Case Nos. 18-2282 and 18-2539

United States Court of Appeals

for the

Third Circuit

UNITED STATES OF AMERICA

– v. –

WHEELER K. NEFF,

Appellant in 18-2282

(E.D. Pa. No. 2-16-cr-00130-002)

UNITED STATES OF AMERICA

– v. –

CHARLES HALLINAN,

Appellant in 18-2539

(E.D. Pa. No. 2-16-cr-00130-001)

ON APPEAL FROM THE JUDGMENTS ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA IN CASE NOS. 2-16-CR-00130-001 AND 2-16-CR-00130-002, EDUARDO C. ROBRENO, U.S. DISTRICT JUDGE

REPLY BRIEF FOR DEFENDANT-APPELLANT CHARLES HALLINAN

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PRELIMINARY STATEMENT

Appellant has effectively been sentenced to life imprisonment for payday lending – a practice that the government concedes is legal and unrestricted in certain states. Payday lending is far from *malum in se.* Legislators have debated the pros and cons of payday loans for decades and the CFPB has recently rolled back restrictions on the practice. *See Consumer Financial Protection Bureau Releases Notices of Proposed Rulemaking on Payday Lending* (Feb. 6, 2019) (noting that payday lending restrictions "reduce access to credit and competition"). With uncertainty in the law, Appellant formed a good faith belief that his activities were lawful due to an industry-wide acceptance of its legality supported by reputable legal opinions. Regardless of whether those legal opinions were right or wrong, it is unjust for him to spend the rest of his life in prison as a result of one of the first ever criminal prosecutions of tribal payday lending (the "Tribal Model") even if his practice crossed an ill-defined line. As noted by Justice Oliver Wendell Holmes:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world, in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear.

McBoyle v. United States, 283 U.S. 25, 27 (1931).

Moreover, Appellant's sole defense – that he never intended to break the law – was frustrated and weakened by egregious legal errors made below. First, due to

infirm instructions, which were objected to, the jury was not told to evaluate his belief in the lawfulness of his actions, as the District Court refused to instruct the jury on willfulness. The District Court further hampered the defense when it prevented Appellant's star witness, codefendant Wheeler Neff, from detailing the research he did into the legality of the Tribal Model, introducing into evidence tribal ordinances, describing the legal opinions he reviewed, and demonstrating to the jury the reasonableness of both Defendants' beliefs that their actions were lawful. Appellant's defense was road-blocked, culminating in the District Court flouting this Circuit's prior ruling and allowing the government to use privileged attorney work product at trial. That act, described first below, began a series of events that led to the effective nullification of Appellants' sole means of defense.

Appellant's continued incarceration is a manifest injustice, and these and other errors mandate that Appellant's conviction be vacated.

I. THE DISTRICT COURT AND GOVERNMENT OPENLY DISREGARDED THIS CIRCUIT'S RULING IN ALLOWING THE GOVERNMENT'S USE AT TRIAL OF PRIVILEGED WORK PRODUCT

After more than a year of briefing, re-briefing, intermediate letters, and oral argument, this Court was exceptionally clear: a July 2013 email from Appellant's attorney (the "Privileged Email") should never have been used in the grand jury as a basis to indict Appellant because it was privileged work product. In the opinion, this Court commented that the inclusion of the Privileged Email would not

"automatically" require a retrial, however, if the government could show harmless error with its use in the grand jury. *In re Grand Jury Matter #3*, 847 F.3d 157, 167 (3d Cir. 2017). In issuing this ruling, Appellant surmises that the panel never envisioned that its ruling would be completely disregarded by the District Court when it allowed its use at trial. The government relied on the Privileged Email in its opening and closing arguments, the direct examination of multiple witnesses, and the cross-examination of co-defendant Wheeler Neff. It was integral to the government's case. Indeed, the jury requested to review the Privileged Email and, upon receiving it, returned a guilty verdict soon thereafter.

In its response, the government argues that the Privileged Email is not privileged, rehashing the same arguments this Court already rejected, and demonstrating yet again that it does not understand the requirements of the "in furtherance" prong for the crime-fraud exception.

The government then falls back on harmless error at trial, which is not the harmless error analysis this Court envisioned in its opinion, i.e. that the grand jury would have issued the indictment even without the Privileged Email. Rather, the government argues that it does not matter if it disregarded this Court's ruling and used the Privileged Email at trial because of an "avalanche" of other inculpatory evidence. From a due process rights perspective, its argument is alarming that it can disregard a Circuit opinion and then claim harmless error; from a legal perspective

the government clearly misunderstands the standard of review; and from a factual perspective, its contention that the Privileged Email was not central to its case is simply not accurate. It defies common sense to think government would risk tainting the indictment, reversing a conviction, and disregarding this Court's order if it were not central to its case. The email's inclusion warrants vacating Appellant's conviction and dismissing the indictment.

A. The Crime-Fraud Exception Was Not Met

This Court has already ruled that the Privileged Email does not meet the crime-fraud exception and it should not revisit that holding. The law of the case should govern this issue. *See United States v. Local 560 (I.B.T.)*, 974 F.2d 315 (3d Cir. 1992) ("When an appellate court decides a legal issue, the decision governs all subsequent proceedings in the same case."); *Todd & Co., Inc. v. SEC*, 637 F.2d 154, 157 (3d Cir. 1980) (noting the doctrine applies "to issues that were actually discussed by the court in the prior appeal [and] to issues decided by necessary implication"). As the Supreme Court noted in *United States v. Camou*:

> After a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined on the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation . . . There would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticism on its opinions or speculate on chances for changes in its members.

184 U.S. 572 (1902).

The government should not be allowed multiple bites at the apple – modifying its argument slightly in the hopes of getting a new result. However, even were this Court to consider the government's new, contorted arguments, they can be quickly rejected.

1. The Privileged Email Did Not Further Any Purported Tax Crimes

The government first attempts to relitigate whether the Privileged Email meets the crime fraud exception by arguing it furthered certain tax crimes. Gov't Resp. at 69 (Doc. No. 003113187578 March 18, 2019). In the first two purported crimes, the government postulates that if Appellant sold the payday lending entity, Apex 1 Processing, to Chief Randall Ginger in 2008, Appellant was legally obligated to report the sale to the IRS. Its argument is absurd. The government's entire indictment was based on the premises that: Appellant *did not* sell Apex 1 to Chief Randall Ginger; Appellant offered payday loans through Apex 1 and not Chief Ginger; and Appellant's testimony in the Indiana litigation that he sold Apex 1 was false. The fact that the government is willing to make an argument antithetical to its theory of guilt at trial demonstrates its desperation.

Next, the government argues the Privileged Email somehow furthered the crime of failing to accurately reflect the ownership of Apex 1 in tax filings in subsequent years. Gov't Resp. at 69. But there was nothing in the attorney's advice

regarding filing future tax returns. The attorney provided advice about litigation strategy for a pending case that would be long over before any future filings were made.

Moreover, the only purported crimes that were furthered were ones of inaction – failing to file tax returns. By definition, nothing was done as a result of the Privileged Email. The government argues that it knows of no legal authority that the crime-fraud exception does not apply to crimes of "inaction," but Appellant did cite such authority. This Court's prior opinion made it clear that the in furtherance prong requires the attorney's advice to be misused in some further action:

> If he had followed through and retroactively amended his tax returns, we would have no trouble finding an act in furtherance. . . . But none of that happened. . . . Doe at most thought about using his lawyer's work product in furtherance of a fraud, but he never actually did so . . . . The absence of a meaningful distinction between these scenarios shows why finding an act in furtherance here lacks a limiting principle and risks overcoming confidentiality based on mere thought.

Grand Jury Matter #3 847 F.3d at 166. Listening to advice and then doing nothing is exactly what the crime-fraud exception is not meant to cover.

2. The Privileged Email Did Not Further A Fraud On Indiana Litigants

Finally, the government reargues the original appeal to the letter and complains that it would have won had it not been prevented from presenting new evidence by Federal Rule of Appellate Procedure 10(a) that would have conclusively shown the Privileged Email furthered a fraud on the Indiana plaintiffs. In effect, the

government states it knew of this evidence but kept its mouth closed and let the litigants and Court go through a pointless exercise for over a year. Federal Rule of Appellate Procedure 10(a) does not require such a contorted procedure that forces parties to spend time on worthless pursuits. The rule simply provides that the record on appeal includes "the original papers and exhibits filed in the district court." Fed. R. App. Proc. 10(a). However, "in exceptional circumstances a court of appeals may allow a party to supplement the record on appeal." *Acumed LLC v. Advanced Surgical Services, Inc.*, 561 F.3d 199, 226 (3d Cir. 2009); *see also Castle v. Cohen*, 840 F.2d 173 (3d Cir. 1988) (granting motion to supplement record under Fed. R. App. P. 10(e)). In addition, this Circuit could have remanded the case to the District Court for further proceedings. *See, e.g., Bass v. Attardi*, 868 F.2d 45, 46, 52 n.15 (3d Cir. 1989). The implication that the government sat on determinative evidence and let the parties go through an exercise in futility is insulting.

The likely reason the government did not raise this evidence is because it is disconnected from the Indiana fraud. The government submits that in October 2014, more than a year after the Privileged Email was sent, the accountant prepared, but was told not to file, new tax returns for Apex 1 that identified Chief Ginger as the owner. This could not have furthered the Indiana litigation fraud because the case settled in April 2014. A4511.

Moreover, the accountant was clear that his 2014 actions had nothing to do with the lawyer's advice. *See* A2152 (testifying he merely put a flag on the Privileged Email and stuck it in a drawer); A2036 (testifying he only "skimmed over" the attorney work product in the email because "those type of things, that's foreign to me."); A2163 (testifying he did not take "any action at all" because he "was told not to amend any tax returns"); A2168 (testifying he "didn't get confirmation from anyone until the email of December 1st, 2014 who owned [Apex 1], who didn't own it; it was still up in the air for me"); A407 (testifying the preparation of returns in October 2014 was in response to communications in 2014 and "not communications in 2013")[1]. The fact that he prepared, but never filed, tax returns had nothing to do with the Privileged Email. And whether returns were filed in subsequent years had nothing to do with the Indiana litigation.

B. The Government's Actions Demonstrate The Importance Of The Privileged Email

Actions speak louder than words. The government's Ahab-esque quest to use the Privileged Email contradicts claims it was not a critical piece of evidence. Why else would the government risk tainting the entire indictment:

> But getting back to the hypothetical possibility that [the indictment] could be tainted, that's entirely our risk. . . . We believe it's worth taking the risk to present this e-mail.

[1] Appellant notes that this transcript was amended. The initial transcript mistakenly wrote "Now communications." The amended page of the transcript accompanies this reply.

A248. And why else would the government attempt to introduce the Privileged Email at trial when this Court had already warned the government that the mere inclusion of the Privileged Email in the grand jury may in and of itself warrant a new trial. *Grand Jury Matter #3*, 847 F.3d at 166.

This is not, as the government claims, a discretionary evidentiary ruling reviewable for abuse of discretion. Rulings on the scope of the attorney-client privilege are mixed-questions of law and fact and reviewed *de novo*. *In re Grand Jury Subpoena Dated Dec. 10, 1987*, 926 F.2d 847, 858-59 (9th Cir. 1991); *In re Impounded*, 241 F.3d 308, 312 (3d Cir. 2001) ("We exercise *de novo* review over the legal issues underlying the application of the crime-fraud exception to the attorney-client privilege."). Moreover, the District Court's failure to follow this Court's mandate is reviewed *de novo*. *See United States v. Lee*, 358 F.3d 315, 320 (5th Cir. 2004) ("Whether the law of the case doctrine foreclosed the district court's exercise of discretion on remand and the interpretation of the scope of this court's remand order present questions of law that this court reviews *de novo*."); *Estate of Thompson v. C.I.R.*, 370 Fed. Appx. 141 (2d Cir. 2010) (same). That said, failing to follow this Court's legal analysis is, in itself, an abuse of discretion even were that the standard.

It is clear that the Privileged Email affected the outcome of the case: 1) the wire fraud and money laundering counts depended on a finding by the jury that

Appellant owned Apex 1 Processing; 2) the government's theory on the RICO counts required a finding that Appellant owned the payday lending companies such as Apex 1 Processing; 3) the Privileged Email constituted overt acts in count three and the sole basis for counts six and seven; 4) it was used in the examination of multiple witnesses; 5) it was used to cross-examine Wheeler Neff and cast dispersions on both Defendants; and 5) it was one of only nine exhibits the jury requested.[2] *See* App. Br. at 15 (Doc. No. 003113086751 Nov. 14, 2018).

The government points to a number of other exhibits in an attempt to show that other evidence was "far more probative" than the Privileged Email. Gov't Resp. at 79. First, it miscomprehends the standard of review: the presence of other evidence is not sufficient unless a court can conclude with high confidence that the Privileged Email did not contribute to the verdict – which it clearly did. Second, the government overstates what it calls as an "avalanche" of other evidence, as the evidence is not so one-sided.

The government relies chiefly on two recordings made by cooperating witness Adrian Rubin. Gov't Resp. at 79-80. In the first, Appellant states he offered Chief Ginger money to "step up to the plate and say that you were with owner of Apex

[2] The government disputes the number of exhibits requested by the jury. According to the transcript, the jury requested nine exhibits. A6291, A6298, A326. Regardless of the exact number, however, the fact the jury requested the Privileged Email from more than a thousand exhibits demonstrates its importance.

One Processing." Gov't Resp. at 79. The government conspicuously omits the previous two sentences of that recording:

> So I call up Wheeler and I said Wheeler remember when we sold all those companies to Randy, did we sell Apex One? He said, yea that was one of them. I said do you have the contract? He says yea, so he sends me the contract.

A6389-90. Before the "step up to the plate" quote, Appellant stated his belief that Apex 1 Processing was sold to Chief Ginger. In that context, stepping up to the plate simply means Chief Ginger involving himself in pending litigation. In the second recording, the government avers that Appellant "admitted that the entire tribal model of payday lending was a sham." Gov't Resp. at 80. The conversation, however, reflects Scott Tucker's Tribal relationships and not his own:

> [Y]ou out to try to follow the Tucker/FTC situation, and you should see how deeply into the relationship the FTC is delving – I believe they are going to prove that it's a sham and I think Mr. Tucker is gonna lose, and I think it's going to set a precedent.

A6368. Moreover, calling the Tribal Model farcical is not the same as calling it unlawful. That is one reason why the willfulness instruction, discussed *infra* at Section II, is so important. Appellant could consider it farcical from a layman's perspective yet believe his actions were still within the law. Indeed, courts have called similar legal arrangements with tribes shams while still acknowledging their validity. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 820, 825 (2014) (referring to the extension of tribal sovereign immunity to off-reservation

commercial actions as "a fiction," "an enigma," and "out of sync with this reality"); *Allergan v. Teva Pharmaceuticals USA, Inc.*, No. 2:15-cv-1455-WCB, 2017 WL 4619790 at *3 (E.D. Tex. Oct. 16, 2017) (acknowledging that Allergan's transfer of a patent to a Tribe to evade arbitration could be lawful, but still analogizing it to "sham transactions such as abusive tax shelters"); *Calvillo v. Yankton Sioux Tribe*, 899 F. Supp. 431, 438 (D.S.D. 1995) (recognizing the farcical nature of using tribal sovereign immunity as a defense to contractual obligations, but finding that result "compelled by the law"); *Carls v. Blue Lake Housing Auth.*, No. C052660, 2007 WL 2040562 at *2 (Cal. Ct. App. July 17, 2007) (affirming motion to quash due to tribal sovereign immunity even while doubting "the wisdom of perpetrating the doctrine" and noting its inequitable results) (citing *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 758 (1998)).

The interpretation of these recordings is a matter for the jury, but they are susceptible to lawful interpretation. Moreover, there was not one other piece of evidence that was the sole basis for entire counts, overt acts in others, and *mens rea* evidence for the entire case. When the erroneously admitted evidence goes to *the* central issue to the case – Appellant's *mens rea* – which was the sole defense, it would be impossible to say it did not contribute to the verdict. *See Carella v. California*, 491 U.S. 263, 270 (1989) (Scalia, J., concurring) ("[A] reviewing court cannot hold that the error did not contribute to the verdict. The fact that the

reviewing court may view the evidence of intent as overwhelming is then simply irrelevant. To allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made.").

C. The Privileged Email Tainted The Indictment

The inclusion of the Privileged Email before the grand jury requires the dismissal of the indictment. The government accepts that *United States v. Helstoski*, 635 F.2d 200 (1980) is controlling but distinguishes it because in *Helstoski* the indictment was dismissed when the grand jury considered evidence precluded by the Speech and Debate Clause and in the instant case, the Privileged Email only concerns a "sub-constitutional privilege, i.e. the work product doctrine." Gov't Resp. at 86. The work product privilege is no less deserving of protection than the speech and debate clause. *See Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (attorney privilege is necessary "to promote justice"); *United States v. Edwards,* 303 F.3d 606, 618 (5th Cir. 2002) (calling the privilege "the oldest and most venerated of the common law privileges"); *Leviton Mfg. Co. v. Shanghai Meihao Elec., Inc.*, 613 F. Supp. 2d 670, 722 n.24 (D. Md. 2009) (describing the attorney client privilege as "largely sacrosanct"); *UPMC v. CBIZ, Inc.*, No. 3:16-cv-204, 2018 WL 2107777 at *3 (W.D. Pa. May 7, 2018) (attorney-client privilege is of "utmost importance"

and production of privileged materials would cause "manifest injustice"). The violation of either privilege before the grand jury should counsel for dismissal.

II. THE DISTRICT COURT ERRED IN FAILING TO CHARGE THE JURY ON WILLFULNESS

By failing to instruct the jury on willfulness, the District Court eviscerated Appellant's sole defense. There was no dispute that Appellant participated in a payday lending business. Appellant's entire defense was that he had a good faith belief that partnerships with Native American tribes insulated lenders from state usury caps. It was not an unreasonable belief. The Supreme Court had already extended the doctrine of Tribal Sovereign Immunity to hamper regulations on tribal casinos. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Where there is ambiguity in the law, "a fair warning should be given to the world, in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25 (1931). Appellant was never given such a warning. He was sentenced to life imprisonment in one of the first ever payday lending RICO prosecutions, and the *only* such prosecution to date that has not included a willfulness instruction. *See* Appellant Brief, *United States v. Tucker*, Docket Nos. 18-181(L), 18-184 (CON) (2d Cir. 2018) ("At trial the parties agreed – as they do now – that the requisite mens rea on the Unlawful Debt Counts is willfulness."); *United States v. Biasucci*, 786 F.2d 504, 513 (2d Cir. 1986) (usury provision of RICO requires "that the defendant acted knowingly, willfully,

and unlawfully"); *United States v. Irizarry*, 341 F.3d 273 (3d Cir. 2003) (approving of a willfulness charge); *United States v. Aucoin*, 964 F.2d 1492 (5th Cir. 1992) (same).

The government has been unable to cite a single case supporting its proposition that one may commit usury under RICO without unlawful intent. Rather, it cites the Third Circuit model jury instructions, which are not designed to be applied dogmatically in every case:

> These model instructions are available to judges and litigants to be used in their discretion in tailoring the instructions in a particular case. They are intended to be model, not mandatory, instructions. . . . [I]t cannot be assumed that all of these model instructions in the form given will necessarily be appropriate under the facts of a particular case or that the Third Circuit will approve these instructions, if given.

Introduction and Description of Committee, Third Circuit Model Jury Instructions, at 2 (revised January 2018). Moreover the Model Instructions counsel for a willfulness charge in certain circumstances. Third Circuit Model Jury Instructions No. 5.02, comment at 10.

It is manifestly unjust to punish Appellant for actions he believed were lawful. An entire industry was built on the legality of the Tribal Model. It was supported by law firms, openly operated, and debated by legislators with many states institutionalizing the practice. While some regulators were hostile to the Tribal Model, they attacked these relationships through civil litigation. This is exactly the kind of case where the jury must be able to distinguish between lawful and unlawful

intent so as not to "impose criminal sanctions on a class of persons whose mental state . . . makes their actions entirely innocent." *Staples v. United States*, 511 U.S. 600, 614-15 (1994); *see also Morisette v. United States*, 342 U.S. 246 (1952):

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature system of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Appellant should not spend the rest of his life in prison when the jury did not even have the opportunity to evaluate Appellant's mental state.

III. THE GOVERNMENT DID NOT PROVE WIRE FRAUD BECAUSE LITIGATION IS NOT PROPERTY

The counts of the Superseding Indictment relating to Appellants' alleged scheme to defraud the Indiana class action plaintiffs are an untenable and unjustified extension of federal power into the realm of civil litigation. The government has been unable to identify a single mail or wire fraud prosecution linked with false statements in civil discovery. This is unsurprising, as unvested legal claims do not constitute the "traditionally recognized" property rights necessary to support a mail or wire fraud prosecution. *United States v. Hedaithy*, 392 F.3d 580, 590 (3d Cir. 2004). The practical impact of permitting such prosecutions to advance would be to render every civil litigant vulnerable to criminal prosecution. Every incomplete interrogatory, deficient document

production, displeasing deposition, and aggressive settlement negotiation could lead to accusations of criminal conduct. Such a result would be absurd.

The government's reliance on this Court's recent decision in *United States v. Hird*, 913 F.3d 332 (3d Cir. 2019) is misplaced. In *Hird*, the defendants were judges that took bribes to dismiss traffic tickets and deprive the City of Philadelphia of fines and costs, i.e. "the right to be paid." *Id.* at 344. *Hird* relied on the Supreme Court's decision in *Pasquantino v. United States*, 544 U.S. 349 (2005), a case concerning a fraudulent scheme depriving the Canadian government out of tax revenue. In both cases, the courts stressed that it was a "legal entitlement to collect money" that constituted the property sufficient to support the wire fraud. *Id.* at 344. The Indiana plaintiffs never had any money due and owing. Rather, they were purportedly "being cheated out of an opportunity to receive" money, which is not wire fraud. *See Henry v. United* States, 29 F.3d 112, 116 (3d Cir. 1994). There is no legal entitlement to collect before final judgment has been entered. *See* Fed. R. Civ. P. 54 (Judgment; Costs), 62 (Stay of Proceedings to Enforce Judgment), and 69 (Execution). Indeed, in the Indiana class action the parties could not even settle the case without court approval.[3] *See* Ind. R. Trial.

[3] The government's cites to *Tulsa Prof. Collection Servs. Inc. v. Pope*, 485 U.S. 478 (1988) and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) are irrelevant. Each concern a Fourteenth Amendment claim that the government blocked litigation.

Proc. Rule 23(e).

Finally, the government's argument that litigation financing is evidence that an unvested claim is property "the law traditionally has recognized" is a non-starter. Gov't Resp. at 126-27 (citing *Henry*, 29 F.3d 112 (3d Cir. 1994)). Litigation finance is a new, and highly contentious, development in the legal industry. Contracts for a security interest in a portion of a claim's final judgment were traditionally illegal under the common law of champerty, and still are today in most states. *See* Terrence Cain, *Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater*, 89 Chi.-Kent L. Rev. 11, 21 (2013).

There was no traditionally recognized property right out of which the Indiana plaintiffs were defrauded. Counts Three through Seven, and the accompanying money laundering counts, of the superseding indictment must be vacated.

IV. THE CURTAILMENT OF WHEELER NEFF'S ABILITY TO TESTIFY PREVENTED APPELLANT FROM PRESENTING HIS SOLE DEFENSE

Appellant's good faith belief that his actions were not unlawful was his sole defense at trial. The most important witness in the defense case was Wheeler Neff. Neff researched the Tribal Model, consulted legal opinions, reviewed tribal ordinances, discussed tribal sovereign immunity with Native American Tribes, and worked with Appellant on a continual basis to set up and run payday lending

businesses. The jury, however, was given an incomplete picture of his work. It was never permitted to understand the extent of these efforts because the District Court substantially circumscribed Neff's testimony. This decision violated Neff's right to testify and both Appellants' constitutional rights to present their defense.

The government's Opposition Brief elides any discussion of Appellants' constitutional rights – and only offers one, misquoted case in support of its proposition that allowing Neff to testify in more detail would somehow confuse the jury.[4] Gov't Resp. at 110 (citing *First Nat'l State Bank v. Reliance Elec. Co.*, 668 F.2d 725, 731 (3d Cir. 1981), although the quotation cited is from another case). In *First Nat'l State Bank*, however, this Court approved of the District Court's admission of legal testimony and that case has nothing to do with a criminal defendant's right to present his defense.

Moreover, Neff's full testimony would not have mislead the jury. The government submits that if Neff were allowed to offer details of his research, the government "would have been compelled to do likewise." Gov't Resp. at 114. But it is not the government's state of mind that is important. Neff's testimony was not for the truth of the matter, but to reflect the Defendants' state of mind and lack of

[4] The government also makes a passing comment that Neff's testimony could lead to jury nullification. Gov't Resp. at 116 (citing *United States v. DeMuro*, 677 F.3d 550 (3d Cir. 2012)). However, in *DeMuro* the excluded evidence was of almost no relevance, the defendant agreed it could be used for jury nullification, and the defendant's testimony was not curtailed.

unlawful intent. A5214. Simply because the government has a different view of the law does not render Neff's beliefs misleading or irrelevant. *See United States v. Scully*, 877 F.3d 464, 475 (2d Cir. 2017) ("One party to a trial will frequently believe that testimony offered by the other side is false or misleading. That, however, is not a factor to be weighed against the receipt of otherwise admissible testimony.")

The government also minimizes the impact of the District Court's decision by submitting that "[a]ll that the district court barred was a description of the details of some of the authorities Neff said he had read." Gov't Resp. at 113. The Court also refused to admit Tribal ordinances that established the payday lending programs which informed the Appellants' good faith beliefs (A5791, A7126, A7254); disallowed the admission of legal opinions that Neff and Appellant reviewed (A5594, A7216); and rejected testimony as to why Neff believed Chief Ginger's tribe was federally recognized because in the District Court's opinion "it doesn't matter" (A5230). It mattered to Appellants and was relevant testimony to their good faith.

It was also essential that Neff be allowed to explain his research in detail so that the jury did not come away with the belief, as the District Court did, that Neff was just reading comic books. A5211. Limiting Neff's testimony undermined his credibility, questioned the reasonableness of his diligence, and fatally undermined an explanation of the lengths Appellants went to assure themselves that their conduct

was legal. Limiting the testimony of the defense's most important witness about the central issue of the case – the sole defense – is not harmless error. *See United States v. Carter*, 491 F.2d 625, 630 (5th Cir. 1974) ("Courts are particularly reluctant to deem error harmless where, as here, the error precludes or impairs the presentation of an accused's sole means of defense.").

Finally, the government submits that precluding Neff from fully testifying had no effect on Hallinan, but nothing can be further from the truth. Hallinan's sole defense was his good faith belief that his use of the Tribal Model rendered his payday lending business legal. The government argued that Neff and Hallinan conspired to offer payday loans under the guise of a model they knew to be illegal. There was no more important testimony than Neff's assertions that there was no conspiracy; that they acted in good faith to ensure the legality of the model; and that Neff's efforts were diligent and well-informed. Limiting his testimony and undermining his credibility was fatal and requires reversal. *See United States v. Kohan*, 806 F.2d 18 (2d Cir. 1986) (reversing conviction because sole witness of the defense was not allowed to offer state of mind evidence).

V. THE OBSTRUCTION OF JUSTICE ENHANCEMENT WAS INAPPLICABLE

Shielding evidence from government scrutiny is obstructive only if doing so "impede[s]" the administration of justice. U.S.S.G. §3C1.1. Our adversary system requires that the prosecution's access to evidence yield to privilege. *Upjohn Co. v.*

United States, 449 U.S. 383, 389 (1981). Thus enabling a privilege assertion "promote[s]," not impedes, the "administration of justice." *Id.*

The district court applied the obstruction enhancement because Apex 1 would not have "assert[ed]" privilege "but for" the fee payments – not because it would have lacked privilege absent them.[5] A8162-63. *In re Grand Jury (ABC Corp.)*, 705 F.3d 133 (3d Cir. 2012), *did* hold that defunct corporations have standing to assert privilege. This Court addressed standing sua sponte (*id.* 142), discussed the corporation's "defunct" status at length (*id.* 148), and concluded both that it had standing and was subject to contempt.

No corporation ever asserts privilege "but for" an individual's direction. *ABC Corp.*, 705 F.3d at 148. An assertion that serves the individual's interests is not a "sham" – even when, as in *ABC Corp*., the corporation is a mere "ghost" but for its privilege assertion. *Id.* (target controlled corporation's privilege, shared counsel with it, and paid fees)*; see also In re Grand Jury Empaneled May 9, 2014*, 786 F.3d 255 (3d Cir. 2015) (same).

Moreover, Apex 1's privilege assertion was far more independent than that of ABC Corp. Unlike ABC Corp., it had interests beyond the privilege to protect

[5] The court expressly opined that the enhancement was consistent with its prior rulings upholding the privilege. A8163. *See* App Br. 54 (quoting ruling finding assertion "legitimate"). It based the enhancement on an unsuccessful "attempt" to obstruct. A8163.

(*e.g.*, funds subject to forfeiture; *see* App. Br. at 54-55). It had separate counsel, who – the district court held – did not take direction from the payor, and was not "influenc[ed]" by the payments. A8163; *see* App. Br. at 55 (arrangement comported with Rules of Professional Conduct).

Finally, the government admits that the facts that underlie its obstruction argument were thoroughly disclosed to the grand jury and district courts *before* any privilege rulings. It carps that Apex 1 did not disclose the facts to the court until ordered – without acknowledging that Apex 1 *requested* that order, to preserve its appellate rights. A4118.

The obstruction enhancement does not apply.

VI. THE DISTRICT COURT ERRED IN ORDERING THE FORFEITURE OF SPECIFIC PROPERTY AND AWARDING A MONEY JUDGMENT

The government's tracing methodology was contrary to Third Circuit caselaw. The government's financial analyst used a first-in, last-out tracing analysis described in *United States v. Banco Cafetero*, 797 F.2d 1154 (2d Cir. 1986). A7423. That methodology was rejected in this Circuit, however, in *United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1990). In response, the government effectively asks this Court to overrule *Voigt*, arguing that the case was limited by *United States v. Stewart*, 185 F.3d 112, 129 (3d Cir. 1999) and "undermined" by *Luis v. United States*, 136 S. Ct. 1083 (2016). The government's analysis is flawed.

This Court's decision in *Stewart* did not limit *Voigt*, but affirmed it. *Voigt* held the government to its obligation to identify illegal proceeds and noted that once funds are comingled it will be "difficult, if not impossible" to separate out the tainted funds. *Id.* at 1084. It counseled that if commingled funds "cannot be divided out with difficulty," then the government must use the substitute asset provision. *Id.* at 1088. *Stewart* upheld *Voigt* and was merely a case where the court could divide out the tainted funds easily. *Stewart*, 185 F.3d at 129. Here, however, the government's financial analyst testified that the bank accounts through which he traced proceeds contained "voluminous transfers." *Id.* He was forced to resort to the tracing methodology in *Banco Cafetero* that this Court has rejected.

Moreover, the Supreme Court's decision in *Luis* did not undermine *Voigt*. *Luis* was not a forfeiture case, but addressed a defendant's Sixth Amendment right to an attorney. The government makes much of passing dicta in *Luis* that quotes a 1956 treatise on the Law of Trusts for the proposition that courts have experience separating tainted from untainted monies. *Luis*, 136 S. Ct. at 1095. This hardly overturns *Voigt*. The government also fails to realize that identifying funds that can be used for attorney fees is very different than concluding that specific property is traceable to illegal proceeds beyond a reasonable doubt.

Finally, evidence presented at the forfeiture hearing did not warrant a money judgment of $64,300,829. First, expert Gregory Cowhey established that the payday

loan companies incurred direct costs of $59,009,749, which should offset this amount of proceeds. *See Lizza Industries,* 775 F.2d 492, 497 (2d Cir. 1985). The government suggests that this will lead drug dealers to try to deduct their costs of purchasing illegal drugs. Appellant's direct costs are far afield from buying contraband. They are legitimate business expenses that must be deducted so as to determine the actual amount of purportedly illegal proceeds he obtained.

Second, the District Court's methodology of approximating illegal proceeds was statistically infirm. The government admitted that its proffered money judgment included untainted funds derived from states where payday lending was unrestricted. The District Court approximated the percentage of illegal funds by using customer leads, i.e. data collected online to help find payday loan candidates. It was uncontested at the forfeiture hearing, however, that leads bore little correlation to actual loans because 99.85% of leads never became loans. A2406-07. The government's use of leads to surmise in what state each loan was made is analogous to predicting how 1000 people will vote based on a poll of 15. This is not proof beyond a reasonable doubt.

The government suggests that Appellant has a burden to offer "affirmative evidence or calculation of his own" on the correct amount of forfeiture. Gov't Resp. at 162. That is obviously false. Appellant has no burden of proof and the money judgment must be overturned.

CONCLUSION

The government went far beyond the bounds of the law in its zest for a conviction. The jury was prevented from evaluating all of the evidence and determining whether Appellants crossed a line or whether they had a good faith belief in the lawfulness of their actions. The Due Process Clause "guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683. 690 (1986). Appellant was deprived of that right. His conviction must be vacated.

Dated: April 8, 2019

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CERTIFICATE OF COUNSEL UNDER RULE 9 AND 21 OF THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT REGARDING BAR MEMBERSHIP

In compliance with Rule 21(d) of the Rules of the United States Court of Appeals for the Third Circuit, I, MICHAEL M. ROSENSAFT, ESQ., AND I, REBECCA A. KINBURN, ESQ., and ANDREW K. STUTZMAN, attorneys for the Appellant, CHARLES M. HALLINAN, certify that we are members of the Bar of this Court

/s/ *Michael M. Rosensaft*
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/s/ *Rebecca A. Kinburn*
Rebecca A. Kinburn

/s/ *Andrew Stutzman*
Andrew K. Stutzman

Dated: April 8, 2019

CERTIFICATE OF COMPLIANCE WITH RULE 32(A), FEDERAL RULES OF APPELLATE PROCEDURE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) per this Court's Order dated October 15, 2018. The brief contains 6464 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) as this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman Style.

/s/ *Michael M. Rosensaft*
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CERTIFICATE OF COUNSEL UNDER RULES 25, 28, AND 32 OF THE FEDERAL RULES OF APPELLATE PROCEDURE AND LOCAL APPELLATE RULES REGARDING THE PDF FILE AND HARDCOPY OF THE BRIEF

In compliance with Rules 25, 28, and 32 of the Federal Rules of Appellate Procedure and Local Appellate Rules, I, MICHAEL M. ROSENSAFT, ESQ., attorney for the Appellant, CHARLES M. HALLINAN, certify that the PDF file and Hard Copy of the brief are identical.

/s/ *Michael M. Rosensaft*
Michael M. Rosensaft

Dated: April 8, 2019

CERTIFICATE THAT A VIRUS CHECK WAS PERFORMED

I, MICHAEL M. ROSENSAFT, ESQ., attorney for Appellant, CHARLES M. HALLINAN, certify that a virus check was performed on my computer before the PDF file of the brief was electronically mailed using VIPRE Anti-Virus, Version 9.3.

/s/ *Michael M. Rosensaft*
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Dated: April 8, 2019

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all counsel of record in this case by filing on the Court's Electronic Case Filing System on April 8, 2019.

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