CASE NO. 20-4393(L)
XAP with 20-4445

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee/Cross-Appellant,

v.

KENNETH R. SPIRITO,
Defendant - Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT NEWPORT NEWS

OPENING BRIEF OF APPELLANT/CROSS-APPELLEE

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STATEMENT OF JURISDICTION

The district court had jurisdiction of this criminal case under 18 U.S.C. § 3231. The district court sentenced Appellant/Cross-Appellee Kenneth Spirito on July 15, 2020, and entered final judgment on July 16,

2020. JA 2587.[1] Spirito timely appealed, the United States cross-appealed, and this Court consolidated their cases. JA 2593; 2595. This Court has jurisdiction under 18 U.S.C. § 3742 over this timely appeal from a final order.

STATEMENT OF THE ISSUES

I. Was there sufficient evidence for a reasonable jury to find Spirito acted without authority, and with the intent to deprive the Peninsula Airport Commission of property, in violation of 18 U.S.C. § 666(a)(1)(A)?

II. Did the district court err in refusing to instruct the jury that a violation of an agency guideline or regulation cannot provide the basis for imposing criminal liability, when the jury improperly considered such violations in finding the defendant guilty under 18 U.S.C. Sec. 666(a)(1) and 1957?

III. Did the district court abuse its discretion in excluding evidence of a change in state law and of another entity's operations under that law, when that evidence was critical to Spirito's defense against the government's theory that he had acted in violation of state policies in allocating airport funds?

IV. Was there sufficient evidence for a reasonable jury to find that Spirito's statements to a federal agency were false and made with the

[1] Citations to the Joint Appendix are referenced with "JA _____."

requisite intent to impede the investigation, in violation of 18 U.S.C. Sec. 1519?

V. Was there sufficient evidence for a reasonable jury to find that the aggregate value of the transactions charged in Count 19 met the statutory threshold of $5,000 within the one-year time period required by 18 U.S.C. § 666(a)(1)(A)?

VI. Was there sufficient evidence for a reasonable jury to find Spirito's sworn statements in Counts 20, 21, and 23 were false and were material to the civil matter in which those statements were made?

VII. Did the district court commit plain error in entering a preliminary order of forfeiture and money judgment, where the court did not provide Spirito with the proper notice and opportunity to be heard?

STATEMENT OF THE CASE

The allegations in this case arise from a business contract between the Peninsula Airport Commission (PAC) and TowneBank executed in 2014, for the benefit of a startup airline, People's Express (PEX). The grand jury initially returned an indictment on Counts 1 through 18 on May 13, 2019, charging eleven separate counts of program fraud in violation of 18 U.S.C. § 666(a)(1)(A), and six separate counts of money laundering related to program fraud in violation of 18 U.S.C. § 1957. JA 23-42. Each count of program fraud related to a transfer of the airport funds

of the Peninsula Airport Commission (PAC). Count 18 charged Spirito with providing false statements to a federal agency under 18 U.S.C. § 1519, based on an email response he submitted to a federal agency on February 1, 2017.

On August 27, 2019, Spirito filed a pre-trial motion to dismiss Counts 1 through 17, arguing that the allegations of program fraud and money laundering failed to allege a crime and that the actions he took were expressly authorized by the PAC. JA 195-219.

The grand jury returned a superseding indictment, on September 9, 2019, adding one additional count of program fraud under 18 U.S.C. § 666(a)(1)(A) (Count 19), relating to Spirito's use of funds related to a vehicle, four counts of perjury under 18 U.S.C. § 1623(a) (Counts 20 through 23), relating to Spirito's statements in a deposition in a civil case against the PAC for defamation, and one count of obstructing a state law enforcement officer under 18 U.S.C. § 1503 (Count 24), relating to Spirito providing a copy of his deposition transcript to a Virginia state

investigator. JA 359-72.[2] Spirito filed a supplemental motion to dismiss Count 19 on November 25, 2019, arguing that the allegations failed to allege a taking above $5,000 in a single-year period, and thus should be dismissed. JA 394-99.

The PAC is a regional commission consisting of six individuals appointed by the City of Newport News and the City of Hampton for the purpose of serving as the "governing body" of the Newport News-Williamsburg International Airport (PHF). JA 1316-17, 1427. The PAC held monthly public meetings and routinely entered closed session to address personnel issues, air service development, and real estate purchases, at the guidance of their legal counsel. JA 1317-18. The PAC oversees the use of all airport funds, and such use is subject to the regulation and policies of state and federal agencies. JA 1318-19. The PAC employed an Executive Director to execute the decisions it makes as a

[2] Additionally, the grand jury's superseding indictment added Paragraph 41, which related to Counts 1 through 17, and described the process by which Spirito received a 3% raise for his performance evaluation for calendar year 2014, the year in which the loan guarantee was executed. JA 352-53.

body, and to oversee the daily operations of PHF. JA 723. The PAC had the authority to hire and fire the Executive Director of the PAC, to approve the budget and to oversee projects of the airport, to amend airport policies, and to commission an annual, outside audit of airport operations. JA 725-26, 1316-19.

In 2011, the PAC and the Tidewater community were suffering from the recent and "catastrophic" exit of AirTran from PHF operations. JA 727-29, 1323-27. At that time, the PAC employed Kenneth Spirito as its Executive Director, and the PAC delegated daily operations of PHF to Spirito. JA 1322. Members of the PAC, particularly James Bourey, the City Manager of Newport News, worked actively, both independently and alongside Spirito, to identify and recruit various airlines to start service at PHF, but were not successful. JA 1324-27, 1433-34.

The fledgling airline PEX sought to establish service at PHF and make it its headquarters. JA 730-32, 1324-27. The PAC believed the expanded service offered by PEX would benefit the Tidewater community and took actions to support the development of their air service. JA 761-

762, 1327. Bourey testified at trial that, in addition to his efforts to secure funding through the City of Newport News and the PAC, he approached at least three private investors from the community in 2014 in order to facilitate private funding for PEX for the start of operations and air service at PHF. JA 1444-46. Bourey also approached three different banks about securing financing for PEX. JA 1460. At that time, Bourey planned for the PAC to use airport funds as collateral for a bank loan to PEX. JA 1463-65.

In 2014 PEX applied for funding from TowneBank, a regional bank headquartered in Virginia. As a condition of extending approximately $5 million in funds to PEX, TowneBank required a third-party source of collateral, a guarantee for the loan, to approve the application. JA 867-68. In May 2014, Spirito provided Bourey with a citation to Virginia state guidance about the use of state funds, which described "air service development" as one of a list of airport projects that were "outside of normal project expenditures" and which explained that such funds would be "counted against new requests for state discretionary funding." JA 1465 (Trial Exhibit H33-a). Spirito also provided the PAC with a breakdown of

the airport funds that would be used for the loan guarantee. JA 1466-67 (Trial Exhibit H33-b).

The PAC discussed the project over the course of several meetings, including concerns about the background of PEX principals and the substantial risk some members saw in guaranteeing the loan. JA 735-36, 1358-59. Members of the PAC knew as early as 2011 that there were concerns with those operating PEX, and, in fact, one member, Steve Mallon, did not believe the principals of PEX "had the experience to run an airline." JA 1333-34, 1363-64, 1469-1474. Mallon "discouraged" a personal friend from making a private investment in PEX, and asked during the PAC discussions whether they could "afford to lose $5 million." JA 1355, 1359.

Ultimately, the PAC voted in a special, closed-session meeting on June 9, 2014, to use airport funds for the loan guarantee to TowneBank. JA 1361-65 (Trial Exhibit B-12). Despite the concerns expressed, the members of the PAC, with the exception of Mallon, "fully supported" the guarantee, with Bourey voicing the most vocal support of the deal. JA 740-41, 1364-65, 1378-79. Counsel for the PAC attended that meeting, and also voiced

support for the deal. JA 1379-80 (Trial Exhibit B-12). Bourey testified that, at the time the guarantee was discussed by the PAC, the attorney for the PAC explicitly authorized the use of state entitlement funds for the collateral. JA 1537-39, 1552-54. The PAC passed a resolution, which had been drafted by counsel, authorizing its chairperson, LaDonna Finch, to take "any act" she deemed "necessary to provide for the adequate, economical, and efficient provisions of air service and general business" at PHF. JA 745-46, 1487-89 (Trial Exhibit B-13). The PAC believed, at the time of that vote, that it had the authority to guarantee the loan using airport funds. JA 1548.

As a result of this authorization, at a meeting arranged by legal counsel for the PAC, Finch entered into the contract for the PAC to serve as the guarantor on the loan to PEX. JA 748-49 (Trial Exhibit A-1). On June 18, 2014, Finch signed the relevant documents for the loan guarantee, including the "Line of Credit Agreement." JA 754-55, 767, 1365-66 (Trial Exhibit A-17). The agreement contained a "Disbursement Statement" that noted TowneBank would be withholding $252,030 of the $5 million loan

funds to account for outstanding "federal tax obligations" owed by PEX.[3] JA 751-52 (Trial Exhibit A-15). Finch signed an acknowledgment of this statement, along with the other documents at the closing of the loan on June 18, 2014. JA 751-52 (Trial Exhibit A-15). While Finch admitted during her testimony that she did not read all of the documents, she signed those documents because she "trusted" the advice of counsel for the PAC, who she asked during the meeting if they were "ok" and "good with this." JA 755-756. That same date, legal counsel for the PAC issued a letter opining that, after reviewing the documents for the loan guarantee, the PAC had the power and the authority to enter into the contract with TowneBank to guarantee the loan, and the PAC providing the loan guarantee "do not, and will not, constitute a breach or result in a violation of any applicable federal or state law, statute, rule or regulation." JA 858-59 (Trial Exhibit A-22).

As a condition of the loan guarantee, TowneBank required the PAC to deposit the collateral promised under the contract into PAC-controlled bank accounts at TowneBank specifically earmarked for the loan

[3] Legal counsel for the PAC later authorized the release of these funds in July 2014 when PEX advised him they had satisfied this tax debt. JA 888.

guarantee. JA 867-68. PAC's Chief Financial Officer, Renee Ford Carr, transferred airport funds controlled by the PAC to these PAC-controlled bank accounts at TowneBank, in accordance with the contract signed by the PAC.[4] At all times relevant to the transfer of funds into the collateral accounts, these airport funds remained under the direct control of the PAC, and no funds were ever diverted to the account of another.

PEX drew down the entirety of the loan funds by August 2014. JA 890-91. After a few months of initial operations at PHF in the summer of 2014, PEX ceased all operations and airline service at PHF. JA 893-895. Information surfaced in the weeks and months following the PAC's execution of the guarantee indicating PEX had not been honest about other debt obligations, or the leadership of their organization. JA 1504-1515. The members of the PAC learned about these developments at the same time as Spirito, and Bourey testified that Spirito was surprised and frustrated by the revelations. JA 1504-1515.

[4] These transfers of airport funds from PAC-controlled bank accounts into other PAC-controlled accounts at TowneBank would later form the basis of the allegations contained in Counts 1 through 11 of the superseding indictment.

By November 2014, PEX was behind on loan payments and without the funds to make any payments. JA 893-895, 899-900. TowneBank began looking to the PAC to make the interest payments on the PEX loan to prevent default. JA 893-895, 902. On November 26, 2014, the PAC chairperson at that time, James Bourey, and counsel for the PAC, directed Spirito to make the PEX interest payment to keep the loan out of default status. JA 1526-27 (Exhibit H-166). Spirito questioned whether he had the authority to transmit any payments without the loan being in default, and was strongly directed, by the PAC chair and legal counsel for the PAC, to make the interest payment, with the advice that, as Executive Director, he had the "authority to pay our obligations" without additional "approval by the Commission." JA 1526-27 (Trial Exhibit H-166). As a result of this direction, Spirito caused the first payment from the loan guarantee to be transferred from the PAC-controlled accounts to TowneBank, starting in December 2014.[5] At all times relevant to the transfer of funds out of the

[5] These transfers of airport funds from PAC-controlled accounts to TowneBank would later form the basis of the allegations contained in Counts 12 through 17 of the superseding indictment.

collateral accounts to TowneBank, these airport funds remained under the direct control of the PAC, and no funds were ever diverted to the account of another.

During his case-in-chief, Spirito sought to present evidence that, in 2017, the Virginia General Assembly passed Senate Bill 1417, which amended Va. Code § 5.1-2.16 relating to the use of state entitlement funds for airports. JA 1932-37 (Trial Exhibits 26-1 & 26-2, Refused). In that section, and for the first time, the state prohibited the use of state funds for "purposes related to supporting the operation of an airline, either directly or indirectly, through grants, credit enhancements, or other related means." *Va. Acts of Assembly, Chapter 709*. The Virginia Secretary of Transportation made clear, in a letter copied to Spirito, that this change was prompted by the loan guarantee made by the PAC and was designed to grant the Virginia Aviation Board "more oversight capability and authority." (Trial Exhibit 26-1, Refused). Spirito's counsel proffered this evidence to the district court, arguing he should be permitted to introduce this in his defense as it demonstrated both the permissible use of such

funds at the time they were used in 2014, and his lack of intent in misusing state entitlement funds. JA 1932-97. The district court precluded any mention whatsoever of this change in the law. JA 1935.

The district court also excluded Spirito from presenting any evidence about another airport in Virginia, specifically in Lynchburg in 2013, using state entitlement funds for an ineligible project. JA 1951-52. The district court refused to allow Spirito to proffer the evidence during a sidebar, or to lay out his arguments for relevance. JA 1952.[6]

The government introduced evidence of three credit card transactions it alleged formed the basis of the violation charged in Count 19, relating to the use of a business credit card issued to Spirito: (1) $1,756.15 on November 28, 2014, (2) $1,849.75 on August 11, 2015, and (3) $1,636.76 on November 30, 2015. JA 1817-25. The government did not introduce evidence to show whether these expenses were permissible expenditures under Spirito's employment agreement, that he lacked the

[6] While the district court did foreclose any opportunity to proffer the evidence of the Lynchburg airport's use of funds in 2013, Spirito outlined the factual basis for this evidence in his written motion to dismiss, filed in August 2019. JA 205-206.

authority to authorize reimbursement of these expenses, or that these amounts represented a fraudulent conversion of the airport's funds.

As to three perjury counts, the government's case focused on a sole event: Spirito's deposition on March 1, 2019, in connection with his federal civil suit filed against the PAC in the Eastern District of Virginia. JA 1876. The following exchange on direct examination of Special Agent Waskey represents all of the information the government presented about the nature of the civil suit:

> Q: Agent Waskey, in the course of your investigation, did you become aware that the defendant, Mr. Spirito, had been involved in a civil proceeding titled Kenneth R. Spirito versus the Peninsula Airport Commission and others?
>
> A. Eventually, yes.
>
> Q. And was that matter in the United States District Court for the Eastern District of Virginia, Newport News Division?
>
> A. Yes.
>
> Q. Was it docketed 4:18cv58?
>
> A. Yes.
>
> Q. And in the course of that proceeding, did Mr. Spirito give a videotaped deposition under oath on March 1, 2019?
>
> A. Yes.

Q. Was that deposition given here in the Eastern District of Virginia, sir?

A. Yes.

Q. Did you obtain a copy of that deposition?

A. Yes.

Q. And do you recall when you actually obtained a copy of that, sir?

A. It was not until sometime in the summer of 2019.

Q. Among other matters, sir, were there questions of Mr. Spirito in that deposition about the Peninsula Airport Commission?

A. Yes.

Q. Were there questions about People Express and the loan guaranty?

A. Yes.

Q. And do certain of the exchanges that occurred in that deposition relate to certain counts in the indictment?

A. Yes.

JA 1876-77.

The specific statements alleged to be false were set forth in detail in Counts 20, 21, 22, and 23 of the superseding indictment, JA 361-71, and the government played approximately 15 minutes of video excerpts of the deposition to the jury. JA 1877-80. In closing the government pointed to

the evidence adduced at trial regarding the program fraud counts to show the statements were "false." JA 2264-66. The government did not introduce any evidence of the nature of the civil suit, or how the statements Spirito made in the deposition were "material" to the civil suit.

At the close of the government's case, Spirito moved to set aside the counts in the indictment, renewing the arguments he raised in written motions to the district court. JA 1920-24. Spirito specifically challenged whether the evidence was sufficient to send to the jury on Count 19, as Spirito argued the three credit card transactions required to meet the $5,000 statutory threshold had not occurred within one year. JA 1897-1912. Spirito moved to set aside the perjury convictions on materiality grounds, pointing to a lack of any evidence introduced by the government to show the statements alleged to be false were material to the proceeding in which they were made. JA 1913-20. The district court denied the motions on Counts 1-17, and 19, and withheld its ruling on Counts 20-23. JA 1920.

Based on the evidence adduced during the trial, Spirito asked the district court to instruct the jury on the proper weight to assign evidence of

agency policies and handbooks. JA 2182, 2212, 2215-16. The instruction provided:

> You have heard references to handbooks, rules, publications, guidelines and regulations of the United States Department of Transportation (U.S. DOT), Federal Aviation Administration (FAA), and the Virginia Department of Aviation (VDOA). Keep in mind that handbooks, rules, publications, guidelines and regulations are not criminal statutes and cannot provide the basis for imposing any criminal penalty on, or finding of guilt beyond a reasonable doubt for anyone. Therefore, evidence of alleged violations as to any U.S. DOT, FAA, or VDOA handbooks, rules, publications, guidelines and regulations should not be considered by you as a violation of criminal law *per se*. You may consider, however, evidence of the HUD or OPM handbooks, rules, publications, guidelines and regulations as you would any other evidence in determining whether or not the defendant had the required intent to violate the criminal statute charged in the indictment.

JA 2182. The district court refused this instruction. Over the Spirito's objection, the jury was instructed that they could find Spirito guilty of committing program fraud if they found he used the money of the PAC, "knowing such use is unauthorized" or is for an "unauthorized purpose," "even if such use benefited the Peninsula Airport Commission."

JA 2337-38.

The jury returned a verdict of guilty on Counts 1 through 21, 23, and 24, and not guilty on one count of perjury, Count 22. JA 2422-2426.

On April 20, 2020, Spirito filed a motion for judgment of acquittal, challenging the sufficiency of his remaining convictions and renewing the arguments previously raised to the district court in his written motions and emphasizing, as to Counts 1 through 18, that the evidence from the government's witnesses cast significant doubt about the source of the funds. JA 2430-2436. On July 9, 2020, Spirito supplemented the arguments on Counts 1 through 18, pointing the district court's attention to the United States Supreme Court's unanimous opinion in *United States v. Kelly*, which provided added support to his previous arguments supporting setting aside the verdict on these counts. JA 2508-10.

In a written opinion issued July 10, 2020, the district court granted Spirito's motion for judgment of acquittal as to Count 24, and denied his motion as to all other counts. JA 2520-34. The district court found that the use of airport funds for the loan guarantee violated federal and state regulations, JA 2524-26, that the Spirito, and not the PAC, was responsible

for directing those funds, JA 2526-27, and that the Supreme Court decision in *Kelly* did not apply to Spirito's conduct, JA 2527-29.

On July 15, 2020, the district court departed below the advisory sentencing guidelines range, and sentenced Spirito to probation supervision for a period of 48 months, with a special condition of home detention for a period of 30 months. JA 2587-92. In rendering this sentence, the district court observed Spirito had "set out to do the right thing and did it in the wrong way," JA 2573. The district court found the sentencing guideline range of 97 to 121 months "just absolutely excessive," based on Spirito's conduct. JA 2576. The district court noted that "Congress passed this statute to deal with theft, fraud, bribery and other matters dealing with federal funds, but as we look at this, there's no theft that went into your pocket," "there's no bribery involved here," and "[t]he Court doesn't consider it fraud that you committed." JA 2580. The district court noted he viewed Spirito's convictions as a "misguided, overzealous effort to get an airline for the airport" and he did not find Spirito's conduct "was motivated by any personal greed or desire to benefit." JA 2581.

On July 1, 2020, the government filed a "Motion for a Preliminary Order of Forfeiture" with the district court, asking the court for a money judgment in the amount of $3,817,931.29 related to Spirito's convictions for money laundering in Counts 12-17, and to seize substitute assets in partial satisfaction of that judgment. JA 2465. In that motion, the government moved for forfeiture under 21 U.S.C. § 982(a)(1), and sought forfeiture of assets "involved in" the program fraud and money laundering offenses, listing "the corpus of the offense, any funds laundered, any proceeds, and any property facilitating the offense." JA 2470. The government failed to identify in its motion, however, exactly how any of the assets it is targeting, and the very figure of the money judgment itself, are "involved in" the criminal activity the government alleges against Spirito.

While the government asked the district court to rule on the pleadings and the record from the trial, the government acknowledged that the local rules of the district court provided the defendant with 14 days to respond to the preliminary motion and raise an objection to the forfeiture. JA 2478-79 (*See* Local Criminal Rule 47(F)(1), Eastern District of Virginia).

The government submitted a draft preliminary order of forfeiture for the court.

The next day, on July 2, 2020, the district court signed the draft order provided by the government, and this order was entered on July 6, 2020. JA 2481-84. Prior to Spirito's sentencing on July 15, 2020, trial counsel for Spirito did not object to the entry of this order or respond to the preliminary motion for forfeiture.[7]

On July 15, 2020, Spirito appeared before the district court for sentencing. The issue of a money judgment was never raised during that hearing, Spirito was not advised of the entry of the preliminary forfeiture order by the district or by the government, and the district court's written judgment did not apprise Spirito that a money judgment had been issued against him. JA 2587-92.

[7] Trial counsel moved to stay the forfeiture order and the seizure of assets on August 25, 2020, more than after noting the appeal to this Court. JA 21. The district court subsequently denied that motion in an order signed on August 31, 2020, and entered on September 14, 2020. JA 21.

SUMMARY OF ARGUMENT

The United States Supreme Court's recent decision in *Kelly v. United States*, 140 S. Ct. 1565 (2020), made clear that, under 18 U.S.C. § 666(a)(1)(A), the government had to prove that the object of any alleged dishonest acts was to obtain the money or property of the Peninsula Airport Commission. The Court distinguished between "wrongdoing" by public officials, like deception, corruption, and abuse of power, and those that rise to the level of criminal culpability. Importantly, the Court held that "an exercise of regulatory power" can ***never*** satisfy this requirement. The government did not meet its burden of showing that Spirito acted without authority and with the object to obtain property, and the evidence was insufficient as a matter of law to convict him of federal program fraud under 18 U.S.C. § 666(a)(1)(A). Similarly, the district court erred in denying Spirito's motion to set aside the jury's verdict to convict the defendant under 18 U.S.C. Sec. 1957, as the only "specified unlawful activity" alleged by the government involved the charged violations of 18 U.S.C. Sec. 666(a)(1).

In light of the government's heavy reliance on violations of state policy and regulation to prove its case, the district court was required to instruct the jury that a violation of an agency guideline or regulation cannot provide the basis for imposing criminal liability, and the jury improperly considered such violations in finding the defendant guilty under 18 U.S.C. Sec. 666(a)(1) and 1957. Similarly, the district court abused its discretion in excluding Spirito's evidence the Virginia legislature had changed the applicable law after the state funds were used.

The evidence was insufficient to convict the defendant on Count 18 under 18 U.S.C. § 1519, as the government failed to prove the defendant's statements to the regulatory agency were false, and failed to show the defendant acted with the requisite intent to impede the regulatory investigation. Additionally, this Court should hold that statutory language of 18 U.S.C. § 666 provides a temporal limitation that requires each aggregated transaction used to reach the $5,000 requirement to occur within a one-year period, and should find the government did not meet its burden of proof on this essential element of the crime.

The district court erred in denying the defendant's motion to set aside the verdict as to Counts 20, 21 and 23 and finding the evidence was sufficient to convict the defendant under 18 U.S.C. Sec. 1623(a), where the government failed to present any evidence that the defendant's alleged false statements in a civil deposition were material to the civil proceeding.

Finally, the district court committed plain error in entering a preliminary order of forfeiture and money judgment, as the court did not provide Spirito with the proper notice, either at sentencing or in the written judgment of conviction, in violation of Federal Rules of Criminal Procedure 32.2. Spirito was deprived of an opportunity to be heard on this matter, and was not permitted to challenge the amount of the money judgment as excessive in violation of the Eighth Amendment.

ARGUMENT

I. The evidence was not sufficient for a reasonable jury to find Spirito acted without authority, and with the intent to deprive the Peninsula Airport Commission of property, in violation of 18 U.S.C. § 666(a)(1)(A).

a. Standard of Review

A challenge to a district court's denial of a motion for acquittal pursuant to Federal Rule of Criminal Procedure 29 is a decision this Court reviews de novo. *United States v. Zelaya*, 908 F.3d 920, 925 (4th Cir. 2018). This Court will affirm a denial where substantial evidence supports a guilty verdict, viewed in the light most favorable to the government. *Id.* "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The government receives "the benefit of all reasonable inferences from the facts proven to those sought to be established." *United States v. Tresvant*, 677 F.2d 1018, 1021 (4th Cir. 1982) (citations omitted).

While this burden is heavy, it is not insurmountable. *See, e.g.*, *United States v. Palomino-Coronado*, 805 F.3d 127, 130-32 (4th Cir. 2015) (finding the evidence insufficient and reversing the defendant's conviction). That is particularly true where, as here, the United States Supreme Court has issued a recent, unanimous opinion that reaffirms the narrow field of conduct that falls within the ambit of 18 U.S.C. § 666(a)(1)(A), and the evidence at trial demonstrates that Spirito's conduct fell outside that narrow field.

b. Essential Elements of Federal Program Fraud

Section 666(a)(1)(A) punishes an agent of a state, local, or tribal government who "embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property" valued at $5,000 or more that is owned by or under the control of the government organization, when that organization "receives, in any one year period, benefits in excess of $10,000 under a Federal program." 18 U.S.C. § 666(a)(1)(A), (b). This law "target[s] fraudulent schemes for

obtaining property," and is limited to those instances where a government official acts without authority to obtain property. *Kelly v. United States*, 140 S. Ct. 1565, 1568 (2020).

"[N]ot every corrupt act by state or local officials is a federal crime." *Id.* at 1574. Instead, "federal fraud law leaves much public corruption to the States (or their electorates) to rectify. Save for bribes or kickbacks[], a state or local official's fraudulent schemes violate that law only when, again, they are 'for obtaining money or property.'" *Id.* at 1571-72. "That requirement, this Court has made clear, prevents these statutes from criminalizing all acts of dishonesty by state and local officials." *Id.* at 1571.

The government pursued a theory of "intentional misapplication" against Spirito. The statutory term "intentionally misapplies" does not cover mere mistakes. *United States v. Thompson*, 484 F.3d 877, 881 (7th Cir. 2007). Instead, an intentional misapplication refers only to "theft, extortion, bribery, and similarly corrupt acts." *Id.* Thus, "intentional misapplication" is simply one means of committing federal program fraud, and the government must still prove, in every case, that the defendant

acted "without authority" and thereby obtained the property of another. *Kelly*, 140 S. Ct. at 1571.

c. Spirito acted within his authority, at the direction of and with the authorization of the Peninsula Airport Commission.

As the Executive Director, Spirito had the power and authority, delegated to him by the PAC, to direct the movement of airport funds, and was specifically authorized to move airport funds into the accounts designated for the loan guarantee. "Authorization, or ratification, from those with authority can be an important evidentiary factor in favor of the defense, militating against a finding of intentional misapplication." *United States v. De La Cruz*, 469 F.3d 1064, 1068 (7th Cir. 2006).

The PAC had the power and authority to direct the use of airport funds, to guarantee a loan, and to enter into a contract – even a bad one. The evidence at trial demonstrated that members of the PAC were intimately involved with the process of securing financing for PEX and knew the risks of securing the loan for PEX with airport funds. The PAC discussed the guarantee over multiple meetings and voted to authorize the PAC chairperson – ***not*** Spirito – to execute the Line of Credit Agreement.

Spirito did not make the decision to extend the loan guarantee; he did not vote at the meeting or sign the closing documents. Indeed, when Spirito pushed back on making the first interest payment to TowneBank, he was directed by the PAC chairperson and the PAC's legal counsel to make the payment.

The government's theory of criminal liability here rests on a violation of government agency policy, specifically that the funds used by the airport for the guarantee were restricted pursuant to specific state and federal regulations. But, as a "general rule," "minor deviations of state or local law are not always sufficient to establish an 'intentional misapplication,' especially when the record evinces neither a bribe nor a kickback." *United States v. Jimenez*, 705 F.3d 1305, 1309 (11th Cir. 2013) (relying on *Thompson*). There was no evidence here of any bribe or kickback.

In closing arguments, the government likened Spirito's actions to "tak[ing] these funds out for a joy ride." JA 2231. But the uncontroverted evidence at trial showed, Spirito never received any funds that are the subject of Counts 1 through 17, Spirito never diverted any of these funds to

a purpose other than that explicitly approved by the PAC, and Spirito never received any bribe, kickback, or personal benefit from these funds. Indeed, the funds remained, at all times, in the possession, dominion, and control of the PAC until they were transmitted, at the direction of the PAC, to TowneBank.

d. Spirito's actions were an exercise of regulatory powers and were not designed to obtain property.

The government went to great lengths at trial to demonstrate that the airport funds used for the loan guarantee fell under federal and state policies that restricted their use for such purposes, and that Spirito acted deceptively in directing those funds to the guarantee in violation of those policies. Essentially, the government argues that, because Spirito directed those funds to the collateral for the loan guarantee, the funds were not available for another airport use.[8]

[8] It is important to note that even if these funds were directed to a different airport use in violation of federal and state agency policies, that action did not cause the loss of funds or property to the PAC. The funds remained in the possession, dominion, and control of the PAC at all times, until the PAC transferred those funds pursuant to their contractual obligations to TowneBank.

However, allocating airport funds to airport uses – regardless of the policy restrictions on that use – amounted to nothing more than an exercise of regulatory power. Such "a scheme to alter such a regulatory choice is not one to appropriate the government's property." *Kelly*, 140 S. Ct. at 1572. "The State's 'intangible rights of allocation, exclusion, and control'—its prerogatives over who should get a benefit and who should not—do 'not create a property interest.'" *Id.* (quoting *Cleveland* v. *United States*, 531 U.S. 12, 23 (2000)). "[T]hose rights 'amount to no more and no less than' the State's 'sovereign power to regulate.'" *Id.* (quoting *Cleveland*, 531 U.S. at 23).

Spirito's actions here were exactly that: an exercise of regulatory power delegated to him by the PAC. Each time the defendant prompted a transfer of money into the accounts at TowneBank in relation to the loan guarantee, he took an action that he was authorized to take and that fell within his power as the Executive Director. Despite the government's repeated attempts to paint these actions as deceptive and motivated by bad intent, *Kelly* makes clear that deception and bad intent cannot turn an

exercise of regulatory power into a criminal offense that falls under 18 U.S.C. §666(a)(1)(A).

In *Kelly*, the Court acknowledges that every action taken by the defendants there was done with bad intent. The exercise of their regulatory power – closing the traffic lanes – was solely for political retribution and had no legitimate purpose, and the defendants crafted blatant lies to conceal their bad intent. *Id.* at 1569-70. Still, because closing the traffic lanes fell under the legitimate power and authority of the defendant public officials, their actions could not be construed as a deprivation of money or property, regardless of their corrupt intent. *Id.* at 1572.

The government did not offer any evidence that Spirito's actions were directed towards *obtaining* any property from the PAC; to the contrary, the funds remained in the possession, dominion, and control of the PAC at all times, until the PAC transferred those funds pursuant to their contractual obligations to TowneBank. The government does not

allege Spirito converted any money or property belonging to the PAC to his own control and use.[9]

Similarly, the Court in *Kelly* found that, because the defendants had not obtained any property of the Port Authority, they could not have violated 18 U.S.C. § 666(a)(1)(A).

> Contrary to the Government's view, the two defendants did not "commandeer" the Bridge's access lanes (supposing that word bears its normal meaning). They (of course) did not walk away with the lanes; nor did they take the lanes from the Government by converting them to a non-public use. Rather, Baroni and Kelly regulated use of the lanes, as officials responsible for roadways so often do—allocating lanes as between different groups of drivers. To borrow *Cleveland*'s words, Baroni and Kelly exercised the regulatory rights of "allocation, exclusion, and control"—deciding that drivers from Fort Lee should get two fewer lanes while drivers from nearby highways should get two more. They did so, according to all the Government's evidence, for bad reasons; and they did so by resorting to lies. But still, *what* they did was alter a regulatory decision about the toll plaza's use—in effect, about which

[9] To the extent the government suggests that the object of the defendant's "fraud" was to obtain a salary increase, this theory of "property" was not the object of the fraud charged in the superseding indictment. *See United States v. Thompson*, 484 F.3d 877, 880 (7th Cir. 2007) (rejecting the government's argument that "any public employee's knowing deviation from state procurement rules is a federal felony," regardless of intent, "as long as the employee gains in the process;" there, the government alleged the employee's "gain" was a "raise").

> drivers had a "license" to use which lanes. And under *Cleveland*, that run-of-the mine exercise of regulatory power cannot count as the taking of property.

Id. at 1573.

The defendant's actions here are no more than this same exercise of regulatory power: allocating airport funds among airport uses and transferring money between accounts at all times under the control and direction of the PAC. Thus, these actions "cannot count as the taking of property." *Id.* "Because the scheme here did not aim to obtain money or property, [Spirito] could not have violated the federal-program fraud [] laws." *Id.* at 1574.

Accordingly, this Court should find the evidence insufficient and reverse Spirito's convictions under 18 U.S.C. § 666(a)(1)(A). As the money laundering charges in Counts 12 through 17 rely on the misapplication of funds under 18 U.S.C. § 666(a)(1)(A) as the sole specified unlawful activity that forms the basis of those money laundering charges, sustaining those charges depends entirely on this Court's decision on Counts 1 through 11. *See United States v. Pinson*, 860 F.3d 152, 170 (4th Cir. 2017) (holding that a

money laundering conviction that depends on a "specified unlawful activity" can only be upheld "if it is predicated on any underlying counts that are also upheld").

II. The district court erred in failing to instruct the jury that a violation of an agency guideline or regulation cannot provide the basis for imposing criminal liability, when the jury improperly considered such violations in finding the defendant guilty under 18 U.S.C. Sec. 666(a)(1) and 1957.

If this Court decides that the decision in *Kelly* does not require dismissal of Counts 1 through 17 with prejudice, this Court nevertheless should reverse these convictions and remand for a new trial to allow the jury to consider the evidence after being properly instructed, in light of *Kelly*, about the weight to assign to a violation of an agency regulation, and about the proper instruction of the jury on the theory of intentional misapplication.

a. Standard of Review

This Court reviews *de novo* whether "a jury instruction failed to correctly state the applicable law." *United States v. Raza*, 876 F.3d 604, 613-14 (4th Cir. 2017). Such a review is not done in isolation; instead, the

question is "whether taken as a whole and in the context of the entire charge, the instructions accurately and fairly state the controlling law." *United States v. Savage*, 885 F.3d 212, 222-23 (4th Cir. 2018).

b. The district court erred in failing to provide a limiting instruction to the jury about the proper weight to assign to evidence of violations of policies and guidelines, and this error was compounded by misleading language in the instruction about "intentional misapplication."

As the Supreme Court's opinion in *Kelly* makes clear, policy violations and the exercise of regulatory authority must be carefully considered in evaluating evidence of federal program fraud. Given the district court's instruction to the jury that it could find "intentional misapplication" based on evidence that funds were used for an "unauthorized purpose" "even if it benefited the Peninsula Airport Commission," it was necessary to provide a limiting instruction to the jury on the proper weight to assign evidence of violations of policies, guidelines and regulations. Without this instruction, the jury likely based its verdict on a constellation of factors that the Supreme Court has said is insufficient to sustain a conviction under 18 U.S.C. § 666(a)(1)(A).

Spirito lifted the language of his proffered instruction directly from the Tenth Circuit, which considered it a "highly relevant warning and direction" to the jury in a prosecution of a public official for wire fraud and theft of public money. *United States v. Ransom*, 642 F.3d 1285, 1293 (10th Cir. 2011).[10] "Although the evidence concerning a civil violation may be used to prove knowledge or intent, it may not be used to prove criminal

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[10] This Court has reached a similar conclusion, in an unpublished opinion, where the defendants challenged the sufficiency of their convictions for fraud and making false statements based evidence of violations of civil regulations introduced against them. *United States v. Perry*, 659 F. App'x 146, 155 (4th Cir. 2016). This Court upheld their convictions, based on the "clear instructions" given to the jury on how to consider evidence of violations of civil regulations:

> The Perrys next contend that the government impermissibly used violations of civil regulations as the basis for their criminal convictions. At trial, however, the district court clearly instructed the jury that the Perrys were not charged with violating civil regulations and that evidence of these regulations was admitted only to show their knowledge and intent. The government also stressed this point to the jury on multiple occasions. In light of these admonitions, as well as undisputed evidence that the Perrys were familiar with the regulations in question, there was no danger that the jury would convict them of fraud or knowingly making false statements simply because they violated DMAS regulations.

Perry, 659 F. App'x at 155.

liability." *United States v. Hilliard*, 31 F.3d 1509, 1516-17 (10th Cir. 1994) ("[W]e are troubled by the absence of any limiting instructions concerning evidence of civil regulatory violations."); *accord United States v. Smith*, 891 F.2d 703, 710 (9th Cir. 1989) ("The district court cautioned the jury that the civil banking regulations were offered only as background and as they might bear on the defendants' intent.").

By refusing the jury instruction on the proper weight to assign evidence of violations of policies and regulations, the district court precluded the jury from placing this evidence in the proper context and, combined with the instruction on the elements of intentional misapplication, permitted the jury to return a verdict on evidence that was not sufficient to sustain a criminal conviction. This Court should reverse the convictions for federal program fraud and money laundering, and remand for trial with a direction that the district court properly advise the jury about how to weigh this evidence.

III. The district court abused its discretion in excluding evidence of a change in state law and of another entity's operations under that law, when that evidence was critical to Spirito's defense against the government's theory that he had acted in violation of state policies in allocating airport funds.

a. Standard of Review

"Decisions regarding the admission or exclusion of evidence are committed to the sound discretion of the district court and will not be reversed absent an abuse of that discretion." *United States v. Stitt*, 250 F.3d 878, 888 (4th Cir. 2001). ("A district court by definition abuses its discretion when it makes an error of law." *Koon v United States*, 518 U.S. 81, 100 (1996); *United States v. Hall*, 858 F.3d 254, 275 (4th Cir. 2017).

If an evidentiary ruling is found to be erroneous, this Court reviews the error for harmlessness. In conducting that review, this Court asks "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States v. Lovern*, 293 F.3d 695, 701 (4th Cir. 2002). This Court must reverse when "an abuse of discretion has occurred that has worked to the prejudice of a defendant." *United States v. Simpson*, 910 F.2d 154, 157 (4th Cir. 1990).

b. Evidence of the change in state law in 2017 and evidence of other airports diverting funds to projects was critical to show Spirito's intent, and to place the government's evidence about violations of state policy into proper context.

If this Court decides that the decision in *Kelly* does not require dismissal of Counts 1 through 17 with prejudice, this Court nevertheless should reverse these convictions and remand for a new trial to allow the jury to consider the evidence improperly excluded by the district court. Given the large volume of emphasis placed by the government on the state policy and regulations surrounding the use of state entitlement funds, Spirito should have been provided an opportunity to present evidence of the change in state law related to the use of state entitlement funds for loan guarantees in 2017, and the circumstances surrounding another airport's similar use of "ineligible" funds in 2013.

In 2017, the Virginia General Assembly passed Senate Bill 1417, which amended Va. Code § 5.1-2.16 relating to the use of state entitlement funds for airports. JA 1932-37 (Trial Exhibits 26-1 & 26-2, Refused). In that section, and for the first time, the state prohibited the use of state funds for "purposes related to supporting the operation of an airline, either directly

or indirectly, through grants, credit enhancements, or other related means." *Va. Acts of Assembly, Chapter 709*. The district court refused to allow any mention of this change during the course of the trial, and also excluded evidence that another Virginia airport in 2013 had reached the same conclusion as the PAC about the import of the state's designation of certain uses of entitlement funds as "ineligible." JA 1951-52.

This evidence was critical to a key theory in Spirito's defense: the PAC's use of entitlements funds for a loan guarantee for air service development ***was*** proper, the use was not "prohibited" under state law or policy, and nothing about his actions was designed to be deceptive.

It is a basic tenet of our criminal justice system that a change in law that proscribes certain conduct ***is*** significant, and when new prohibitions are added to a law, it necessarily implies the law did not previously apply to that conduct. The Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3, states that "No . . . ex post facto Law shall be passed." The very purpose of the Ex Post Facto clause is to "give fair warning" of legislative enactments' effect

and "permit individuals to rely on their meaning until explicitly changed." *Miller v. Florida*, 482 U.S. 423, 429-30 (1987).

The Constitution guarantees criminal defendants a "meaningful opportunity to present a complete defense." *United States v. Scheffer*, 523 U.S. 303, 329 (1998). Here, the district court erred in deeming this evidence irrelevant to the issues at trial and excluding this critical evidence of Spirito's defense was an abuse of discretion.

c. This error was not harmless.

Under a harmless error analysis, it is the government's burden to establish that these errors were harmless, and that burden is heavy. This Court would need to find that "'the guilty verdict actually rendered [at] trial was surely unattributable to the error.'" *United States v. Brown*, 202 F.3d 691, 699 (4th Cir. 2000) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)). This Court must ask whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999). Given the government's heavy reliance on violations of state regulations and policies

in proving its case, this Court cannot conclude beyond a reasonable doubt that this evidence would not have mattered to at least one juror.

IV. The evidence was not sufficient for a reasonable jury to find that Spirito's statements to a federal agency were false and made with the requisite intent to impede the investigation, in violation of 18 U.S.C. Sec. 1519.

The trial court erred in finding the evidence sufficient to sustain a conviction for providing a false statement in an email to a federal investigator, in violation of 18 U.S.C. § 1519. That section " requires the government to prove the following elements: (1) the defendant made a false entry in a record, document, or tangible object; (2) the defendant did so knowingly; and (3) the defendant intended to impede, obstruct, or influence [a federal] investigation." *United States v. Powell*, 680 F.3d 350, 355-56 (4th Cir. 2012).

At trial the government alleged that Spirito had provided false statements in an email response on February 1, 2017, to an inquiry from the Federal Aviation Administration (FAA) from about the particular source of airport funds used to for the loan guarantee. JA 1415-1418 (Trial Exhibit H-249). Essentially, the government argued in closing that, because airport

revenue and passenger facility charges were used to fund the loan guarantee, these statements about "state entitlement funds" were false. JA 2264. The government did not point to evidence to show that these statements were knowingly false at the time they were made, aside from pointing to the evidence adduced in support of Counts 1 through 17. "The falsification must be done knowingly; an unwitting falsehood will not suffice." *United States v. Yielding*, 657 F.3d 688, 711 (8th Cir. 2011).

The government elicited testimony from its own witness that calls that analysis into question. At trial, Michael Swain, a supervisor at Virginia Department of Aviation (DOAV) testified about a process that was "unique to Virginia" involving certain types of airport funds, like a portion of passenger facility charges, were permitted by the airport to be kept as "local funds" and converted into "state entitlement funds." JA 1244-45. He acknowledged that reports of spending from state entitlement funds were not reviewed for whether airport projects using these funds were "appropriate." JA 1247. In October 2016, the PAC submitted reports to the DOAV relaying their use of approximately $3.5 million in state entitlement

funds for air service development. JA 1259-61. Swain testified he did not pay much attention to the report, since PHF did not have any funding requests before the state Aviation Board at that time. JA 1263. In an email exchange dated January 26, 2017, Swain acknowledged that, $3,552,341.25 of "Air Service Development" was "not eligible" for state entitlement fund use. JA 1265-67. Swain noted the consequences for using those funds for a restricted use, as was done here, would simply "reduce[]" "any requests for state discretionary funds prior to July 1, 2021" by the same amount. JA 1266-69 (Trial Exhibit H-229).

Thus, even when viewing this evidence in the light most favorable to the government, the government has failed to prove that Spirito's statements in this message were false, that he made them knowingly, or, most notably, that he acted with the intent to obstruct a federal investigation. "[E]vidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government's case," or where "the evidence construed in favor of the government may be insufficient to establish every element of the crime." *United States v. Nevils*,

598 F.3d 1158, 1167 (9th Cir. 2010). This Court should find the evidence insufficient to establish a necessary element of the offense and reverse this conviction.

V. The evidence was not sufficient for a reasonable jury to find that the aggregate value of the transactions charged in Count 19 met the statutory threshold of $5,000 within the one-year time period required by 18 U.S.C. § 666(a)(1)(A).

The district court erred in refusing to set aside the jury's verdict on Count 19. The evidence at trial, when viewed in the light most favorable to the government, demonstrated that the three credit card transactions required to reach the statutory threshold of $5,000 extended for longer than one year. The government's witness at trial testified that the three transactions were: (1) $1,756.15 on November 28, 2014, (2) $1,849.75 on August 11, 2015, and (3) $1,636.76 on November 30, 2015. JA 1817-25. Most importantly, though, in ruling on

Where multiple conversions are part of a single scheme or plan to defraud, aggregation is proper to establish the $5,000 threshold. *United States v. Sanderson*, 966 F.2d 184, 189 (6th Cir. 1992). However, if such a plan or scheme is established, the issue arises "whether Sec. 666(a)(1)(A)(i)

of the statute criminalizes multiple conversions of less than $5,000, if more than one year is needed to reach the $5,000 statutory minimum." *United States v. Valentine*, 63 F.3d 459, 462 (6th Cir. 1995). That is, whether "Congress intended to reach theft of insignificant amounts by allowing the government to aggregate conduct over an indefinite, expansive period of time." *Id.* at 464. In *Valentine,* the Sixth Circuit held that an alleged aggregate theft of $5,000 or more must occur within the one-year period prescribed in subsection (b) of 18 U.S.C. § 666. The Sixth Circuit concluded that "[t]he interrelationship between subsections (a) and (b) of the statute mandates that a one-year limitation likewise attaches to the $5,000 threshold requirement." *Id.*

The Eighth Circuit reached the same conclusion in *United States v. Hines*, 541 F.3d 833, 837 (8th Cir. 2008). The Eighth Circuit held the government can aggregate separate transactions to reach the $5,000 requirement under 18 U.S.C. § 666, as long as these transactions "fall within a one-year period wherein the government agency or organization received $ 10,000 or more in federal funds." *Id.* Similarly, the court found

"[s]ignificant longstanding schemes that extend for longer than one year . . . may be charged in multiple counts so long as the $ 5,000 requirement is met in each one-year time period." *Id.* [11]

[11] Importantly, in a recent unpublished opinion considering challenges to the aggregation of offenses under 18 U.S.C. § 666(a)(1)(A), this Court cited the Sixth Circuit's reasoning in *Valentine* with approval:

> We do not suggest, and need not find, that this aggregation has no bounds. Although the statute does not explicitly articulate a temporal limitation, it does provide a context clue. *See United States v. Valentine*, 63 F.3d 459, 462-63 (6th Cir. 1995). To be prosecuted under § 666(a), "the circumstance described in subsection (b) of [that] section [must] exist[]." 18 U.S.C. § 666(a). The relevant "circumstance" is that the government organization "receives, in any one year period, benefits in excess of $10,000 under a Federal program." § 666(b). And the one-year period must be "a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense" and may include "time both before and after the commission of the offense." § 666(d)(5). Conditioning the commission of the offense on the "exist[ence]" of this "circumstance" at least suggests a temporal limit. *See, e.g., Valentine*, 63 F.3d at 463; *United States v. Hines*, 541 F.3d 833, 837 (8th Cir. 2008).

United States v. Doty, No. 19-4220, 2020 U.S. App. LEXIS 33229, at *11 n.4 (4th Cir. Oct. 21, 2020), *pet. for r'hrg denied,* Nov. 17, 2020.

Other courts examining the issue have applied this same reasoning. *See, e.g., United States v. Berger*, 22 F. Supp. 2d 145, 152 (S.D.N.Y. 1998) (holding that under 18 U.S.C. § 666(a) the government must prove "that defendants wrongfully obtained property worth more than $ 5,000 from [victim] within a one-year period and that [victim] received federal benefits in excess of $ 10,000 within one year of defendants' offense").

This Court should hold that statutory language of 18 U.S.C. § 666 provides a temporal limitation that requires each aggregated transaction used to reach the $5,000 requirement to occur within a one-year period. The government did not meet its burden of proof on an essential element of the crime set forth in 18 U.S.C. § 666, and this Court should reverse and dismiss Spirito's conviction on Count 19.

VI. The evidence was not sufficient for a reasonable jury to find Spirito's sworn statements in Counts 20, 21, and 23 were false and were material to the civil matter in which those statements were made.

The district court erred in finding the evidence was sufficient to support the jury's verdicts on Counts 20, 21, and 23. To convict Spirito of perjury under 18 U.S.C. § 1623(a), the government had to prove beyond a

reasonable doubt that he "(1) knowingly made a (2) false (3) material declaration (4) under oath (5) in a proceeding before or ancillary to any court of the United States." *United States v. Wilkinson*, 137 F.3d 214, 224 (4th Cir. 1998).

"[T]here is no doubt that materiality is an element of perjury under § 1623." *Johnson v. United States*, 520 U.S. 461, 465 (1997). "A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed." *United States v. Littleton*, 76 F.3d 614, 617-18 (4th Cir. 1996).

In *Wilkinson*, this Court did not reach the question of which standard of materiality should apply to statements made in the context of a civil deposition. *Id.* at 225. After contrasting the approaches of the Second, Fifth, Sixth, and Ninth Circuits, the Court found it unnecessary to elect a standard under those particular facts, as the statements in *Wilkinson* met the most strident standard and the defendant in *Wilkinson* had not challenged materiality in the trial court. *Id.* at 225, 228-29.

Here, however, the government did not introduce *any* evidence about the nature of the underlying civil litigation and pointed simply to the evidence adduced at trial regarding the program fraud counts in the criminal case. "The materiality test is determined at the time and for the purpose for which the allegedly false statement was made." *United States v. Allen*, 892 F.2d 66, 68 (10th Cir. 1989). In the context of a civil deposition, the relevant inquiry is whether the statements were material to the underlying civil litigation.

In order to answer this question, the government must offer evidence to show, *at a minimum*, the nature of the underlying civil proceeding. The government failed to introduce any evidence on that point,[12] the evidence was insufficient as a matter of law, and, thus, these convictions must be reversed and dismissed. *See Littleton*, 76 F.3d at 615 (reversing perjury

[12] The District Court in the Eastern District of Pennsylvania, when confronted with a nearly identical situation, held that "[i]n the civil deposition context, the Government at least should produce sufficient evidence of the nature of the civil action at issue, including the plaintiff's allegations, and how truthful answers from the deponent on the issue at hand could have assisted that litigation." *United States v. Newmark*, No. 06-447, 2008 U.S. Dist. LEXIS 27460, at *118 (E.D. Pa. Apr. 4, 2008) (reversing jury's verdict on perjury).

conviction where "the government failed to present any proof of" materiality of the allegedly false statement to the proceeding in which it was made).

VII. The district court committed plain error in entering a preliminary order of forfeiture and money judgment, where the court did not provide Spirito with the proper notice and opportunity to be heard.

a. Standard of Review

While trial counsel did not raise an objection to the forfeiture motion and order entered by the district court until after the time had passed to challenge those items, the nature of the error here warrants reversal for plain error under the exception to the contemporaneous objection rule. Fed. R. Crim. P. 52(b) allows this Court to correct "plain errors or defects affecting substantial rights" even if they were not brought to the trial court's attention.

> [A]n appellate court may correct a forfeited error when: "(1) there is an error; (2) the error is plain; (3) the error affects substantial rights; and (4) the court determines, after examining the particulars of the case, that the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."

United States v. Williamson, 706 F.3d 405, 411 (4th Cir. 2013) (quoting *United States v. Wilkinson*, 137 F.3d 214, 223 (4th Cir. 1998).

b. The district court committed plain error in failing to notify Spirito about the forfeiture judgment at sentencing.

Federal Rule of Criminal Procedure 32.2(b)(1)(A) requires the district court to "determine what property is subject to forfeiture under the applicable statute" and "whether the government has established the requisite nexus between the property and the offense." Federal Rule of Criminal Procedure 32.2(b)(4)(B) requires the district court to "include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing."

The district court did not take any steps here to ensure the defendant knew of the forfeiture at the time he was sentenced on July 15, 2020. The money judgment was not discussed during the hearing, and the fact of the judgment was not mentioned anywhere in the district court's order. F.R.C.P. 32.2(b)(4)(B) ("The court must also include the forfeiture order, directly or by reference, in the judgment."). The district court signed the preliminary order of forfeiture the day after the draft order was submitted

to the Court, depriving Spirito of a meaningful opportunity to object to the government's position on the money judgment, the seizure of his assets, and whether the government had met its burden to demonstrate that the assets were properly connected to the crimes of conviction that subject Spirito's property to forfeiture.

c. The district court's error affects Spirito's substantial rights and the fairness and integrity of the judicial proceedings.

The preliminary order of forfeiture entered without providing the proper notice to Spirito, and, given the nature of the violations here, this forfeiture implicates Spirito's Eighth Amendment right to be free from excessive fines.

Had the district court provided Spirito notice of the forfeiture and an opportunity to be heard, he would have challenged the constitutionality of the forfeiture judgment under the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution. The Supreme Court has held "a punitive forfeiture violates the Excessive Fines Clause if it is *grossly disproportional* to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (emphasis added).

Based on the facts entered into evidence by the government at trial, the monetary loss to the PAC alleged here did not result from the "misapplication" of funds. Instead, the monetary loss resulted from issuing the loan guarantee itself and the subsequent contractual obligation between PAC and Towne Bank to pay the loan in full when PEX failed. Indeed, the government conceded, in its response to Spirito's motion to dismiss the indictment, that "[t]he criminal activity alleged is not the loan guarantee itself, but the knowing and intentional use of prohibited funds to service that loan guarantee." JA 390. Yet, the government seeks to hold Spirito responsible for a money judgment that corresponds ***directly*** to the amount of the loan guarantee that was the subject of the money laundering counts.

Several different individuals, all vested with fiduciary obligations by virtue of their public official positions, voted to issue the loan guarantee for PEX, and then made the later decision to fulfill their contractual obligations to Towne Bank. Those same individuals directed Spirito to execute that decision. To hold him responsible for the full amount of the loss is grossly

disproportional to the gravity of Spirito's actions, particularly where, as here, the district court observed he acted with the best of intentions and without obtaining any personal benefit.

"[A] genuine issue of material fact exists as to whether [Spirito's] property was subject to forfeiture," *United States v. Leak*, 123 F.3d 787, 793 (4th Cir. 1997), and, based on the record before the district court at the time the preliminary order was entered, the government has not met its burden of showing forfeiture and the entry of a $3.5 million money judgment was proper here.

The failure to provide Spirito with due process rights to notice and the opportunity for hearing was plain error, affects Spirito's constitutional rights under the Eighth Amendment, and this error seriously affects the fairness and integrity of the judicial proceedings surrounding the forfeiture. For all these reasons, this Court should vacate the preliminary order of forfeiture and remand this matter to the district court to conduct a proper hearing pursuant to Eighth Amendment.

CONCLUSION

This Court should reverse and dismiss the convictions for Counts 1 through 17, because the evidence was insufficient to find Spirito committed federal program fraud under 18 U.S.C. § 666(a)(1)(A). In the alternative, this Court should reverse and remand for a new trial on these counts, as the district court improperly instructed the jury on these offenses and abused its discretion in excluding evidence critical to Spirito's defense at trial. This Court should reverse and dismiss the convictions for Counts 18 through 21 and 23, because the evidence was insufficient to sustain the convictions on these counts. Finally, this Court should vacate the district court's preliminary forfeiture order, and remand this case for a hearing to determine whether the forfeiture and money judgment is an excessive fine in violation of the Eighth Amendment.

REQUEST FOR ORAL ARGUMENT

Mr. Spirito respectfully requests leave to present oral argument in support of his position, as he believes it would aid the court in deciding the issues presented in this appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The brief of the appellant/cross-appellee has been prepared using Microsoft Word software, Palatino Linotype font, 14 point proportional type size.

EXCLUSIVE of the table of contents, table of authorities, statement with respect to oral argument, any addendums, and the certificate of service, this brief contains **11,129** words and is compliant with Fed. R. App. Pr. 32(a)(7)(B).

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so requests, I will provide an electronic version of the brief and/or a copy of the word or line print-out.

By: /s/ Erin M. Harrigan
Counsel for Appellant/Cross-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the November 25, 2020, I caused this brief to be electronically filed with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all counsel of record.

By: /s/ Erin M. Harrigan
Counsel for Appellant/Cross-Appellee