were, and then to draft meetings but on instruction to be very careful what we wrote, how we phrased things and what we included in the drafts we were going to prepare.
>
> . . .
>
> [W]e were to de-emphasize references to any pricing involvement or pricing arrangements. . . . The emphasis was to make it more seem as though they were joint venture meetings.

(*Id.* 114:14–20; 115:22–23; 115:25–116:1.) The purpose of these scripts were to "help each of us that were—attended the meetings in terms of misleading the Department of Justice." (Tr. 31:21–23 (July 20, 2010 A.M.).) They were, in Kroef's words, to form a "new memory" in the event "you would be questioned"

in connection with the investigation. (Tr. 12:23–13:3, 14:7–8 (July 16, 2010 A.M.).)

Several other witnesses told the same story at trial. (*See, e.g.*, Tr. 109:1–10; 112:8–12 (July 15, 2010 P.M.) (Kroef's testimony that, after receiving the grand jury subpoena, there were meetings between Defendant and others in which it was de-**[753 F. Supp. 2d 509]**termined evidence should be created to show that "it wasn't cartel meetings, that these were meetings on other topics which were allowed to take place"); Tr. 4:20–22, 28:17–19 (July 20, 2010 A.M.) (MacFarlane's testimony that Defendant had the grand jury subpoena at the initial meeting and that the set of notes prepared were "designed to mislead the—investigation by the U.S. Department of Justice").) This evidence supports a jury finding that Defendant and others took actions to prevent the grand jury's information gathering process after learning about the grand jury investigation for the purpose of influencing testimony they believed might be given to the grand jury—*i.e.*, with the knowledge required to effectuate a violation of Section 1512(b)(1).

The jury's verdict is also supported by much of the other testimony elicited at trial. As Kroef and Weidlich both testified, Kroef met with Weidlich at Defendant's direction and on Morgan's accord to persuade Schunk to perpetuate the lies relayed on the scripts if questioned. Kroef testified that, after the grand jury investigation began, Defendant asked him to find out what Schunk was "going to do about the investigation. A, were they under investigation? B, what was their proceeding? What was their strategy." (Tr. 33:19–21 (July 16, 2010 A.M.).) Defendant further requested that Kroef arrange a

meeting with Weidlich. (*Id.* 39:5–7.) Kroef held the meeting with Weidlich on November 30, 2000 to convey the "Morgan strategy" to "use joint venture discussions, acquisition discussions, all sort of legal possible activities to explain the meetings." (*Id.* 37:23–25.) Kroef's discussion with Weidlich was not purely informational. Rather, as Weidlich testified:

> Mr. Kroef told me that . . . that the Morgan people had been interviewed by the United States authorities already. And he told me that certainly at some given time the Schunk people will be interviewed as well. And for that, he told me that they have made a kind of protocol after those interviews. And he wanted me to—to send me that—that protocol, in order that I distribute it to the Schunk and Hoffman people, in order to make to—in order to—to make sure that the testimony that they would be giving would be the same as or similar to what the Morgan people have said.

(Tr. 9:6–18 (July 20, 2010 P.M.).)

After this meeting, Kroef informed Defendant that Weidlich was not "really grasping the importance of what was happening." (Tr. 39:23–40:6 (July 16, 2010 A.M.).) Thus, Defendant decided he needed to speak with Schunk's CEO, Dagobert Kotzur. (*Id.*) A follow-up meeting between Defendant, Weidlich, Kotzur and Kroef was held on February 26, 2001.[8] As Weidlich

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8. Viewed in the light most favorable to the Antitrust Division, the evidence at trial also established that Defendant met with Kotzur on his own on December 17, 2000. (*See id.* 46:3–47:1.) Following this meeting, Defendant falsely represented on the dinner receipt that the meeting with Kotzur was arranged to discuss an acquisition. (*See* Tr. 45:10–25 (July 20, 2010 A.M.).)

testified, Defendant and Kroef urged the same conduct of Schunk at this second meeting:

> [Defendant] strongly suggested that we make sure that our people answer in the same way, on the one hand because that would help to convince the US authorities that the Morgan story was right. And that could be an instrument in order to—to slaughter Carbone. And on the other hand, he drew our attention to the fact that if the investigation into the carbon brush business cannot be stopped in the United States, then, for **[753 F. Supp. 2d 510]** sure, an investigation in Europe will start as well.

(Tr. 20:16–23 (July 20, 2010 P.M.).) This evidence could lead a rational jury to convict Defendant of Count Two.

So too could the testimony from two of the Antitrust Division's witnesses regarding how Defendant and others sought the retirement of Emerson, a British national residing in the United Kingdom, who served as a pricing officer at Morgan. At trial, evidence was presented that Emerson's retirement was sought for the express purpose of preventing him from testifying against Morgan in the proceedings after it became apparent that any testimony Emerson might give could not be readily influenced. Indeed, MacFarlane testified that, after learning of the grand jury investigation, a concern arose that Emerson would not be able to stick to the story in the scripts if questioned:

> [Defendant] emerged [from a meeting] saying that Mr. Emerson would not stand the questioning of his role in any of these activities going forward. . . . [I]f he were questioned by the

> Department of Justice either in Canada or yourselves on his role, he would perhaps not be able to stay to the story. He would—he would have to tell the truth.

(Tr. 43:12–16, 44:1–4 (July 20, 2010 A.M.).) Accordingly, Emerson's retirement from Morgan was pursued. (*See id.* 44:7–9 ("It was our view that as a retired employee, [Emerson] would be inaccessible to either [sic] Department of Justice or Canada's Department of Justice").) Kroef also testified to this effect. (*See* Tr. 31:6–25 (July 16, 2010 A.M.) (explaining that "the company believed, at that time, if Mr. Emerson was no longer in the company, he could not be told to testify in a case against the company" and elaborating on how Defendant and others went about procuring Emerson's retirement).) This evidence supports the jury's verdict.

Accordingly, the Court concludes there was sufficient evidence for a rational jury to conclude that Defendant conspired to violate Section 1512(b)(1).

ii. *The Evidence Pertaining to Section 1512(b)(2)(B)*

Because a rational jury could conclude that Defendant conspired with others to violate Section 1512(b)(1), it is technically unnecessary to consider whether the evidence at trial also supported a conspiracy conviction for the other object charged in the Indictment. *See Griffin*, 502 U.S. at 59–60, 112 S. Ct. 466. However, the evidence presented at trial provides a sufficient basis for a rational jury to have found Defendant guilty of a conspiracy to violate Section 1512(b)(2)(B) as well. Thus, in the interest of completeness, the Court will also discuss the arguments pertaining to Section 1512(b)(2)(B).

Section 1512(b)(2)(B) punishes those who "corruptly persuade[] another person . . . with intent to . . . cause or induce any person to . . . alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. § 1512(b)(2)(B). As discussed above in the context of Section 1512(b)(1), a nexus—albeit not necessarily the same nexus required under Section 1503—is required for a violation of Section 1512(b)(2)(B). Thus, a defendant cannot be convicted under Section 1512(b)(2)(B) unless the document destruction occurs "in contemplation [of] any particular official proceeding in which those documents might be material." *Arthur Andersen*, 544 U.S. at 708, 125 S. Ct. 2129. The indictment charged Defendant with conspiring to violate this statute by agreeing with others to: **[753 F. Supp. 2d 511]**

> 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. . . .

(Indictment ¶ 13.)

Defendant asserts the evidence at trial was insufficient to establish a conspiracy to violate Section 1512(b)(2)(B) because (1) there was no document destruction in the United States; (2) the documents destroyed were European documents only which were destroyed with no intent to affect the grand jury proceeding in the United States; (3) the

document destruction occurred before the grand jury subpoena was issued; and (4) the documents in Europe were, based on Defendant's understanding from legal counsel, beyond the power of the grand jury subpoena. These arguments lack merit.

First, this Court has already resolved the issue of whether a Section 1512(b)(2)(B) violation can lie where the document destruction occurred (1) outside of the United States; and (2) before the issuance of the grand jury subpoena. In *Norris I*, Defendant sought to dismiss Count IV of the indictment—the Count charging him with actually violating Section 1512(b)(2)(B)—on these same grounds. In rejecting these arguments, the Court explained:

> Defendant's contention that he could not have impaired the availability of foreign-based documents because they were beyond the grand jury subpoena power is irrelevant. The statute requires only that Defendant's action be taken "with intent to impair the object's integrity or availability for use in an official proceeding." The offense could have occurred even before the grand jury was empaneled and had authority to issue subpoenas. Here, the relevance of the Morganite subpoena (which also sought Morgan documents) is that it allegedly informed Defendant of the existence of the federal grant jury's price-fixing investigation. As explained earlier, it is for the jury to decide if Defendant and his co-conspirator's actions to destroy or conceal documents were taken with intent to impair their availability in the grand jury investigation.

719 F. Supp. 2d at 566–67 (internal citations omitted); *see* 18 U.S.C. § 1512(h) (providing for "extraterritorial Federal jurisdiction over an offense

under this section"); 18 U.S.C. § 1512(f) ("[A]n official proceeding need not be pending or about to be instituted at the time of the offense."). Thus, a rational jury could have convicted Defendant even if the only document destruction that took place occurred outside the United States and before the grand jury subpoena was issued.

Second, the evidence supports a jury finding that document destruction took place with the intent to affect the grand jury proceeding in the United States. This evidence is not negated by Defendant's understanding of what the grand jury could legally compel. The grand jury subpoena was, as noted, served on Morganite on April 27, 1999. (*See* GX–05.) This subpoena requested production of "all responsive documents . . . of [the] company without regard to the physical location of said documents." (*Id.*) It clarified that it sought Morgan documents. (*See id.* (instructing that the subpoena covered Morganite's "divisions and affiliates").) Testimony was heard at trial that, after receiving the subpoena, Defen-**[753 F. Supp. 2d 512]**dant ordered the destruction of responsive files. As Kroef testified:

> [I]f 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 [Defendant] 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.

(Tr. 28:5–16 (July 16, 2010 A.M.).)

Kroef further testified that, following this conversation with Defendant, the document destruction was actually carried out:

> I selected three people [to review the files because] all three were involved in the cartel activities, because you didn't—you wanted to keep the number of people involved as small as you possibly can . . . . [s]o they went to all our own offices in Europe, and did—did the check. They just checked all the files. . . . Every time they found a copy of, let's say a quotation to a customer, which had some, let's say, indication of cartel activities handwritten on them, they would take them out of the file, and throw them away, destroy them.

(*Id.* 28:19–23, 29:3–18.) Emerson testified similarly. (*See* 17:1–19:25, 50:9–12 (July 14, 2010 A.M.) (Emerson's testimony that he was summoned by Kroef to destroy files in light of the subpoena and that files—including notes "relating to competitor meetings with the U.S. market"—were destroyed after the subpoena was served).)

Defendant takes exception to Kroef's testimony insofar as Kroef revealed on cross-examination that he could not recall the year in which Defendant instructed him to destroy the documents. However, Kroef did clearly testify that the conversation with Defendant occurred after the subpoena was served and was triggered by the same. This evidence thus supports a jury finding that Defendant and others agreed to destroy responsive documents for the

purpose of preventing the grand jury from procuring them.[9]

Thus, a rational jury could find that Defendant conspired to violate Section 1512(b)(2)(B) by impairing the availability of documents for the grand jury proceeding.

3. *Validity of the Charge for Which Defendant was Convicted*

Finally, Defendant argues that the Court must enter a judgment of acquittal because the jury may have convicted him of the legally inadequate charge of "conspiracy to attempt" obstruction of justice.[10] It is true, as Defendant points out, **[753 F. Supp. 2d 513]** that the verdict form provided to the jury allowed them to find Defendant guilty if he conspired to attempt to corruptly persuade other persons with intent to influence their testimony in violation of

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9. Moreover, Defendant's contention that he did not understand the grand jury could obtain foreign documents is contradicted by Defendant's actions in ensuring the incriminating documents were destroyed after learning of the subpoena. A rational jury could conclude that the actions undertaken were designed to ensure the documents would be unavailable for the grand jury notwithstanding the legal advice Defendant may have received regarding the grand jury's ability to reach foreign documents.

10. Defendant also asserts that the Court should not allow the charge to stand because there was no evidence presented at trial that Defendant conspired to attempt to violate either Section 1512(b)(1) or Section 1512(b)(2)(B). Even if this were true, however, the lack of evidence presented on these objects of the multiple-object conspiracy for which Defendant was convicted would not be a basis for setting aside the jury's guilty verdict. *See Griffin*, 502 U.S. at 59–60, 112 S. Ct. 466.

Section 1512(b)(1) or conspired to attempt to corruptly persuade other persons with intent to cause or induce them to destroy documents in violation of Section 1512(b)(2)(B). (*See* doc. no. 149.) It is also true that a general verdict should be set aside where one of several bases for conviction is unconstitutional or illegal as opposed to supported by insufficient evidence. *See Griffin*, 502 U.S. at 56, 59–60, 112 S. Ct. 466 (explaining that a general verdict should be set aside if one of the bases is unconstitutional or illegal, but holding a guilty verdict on a multiple-object conspiracy is valid even if there is insufficient evidence concerning one of the conspiracy's alleged objects). However, the charge Defendant complains of is neither unconstitutional nor illegal.

Defendant cites a Fifth Circuit case from 1980, *United States v. Meacham*, 626 F.2d 503 (5th Cir. 1980), for the proposition that a conspiracy to attempt charge is illegal. (*See* Def.'s Mot. for Acquittal or, in the Alternative, a New Trial, at 55.) In *Meacham*, the defendant was charged with conspiring to attempt a violation of two identical statutes which proscribed either attempt or conspiracy. *Id.* at 506. Noting that a successful conspiracy prosecution requires both a statute making the conspiracy a crime and a statute making the object of the conspiracy a crime, *see id.* at 507 ("In order successfully to prosecute a conspiracy, the government must be able to point to two separate provisions: one making the act of conspiring a crime and one making the object of the conspiring a crime."), the *Meacham* Court concluded the indictment failed because the statutes at issue could only be read to permit a prosecution for either conspiracy or attempt:

> The government seeks yeoman's performance out of [the statutes] by using them as conspiracy statutes and as substantive-offense statutes through which the conspiracy statutes can be applied.
>
> . . .
>
> Acceptance of the government's position would lead to the conclusion that [the statutes at issue] describe four separate crimes apiece: conspiracy, attempt, conspiracy to attempt and attempt to conspire. We do not believe Congress intended to create four discrete crimes with the three words "attempts or conspires."

Id. at 508 (internal footnote omitted). Thus, *Meacham* does not support Defendant's contention that a charge of conspiracy to attempt is illegal. The *Meacham* Court did criticize such a charge, *see id.* at 509 & n.7 (calling conspiracy to attempt "conceptually bizarre" and noting "it would be the height of absurdity to conspire to commit an attempt, an inchoate offense, and simultaneously conspire to fail at the effort"), but never had occasion to reach the issue. *See id.* at 509 ("Because we hold [the statutes] do not authorize conspiracy-to-attempt prosecutions, we need not reach the more elusive question . . . whether the government may prosecute the . . . crime of conspiracy to attempt in instances where separate provisions make both the conspiracy and the attempt criminal offenses.").

Instead, as the *Meacham* Court acknowledged, courts have permitted conspiracy to attempt prosecutions where de-**[512 F. Supp. 2d 514]**fendants were prosecuted for conspiracy "in conjunction with other statutes expressly making attempts criminal." *Id.* at 508. That is precisely the

situation in the instant case: Defendant was indicted for conspiracy in violation of Section 371 to attempt (or commit) violations of either Section 1512(b)(1), Section 1512(b)(2)(B) or both. And, notwithstanding the criticism lodged by the Fifth Circuit in dicta three decades ago, such a charge is hardly illegal. *See, e.g., United States v. Clay*, 495 F.2d 700, 710 (7th Cir.) (rejecting argument that conspiracy to attempt charge was legally invalid: "[w]hile entering the savings and loan was obviously an objective of the conspiracy and a federal crime, the men necessarily contemplated their attempting to gain entry into the building, and such attempts are [also] expressly proscribed"), *cert. denied*, 419 U.S. 937, 95 S. Ct. 207, 42 L. Ed. 2d 164 (1974). Defendant cites no cases that come close to establishing otherwise.

Therefore, because the jury convicted Defendant on a legally adequate charge and could rationally conclude that Defendant conspired to violate either Section 1512(b)(1) or Section 1512(b)(2)(B), the Court will deny Defendant's motion for a judgment of acquittal under Rule 29.

IV. MOTION FOR A NEW TRIAL UNDER RULE 33

Rule 33 allows the Court to grant a new trial upon the defendant's motion "if the interest of justice so requires." Fed. R. Crim. P. 33. Defendant asks the Court to vacate the jury's conviction and grant a new trial under Rule 33 for two reasons. First, Defendant claims the jury's guilty verdict is against the weight of the evidence. Second, Defendant argues that fundamental errors throughout the trial tainted the jury's verdict. These contentions are addressed in turn.

A. *Defendant's Argument that the Verdict is Against the Weight of the Evidence*

1. *Legal Standard*

Defendant first argues that the Court should order a new trial under Rule 33 because the jury's verdict was against the weight of the evidence. In evaluating whether a jury's verdict was against the weight of the evidence, the court does not view the evidence in the light most favorable to the government as it does when considering a motion for a judgment of acquittal under Rule 29. Instead, the court exercises its own judgment in evaluating the government's case. *See United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002). However, motions for a new trial based on the weight of the evidence "are not favored" and should "be granted sparingly and only in exceptional cases." *United States v. Brennan*, 326 F.3d 176, 189 (3d Cir. 2003) (quoting *Virgin Islands v. Derricks*, 810 F.2d 50, 55 (3d Cir. 1987)). Indeed, "even if a district court believes that the jury verdict is contrary to the weight of the evidence, it can order a new trial 'only if it believes that there is a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted.'" *United States v. Silveus*, 542 F.3d 993, 1004–05 (3d Cir. 2008) (quoting *Johnson*, 302 F.3d at 150).

2. *Discussion*

The theme of Defendant's weight-of-the-evidence argument is that the seemingly damning evidence presented at trial is not actually incriminating but, when properly construed and analyzed, demonstrates Defendant's innocence. To that end, Defendant primarily advances four contentions: (1) that the scripts were not materially false because joint

ventures were actually **[753 F. Supp. 2d 515]** discussed at the meetings; (2) that the scripts were merely produced to marshal a legitimate legal defense; (3) that Emerson's retirement was legitimate and not the product of a scheme of obstruction; and (4) that some of the witnesses were not credible because they testified years later pursuant to corporate or personal plea agreements and selectively remembered details of past events.[11]

In so doing, Defendant advances a fanciful story of innocence, drawing the most innocuous interpretation of the multitude of facts presented to the jury over the course of the seven day trial. However, as the evidence outlined above in examining Defendant's Rule 29 challenge confirms, the facts of this case hardly lead one to believe that "an innocent person has been convicted." *Id.* (internal marks omitted). Nevertheless, because the standard of review for a weight of the evidence challenge under Rule 33 differs from that conducted above in evaluating the facts for the purpose of considering Defendant's Rule 29 arguments, the analysis that follows briefly addresses, in turn, Defendant's professed bases of innocence.[12]

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11. Unsurprisingly, Defendant launches his credibility argument in explaining away the testimony that is unfavorable to his position.

12. It is axiomatic that the court views the facts in the light most favorable to the government in evaluating a defendant's motion for a judgment of acquittal under Rule 29. By contrast, the inquiry associated with a weight of the evidence challenge under Rule 33 is considerably different insofar as the court is required to exercise its own judgment in determining whether to grant the defendant relief. But because the court's ability to

First, the evidence at trial readily demonstrates that the scripts were materially false. Several witnesses testified to this effect. (*See* Tr. 30: 16–20 (July 15, 2010 A.M.) (Perkins' testimony that the "headline approach to [the minutes produced] was that the meetings were primarily about joint ventures" and that this was not true); *id.* 111:17 (Muller's testimony that the scripts were "a cover story"); Tr. 15:12–15 (July 14, 2010 P.M.) (Emerson's testimony regarding a conversation between Perkins and Emerson in which both acknowledged the minutes were "false").)

Defendant attempts to discredit the falsity of the scripts by arguing that there were, in fact, discussions pertaining to joint ventures at the meetings for which the scripts were ultimately produced. Thus, according to Defendant, the omission of price-fixing in the notes was not materially false as to show Defendant's intent to obstruct justice. But, as noted, several witnesses explicitly described the notes as false, explaining that they were created for the express purpose of

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order a new trial based on a verdict against the weight of the evidence is extremely limited, the different standards of review do not materially change the analysis the Court has already undertaken in the Rule 29 context insofar as the Court is persuaded that (1) the government's witnesses and evidence were credible; and (2) ample evidence befitting a guilty verdict was presented. *See United States v. Hunt*, 526 F.3d 739, 744 n. 1 (11th Cir. 2008) ("For the same reasons our de novo review of the evidence leads us to conclude the evidence was sufficient to convict Hunt, we find the district court did not abuse its discretion in declining to grant him a new trial."). Consequently, it is unnecessary to rehash at length the facts proven at trial.

misleading the grand jury investigation in one way or another. Moreover, Defendant's handwritten notes from one of the alleged joint venture meetings clearly show that price-fixing, at a minimum, predominated. (*See, e.g.*, GX-01.)

Second, the facts do not support the benign interpretation of the scripts' creation Defendant advances. Defendant, pointing to testimony that the scripts were to "account for" and "justify" certain meet-**[753 F. Supp. 2d 516]**ings, claims the evidence shows that the scripts were a component of Morgan's efforts to develop a legitimate legal defense. Defendant supports this interpretation by noting that most of the summaries are labeled "Attorney Privileged Information." Moreover, Defendant rationalizes the above-described meetings with Schunk in November 2000 and February 2001 as "simpl[e] . . . attempt[s] to discover[] what strategy Schunk was employing with respect to the grand jury investigation." (Def.'s Mot. for Acquittal or, in the Alternative, a New Trial, at 79.) Viewed as a whole, the evidence at trial does not support Defendant's contention.

As a legal matter, the fact that the scripts may have been produced at the behest of attorneys is—for the reasons discussed in evaluating Defendant's motion for a judgment of acquittal—irrelevant provided the purpose of the scripts' production was to influence grand jury testimony. And, factually, the evidence at trial strongly supports the conclusion that was precisely their purpose. Several witnesses testified that the scripts were developed to be a cover story for the parties who price-fixed. (*See* Tr. 31:21–23 (July 20, 2010 A.M.); *id.* 28:17–19; Tr. 109:1–10; 112:8–12 (July 15, 2010 P.M.).) Indeed, as Kroef

explained it, the scripts were designed to form a "new memory" that was to be memorized "if you would be questioned" by anybody with respect to the investigation. (Tr. 12:23–13:3, 14:7–8 (July 16, 2010 A.M.).) And, as the accounts of the Schunk meetings confirm, others were persuaded in order to facilitate this goal. (*See* Tr. 9:6–18 (July 20, 2010 P.M.); *id.* 20:16–23.)

Third, the evidence concerning Emerson's retirement does not support Defendant's claim of innocence. Defendant, citing *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997), contends that persuading Emerson to retire early was lawful. In *Farrell*, the Court held that corruptly persuading under Section 1512(b) "does not include a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information." *Id.* at 488. According to Defendant, Emerson's retirement was within the lawful conduct defined in *Farrell* because Emerson was (at worst) merely advised not to voluntarily disclose information. Defendant claims that counsel's involvement in advising Emerson that he could not be forced to testify if he retired confirms this account.

However, the evidence at trial showed that the purpose of Emerson's retirement was not merely to advise or encourage him not to speak on a matter he had no legal duty to discuss with the government—it was to induce Emerson into not offering testimony that would incriminate Morgan. This activity, as *Farrell* acknowledges and *Arthur Andersen* confirms, is illegal under Section 1512(b). *See Arthur Andersen*, 544 U.S. at 706, 125 S. Ct. 2129 (corrupt persuasion requires criminal culpability); *Farrell*, 126 F.3d at 488 ("[W]e are confident that . . . attempting

to *persuade* someone to provide *false* information" would constitute "corrupt persuasion punishable under § 1512(b)" (internal marks omitted)).

In particular, testimony was heard at trial that Emerson's retirement was sought when it became apparent Emerson might be unable to stick to the scripts when questioned. (Tr. 43:12–16, 44:1–4, 44:7–9 (July 20, 2010 A.M.).) At the time of his retirement, Emerson was making about £32,000 and would not have been able to retire on a full pension. (Tr. 24:18–21, 25:14 (July 14, 2010 P.M.).) Nevertheless, he requested and was granted a pension of £150,000 without any negotiation whatsoever. (*Id.* 25:8–22.) Thereaf-**[753 F. Supp. 2d 517]**ter, Emerson received a letter explaining that Keany, in connection with the internal investigation "should simply like to confirm with you, your role in the many meetings we held to exit our joint ventures with Le Carbone." (GX–07.) However, Emerson had no involvement in the Carbone joint venture. (Tr. 29:19–23 (July 14, 2010 P.M.).) Taken together, this evidence strongly indicates that Emerson's retirement was affirmatively designed to influence him not to offer incriminating testimony.

Finally, Defendant's attempts to discredit the witnesses who offered incriminating testimony are without foundation. Defendant, citing the fact that the government witnesses testified pursuant to plea agreements, intimates that the Antitrust Division improperly influenced the testimony of the witnesses.[13] For example, Defendant notes that "Kroef took every opportunity to quarrel and shade

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13. As discussed *infra*, Defendant also suggested as much to the jury during his closing argument.

the evidence toward impropriety" and that the witnesses called by the Antitrust Division "dutifully provided conclusory testimony that the meeting summaries were false." (Def.'s Mot. for Acquittal or, in the Alternative, a New Trial, at 88.) Defendant further questions the credibility of the witnesses, noting they selectively remembered certain details that were favorable to the Antitrust Division's theory of the case. However, the Court is persuaded that the witnesses were credible. In addition, the exhibits entered into evidence readily support the testimony advanced. Consequently, the Court concludes, for the purpose of its Rule 33 analysis, that Defendant has failed to show the witnesses were not credible.

Thus, because the evidence does not support Defendant's contention that his conviction was a miscarriage of justice, the Court will deny Defendant's motion for a new trial based on the weight of the evidence.

B. *Defendant's Argument that Fundamental Errors were Committed During Trial*

Defendant also contends that he should receive a new trial under Rule 33 because fundamental errors at trial—on their own and coupled with others—prejudiced his case. Specifically, Defendant claims that a new trial should be ordered based on: (1) errors in the jury instructions; (2) the Court's decision to allow Keany to testify; (3) the Antitrust Division's alleged failure to comply with its discovery obligations under *Brady* and Rule 16 of the Federal Rules of Criminal Procedure; and (4) prosecutorial misconduct by the Antitrust Division in its closing argument and rebuttal.

1. *Legal Standard*

A court should only grant a motion for new trial based on errors at trial where the "error . . . had a substantial influence on the verdict." *United States v. Malik*, No. 08–614, 2009 WL 4641706, at *3 (E.D. Pa. Dec. 7, 2009) (internal marks omitted) (quoting *United States v. Enigwe*, No. 92–257, 1992 WL 382325, at *4 (E.D. Pa. Dec. 9, 1992)). Where multiple errors are alleged, a new trial may be granted only where the errors, "'when combined, so infected the jury's deliberations that they had a substantial influence on the outcome of the trial.'" *United States v. Copple*, 24 F.3d 535, 547 n.17 (3d Cir. 1994) (quoting *United States v. Thornton*, 1 F.3d 149, 156 (3d Cir. 1993)). Consequently, harmless errors **[753 F. Supp. 2d 518]** that do not deprive the defendant of a fair trial are not a basis for granting a defendant's Rule 33 motion. *See id.*

2. *Errors in the Jury Instructions*

Defendant contends that the Court committed several errors in instructing the jury which entitle him to a new trial. In evaluating alleged errors in jury instructions, the court is to "consider the totality of the instructions and not a particular sentence or paragraph in isolation." *United States v. Khorozian*, 333 F.3d 498, 508 (3d Cir. 2003) (quoting *United States v. Coyle*, 63 F.3d 1239, 1245 (3d Cir. 1995)). "Moreover, in reviewing jury instructions, our task is also to view the charge itself as part of the whole trial" since "isolated statements . . . seemingly prejudicial on their face, are not so when considered in the context of the entire record of the trial." *United States v. Park*, 421 U.S. 658, 674–75, 95 S. Ct. 1903, 44 L. Ed. 2d 489 (1975) (internal marks omitted) (quoting *United States v. Birnbaum*, 373

F.2d 250, 257 (2d Cir. 1967)). Two special considerations apply to the court's review. First, where the alleged error is that the court failed to give a requested instruction, error only lies "if the omitted instruction is correct, is not substantially covered by other instructions, and is so important that its omission prejudiced the defendant." *United States v. Davis*, 183 F.3d 231, 250 (3d Cir. 1999). Second, to the extent the defendant failed to object at trial, the contested jury instruction is reviewed for plain error only. *See Virgin Islands v. Knight*, 989 F.2d 619, 631 (3d Cir. 1993). Under this standard, the instruction at issue is only reversible if the error is "particularly egregious" such that it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* (quoting *United States v. Young*, 470 U.S. 1, 15, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)).

Here, Defendant argues the Court erred by (1) not identifying the overt acts Defendant committed in furtherance of the conspiracy; (2) constructively amending the indictment via its preliminary instruction; (3) failing to give an instruction on the right to withhold testimony; (4) giving an improper instruction as to the "nexus" required for a Section 1512(b) violation; (5) failing to distinguish between the charged conduct of "influencing" testimony and the uncharged conduct of "preventing" testimony; and (6) failing to give a missing witness instruction. Defendant failed to timely object to the first two alleged errors and they are therefore reviewed for plain error. The remaining objections were timely raised. Nevertheless, the third, fifth and sixth alleged errors cited by Defendant are only "error" in limited circumstances. *See Davis*, 183 F.3d at 250. As explained more fully below, the Court concludes that none of the supposed errors—individually or

collectively—are grounds for granting Defendant's motion.

i. *Failure to Identify the Overt Acts Defendant Took in Furtherance of the Conspiracy*

Defendant objects to the Court's jury charge on overt acts. Because Defendant failed to timely raise this objection, this Court's review is for plain error. In its charge, the Court instructed the jury as follows:

> With regard to the fourth element of the conspiracy, that is the overt acts, the Government must prove beyond a reasonable doubt that during the existence of the conspiracy 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. **[753 F. Supp. 2d 519]**
>
> The indictment alleges certain overt acts. The Government does not have to prove that all of these acts were committed or that any of these acts were themselves illegal. Also, the Government does not have to prove that Ian Norris personally committed any of the overt acts.
>
> The Government must prove beyond a reasonable doubt that at least one member of the conspiracy committed at least one of the overt acts charged in the indictment and committed it during the time that the conspiracy existed for the purpose of furthering or helping to achieve the objectives of the conspiracy. You must unanimously agree on the overt act that was committed.

(Tr. 36:9–37:2 (July 22, 2010 P.M.).) According to Defendant, this instruction was erroneous because it failed to identify the overt acts in the Indictment. The Court disagrees. The instruction was not, by any measure, plainly erroneous because any error actually benefitted Defendant.

Indeed, "[i]t is well settled that the government can prove overt acts not listed in the indictment, so long as there is no prejudice to the defendants thereby." *United States v. Schurr*, 794 F.2d 903, 908 n.4 (3d Cir. 1986). Thus, any speculation by the jury as to whether an overt act was or was not charged in the Indictment would, by definition, be harmless. Defendant acknowledges this point, but claims that only the acts alleged in the indictment could support a conviction where, as in this case, the court's instruction expressly directs the jury to consider the overt acts in the indictment. Some courts have reached this conclusion. In *United States v. Morales*, for example, the First Circuit held "the absence of any evidence with respect to . . . [the] alleged [overt] acts is grounds for reversal of [a] conspiracy conviction" where the instructions given by the court "refer[] repeatedly only to the specific overt acts alleged in the indictment." 677 F.2d 1, 2 (1st Cir. 1982) (citing *United States v. Negro*, 164 F.2d 168, 171–72 (2d Cir. 1947)), *overruled on other grounds*, *United States v. Bucuvalas*, 909 F.2d 593, 594 (1st Cir. 1990).

However, the Court did not "refer[] repeatedly only to the specific overt acts alleged in the indictment," *id.*; its description was decidedly general. At least under these circumstances, the general rule that the government need not prove the overt acts in the indictment is not displaced under

the law of this Circuit. *See Schurr*, 794 F.2d at 907–08 (describing jury instruction requiring the jury to find "that an overt act that had been *listed in the indictment* took place within five years of the indictment" but nevertheless stating and applying the general rule that the government need not prove the overt acts alleged in the indictment (emphasis added)). Accordingly, Defendant actually benefitted from the Court's instruction to the extent it suggested to the jury that a guilty verdict required a finding that Defendant committed one of the overt acts charged in the Indictment. *See id.* at 908 n.4 (alleged error was harmless to defendant and "if anything . . . hurt the government by limiting the overt acts upon which the jury could rely").

Thus, the Court's failure to recite the overt acts in the jury charge was not plain error and is not grounds for ordering a new trial.[14] **[753 F. Supp. 2d 520]**

ii. *Alleged Constructive Amendment of the Indictment via the Preliminary Instructions*

Defendant also objects to another aspect of the Court's instructions which he failed to raise at trial—the Court's preliminary instructions which provided the jury with a cursory explanation of both parties'

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14. Defendant also contends the Court committed plain error by not defining the term "overt acts" for the jury. This argument is not persuasive. First, there is no good reason the term ought to be defined. Second, there was an abundance of evidence that Defendant and his co-conspirators committed overt acts in furtherance of the charged conspiracy. It could, therefore, hardly be said that the failure to define the term was manifestly unfair as to constitute plain error.

legal theories of the case. And, because Defendant failed to timely object to this instruction, it is reviewed for plain error. During this overview, the Court explained the case to the jury as follows:

> [P]lease remember that I do not know any facts of this case. I do not know the circumstances, and anything that I may say now is simply to help you place the case in context, not that I'm relating to you any facts of the case, but I'm going to give you the Government's theory of the case, and then I'm going to give you the defendant's contention so that you get a sense of what is going to be happening in the case.
>
> . . .
>
> The indictment alleges that the obstruction of justice charges involved some of the following activities. The defendants and his co-conspirators provided false and fictitious relevant and material information in response to a Federal Grand Jury investigation into the carbon products industry.
>
> The defendant and his alleged co-conspirators prepared what the Government calls a script, that is, some documents containing false material information *which was to be followed by anyone questioned by either the Antitrust Division or the Federal Grand Jury*. Defendant Norris and his alleged co-conspirators contacted other persons who had information relevant to the investigation being conducted by the Antitrust Division and the Federal Grand Jury and distributed the so-called script to them with instructions to follow the-what the Antitrust Division calls the script when answering questions posed by either the Antitrust Division or the Federal Grand Jury.

. . .

> Now, that's the Government's theory of the case. That's what the Government will contend. The defendant has pled not guilty to the indictment, and as we have indicated and charged you, he is entitled to the presumption of innocence.
>
> The defendant contends that Mr. Norris is not guilty because he did not knowingly, corruptly persuade any witness who was going to appear before a U.S. Federal Grand Jury sitting in the Eastern District of Pennsylvania. The defense also contends that the meeting summaries at issue in this case were not prepared for the purpose of influencing any witness's testimony before the United States Federal Grand Jury. Rather, the defendant contends that the meeting summaries were prepared at the request of counsel to aid the counsel's fact gathering process in representing Mr. Norris and his company.

(Tr. 27:3–30:2 (July 13, 2010 A.M.) (emphasis added).) Defendant argues the Court's reference to the Antitrust Division's theory that Defendant was culpable for acts directed at "anyone questioned by either the Antitrust Division or the Federal Grand Jury" constructively amended the Indictment insofar as it permitted a guilty finding on the Section 1512(b)(1) conspiracy charge if the jury found Defendant had **[753 F. Supp. 2d 521]** conspired to mislead the Antitrust Division but not the grand jury.

Under the facts of this case, the preliminary instructions were not plain error. For one, the Court clearly instructed the jury they were not to apply

these instructions, which were a mere recitation of the parties' respective theories of the case. The Court's actual jury instructions—which the jury took with them to the deliberation room—instructed the jury that it could only find Defendant guilty if he conspired to influence testimony in the grand jury proceeding. (*See* Tr. 30:19–25 (July 22, 2010 P.M.).)

And, significantly, the final instructions the Court provided further informed the jury that the final instructions—and not the prior informational instructions—were the Court's explanation of the law to be applied. (*See id.* 13:10–12 ("We have now arrived at the point in the case where I charge you before you go out to deliberate. That is to say, this is the point where I tell you what the law is."). For this reason, the preliminary instructions could not have been prejudicial to Defendant in this case.[15] *See United States v. Hernandez*, 176 F.3d 719, 735 & n.10 (3d Cir. 1999) (holding preliminary instructions may be a basis for dismissing a conviction, but clarifying that "[w]e only hold that when such preliminary instructions are given, jurors must not be allowed to guess at which of two conflicting instructions control their deliberations. *This can be avoided by simply*

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15. In any event, it is debatable whether the preliminary instructions mean what Defendant says they do. The statements made in the preliminary instructions do not state that Defendant and his co-conspirators asked others to lie *only* to either the grand jury or to the Antitrust Division. Thus, one could read the statement to imply that a guilty finding would require Defendant to have lied to both the grand jury and the Antitrust Division. Under such a reading, the jury would not believe it could find Defendant guilty without finding that Defendant's conduct was directed to the grand jury.

informing jurors which instructions control in the event they perceive a conflict" (emphasis added)).

Consequently, the Court's preliminary instructions do not entitle Defendant to a new trial.

iii. *Failure to Give an Instruction on the Right to Withhold Testimony*

Defendant next argues that the Court erred by not giving the following requested instruction on the right to withhold testimony:

> [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.

(Doc. no. 59.) Although Defendant timely requested this instruction, the Court opted not to give it and instead charged the jury as follows:

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

(Tr. 39:13–19 (July 22, 2010 P.M.).) The instructions employed by the Court were derived from the Third Circuit pattern instructions for obstruction of justice. *See* Mod. Crim. Jury Instr. 3d Cir. 6.18.1512B. Defendant, although apparently recognizing that the

instructions given were legally accurate, contends he was entitled to the **[753 F. Supp. 2d 522]** requested instruction based on *United States v. Farrell*, which, as discussed earlier, held that corruptly persuading under the Section 1512(b) "does not include a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information." 126 F.3d at 488.

Defendant's argument can be easily rejected because it is intimately tied to two of the factual misconceptions that underscored his motion for a new trial based on a verdict against the weight of the evidence. Namely, that (1) the scripts were not materially false; and (2) Emerson's retirement was not illicit because he had no obligation to voluntarily disclose information. Accepting these facts as true, Defendant reasons that both the omission of price-fixing from the meeting summaries and the effort to facilitate Emerson's retirement could have been found by the jury to further an entirely lawful withholding of information. But, as explained in rejecting Defendant's weight of the evidence argument, the evidence at trial showed the scripts were materially false and that the circumstances attendant to Emerson's retirement were designed to influence his testimony or prevent it altogether. Thus, there was no lawful withholding of information in this case. In fact, to the extent there was any withholding of information, it was in the context of asking others to tell a story including affirmative lies which deliberately left out material information.

For these reasons, Defendant was not entitled to the requested instruction and it was no error not to give it.

iv. *Alleged Error in the "Nexus" Requirement Instruction*

Raising many of the same arguments advanced elsewhere, Defendant claims the Court erred in its instruction on the nexus requirement with respect to Counts Three and Four of the Indictment.[16] The Court instructed the jury as follows on the nexus required for Count Three, which charged Defendant with violating Section 1512(b)(1):

> The Government must prove beyond a reasonable doubt that Ian Norris's actions would have the natural and probable effect of interfering with the Grand Jury proceeding, that is, the acts must have a relationship in time, causation or logic with the Grand Jury proceeding.
>
> If the defendant lacks knowledge that his actions are likely to affect the Grand Jury proceedings, he lacks the requisite intent to obstruct. However, the Government is not required to prove that at the time of the corrupt persuasion that [sic] the person who was the subject of the persuasion was under subpoena or scheduled to testify at the Grand Jury proceeding.
>
> Testimony in the context of this case is evidence that a witness gives or may give under oath.

(Tr. 40:6–19 (July 22, 2010 P.M.).) The nexus instruction as to Count Four, which charged Defendant with violating Section 1512(b)(2)(B), was substantially similar. (*See id.* 43:4–6 ("[T]he

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16. Although the jury ultimately acquitted Defendant on these counts, it did find Defendant guilty of conspiring to violate the statutes they charged Defendant with actually violating.

Government is not required to prove that at the time of the corrupt persuasion the records or documents were under subpoena. . . .").) According to Defendant, these instructions improperly informed the jury that (1) the existence of a subpoena was altogether irrelevant when, in fact, the absence of a subpoena can negate intent; and (2) Defendant could possess the requisite intent even if the individuals he targeted might **[753 F. Supp. 2d 523]** not actually testify. These objections were timely raised.

However, both of these arguments are founded in the same misconception this memorandum has already dispelled: that *Aguilar* requires actual knowledge an individual will testify and would necessarily be governing with respect to the nexus required for a Section 1512(b) violation. As explained earlier, the standard of knowledge Defendant advances does not apply-at least not to a Section 1512(b) violation. Viewed as a whole, then, the instruction was entirely proper as to the nexus required. It explained to the jury that there must be a connection in time, causation or logic between the defendant's actions and the grand jury proceeding, but clarified that (1) a grand jury subpoena was not required for a violation; and (2) actual testimony from the witness was not required. These clarifying points track the statutory language of Section 1512(f)(1), which plainly states "an official proceeding need not be pending or about to be instituted at the time of the offense." 18 U.S.C. § 1512(f)(1).

Thus, the nexus requirement instruction was not improper and is not grounds for a new trial.

v. *Failure to Distinguish in the Instructions Between "Influencing" and "Preventing"*

Defendant next contends the Court erred by not instructing the jury on the distinction between "influencing" and "preventing" in Section 1512(b)(1) given that Defendant was only indicted for violating the statute (and conspiring to do the same) by influencing the testimony of another. Defendant raised this issue in the charge conference, and asked the Court to instruct the jury as follows:

> "Influencing" the testimony of another person does not include conduct intended to prevent the person from testifying. Instead, "influencing" means causing them to materially change the substance of the testimony they will provide in a particular grand jury proceeding.

(Doc. no. 59.) According to Defendant, the Court erred by not instructing on the distinction between the terms because the jury could confuse actions the Defendant may have taken to "prevent" testimony with those designed to "influence" testimony and improperly convict him on that basis.

The parties do not dispute the distinction between the two concepts, which has been recognized in cases construing similar statutes. *See, e.g.*, *United States v. Dawlett*, 787 F.2d 771, 773–74 (1st Cir. 1986) (distinguishing between "influencing" and "preventing" because "one who attempts to kill a witness does not intend to influence that person's testimony, but rather to eliminate it entirely"); *see also United States v. Johnston*, 472 F. Supp. 1102, 1106 (E.D. Pa. 1979) ("[A]n attempt to 'influence' an individual means an attempt to make him change his

course of conduct, that is, the course of his voluntary actions, and not an attempt to destroy him as a voluntary actor."). Instead, the dispute concerns whether there was evidence supporting a jury finding that Defendant sought to prevent another's testimony as to entitle Defendant to the instruction: the Antitrust Division suggests "prevent" refers to physically incapacitating another and that there was no evidence to this effect, while Defendant contends non-violent means qualify as "preventing" testimony under the statute and that the evidence concerning Emerson's retirement supports the requested instruction.

Although the cases espousing the difference between "prevent" and "influence" both hold a defendant did not influence insofar as the witness in question was physically incapacitated, the Antitrust Di-**[753 F. Supp. 2d 524]**vision's limited interpretation of the statute is too narrow. Nevertheless, it is not the case that Defendant's actions in this case could merely be characterized as preventing testimony within the meaning of the statute. The evidence concerning Emerson is illustrative of this point.

At the outset, Defendant attempted to influence Emerson's testimony by getting him to tell the story laid out in the scripts. When it became apparent that Emerson would be unable or unwilling to do so, Defendant sought, literally speaking, to prevent Emerson from testifying against Morgan. However, by doing so, Defendant again sought to influence the testimony Emerson might give insofar as Emerson was an available witness with material information. Thus, Defendant's actions were designed to make Emerson voluntarily "change his course of conduct."

Cf. Johnston, 472 F. Supp. at 1106. This is much different from instances where, as in *Johnston* and *Dawlett*, the witness was killed to prevent any such voluntary choice.

Because the evidence at trial concerning efforts to prevent testimony was coextensive with Defendant's efforts to influence any testimony given, the instruction Defendant requested would have only served to confuse the jury alongside the proper instruction the Court gave.[17] Accordingly, its omission did not prejudice Defendant and does not entitle Defendant to a new trial. *See Davis*, 183 F.3d at 250.

vi. *Failure to Give a Missing Witness Instruction*

Finally, Defendant argues the Court erred by not giving the missing witness instruction that Defendant requested as to three witnesses the Antitrust Division did not call: (1) Emilio DiBernardo; (2) Michel Coniglio; and (3) Kotzur. All three were employees of Morgan's competitors during the time of the alleged price-fixing and coverup. Defendant argues the failure to give the instruction constitutes reversible error because Defendant was entitled to such an instruction and was deprived of due process by the Court's refusal. The Antitrust Division, on the other hand, asserts Defendant was not entitled to any such instruction because (1) Defendant did not show the witnesses were available

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17. Additionally, Defendant's proposed instruction is legally erroneous to the extent it implies the witness must (as opposed to may) testify in the official proceedings at issue. As discussed at length earlier, the nexus requirement for a Section 1512(b) violation does not require the witness to actually testify.

to the Antitrust Division but not the Defendant; and (2) the testimony given by the witnesses would have been cumulative.

A missing witness instruction is appropriate only where the witness in question (1) is available to one party and not the other; (2) is not called to testify on behalf of the party to whom the witness is available without an explanation for the failure to call the witness; (3) is not prejudiced against the party to whom the witness is available; and (4) would give relevant, non-cumulative testimony. *See United States v. Ariza-Ibarra*, 651 F.2d 2, 15–16 (1st Cir. 1981); *see also United States v. Vastola*, 899 F.2d 211, 235 (3d Cir.) ("[A] missing witness instruction is not appropriate when the witness is available to both the defense and the prosecution."), *vacated on other grounds*, 497 U.S. 1001, 110 S. Ct. 3233, 111 L. Ed. 2d 744 (1990). In explaining the standard for a missing witness instruction, some Third Circuit cases suggest there is an affirmative entitlement to a missing witness instruction if the elements for the instruction are met. *See, e.g.*, *United States v.* **[753 F. Supp. 2d 525]** *Drozdowski,* 313 F.3d 819, 824 n.3 (3d Cir. 2002) (stating a "defendant is *entitled* to an absent witness instruction when the testimony of a witness can only be produced by the Government" and that the instruction "*is to be given* in a case where the government fails to produce evidence" (emphasis added)). However, each party is the captain of their own case and "a party's failure to call a witness does not necessarily imply that the witness's testimony would have been unfavorable to that party." *United States v. Busic*, 587 F.2d 577, 586 (3d Cir. 1978), *rev'd on other grounds*, 446 U.S. 398, 100 S. Ct. 1747, 64 L. Ed. 2d 381 (1980). Thus,

district courts should not, as Defendant urges, treat missing witness instructions as a matter of right.

Defendant contends a missing witness instruction should have been given because the witnesses were foreign witnesses who the Antitrust Division, by virtue of plea agreements, had superior access to since the witnesses were beyond the Court's subpoena power. However, the evidence on this point confirms the Court's earlier finding that Defendant never made any effort to obtain the testimony of these witnesses. Thus, Defendant's contention that the witnesses were not available to Defendant is sheer speculation. And, notwithstanding the plea agreements, two of the three witnesses were not available to the Antitrust Division at all: (1) Coniglio could not be located prior to trial; and (2) DiBernardo refused to testify for the Antitrust Division and was no longer subject to prosecution under the plea agreement because the statute of limitations had run on any crime DiBernardo committed. *Cf. United States v. Henries*, 98 Fed. Appx. 164, 166 (3d Cir. 2004) (holding the district court's finding that defendant had equal access to confidential government informant was not clearly erroneous).

While the Antitrust Division concedes Kotzur was available, there is no indication his testimony would not have been cumulative. Indeed, two other witnesses—Weidlich and Kroef—both testified concerning the meeting between Defendant, Weidlich, Kotzur and Kroef. The Antitrust Division represents that they opted not to call Kotzur as a witness based on difficulties in interpreting his German speech. This, itself, in the absence of evidence to the contrary, is a satisfactory reason for failing to call Kotzur as a witness. *See Busic*, 587

F.2d at 586. Coupled with the fact that (1) there was ample other testimony presented on the topic Kotzur would have testified; and (2) Defendant never cited Kotzur as a witness of interest before asking the Court for a missing witness instruction,[18] the Court correctly concluded the jury should not have been given the missing witness instruction Defendant sought. Thus, the Court's refusal to give the missing witness instruction is not grounds for ordering a new trial. *See Davis*, 183 F.3d at 250.

3. *Attorney Testimony in Violation of Defendant's Attorney-Client Privilege*

At trial, the Court permitted Keany to testify as a witness for the Antitrust Division. This decision followed a July 6, 2010 evidentiary hearing in which the Court sought to determine whether Keany's testimony would violate Defendant's attorney-client privilege. Defen-**[753 F. Supp. 2d 526]**dant had vigorously argued that Keany represented Defendant in his individual capacity while the Antitrust Division claimed Keany represented only Morgan, which had duly waived its attorney-client privilege.

On consideration of the testimony presented at the evidentiary hearing and the parties' proposed findings of facts, the Court concluded Defendant did not meet the burden of establishing an attorney-client relationship under the controlling law of this

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18. At oral argument on this motion, for the first time and without any support or documentation, defense counsel claimed that he had attempted to secure Kotzur as a witness. Because this argument was not previously advanced, it is waived. In any event, it strains credulity that such an important point, if indeed true, would not have been raised by defense counsel at any point prior to oral argument.

Circuit. *See United States v. Norris*, 722 F. Supp. 2d 632, 639–40 (E.D. Pa. 2010) ("*Norris* II"). The legal standard, as the Court explained, required a corporate officer invoking an attorney-client relationship with corporate counsel to demonstrate the following elements:

> First, they must show they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And, fifth, they must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.

Id. at 637–38 (quoting *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 124–25 (3d Cir. 1986)). The Court concluded Defendant, a former CEO of Morgan, did not meet this burden:

> Defendant has not satisfied [the Court] that he sought legal advice or representation from the Law Firm in general or from Keany specifically.
>
> First, Norris did not approach the Law Firm or Keany for legal representation. The evidence showed that the Law Firm was contacted by Morgan (an existing client of the Law Firm). . . . At no time, did Norris ask the Law Firm or Keany specifically to represent him personally during the

> grand jury investigation. The conversation between Peppers and Norris where Norris asked Peppers whether Keany could "continue to represent him," is not to the contrary. That conversation reportedly occurred in late September 2001, a month prior to the termination of the Law Firm's representation of Morgan, and long after the scripts had been produced by Morgan to the grand jury. *Bevill*, 805 F.2d at 123 (prongs #1 & 2); *see* Findings of Fact ¶¶ 2–4; 22–24.
>
> Second, at no time did Keany think that he was representing Norris individually. In fact, at some point during Keany's representation of Morgan, he advised Norris that he should retain separate counsel. *Bevill*, 805 F.2d at 123 (prong #3); *see* Finding of Fact ¶ 24.
>
> Third, the conversations between Norris and Keany only involved matters within Morgan or the business affairs of Morgan. At the hearing, Norris failed to adduce any conversation with Keany which was confidential or which dealt with Norris' personal liability or criminal exposure as opposed to Morgan's. *Bevill*, 805 F.2d at 123 (prongs #4 & 5); *see* Finding of Fact ¶ 25.

Id. at 638–39. (internal footnote omitted).

Raising many of the same arguments this Court has already considered and rejected, Defendant continues to contend that Keany jointly represented him as an individual and Morgan as a corporation. Consequently, Defendant argues Keany's testimony violated his attorney-client privi-**[753 F. Supp. 2d 527]**lege and that he is therefore entitled to a new trial. Defendant also contends he is entitled to a new

trial because Keany improperly testified about European price-fixing activity in the following manner:

> Q: Mr. Keany, in representing Morgan in the-in the Grand Jury's investigation . . . would it have been of interest to you to know whether Morgan was engaged in [price-fixing] in Europe?
>
> A: Yes, of course.
>
> Q: Did you ask Mr. Norris whether Morgan was engaged in any of that kind of conduct in Europe?
>
> A: I did.
>
> Q: And what did he tell you?
>
> A: He—he told me that Morgan was not, but I remember he had a particular way of expressing it. He said—about Europe, he said, could I put my hand on my heart and swear that nobody had fixed prices in Europe? I don't think I could do that, but Morgan didn't. He was very clear about that.

(Tr. 82:8–21 (July 19, 2010 A.M.).) According to Defendant, this "hand over heart" testimony was (1) a violation of the Court's ruling permitting Keany's testimony at trial; (2) prior bad act evidence under Rule 404(b) of the Federal Rules of Evidence for which Defendant was not provided the required pretrial notice; and (3) substantially more prejudicial than probative as to violate Rule 403 of the Federal Rules of Evidence. These arguments are unpersuasive.

First, the Court has already ruled that Keany's testimony did not violate Defendant's attorney-client privilege and denied a motion for reconsideration of this issue. And, in so doing, the Court explicitly recognized and permitted the testimony Defendant now takes issue with. (*See id.* 49:5–53:2 (considering that Keany would testify as to Defendant's statements concerning European price-fixing, but nevertheless denying Defendant's motion for reconsideration of the Court's ruling that Keany's testimony would not violate Defendant's attorney-client privilege).) In fact, in *Norris II*, the Court expressly recognized that Keany's testimony might recount such conversations to the extent that they related to the Antitrust Division's proffer concerning (1) Morgan's internal investigation; (2) interactions between counsel with the Antitrust Division; and (3) the ultimate production of the scripts to the Antitrust Division. *See Norris II*, 722 F. Supp. 2d at 640 (explaining that, amongst other things, Keany's testimony would include that, "when Keany interviewed Norris and his subordinates in connection with the internal investigation, they all told him the same story they had agreed to tell about their price-fixing meetings"). Thus, both of the Court's rulings on this issue did not bar mention of Defendant's statements to Keany as they related to the European price-fixing scheme.

Second, Defendant failed to timely object to Keany's "hand over heart" testimony under Rules 403 or 404(b) of the Federal Rules of Evidence.[19] *See* Fed.

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19. In asserting the testimony at issue should not be presented to the jury during argument of Defendant's motion for reconsideration, Defendant never referred to Rule 403 or Rule 404(b). Instead, he only objected to the proffered testimony on

R. Evid. **[753 F. Supp. 2d 528]** 103(a)(1) ("Error may not be predicated upon a ruling which admits . . .

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attorney-client privilege grounds. (*See, e.g.*, Tr. 49:1–3 (July 19, 2010 A.M.) ("Well, if there was such a communication between Mr. Norris and Mr. Keany, that's the heart of the attorney/client privilege.").) It was not clear from the context in which Defendant objected that his objection was predicated on Rule 403 or Rule 404(b). *Cf.* Fed. R. Evid. 103(a)(1).

Moreover, the fact that Defendant raised certain objections under Rules 403 and 404(b) in his proposed findings of fact and conclusions of law did not preserve the instant objections. Those earlier objections were based on Keany's proposed testimony that Defendant authorized him to transmit the scripts to the Antitrust Division. Defendant argued this testimony was improper under Rule 404(b) because it provoked a propensity inference—namely, that Defendant likely persuaded persons to lie before the grand jury because he had allowed Keany to transmit the false scripts to the Antitrust Division. For essentially the same reason, Defendant argued this testimony was substantially more prejudicial than probative under Rule 403.

Thus, Defendant never presented to the Court any argument remotely similar to the one advanced here: that testimony regarding Defendant's lie to Keany concerning European price-fixing involvement was improper. And because the Court had no occasion to make a definitive ruling admitting this evidence, *see* Fed. R. Evid. 103(a) ("Once the court makes a definitive ruling on the record admitting or excluding evidence . . . a party need not renew an objection . . . ."), Defendant had an obligation to bring this objection to the Court's attention in order to preserve it. *See United States v. Schalk*, 515 F.3d 768, 776 (7th Cir. 2008) ("If no objection was made that would put the district court . . . *on notice of the objecting party's concern*, then the standard of review is for plain error." (emphasis added)).

evidence" unless a "a timely objection . . . stating the specific ground of objection" is made). This is particularly notable given that Defendant had at least two opportunities to timely present his objections: (1) during the Court's consideration of Defendant's motion for reconsideration when the Antitrust Division explained that Keany would testify regarding Defendant's statements relating to European price-fixing; and (2) when Keany actually offered the supposedly offensive testimony. Consequently, the Court reviews Defendant's tardy objections for plain error. *See* Fed. R. Evid. 103(d). Under this standard, Defendant's argument fails.

Indeed, even assuming *arguendo* the testimony was not intrinsic to the charges for which Defendant was tried as evidence of a scheme to obstruct justice, it would nevertheless be admissible under Rule 404(b) as it plainly bears on Defendant's motive and intent to commit those offenses. The fact that Defendant lied about European price-fixing to Keany, the corporation's attorney, in the midst of an internal investigation relating to the very same conduct speaks to Defendant's motive and intent to obstruct justice (and conspire to do the same) in the United States. Given this, it could hardly be said that the testimony's "probative value [was] *substantially* outweighed by the danger of unfair prejudice." Fed. R. Evid. 403 (emphasis added).

Finally, although Defendant's argument that the pretrial notice required by Rule 404(b) was not given is factually suspect based on the abovementioned proffer by the Antitrust Division, it is clear—in any event—that Defendant's substantial rights were not impacted by any delay. Defendant was apprised of the testimony well before it was presented to the jury

and had ample opportunity to prevent its admittance.[20] *See United States v. Gonzalez*, 501 F.3d 630, 640 (6th Cir. 2007) (holding that no plain error was committed where defense counsel was given notice one day before trial; the fact defense counsel stated he "considered filing a motion in limine" after receiving the late notice demonstrated that the evidence's "ad-**[753 F. Supp. 2d 529]** mittance at trial did not seriously affect the fairness, integrity, or public reputation of the proceedings").

Thus, Keany's testimony—including his "hand over heart" testimony—does not entitle Defendant to a new trial.

4. *Failure to Comply with Discovery Obligations*

Defendant contends he is entitled to a new trial because the Antitrust Division failed to comply with its discovery obligations by: (1) not producing material in possession of Morgan, Schunk, and Carbone with whom the Antitrust Division has cooperation agreements; (2) denying Defendant access to foreign-located witnesses; and (3) redacting information in witness notes turned over to Defendant that might have been helpful to Defendant for impeachment purposes. In denying a series of motions to compel filed by Defendant on May 23, 2010, the Court rejected most of the arguments now advanced in the instant motion. (*See* doc. no. 88.) Then, as now, Defendant's arguments lack merit.

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[20] Pretrial notice under Rule 404(b) would, of course, be unnecessary if the testimony presented by Keany was intrinsic to the charges. *See, e.g.*, *United States v. Watkins*, 591 F.3d 780, 786 (5th Cir. 2009) ("If evidence is intrinsic, it simply does not implicate the requirements of Rule 404(b).").

i. *Legal Standard*

As a preliminary matter, it is necessary to distinguish between the discovery permitted under Rule 16 of the Federal Rules of Criminal Procedure and that required by due process under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) and its progeny. Rule 16 contemplates a fundamentally limited range of pretrial discovery. *See United States v. Ramos*, 27 F.3d 65, 68 (3d Cir. 1994) ("In contrast to the wide-ranging discovery permitted in civil cases, Rule 16 of the Federal Rules of Criminal Procedure delineates the categories of information to which defendants are entitled in pretrial discovery in criminal cases."). A Rule 16 violation does not automatically entitle a Defendant to a new trial. Rather, the "extreme remedy of a new trial" is only warranted where the "government's failure resulted in a denial of [the defendant's] right to a fair trial." *United States v. Lopez*, 271 F.3d 472, 484 (3d Cir. 2001).

"In addition to the government's discovery obligations under Rule 16(a), the government must also honor the defendant's constitutional rights, particularly the due process right *Brady v. Maryland* established." *United States v. Jordan*, 316 F.3d 1216, 1251 (11th Cir. 2003). Under *Brady* and its progeny, the government must—consistent with due process—turn over material exculpatory evidence to the defense. *See United States v. Reyeros*, 537 F.3d 270, 281 (3d Cir. 2008) ("A *Brady* violation has three components: the evidence at issue must be favorable to the defendant; it must be material; and it must have been suppressed by the prosecution."). However, evidence is material as to require a new trial only where "there is a reasonable probability

that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 107 S. Ct. 989, 984 L. Ed. 2d 40 (1987) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)).

ii. *Discussion*

Defendant's primary contention is that the Antitrust Division violated Rule 16 and *Brady* by failing to turn over materials in the possession of three of the foreign corporations with whom the Antitrust Division had plea agreements with: Morgan, Schunk and Carbone. Where, as here, document production is sought, the government must permit discovery of items "within the government's possession, custody, or control." Fed. R. Crim. P. 16(a)(1)(E). The government's *Brady* obligations extend similarly: the government **[753 F. Supp. 2d 530]** must turn over materials it does not possess that are in its "constructive possession"—*i.e.*, possessed by others acting "on the government's 'behalf'" or "under its `control.'" *Reyeros*, 537 F.3d at 282. According to Defendant, the Antitrust Division violated Rule 16 and *Brady* by not turning over materials held by the three companies because the Antitrust Division had "broad power to obtain overseas documents" from the three companies since they "elected to enter into corporate amnesty and plea agreements." (Def.'s Mot. for Acquittal or, in the Alternative, a New Trial, at 152.) Some courts have accepted similar arguments. *See, e.g., United States v. Stein*, 488 F. Supp. 2d 350, 364 (S.D.N.Y. 2007) (holding that materials in corporation's files are within government's "control" for Rule 16 purposes because of cooperation agreement).

However, as the Court explained in its July 24, 2010 order, the case-by-case test from *United States v. Reyeros* is controlling on the question of whether the government must produce materials possessed by another entity. In *Reyeros*, the Court analyzed this question in the context of determining whether the government had discovery obligations under *Brady* for materials in possession of another sovereign. The *Reyeros* Court explained that the following factors are relevant to this analysis:

> (1) whether the party with knowledge of the information is acting on the government's 'behalf' or is under its 'control'; (2) the extent to which state and federal governments are part of a 'team,' are participating in a 'joint investigation' or are sharing resources; and (3) whether the entity charged with constructive possession has 'ready access' to the evidence.

Reyeros, 537 F.3d at 282 (quoting *United States v. Risha*, 445 F.3d 298, 304 (3d Cir. 2006)). Although the precise context in which *Reyeros* tackled the constructive possession question differs from that presented in the instant case, the circumstances are not materially different. In fact, the mode of analysis in *Reyeros* is even more compelling here, where the materials at issue are in the possession of non-governmental cooperating foreign entities.[21] Under

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21. The test in *Reyeros* speaks only to the government's constructive possession of materials for *Brady* purposes. Given that Rule 16 limits document production discovery to materials within the government's "possession, custody, or control" and that *Brady* is rooted in constitutional due process, a strong argument can be made that Rule 16 does not (or should not) require as expansive disclosure of materials not in the actual

this test, Defendant cannot show the Antitrust Division had the requisite control of any of the materials possessed by Morgan, Schunk, and Carbone as to have discovery obligations attendant to those materials.

While the companies entered into cooperation agreements with the Antitrust Division, they were not—by any means—agents of the Antitrust Division. And, contrary to Defendant's contention, the fact that the Antitrust Division could have possibly obtained the materials does not **[753 F. Supp. 2d 531]** give rise to any discovery obligations. *See Reyeros*, 537 F.3d at 284 ("[T]he mere fact that documents may be obtainable is insufficient to establish constructive possession."). Instead, there must be a "showing that evidence is possessed by people engaged in the investigation or prosecution of the case." *Id.* Because the materials were in possession of non-governmental entities that were in no way working with the Antitrust Division or acting on its behalf, the Antitrust Division had no constructive possession of the materials and, correspondingly, no discovery

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possession of the government. *Cf. United States v. Gatto*, 763 F.2d 1040, 1048 (9th Cir. 1985) (concluding document production portion of Rule 16 does not have any "constructive possession extension" and that it therefore "triggers the government's disclosure obligation only with respect to documents within the federal government's actual possession, custody, or control").

However, while a different standard may apply for determining "custody" or "control" under Rule 16, it is unnecessary to reach this issue because Defendant has not shown how the alleged Rule 16 failings differ from those under *Brady* which, as noted *infra*, the Court concludes do not entitle Defendant to a new trial.

obligations that would entitle Defendant to a new trial.[22] Nor do Defendant's additional arguments that the Antitrust Division improperly denied Defendant access to foreign witnesses and improperly suppressed impeachment material by making redactions to the documents the Antitrust Division produced.[23]

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22. Although the Court therefore need not consider whether the evidence at issue was "material" as to constitute a *Brady* violation, Defendant's materiality argument is suspect. Defendant asserts the Morgan Board minutes, which Defendant ultimately received pursuant to a Rule 17(c) subpoena after the Antitrust Division rested, demonstrate a *Brady* violation because they showed that the Morgan Board had entered into the plea agreement for "political reasons." Assuming *arguendo* the Antitrust Division did have an obligation to turn over these materials, this evidence does not support Defendant's conclusory determination that the Morgan Board minutes create a reasonable probability of a different result.

23. Defendant's argument concerning foreign witnesses is largely the same as the one Defendant makes concerning his alleged entitlement to a missing witness instruction. In essence, Defendant contends that the Antitrust Division should have facilitated the witness' testimony in Defendant's trial because they had better access to the witnesses than the defense. However, because the facts demonstrate that Defendant was not denied access to foreign witnesses and because Defendant cannot demonstrate the requisite materiality under *Brady*, Defendant's argument fails. This is so even though the Antitrust Division redacted personal information from the witness list. Indeed, these redactions did not-as the Court has already held—prejudice Defendant's case. (*See* doc. no. 88 n. 4 ("Defendant does not indicate how the redaction of personal information has actually impeded his access to witnesses in preparation of his defense").)

Thus, the alleged discovery violations do not entitle Defendant to a new trial.

5. *Prosecutorial Misconduct in the Antitrust Division's Closing Argument and Rebuttal*

Finally, Defendant contends he is entitled to a new trial based on statements made by the Antitrust Division during the closing argument and rebuttal. Specifically, Defendant asserts the Antitrust Division impermissibly: (1) referred to several facts outside the record; and (2) turned the jury's verdict into a referendum on the prosecutor's integrity. Defendant, having failed to timely object at trial, raises these issues for the first time in the instant motion. Accordingly, the alleged prosecutorial misconduct is reviewed for plain error. *See United States v. Rose*, 538 F.3d 175, 177 n. 3 (3d Cir. 2008) ("As to prosecutorial misconduct, because [the defendant] did not object before the District Court, we review for plain error. . . ."). To satisfy this standard, "the review [of the record] must reveal 'egregious error or a manifest miscarriage of justice.' " *Unit-***[753 F. Supp. 2d 532]***ed States v. Brennan*, 326 F.3d 176, 182 (3d Cir. 2003). In undertaking this analysis, the

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For similar reasons, Defendant's argument that the Antitrust Division violated *Brady* by redacting notes of interviews produced during discovery is equally meritless. In rejecting this argument initially, the Court pointed to Defendant's speculation of material evidence under *Brady*: "Defendant proffers mere speculation that the Government has exculpatory evidence and these speculations are insufficient to compel disclosure." (Doc. no. 88 n. 4.) Defendant has still failed to show (or even mention) how the absence of redactions would have led to a reasonable probability of a different outcome.

court is cognizant that "[i]mproper conduct only becomes constitutional error when the *impact* of the misconduct is to distract the trier of fact and thus raise doubts as to the fairness of the trial." *Marshall v. Hendricks*, 307 F.3d 36, 67 (3d Cir. 2002).

i. *Reference to Facts Outside the Record*

Defendant first asserts that the Antitrust Division impermissibly made reference to facts outside the record. In particular, Defendant claims the closing argument was improper because it: (1) invited speculation as to grand jury proceedings for which there was no trial evidence; (2) stated that Defendant lied to David Coker when there was no evidence to that effect; (3) referred to Defendant's "big executive office" when there was no evidence of any such office; and (4) invoked the Enron scandal by referring to Emerson as "the smartest guy in the room"—a term that, according to Defendant, must have referred to "the best-selling account of the Enron scandal" titled "*The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron*." (Def.'s Mot. for Acquittal or, in the Alternative, a New Trial, at 172–73.)

Underlying Defendant's first three arguments is a narrow conception of what the prosecutor may do during closing argument. The last argument concerning the supposed allusion to Enron is unfounded speculation that requires no additional discussion.[24] Indeed, the prosecutor's first two

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24. Even if the Court were to credit as true Defendant's suggestion that the prosecutor must have been invoking the Enron scandal by using the popular term "the smartest guy in

statements concerning the grand jury and Coker were permissible as reasonable inferences that the jury could draw from the evidence presented. *See United States v. Green*, 25 F.3d 206, 210 (3d Cir. 1994) ("[T]he prosecutor is entitled to considerable latitude in summation to argue the evidence and any reasonable inferences that can be drawn from that evidence." (quoting *United States v. Werme*, 939 F.2d 108, 117 (3d Cir. 1991))); *see also Oliver v. Zimmerman*, 720 F.2d 766, 770 (3d Cir. 1983) ("It is not prosecutorial misconduct to ask the jury to draw permissible inferences from anything that appears in the record. . . .").

Defense counsel, apparently believing that a Section 1512(b) violation should be inherently suspect where there was no testimony presented to a grand jury, repeatedly questioned witnesses on cross-examination whether they had received a subpoena to testify before the grand jury. Given this evidence, the prosecutor could reasonably ask the jury to infer why no one had been subpoenaed—namely, because the scheme for which Defendant was prosecuted was successful. *Cf. United States v. Glover*, 558 F.3d 71, 79 (1st Cir. 2009) (prosecutor's question in closing, asking the jury "what other explanation can there be?" was proper; it was merely "appealing to the jurors' common sense in asking them to credit the government's explanation instead of the defendant's"). Similarly, there was ample evidence to

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the room," the facts of this case do not bespeak a manifest miscarriage of justice as to satisfy the plain error standard.

support the inference that Defendant lied to Coker.[25] **[753 F. Supp. 2d 533]**

And the prosecutor's third statement of a "big executive office" was a mere rhetorical device prosecutors may employ in summation after explaining they are stating "a matter of opinion not of evidence." *Donnelly v. DeChristoforo*, 416 U.S. 637, 646, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). Here, before making the reference Defendant complains of, the prosecutor clearly explained she was "just set[tting] the stage for [the jury], first, before we get started." (Tr. 19:19–20 (July 22, 2010 A.M.).) Consequently, the prosecutor's third statement was no error at all, let alone plain error. *Cf. Albela v. Martin*, 380 F.3d 915, 930 (6th Cir. 2004) (no reversible error where prosecutor presented hypothetical conversation to the jury because the prosecutor prefaced the conversation by explaining he was presenting his own beliefs).

Thus, the prosecutor's alleged references to facts outside the record are not grounds for setting aside Defendant's conviction and ordering a new trial.

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25. It is unnecessary to delve into the facts supporting this inference, however, because this isolated misstatement of the evidence would not, in any event, be grounds for granting Defendant's motion for a new trial. The evidence of Defendant's guilt is substantial and there was evidence introduced of similar lies being told by Defendant to others, such as Keany, in furtherance of the scheme.

ii. *Turning the Verdict into a Referendum on the Prosecutor's Work on the Case*

Defendant next contends he was prejudiced by the prosecutor's statements on rebuttal which "expressly equated a verdict of guilt or innocence of [Defendant] with a rejection or endorsement of the integrity of the prosecutor's work on the case." (Def.'s Mot. for Acquittal or, in the Alternative, a New Trial, at 173.) However, the prosecutor's statements on rebuttal were precipitated by defense counsel's closing argument and therefore served as a response to defense counsel that is best understood in the context of what occurred at trial.

Indeed, during Defendant's closing argument, the defense repeatedly attacked the Antitrust Division's case in an inflammatory manner. (*See* Tr. 69:17–29 (July 22, 2010 A.M.) (stating the prosecution's theory of the case that there was a "nefarious intent to all of this is made up. It's concocted, it's phony, and it melted away in the heat of this trial"); *id.* 83:1–3 ("Again, the suggestion that we're hearing from the prosecutors in this case, is whenever there's something that isn't obvious, they take a nefarious read on it.").) Some of these attacks were plainly personal, suggesting that the Antitrust Division's case was brought due to the ambition of the prosecutors. (*See id.* 86:18–21 ("The only relevance to the fact that [Defendant] was the CEO and had a CEO's office, is that that made him a target for ambitious prosecutors."); *id.* 100:12–14 ("There were a lot of witnesses, who appeared in this case, who lack character, who lack the backbone to stand up to Government Prosecutors, who want to try and win a case.").) In fact, defense counsel accused the

Antitrust Division of tampering with witnesses, explaining to the jury that Defendant's sole witness, Cox, bravely stuck to his story after the Antitrust Division employed a tactic that allegedly manipulated another witness, Muller, to acknowledge the meetings in question were price-fixing meetings after initially denying the same:

> And [Muller] goes to meet with the Government lawyers, and he's interviewed, and he said, yeah, I went to that Toronto meeting, and it was to deal with joint venture issues . . . .
>
> And then the Antitrust Division lawyers stand up and storm out with an implied, if not expressed threat, that if that account stays, then Mr. Muller will face the same type of prosecution that Mr. Norris has been going through. **[753 F. Supp. 2d 534]**
>
> So what happens? Mr. Muller suddenly has a change of heart, a dramatic change of account, and says, you know what? That meeting dealt—it didn't deal with joint ventures at all. It was a price-fixing meeting.
>
> . . .
>
> So Mr. Cox goes in for an interview, he provides his account about the Toronto meeting, the same meeting that Mr. Muller attended and what does the—what does the Antitrust Division attorneys do? They stand up and storm out the same way the [sic] had with Mr. Muller. It worked that time. Maybe it will work again with Mr. Cox. It didn't work. Mr. Cox had the backbone to stand up to the Antitrust Division and stick with the truth.

> Ladies and gentlemen, this case is about witness tampering, but I—I ask you, *who's doing the tampering in this case*? Mr. Cox showed character when he was subjected to the heat that a crucible generates. Mr. Muller fell apart.

(*Id.* 57:18–59:5 (emphasis added).)[26]

After the Defendant's closing and before rebuttal, the Antitrust Division asked for and received a side bar conference in which the Court and defense counsel were advised that the prosecutor considered defense counsel's statements a personal attack to which she would respond on rebuttal. (*See* Tr. 3:11–15 (July 22, 2010 P.M.) ("I want to respond to it. . . . I cleared it with my supervisors. I let them know what I was going to say. And I'm telling Your Honor that I'm going to respond. I can't let it go. It's a personal attack.").) The Court asked defense counsel for his response. No objection was lodged. (*See id.* 3:22–24.) Thus, the prosecutor conveyed the following to the jury at the conclusion of her rebuttal:

> And finally, ladies and gentlemen, you heard Mr. Curran say, both in his opening and in this closing, that the only people who were influencing witnesses here, the only influencing of witnesses that was done, was done by the Government attorneys, by Mr. Rosenberg and myself. And that's an incredibly serious charge to level against career prosecutors.

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26. If defense counsel had evidence pretrial that the Antitrust Division tampered with witnesses, it should have moved to dismiss the indictment for prosecutorial misconduct. *See United States v. Nolan-Cooper*, 155 F.3d 221, 229 (3d Cir. 1998) (outlining standard for dismissal of indictment based on outrageous government conduct).

That we were here for one week, trying this case, doing our job, defending the laws of this country, against those who would ignore them and hold them in such low regard. Willing to put the Government's evidence in your hands, the hands of the jury, the guardians of our criminal justice system, so you could decide the fate of Mr. Norris. To personally and viciously disparage us by saying that we did all that because of an over—not because of the overwhelming evidence that we had, or the powerful evidence that we had, but because of some malicious unspecified motive that we harbor to influence the testimony of the Government witnesses.

Ladies and gentleman, over the past week, you saw and heard the witnesses. You've seen the evidence. It's up to you to judge their credibility and decide whether you believe them or not. It's up to you to weigh the evidence, and it's up to you, not Mr. Rosenberg, not me, but you, to convict or acquit Mr. Norris.

You've watched Mr. Rosenberg and me over this past week. And you also had an opportunity to watch Mr. Curran and Mr. Gidley and their team of lawyers. You decide the legitimacy of that **[753 F. Supp. 2d 535]** Defense. I submit, ladies and Gentlemen, that smacks of desperation.

I submit, ladies and gentlemen, that those personal attacks on Mr. Rosenberg and myself are evidence of a desperate, desperate Defense. Evidence that we've not only done our jobs, but we've done our jobs well.

And at the end of the day, ladies and gentlemen, before we leave this trial, it's you,

> whether or not Mr. Norris is convicted or acquitted, it's up to you; not Mr. Rosenberg or not myself. You have the last word on Mr. Norris's guilt or innocence. You have the last one word; guilty. Thank you.

(Tr. 11:12–12:25 (July 22, 2010 P.M.).) Defendant did not object at any point during or after the Antitrust Division's rebuttal. Now, however, Defendant claims the prosecutor's rebuttal statements entitle him to a new trial, pointing to *United States v. Gracia*, 522 F.3d 597 (5th Cir. 2008) where the Fifth Circuit held the prosecutor's bolstering of witness testimony was plain error. The Court disagrees because this case is different from *Gracia* and cases like it.

Indeed, unlike *Gracia*, the prosecutor's rebuttal in this case did not vouch for the witness' credibility or ask the jury to believe the witnesses simply because the prosecutors were doing their job. *Cf. id.* at 600 (holding prosecutor's statements were plain error where prosecutor told the jury that an acquittal of defendant would mean that they believed the agents "got out of bed" on the day they arrested the defendant and decided this was "the day that [they] were going to start [a] conspiracy to wrongfully convict [the defendant]"). Instead, and in sharp contrast, the prosecutor's rebuttal was a measured response to a personal attack lodged by defense counsel. Such responses are appropriate and not grounds for setting aside a defendant's conviction. *See United States v. Young*, 470 U.S. 1, 12–13, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985) (explaining that, "if the prosecutor's remarks were 'invited,' and did no more than respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction"); *see also United States v. Torres*, 809 F.2d

429, 437 (7th Cir. 1987) ("In light of defense counsels' arguments that the Government's witnesses were coached, programmed, and intimidated, the prosecutor's statements vouching for his witnesses and asserting their bravery were fair responses." (emphasis omitted) (quoting *United States v. Saenz*, 747 F.2d 930, 941 (5th Cir. 1984))).

Moreover, putting aside the fact that the prosecutor's response was tailored to responding to defense counsel's summation, Defendant's right to a fair trial was not substantially affected by the prosecutor's rebuttal. After closing arguments, when charging the jury, the Court explicitly instructed that statements made by the attorneys are not evidence to be considered in deliberation. (*See* (Tr. 15:11–18 (July 22, 2010 P.M.).) This cured the prejudice Defendant now alleges. *See United States v. Retos*, 25 F.3d 1220, 1224 (3d Cir. 1994) ("Even if a prosecutor does make an offending statement, the district court can neutralize any prejudicial effect by carefully instructing the jury 'to treat the arguments of counsel as devoid of evidentiary content.' " (quoting *United States v. Somers*, 496 F.2d 723, 738 (3d Cir. 1974))).

Thus, given that the prosecutor's rebuttal statements were a reasonable invited response and that any prejudice was cured by the Court's subsequent instruction, the prosecutor's statements are not plainly er-**[753 F. Supp. 2d 536]**roneous as to be grounds for ordering a new trial.[27] *See Moore v.*

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27. This conclusion is buttressed by the fact that, despite being presented at least three opportunities to object-at side bar, during the rebuttal and at the conclusion of the rebuttal-defense counsel remained conspicuously silent. *See United*

Morton, 255 F.3d 95, 113 (3d Cir. 2001) ("When the evidence is strong, and the curative instructions adequate . . . the prosecutor's prejudicial conduct does not deprive a defendant of a fair trial.").

V. CONCLUSION

For the foregoing reasons, Defendant's motion for a judgment of acquittal or, in the alternative, a new trial will be denied.

ORDER

AND NOW, this **30th** day of **November, 2010,** it is hereby **ORDERED** that Defendant's motion for a judgment of acquittal or, in the alternative, a new trial (doc. no. 159) is **DENIED;**

It is hereby further **ORDERED** that Defendant's motion for leave to file a reply memorandum in support of Defendant's motion (doc. no. 196) is **GRANTED.**

AND IT IS SO ORDERED.

States v. Bethancourt, 65 F.3d 1074, 1080 (3d Cir. 1995) (holding prosecutor's remarks were not plain error because, amongst other things, "Defense counsel . . . [was] articulate and experienced" but "at the time of the prosecution's remarks, he heard nothing in the Government's response warranting any objection whatsoever").

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 03 Cr. 632 (ECR)

IAN P. NORRIS,

Petitioner

v.

UNITED STATES,

Respondent.

[722 F. Supp. 2d 632]

***

[722 F. Supp. 2d 634]

MEMORANDUM[1]

Eduardo C. Robreno, U.S.D.J. JULY 12, 2010

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1. This memorandum represents the Court's findings of fact and conclusions of law.

I. BACKGROUND

The Defendant Ian Norris ("Norris") contends that attorney Sutton Keany ("Keany") individually represented him while he served as a corporate officer of the Morgan Crucible Company plc ("Morgan"), a British corporation, during the period the United States Department of Justice Antitrust Division (the "Antitrust Division") was investigating Morgan for involvement in a price fixing conspiracy.

Norris argues Keany dually represented him individually and Morgan as a corporation. Morgan has waived the attorney-client privilege. Norris contends, however, that admission of Keany's testimony would violate the attorney-client privilege as it applies to him. Defendant also moves to suppress written non-contemporaneous summaries ("scripts") of what employees claimed had occurred at meetings attended with Morgan's competitors.

On July 6, 2010, the Court held an evidentiary hearing to determine whether Keany individually represented Norris. On July 9, 2010, the Court heard argument on the matter. This issue is presently before the Court.

After consideration of the testimony presented at the evidentiary hearing, the Government's proposed findings of facts (doc. no. 103), Defendant's proposed findings of facts (doc. no. 101) and arguments of counsel, below are the facts the Court finds to be true.

II. FINDINGS OF FACT

A. The Grand Jury Investigation

1. On or about April 27, 1999, Morganite (a U.S. subsidiary of Morgan) was served with a subpoena by

the federal grand jury sitting in the Eastern District of Pennsylvania investigating alleged price fixing ("April 1999 Subpoena"). *See* Indict. ¶ 12; Hrg. Tr. 11:8–15.

2. Morgan retained Winthrop Stimson, Putnam & Roberts (the "Law Firm") to handle Morganite's response to the April 1999 Subpoena and to conduct its own internal investigation. Hrg. Tr. 11:8–15,102:25–103:1–6. **[722 F. Supp. 2d 635]**

3. The Law Firm's "relationship partner" for Morgan was, former partner, Jerry Peppers ("Peppers"). Hrg. Tr. 14:14–18; 15:2–8.

4. Peppers assigned the matter to his partner at that time, Keany, who became the principal partner handling the grand jury matter for Morgan. Hrg. Tr. 11:8–18.

5. Between April 1999 and August 2001, Keany was the primary contact with attorneys from the Antitrust Division. *See* DX–3, DX–4, DX–24, GX–44, GX–101, GX–102, GX–103. Between April 1999 and approximately August 2000, the investigation involved mainly document gathering and production in the United States. *See* Hrg. Tr. 58:23–25.

B. The Meeting Summaries ("Scripts")

6. On August 30, 2000, in the course of his internal investigation, Keany asked Morgan executives to "[p]rovide any documents (located in the U.S. and abroad) describing or referring to any meeting or other communication between (i) any of the relevant individuals and (ii) representatives of any competitor in the relevant business area, particularly Carbone." DX–4 (Email from S. Keany to

B. Dunlap, D. Coker, and J. Peppers re: Draft Document Request, dated August 30, 2000).

7. As part of his investigation of the grand jury matter, Keany later interviewed Morgan executives in Windsor, England. During his first interview, Keany learned that Norris' subordinates had drafted non-contemporaneous meeting summaries ("scripts") of the competitor meetings. Hrg. Tr. 35:13–25–36:1–11. The first Morgan executive to be interviewed had the notes with him at the interview and appeared to be consulting the notes during the interview. Hrg. Tr. 35:18–24. When Keany asked about the notes, the Morgan executive showed Keany the notes and told him they were drafted after an internal meeting (chaired by a Morgan executive, Mr. McFarland) convened to discuss Morgan's alleged price fixing meetings with their business competitors, which were of interest to the Antitrust Division. Hrg. Tr. 35:21–25–36:1–11.

8. After the first interview, Keany spoke with Norris, during lunch in the Morgan cafeteria, and mentioned the existence of the scripts to Norris and David Coker ("Coker"), Morgan's "chief administrator." Hrg. Tr. 80:19–21; 17:16–19; 81:10–12.

9. Keany told Norris and Coker that Morgan was not under a legal duty to produce the scripts to the grand jury in response to the subpoena because they were not located in the United States. Hrg. Tr. at 39:14–23. But Keany expressed his opinion that the content of the scripts would be helpful and that he wanted to provide them to the Antitrust Division. Hrg. Tr. 81:21–22. Keany believed the scripts supported Morgan's position in the investigation that Morgan had met with competitors only for lawful

reasons, i.e., to discuss legitimate joint ventures that existed between the companies. Hrg. Tr. 39:14–18; 63:4–16; 64:1–14; 68:11–18.

10. Norris and Coker agreed to let Keany produce the scripts to the Antitrust Division. Hrg. Tr. 40:3–16; 81:6–25–82:1–17.

11. Keany then reached an agreement with the Antitrust Division that by providing certain documents, including the scripts (the "selected documents"), Morgan would not waive its right not to produce other foreign-based documents. GX–44; Hrg. Tr. 40:23–25–41:1–16.

12. On November 29, 2000, Keany sent an email to Norris telling him that the Antitrust Division was prepared to permit Morgan "to produce a copy of the [selected **[722 F. Supp. 2d 636]** documents] related to the [joint venture] meetings" without waiving its right not to produce other documents. Keany wrote to Norris that he proposed producing the selected documents subject to any comments Norris or others who were copied on the email might wish to make. GX–44; Hrg. Tr. 41:8–25–42–1:10. Norris did not object to Keany's proposal to send the scripts to the Antitrust Division. Hrg. Tr. 42:1–10.

13. On December 21, 2000, Keany sent an email to Norris, Peppers, Coker and others, informing Morgan recipients that he would be producing the selected documents to the Antitrust Division, but did not specifically identify the scripts as being part of the documents produced. DX–11 (S. Keany email to I. Norris cc: F. Wollman, D. Coker, J. Peppers, B. Dunlap et. al., dated Dec. 21, 2000).

14. Keany mailed the selected documents, including the scripts, to the Antitrust Division on December 21, 2000. DX–12

15. Sometime later (not specifically identified), Coker called Peppers to complain that he felt Keany produced the selected documents without authorization. Hrg. Tr. 109:2–22.

C. The Scope of Keany's Representation

16. Keany met at least twice with Norris in connection with the grand jury investigation. They also spoke on occasion in the Morgan cafeteria at lunch and by telephone. Hrg. Tr. 17:20–24. Each time they met, Keany initiated the meeting. Hrg. Tr. 32:22–25–33:1–3.

17. On July 30, 2001, the Antitrust Division sought confirmation of the scope of Keany's client representation in the matter. GX–101 (Letter from L. McClain to S. Keany dated July 30, 2001); Hrg. Tr. 29:1–4.

18. That same day, Keany wrote an email to Messrs. Coker and Wollman, copying Messrs. Dunlap and Peppers, informing them of the Antitrust Division's request. Keany stated, "I told her that there was no mystery at all: this [Law 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." GX–102 (Email from S. Keany to F. Wollman, D. Coker. cc: J. Peppers, B. Dunlap).

19. On July 31, 2001, Keany responded by letter to the Antitrust Division:

> I am responding to your letter of July 30, 2001. . . . As you know, this [Law Firm] represents Morganite Industries, Inc. and its parent company, The Morgan Crucible Company plc, in connection with matters related to the investigation which you are conducting on behalf of the Division. 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 employees, I assume that we would also represent those individuals.

GX–101 (Letter from S. Keany to L. McClain dated July 30, 2001).

20. Keany's intent in sending the letter to the Antitrust Division was to ensure that he would be made aware if the grand jury subpoenaed Morgan employees. Hrg. Tr. 29:20–23; 30:12–13.

21. Keany was "at [Norris'] side" during an interview Norris has with Canadian Antitrust authorities as part of his corporate representation of Morgan. Hrg. Tr. **[722 F. Supp. 2d 637]** 84:4–21. Keany also appeared with Norris, at an earlier, unrelated, sworn interview of Norris by the Federal Trade Commission, as part of his corporate representation of Morgan. Hrg. Tr. 53:3–13.

22. At some earlier date, the Law Firm also provided Norris with a letter identifying the Law Firm as Norris' counsel in case he encountered difficulties with immigration officials, while crossing

the border into the United States. Hrg. Tr. 106:10–14.

23. Peppers understood the Law Firm also represented Norris personally. Hrg. Tr. 105:15–25. In late September 2001, Norris asked Peppers "if [Keany] could continue to represent [Norris]." Hrg. Tr. 119:7. However, Peppers did not witness Norris ask Keany or any other attorney to personally represent Norris. Hrg. Tr. 120:20–25.

24. Keany understood that he represented Morgan as a corporate entity, and not Norris as an individual. Hrg. Tr. at 21:23–25–22:1–25; 23:1–3; 31:21–25; 33:4–9. Keany told Norris that he represented the company (Morgan) and did not represent Norris personally. He also advised Norris to hire independent counsel. Hrg. Tr. 22:2–25; 23:1–3; 33:4–9;.

25. At no time did Norris ask Keany to represent him personally. Hrg. Tr. 21:23–25–22:1. Norris and Keany never discussed personal legal matters. Everything they discussed in connection with the investigation solely concerned Morgan/Morganite business and corporate matters. Hrg. Tr. 25:17–25–26:1–12.

26. Morgan (and its subsidiaries and affiliates, including Morganite) has waived its attorney-client privilege as to communications with Keany regarding his representation of Morgan in connection with the grand jury investigation. GX–100

After consideration of the Defendant's motion to suppress and the Government's motion to permit Keany's testimony, the parties' opposition thereto, and testimony given at the evidentiary hearing and

oral argument on the motions, the issue is now ready for disposition.

III. CONCLUSIONS OF LAW AND DISCUSSION

A. *Applicable Law*

The attorney-client privilege is designed to encourage uninhibited communication between clients and their attorneys. *Haines v. Liggett Group, Inc.,* 975 F.2d 81, 90 (3d Cir. 1992). Under both federal and Pennsylvania law, corporate officers and directors may not claim a privilege for communications made to counsel in their corporate capacities. *In the Matter of Bevill, Bresler and Schulman Asset Management Corporation,* 805 F.2d 120, 124–25 (3d Cir. 1986); *Maleski by Chronister v. Corporate Life Ins. Co.,* 163 Pa.Cmwlth. 36, 641 A.2d 1, 4 (1994).

To assert a claim of attorney-client privilege as to communications with corporate counsel, corporate officers must demonstrate that:

> First, they must show they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And, fifth, they must show that the substance of their conversations with [counsel] did not concern **[722 F. Supp. 2d 638]** matters within the company or the general affairs of the company.

Bevill, 805 F.2d at 123 (citing *In re Grand Jury Investigation,* 575 F. Supp. 777, 780 (N.D. Ga. 1983)); *Maleski,* 641 A.2d at 4–5 (adopting the five-part *Bevill* test for the purpose of Pennsylvania law). "[T]he party asserting the privilege bears the burden of proving the existence of each element of the privilege." *United States v. Fisher,* 692 F. Supp. 488, 490–91 (E.D. Pa. 1988).

On this issue, *Bevill* is controlling. In *Bevill,* the Third Circuit affirmed Judge Debevoise's holding that corporate officers could not assert individual attorney-client privilege to prevent the disclosure of corporate communications with corporate counsel after the corporation's privilege was waived. In making his determination, Judge Debevoise relied on the test formulated by a Georgia district court. *See In re Grand Jury Investigation,* 575 F. Supp. 777, 780 (N.D. Ga. 1983) (relying in turn on *In re Grand Jury Proceedings, Detroit, Mich., Aug. 1977,* 434 F. Supp. 648 (D.C. Mich. 1977) (finding that a corporation has waived its privilege and since a corporation can act only through its officers, corporate officer could not assert the attorney-client privilege as to matters involving the affairs of the corporation); *In re Grand Jury Subpoena Duces Tecum,* 391 F. Supp. 1029 (D.C.N.Y. 1975) (finding that individual claiming privilege must: (1) inform the counsel that he (the individual) is consulting and communicating with the counsel as an individual rather than as a representative of the corporation; and (2) the attorney must see fit to accept and give communication, knowing the possible conflicts that could arise)).

Subsequently, numerous district courts within the Third Circuit have approvingly applied the *Bevill* test

in situations similar to this case. *See e.g., Applied Technology Intern., Ltd. v. Goldstein,* No. 03–848, 2005 WL 318755, *3 (E.D. Pa. Feb. 7, 2005) (applying *Bevill* and finding that corporate officer did not seek legal advice as an individual and officer made no showing the communications related to personal matters); *U.S. ex rel. Magid v. Wilderman,* No. 96–4346, 2006 WL 2346426, *4 (E.D. Pa. Aug. 10, 2006) (finding that corporate officer presented no evidence to satisfy the *Bevill* test and could not sustain personal privilege claim); *First Fidelity Bancorporation v. National Union Fire Ins. Co. of Pittsburgh, PA.,* 1992 WL 6781, *1 (E.D. Pa. Jan. 14, 1992) (denying privilege claim because officer failed to meet burden of presenting evidence to satisfy the *Bevill* test).

Moreover, the First, Second, Ninth and Tenth Circuits have referred to *Bevill* as the controlling authority in the Third Circuit in cases where an employee seeks to assert the attorney-client privilege to bar disclosure by the corporation of privileged communications after the corporation has waived the attorney-client privilege. *See In re Grand Jury Subpoena,* 274 F.3d 563, 571 (1st Cir. 2001) (adopting the reasoning and test in *Bevill*); *United States v. Int'l Bhd. of Teamsters,* 119 F.3d 210, 215 (2d Cir. 1997) (listing *Bevill* requirements and stating the corporate officer could not meet them in that case); *United States v. Ruehle,* 583 F.3d 600, 608 n. 7 (9th Cir. 2009) (noting, but not adopting *Bevill's* standard); *Grand Jury Proceedings v. United States,* 156 F.3d 1038, 1041 (10th Cir. 1998) (finding that the district court incorrectly applied the fifth prong of the *Bevill* standard).

B. *Application of the Bevill Factors*

Defendant has not satisfied that he sought legal advice or representation from the Law Firm in general or from Keany specifically. **[722 F. Supp. 2d 639]**

First, Norris did not approach the Law Firm or Keany for legal representation. The evidence showed that the Law Firm was contacted by Morgan (an existing client of the Law Firm); through Peppers, to represent it during the grand jury investigation. At no time, did Norris ask the Law Firm or Keany specifically to represent him personally during the grand jury investigation.[2] The conversation between Peppers and Norris where Norris asked Peppers whether Keany could "continue to represent him," is not to the contrary. That conversation reportedly occurred in late September 2001, a month prior to the termination of the Law Firm's representation of Morgan, and long after the scripts had been produced by Morgan to the grand jury. *Bevill,* 805 F.2d at 123 (prongs # 1 & 2); *see* Findings of Fact ¶¶ 2–4; 22–24.

Second, at no time did Keany think that he was representing Norris individually. In fact, at some point during Keany's representation of Morgan, he advised Norris that he should retain separate counsel. *Bevill,* 805 F.2d at 123 (prong # 3); *see* Finding of Fact ¶ 24.

Third, the conversations between Norris and Keany only involved matters within Morgan or the business affairs of Morgan. At the hearing, Norris failed to adduce any conversation with Keany which

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2. Peppers is not a totally disinterested party since, as he testified, Peppers is a personal friend of Norris.

was confidential or which dealt with Norris' personal liability or criminal exposure as opposed to Morgan's. *Bevill,* 805 F.2d at 123 (prongs # 4 & 5); *see* Finding of Fact ¶ 25.

Defendant's position on the issue of Keany's representation is two fold. First, Norris points to the July 31, 2001, letter to the Antitrust Division where Keany writes, "[w]e presumptively also represent all current employees of the companies in connection with the matter. . . . Should you wish to call other current employees [to the grand jury], I assume that we would also represent those individuals." Letter from Sutton Keany to Lucy P. McClain, dated July 31, 2001. The force of this letter is unclear, but by no means establishes that the representation was individual rather than corporate. First, the use of the words "presumptively" and "I assume we would represent all [of Morgan's] employees" appears to refer to a future decision to be made, if and when, the employees, including Norris, were called before the grand jury. Second, the letter was addressed to the Antitrust Division and appeared designed to designate Keany as the contact person in the event the grand jury issued subpoenas, rather than an entry of appearance on behalf of unnamed and unidentified employees.

Defendant's second argument in support of his claim of attorney-client privilege is that Peppers testified that Norris asked Peppers if Keany would continue to represent him (Norris). Defendant has not presented evidence that Norris did, in fact, ask Keany to represent him individually or that Keany ever agreed to represent Norris individually. As discussed above, the exchange occurred in late September 2001:(1) shortly before Keany's

representation of Morgan ended (October or November 2001) and (2) long after the documents at issue had been produced (December 21, 2000).

While establishment of an attorney-client relationship "is not dependent . . . upon execution of a formal contract," the burden of demonstrating that a privileged relationship exists nonetheless rests on the party who seeks to assert it. *See United* **[722 F. Supp. 2d 640]** *States v. Costanzo,* 625 F.2d 465, 468 (3d Cir. 1980).

Under these circumstances, Defendant can claim no attorney-client privilege which would bar Keany's testimony at trial or which would trump Morgan's waiver of the attorney-client privilege.[3]

C. *Relevance of Keany's testimony*

Keany's testimony would include: (1) when Keany interviewed Norris and his subordinates in connection with the internal investigation, they all told him the same story they had agreed to tell about their price-fixing meetings; (2) Norris and Coker authorized him to provide the meeting summaries to

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3. There are two additional grounds which counsel in favor of denying the Defendant's motion to suppress. First, because Defendant did not create the scripts himself, and the scripts were distributed to several people within the company, he lacks standing to prevent Morgan from waiving the privilege. *United States v. Rockwell Intern.*, 897 F.2d 1255, 1265 (3d Cir. 1990). Second, to the extent the crime-fraud exception applies, it does appear that the Government has made a prima facie showing that Norris was intending to commit a fraud and that the attorney-client communications were in furtherance of that alleged crime or fraud. See *In re Grand Jury Subpoena*, 223 F.3d 213, 217 (3d Cir. 2000).

the Government; and (3) he provided these summaries, later determined to be false, to the Government. This testimony is directly relevant to the obstruction of justice charges and Defendant's role in the events. Accordingly, a jury could infer from this evidence Defendant's intent to obstruct justice. Thus, evidence of Defendant's role in the obstruction of justice scheme is necessary to prove the essential elements of the charged offense. Fed. R. Evid. 402. Finally, given the importance of the testimony, the probative value is not substantially outweighed by the dangers of unfair prejudice, confusion to the jury or waste of time. Fed. R. Evid. 403.

IV. CONCLUSION

For the reasons set forth above, the Court will deny Defendant's motion to suppress and grant the Government's motion to permit the testimony of Sutton Keany. An appropriate order follows.

ORDER

AND NOW, this **12th** day of **July, 2010,** it is hereby **ORDERED** that:

1. Government's motion in limine for an order to permit the testimony of Sutton Keany (doc. no. 58) is **GRANTED.**
2. Defendant's motion to suppress (doc. no. 45) is **DENIED.**

AND IT SO ORDERED.

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

No. 03 Cr. 632 (ECR)

IAN P. NORRIS,

Petitioner

v.

UNITED STATES,

Respondent.

July 19, 2010

9:39 a.m.

TRANSCRIPT OF JURY TRIAL BEFORE THE
HONORABLE EDUARDO C. ROBRENO
UNITED STATES DISTRICT JUDGE

* * *

[The Court – Ruling]

* * *

THE COURT: The Court has considered the motion for reconsideration. The motion will be denied.

And I will state my preliminary thinking on this matter as to why I have so found.

The Third Circuit in the Haskell Corp. at 779 F.2d 906, provided a general purpose of a motion for reconsideration as one intended to, "Correct manifest errors of law or fact, or to present newly discovered evidence."

Reconsideration is appropriate:

"When the party seeking reconsideration establishes, one, an intervening change in the controlling law. Two, the availability of new evidence that was not available when the Court issued its prior decision. Or, three, the need to correct an error of law or fact, or to prevent manifest injustice."

And that's Max Seafood Café, 176 F.3d 669 at 677 Third Circuit (1999).

In this case, we begin with the question of whether reconsideration in the case involves newly discovered evidence. The motion for reconsideration in this case was filed on July 15th.

So let me just retrace our steps here as to how we got to where we are today.

The initial motion to permit the testimony of Mr. Keany was filed on June 1st, 2010. The Court scheduled a **[54]** hearing July 6th, at which time Mr. Keany testified and Mr. Peppers testified.

The Court then asked for proposed findings of fact and conclusions of law, which the parties timely submitted. The Court heard arguments on Friday, July 9th. And the Court issued its decision on July 12th. On Monday, including detailed findings of facts and conclusions of law in this case.

As I said, this instant motion was then filed on July 15th, and argument was heard this morning, after the Government had a opportunity to respond.

Additionally, it is worth noting that, as we all know, the grand jury investigation in this case dates back to 1999, as far as the Morgan Company is concerned.

And the indictment of the defendant dates back to 2004. The Court does not consider the three documents which the defendant has produced to date to be newly discovered evidence, because they were at all times in the possession of the defendant.

One -- or, two, they were accessible by either subpoenas to Morgan, or to the law firm. There is no question that defendant knew of the existence of these documents, in that it was the defendant's counsel, who through cross-examination of the witnesses at the hearing on July 12th, identified and pursued the existence of these documents.

There was no request for a continuance or request to **[55]** enforce a subpoena that would have produced the documents from parties other than Mr. Norris.

And the explanation that, although Mr. Norris knew that he had legal papers, but that they were unaccessible because they were, as part of his property was apparently partially blocked by an automobile and some heavy boxes, given the seriousness with which Mr. Norris, as he's entitled to,

has litigated this matter, and the excellent work that his law firm has provided, is, frankly, unconvincing.

At the hearing on July 12th, as I have indicated, it was Mr. Norris's counsel, that though skillful cross-examination, brought out the existence of the letters, and the witness who testified about them, Mr. Peppers, if not a friend of Mr. Norris, as he contended at the hearing, is at least, I think we would all agree, not hostile to him.

So a further discussion with Mr. Peppers, I think, would have elucidated the existence of and location of these documents at a much earlier point.

All of the interests that are served by the law on motion for reconsideration, provide for some finality of the judgments, even when those judgments are of an interlocutory basis.

After the parties have briefed the issues, witnesses have testified, findings of facts and conclusions of law have been issued, argument have been taken, it would undermine the **[56]** fundamental fairness of a trial, and the purpose of the jurisprudence on reconsideration to commit the admission of documents, when the documents were in the possession of the defendant all along, and where good cause has not been shown for their late production.

Now assuming that the Court would reconsider its earlier motion, the Court finds that the defendant, again, 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.

The three documents which were produced today, support what appears to the Court to be the case at the time of the hearing, and that is that the law firm provided general advice to senior executives concerning immigration matters, in case they were detained at a border crossing during the course of the company's business.

Upon close examination, they do not add to the Court's previous calculus that no attorney/client relationship between Mr. Norris individually, and the law firm, and/or Mr. Keany, was sought by Mr. Norris, or otherwise established at any relevant time concerning the law firm's, or Mr. Keany's representation of Mr. Norris in connection with a Grand Jury investigation emanating from the Eastern District of Pennsylvania. **[57]**

Now assuming that the Court would reconsider the July 12th ruling, and that Mr. Norris could meet the burden of establishing an attorney/client relationship with Mr. Keany, and/or the law firm, the Court finds, as it did in its memorandum of July 12th, that the fraud crime exception to the attorney/client privilege would permit Mr. Keany's testimony here today.

As the Third Circuit pointed out in In Re Grand Jury Proceedings at 604 F.2d 792 at 802.

"The attorney/client privilege is designed to encourage clients to make full disclosure of facts to counsel, so that counsel may properly competently and ethically carry out its representation. Its ultimate aim is to promote the proper administration of justice. Thus, when a lawyer is consulted, not with respect to past wrongdoing, but to future illegal activities, the privilege is no longer defensible, and the crime fraud exception comes into play."

As I indicated earlier, it seems to me that all of the purposes and objectives for which the attorney/client privilege is invoked, are by necessity cast away when that privilege is put to the service of criminal activity.

In doing so, the Government bears the initial burden of proving a prima facie case of a crime or fraud. To make this prima facie showing, the Government must demonstrate:

"The client was committing or intending to commit a fraud **[58]** or a crime. And, two, the attorney/client communications were in furtherance of that alleged crime or fraud."

In Re Grand Jury Subpoena, 223 F.3d, 213 at 217.

This prima facie showing requires that the Government present evidence, which if believed by the fact finder, will be sufficient to support a finding that the elements of the crime fraud exception were met.

That is also addressed In Re Grand Jury Subpoena, quoting from Haines v. Liggitt Group at 975 F.2d 81, 95, 96.

In this case, the Court concludes that the burden has been met, because the evidence here at trial, by virtue of the testimony of a number of the witnesses called by the Government, if believed by the fact finders, would be sufficient to support a finding that the defendants and others communicated with Mr. Keany and provided evidence -- strike that.

Communicated with Mr. Keany, as part and parcel of a scheme to obstruct justice. Partially by providing Mr. Keany with false information that Mr. Keany would provide to the Government, in an effort to

disguise or manufacture false evidence that may coverup what the defendant may have thought was prior criminal conduct.

Specifically, Mr. Keany -- Mr. Norris -- strike that. Mr. Norris authorized Mr. Keany to turn over false scripts to the United States Antitrust Division. **[59]**

Under those circumstances, the Court believes that the Government has made out a prima facie showing that in consulting Mr. Keany, Mr. Norris intended to commit a crime, and that the communications between Mr. Norris and Mr. Keany, as to which Mr. Keany intends to, it's proposed that he testified about today, were made in furtherance of the crime of obstruction of justice.

So for all of those reasons, Mr. Keany will be permitted to testify, and the motion for reconsideration will be denied. Okay?

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APPENDIX F

STATUTORY PROVISIONS

Presented below are the current versions of 18 U.S.C. §§ 1512, 1503 and 1505. Any amendments to these statutory provisions after 1999 are set forth in the footnotes.

18 U.S.C. § 1512.[1] Tampering with a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person, with intent to--

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).[2]

(2)[3] Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to--

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[1] Section 1512 was amended in 2002 and 2008.

[2] The 2002 Amendments substituted "as provided in paragraph (3)" for "as provided in paragraph (2)".

[3] The 2002 Amendments redesignated former paragraph (2) as (3) and inserted a new paragraph (2).

(A) influence, delay, or prevent the testimony of any person in an official proceeding;

(B) cause or induce any person to--

(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv) be absent from an official proceeding to which that person has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(3)[4] The punishment for an offense under this subsection is--

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[4] The 2002 Amendments redesignated former paragraph (2) as (3).

(A)[5] in the case of a killing, the punishment provided in sections 1111 and 1112;[6]

(B)[7] in the case of--

(i) an attempt to murder; or

(ii) the use or attempted use of physical force against any person;

imprisonment for not more than 30 years;[8] and

(C)[9] in the case of the threat of use of physical force against any person, imprisonment for not more than 20 years.[10]

(b) Whoever knowingly uses intimidation,[11] threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to--

(1) influence, delay, or prevent the testimony of

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[5] The 2002 Amendments struck out "and" at the end of subparagraph (A).

[6] The 2008 Amendments rewrote subparagraph (A), which formerly read: "(A) in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case of any other killing, the punishment provided in section 1112;".

[7] The 2002 Amendments struck out former subparagraph (B) and inserted a new subparagraph (B).

[8] The 2008 Amendments struck out "20 years" and inserted "30 years."

[9] The 2002 Amendments added subparagraph (C).

[10] The 2008 Amendments struck out "10 years" and inserted "20 years."

[11] The 2002 Amendments substituted: "Whoever knowingly uses intimidation," for "Whoever knowingly uses intimidation or physical force,".

any person in an official proceeding;

(2) cause or induce any person to--

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release,,[12] parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than 20 years, or both.[13]

(c)[14] Whoever corruptly--

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[12] The 2002 Amendments inserted "supervised release," following "probation".

[13] The 2008 Amendments struck out "ten years" and inserted "20 years."

[14] The 2002 Amendments inserted a new subsection (c).

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

(d)[15] Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from--

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release,,[16] parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or

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[15] The 2002 Amendments redesignated former subsection (c) as (d).

[16] The 2002 Amendments inserted "supervised release," following "probation".

imprisoned not more than 3 years, or both.[17]

(e)[18] In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(f) For the purposes of this section--

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance--

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal

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[17] The 2008 Amendments struck out "one year" and inserted "3 years."

[18] The 2002 Amendments redesignated subsections (d) to (i) as subsections (e) to (j), respectively.

Government or serving the Federal Government as an adviser or consultant.

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(k)[19] Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

18 U.S.C. § 1503. Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing

[19] The 2002 Amendments added subsection (k).

magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is--

(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

18 U.S.C. § 1505.[20] Obstruction of proceedings before departments, agencies, and committees

* * *

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress--

Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.[21]

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[20] Section 1505 was amended in 2004.

[21] The 2004 Amendments substituted "be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both" for "be fined under this title or imprisoned not more than 5 years, or both."

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

No. 03 Cr. 632 (ECR)

IAN P. NORRIS,

Petitioner

v.

UNITED STATES,

Respondent.

July 22, 2010

1:12 p.m.

TRANSCRIPT OF JURY TRIAL BEFORE THE
HONORABLE EDUARDO C. ROBRENO
UNITED STATES DISTRICT JUDGE

* * *

[Charge – Court]

[28]

* * *

THE COURT:

* * *

I will now explain to you the offenses with which the defendant has been charged and the law that you must apply in this case. You are to determine the guilt or innocence of the defendant only as to the specific charge brought against him by the Government. Such a charge are the only charges **[29]** before you for consideration. The defendant is not on trial for any conduct not charged as a crime in the indictment.

So let me summarize first the indictment for you. The indictment in the case alleges that Ian Norris has been charged in three counts.

Count 2 charges the defendant with conspiring with others to obstruct justice, by permitting an offense against the United States by (1) knowingly corruptly persuading and knowingly attempting to corruptly persuade other persons with intent to influence their testimony in the grand jury proceedings in the Eastern District of Pennsylvania. Now hereinafter, all references to the grand jury proceeding refer to the grand jury proceedings in the Eastern District of Pennsylvania so I don't have to repeat it every time. So any references to the grand jury proceeding refer to the grand jury proceeding in the Eastern District of Pennsylvania.

And (2), by knowingly corruptly persuading and knowingly attempting to corruptly persuade other

persons with the intent to cause or induce those persons to alter, destroy, mutilate or conceal records and documents with the intent to impair their ability to use in the grand jury proceedings.

Count 3 charges the defendant with knowingly corruptly persuading and knowingly attempting to corruptly persuade other persons with the intent to influence their testimony in the grand jury proceeding. **[30]**

And Count 4 charges the defendant with knowingly corruptly persuading other persons, and knowingly attempting to corruptly persuade other persons with the intent to cause or induce those persons to alter, destroy, mutilate or conceal records and documents with the intent to impair the ability of such records and documents for use in the grand jury proceeding.

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[30] Count 2 of the indictment charges that in or about April of 1999 until in or about August of 2001, Ian Norris agreed or conspired with one or more other persons to commit persons against the United States; namely, to knowingly corruptly persuade, and knowingly attempt to corruptly persuade other persons with intent to influence their testimony in the grand jury proceeding. And (2) to knowingly corruptly persuade and knowingly attempt to corruptly persuade **[31]** other persons with the intent to cause or induce those persons to alter, destroy, mutilate or conceal records and documents with the intent to impair the ability of those records and documents for use in the grand jury proceeding. And that to further the objective of the conspiracy, at least one member of the conspiracy committed at least one overt act as I will describe to you.

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[33]

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THE COURT: The indictment charges a conspiracy to commit two offenses against the United States. The Government **[34]** does not have to prove that the alleged conspirators agreed to commit both of these alleged offenses. The Government, however, must prove that they agreed to commit at least one of the object offenses, and you must unanimously agree on which offense.

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[38]

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Now I'm going to move to the third count, the obstruction of justice, witness tampering through corrupt persuasion. Now, Count 3 charges Ian Norris with knowingly, corruptly persuading and knowingly attempting to corruptly persuade other persons with the intent to influence their testimony in the Grand Jury proceedings.

In order to find Ian Norris guilty of this offense, you must find that the Government proved each of the following four elements beyond a reasonable doubt; first, that Ian **[39]** Norris knowingly corruptly persuaded another person or knowingly attempted to do so; second, that Ian Norris acted with the intent to influence the testimony of another person in the Grand Jury proceeding; third, that Ian Norris knew or should have known that the Grand Jury proceedings were pending or were likely to be instituted.

However, the Government does not need to prove that the Grand Jury proceedings were actually pending or about to be instituted at the time of the alleged offense;

and fourth, that the Grand Jury proceeding was a Federal proceeding.

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 an 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.

As to the second and third element, the Government must prove beyond a reasonable doubt that Ian Norris acted knowingly and with a specific intent to influence the testimony of another person in the Grand Jury proceedings. By specific intent, I mean that Ian Norris must have acted with the unlawful intent to influence the testimony of another person in the Grand Jury proceedings. It is not necessary for the Government to prove that the defendant knew he was **[40]** breaking any particular law, nor need the Government prove that Ian Norris knew the Grand Jury proceeding was a Federal proceeding.

The Government must prove beyond a reasonable doubt that Ian Norris's actions would have the natural and probable effect of interfering with the Grand Jury proceeding, that is, the acts must have a relationship in time, causation or logic with the Grand Jury proceeding.

If the defendant lacks knowledge that his actions are likely to affect the Grand Jury proceedings, he lacks the requisite intent to obstruct. However, the Government is not required to prove that at the time of the corrupt persuasion that the person who was the subject of the persuasion was under subpoena or scheduled to testify at the Grand Jury proceeding.

Testimony in the context of this case is evidence that a witness gives or may give under oath. In determining whether Ian Norris is guilty or not guilty on Count 3 of the indictment, you may consider acts that took place both within the United States and outside of the United States, and the location of persons both within the United States and outside of the United States.

Now I'm going to move to the fourth count in the indictment. Count 4 charges Ian Norris with knowingly corruptly persuading other persons and knowingly attempting to **[41]** corruptly persuade other persons with the intent to cause or induce those persons to alter, destroy, mutilate or conceal records and documents with the intent to impair the ability of such records and documents for the use in the Grand Jury proceeding.

In order to find Ian Norris guilty of this offense, you must find that the Government proved each of the following four elements beyond a reasonable doubt; first, that Ian Norris knowingly corruptly persuaded another person or knowingly attempted to do so; second, that Ian Norris acted with the intent to cause or induce that other person to alter, destroy, mutilate or conceal an object with the intent to impair the object's integrity, or availability for use in the Grand Jury proceeding; third, that Ian Norris knew or should have known that the Grand Jury proceeding was pending or was likely to be instituted.

However the Government does not need to prove that the Grand Jury proceeding was actually pending or about to be instituted at the time of the alleged offense; and fourth, that the Grand Jury proceeding was a Federal proceeding.

As to the first element, to corruptly persuade means to corrupt another person by persuading him or her to violate a legal duty to accomplish an unlawful or -- an unlawful result, or to accomplish some objectives -- or to accomplish some otherwise lawful end or lawful result in an unlawful **[42]** manner. Again to persuade means to cause or induce a person to do something or not to do something.

As to the second and third element, the Government must prove beyond a reasonable doubt that Ian Norris acted knowingly and with the specific intent to cause or induce any person to conceal or destroy a record, document or other object from the Grand Jury proceedings.

By specific intent, I mean that Ian Norris must have acted with an unlawful intent to cause or induce another person to withhold evidence from the Grand Jury proceedings. It is not necessary for the Government to prove that Ian Norris knew that he was breaking any particular law, nor need the Government prove that Ian Norris knew the Grand Jury proceeding was a Federal proceeding.

The Government must prove beyond a reasonable doubt that Ian Norris's actions would have the natural and probable effect of interfering with the Grand Jury proceedings, that is, the act must have a relationship in time, causation or logic with the Grand Jury proceeding.

If the defendant lacks knowledge that his actions are likely to affect the Grand Jury proceeding, he lacks the requisite intent to obstruct. In determining whether Ian Norris is guilty or not guilty on Count 4 of the indictment, you may consider acts that took place both within the United States and outside of the United States, and the location of **[43]** documents both within

the United States and outside of the United States. However, the Government is not required to prove that at the time of the corrupt persuasion the records or documents were under subpoena, or scheduled to testify at the Grand Jury proceeding.

Now I'm going to talk to you about the attempt to obstruct justice charge. Ian Norris is charged in Count 3 -- so I'm going back to Count 3 -- with knowingly corruptly persuading or knowingly attempting to corruptly persuade other persons with the intent to influence their testimony in the Grand Jury proceedings.

An attempt to knowingly corruptly persuade other persons with the intent to influence their testimony in the Grand Jury proceedings is a Federal crime, even though the defendant did not actually complete the crime. In order to find Ian Norris guilty of attempting to knowingly corruptly persuade another person with the intent to influence their testimony, you must find that the Government proved beyond a reasonable doubt each of the following two elements.

First, that Ian Norris intended to commit the crime of knowingly corruptly persuade another person with the intent to influence their testimony, as I have defined that offense earlier; and second, that Ian Norris performed an act constituting a substantial step towards the commission of obstruction of justice regarding witness testimony which **[44]** strongly corroborates or confirms that Ian Norris intended to commit that crime.

With respect to the first element of attempt, you may not find Ian Norris guilty of knowingly corruptly persuading another person with the intent to influence their testimony merely because he thought about it. You

must find that the evidence proved beyond a reasonable doubt that Ian Norris's mental state passed beyond the stage of thinking about the crime to actually intending to commit it.

With respect to the substantial step element, you may not find Ian Norris guilty of knowingly corruptly persuading another person with the intent to influence their testimony merely because he made some plans to or some preparation for committing the crime.

Instead, you must find that Ian Norris took some firm, clear undeniable action to accomplish his intent to knowingly corruptly persuade another person with the intent to influence their testimony. However, the substantial step element does not require the Government to prove that Ian Norris did everything except the last act necessary to complete the crime.

Now I'm going to go to the attempt in Count 4. Ian Norris is charged in Count 4 with knowingly attempting to commit the crime of knowingly corruptly persuading other persons with the intent to cause or induce those persons to **[45]** alter, destroy, mutilate or conceal records and documents with the intent to impair the availability of such records and documents for use in the Grand Jury proceedings.

An attempt to commit the crime of knowingly corruptly persuading other persons with the intent to cause or induce those persons to alter, destroy, mutilate or conceal records and documents with the intent to impair the availability of such records and documents for use in the Grand Jury proceedings is a Federal crime, even though the defendant did not actually complete the crime.

In order to find Ian Norris guilty of knowingly attempting to commit the crimes of knowingly corruptly

persuading other persons with the intent to cause or induce those persons to alter, destroy, mutilate or conceal records and documents with the intent to impair the availability of such records and documents for use in the Grand Jury proceeding, you must find that the Government proved beyond a reasonable doubt each of the following two elements.

First, that Ian Norris intended to commit the crime of knowingly corruptly persuading other persons with the intent to cause or induce those persons to alter, destroy, mutilate or conceal records and documents with the intent to impair the availability of such records and documents for use in the Grand Jury proceeding, as I have defined that offense; and second, that Ian Norris performed an act constituting a **[46]** substantial step towards the commission of knowingly corruptly persuading other persons with the intent to cause or induce those persons to alter, destroy, mutilate or conceal records and documents with the intent to impair the availability of such records and documents for use in the Grand Jury proceedings, which strongly corroborates or confirms that Ian Norris intended to commit that crime.

With respect to the first element of attempt on the Count 4, you may not find Ian Norris guilty of attempting to commit the crime of knowingly corruptly persuading other persons with the intent to cause or induce those persons to alter, destroy, mutilate or conceal records and documents with the intent to impair the availability of such records and documents for use in the Grand Jury proceeding merely because he thought about it.

You must find that the evidence proved beyond a reasonable doubt that Ian Norris's mental state passed beyond the stage of thinking about the crime to actually intending to commit it. With respect to the substantial

step element, you may not find Ian Norris guilty of attempting to commit the crime of knowingly corruptly persuading other persons with the intent to cause or induce other persons to alter, destroy, mutilate or conceal records and documents with the intent to impair the availability of such records and documents for use in the Grand Jury proceedings merely because he made some **[47]** plans to or some preparation for committing that crime.

Instead, you must find that Ian Norris took some firm clear undeniable action to accomplish his intent to commit the crime. However, the substantial step element does not require the Government to prove that Ian Norris did everything except the last act necessary to complete the crime.

Now I'm going to talk to you about the required state of mind that is part of the offenses in this case. Often the state of mine, that is, intent and knowledge with which a person acts at any given time, cannot be proved directly because one cannot read another person's mind and tell what he or she is thinking.

However, Ian Norris's state of mind can be proved indirectly from the surrounding circumstances, thus, to determine Ian Norris's state of mind at a particular time, you may consider evidence of what he said, what he did or failed to do, how he acted and all other facts and circumstances shown by the evidence that may prove what was in Ian Norris's mind at that time.

It is entirely up to you to decide what the evidence presented during the trial proves or fails to prove about Ian Norris's state of mind. You may also consider the natural and probable result or consequences of any acts that Ian Norris knowingly did, and whether it is reasonable to conclude that **[48]** Ian Norris intended

those results or consequences. You may find, but you're not required to find, that Ian Norris knew and intended the natural and probable consequences and results of acts that he knowingly did.

This means that if you find that an ordinary person in Ian Norris's situation would have naturally realized that certain consequences would result from his actions, then you may find, but you're not required to find, that Ian Norris did know and did intend that those consequences would result from his actions. This is entirely up to you to decide as the finders of facts in the case.

Now, the obstruction of justice offense charged in the indictment required that the Government prove that Ian Norris acted with what we call knowingly, that is, with respect to an element of the offenses. This means that the Government must prove beyond a reasonable doubt that Ian Norris was conscious and aware of the nature of his actions and of the surrounding facts and circumstances as specified in the definition of those offenses charges.

In deciding whether Ian Norris acted knowingly, you may consider the evidence of what he said, what he did and failed to do, how he acted and all other facts and circumstances shown by the evidence that may prove what was in Ian Norris's mind at the time. It is not necessary for the Government to prove that Ian Norris knew that he was breaking **[49]** any particular criminal law.

Now, the obstruction of justice offenses charged in the indictment required that the Government prove that Ian Norris acted with intent with respect to certain elements of the offense. This means that the Government must prove beyond a reasonable doubt

either that it was Ian Norris's conscious desire or purpose to act in a certain way or to cause a certain result, or that Ian Norris knew that he was acting in that way and so would be practically certain to cause the result.

In deciding whether Ian Norris acted with intent, you may consider evidence about what he said, what he did and failed to do, how he acted and all of the other facts and circumstances shown by the evidence that may prove what was in Ian Norris's mind at the time.

Now, motive is not an element of the offense with which Ian Norris is charged. Proof of bad motive is not required to convict. Further, proof of bad motive alone does not establish that Ian Norris is guilty, and proof of good motive on the other hand, does not establish that Ian Norris is not guilty. Evidence of Ian Norris's motive may however help you to find his intent.

Intent and motive are different concepts. Motive is what prompts a person to act. Intent refers only to the state of mind with which the particular person with the particular **[50]** act is done. For example, personal advancement and financial gain are motives for much of human conduct. However, these motives may prompt one person to intentionally do something perfectly acceptable, while prompting another person to intentionally do an act that is a crime.

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APPENDIX H

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 03 Cr. 632 (ECR)

IAN P. NORRIS,

Petitioner

v.

UNITED STATES,

Respondent.

Ian Norris's Proposed Jury Instructions[1]

* * *

Count Three — Witness Tampering to Influence Testimony (Elements)

Count Three of the indictment charges Mr. Norris with tampering with a witness through corrupt

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[1] In accordance with the District Judge's trial procedures, modifications to model jury instructions are set forth by underlining additions to the instructions and bracketing deletions from the instructions.

persuasion to influence the witness' testimony in an official proceeding, which is a violation of federal law.

[In order to find the defendant guilty of this offense] To sustain its burden of proof, [you must find that] the government must prove[d] each of the following four elements beyond a reasonable doubt:

> First: That Mr. Norris knowingly corruptly persuaded another person, or attempted to do so;
>
> Second: That Mr. Norris acted with intent to influence the testimony of that person in an official proceeding, namely, the federal grand jury sitting in the U.S. District Court for the Eastern District of Pennsylvania [an official proceeding];
>
> Third: That Mr. Norris knew or should have known that the grand jury proceeding was pending or was likely to be instituted; and
>
> Fourth: That the grand jury proceeding [, the official proceeding,] was a federal proceeding.

If you find that the government has failed to prove ay of these elements beyond a reasonable doubt, you must find Mr. Norris not guilty on this Count.

THIRD CIRCUIT MODEL JURY INSTRUCTIONS 6.18.1512B (2009) (modified, selected appropriate options); *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (general discussion of elements under 18 U.S.C. § 1512); *United States v. Aguilar*, 515 U.S. 593, 599-602 (1995) (discussing required nexus to grand jury investigation); *United States v. Vampire Nation*, 451 F.3d 189, 205 (3d Cir. 2006) ("[T]he natural and probable effect of interfering with a

judicial or grand jury proceeding that constitutes the administration of justice; that is, the act must have a relationship in time, causation, or logic with the judicial proceedings.") (quoting *United States v. Quattrone*, 441 F.3d 153, 171 (2d Cir. 2006)).

***

Count Three — Witness Tampering to Influence Testimony ("Corruptly Persuades") (Part I)

A person "corruptly persuades" another person with the intent to influence their testimony in an official proceeding if he or she (1) uses an improper method, such as bribery or other unlawful means, to influence that person's testimony in an official proceeding; or (2) persuades that person to provide affirmatively and materially false testimony in the grand jury proceeding in the U.S. District Court for the Eastern District of Pennsylvania.

As to the first basis, there has been no allegation or proof offered by the government. As to the second basis, it is not "corrupt persuasion" to persuade a co-conspirator to withhold, or fail to volunteer, information, no matter how important that information may be to the grand jury proceeding. In other words, you may not find someone has "corruptly persuade[d]" another person if all he did was to persuade co-conspirators to withhold incriminating information.

United States v. Farrell, 126 F.3d 484, 488 (3d Cir. 1997) ("[B]oth attempting to *bribe* someone to *withhold* information and attempting to *persuade*

someone to provide *false* information to federal investigators constitute 'corrupt persuasion' punishable under § 1512(b)") (emphasis in original); Indict. at ¶ 21 ("defendant Ian P. Norris corruptly persuaded and attempted to corruptly persuade persons . . . with intent to influence their testimony in an official proceeding . . . ."); *United States v. Farrell*, 126 F.3d 484, 488-89 (3d Cir. 1997) ("[W]e are similarly confident that the "culpable conduct" that violates § 1512(b)(3)'s "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 . . . . A participant in a conspiracy clearly has a right under the Fifth Amendment not to provide law enforcement officials with information about the conspiracy that will incriminate him."); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703-04 (2005) ("[P]ersuading a person with intent to cause that person to withhold testimony or documents from a Government proceeding or Government official is not inherently malign.") (internal marks omitted).

Count Three — Witness Tampering to Influence Testimony ("Corruptly Persuade") (Part II)

An otherwise innocent act of persuasion is not "corrupt" if it is undertaken with a genuine belief that the persuasion is not improper or unlawful, even if its purpose is to make testimony unavailable in an official proceeding. Accordingly, if you find that Mr. Norris persuaded another person with regards to that

person's testimony with the genuine belief that his conduct was lawful, then you must find Mr. Norris not guilty.

Arthur Andersen LLP v. United States, 544 U.S. 696, 706 (2005) ("the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing"); *United States v. Farrell*, 126 F.3d 484, 489 (3d Cir. 1997) ("[T]he inclusion of 'corruptly' in § 1512(b) . . . necessarily impl[ies] that an individual can 'persuade' another not to disclose information to a law enforcement official with the intent of hindering an investigation without violating the statute, i.e., without doing so 'corruptly.'"); *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) ("Judges should hesitate . . . to treat statutory terms [as surplusage] in any setting, and resistance should be heightened when the words describe an element of a criminal offense.").

Count Three — Witness Tampering to Influence Testimony ("Persuades")

I have instructed you as to the meaning of "knowingly" and "corruptly persuades." I will now add a short explanation of the term "persuades." You should give the word "persuades" its ordinary meaning, that is, the government must prove beyond a reasonable doubt that Mr. Norris pleaded with, induced, or entreated someone into a determination, decision, belief, or the like; or won someone over by an appeal to that person's reason and feelings to get them to do or believe something in order to influence the testimony of that person in the grand jury proceeding. Merely "agreeing" with another person is

not sufficient. Merely raising an idea with another person is not sufficient. Only by convincing other persons — talking them into it — does one "persuade" them.

United States v. Khatami, 280 F.3d 907, 911 (9th Cir. 2002) (noting "[t]he verb 'persuade' has many definitions, but within the context of § 1512(b)(3) can be understood to mean . . . 'to plead with,' . . . or '[t]o induce one by argument, entreaty, or expostulation into a determination, decision, conclusion, belief, or the like; to win over by an appeal to one's reason and feelings, as into doing or believing something'") (citation omitted); *United States v. Joseph*, 542 F.3d 13, 17 (2d Cir. 2008) (quoting jury charge defining the term "persuading" under 18 U.S.C. § 2422, meaning "to move by argument or entreaty or expostulation to a belief, position, or course of action").

Count Three — Witness Tampering to Influence Testimony ("Influence")

"Influencing" the testimony of another person does not include conduct intended to prevent the person from testifying. Instead, "influencing" means causing them to materially change the substance of the testimony they will provide in a particular grand jury proceeding.

United States v. Dawlett, 787 F.2d 771, 774-75 (1st Cir. 1986) (holding that "forbidd[en] conduct that 'influences' the testimony of a witness [does not] include conduct which *prevents* the testimony of the

witness") (citing *United States v. Johnston*, 472 F. Supp. 1102, 1106 (E.D.Pa. 1979) (holding same)); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005) (acknowledging materiality element).

* * *

Count Four — Witness Tampering to Cause or Induce Document Destruction ("Corruptly Persuade")

A person "corruptly persuades" another person with the intent to cause or induce those persons to destroy or conceal an object, with the intent to impair the object's availability for use in an official proceeding if he or she (1) uses an improper method, such as bribery or other unlawful means, to cause or induce that person to destroy or conceal the object; or (2) persuades that person to conceal or destroy an object in contemplation of a particular proceeding in which the object might be material.

As to the first basis, there has been no allegation or proof offered by the government. As to the second basis, it is not "corrupt persuasion" to persuade a co-conspirator or anyone else to destroy or conceal any object unless done in contemplation of a particular official proceeding in which the object might be material.

United States v. Farrell, 126 F.3d 484, 488 (3d Cir. 1997) ("[B]oth attempting to *bribe* someone to *withhold* information and attempting to *persuade* someone to provide *false* information to federal investigators constitute 'corrupt persuasion' punishable under § 1512(b)") (emphasis in original); *Arthur Andersen LLP v. United States*, 544 U.S. 696,

703-04 (2005) ("We have traditionally exercised restraint in assessing the reach of a federal criminal statute . . . . Such restraint is particularly appropriate here, where . . . "persuasion—is by itself innocuous. Indeed, persuading a person with intent to cause that person to withhold testimony or documents from a Government proceeding or Government official is not inherently malign.") (internal quotation marks and citations omitted); *Id.* at 706 (examining the 5th Circuit pattern instruction which defined corruptly as "knowingly and dishonestly, with the specific intent to subvert or undermine the integrity' of a proceeding" and holding that the district court erred in excluding 'dishonesty' and adding the term 'impede' to the phrase 'subvert or undermine.') (internal citations omitted).

* * *

APPENDIX I

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 03 Cr. 632 (ECR)

IAN P. NORRIS,

Petitioner

v.

UNITED STATES,

Respondent.

Government's Proposed Jury Instructions[1]

* * *

Obstruction of Justice - 18 U.S.C. § 1512(b)(1)

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[1] In accordance with the District Judge's trial procedures, modifications to model jury instructions are set forth by underlining additions to the instructions and bracketing deletions from the instructions.

Count Three of the indictment charges the defendant with obstruction of justice regarding witness testimony, which is a violation of federal law.

In order to find the defendant guilty of a violation of this offense, you must find that the government proved each of the following four elements beyond a reasonable doubt:

First: That the defendant knowingly corruptly persuaded *[name of person,]* another person or attempted to do so;

Second: That the defendant acted with intent to influence the testimony of [name of person] that other person in an official proceeding, that is, a federal grand jury investigation[, an official proceeding];

Third: That the defendant knew or should have known that the grand jury investigation was pending or likely to be instituted. However, the government does not need to prove that a grand jury investigation was actually pending or about to be instituted at the time of the alleged offense; and

Fourth: That the grand jury investigation, the official proceeding, was a federal proceeding. However, the government does not need to prove that the defendant knew that the proceeding was a federal proceeding.

To "corruptly persuade" 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 in an unlawful manner. To "corruptly persuade" includes attempting to persuade someone to provide false information to federal investigators.

While the government must prove that the defendant acted with the intent to influence the testimony of another person, the government is not required to prove that the defendant had direct contact with that person and the government is not required to prove that the defendant succeeded in influencing the testimony of that person. The government is also not required to prove that person was under subpoena or scheduled to testify in any proceeding.

The government also does not need to prove that the testimony would have been admissible at the official proceeding or free of a claim of privilege.

The government must prove beyond a reasonable doubt that the defendant acted knowingly, and with the intent to affect the administration of justice. However, the government need not prove that the defendant knew that his conduct violated a specific obstruction statute. Ignorance of the law is not an excuse.

The defendant can be found guilty of this offense even if all of his acts took place outside the United States and all of the persons he sought to corruptly persuade were located outside the United States.

Third Circuit Model Criminal Jury Instruction 6.18.1512B (modified)

United States v. Farrell, 126 F.3d 484, 488 (3d Cir. 1997) ("attempting to *persuade* someone to provide *faIse* information to federal investigators constitutes 'corrupt persuasion' punishable under § 1512(b)"), *cited in United States v. Hull,* 456 F.3d 133, 142 (3d

Cir. 2006) *and United States v. Richardson,* 265 Fed. Appx. 62, 65 (3d Cir. 2008).

United States v. Davis, 183 F.3d 231, 250 (3d Cir. 1999) (the fact that the defendant never had "direct contact" with the witness is "irrelevant").

United States v. Risken, 788 F.2d 1361, 1365-69 (8th Cir. 1986) (18 U.S.C. § 1512 is expressly not limited to pending official proceedings, and thus explicitly covers potential witnesses).

18 § 1512 (f)(2) (regarding fact that admissibility is not required and evidence could have been privileged).

United States v. Vampire Nation, 451 F.3d 189, 205 (3d Cir. 2006) (approving instruction with regard to § 1512 obstruction offense that "[i]t is not necessary for the Government to prove the Defendant knew he was breaking any particular criminal law"); Third Circuit Model Jury Instruction - Criminal No. 5.02 (last paragraph) ("The government is not required to prove that [the defendant] knew [his] acts were against the law); *United States v. Barbosa,* 271 F.3d 438, 457-58 (3d Cir. 2001) (explaining that "No act 'knowingly' is to act with 'knowledge of the facts that constitute the offense' but not necessarily with knowledge that the facts amount to illegal conduct, unless the statute provides otherwise").

18 U.S.C. § 1512(h) - "There is extraterritorial Federal jurisdiction over an offense under this section."

Obstruction of Justice - 18 U.S.C. § 1512(b)(2)(B)

Count Four of the indictment charges the defendant with obstruction of justice regarding

documentary evidence which is a violation of federal law.

In order to find the defendant guilty of a violation of this offense, you must find that the government proved each of the following four elements beyond a reasonable doubt:

First, That the defendant knowingly corruptly persuaded *[name of person,]* another person or attempted to do so;

Second: That the defendant acted with intent to cause or induce *[name of person)* that other person to alter, destroy, mutilate or conceal [an object] records and documents; with intent to impair the [object's] records' and documents' availability for use in an official proceeding, that is, a federal grand jury investigation[, an official proceeding];

Third: That the defendant knew or should have known that the grand jury investigation was pending or likely to be instituted. However, the government does not need to prove that a grand jury investigation was actually pending or about to be instituted at the time of the alleged offense; and

Fourth: That the grand jury investigation, the official proceeding, was a federal proceeding. However, the government does not need to prove that the defendant knew that the proceeding was a federal proceeding.

To "corruptly persuade" 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 in an unlawful manner. To "corruptly persuade" includes acting without legal

basis to cause or induce another person to destroy or conceal evidence from an official proceeding, such as a grand jury investigation, which has been instituted or contemplated.

While the government must prove that the defendant acted with the intent to cause or induce another person to alter, destroy, mutilate or conceal records and documents, the government is not required to prove that the defendant had direct contact with that person and the government is not required to prove that the defendant succeeded. The government is also not required to prove that person was under subpoena or scheduled to produce records and documents in any proceeding.

The government also does not need to prove that the record or document would have been admissible at the official proceeding or free of a claim of privilege.

The government must prove beyond a reasonable doubt that the defendant acted knowingly, and with the intent to affect the administration of justice. However, the government need not prove that the defendant knew that his conduct violated a specific obstruction statute. Ignorance of the law is not an excuse.

The defendant can be found guilty of this offense even if all of his acts took place outside the United States and all of the persons he sought to corruptly persuade were located outside the United States. Furthermore, the defendant can be found guilty of this offense even if all the records and documents that he sought to alter, destroy, mutilate or conceal were located outside the United States.

Third Circuit Model Criminal Jury Instruction 6.18.1512B (modified) *United States v. Vampire Nation,* 451 F.3d 189, 205 (3d Cir. 2006).

18 U.S.C. § 1512 (f)(2) (regarding fact that admissibility is not required and evidence could have been privileged).

United States v. Davis, 183 F.3d 231, 250 (3d Cir. 1999) (the fact that the defendant never had "direct contact" with the witness is "irrelevant").

United States v. Risken, 788 F.2d 1361, 1365-69 (8th Cir. 1986) (18 U.S.C. § 1512 is expressly not limited to pending official proceedings, and thus explicitly covers potential witnesses).

Vampire Nation, 451 F.3d 189 at 205 (approving instruction with regard to § 1512 obstruction offense that "[i]t is not necessary for the Government to prove the Defendant knew he was breaking any particular criminal law"); Third Circuit Model Jury Instruction - Criminal No. 5.02 (last paragraph) ("The government is not required to prove that `[the defendant] knew [hisj acts were against the law); *United States v. Barbosa,* 271 F.3d 438, 457-58 (3d Cir. 2001) (explaining that "[t]o act 'knowingly' is to act with 'knowledge of the facts that constitute the offense' but not necessarily with knowledge that the facts amount to illegal conduct, unless the statute provides otherwise").

18 U.S.C. § 1512(h) - "There is extraterritorial Federal jurisdiction over an offense under this section."

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APPENDIX J

[excerpted from 3d Cir. Appendix 2309–2311]

To: ian.norris@morgancrucible.co.uk, David Coker at Morgan Crucible, fwollman@morganifena.com

CC: Jerry P Peppers/New/ York/WSP&R@WSP&R, Byan R. Dunlap/New York/WSP&R@WSP&R

From: Sutton Keany

Date: 09/07/00 12:03 p.m.

Subject: Re: Further Steps

Gentlemen:

Bryan and I attempted to call Lucy McClain this morning. In the end I left a fairly long voicemail sketching our response to her theory and telling her that we propose to proceed with an interviewing schedule of the individuals referred to below preceded by the gathering of documents related to the matter, as set forth below.

Some of these documents will be in the UK, others in the US. We recommend that a program to pull them be initiated immediately. I have advised Lucy that she and I will have to talk about off-shore documents as matters progress.

Please let us know if we can provide any assistance in the document gathering process. As we discussed at Windsor, "the sooner the better".

Is there any chance that Mr. Emerson might be traveling to the United States? If he does, he may find his travel interrupted, particularly if Lucy

realizes that he is a former employee. If there is any likelihood of such travel, I think it would be best that there be contact with him and that he be told simply that the authorities have asked for certain information related to these Carbone meetings and that we may have further contact with him. If we are in a position to advise Lucy that we are working with him, I can ask that none of the six have their travel interrupted pending the completion of this phase of the investigation……S.K.

_____Forwarded by Sutton Keany/New York/WSP&R on 09/07/2000 11:48 AM_____

SUTTON KEANY
08/30/2000 04:04 PM

To: Bryan R Dunlap/New York/WSP&R@WSP&R, David Coker at Morgan Crucible, Jerry P Peppers/New York/WSP&R@WSP&R

cc:

Subject Re: Draft Document Request

Gentlemen:

Here is the document request that I think we should concentrate on ASAP

Sutton

Bryan R Dunlap

To: Sutton Keany/New York/WSP&R@WSP&R, Jerry P Peppers/New York/WSP&R@WSP&R

cc:

Subject: Draft Document Request

As discussed earlier this morning, here is a draft document request for your review. (I can have it cut/copied into a Word document, if that would be easier to edit than the text below.)

****

ADDITIONAL DOCUMENTS REQUESTED BY WSP&R

General Guidelines

* Relevant business area: Carbon brushes for traction and transit applications

* Relevant time period: January 1, 1993 - April 31, 1999

* Relevant individuals:

Ian Norris

William Macfarlane

Mike Cox

Bruce Mueller

Met Perkins

Robin Emerson.

Specific Topics

1. List, for each individual, his (i) full name, (ii) current home address and telephone number, (iii) current business address and telephone number (including mobile), (iv) positions held during relevant time period, including responsibilities connected with each position and dates of service in each position, (v) date of birth, (vi) passport number and country of issuance, (vii) U.S. Social Security number (if any).

2. For each individual, provide all–

a. "Travel and expense vouchers, credit and charge card or account statements and bills, invoices and other records of expenses, including all attached, supporting, or explanatory documents, relating to any travel, entertainment or other expenses such as long distance telephone calls incurred in connection with [his] employment."

b. "Desk calendars, appointment books, day books, reminders or other documents maintained by or for such individual which show schedules, meetings or appointments."

c. "Memoranda, reports, or similar documents reflecting the individual's actual or planned agendas or schedules."

d. "Telephone note pads or logs, notes of conversations or meetings or tape recordings of conversations made by or maintained for the individual in connection with his employment."

3. Provide any documents (located in U.S. or abroad) describing or referring to –

a. any meeting or other communication between (i) any of the relevant individuals and (ii) representatives of any competitor in the relevant business area, particularly Carbone.

b. any communication, agreement or understanding (express or implied) between two or more competitors in the relevant business area concerning (i) prices they charge or will charge, (ii) efforts to improve or maintain price levels, (iii) timing or amount of price increases, (iv) grading or grouping of relevant products, (v) granting or refusing to grant price discounts, (vii) imposition of premium pricing on any size, shape or grade of product, (viii)

elimination or control of production capacity, (ix) monitoring of market shares, (x) allocation of customers, markets or territories, (xi) reporting of actual sales or total sales volumes.

We are particularly interested in all documents related to the Canadian and Paris meetings that involved the individuals referred to above. It would be most useful if there were minutes of those meetings or reports on their contents, etc.

Finally, as we discussed, it might be very helpful if documents could be located which discuss the desirability of ending the Carbone joint ventures as well as any documents reporting on the gradual implementation of that strategy which resulted in the last of the joint ventures being dissolved in 1999.

###

[excerpted from 3d Cir. Appendix 2645]

From: Lucy McClain

To: CONNOLRE, ROSENBRS, PIONKOMA, Rogersjw, WEBSTECD

Date: 9/7/00 3:39 pm

Subject: Carbon Brushes

I got a voice mail from Sutton Keaney. He has returned from London after meeting with Morgan Crucible's attorneys and Ian Norris. According to Sutton, there were 3 meetings between Carbone Lorraine and Morgan Crucible officials (2 in Canada and 1 in Paris), but they did were limited to discussing the joint ventures the two companies had together. Coniglio did try to bring up pricing at one of those meetings, but Morgan Crucible rejected the idea. [REDACTED] Anyway, Keaney is going back over to England to personally interview the 6 people I identified to him as having been at the price fixing meetings.

###

[excerpted from 3d Cir. Appendix 2646]

To: ian.norris@morgancrucible.co.uk

CC: David Coker at Moran Crucible, fwolliman@morganiterna.com; Bryan R. Dunlap/New York/WSP&R@WSP&R

From: Sutton Keany [skeany@optonline.net]

Date: 09/08/2000 03:45 PM

Subject: MC-Lucy McClain

Dear Ian:

This is a follow-up to my message of yesterday, in which I mentioned that Bryan Dunlap and I had left a voicemail message for Lucy McClain concerning our meeting in Windsor and our plans to pull documents together and then have an interviewing program.

I just had a rather extraordinary talk with Lucy McClain. She breezily dismissed any idea that the meetings in question were limited, from Morgan's point of view, to the implementation of a "joint venture exit" strategy.

Her point of view is the following:

Morgan was an active participants in discussions and agreements with respect to prices in Europe. The meetings in question, which began with the Mueller/Cox/Perkins meetings in Toronto in 1995, was designed to begin that process. It was followed up by various meetings, including the two meetings in Paris (which we discussed at Windsor) and then by a series of additional meetings, held in a variety of cities:

Sept. 1995

Fall 1996

Nov. 1997

Dec. 1998

Brussels 1998 (two days- JV issues first day, pricing issues second day)

Mexico City (2 or 3 meetings)

Toronto (Oct. 6)

She added another name to the list: Jack Kroef.

She noted that the information that she was giving me was sketchy, but she explained that she had not personally participated in all of the interviews they have conducted and that she knew that I was interested in an early report.

As we discussed in Windsor, it is "customary" for the earliest cooperating party to receive the most lenient treatment. She told me that there was not much room left with respect to electrical carbon. She then remarked that it was different in mechanical carbon: "We are just getting into that investigation. If you can bring us information in that area, we may very well be able to 'do a deal' that will be favorable to the company. We can even give you some credit in electrical carbon which will reduce the severity of the matter if you provide us with useful information in respect to mechanical carbon."

As I say: extraordinary.

She then confirmed that she is interested in pursuing mechanical carbon. I told her that we would proceed with our program in electrical carbon and get to mechanical when this "fire" had been put out. She said that was O.K., but noted that we might lose our chance-to "get in early".

Ian, as I told you in Windsor, this is going to be O.K., if our factual recitation gets accepted or at least significantly credited. It is somewhat unsettling to hear Lucy dismiss the position so totally with innuendo about "they always say that".

S.K.

###

[excerpted from 3d Cir. Appendix 2312]

To: fwollman@morganitena.com, David.Coker@morgancrucible.co.uk

CC: Sutton Keany/New York/WSP&R@WSP&R

From: Bryan R Dunlap

Date: 10/10/00 02:20 PM

Subject: PRIVILEGED AND CONFIDENTIAL

Fred/David,

In preparation for our upcoming interviews of the individuals that Lucy identified (particularly, in the near future, Bruce Muller and Mike Cox), I'd like to check whether any documents of the kind described below have turned up in your searches:

3. Provide any documents (located in U.S. or abroad) describing or referring to –

a. any meeting or other communication between (i) any of the relevant individuals and (ii) representatives of any competitor in the relevant business area.

b. any communication, agreement or understanding (express or implied) between two or more competitors in the relevant business area concerning (i) prices they charge or will charge, (ii) efforts to improve or maintain price levels, (iii) timing or amount of price increases, (iv) grading or grouping of relevant products, (v) granting or refusing to grant price discounts, (vii) imposition of premium pricing on any size, shape or grade of product, (viii) elimination or control of production capacity, (ix) monitoring of market shares, (x) allocation of

customers, markets or territories, (xi) reporting of actual sales or total sales volumes.

Ideally, from our point of view, there would be memos summarizing some or all of the meetings in question that would document their legitimate purposes.

Thanks and best regards,

BD

###

Attorney Privileged Information.

25th November 1997 - Meridien Paris

Present:
W. G. Humphrey
M. Cox
M. Perkins
R. Emmerson
J. Nantier
T. Kroef
R. Fourcault
E. Di Bianco

Follow up to meeting of 5th June 1997.

Model Energy:

- Long thy discussions about the market.
- Morgan is convinced that market has not disappeared.
- Corbone refuses to give facts on import of brushes and Ferrex products from Columbia.
- Mr. Overlaan continues action against Corbone on this subject. He is well connected and this could be difficult for us. They may have to face closing their newly opened Alicante office.
- Proposed Solution: We or Corbone acquire Overlaan's 50% Share. It had been agreed however that Morgan should ultimately acquire this entire business. Morgan feels price (£500K) discussed by Overlaan too high based on present order book.

MCE 0069

25th November 1997 - Invoicing Basis... 2 of 2 contd.

D. Brown:
- Discussion on the stock that was taken from New Zealand by LCH and its value.
- Fears that they took stock which we paid for prior to move.
- LCH offered jobs to 2 senior engineers against our agreement to not poach personnel.
- It was agreed that further activities on personnel recruitment would stop.

Various: D. Biondo again raised the issue of them taking a share of the US textile market.
- It was again stressed that we did not want to discuss this matter.
- We stressed that our product was the superior performer and we were not prepared to consider giving it away.

169a

Attorney Privileged Information.

1 of 2.

16th October 1998 - Brussels.

present:

W. McFarlane — R. Fauroux.
J. Kroes — E. di Rinaldo.
M. Perkins — J. Montier
R. Emerson

McFarlane called meeting for Mokveren wrap-up.

We were again called to a meeting by McFarlane where they advised Morgan's of their intention to attack our customer base using what ever means they felt appropriate to increase their market share in the Americas.

Fauroux did all the talking on their side and in an extremely hostile and intimidating tone, he threatened to more aggressively against Morgans in the Americas.

MCE 0074

- We advised that it was not our intention to co-operate in any way with any competition and that we were fully prepared to compete with the Cartons, with the same level of success which we have enjoyed to date.

- The meeting lasted no more than 15 minutes with absolutely no exchange of commercial information and absolutely no agreement to co-operate with respect to their demands.

No discussions on the J.V. arrangement, as relevance not perceived.

MCE 0075

[excerpted from 3d Cir. Appendix 407–408]

WINTHROP, STIMSON, PUTNAM & ROBERTS

PRIVILEGED AND CONFIDENTIAL

COMMUNICATED FROM COUNSEL

October 29, 1999

To: Ian Norris

From: Winthrop, Stimson, Putnam & Roberts

Re: Legal Advice Concerning U.S. Border Watches

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. and present your passport to the Immigration and Naturalization Service ("INS") officer. 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 by the government other than routine questions about your name, address, travel and contact information, here is what you can do:

- **Be polite, friendly, cooperative and professional.** You are not under arrest. You have not been accused of anything. Rather, this is an exasperating bureaucratic delay, which, obviously, could well affect your schedule for your U.S. visit.
- **Feel free to ask basic questions.** You are welcome to ask, for example, natural and routine questions such as: What is this about? How long can I expect to be delayed? Can I get

a message to my lawyer? Is there a telephone I may use? May I use my cellular phone? May I write down the name and telephone number of an INS contact person here so that my attorney may contact the appropriate official?

- **Ask to contact your lawyer.** If you are, in fact, being delayed for a subpoena, or to ask you to participate in an interrogation, you can politely and respectfully advise 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.
- **Understand your constitutional rights to remain silent, and to counsel.** Be friendly and cooperative in providing routine requested information, such as name, address, contacts in the U.S., duration of stay, and the general nature of your visit. Beyond this, keep in mind that you, like everyone in the U.S., have the constitutional right to decline to answer questions posed by DOJ prosecutors, FBI agents or anyone else. It is entirely proper and appropriate for you to simply advise that (1) you would be delighted to cooperate with them concerning the subpoena or any other matter, but (2) you are represented by counsel and expect to cooperate and communicate solely through counsel, and (3) your lawyers are Jerry Peppers, Sutton Keany and Stephen Weiner of Winthrop, Stimson, Putnam & Roberts.
- **Take steps to terminate the interrogation** by providing full information as to your travel

plans (hotel, etc.) and the name and telephone number of your attorney. If the INS officer is not satisfied with this information, give him the enclosed letter about our being authorized to accept service of a subpoena on your behalf. Then advise the INS officer that you are leaving unless he insists that you stay. If he says that you are forbidden to leave the country, tell him that you understand what he is saying, and will discuss the matter with your lawyer.

Jerry P. Peppers
Telephone: 212-858-1205
Cellular: 914-649-3404
Pager: 914-553-0162
Home: 914-472-4270

Sutton Keany
Telephone: 212-858-1724
Cellular: 914-522-6275
Home: 212-732-1269
203-454-8631

Stephen A. Weiner
Telephone: 212-858-1749
Home: 516-883-7514
516-944-7754
212-945-3628

###

[excerpted from 3d Cir. Appendix 409–410]

WINTHROP, STIMSON, PUTNAM & ROBERTS

ONE BATTERY PARK PLAZA
NEW YORK, NY 10004-1490

TELEPHONE: 212-858-1000
TELEFAX: 212-858-1500

November 1, 1999

TO WHOM IT MAY CONCERN – i.e., to any INS Agent or official of the Immigration and Naturalization Service, the Federal Bureau of Investigation, the U.S. Department of Justice or any other government agency:

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. In handing you this letter, our client has now formally advised you, your agency and the government of the United States that, pursuant to the Fifth and Sixth Amendments to the U.S. Constitution, he wishes to remain silent and is requesting an opportunity to contact and consult with his counsel.

As you, your supervisors and the government lawyers are well aware, the United States Supreme Court issued a set of definitive instructions to government agents in situations such as this in *Miranda v. Arizona.* The Court advised that:

> If the individual indicates in any manner, at any time prior to or during

> questioning, that he wishes to **remain silent**, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise . . . If the individual states that **he wants an attorney**, the interrogation **must cease** until an attorney is present. At that time, the individual **must have an opportunity to confer with the attorney** and to have him present during any subsequent questioning. *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966) (emphasis added).

The Court emphasized that:

> If . . . he indicates in any manner and at any stage of the process that he wishes to **consult with an attorney** before speaking **there can be no questioning**. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. *Id.* at 444-45 (emphasis added).

Moreover, now that you have clearly been provided with notice that Mr. Norris is represented by counsel, the ABA (American Bar Association) Code of Professional Responsibility prohibits DOJ and all other lawyers – *and INS or other agents like yourselves, who are acting at the behest of those DOJ lawyers*- from directly contacting and communicating

with persons they know to be represented by counsel. The Courts have held that "the Rule applies to prosecutors and to non-attorney law enforcement officers acting as the alter-ego of prosecutors in non-custodial, pre-indictment situations." *See, e.g., United States v. Gray*, 825 F. Supp. 63-64 (D. Vt. 1993).

Therefore, by this letter, Mr. Norris has now advised you that (a) he 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.

Our phone numbers are listed below, and we would greatly appreciate your courtesy, cooperation and compliance with the law in making our client's communication with counsel possible. In the event that you are unable to permit our client to contact us directly at this time, we respectfully request that you or one of your colleagues contact us immediately in order to advise that you have detained our client and as to his location and status.

We also hereby advise and represent to you that our client has authorized us to accept service on his behalf of any grand jury subpoena addressed to him. Accordingly, we respectfully request that you provide us with a copy of any subpoena, and permit our client to proceed promptly with his travel plans. Upon receipt of the subpoena, we will provide you with an acknowledgment of service of the subpoena upon our client.

Thank you for your courtesy and professionalism. Please do not hesitate to contact us.

Very truly yours,

/s/

Jerry P. Peppers
Telephone: 212-858-1205
Cellular: 914-649-3404
Pager: 914-553-0162
Home: 914-472-4270

Sutton Keany
Telephone: 212-858-1724
Cellular: 914-522-6275
Home: 212-732-1269
203-454-8631

Stephen A. Weiner
Telephone: 212-858-1749
Home: 516-883-7514
516-944-7754
212-945-3628

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[excerpted from 3d Cir. Appendix 411]

WINTHROP, STIMSON, PUTNAM & ROBERTS

ONE BATTERY PARK PLAZA
NEW YORK, NY 10004-1490

TELEPHONE: 212-858-1000
TELEFAX: 212-858-1500

November 1, 1999

To Whom It May Concern – i.e., to any INS Agent or official of the Immigration and Naturalization Service, the Federal Bureau of Investigation, the U.S. Department of Justice or any other government agency:

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. Accordingly, we respectfully request that he not be detained, and that a copy of any subpoena for him be sent to us. Upon receipt of such subpoena, we will provide you with an acknowledgement of service of the subpoena upon Mr. Norris.

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.

Thank you for your cooperation.

Very truly yours,

/s/

Jerry P. Peppers
Telephone: 212-858-1205
Cellular: 914-649-3404
Pager: 914-553-0162
Home: 914-472-4270

Sutton Keany
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Stephen A. Weiner
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516-944-7754
212-945-3628

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[excerpted from 3d Cir. Appendix 3416–3417]

U.S. Department of Justice

Antitrust Division

Philadelphia Office
The Curtis Center, Suite 650 W 215/597-7405
170 S. Independence Mall West(Commercial & FTS)
7th and Walnut Streets FAX 215/597-8838
Philadelphia, Pennsylvania 19106-2424

Direct Dial:
(215) 597-1131

REPLY TO:
60-335991-01 July 30, 2001

VIA FAX:
(212) - 858-1500

Sutton Keany, Esq.
Pillsbury Winthrop LLP
One Battery Park Plaza
New York, New York 10004-1490

Re: Morganite Industries, Inc.

Dear Mr. Keany::

Would you please specifically identify for me, by name, those individuals from Morganite Industries, Inc., that you represent in the grand jury investigation currently being conducted in the Eastern District of Pennsylvania. I have thoroughly searched our files and, other than for Mike Cox and Bruce Muller, I have found neither a formal notification nor other indication from you or your

firm that your representation of Morganite Industries includes clients other than the corporation.

Additionally, if your representation is limited to the corporation only, I would greatly appreciate your confirming that fact for me so that there are no misunderstandings as to the scope of your representation.

I would greatly appreciate your response to this inquiry not later than the close of business Wednesday, August 1, 2001. If I do not hear from you by that time, I will assume that your representation is limited to the corporation and to Mike Cox and Bruce Muller.

Sincerely yours,

/s/

LUCY P. MCCLAIN
Attorney
Philadelphia Office
Antitrust Division

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[excerpted from 3d Cir. Appendix 3418]

To: fwollman@morganitena.com, david.coker@morgancrucible.co.uk

CC: Jerry P Peppers/New York/ WSP&R@WSP&R, Bryan R Dunlap/ NewYork/WSP&R@WSP&R

From: Sutton Keany

Date: 07/30/01 06:04 PM

Subject: Lucy McClain

Dear Fred and David:

We have heard from Lucy. A very brief, somewhat formal letter in which she inquires as to who our firm represents. Is it limited to Morganite, Mike and Bruce?

More than a little puzzling. I called her to try to get some insight. She was very informal and told me, quote unquote, "Oh, this is just one of those cover your ass things. I just realized that I did not know exactly who you represented."

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. I told her that I would.

I am faxing you her letter.

As I said, more than a little puzzling. We can speculate about some possible meaning to all of this on Friday.

Sutton

Sutton Keany
Pillsbury Winthrop LLP
One Battery Park Plaza
New York, New York 10004
212-858-1724
Fax- 212-858-1500
Cell- 203-247-2630

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[excerpted from 3d Cir. Appendix 3419]

July 31, 2001

BY TELEFAX AND MAIL

Lucy P. McClain, Esq.
Department of Justice
Antitrust Division
The Curtis Center
Suite 650 West
170 South Independence Mall West
Philadelphia, PA 19106-2424

Re: Morganite Industries, Inc.

Dear Lucy:

I am responding to your letter of July 30, 2001, which we discussed yesterday afternoon.

As you know, this firm represents Morganite Industries, Inc. and its parent company, The Morgan Crucible Company plc, in connection with matters related to the investigation which you are conducting on behalf of the Division. 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.

Please do not hesitate to call or write if I can be of any further help in clarifying matters.

Sincerely,

/s/

Sutton Keany

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[excerpted from 3d Cir. Appendix 383]

Memorandum

Subject Conversation with Sutton Keany at ABA conference, NY	Date February 8, 2002

To The File From Lucy P. McClain
Richard S. Rosenberg

On January 31, 2002, at approximately 3:30 p.m., Richard Rosenberg and I spoke with Sutton Keany, Esquire (former counsel for Morganite) at the ABA conference in New York.

We prefaced our remarks to Sutton by saying that it was not our intention to have him violate any attorney-client or work product privilege, but that we were hoping he could answer a few questions for us concerning the handwritten statements prepared by Morganite's employees. 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 told us that it was his position, as well as the position of Sullivan & Cromwell, Morganite's new counsel, that those handwritten statements were not privileged. Sutton also told us that it was his understanding that the Morganite employees knew that he would be turning the statements over to us. Sutton said that he explained to the clients what he wanted to do with the

statements, and the clients agreed that they should turn the statements over to us to try to convince us to drop the case against Morganite.

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[excerpted from 3d Cir. Appendix 379–380]

From: McClain, Lucy

Sent: April 30, 2010 7:04 a.m.

To: Rosenberg, Richard; Justice, Kimberly A; 'j_hughes1 18@comcast.net'

Subject: Fw: Developments

FYI

----- Original Message -----

From: SUSANNE KEANY <skeany@optonline.net>

To: McClain, Lucy

Date: Thu Apr 29 20:35:06 2010

Subject: Re: Developments

Hi, Lucy.

We will talk.

I understand your thinking on the Norris opposition. I am very comfortable in asserting that I never represented Norris. On two occasions I urged him to retain his own counsel: during my first face to face meeting with him in Windsor after the subpoena in the U.S. was served and again in September of 2001 when I finally grasped that things were just not as they had seemed to me. He blew me off on each occasion, not because he expressed some thought that I represented him but rather because he could not imagine why he would need counsel ... he had never done anything wrong……Sutton

On Thu, Apr 29, 2010 at 11:47 AM, McClain, Lucy wrote:

Thanks for the e-mail and voice mail message. We'll look forward to talking to you later today. I also wanted you to know that we talked to Morgan's counsel late yesterday, and they told us that they will not be asserting the attorney-client privilege. (They said they were getting ready to send you a letter to that effect, but I obviously don't have any further information about that.) With respect to the proposed affidavit: We will be giving notice to Norris's counsel that we plan to call you as a witness, and we fully expect that once they learn about your subpoena they will file a motion to prevent your appearance: And we fully expect that they will raise attorney-client privilege to prevent your testimony. If the facts allow it, we were hoping we could include an affidavit from you in our response that sets out your belief that you did not/never did represent Norris. We can talk about this in more detail later today when we chat.

Thanks Sutton.

P.S. Sorry to be intruding on your vacation.

-----Original Message-----

From: SUSANNE KEANY
skeany@optonline.net

Sent: Wednesday, April 28, 2010 8:28 p.m.

To: McClain, Lucy

Subject: Deve a problem.elopments

Hi, Lucy.

I heard most of your voicemail.

We are now on the road. We expect to be back in Weston during the first week in June. A Duly trial date does not seem to me to be a problem.

I will apparently have access to email as we go along. Please provide me with more details concerning the proposed affidavit. I had expected to do one; I do not see an issue.

Send me a proposed draft, if you are comfortable with that.

I will try to call you in the next day or so. I assume this means that MC will not be waiving the privilege. But maybe they will. Wendy seemed very non-combative.

Take care.

Sutton

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[excerpted from 3d Cir. Appendix 381–382]

From: Sutton Keany [skeany@optonline.net]

Date: Thursday, May 27, 2010 2:56 p.m.

To: McClain, Lucy

CC: Connolly, Robert; 'John Hughes'; Justice, Kimberly A; Kievit, MaryJo; Lang, Patrick; Montanti, Elizabeth A; Norman, Wendy; Parker, Jeffrey; Petosa, Theresa; Rosenberg, Richard

Subject: The scripts

Dear Lucy;

I just flipped through the motion to suppress the scripts.

There are a number of thingd that I disagree with. The central reaction I have is this:

I became aware of the notes that came to be called "the scripts" during the course of my first interview with a MC executive at Windsor. I had not asked that such a document be prepared. I was concerned, in a way, that it existed: I would have preferred to interview each executive separately to gather unrefreshed recollections, unaided by a group session. Nevertheless, I "liked" the content: it was consistent with what Coker had told me to expect.

During the lunch break on the first day of interviewing, after the "discovery", Dunlap and I had lunch with Norris and Coker. I raised the issue of the notes. I was not surprised that they both knew of them; it made sense to me that they would have been aware of the session that preceded our arrival. One of the executives told me that the session had been

held, under MacFarlanes leadership, at the express direction of Norris. In any event, I told Norris and Coker that the notes were not within the geographic scope of the subpoena and I also noted that they bore a legend referring to the AC privilege. BUT I did say to Norris and Coker that I wanted them to consider whether we should go ahead and produce them, subject only to some language about nonwaiver of geographic scope and other privileges. 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.

Sutton

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Sutton Keany

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