UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 18-2282

UNITED STATES OF AMERICA,

Appellee,

v.

WHEELER NEFF,

Appellant.

REPLY BRIEF FOR APPELLANT

APPEAL FROM THE JUDGMENT OF SENTENCE AND CONVICTION ENTERED ON MAY 29, 2018, IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, AT NO. 16-CR-00130-002 BY THE HONORABLE EDUARDO C. ROBRENO

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ARGUMENT

Neff is confident that his initial brief compels the granting of relief, that he has anticipated and has met all arguments made by the Appellee in this matter and that only three discrete points require specific rejoinder. Accordingly, to the extent that he does not presently address herein any matter more specifically, Neff relies on the arguments set forth in his principal brief and in the arguments set forth by Charles Hallinan in his principal brief and reply so far as these arguments pertain to Neff pursuant to F.R.A.P. 28(i).[1]

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[1] In order to keep the focus of this appeal on the issues herein, Neff will refrain from commenting on various inaccuracies and/ or misstatements in the Government's brief. One matter, however, must be mentioned. In support of the admission of the July 12, 2013, email against Neff that was of significant importance to the government's case, the government suggests at page 78 of its brief that Neff's transmission of this email to Hallinan was in itself an act in furtherance of a crime or fraud that would somehow make the crime fraud exception inapplicable to Neff. The government's position is at complete odds with its theory of the case, its basis for the attempt to admit the email and the testimony of Rod Ermel. Ermel, a trained and experienced CPA, specifically testified that Neff's advice with respect to Hallinan's tax returns and the transfer of business activity out of Apex 1 to other Hallinan companies was completely consistent with prevailing business practices and not a request for Hallinan to do anything wrong:

> Q Now, that was just a few hours ago. Is there a word in this email asking that you do anything wrong, that you backdate or falsify any document?
> A No.
> Q Did Charley Hallinan ever ask you to backdate or falsify any document?
> A No.
> Q Did Wheeler Neff ever ask you to backdate or falsify any document?
> A No.

A2110-2116.

I. THE COURT FATALLY PREJUDICED NEFF BY INSTRUCTING THE JURY IN THREE DISTINCT WAYS.

In recognition of the incredible volume of words that has already been placed before this Court, Neff seeks in this final pleading to give the Court a broad perspective of the profound issues that are presented to it which compel the reversal of his conviction. While there are multiple details in the Government's brief that should be corrected consistent with any fair reading of the facts, the focus here is on the larger picture of justice which will hopefully inform the Court's final decision.

a. The Court's instruction usurped the province of the jury to find a key element of the offenses charged.

The Government's response to Neff's argument that the Court essentially directed a verdict on the element of the offense dealing with the unenforceability of the loans (and his argument that the proof on Counts 1 and 2 failed) reads as though the Government is talking about a case different than the one currently on appeal.

After systematically avoiding the issue, the Government at last admits that the District Court did rule that Tribal Sovereign Immunity was wholly irrelevant to any issue in this case. Government Brief ["GB"] p. 106. But for the vast majority of its response to these claims, the Government's brief would lead someone to believe that the Court instructed the jury that while tribal immunity would provide

a safe harbor to some business relationships between a non-tribal entity and a tribe engaged in payday lending, the relationships here were not of that kind and that, through the application of some well-developed calculus to make that determination, they were "sham" relationships that made them criminal. GB p. 90-96. Indeed, the Government argument concludes with the assertion that as the jury could have found "the tribal arrangements were a sham," the conviction should be affirmed. Id.

Of course, if someone actually read the jury instructions in this case, they would know that this is not at all how the jury was charged. What happened was that the District Court swallowed whole the Government's categorical proposition that Tribal Sovereign Immunity had absolutely nothing to do with this case. The Court rejected the principle that such immunity could, depending upon the nature of the relationship between the non-tribal party and the tribe, legitimize loans made to individuals in states that had lower interest rate caps than those loans charged. The Court's instruction, set forth at page 16 of Neff's brief and discussed throughout, wrote the entire doctrine of Tribal Sovereign Immunity out of the law insofar as this jury was concerned.

In doing so, the Court committed the first fatal error which irreparably prejudiced Neff and assured his conviction. Tribal Sovereign Immunity was not only relevant in this case, it profoundly affected all aspects of the jury's proper

consideration of Neff's alleged criminal liability. It is a doctrine that addresses directly the question of whether the loans were illegal and unenforceable, as through today courts in various jurisdictions are not debating the basic applicability of the doctrine to payday lending but are trying to develop a generally accepted "arm-of-the-tribe" test that would set clear parameters for how the doctrine legitimizes various lending relationships. Further, it is also a doctrine that permeated every aspect of the critical issue here of whether the Government proved that Neff acted with the *mens rea* sufficient to convict him. This doctrine, so clearly embraced in the law[2] and so plainly influential on individuals like Neff who were studying the matter during the indictment period, would make it impossible for anyone to have found that Neff acted with the intent to join a criminal enterprise involving loans he knew to be illegal. But the jury was told to disregard the doctrine in all respects.

[2] In reviewing Michigan v. Bay Mills, 134 S.Ct. 2024 (2014), the Harvard Law Review noted that it "reaffirmed the broad reach of tribal immunity," holding that it is not limited to non-commercial activities or to conduct occurring only on tribal land, leaving the only question in any case whether the federal government abrogated it or whether the tribe waived it. Note, The Supreme Court 2013 Term, 128 Harvard Law Review, 301, 301 to 303 (2014). The Supreme Court read the broad reach of tribal immunity to cover tribal payday lending since Justice Thomas, in his dissent, raised a specific concern that Tribal Sovereign Immunity would allow tribes to associate with what he called "unsavory entities" in order to "escape state regulation by arranging to share profits with the tribes in exchange for using tribal immunity". Id. at 305.

The legitimacy of Tribal Sovereign Immunity in the payday lending context, chronicled in Neff's original brief, continues through scholarly writing to this day and reinforces his position that the doctrine, properly applied, legitimizes loans made that would otherwise run afoul of state usury laws.[3]

In 2018, Professor Grant Christensen of the University of North Dakota School of Law makes the point directly:

> The payday lending cases all derive from questions of tribal sovereignty. Tribes are generally not subject to state law, and tribes have used this exception to expand their economic development in a number of different sections. Some tribes have opted to operate or help facilitate payday lending because **tribal entities are otherwise exempt from state usury laws**.

Christensen, A View from American Courts: The Year in Indian Law 2017, 41 Seattle Law Review 805, 890 (2018) (emphasis supplied). Christensen points out that such an exemption arises when the relationship of the tribe and its affiliated entity meets the "arm-of-the-tribe" test. Various jurisdictions are working on formulations for an effective test, although none has yet received universal

[3] The government's suggestion that Tribal Sovereign Immunity offers no protection against state criminal sanctions is simply not true. On pages 20 to 21 of Neff's original brief, he cites ample authority that when the government regulates some activity via criminal statutes (like usury), Tribal Sovereign Immunity operates to protect both the tribe and the individuals who act in the name of the tribe. It is absurd to suggest that somehow a tribe could be fully protected in payday lending but that the individuals who operate the lawful tribal entity in that process would not be since the tribe would have no way to carry out the programs its immunity permits if the individuals needed to carry out the tribe's policies faced personal liability.

acceptance by Congress or the Courts. Such a test, when met, however, wholly justifies tribal payday lending. Id. at 891 to 892.[4]

A 2017 article in the American Indian Law Journal points out that several tribes continue to operate payday lending businesses consistent with the framework of Tribal Sovereign Immunity. Bree Black Horse, The Risk and Benefits of Tribal Payday Lending to Tribal Sovereign Immunity: Tribal Payday Lending Enterprises are Immune Under a Proposed Universal Arm-of-the-Tribe Test, 2 American Indian Law Journal 388 (2017). The regulation of payday lending must be focused on either Congressional legislation or, on a case by case basis, when Courts (or Congress) adopt a consistent arm-of-the-tribe test that sets an effective rubric to determine permissible relationships within the scope of tribal sovereign immunity. Id. at 395 to 396. But contrary to the District Court's categorical dismissal of tribal immunity in this area, the doctrine is vitally relevant:

> Tribal Sovereign Immunity protects subordinate secular or commercial entities acting as arms of a tribe from state regulation and legal action. Tribal Sovereign Immunity may extend to the sub-divisions of a tribe, including those engaged in economic activities, provided that the relationship between the tribe and entity is sufficiently close to properly permit the entity to share in the tribe's immunity. In order to determine which tribal entities can share in a

[4] An article in a 2018 edition of the Boston College Law Review makes the same points: Tribal Sovereign Immunity is a "strong" protection, "arm-of-the-tribe" tests currently vary from state to state and the resolution of the differences in those tests is critical to the application of Tribal Sovereign Immunity in various jurisdictions. Note, Tribal Sovereign Immunity and the Need for Congressional Action, 59 Boston College Law Review 2469, 2491, 2502 (2018).

> tribe's immunity, Courts implement what is commonly referred to as the "arm of the tribe" test. Id. at 398.

Tribal Sovereign Immunity is not lost when a tribe contracts with a non-Indian operator because "as a matter of established federal Indian policy, Indian nations must be encouraged to generate their revenue to fund their governments and activities." Id. at 399. The conclusion is clear: "if the operation of tribal payday lending enterprises is within the law and policy of Tribal Sovereign Immunity, tribes should be able to profit from this industry. Despite criticism of payday lending, tribes have the right to choose which industries they decide to profit from." Id. 411.

As this article illustrates, the legal debate in this area is not about *whether* tribal immunity applies at all but concerns development of a viable arm-of-the-tribe test that would guide Courts in determining in a given case if a particular relationship was within the proper confines of the tribal immunity doctrine. While a few federal Courts of Appeals and some states are developing arm-of-the-tribe tests, none yet exists in the Third Circuit and none is universally approved. That such a pivotal test is still in the gestational stage is a critical revelation in a case where a man is being prosecuted for a *criminal* offense, and the law has not yet drawn a bright line to permit a jury to find beyond a reasonable doubt that he crossed into criminality, fully aware of that transgression.

Scholarship into 2019 continues to demonstrate the error of the District Court in rejecting Tribal Sovereign Immunity here:

> …non-tribal payday lenders seeking to evade state usury laws and lend to borrowers in states with interest rate caps are often incentivized to form relationships with tribes to benefit from their tribal sovereign immunity from state usury laws and any suits to enforce them. **This immunity is possible if such lenders establish legitimate ties with a tribe because arm-of-the-tribe entities are protected under tribal sovereign immunity.** (emphasis supplied)

Note, Tribal Lending Under CFPB Enforcements: Tribal Sovereign Immunity And The "True Lender" Distinction, 23 NC. Banking Institute Journal, 401, 402 (March 2019).[5] The article reaffirms that Tribal Sovereign Immunity protects both tribes and arm-of-the-tribe entities. Once a legitimate arm-of-the-tribe relationship is established under one of the tests currently evolving, the immunity protects all parties in the arrangement. Id. at 411. Today, many tribal lending entities are "properly classified as 'arms-of-the-tribe' warranting tribal immunity protection." Id. at 413.

Neff was convicted because he advised clients that Tribal Sovereign Immunity could, under proper circumstances, apply to non-tribal entities that enter into business relationships with tribes. While at the time of his advice arm-of-the-tribe doctrines were at their most formative stages, the overall concept that tribal immunity shielded these loans from state usury laws was clear to him and a vast

[5] A publication of the University of North Carolina School of Law.

array of others. In his trial, however, he heard the Court and Government reject that thoughtful precedent on these matters, decree that Tribal Sovereign Immunity was irrelevant, and brand his advice as categorically wrong. Today, from his federal prison jail cell, he could read matters published as recently as 2019 that say the exact opposite.

The Government's current argument appears to be an attempt to backpedal from an unsustainable categorical rejection of tribal immunity's applicability to one that seeks to sustain this conviction on the basis that, while some relationships payday lenders could have with tribes are legitimate, the ones here were a "sham." The attempt must fail. The Trial Court did not instruct on what a "sham" relationship meant because It never admitted the possibility that Tribal Sovereign Immunity could legitimize a non-"sham" relationship, whatever that may be.

But a further problem with government's "sham" theory is that the word "sham" has no legal meaning whatsoever. For the government to prove that the relationship between the entities Neff advised and Indian tribes did not properly bring them under the arm-of-the-tribe test, the government would have had to articulate a standard by which that would be judged. But as of the time of these transactions (and today), no such established test existed within this Circuit. Having no way to articulate for the jury what would make something a "sham" relationship outside the tribal immunity protection, the government at trial fell

back on what it perceived to be the safer ground of convincing the District Court to disregard the whole question of whether the relationship was a "sham" and simply declare that all lending here was categorically criminal and that Neff was therefore guilty of it.

What the Government and District Court did here was more than just a usurpation of the province of the jury. It was also a usurpation of the power of Congress to regulate Indian Tribes by limiting the reach of the well-established doctrine of Tribal Sovereign Immunity. To date, Congress has passed no law regarding tribal payday lending and the Courts still struggle with developing an effective arm-of-the-tribe test to guide in the determination of the legitimacy of a relationship in a given case. By the actions here, a local federal prosecutor and a compliant District Court have taken on a judgment the Constitution leaves to others. That usurpation is bad enough, but it pales in comparison to the damage done to a lawyer with an unblemished record of legal and ethical rectitude who is now serving a federal prison term because he read the law as it was and advised clients in ways he had every reason to believe were entirely legitimate.

b. The instructions on the *mens rea* element of Counts 1 and 2 were internally inconsistent, contradictory and fatally prejudicial.

Relatively few of the operative facts of this case were ever in meaningful dispute. The critical focal point of the case was Neff's state of mind when he gave the advice he did. But on that point, the Court's jury instruction was a cacophony

of errors and contradictions that make any effort to now invest confidence in the legitimacy of this verdict an exercise in wishful thinking.

The Government is unable to explain away the inherently inconsistent instructions the Court gave on the *mens rea* element; indeed, it does little more than repeat the Court's instructions without justifying them. GB 98-103. The Government and the District Court desperately sought to denude this element of all meaning by rejecting the idea that tribal immunity could, in any case, legitimize these loans, leaving the knowledge and intent element of Counts 1 and 2 to be simply whether Neff knew that loans were being made at interest rates more than twice that prescribed by the relevant states. A5993 to A5984.

But to bury Neff's defense even deeper, the Court emphasized that even if Neff was ignorant of the unlawful nature of the loans, he was still guilty. As quoted in full on page 29 of Neff's brief, the Court repeated that Neff's ignorance of the law was no excuse and that the government was not even required to prove that he knew what the usury rates were in the states where the borrowers lived. Id. at a 5985. The instruction converted RICO conspiracy to a general intent and general knowledge crime, with the Court admonishing that "the government is not required to prove that the defendant knew his acts were against the law." A5989.

The Court then made this morass of confusing and erroneous instructions completely incomprehensible to any reasonable jury by then issuing some form of

a "good faith defense" instruction that told the jury that Neff's good faith belief that the object of his agreement "was not the collection of an unlawful debt would be inconsistent with the government's proof." A5990 to A5991. The Court did this, of course, while also telling the jury that whatever Neff believed about the legitimacy of the loans was categorically wrong since Tribal Sovereign Immunity, a concept many witnesses and the legal community thoroughly accepted as relevant to this case, really had nothing to do with it.

The Trial Court so fatally confused the jury about this critical element that the conviction must be reversed. The case is even more egregious than United States v. Latorre-Cacho, 874 F.3d 299 (1st Cir., 2017), in which the First Circuit reversed a RICO conspiracy conviction under the plain error doctrine.

In Latorre, the Trial Court, in orally instructing the jury on the predicate offenses charged, summarily referred to "firearms" instead of the particular firearms offenses that were charged. The Court's written instructions contained no such error, Id. at 309, but the First Circuit still reversed, finding that where a jury instruction relieves the government of its burden of proving an element of the offense, a due process violation occurs if there is any reasonable likelihood that the jury applied the law in violation of the Constitution. Id. at 302. The error in the oral instruction was significant, particularly because it was repeated by the Trial Court, was given in "considered fashion," and was never clarified. Id. at 303, 309

to 312. The clear conflict among the oral instructions, the written instructions, and the applicable law mandated a reversal. Id.

Here, the Court emphasized its instructions that ignorance of the law was no defense and did so almost in the same breath as It told the jury that a good faith defense was nonetheless possible. No reasonable jury could have resolved this dispute especially considering the Court's other instructions that effectively told the jury that Neff's beliefs were so completely wrong as a matter of law that no one could have reasonably accepted them in good faith.

The confusion in this instruction went to the heart of this case. Neff's defense was not that he was ignorant of state usury laws. His defense was that Tribal Sovereign Immunity and the understanding he and a broad consensus of the legal community had of it put those usury laws into a context that did not permit criminality to be assigned just because a loan exceeded a particular interest rate. The jury needed to understand that as he clearly embraced that consensus as any reasonable lawyer would, he could not have given advice with the mental state required to make him a racketeer. The confusing instructions on knowledge, intent, ignorance of the law, and the good faith defense were irreparably prejudicial to Neff standing alone but, in a deeper sense, reflect the fundamental error of law that permeated this prosecution.

c. The Court failed to charge on willfulness.

RICO has no prescribed *mens rea* element in either its substantive or conspiratorial form. Genty v. Resolution of Trust Corporation, 937 F.2d 899, 908 (3rd Cir., 1991). While having the unique elements of enterprise, association with the enterprise and pattern of racketeering activity, it is also a crime rooted in substantive offenses that have to be defined properly to a jury. Where the RICO predicates are straightforward offenses like drug trafficking and murder, the instructions on the *mens rea* component of it are easily determined.

Where, as here, the predicate crime could only be established upon a showing that Neff advised on the making of loans knowing that the doctrine of Tribal Sovereign Immunity did not legitimize them, the case became at least as complex as other cases in which the United States Supreme Court has dictated that the *mens rea* for the offense be charged as willfulness. See, Neff's original brief at page 33-34.[6]

In discussing the impact of a willfulness charge in a RICO conspiracy context, the government's argument might leave confusion about whether it would

[6] If, for example, welfare fraud was charged as a RICO predicate crime, there would be a necessity of charging on the *mens* rea of willfulness. See, Liparota v. United States, 471 US 419 (1985).

require a showing that the defendants understood that their actions were unlawful. Government Brief page 99. That confusion is unwarranted.

In Bryan v. United States, 524 US 184 (1998), the Supreme Court discussed the various ways in which willfulness finds its voice in the criminal law. In certain cases, willfulness requires a showing that the defendant was aware of provisions of the tax code or the statutes prohibiting structuring of financial transactions. Id. at 194. But, at a minimum, willfulness requires in all cases that the "jury must find that the defendant acted with an evil meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." Id. The correct application of willfulness here would have required the Court to have charged the jury that, in order to find Neff guilty, it must find that Neff was aware that he was giving advice to specifically facilitate an act he knew to be unlawful. The instructions never articulated that to the jury.

Since the determination of the unlawfulness of the debt here required an assessment of the doctrine of tribal immunity to the circumstance, failing to give a willfulness instruction presented the precise sort of case in which a statute could "ensnare persons who are engaging in an apparently innocent conduct." Id. at 194. This was not the kind of case that only requires the government to prove that a defendant knew the basic facts of an offense.

The failure to instruct on willfulness also highlights the critical error made in the repeated instructions that ignorance of the law was no defense. Cases that call for a willfulness charge "carve out" an exception to the general principle that ignorance of the law is no defense. Bryan, at 194. But perhaps even worse than failing to carve this exception here, the trial Court left it in a horrific mess by failing to realize that an ignorance of the law is no defense charge wholly negates a "good faith defense" instruction.

This point is derived from United States v. Gross, 961 F.2d 1097 (3rd Cir., 1992), wherein this Court held that where a Court charges on the *mens rea* of willfulness, an additional charge on the good faith defense is surplusage since the instructions essentially cover the same concept. Id. at 1102 to 1103. As the good faith defense instruction is, per Gross, the functional equivalent of a willfulness charge, the Court directly violated Bryan by failing to carve out the "ignorance of the law" concept. That carving out is also dictated by the Third Circuit Standard Jury Instructions on willfulness, Section 5.05, which specifically notes that a defense of ignorance or mistake of law is permitted when willfulness is charged. To admonish the jury that ignorance of the law was no defense here created massive confusion and contradiction on multiple levels.

Thus, despite the Government's casual assertion that the giving of the ignorance of the law instruction was correct and that the good faith instruction

somehow justifies the entire charge, GB p. 102, the charge as a whole did nothing but disorient the jury by presenting it with an irreconcilable set of standards, fundamentally prejudicing Neff and requiring a new trial.

II. THE EVIDENCE AS TO COUNTS 1 AND 2 WAS INSUFFICIENT AS A MATTER OF LAW.

The more recent scholarly articles set forth herein, along with Neff's argument at pages 35-37 of his major brief demonstrate that the government failed to prove the illegality of the loans here because Tribal Sovereign Immunity, while a concept that would legitimize transactions in this area, was completely ignored in the proof.

Furthermore, the further evidence of legal scholarship demonstrates that the government failed to prove that Neff acted in bad faith. Neff's views were not *sui generis* to him; they were part of a legal consensus that evolves to this day. The government simply had no evidence to prove that Neff did not embrace that consensus and, instead, corruptly schemed to advise clients about how to conduct widespread illegal lending practices. Under no circumstances was the evidence here sufficient to warrant his conviction.

III. THE GOVERNMENT FAILED TO PROVE THAT NEFF COMMITTED MAIL/WIRE FRAUD BECAUSE AN UNVESTED CLAIM IN A CIVIL LAWSUIT DOES NOT CONSTITUTE MONEY OR INTANGIBLE PROPERTY.

What is absent from the government's brief is more telling than what is in it.

Rather than cite to one case in the history of American law where a court has concluded that an unvested claim in a civil lawsuit constitutes money or property under the mail/wire fraud statutes, the government has sidestepped the issue by suggesting that a litigant's valuing a claim makes it property.[7] It most certainly does not.

When a civil litigant files a claim against another, the litigant seeks to obtain a judgment. That the claim is written down, filed in court and viewed by the plaintiff with hope, however, does not make the civil claim property, tangible or otherwise.

[7] That a person values something does not make it "property" under the Federal Criminal Code. Nor does feeling "cheated" by another bestow a claim under mail/wire fraud. A parent might assign the most value in the world to the love of a child but that does not make the child's love for the parent "property" under these statutes or give rise to a claim that an embittered spouse who turned the child's affections against the victimized parent should face indictment under §1341 of Title 18, USC. Such an absurd broadening of the statutes would violate the Rule of Lenity and the strict construction that is due a criminal proscription and would contradict every relevant Supreme Court and Third Circuit case in this area as cited in Neff's principal brief, pages 51-59, see, e.g. Cleveland v. United States, 531 U.S. 12 (2000) (a valued video poker license), United States v. Zauber, 857 F.2d 137 (3d Cir. 1988) (a valued high rate of return from an investment); and United States v. Henry, 29 F.3d 112 (3d Cir. 1994) (a valued fair bidding opportunity).

What a civil litigant has when a claim is pending is the potential for a judgment. If the claim is successful and vests, a judgment will be imposed in due course and the claimant may then obtain money or property upon the execution of the judgment. No matter how strong the cause of action, however, there can be no execution to obtain money or property until the judgment actually imposes, a claim not transferrable to another while the claim is pending.

That a plaintiff may, in some jurisdictions, get funding from outside sources before a claim vests into a judgment does not make the claim "property." The authority the government cites in its brief **supports** this proposition. Terrence Cain, Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater, 89 Chi.-Kent L.Rev. 21 (2013) ("Twenty-nine states and the District of Columbia prohibit the assignment of personal injury claims as well as the proceeds of personal injury claims.").[8] See also, Anthony J. Sebok, The Inauthentic Claim, 64 Vand. L. Rev. 4 (2011) ("Assignment of personal injury tort claims is prohibited throughout the United States, while the assignment of other claims, such as fraud and professional malpractice, is prohibited in a large number of states. Maintenance, in which a stranger provides something of value to a litigant in order to support or promote the litigation, is prohibited in varying

[8] Lawyers Funding Group, LLC v. Harris, 2016 WL 233669 (E.D.PA. 2016) is a case involving venue and has nothing to do with whether a pending civil claim is property under the mail and wire fraud statutes. Why the government makes reference to it remains a mystery.

degrees in the United States."); Picadilly, Inc. v. Raikos, 582 N.E.2d 338, 345 (Ind. 1991) (summarizing the law of assignment in Indiana and holding that an assignment of a malpractice claim was invalid as against public policy), abrogated on other grounds by Liggett v. Young, 877 N.E.2d 178 (Ind. 2007).

Even in those jurisdictions that permit litigation funding, i.e. maintenance, although someone may determine that the claimant's likelihood of recovery is so strong that they are willing to loan money to the claimant because of the belief that the claimant will ultimately obtain a judgment and the lender may then recoup their loan by sharing in the proceeds, this too does not transform a claim into "property". Cain, supra, at 12 (Litigation Finance Companies "stepped into this market void by offering cash advances to tort plaintiffs in exchange for a portion of the proceeds of their lawsuits **if and when they obtained a settlement, judgment, or verdict**.")(Emphasis added).

In such a scenario, the party that makes the loan is making a calculated assessment of the claimant's prospects of obtaining a judgment (or a monetary settlement) and advancing the claimant money based on the promise that the claimant will share the proceeds that are obtained once a judgment is obtained or a settlement reached. The fact, however, that the party that makes a loan may purport to have a "secured" interest in the claim is insignificant as the lender may only take possession of money or property when and if the claim results in a final

judgment. Once again, although the lender may ascribe "value" to the prospect of obtaining money as a result of the success of the claim, until that point when a judgment imposes (or a settlement is reached), all that the lender and the claimant truly have is a desire to obtain money tempered by the fact that a judge or a jury might ultimately conclude that no judgment should be imposed at all. While the claim may prove successful, ultimately giving rise to a court ultimately imposing a judgment, the underlying action might ultimately prove to be legally benign with no judgment imposed or no settlement reached. Either way, no "property" is created by the simple allegation of an injury under the law through the filing of the claim.

That simple point is the essence of the Third Circuit's holding in United States v. Hird, 913 F.3d 332 (3d Cir. 2019) where the defendants rigged a ticket adjudication process to create an extrajudicial system through which connected persons could avoid the payment of traffic judgments. The scheme was properly upheld as an actionable fraud because it resulted in the government not obtaining money from **judgments**, the scheme "obviating judgments of guilt imposing fines and costs in those selected cases" as "the entire scheme was centered on keeping (or taking) judgments out of the hands of the Government to prevent the imposition of fines and costs." Id. at 344. The fines/costs were "part and parcel of the judgment of the court" and the indictment focused on how the system was rigged

to "produce only judgments that imposed lower fines – or most often – no fines or costs at all." Id. at 341. The Court analogized the situation to the facts of Pasquantino v. United States, 544 U.S. 349 (2005) where the defendants' scheme deprived the Canadian government of taxes their conduct otherwise made due. Hird, at 344. In both cases, money legally due to the government was taken/diverted by the fraud.

But here, no money was due to anyone, government or private plaintiff, as no judgment was obtained. An unvested civil claim is thus not "property" in the critical context of these statutes.

The government's citation to Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988) and Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) is similarly inapposite and unavailing.

These cases concerned whether **government** action that operated to deny an individual the opportunity to file a claim or process litigation due to some statutory nuance constituted a deprivation of property for 14th Amendment due process purposes. That scenario has absolutely nothing to do with the case at hand. Nothing that Neff or Hallinan did deprived the plaintiffs of their capacity to bring their lawsuit. Neither Neff nor Hallinan were imbued with governmental power to make them capable of depriving the plaintiffs of any due process right they would otherwise enjoy under the 14th Amendment. The cases speak of "property" in the

unique context of the 14th Amendment and simply do not inform this Court's decision on whether a civil claim is money or property for mail/wire fraud.

In like manner, Ministry of Defense v. Elahi, 556 U.S. 366, 388 (2009) has nothing to do with the mail/wire fraud statutes. Indeed, the government quotes a comment made in a *concurring and dissenting opinion* there that refers to the specific definition of property under the unique statute involved in that case. The government, however, fails to identify the fact that what existed in that case was not an un-adjudicated claim but a **final judgment** the party was seeking to execute. Elahi, 556 U.S. at 388.

Similarly irrelevant to the critical legal issue here is In Re Emoral, Inc., 740 F.3d 875 (3d. Cir. 2014) a case involving the Bankruptcy Code. While interesting to bankruptcy practitioners on whether a claim against a debtor was part of the bankruptcy estate or was otherwise the subject of a waiver to a successor company, the case advances nothing on the critical issue of whether a civil claim constitutes money or property under the mail/wire fraud statutes.

The first version of the mail fraud statute was passed in 1872. In the 147 years since then, there have been legions of disgruntled litigants who believed that they were lied to in settlement negotiations in a civil case. Yet at no time has any

federal court found that such a circumstance constituted mail fraud. There is a good reason for that.[9]

Unvested civil claims are not property and if the Rule of Lenity has any vitality, such a prosecution will never be upheld. Since one tragically occurred here, Neff's convictions at Counts 3-8 must be vacated.

CONCLUSION

The judgment of conviction should be reversed and Neff discharged. Otherwise, Neff should be granted a new trial. Minimally, the sentence imposed in this case should be vacated and the matter remanded for resentencing.

RESPECTFULLY SUBMITTED,

s/ADAM B. COGAN
PA ID NO.: 75654

s/BRUCE A. ANTKOWIAK
PA ID NO.: 25506

[9] A decision upholding the government's novel theory of mail/wire fraud would have enormous ramifications in both the civil and criminal contexts. Civil cases are settled by the thousands every day in the Courts of the United States. When a party that has settled comes to believe they were shortchanged in some way by the other side's negotiating posture, should they have recourse through the government's pursuit of a federal mail/wire fraud investigation? If Congress truly means to expand federal criminal jurisdiction in such a radical new venue, It should speak directly to the matter. Allowing federal prosecutors to stretch the mail/wire fraud statutes beyond their most extensive breaking point is not the avenue that should sensibly be pursued.

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, ADAM B. COGAN, ESQUIRE, and I, BRUCE A. ANTKOWIAK, ESQUIRE, attorneys for the Appellant, WHEELER NEFF, certify that we are members of the Bar of this Court.

s/ADAM B. COGAN_____
ADAM B. COGAN, ESQUIRE

s/BRUCE A. ANTKOWIAK
PA ID NO.: 25506

DATED: April 5, 2019

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

I certify that this reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief contains 6,145 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii). 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 Office Word 2011 in 14 point Times New Roman style.

s/ADAM B. COGAN_____
ADAM B. COGAN, ESQUIRE

DATED: April 5, 2019

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, ADAM B. COGAN, ESQUIRE, attorney for the Appellant, WHEELER NEFF, certify that the PDF file and Hard Copy of the brief are identical.

s/ADAM B. COGAN_____
ADAM B. COGAN, ESQUIRE

DATED: April 5, 2019

CERTIFICATE THAT A VIRUS CHECK WAS PERFORMED

I, ADAM B. COGAN, ESQUIRE, attorney for Appellant, WHEELER NEFF, certify that a virus check was performed on my computer before the PDF file of the brief was electronically mailed using Avira Free Antivirus Version 3.10.12.10 software.

s/ADAM B. COGAN_____
ADAM B. COGAN, ESQUIRE

DATED: April 5, 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.

RESPECTFULLY SUBMITTED,

s/ADAM B. COGAN
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ATTORNEY FOR THE APPELLANT