22-539

To Be Argued By:
SAMUEL P. ROTHSCHILD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 22-539

UNITED STATES OF AMERICA,

Appellee,

—v.—

DEVON ARCHER,

Defendant-Appellant,

JASON GALANIS, GARY HIRST, JOHN GALANIS, also known as Yanni, HUGH DUNKERLEY, MICHELLE MORTON, BEVAN COONEY,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

DAMIAN WILLIAMS,
United States Attorney for the Southern District of New York, Attorney for the United States of America.
One St. Andrew's Plaza
New York, New York 10007
(212) 637-2200

SAMUEL P. ROTHSCHILD,
NEGAR TEKEEI
HAGAN SCOTTEN,
Assistant United States Attorneys, Of Counsel.

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Devon Archer appeals from a judgment of conviction entered on February 28, 2022, in the United States District Court for the Southern District of New York, following a five-week trial before the Honorable Ronnie Abrams, United States District Judge, and a jury.

Superseding Indictment S3 16 Cr. 371 (RA) (the "Indictment") was filed on March 26, 2018, in four counts, two of which contained allegations against Archer. Count One charged Archer and four co-defendants with conspiracy to commit securities fraud, in violation of 18 U.S.C. § 371. Count Two charged Archer and four co-defendants with securities fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff, 17 C.F.R. § 240.10b-5, and 18 U.S.C. § 2.

Trial on Counts One and Two commenced against Archer and two co-defendants on May 22, 2018, and ended on June 28, 2018, when each defendant was convicted on both counts. Archer and his co-defendants moved for a judgment of acquittal or, in the alternative, a new trial. On November 15, 2018, Judge Abrams granted Archer's motion for a new trial and denied the other motions. The Government appealed the grant of Archer's new trial motion.

On October 7, 2020, this Court reversed the grant of a new trial and remanded the case for sentencing. On December 23, 2020, this Court denied Archer's petition for rehearing and rehearing en banc. On November 1, 2021, the Supreme Court denied Archer's certiorari petition.

On February 28, 2022, Judge Abrams sentenced Archer principally to concurrent terms of one year and one day of imprisonment on Counts One and Two.

Archer has been released on bail pending resolution of this appeal.

Statement of Facts

Archer participated in a scheme to defraud the Wakpamni Lake Community Corporation of the Oglala Sioux Tribe ("Wakpamni") into issuing more than $60 million in bonds, and to use the proceeds of the bonds to further the schemers' personal goals rather than providing the annuity they promised Wakpamni. Wakpamni was not the only victim of the scheme. Also harmed were the investors upon whom the schemers foisted the bonds. At trial, the Government introduced ample evidence that Archer willfully took part in these crimes, leading the jury to convict Archer and this Court to reach the "unmistakable conclusion that the jury's verdict must be upheld." *United States v. Archer*, 977 F. 3d 181, 190 (2d Cir. 2019).[1]

A. The First Bond Issuance

In 2014, Archer, Jason Galanis, Bevan Cooney, and others were working to acquire financial services companies to "roll up" into a conglomerate. (*See, e.g.*,

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[1] In his statement of the facts, Archer repeatedly relies on characterizations of the evidence from the District Court's opinion granting a new trial. (*See* Br. 3-9). But this Court reversed that opinion, explaining that some of the District Court's conclusions about the evidence were questionable or wrong, and that in any event the jury, not the District Court, served as factfinder here. *See Archer*, 977 F.3d at 186, 190-96; *see also id.* at 183-85 (summarizing the trial evidence).

Tr. 906-09, 1321; *see also* Tr. 2159-60).[2] Archer would head the conglomerate, which would be sold for profit. (*See* Tr. 1318-22, 2503-05). But Archer and his partners lacked the funds to buy all the companies they wanted to acquire. (*See, e.g.*, Tr. 1587-88, 2504-05).

In March 2014, John Galanis—Jason Galanis's father—introduced himself to an Oglala Sioux representative and proposed that Wakpamni issue bonds, the proceeds of which would be invested in an annuity. (Tr. 1834-36). John Galanis claimed that the annuity would be provided by Wealth Assurance-AG, an established insurance company that Archer, Cooney, Jason Galanis, and others had acquired as part of their roll-up plan. (Tr. 911, 1840). The purported involvement of Wealth Assurance-AG gave "[t]he scheme an air of legitimacy." *Archer*, 977 F.3d at 184. But the transactional documents ultimately identified the annuity provider as Wealth Assurance Private Client ("WAPC"), which was just a shell entity with a name

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[2] "Br." refers to Archer's brief on appeal; "A." refers to the appendix filed with that brief; "SPA" refers to the special appendix filed with that brief; "Tr." refers to the trial transcript; "SA" refers to the supplemental appendix filed with this brief; "Presentence Report" or "PSR" refers to the Presentence Investigation Report prepared by the United States Probation Office in connection with Archer's sentencing; and "Dkt." refers to an entry on the District Court's docket for this case. Unless otherwise noted, case text quotations omit all internal quotation marks, citations, and previous alterations.

that resembled the legitimate company. (*See* Tr. 209). John Galanis falsely told the tribe that WAPC was a "subsidiary" of Wealth Assurance-AG. (Tr. 183, 1014, 1852). He also told the tribe that the placement agent for the bonds would be an entity called Burnham Securities, and falsely said that his son Jason worked as an investment banker there. (Tr. 150-51).

In the following months, communications between Archer, Jason Galanis, and Cooney revealed that all three knew that Wakpamni had been promised an annuity investment. (A. 2012). But there was no annuity. (*See* Tr. 898, 1092). Instead, as discussed below, the proceeds from the bond sale would become the conspirators' slush fund. (A. 2055.63-2055.69, 2065.5-2065.6; Tr. 2513-14).

On May 9, 2014, Jason Galanis alerted Archer and Cooney to an opportunity to acquire an investment firm named Hughes Asset Management "for the purchase of the bond issuances." (Tr. 933; *see also* A. 2048-49). During the spring and summer of 2014, Galanis kept Archer and Cooney informed about the impending bond issuance and the Hughes acquisition. (A. 2012, 2016, 2063; Tr. 1595). Jason Galanis, Archer, and Cooney anticipated taking control of Hughes, placing the bonds with Hughes's clients, and then using the proceeds generated from the bond sales to fund their own purposes—chiefly, their planned roll-up. (*See, e.g.*, A. 2062.1; Tr. 912). Jason Galanis also previewed for Archer his plan to buy a Tribeca apartment in the name of an LLC bearing Archer's name and using Archer's business after the bond issuance closed. (A. 2055.72).

The Hughes acquisition closed on or about August 11, 2014. (*See* A. 2063). Wealth Assurance-AG, the legitimate company with a name that sounded like the shell company supposedly providing the annuity, financed the acquisition by wiring $2.76 million to Hughes. (*See* A. 2063).

Also in August 2014, another roll-up company, COR Fund Advisors ("CORFA"), acquired a minority stake in the parent of the designated placement agent for the bonds, Burnham Securities. (*See* Tr. 908, 915, 2622-23). As a member of Burnham Securities' investment committee, Archer had approved that entity's role as placement agent. (*See, e.g.*, Tr. 1007-11). And as an investor in CORFA, he had been working to acquire Burnham Securities' parent since early 2014. (*See* Tr. 2607-13). Thus, by mid-August 2014, the conspirators controlled: (i) Hughes, the entity whose clients would be used to purchase the Wakpamni bonds; (ii) Burnham Securities, the purported placement agent; and (iii) WAPC, the purported annuity provider.

On August 22, 2014, Hughes purchased the entire $28 million Wakpamni bond offering on behalf of nine Hughes clients. (A. 1863-73). Burnham Securities, the purported placement agent, got a $250,000 "placement agent fee" despite performing no work. (*See* Tr. 1005; A. 2055.1-2055.2). Jason Galanis got $1 million. (*See, e.g.*, A. 1784-85). Hughes's clients were not informed of the bond purchases in advance, nor was it explained to them that their investment firm, the placement agent for the bonds, and the entity reaping the proceeds from the bond sales were all controlled by related parties.

(Tr. 1610, 1617, 1680-81). Once the clients learned of the bond purchases, they reacted "negatively across the board," with many demanding that the bonds be sold immediately. (Tr. 2050).

B. The Second Bond Issuance

After the first bond issuance, John Galanis proposed that Wakpamni issue a second round of bonds—claiming that a "Burnham client . . . was excited about what had occurred with the first bond issue and wanted to be supportive" by purchasing more bonds. (Tr. 221, 1853-54). Wakpamni agreed, and John Galanis again assured it that the bulk of the proceeds would be used to purchase an annuity through WAPC. (*See* Tr. 1854-55).

Burnham Securities was again designated as the placement agent (Tr. 1023-24), but rather than again using captive investors to offload the bonds, this time Archer and his co-conspirators used the funds they had generated with the first issuance to buy the entirety of the second issuance, then used the *bonds* for their own purposes. Specifically, Jason Galanis arranged to have $20 million of the proceeds that were sitting in the WAPC account transferred to an account controlled by Archer (who would take $15 million) and another account controlled by Cooney (who would take $5 million), and to have Archer and Cooney use that money to buy the entire second issuance. (*See* A. 2083-89). Next, that same $20 million—which originated with the WAPC account—was sent back to the WAPC account for the purported annuity. (A. 2083-89).

The transfer of funds to Archer involved several steps, with funds flowing from the WAPC account to one of Jason Galanis's companies, then from that company to an attorney, and then to one of Archer's companies. (*See* A. 2083-89; Tr. 1963, 2961-63). Jason Galanis told Archer in advance that the bonds, once purchased, could be deposited at Morgan Stanley. (Tr. 1963). Archer signed a representation letter, which was sent to Wakpamni, warranting that he was a sophisticated investor purchasing the bonds "for [his] own account and for investment only." (Tr. 229-30).

On the day of the bond purchase, and over the next several days, Archer made a number of false statements about the bonds and his relationship with Jason Galanis—who, as Archer knew, had a checkered past. (*See* Tr. 2613-31; A. 2065.7, 2066.3). First, Archer lied to Morgan Stanley in connection with depositing the bonds. Asked how the $15 million used to purchase the bonds had been generated, Archer responded, falsely, that the "$15mm was generated through the sale of real estate." (Tr. 796-98). Asked for "more detail about how [he] came to know of the [bond] purchase," Archer responded simply that he was a "shareholder" of Burnham Financial (Burnham Securities' parent), which "packaged the issuance." (Tr. 796-98). And when exploring a possible deposit of the bonds at Deutsche Bank instead, Archer lied to that institution, also telling it that he had acquired the bonds through "Real Estate Sale." (A. 1880).

None of the proceeds of the second Wakpamni bond issuance were invested in an annuity. Archer and

Cooney transferred the bonds they had acquired to two of their affiliated entities. (Tr. 2082-99; A. 2083-89).

C. Lies to the BIT Board

Around the time of the second bond issue, Archer lied to the board of the Burnham Investors Trust (the "BIT Board") about Jason Galanis's involvement with Burnham-related business. The conspirators needed the BIT Board to approve an acquisition of a Burnham subsidiary to further their roll-up plan. But given Jason Galanis's poor reputation, the BIT Board had concerns about his continued involvement with Burnham. The board emailed Archer, seeking "an iron-clad assurance that, going forward, he"—meaning Jason Galanis—"will not be involved with any of the Burnham entities or their affiliated persons." (Tr. 2626). Archer responded, "Confirmed." (Tr. 2626). Later, Archer warranted that Jason "Galanis will have no interest of any kind, direct or indirect, in any of the Burnham entities." (Tr. 2631).

Archer's representations were misleading at best: Not only was Jason Galanis's money used to buy bonds that would support a Burnham entity's net capital, but, as discussed below, Burnham Securities would shortly be acting, once again, as placement agent for a Wakpamni bond transaction that Jason Galanis spearheaded. (*See* Tr. 802-04, 2956-58, 3269-71).

D. The Third Bond Issuance

In April 2015, the conspirators orchestrated a third issuance of Wakpamni bonds. The pattern of this issuance roughly mirrored the first: After John Galanis

prompted Wakpamni to issue bonds, the schemers took control of an investment adviser, used that firm's clientele to offload the bonds and generate cash, positioned Burnham Securities as the purported placement agent, directed the proceeds to the WAPC account, and then used the proceeds for their own purposes rather than the promised annuity. (*See* Tr. 277-78, 1039-41, 1858).

This time, the financial company ultimately acquired was Atlantic Asset Management. Jason Galanis alerted Archer and Cooney that Atlantic was the target in August 2014, and updated them about negotiations toward the purchase in early 2015. (*See* A. 2065.1; Tr. 1032-33, 2430-31). When the $6.1 million acquisition closed, it was structured as a merger between Hughes and Atlantic, financed by an entity where Archer served as a director and was a significant shareholder, with a nearly $5 million guarantee of Atlantic's debts from that same entity. (*See* Tr. 912, 1032-35, 2051, 3584; *see also* A. 2010, 2065.40).

Shortly after the acquisition, Atlantic bought $16 million worth of Wakpamni bonds on behalf of a single client, the Omaha School Employees Retirement System ("OSERS"). (*See* Tr. 645-56; A. 2065.43-2065.44, 2090). Although OSERS was given no notice of the purchase—much less informed of the conflicts of interest plaguing the transaction (*see* Tr. 741-43)—the conspirators discussed the buy in advance. The day before the purchase, Jason Galanis sent Archer and others the placement memorandum, and noted a need to "finesse" an Atlantic managing director who would have

to be "marginalized" in connection with the proposed bond dump but seemed "agreeable." (A. 2065.43).

The proceeds from the bond purchase went to the WAPC account. (A. 2090). None went to the promised annuity. More than $5.4 million was used to acquire yet another roll-up company, Fondinvest (Tr. 1042; A. 2090)—a use that Jason Galanis had previewed to Archer months before. (Tr. 3641). Another $4.6 million went to another roll-up company, on the board of which Archer served, and to which he had transferred bonds purchased in the second Wakpamni issuance. (A. 2089, 2090; Tr. 375). Proceeds also went to Hughes and Cooney. (A. 1784-85; Tr. 2161-62, 2165-67).

E. The Cover-Up and Aftermath

In the fall of 2015, the scheme unraveled. The annual interest payment on the first tranche of Wakpamni bonds became overdue. (Tr. 282). Ultimately, that payment was made, in Ponzi-like fashion, from the proceeds of the third issuance, as well as from funds contributed by Archer and another co-conspirator. (*See* Tr. 2967-69). Archer was later partially repaid by Jason Galanis, with proceeds from the third issuance. (Tr. 2170-71). No further interest payments were made. (Tr. 281-83).

On top of these bourgeoning financial problems, Jason Galanis was arrested on unrelated charges. (Tr. 2519-20). Faced with these difficulties and the imminent threat of exposure, on October 1, 2015, the conspirators incorporated a fake company, Calvert Capital, to conceal the misappropriation of the bond proceeds. (*See* Tr. 2182-83). The conspirators created

documents backdated to 2014 which made it look as if WAPC (the shell company that had been held out as the annuity provider, and the holder of the account into which all the bond proceeds had flowed) had invested in Calvert, and that Calvert, in turn, had lent Archer and Cooney $20 million to purchase Wakpamni bonds. (Tr. 3681, 4092; A. 2041-42).

Archer wielded the Calvert fiction to help cover up the fraud. He emailed an employee of a roll-up company that had taken possession of some of the bonds that Archer had purchased in the second issuance, instructing him that the bonds "are to be replaced / returned to Calvert." (A. 2067). When the employee sought clarification, Archer responded that "we would like to return these bonds to the lender and beneficial owner in the quickest orderly manner possible" (A. 2067)—even though Archer knew that Calvert had played no role (and did not even exist) when Archer bought his bonds in 2014.

In the end, Wakpamni was left with over $60 million in debt, and the ten pension fund investors upon whom the Wakpamni bonds had been foisted lost over $40 million. (Tr. 752, 1686, 1862-63, 2950, 2956-57, 2959, 2964).

ARGUMENT

POINT I

The District Court's Sentence Was Procedurally Reasonable

A. Relevant Facts

1. This Court Reinstates the Jury's Verdict

After the jury convicted Archer of both counts in the Indictment, Judge Abrams granted his motion for a new trial. Judge Abrams explained that the charged crimes had plainly occurred, leaving the "only seriously disputed element" as the defendants' intent. (SPA 11). Judge Abrams reviewed the evidence of Archer's intent and was "unconvinced" that Archer knew his actions were facilitating a massive fraud being perpetrated by Jason Galanis. (SPA 22).

This Court reversed Judge Abrams' grant of a new trial. It detailed five categories of evidence that showed Archer understood that he was taking part in the charged scheme:

- "[A] wealth of emails" in which Archer "discussed the progression of the Wakpamni scheme" that "taken as a whole . . . provided strong support" for the conclusion that Archer knew that Jason Galanis was using the bond proceeds for personal purposes. *Archer*, 977 F.3d at 190-91.
- "[A]mple evidence" showing that Archer helped to acquire Hughes and Atlantic for

the specific purpose of "plac[ing] the Wakpamni bonds with their clients," even though the "very nature of the transactions was surely suspect" and even though Archer's emails showed his awareness that Jason Galanis was "investing in ways that would be objectionable to the directors" of the companies. *Id.* at 191-92.

- Archer told Wakpamni that his company wanted to buy the second bond offering "as a legitimate investor using its own funds to invest," when, in reality, "the funds used to purchase the bonds were not Archer's at all," and, instead, "in Ponzi-like fashion," the conspirators "knowingly purchas[ed] the bonds from the second issuance with proceeds from the first." *Id.* at 192-93.
- Archer's "lies" in furtherance of the scheme, such as telling two banks that his company used its own funds to acquire the Wakpamni bonds from the second offering, even though the bonds were in fact purchased with the proceeds of the first offering. *Id.* at 194.
- "[E]vidence that Archer knowingly performed two key actions in furtherance of a cover-up designed to delay discovery of the scheme." *Id.* at 195. When the first interest payments on the bonds came due, Archer transferred money to a "purported

> annuity provider," and "[t]hese funds were then used to help pay the interest on the bonds, thereby delaying disclosure of the fraud." *Id.* at 196. And Archer made "false statements concerning . . . [a] fraudulent entity created to cover the conspiracy's tracks and delay discovery of the scheme." *Id.*

Moreover, the "evidence, when viewed as a whole, strongly supported that Archer knew at least the general nature and extent of the scheme and intended to bring about its success." *Id.* at 197. This Court therefore reinstated the jury's verdict and remanded the case to Judge Abrams for sentencing. *Id.* at 198.

2. The Sentencing

In advance of sentencing, the Probation Office prepared the Presentence Report. The report calculated a Guidelines range of 108 to 135 months' imprisonment. (PSR ¶ 151). That calculation was principally driven by an estimated loss amount of approximately $43 million. (PSR ¶¶ 15, 48, 82). The Probation Office recommended 84 months' imprisonment under 18 U.S.C. § 3553(a). (PSR at 61).

Judge Abrams began the sentencing hearing by addressing Archer's objections to the factual summary and Guidelines calculation in the Presentence Report. Archer urged Judge Abrams to reject the factual summary in the Presentence Report and substitute the summary of the facts in her opinion granting Archer's motion for a new trial. (A. 2110-17). According to

Archer, this would mean, among other things, that no loss amount was attributable to him. (*See* A. 2130-31).

Judge Abrams disagreed, explaining, "I don't think I can adopt the characterization that was in my Rule 33 opinion and be faithful to the jury's verdict." (A. 2112). Judge Abrams recognized that she did not need to accept every fact argued by the Government, or summarized by this Court in *Archer*, but did "have to accept the facts that are implicit in a finding of guilt with respect to these crimes," including that Archer "had the requisite intent to engage in these particular crimes." (A. 2114-28). Judge Abrams repeatedly offered Archer an opportunity to discuss specific portions of the Presentence Report (A. 2112-13, 2124, 2128), but Archer persisted in seeking a wholesale rejection of the report's factual summary. (A. 2127). Explaining that "the theory of the case as presented in the PSR is what is consistent with the jury's verdict," Judge Abrams adopted the report's factual summary. (A. 2127-28).

With respect to loss amount, Judge Abrams found, "by a preponderance of the evidence, that the entire $43 million in losses was reasonably foreseeable" to Archer. (A. 2131). In doing so, she reviewed some of the evidence this Court found to show Archer's knowledge, while noting that she was not bound by this Court's characterizations. (A. 2131-32). Having recited that evidence, Judge Abrams explained that "accepting the factual findings I believe were implicit in the jury's verdict, there is sufficient evidence to establish by a preponderance of the evidence that Mr. Archer got involved with the [Wakpamni] scheme from

the start and either did foresee, or reasonably should have foreseen, the entire amount of the losses from the scheme . . . ." (A. 2132-33). Judge Abrams denied Archer's requests for various departures, but stated that she would consider the facts underlying those requests in her Section 3553(a) analysis. (A. 2134-36).

After hearing from counsel and Archer, Judge Abrams analyzed the Section 3553(a) factors. She began by explaining the "harm this fraud caused to real people," including one of "the poorest Native American tribes in the country" and "pension funds held for the benefit of transit workers, longshoremen, housing authority workers, and city employees, among others." (A. 2146). Judge Abrams also, however, found that the Guidelines' "inordinate emphasis" on loss amount supported a downward variance "to arrive at a more just and reasonable sentence." (A. 2146). After analyzing the other statutory factors, Judge Abrams concluded "while I think the guidelines range is simply too high, as is the government's recommendation, being faithful to the jury's verdict, as I must, the crimes are just too serious and the harm done too great to sanction a non-incarceratory sentence here." (A. 2146-50). Judge Abrams thus imposed a sentence one year and one day imprisonment. (A. 2150).

B. Applicable Law

This Court's review of a district court's sentence "encompasses two components: procedural review and substantive review." *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). "Procedural error occurs in situations where, for instance, the district court

miscalculates the Guidelines; treats them as mandatory; does not adequately explain the sentence imposed; does not properly consider the § 3553(a) factors; bases its sentence on clearly erroneous facts; or deviates from the Guidelines without explanation." *United States v. McIntosh*, 753 F.3d 388, 393-94 (2d Cir. 2014); *see also Gall v. United States*, 552 U.S. 38, 51 (2007); *Cavera*, 550 F.3d at 190. This Court reviews a sentence for procedural reasonableness under a "deferential abuse-of-discretion standard." *Gall*, 552 U.S. at 41; *see United States v. Broxmeyer*, 699 F.3d 265, 278 (2d Cir. 2012).

"'A guilty verdict, not set aside, binds the sentencing court to accept the facts necessarily implicit in the verdict.'" *United States v. Hourihan*, 66 F.3d 458, 465 (2d Cir. 1995) (quoting *United States v. Weston*, 960 F.2d 212, 218 (1st Cir. 1992), *abrogated in part on other grounds by Stinson v. United States*, 508 U.S. 36 (1993))); *see also United States v. Slaton*, 801 F.3d 1308, 1319 (11th Cir. 2015) ("That principle prohibits a sentencing court from finding a fact that is inconsistent with any of the findings that are necessarily implicit in the jury's guilty verdict."); *United States v. Bertling,* 611 F.3d 477, 481 (8th Cir. 2010) ("[A] district court errs as a matter of law if it imposes a sentence based on a finding that contradicts the jury's verdict."); *United States v. Hunt,* 521 F.3d 636, 649 (6th Cir. 2008) ("[A] factual determination is necessarily clearly erroneous where a jury has previously found to the contrary beyond a reasonable doubt."); *United States v. Curry*, 461 F.3d 452, 461 (4th Cir. 2006) ("The court erred . . . in sentencing [the defendant] based on a conclusion that contravened the jury's verdict."); *United*

States v. Rivera, 411 F.3d 864, 866 (7th Cir. 2005) ("[I]t is both unnecessary and inappropriate for the judge to reexamine, and resolve in the defendant's favor, a factual issue that the jury has resolved in the prosecutor's favor beyond a reasonable doubt.").

C. Discussion

Judge Abrams imposed a procedurally reasonable sentence in which she correctly calculated the advisory sentencing range under the Guidelines, carefully analyzed the Section 3553(a) factors, and ultimately concluded that a sentence of one year and one day—less than one-tenth of the middle of the Guidelines range, and approximately one-seventh the sentence recommended by the Probation Office—was appropriate.

Archer argues that Judge Abrams committed procedural error by accepting facts implicit in the jury's finding of guilt, and thus failing to conduct "independent fact-finding" with respect to his knowledge of the offenses. (Br. 15). Archer exaggerates the freedom that the law gave Judge Abrams to find facts at odds with the jury's verdict. Although a sentencing court is bound only by those facts "necessarily implicit" in the verdict, *Hourihan*, 66 F.3d at 465, as Judge Abrams explained, the jury convicted "Mr. Archer not just of any scheme to defraud, but the particular scheme to defraud alleged here" (A. 2131). Judge Abrams thus correctly rejected Archer's creative theories concerning how "in a hypothetical world" the jury "could have convicted" while barely finding Archer culpable. (A. 2113).

The law also does not support Archer's view that a guilty verdict binds a sentencing court no further than accepting that the raw elements of the charges were proven. (*See* Br. 18-20). As an example of the limits a verdict imposes on judicial factfinding, Archer holds out *United States v. Jackson*, 862 F.3d 365 (3d Cir. 2017). (Br. 19). But *Jackson* rejected the imposition of a sentence that failed to account for facts the jury had clearly found. It did so not by merely reciting the elements, but by also analyzing the proof at trial and the jury instructions. *See* 862 F.3d at 395-97. Based on that context, the appellate court concluded that "[i]t defie[d] common sense to believe that the jury" had convicted the defendants without finding certain facts that the sentencing court failed to find. *Id.* at 397. Thus, far from restricting itself to the elements of the convictions, *Jackson* shows that a sentencing court has improperly "substituted its view of the evidence for the jury's verdict" when it fails to account for facts implicit in the verdict. *Id.* at 395 (citing *Bertling*, 611 F.3d at 481, and *Rivera*, 411 F.3d at 866). Other courts have similarly found not just elements, but specific facts, necessarily implied by a jury's verdict. *See, e.g.*, *United States v. Curry*, 461 F.3d 452, 461 (4th Cir. 2006) ("Thus, implicit in the jury's verdict is the conclusion that Curry did not deliver coins to UPS on September 4, 2004, and thus never had 381 Gold Eagles at his disposal for sale.").

By contrast, Archer has cited no case supporting his view that a sentencing court may disregard facts implicit in the jury's verdict. (Br. 15). He notes that some cases required sentencing courts to find facts that were elements of the crimes of conviction (Br. 19-

20), but that is an example of the rule that courts must "accept the facts necessarily implicit in the verdict," *Hourihan*, 66 F.3d at 465, not a limitation on it. Archer also cites two cases as standing for the proposition "that a district court has discretion to engage in fact-finding at sentencing by a preponderance of the evidence, even if that factfinding may be in tension with the jury's verdict" (Br. 17), but neither says anything applicable here: This Court held that a narcotics defendant's "safety-valve" eligibility should be determined by a judge rather than a jury in *United States v. Holguin*, 436 F.3d 111, 119 (2d Cir. 2006), but nothing in that case suggests that a court could find a defendant eligible where a fact necessarily implicit in a jury verdict meant he was not. Even farther afield is *Hollis v. Smith*, 571 F.2d 685 (2d Cir. 1978), which concerned a defendant's claimed constitutional right to have his sentence determined by a jury. Nor does a district court's finding (*see* Br. 17) that there was "simply no proof" as to the quantity of drugs reasonably foreseeable in a different case do anything to refute Judge Abrams' assessment of the evidence here. *United States v. Sanchez*, 925 F. Supp. 991, 1004 (S.D.N.Y. 2006). And although the Third Circuit did caution sentencing courts to defer only to those facts clearly found by the jury in *United States v. Fiorelli*, 133 F.3d 218, 225 (3d Cir. 1998) (*see* Br. 19), that case concerned an obstruction enhancement for a defendant who testified, a scenario that requires special findings because —unlike the issues here—it implicates defendants' constitutional right to testify. *See United States v. Rosario*, 988 F.3d 630, 633 (2d Cir. 2021).

Judge Abrams' sentencing followed the approach required by the relevant case law. She repeatedly explained that she had no obligation to accept all the evidence offered at trial, or even every fact this Court relied on in *Archer*. (A. 2114, 2116, 2124). But she also held that she could not disregard the jury's verdict that Archer had "the requisite intent to engage in these particular crimes." (A. 2116). The law did not permit her to do otherwise. *See Weston*, 960 F.2d at 218 ("Thus, the district court was correct in recognizing the primacy of the jury's determination on the issue of Weston's retaliatory intent."); *United States v. Hunt*, 521 F.3d 636, 649 (6th Cir. 2008) ("The district court appears to have relied in substantial part on its doubt that Hunt intended to commit fraud. If the district court did so rely, then it is necessary for us to remand under the abuse-of-discretion scope of review.").

Contrary to Archer's claim, that did not leave Judge Abrams to "guess" at which facts the jury found. (Br. 18-19). The only specific finding that Archer questions is whether the verdict required finding that Archer understood the full extent of the fraud. (*See* Br. 20-27). In granting Archer's new trial motion, Judge Abrams expressed doubt that Archer knew there was any fraud at all. (SPA 45). But at sentencing, Judge Abrams correctly reasoned that if she accepted that Archer had such knowledge, as the verdict required, then the full scope of the fraud was necessarily at least reasonably foreseeable to him. She reached that conclusion not through guesswork, but rather by analyzing the evidence, including emails on which Archer was copied and specific statements he made. (A. 2131-32). And Judge Abrams made that

finding "by a preponderance of the evidence." (*Id.*). In other words, Judge Abrams made exactly the finding Archer now demands. (*Compare id. with* Br. 17, 21).

Archer fails to show that Judge Abrams abused her discretion. He does not even bother to address her analysis of the evidence showing that the entire scheme was at least foreseeable to him. Nor could he: Judge Abrams relied on the same evidence this Court found to "strongly" show that "Archer knew at least the general nature *and extent* of the scheme." *Archer*, 977 F.3d at 197 (emphasis added); *cf. Bertling*, 611 F.3d at 481 ("On remand following our decision to reinstate the jury's verdict . . . the question [of intent] . . . was no longer open to debate.").

Instead, Archer notes that the jury instructions did not require the jury to find that he knew of the entire scheme. (Br. 21-22. 24-25). Judge Abrams never said otherwise. Although at sentencing she cited to her jury instructions, the instructions mattered because they showed that Archer had been convicted of the "particular crimes" on which Judge Abrams had instructed the jury, and thus Archer's "hypothetical world" of other possible convictions was foreclosed by the verdict. (A. 2113-16). But, as just discussed, Judge Abrams did not rest on the instructions alone, instead examining specific evidence proving the scope of Archer's knowledge. *See Jackson*, 862 F.3d at 395-97 (relying on jury instructions and evidence to determine facts jury necessarily found).

Similarly, Archer points to instances when the Government told the jury that he could be convicted without finding that he knew the full extent of the scheme

(Br. 23, 25), but that does not call into question Judge Abrams' finding on reasonable foreseeability. A single lie (*see* Br. 23) may suffice to prove that a defendant had the requisite intent to defraud, and having joined a conspiracy to defraud, the full extent of the losses it inflicted may be foreseeable to that defendant even if he did not affirmatively know everything about the conspiracy. *See, e.g.*, *United States v. Smith*, 513 F. App'x 43, 45 (2d Cir. 2013). That is why Judge Abrams' sentencing did not rest solely on "accepting the facts implicit in the jury's verdict" but also discussed the "evidence in the record" (A. 2127): Accepting the requisite intent to commit "not just any scheme to defraud, but the particular scheme to defraud alleged here," Judge Abrams found that "a wealth of emails," Archer's personal actions, and his statements proved foreseeability for "the entire amount of the losses from the scheme." (A. 2130-32).

Finally, Archer notes that two of his co-defendants pled guilty to participating in the Wakpamni without admitting knowledge of its full scope. (Br. 25-27). That too does not help him. To start, he makes no effort to show that their understanding of the scheme was the same as his. Moreover, Archer acknowledges that in sentencing one of those defendants, Michelle Morton, Judge Abrams found that the entire loss amount was reasonably foreseeable to her even while accepting that she did not knowingly participate in the entire fraud. (Br. 26-27 & n.3). Morton's sentencing thus further illustrates that a defendant may be guilty based on knowing participation in part of a fraud, but reasonably foresee the full extent of the fraud's damage. And as with Morton—who received a 15-month

sentence (A. 2148)—Judge Abrams spared Archer from the consequences of that principle by imposing a massively below-Guidelines sentence on him while expressly discounting the loss amount Guidelines. (A. 2146).

POINT II

This Court Should Not Revisit Its Prior Decision

Archer's request that this Court overrule its prior decision reversing Judge Abrams' grant of a new trial (Br. 27-29) is without merit. "As a general matter, this Court will adhere to its own decision at an earlier stage of the litigation" under the law of the case doctrine. *United States v. Plugh*, 648 F.3d 118, 123 (2d Cir. 2011). Although that doctrine has "limited exceptions," *id.*, Archer has failed to identify one.

Archer bases his arguments solely on this Court's decision in *United States v. Landesman*, 17 F.4th 298 (2d Cir. 2021). But *Landesman* does not—and could not—create grounds for revisiting *Archer*. Although the law-of-the-case doctrine will not apply where there has been an "intervening change in controlling law," *Plugh*, 648 F.3d at 124, *Landesman* did not change the law applied in *Archer*. *Archer* is a published decision of a panel of this Court, and "a published panel decision is binding on future panels unless and until it is overruled by the Court en banc or by the Supreme Court." *Deem v. DiMella-Deem*, 941 F.3d 618, 623 (2d Cir. 2019). That is why *Landesman*—also a panel decision—made clear that it was applying *Archer*, not modifying or overruling it. *See Landesman*, 17 F.4th at 330-31.

Moreover, even if *Landesman* could have modified *Archer*, it did not do so. Archer posits that *Landesman* "refined" *Archer* when it noted that the two examples in *Archer* of instances where new trial motions can be granted based on the weight of the evidence are not an exhaustive list. (Br. 29). *Landesman* explained, however, that it was describing, not changing, *Archer*. *See Landesman*, 17 F. 4th at 331 ("Of course, in *Archer* we provided the clearest examples of when it would be appropriate to grant a Rule 33 motion, but they were merely examples, and not an exhaustive list."). Archer also points to *Landesman*'s instruction "'to consider any reliable trial evidence as a whole, rather than on a piecemeal basis.'" (Br. 29-30 (quoting *Landesman*, 17 F.4th at 331)). But that plainly did not alter *Archer*, because *Landesman* was directly quoting *Archer* when it made that statement. *See Landesman*, 17 F.4th at 331 (quoting *Archer*, 977 F.3d at 189). And in any event, even if *Landesman* refined the application of *Archer* to future cases, it obviously could not refine the application of *Archer* to Archer: Whatever contours *Archer* has after *Landesman*, the holding of *Archer* itself—that Archer did not merit a new trial—must necessarily fall within those contours.

POINT III

The District Court Correctly Denied Archer's Motion to Suppress

A. Relevant Facts

Before trial, a magistrate judge issued search warrants for the contents of five email accounts, two of

which belonged to Archer. (A. 203-04, 214-15). The warrants issued based on a 20-page affidavit signed by an FBI agent, which detailed the Wakpamni scheme, the email accounts to be searched, and the reasons to believe those accounts contained evidence of the scheme, and which attached and incorporated by reference the Indictment. (A. 159-202). The warrants directed the companies that controlled the accounts to provide copies of their contents to the FBI, and contained sections guiding the FBI's review of that material. Those sections stated, in part:

> Law enforcement personnel . . . are authorized to review the records produced by the Provider in order to locate any evidence, fruits, and instrumentalities of violations of Title 18, United States Code, Section 1348, and Title 15, United States Code, Sections 78j(b) and 78ff, Title 17, Code of Federal Regulations, Sections 240.10b-5; conspiracy to commit securities fraud, in violation of Title 18, United States Code, Section 371; investment advisor fraud, in violation of Title 15, United States Code, Sections 80b-6 and 80b-17; and conspiracy to commit investment adviser fraud, in violation of Title 18, United States Code, Section 371, *among other statutes*, including the following:
>
> - evidence of the agreement to engage in a fraudulent scheme involving the issuance of bonds on behalf of the Wakpamni Lake

Community Corporation ("WLCC") and the misappropriation of the proceeds of those bonds, from January 1, 2014 to May 11, 2016;

- evidence of communications and/or meetings involving or related to the bonds issued on behalf of the WLCC, including but not limited to:
- all emails with or pertaining to Jason Galanis, John Galanis, Gary Hirst, Hugh Dunkerley, Michelle Morton, Devon Archer, and Bevan Cooney . . .
- *evidence of crime* (*e.g.*, agreement to engage in unlawful conduct, references to or discussion of unlawful conduct), *communications constituting crime* (*e.g.*, emails containing fraudulent representations); and identities and locations of co-conspirators or victims (communications with co-conspirators or victims, photos or other attachments, address book information);
- email communications with co-conspirators . . . .

(A. 211-13, 218-19 (emphasis added)).

Archer moved to suppress the fruits of the warrants on many grounds, including that the warrants lacked particularity based on the phrases "among other statutes," "evidence of crimes," and "communications constituting crimes." (Dkt. 302 at 32-36). Judge Abrams denied the motion. (SA 85-89). She explained that the

contested phrases, when "read in context," were accompanied by "meaningful limits, sufficiently specific to permit the rational exercise of judgment by the executing officers in selecting what items to seize." (SA 85-87). The phrase "among other statutes," Judge Abrams reasoned, "followed a list of specific statutory provisions." (*Id.*). And the phrases "evidence of crimes" and "communications constituting crimes," Judge Abrams explained, formed part of one category in a list of categories of objects to be seized, "accompanied by examples of the sorts of evidence that may constitute such items, serving to narrow somewhat these otherwise broad terms." (*Id.*). Archer's claims thus failed "when the warrant is read in its entirety and the clauses" at issue "are construed in context." (SA 89).[3] Judge Abrams additionally found that the good faith exception would apply. (SA 95).

B. Applicable Law

1. Particularity

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, . . . and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

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[3] Archer states that Judge Abrams found this decision "'a difficult one.'" (Br. 32 (quoting A. 225)). In fact, that comment applied to whether the warrants authorized seizure of too many portions of several accounts (*see* A. 225)—a different question that Archer has not raised on appeal.

A warrant therefore must be "sufficiently specific to permit the rational exercise of judgment by the executing officers in selecting what items to seize." *United States v. Shi Yan Liu*, 239 F.3d 138, 140 (2d Cir. 2000). To satisfy the particularity requirement, a warrant must: (1) "identify the specific offense for which the police have established probable cause"; (2) "describe the place to be searched"; and (3) specify the items to be seized by their relation to designated crimes." *United States v. Ulbricht*, 858 F.3d 71, 99 (2d Cir. 2017). "The Fourth Amendment does not require a perfect description of the data to be searched and seized." *Id.* at 100.

2. Severance of Infirm Clauses

Even where a warrant is facially invalid, suppression should be tailored by severing the constitutionally infirm portion of the warrant from its remainder, permitting the admission of evidence seized under the warrant's valid portion. *See United States v. George*, 975 F.2d 72, 79 (2d Cir. 1992) ("Fourth Amendment guarantees are adequately protected by suppressing only those items whose seizure is justified solely on the basis of the constitutionally infirm portion of the warrant, which no reasonably well-trained officer could presume to be valid.").

This Court has established a three-step "severance" analysis: (1) "separate the warrant into its constituent clauses"; (2) "examine each individual clause to determine whether it is sufficiently particularized and supported by probable cause"; and (3) "determine whether the valid parts are distinguishable from the nonvalid part." *United States v. Galpin*, 720 F.3d 436, 448-49

(2d Cir. 2013). In short, "the court must be able to excise from the warrant those clauses that fail the particularity or probable cause requirements in a manner that leaves behind a coherent, constitutionally compliant redacted warrant." *Id.* at 449. Severance "is not available where no part of the warrant is sufficiently particularized, where no portion of the warrant may be meaningfully severed, or where the sufficiently particularized portions make up only an insignificant or tangential part of the warrant." *George,* 975 F.2d at 79-80.

3. Good Faith

A search conducted pursuant to a warrant is "presumed valid," *United States v. Awadallah*, 349 F.3d 42, 64 (2d Cir. 2003), and "will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer acted in good faith in conducting the search," *United States v. Leon*, 468 U.S. 897, 922 (1984). Even when a search is found to be illegal, suppressing evidence is a court's "last resort," not its "first impulse." *Herring v. United States*, 555 U.S. 135, 140 (2009).

Under the "good faith" exception, the exclusionary rule does not apply "to evidence seized in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate judge, even where the warrant is subsequently deemed invalid." *United States v. Falso*, 544 F.3d 110, 125 (2d Cir. 2008). Accordingly, evidence collected pursuant to a warrant later found defective will be suppressed only if (1) the issuing

judge was knowingly misled; (2) the issuing judge wholly abandoned his judicial role; (3) the application was so lacking in indicia of probable cause as to render reliance upon it unreasonable; or (4) the warrant is so facially deficient that reliance upon it is unreasonable. *Id.* The central question is "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Leon*, 468 U.S. at 922 n.23.

4. Standard Of Review

"On appeal from a district court's ruling on a motion to suppress evidence," this Court reviews "legal conclusions *de novo* and findings of fact for clear error," and "may uphold the validity of a judgment on any ground that finds support in the record." *United States v. Ganias*, 824 F.3d 199, 208 (2d Cir. 2016).

C. Discussion

1. The Warrants Were Particular

The warrants identified the criminal activity for which the Government had established probable cause, accurately described the email accounts to be searched, and specifically described the material to be seized from those accounts. Judge Abrams thus correctly found the warrants sufficiently particular. (*See* SA 85-89).

Archer's contrary claim depends on taking words out of context. His brief makes liberal use of ellipses to collapse two pages of each warrant into a sentence, then claims that this condensation authorized a search

for evidence "in relation to any criminal statute without any further restriction." (Br. 34 (purporting to cite A. 211, 218[4])). No law enforcement officer attempting a "rational exercise of judgment," *Shi Yan Liu*, 239 F.3d at 140, would take the same approach. Archer's aggressive excerpting leaves out, among other things, a list of statutes for which the Indictment established probable cause, and a detailed description of the items to be seized, which included evidence of "a fraudulent scheme involving the issuance of bonds on behalf of the Wakpamni . . . and the misappropriation of the proceeds of those bonds" during a specified time period and "evidence of communications and/or meetings involving or related to the bonds issued on behalf of the W[akpamni], including" communications involving the named defendants in this case. (A. 211-12, 218). That matters because "[i]n upholding broadly worded categories of items available for seizure," this Court "ha[s] noted that the language of a warrant is to be construed in light of an illustrative list of seizable items." *United States v. Riley*, 906 F.2d 841, 844 (2d Cir. 1990). Here, that illustrative list made clear that the officers executing the warrants were not permitted to seize evidence "in relation to any criminal statute without any further restriction" (Br. 34), but rather evidence of the Wakpamni scheme, requiring only "some minimal

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[4] Archer cites only two pages for his quotations from the warrants, but in fact the material he quotes is spread over four pages. (*Compare* Br. 34, *with* A. 211-12, A. 218-19).

judgment as to whether a particular document falls within the described category," *Riley*, 906 F.2d at 845.

Archer argues that as a matter of grammar, including "among other statutes" in this detailed description of the items to be seized meant that the warrants authorized seizing evidence of literally any crime. (Br. 34). But "[a] warrant need not necessarily survive a hyper-technical sentence diagraming and comply with the best practices of *Strunk & White* to satisfy the particularity requirement." *United States v. Otero,* 563 F.3d 1127, 1132 (10th Cir. 2009); *see also United States v. Fiorito,* 640 F.3d 338, 346 (8th Cir. 2011) ("The particularity requirement is a standard of practical accuracy rather than a hypertechnical one."). Because, as *Riley* makes clear, a list of examples can narrow a broad phrase, reading the warrant as a whole would tell an officer executing the search that he was authorized to seize only the specified evidence of the Wakpamni scheme, not violations of any statute whatsoever. *See, e.g.*, *United States v. Castro*, 881 F.3d 961, 965 (6th Cir. 2018) (rejecting particularity challenge to warrant including phrases that allowed search for evidence of "any other unlawful activities" and "a crime" based on reading warrant "as a whole"); *United States v. Rubio*, 526 F. Supp. 171, 176 (S.D.N.Y. 1981) ("Defendants' reading of the 'other drugs' clause is out of context. When the warrant is read as a whole, it becomes obvious that only contraband evidencing a drug conspiracy was sought.").[5]

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[5] To the extent Archer suggests that warrants must specify the statutes for which probable cause

Archer fares no better by taking the phrases "evidence of crime" and "communications constituting crime" in isolation. (Br. 34). Because those phrases appear in a list of evidence of the Wakpamni scheme, they refer to evidence of that crime, not any crime. (*See* A. 211-12, 218-19). That follows not only from the law's emphasis on reading warrants as a whole, but from common sense. Archer acknowledges that the other items listed in the warrants are "more particularized examples." (Br. 35-36 n.5). But those "more

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exists, he is wrong. "[T]here is no constitutional *requirement* that a warrant must specify the crime for which a search is being conducted. Rather, specifying the crime is important when it helps guard against general searches by delineating the scope of the search and allowing executing officers to determine what they are authorized to seize." *United States v. D'Amico*, 734 F. Supp. 2d 321, 364 (S.D.N.Y. 2010). This Court has thus approved warrants that specified the type of criminal activity for which evidence was sought without listing the statutes at issue, while expressing skepticism that citing a statute alone will always establish particularity. *See George*, 975 F.2d at 76 (warrants seeking evidence of "prostitution activity" and "theft of fur coats" sufficiently particular); *Galpin*, 720 F.3d at 445 n.5 (broad statutes such as the mail fraud statute may not, standing alone, provide particularity). Because the warrants here made plain that they sought evidence of the Wakpamni scheme, they were sufficiently particular regardless of whether they cabined the statutes that may have been violated.

particularized examples" include "email communications with co-conspirators" and "emails that can be helpful to establish user identity." (A. 212, 219). The reason Archer concedes those phrases' particularity is because he—like any officer exercising "some minimal judgment"—reads them in context. Read in isolation, those examples could refer to a co-conspirator in any crime, or any user of any email account. But because not even Archer actually reads warrants that way, it is plain that they refer to co-conspirators in the Wakpamni scheme, and users sending emails related to that scheme. *See George*, 975 F.2d at 75 (explaining how a "catch-all phrase, read in context" applied to a specific crime (discussing *Andresen v. Maryland,* 427 U.S. 463 (1976)).

By contrast, the cases cited by Archer failed to identify the criminal activity for which evidence was sought. The warrant in *George* authorized a search for various enumerated items and "other evidence relating to the commission of a crime," without any information regarding what the crime at issue might be. 975 F.2d at 74; *see also id.* at 76 ("Nothing on the face of the warrant tells the searching officers for what crime the search is being undertaken"). The warrant in *Galpin* sought evidence of a very specific crime—violation of a statute requiring sex offenders to register their email and other online addresses—but also violations of "NYS Penal Law and or Federal Statutes," and allowed the search and seizure of all Galpin's electronics to obtain such evidence. 720 F.3d at 440-41. That was a problem, because the *Galpin* warrant authorized the search for material irrelevant to the one crime it described, and for which no probable cause

existed. *See id.* at 448 ("[T]here was no probable cause to believe that Galpin possessed or produced child pornography—crimes that were mentioned neither in the warrant application nor in the warrant itself, which nonetheless authorized a search for images depicting child sexual activity."). It is thus not surprising that this Court viewed that warrant as authorizing "a general, exploratory rummaging in . . . [Galpin]'s belongings." *Id.* at 445. By contrast, the warrants here, like the warrant in *Riley*, are limited by the "illustrative list of seizable items," because that list pertains to (and describes) evidence of the Wakpamni scheme. *See United States v. Ables*, 167 F.3d 1021, 1033-34 (6th Cir. 1999) (applying *Riley* and finding that a seemingly generic authorization to search for "other items evidencing" the movement of money was sufficiently particular when the warrant was read as a whole).

2. Any Infirmities Are Severable

Even if one of the clauses Archer cites did fail the particularity test, "Fourth Amendment guarantees are adequately protected by suppressing only those items whose seizure is justified solely on the basis of the constitutionally infirm portion of the warrant." *George*, 975 F.2d at 79. Following the three steps in *Galpin*, 720 F.3d at 448, it is easy to "separate the warrant into its constituent clauses," *id.*, because the phrase "among other statutes" was its own clause, set off by commas from the remainder of the warrants. And striking that phrase corrects any problem with the "evidence of crime" and "communications constituting crime" list items, because the references to "crime" would then unquestionably be limited to the specific

statutes in the warrants. At the second step, Archer does not argue that any other part of the warrants fails to be "sufficiently particularized and supported by probable cause." *Id.* at 448-49. And it is also simple to "determine whether the valid parts are distinguishable from the nonvalid part." *Id.* at 449. The "among other statutes" clause is, at worst, a carelessly appended phrase that did no work in the remainder of the warrants. (*See* SA 87 (Judge Abrams explaining that phrases to which Archer objects are "likely not best practice")). Its removal thus "leaves behind a coherent, constitutionally compliant redacted warrant." *Galpin*, 720 F.3d at 449. And because Archer identifies no evidence that was seized under the severed clause, the Fourth Amendment did not require suppressing any of the evidence used at trial.

3. The Good Faith Exception Applies

Archer also identifies no reason to disturb Judge Abrams' ruling that the warrants were executed in good faith. (SA 95).[6] Archer offers a single conclusory

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[6] Judge Abrams made her good faith ruling after addressing a different objection to the warrants, which Archer has not raised on appeal. That does not make her ruling less applicable to the issue on appeal, because Judge Abrams was necessarily deciding the issue of good faith based on the warrants' contents, not Archer's objections to them. (SA 95 ("There is no basis for concluding that the application or the warrant itself were so lacking as to render reliance on them unreasonable.")).

sentence (Br. 37 ("No reasonable law enforcement officer could have thought that the warrants were facially valid in light of this Court's clear authority to the contrary.")). But Archer's reading of the warrants as applying to evidence of any crime relies on a technical deconstruction of their grammar, meaning that there is no reason to think that "a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Leon*, 468 U.S. at 922 n.23.

In fact, it is not only the Government, the agents executing the warrants, the magistrate judge who issued the warrants, and Judge Abrams who did not read the warrants as broadly as Archer now does. Neither did Archer: Archer learned of the warrants shortly after they were issued to the email service providers and asked Judge Abrams to block their execution, attacking their validity on several grounds. (*See* Dkt. 126 at 2-3). After Judge Abrams denied his request, Archer sought interlocutory relief in this Court, again identifying several supposed flaws in the warrants. *See United States v. Archer*, No. 17-346, ECF 19-1 at 24-26 (2d Cir. Feb. 6, 2017). He did not, however, identify the issue he raises here, despite now depicting it as obvious. *See id.* If even Archer's skilled defense attorneys, carefully scrutinizing the warrants for angles of attack, did not perceive this purported problem for some time, he cannot claim that the agents executing the warrants should have immediately spotted the issue and refused to rely on the warrants. *See Leon*, 468 U.S. at 921 ("In the ordinary case, an officer cannot be expected to question the magistrate's . . .

judgment that the form of the warrant is technically sufficient.").

Nor did the Government waive reliance on the good faith exception during the pre-execution litigation. (*See* Br. 37-38). The statement on which Archer relies —that "the risk is on the government"—referred to the risk that the warrant returns contained privileged material that would taint further investigation if viewed by the prosecution team. (Dkt. 135 at 16). It thus has nothing to do with whether the agents executing the warrants could rely on them in good faith. In fact, as just noted, Archer did not even raise his current objection to the warrants before their execution, meaning that he obviously did not "put the government on explicit notice" (Br. 38) of his current claim that the warrants are invalid.

Furthermore, although the affidavit seeking the warrants was not incorporated in the warrants and thus does not bear on their particularity, it is "still relevant to [the] determination of whether the officers acted in good faith." *United States v. Rosa,* 626 F.3d 56, 64 (2d Cir. 2010). Here, the affidavit described the Wakpamni scheme and listed the statutes it violated without the "among other statutes" language (A. 160), and demonstrated probable cause to search for evidence in the same categories described in the warrants (*compare* A. 175-76, *with* A. 211-13, 218-19). The affidavit thus shows that the searches were a good-faith effort to find evidence of the Wakpamni scheme and not an excuse to conduct a general search. *See*, *e.g.*, *United States v. Romain*, 678 F. App'x 23, 25-26 (2d Cir. 2017) (applying good faith exception where

warrant did not mention *any* statute, but the affidavit made clear that the officers were seeking evidence of a specific crime).

POINT IV

The District Court Correctly Instructed the Jury

A. Applicable Law

This Court reviews *de novo* a defendant's preserved claim of error in instructions to the jury. *United States v. Roy*, 783 F.3d 418, 420 (2d Cir. 2015). An "instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *Id.* "As a general matter, no particular wording is required for a jury instruction to be legally sufficient, but rather, this Court must look to the charge as a whole to determine whether it adequately reflected the law and would have conveyed to a reasonable juror the relevant law." *United States v. Gabinskaya*, 829 F.3d 127, 132 (2d Cir. 2016); *see also United States v. Weintraub*, 273 F.3d 139, 151 (2d Cir. 2001) ("We do not review portions of the instructions in isolation, but rather consider them in their entirety to determine whether, on the whole, they provided the jury with an intelligible and accurate portrayal of the applicable law.").

Where the defendant's claim is that the district court wrongly omitted an instruction that he requested, the defendant must demonstrate both that (1) he requested a charge that "accurately represented the law in every respect," and (2) the charge delivered, when viewed as a whole, was erroneous and

prejudicial. *Roy*, 783 F.3d at 420; *see also United States v. Feliciano*, 223 F.3d 102, 116 (2d Cir. 2000) (when a district court declines to deliver a requested instruction, a defendant bears the "heavy burden" of showing that the charge given was prejudicial).

B. Discussion

1. The Conscious Avoidance Instruction Was Proper

Over Archer's objection (A. 776-78), Judge Abrams instructed the jury:

> [I]f you find beyond a reasonable doubt that the defendant you are considering was aware that there was a high probability that a material fact was so, but that the defendant deliberately and consciously avoided confirming this fact, such as by purposely closing his eyes to it, or intentionally failing to investigate it, then you may treat this deliberate avoidance of positive knowledge as the equivalent of knowledge.

(Tr. 4177-78). Judge Abrams reasoned that Archer's argument that he lacked knowledge of the fraud despite his "'deep involvement in the transactions that effectuated th[at] fraud all but invite [a] conscious avoidance charge.'" (A. 777 (quoting *United States v. Cuti*, 720 F.3d 453, 464 (2d Cir. 2013))). "For instance," Judge Abrams explained, "Archer was given $15 million by Jason Galanis to purchase the second tranche of W[akpamni] bonds, which particularly given

Galanis' role in setting up the bond issuances, seems unusual to say the least. . . . These are the sorts of red flags about the legitimacy of the transaction that may be used to show both actual knowledge and conscious avoidance." (A. 777 (citing *United States v. Goffer*, 721 F.3d 113, 127 (2d Cir. 2013))).

Archer denies that there was a valid factual predicate for the conscious avoidance instruction. (Br. 44-46). An "appropriate factual predicate for the charge exists," where "the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was (a) aware of a high probability of the fact in dispute and (b) consciously avoided confirming that fact." *United States v. Wedd*, 993 F.3d 104, 118-19 (2d Cir. 2021). To show otherwise, Archer bears the "heavy burden" of a sufficiency challenge, and this Court "review[s] all the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government." *United States v. Aina-Marshall*, 336 F.3d 167, 171 (2d Cir. 2003).

There was overwhelming evidence that Archer was aware of a high probability that the various machinations he facilitated were lies, misrepresentations, or other devices supporting the fraudulent scheme. As this Court catalogued in *Archer*, Archer was involved in many suspicious aspects of the underlying transactions, such as the plan to use proceeds earmarked for a "conservative annuity investment" for "discretionary liquidity," the "Ponzi-like" funding of the second bond purchase using the proceeds of the first, and the

circuitous routing of $15 million cited by Judge Abrams. *See Archer*, 977 F.3d at 190-93. And although Archer protests the lack of direct evidence that he deliberately avoided learning of the fraud, this Court has repeatedly held that the sort of clear circumstantial evidence at issue here supports that inference. *See, e.g.*, *United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003) ("[T]he second prong may be established where a defendant's involvement in the criminal offense may have been *so overwhelmingly suspicious* that the defendant's failure to question the suspicious circumstances establishes the defendant's purposeful contrivance to avoid guilty knowledge.'"); *accord United States v. Lange*, 834 F.3d 58, 78 (2d Cir. 2016); *Cuti*, 720 F.3d at 463. The "red flags" Judge Abrams noted were thus exactly the sort of evidence that supports a conscious avoidance charge. *See, e.g.*, *United States v. Muratov*, 849 F. App'x 301, 305-06 (2d Cir. 2021) ("[W]e have emphasized that 'red flags about the legitimacy of a transaction can be used to show both actual knowledge and conscious avoidance.'" (quoting *United States v. Ferguson*, 676 F.3d 260, 278 (2d Cir. 2011))).

Nor is Archer correct that a conscious avoidance charge should not have been given because the Government's theory was that Archer actually knew of the fraud. (*See* Br. 44-45). This Court has repeatedly made clear that "where the defendant asserts a lack of actual knowledge, the Government need not choose between an actual knowledge and a conscious avoidance theory because ordinarily the same evidentiary facts that support the government's theory of actual knowledge also raise the inference that he was subjectively aware

of a high probability of the existence of illegal conduct and thus properly serve as the factual predicate for the conscious avoidance charge." *Lange*, 834 F.3d at 78; *see also e.g.*, *United States v. Nektalov*, 461 F.3d 309, 316 (2d Cir. 2006) ("[W]here the evidence could support both a finding of actual knowledge and a finding of conscious avoidance, the government may present conscious avoidance as an argument in the alternative."); *Cuti*, 720 F.3d at 464.

2. The Government's Arguments Did Not Create a Flaw in the Jury Instructions

Archer also claims that the Government made improper arguments about conscious avoidance. (Br. 46-48). To start, Archer does not mention, much less attempt to meet, the relevant standards of review. A claim about what the Government said to the jury is not an attack on Judge Abrams' jury instructions, but an attack on what the Government argued. That requires Archer to show that the Government's arguments "resulted in substantial prejudice by so infecting the trial with unfairness as to make the resulting conviction a denial of due process." *United States v. Aquart*, 912 F.3d 1, 27 (2d Cir. 2018). Moreover, at trial Archer did not object to either of the Government arguments that he questions here. (*See* A. 791-92, 1096). He therefore must show plain error to obtain any relief. *United States v. Williams*, 690 F.3d 70, 77 (2d Cir. 2012).

Archer has not shown that Judge Abrams erred, much less plainly erred, in failing to *sua sponte* find fault with the Government's summations. Archer

claims that the Government's arguments improperly "conflated knowledge of the conspiracy with knowledge of a specific fact." (Br. 47). Archer makes this claim through creative supplementation of the transcript: He portrays the Government as stating "that 'you can't say you didn't know [about the conspiracy] because you stuck your head in the sand.' " (Br. 47 (quoting A. 1096)).[7] But the bracketed "[about the conspiracy]" was simply inserted by Archer. (*See* A. 1096). In the actual transcript the Government discussed "red flags," then said that conscious avoidance means "you can't say you didn't know because you put your head in the sand." (*Id.*). That is a perfectly accurate, if colloquial, description of conscious avoidance. *See Ferguson*, 676 F.3d at 278. And it in no way implies that the Government was using conscious avoidance to prove intent to defraud or conspire—which is improper—rather than to prove "knowledge of the conspiracy's unlawful goals"—which is a proper use of conscious avoidance. *Lange*, 834 F.3d at 76. Archer's complaint about the Government's principal summation is similar: Although Archer's brief compresses the Government's brief discussion of "red flags" and "put[ting] your head in the sand" with the phrase "knowing participants in the fraud" (Br. 47), there is nothing wrong with using conscious avoidance to show knowledge of the conspiracy's illegal objects, which is what the Government was actually arguing. (*See* A. 791-92).

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[7] Archer locates this quotation at appendix pages 4069-70 (Br. 47), but those are the trial transcript pages; the appendix page is 1096.

In any event, Judge Abrams properly instructed the jury that it "may consider conscious avoidance in deciding whether a defendant knew the objective or objectives of a conspiracy . . . . But conscious avoidance cannot be used as a substitute for finding that the defendant intentionally joined the conspiracy in the first place. . . . Similarly . . . conscious avoidance can go only to knowledge and cannot be used as a substitute for finding that the defendant you are considering acted willfully or with an intent to defraud." (Tr. 4179). Those instructions mirror the legal principles on which Archer now relies. (*See* Br. 46). And, especially on plain error review, Archer cannot reasonably seek relief based on the theory that the jury ignored those instructions. *See Williams*, 690 F.3d at 77 (rejecting argument based on Government summation where jury was properly instructed).

3. Judge Abrams Correctly Declined to Instruct the Jury on Multiple Conspiracies

Judge Abrams correctly declined to give a multiple conspiracies charge. (A. 780). As she explained, although the conspiracy involved "two types of misrepresentations"—the lies to Wakpamni about how the bond proceeds would be used, and the misrepresentations to the buyers of those bonds—"both sets of misrepresentations were clearly in furtherance of the same goal; namely, to misappropriate the bond proceedings for the personal use of the co-conspirators." (A. 780). Judge Abrams thus found no "factual predicate for a jury to conclude that there were multiple conspiracies here, nor have any of the defendants introduced such evidence." (A. 780).

Judge Abrams' decision was correct. Although a "defendant is entitled, upon proper request, to an instruction submitting to the jury any defense theory for which there is a foundation in the evidence," *United States v. Bryser*, 954 F.2d 79, 87 (2d Cir. 1992), "if only one conspiracy has been alleged and proved[,] the defendants are not entitled to a multiple conspiracy charge," *United States v. Maldonado-Rivera*, 922 F.2d 934, 962 (2d Cir. 1990). In order to secure a reversal on the ground that the trial court failed to give a multiple conspiracy charge, a defendant must show both that "there was evidence of separate networks operating independently of each other" and that the defendant "suffered substantial prejudice resulting from the failure to give the requested charge." *United States v. Cusimano*, 123 F.3d 83, 89 (2d Cir. 1997); *accord United States v. Dawkins*, 999 F.3d 767, 797 (2d Cir. 2021). Because the evidence here showed only a single conspiracy, there was no factual predicate for the charge Archer requested.[8]

Archer depicts two conspiracies—one based on misrepresentations to Wakpamni and one based on misrepresentations to the bond-buyers—but he admits

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[8] This Court has noted "some ambiguity" in its precedent concerning whether a district court's determination that there is no factual predicate for a requested jury instruction is reviewed *de novo* or for an abuse of discretion. *United States v. Hidalgo*, 736 F. App'x 255, 256-57 (2d Cir. 2018). As in *Hidalgo*, this Court need not resolve that ambiguity here, because Archer's argument fails under any standard. *See id.*

that the people making both sets of misrepresentations "interacted with one another and . . . furthered [Jason] Galanis's ultimate goal." (Br. 50). That is, Archer acknowledges that this case did not involve "separate networks operating independently of each other," which suffices to show that a multiple conspiracy charge was not warranted. *Dawkins*, 999 F.3d at 797; *see also, e.g.*, *United States v. Thompson*, 76 F.3d 442, 454 (2d Cir. 1996); *United States v. Reid*, 475 F. App'x 385, 387 (2d Cir. 2012). By contrast, in the case Archer cites as showing that such joint activity still permits a multiple conspiracy charge (*see* Br. 50-51), this Court found "no evidence . . . linking" the two parts of the charged conspiracy, and "not a whit of evidence" that the defendant "was aware of the existence" of other defendants or "shared a common goal" with them, *United States v. Johansen*, 56 F.3d 347, 351 (2d Cir. 1995); *cf. United States v. Payne*, 591 F.3d 46, 61 (2d Cir. 2010) ("A single conspiracy is not transformed into multiple conspiracies merely by virtue of the fact that it may involve two or more phases or spheres of operation, so long as there is sufficient proof of mutual dependence and assistance.").

Nor can Archer show substantial prejudice from the absence of a multiple conspiracies instruction. "A trial court's refusal to give a requested jury charge does not prejudice the defendant where the evidence is sufficient to allow the jury to find beyond a reasonable doubt that the defendant was a member of the single conspiracy alleged." *United States v. Vazquez*, 113 F.3d 383, 387 (2d Cir. 1997). This Court has already catalogued the evidence showing that Archer facilitated both sets of misrepresentations that he depicts as

separate conspiracies. *See Archer*, 977 F.3d at 190-96. In particular, although Archer portrays himself as separated from the deceptions to the Hughes and Atlantic clients who the purchased the bonds (Br. 49-50), "[t]he evidence . . . strongly supported an inference that Archer intended to help the conspirators defraud Hughes's and Atlantic's clients," *Archer*, 977 F.3d at 191. That same point refutes Archer's claim about "spillover prejudice" (Br. 50-51) from evidence of the fraud against the bond buyers: The evidence of fraud against the Hughes and Atlantic clients would have been properly considered against Archer regardless of any jury instruction, because Archer both facilitated that fraud and helped cover it up. *See Archer*, 977 F.3d at 191-92, 195-96.

POINT V

The District Court Properly Denied Archer's Severance Motion

A. Relevant Facts

Before trial, Archer moved to sever his trial from John Galanis's. (Dkt. 290). Judge Abrams denied Archer's motion. (SA 116-19). She rejected the argument that Archer and his co-defendant Cooney would present a defense that was antagonistic to Galanis's. (SA 117-18). She further explained that limiting instructions could prevent spillover prejudice from evidence that was admitted against Galanis but not Archer or Cooney. (SA 118-19).

Also before trial, Judge Abrams denied the Government's motion to admit evidence that Jason and John

Galanis were arrested together and convicted in a separate securities fraud referred to as the Gerova matter. *See United States v. Galanis*, 15 Cr. 643 (PKC) (S.D.N.Y.). Judge Abrams found this evidence "too prejudicial" to John Galanis. (SA 26).[9] Judge Abrams warned, however, that if John Galanis "were to argue that . . . he was duped by [Jason Galanis] in the context of this conspiracy, that . . . would open the door" to evidence of the Gerova conviction. (A. 232).

In summation, John Galanis made exactly that argument. (Tr. 3764). Judge Abrams granted the Government's motion to introduce John Galanis's conviction, alongside Jason, in the Gerova case. (Tr. 3787-92). Archer moved for a mistrial, which Judge Abrams denied. (Tr. 3813). The Government

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[9] Archer states that Judge Abrams found this evidence "would be 'simply too prejudicial' *to Archer* in a joint trial." (*E.g.*, Br. 56 (citing A. 230-32, 235) (emphasis added)). That is inaccurate. The passage in which the "simply too prejudicial" quote appears does not name who the evidence would prejudice (*see* A. 230-31), but the prejudiced defendant was obviously John Galanis, because he was the one convicted in the Gerova case. And Judge Abrams has since confirmed that her prejudice ruling was as to John Galanis, rejecting the characterization of her reasoning that Archer nonetheless repeats here. (*See* SPA 53-54 ("While Archer accurately notes that the Court had previously found the introduction of this evidence to run afoul of Rule 403, *that was with respect to John Galanis*." (emphasis added))).

entered into evidence a stipulation proving that John Galanis conspired with Jason Galanis to commit securities fraud in the Gerova matter. (Tr. 3829). Judge Abrams immediately gave a limiting instruction, telling the jury, among other things, that the Gerova matter "was entirely unrelated to this case," that Archer was not a subject of the Gerova investigation, and that the jury could not "consider this evidence in any way against either Mr. Archer or Mr. Cooney." (A. 857-58). The Government and John Galanis's lawyer then gave brief supplemental summations to address the newly admitted evidence. (A. 858-64). The Government's arguments explained how the Gerova conviction further proved John Galanis's knowledge that his son was perpetrating a fraud, and never mentioned Archer. (*See* A. 858-61).

B. Applicable Law

If the joinder of defendants "appears to prejudice a defendant or the government, the court may order separate trials . . . or provide any other relief that justice requires." Fed. R. Crim. P. 14(a). A defendant who "seeks separate trials . . . carries a heavy burden of showing that joinder will result in substantial prejudice." *United States v. Amato*, 15 F.3d 230, 237 (2d Cir. 1994). The defendant must show prejudice that is "unfair," and "not merely that [the defendant] might have had a better chance for acquittal at a separate trial." *United States v. Page*, 657 F.3d 126, 129 (2d Cir. 2011). The prejudice must be "sufficiently severe to outweigh the judicial economy" of a joint trial. *Id.*

Because Federal Rule of Criminal Procedure 14 explicitly permits district courts to "provide any other relief that justice requires," the rule "does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion." *Zafiro v. United States*, 506 U.S. 534, 538-39 (1993). Even in the rare circumstances where "the risk of prejudice is high," severance is not required, as "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." *Id.* at 539.

Rule 14 severance decisions are committed to the district court's discretion, which is "entitled to considerable deference that is virtually unreviewable." *United States v. Stewart*, 433 F.3d 273, 314 (2d Cir. 2006). Denial of a Rule 14 severance motion "will not be overturned unless the defendant demonstrates that the failure to sever caused him substantial prejudice in the form of a miscarriage of justice." *Page*, 657 F.3d at 129; *see also United States v. Feyrer*, 333 F.3d 110, 114-15 (2d Cir. 2003) ("We rarely overturn the denial of a motion to sever.").

C. Discussion

Judge Abrams acted well within her broad discretion in trying Archer and John Galanis together, because both were charged together for participating in the same criminal scheme. *See generally Zafiro*, 506 U.S. at 537 (explaining the "preference in the federal system for joint trials of defendants who are indicted together"). Archer's contrary argument rests on his claim that the "nature and quantity of evidence"

differed between the two defendants. (Br. 54-56). But "differing levels of culpability and proof are inevitable in any multi-defendant trial and, standing alone, are insufficient grounds for separate trials." *United States v. Scarpa*, 913 F.2d 993, 1015 (2d Cir. 1990). In addition, Judge Abrams instructed the jury to weigh the evidence against each defendant individually (Tr. 4123, 4144) mitigating any risk of prejudice. *See United States v. Spinelli*, 352 F.3d 48, 55 (2d Cir. 2003) (finding no prejudice in joint trial where "the district court explicitly instructed the jury to consider the defendants individually").

Moreover, with the exception of John Galanis's conviction in the Gerova case (discussed below), Archer fails to identify any evidence concerning John Galanis that would not have been admissible at Archer's trial, even if he had been tried alone. *See United States v. Salameh*, 152 F.3d 88, 111 (2d Cir. 1998) ("Where a defendant is a member of a conspiracy, all the evidence admitted to prove that conspiracy, even evidence relating to acts committed by co-defendants, is admissible against the defendant."). The denial of his severance motion therefore did not prejudice Archer, because he would have faced the same evidence even if his motion were granted. *See, e.g.*, *United States v. Villegas*, 899 F.2d 1324, 1347 (2d Cir. 1990) (no prejudicial spillover where evidence regarding a charged conspiracy was admissible against each of the defendants); *United States v. Bari*, 750 F.2d 1169, 1178 (2d Cir. 1984) (affirming denial of severance motion by "the least active but nevertheless . . . fully implicated conspirator" because the evidence would have been admissible at a separate trial).

The first case on which Archer relies (*see* Br. 56), illustrates just how greatly his case differs from those demanding severance. *United States v. DiNome* was a sixteen-month racketeering trial against a Mafia crew, which included "the evidence of numerous crimes, including the routine resort to vicious and deadly force to eliminate human obstacles." 954 F.2d 839, 841-43 (2d Cir. 1992). But also charged were a married couple, the Hellmans, who had received a bribe from the mobsters. *Id.* at 844. After racketeering charges against the Hellmans were dismissed, they were tried solely on mail and wire fraud stemming from attempts to secure loans for a house and a car. *Id.* This Court explained that after the "RICO charges against the Hellmans were dismissed, all but an infinitesimal fraction of the evidence at this sixteen-month trial lost any relevance to the mail and wire fraud charges against them. Instead of being swamped by this mass of irrelevant evidence, these charges should have been tried separately." *Id.* at 844-45.

This case looks nothing like *DiNome*. While the Hellmans were forced to defend against small-scale fraud charges during a trial about "vicious murders, loansharking, auto theft, pornography, and firearms trafficking," *id.* at 844, the only charges proved at Archer's trial concerned the Wakpamni bond scheme in which he participated, which is why he and John Galanis were convicted of the same counts. This case therefore resembles the many others in which this Court has affirmed the joint trial of co-conspirators. *See, e.g.*, *Spinelli*, 352 F.3d at 55 ("Joint trials are often particularly appropriate in circumstances where the defendants are charged with participating in the same

criminal conspiracy . . . ."); *Salameh*, 152 F.3d at 115 (noting "particularly strong" preference for joint trials of defendants charged with interconnected schemes).[10]

Nor did the introduction of John Galanis's conviction in the Gerova matter render the joint trial improper. Archer argues that the jury would have applied the Government's argument that the conviction put John Galanis on notice of his son's fraudulent conduct to Archer (Br. 57), but fails to explain why that is so. The evidence and the Government's arguments made no reference to Archer, and Judge Abrams expressly told the jury that Archer did not even know about the Gerova matter until at least September 2015, well into the Wakpamni scheme, when Jason Galanis was arrested. (*See* A. 857-61). And the jury had already learned—through previously admitted evidence not at issue in this appeal—that Archer knew of Jason Galanis's arrest, and that he had a checkered reputation in the securities industry. (Tr. 2519-20, 2613-31). Thus, as Judge Abrams explained, the Gerova evidence did not prejudice Archer, and may even have helped him by lumping Jason and John Galanis together as convicted fraudsters, furthering

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[10] In addition to *DiNome*, Archer cites Justice Jackson's concurrence in *Krulewitch v. United States*, 336 U.S. 440 (1949). (Br. 56). But that concurrence, like the majority opinion, concerned hearsay rules, not severance, and thus does not undermine the countless cases approving the joint trial of co-conspirators. *See Krulewitch*, 336 U.S. at 445-58 (Jackson, J., concurring).

Archer's defense that he was an innocent dupe of the "'real' conspirators." (SPA 54). Given all that, there is no reason to doubt the strong presumption that the jury followed Judge Abrams' instruction "not to consider this evidence in any way against" Archer. (Tr. 3831).

To argue that the jury would not have followed those instructions regarding the Gerova matter, Archer cites *United States v. McDermott*, 245 F.3d 133, 139-40 (2d Cir. 2001). (Br. 57-58). But in that case this Court found that a jury could not follow the instruction in question without "humanly impossible feats of mental dexterity." 245 F.3d at 139-40. By contrast, not only was Archer uninvolved in and unaware of the Gerova matter, he did not even know John Galanis. (Tr. 3795). Judge Abrams was thus correct in concluding that nothing about the Gerova case "taints [Archer] in any way." (Tr. 3797). Put another way, the jury would not have held John Galanis's conviction in the Gerova case against Archer even without an instruction, because all the evidence showed that there was no connection between Archer and that conviction. (*See* Tr. 3796, 3798). Because this case thus looks nothing like the extraordinary facts of *McDermott*, the usual principle that juries will follow their instructions applies. *See Zafiro*, 506 U.S. at 538-39 (explaining strong preference for joint trials to promote efficiency and that limiting instructions can often cure any prejudice).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: New York, New York
September 27, 2022

Respectfully submitted,

DAMIAN WILLIAMS,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

SAMUEL P. ROTHSCHILD,
NEGAR TEKEEI
HAGAN SCOTTEN,
Assistant United States Attorneys, Of Counsel.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 13,858 words in this brief.

DAMIAN WILLIAMS,
United States Attorney for the
Southern District of New York

By: HAGAN SCOTTEN,
Assistant United States Attorney