NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JESSE BENTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To The Eighth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE MATERIALITY REQUIREMENT IN 18 USC SECTION 1001 CAN BE TURNED INTO A MERE FALSITY REQUIREMENT IN THE FEC REPORTING CONTEXT OR WHETHER THE STATUTE REQUIRES SOMETHING MORE THAN MERE FALSITY.

2. WHETHER THE SARBANES-OXLEY ACT CAN BE APPLIED TO ALLEGATIONS OF CAMPAIGN FINANCE VIOLATIONS PUNISHABLE UNDER FECA SIMPLY BECAUSE THE FEC PUBLISHES EXPENDITURE REPORTS ON THE INTERNET.

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The petitioner, Jesse Benton, respectfully prays that a writ of certiorari issue to review the judgment of the Eighth Circuit Court of Appeals in Case No. 16-3861 entered on May 11, 2018, and made final with the denial of rehearing and rehearing en banc on July 6, 2018. *United States v. Benton*, 890 F.3d 697 (8th Cir. 2018).

JURISDICTION

The panel of the Eighth Circuit Court of Appeals entered its judgment on May 11, 2018. The petitioner's petition for rehearing and rehearing en banc was denied on July 6, 2018. Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C §2 states:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. **(b)** Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 371 states:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. §1519 states:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

52 U.S.C. §30104(a)(1) states:

(a) Receipts and disbursements by treasurers of political committees; filing requirements
(1) Each treasurer of a political committee shall file reports of receipts and disbursements in accordance with the provisions of this subsection. The treasurer shall sign each such report.

52 U.S.C. §30104(b)(5)(A) states:

(b) Contents of reports
Each report under this section shall disclose-- . . .

(5) the name and address of each--
(A) person to whom an expenditure in an aggregate amount or value in excess of $200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure;

52 U.S.C. §30109(d)(1)(A)(i) states:

(d) Penalties; defenses; mitigation of offenses
(1)(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure--

(i) aggregating $25,000 or more during a calendar year shall be fined under Title 18, or imprisoned for not more than 5 years, or both; or

STATEMENT OF THE CASE

Jesse Benton was the chairman of Dr. Ron Paul's 2012 Campaign ("RPPCC"). App. at 3a. Two others, co-Defendants, were also given national roles—John Tate as campaign manager and Dimitrios Kesari as deputy campaign manager. *Id.*

Iowa State Senator Kent Sorenson previously accepted a position with Michele Bachmann's competing campaign and devised a way to skirt state ethical rules so he could be paid for his work. *See id.*; *compare* Iowa Senate Code of Ethics, Rule 6 (preventing state senators from receiving payments from national campaigns), *with* DCD 546, p. 17 (stating national campaigns are not bound by state ethics rules). Bachmann's campaign sought and obtained legal advice on the propriety of paying Sorenson through a sub-vendor relationship; concluding it could pay him in this manner, Bachmann's campaign assisted Sorenson in avoiding his state ethics problems. *See id.*; Tr. p. 1215–17, 1225–27.

Bachmann's campaign, however, started to falter and Sorenson pursued switching his support to RPPCC so he could continue to receive a paycheck. Tr. Vol 6, p. 1224; App. at 3a. Among several

ridiculous demands, Sorenson proposed, in part, $8,000 a month for a salary in addition to a $100,000 donation to his PAC. *Id.*

Benton characterized the proposal as "insulting" and "offensive," and rejected Sorenson's attempts to sell his endorsement. *Id.* Instead, Benton offered Sorenson a position at market rate. *Id.* Benton never tried to negotiate for or accept the endorsement.

During a volley of negotiations, Sorenson lied repeatedly to the Defendants, which is detailed throughout the record. Benton, frustrated and fed up with Sorenson's feints, told Kesari to pull the offer to work for the RPPCC.[1] Kesari, however, of his own volition and unbeknownst to Benton and Tate, did not pull the offer. *Id.* at 5. Instead, Kesari had already met with Sorenson and his wife for dinner a few days prior, giving Sorenson's wife a $25,000 check from Kesari's company. *Id.* The check was never cashed and was held as leverage over Kesari alone. *See id. passim*.

In early 2012, Sorenson worked for RPPCC by recording robo-calls, posing for photographs, giving speeches at campaign rallies, sending email blasts, making public appearances on television, and travelling in support of Dr. Paul's candidacy, including having dinner with Dr. Paul himself. *See*

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[1] Specifically, Benton said, "Fuck him. This is absurd," (Gov't Ex. 35), followed by, "I am not interested in this game any more. Dimitri, pull the offer. If we can't depend on him, I don't want him involved." (Gov't Ex. 37).

Panel Op. at 8. Kesari, in paying Sorenson for his troubles, set out to do so in a way Benton neither had knowledge of nor had given permission for. *See id.* at 7. On his own, Kesari set up a payment structure exactly like what Sorenson had used with Bachmann's campaign. *Id.* Kesari arranged through his brother, Pavlo Kesari, for a "paymaster," Noel "Sonny" Izon, to (1) receive the invoices from Sorenson's company, (2) add a service fee to the invoice, and (3) submit to RPPCC from Interactive Communications Technology ("ICT"), Sonny's company, as "production services." *Id.* Such a paymaster structure is common in other industries and federal election campaigns, and neither Sonny nor Pavlo thought anything was wrong with the arrangement, nor did either ever speak to, let alone know of, Benton. *See id.*

RPPCC was required by the Federal Election Campaign Act of 1971 ("FECA") to report its expenditures to the Federal Election Commission ("FEC"). 52 U.S.C. § 30104(a)(1), (b)(5)(A). In line with "production services" invoices, the campaign treasurer and other staff, with Kesari's approval, listed the purpose of the expenditures as "audio/visual services." Panel Op. at 7–8. It bears repeating: Sorenson lent his time and energy through his presence, face, voice, and name through both auditory and visual means; no other purpose code was a true match for his work; and "audio/visual services" is not per se disallowed by FEC.

RPPCC accurately reported whom it sent the checks to, which was the vendor, ICT.[2] Furthermore, the amounts disbursed have never been in dispute. The purpose listed for each payments was "audio/visual services." Each quarter, the FEC published the expenditure reports with no objection to their completeness.

Throughout this time, Benton was receiving hundreds of emails per day, in addition to phone calls and text messages. (Tr., Vol. 6, p. 1242-44). He reviewed the emails and attachments on an iphone. (Tr., Vol. 6, p. 1241-42). Benton was travelling extensively. (Benton Exh. B1; Tr. Vol. 6, p. 1237-38). He worked himself so hard that he had to be hospitalized, twice, once in mid-December of 2011 for pneumonia, and once on February 23, 2012 for severe diabetic ketosis. (Tr. Vol. 6, p. 1244-46). He did nothing with the preparation or filing of the FEC reports.

Benton specifically told Kesari to stop paying Sorenson after April. (Tr., Vol. 3, p. 506; Government Exh. p. 506). Once Benton told Kesari to stop paying Sorenson, Kesari lied to Tate to get two more payments through to Sorenson. (Tr., Vol. 3, p. 512 – 532).

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[2] It is undisputed federal law does not prohibit the use of intermediaries to pay vendors or reporting only the immediate, rather than the ultimate, recipient of campaign expenditures, and federal law does not prohibit paying an individual for his/her endorsement. Panel Op. at 11.

The RPPCC accurately reported who they sent the checks to, and for how much, on their FEC reports. Specifically they reported each payment to ICT and that the purpose was for "audio visual services." (Tr., Vol. 3, p. 512-532).

Eventually, Sorenson self-destructed. He became the target of a senate ethics investigation because he had been paid by two presidential campaigns. He lied to the senate ethics investigators. (Tr. Vol. 5, p. 24-25). He resigned from the Senate and went on a Facebook rank blaming everyone else for his resignation, including the Republican establishment and the Iowa Supreme Court for his resignation. (Tr. Vol. 5, p. 25-26). As was par for the Sorenson course, he blamed others for his lies to the FBI and government, including his defense lawyer. (Tr., Vol. 5, p. 995).

Benton was initially charged with five counts. (DCD 3, at p. 1-2.)

Count I: Conspiracy to Defraud the United States, in violation of 18 U.S.C. § 371.

Count II: Causing False Records, in violation of 18 U.S.C. §§ 2 and 1519

Count III: Causing False Campaign Expenditure Reports, in violation of 52 U.S.C. §§30104(a)(1), 30104(b)(5)(A), 30109(d)(A)(i), and 18 U.S.C. §2.

Count IV: False Statements Scheme in violation of 18 U.S.C. § 2 and 1001(a)(1).

Count V: False Statements in violation of 18 U.S.C. §§ 2 and 1001(a)(2).

The Court dismissed Counts I-IV because the Government violated its proffer agreement with Benton by using his proffer statements against him in the grand jury. (DCD 257). The Government elected to proceed to trial on the fifth count, an allegation that Benton lied during this proffer session. Benton was acquitted, Kesari was acquitted of one count, convicted of one count, and the jury hung on three counts.

The Government then re-filed the first four counts of the original indictment against Benton, slightly altering Count I to Conspiracy to Commit an Offense Against the United States, and reinstating the other dismissed counts. (DCD 323). The Government also proceeded to retry Kesari on the hung counts. The Defendants moved to dismiss the indictment. (DCD 468, 396, 394). The motions were denied. (DCD 319). The matter proceeded to jury trial.

Benton made motions for judgment of acquittal both orally, and in writing, at the end of the Government's evidence (DCD 544; 581; Tr. Vol. 6, p. 1166-1169), at the end of the defendant's evidence (Tr. Vol. 6, p. 1298), and renewed the judgment of acquittal motions in conjunction with his written motion for new trial. (DCD 581). The Court denied the motions. (DCD 683).

Benton was convicted of Conspiracy to Commit an Offense Against the United States, in violation of 18 U.S.C. § 371; Causing False Records, in violation of

18 U.S.C. §§ 2 and 1519; Causing False Campaign Expenditure Reports, in violation of 52 U.S.C. §§30104(a)(1), 30104(b)(5)(A), 30109(d)(A)(i), and 18 U.S.C. §2; and False Statements Scheme in violation of 18 U.S.C. § 2 and 1001(a)(1). Benton was sentenced to six months of home confinement, two years of probation, and a $10,000 fine. (DCD 648). He appealed his conviction.

On May 11, 2018, the Eighth Circuit affirmed Benton's conviction, holding that materiality as required by the false-statement statute could be proven merely by proving falsity in the labels placed in the FEC reports. App. at 28a-29a. The Eighth Circuit panel further held that by the campaign filing the expenditure reports, Benton obstructed "a matter within the jurisdiction" of the FEC because those reports were published online by the FEC. App. at 27a.

REASONS FOR GRANTING THE WRIT

This case involves important and recurring issues concerning the intersection of campaign-finance laws and federal false-statement statutes and the ability of federal prosecutors to turn every statement in every box on every FEC report into multiple different felonies.

I. THIS COURT SHOULD RESOLVE THE QUESTION OF WHETHER THE KNOWLEDGE REQUIREMENTS UNDER EACH STATUTE OF CONVICTION AND THE MATERIALITY REQUIREMENTS IN 18 USC SECTION 1001 CAN BE TURNED INTO A MERE FALSITY REQUIREMENT IN THE FEC REPORTING CONTEXT OR WHETHER THE STATUTES REQUIRES SOMETHING MORE THAN MERE FALSITY.

Whether every inaccurate purpose for a campaign expenditure on an FEC filing is "material" so as to support a felony criminal conviction is a question of exceptional importance that should be resolved by this Court. Benton's conviction for violating 18 U.S.C. section 1001 requires materiality as an essential element, meaning the Government must have proven the allegedly false information was "material." 18 U.S.C. § 1001(a)(1) (2012); *United*

States v. Johnson, 937 F.2d 392, 396 (8th Cir. 1991) (citing *United States v. Hicks*, 619 F.2d 752, 754 (8th Cir. 1980)).

For purposes of the materiality requirement under section 1001, a statement should only be considered material if it has "'a natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed.'" *United States v. Gaudin*, 515 U.S. 506, 509 (1995) (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988)); *see also United States v. Phythian*, 529 F.3d 807, 813 (8th Cir. 2008) ("A statement is material if it has 'a natural tendency to influence or was capable of influencing the government agency or official.'") (quoting *United States v. Baker*, 200 F.3d 558, 561 (8th Cir. 2000)). In some Circuits, a false statement is not "capable of" influencing an agency's decision if a *true* statement would have led to the *same decision*. *United States v. Facchini*, 874 F.2d 638, 643–44 (9th Cir. 1989) (en banc); *United States v. Kwiat*, 817 F.2d 440, 445 (7th Cir. 1987).

Under the Federal Election Campaign Act of 1971 ("FECA") the Paul campaign was required by the to report its expenditures to the Federal Election Commission ("FEC"). *See* 52 U.S.C. §§ 30104(a)(1), (b)(5)(A). The Paul campaign reported the payments as going to ICT for "audio/visual services." Federal law does not prohibit the use of intermediaries to pay vendors or reporting only the intermediary, rather

than ultimate, recipient of campaign expenditures. Federal law does not prohibit paying an individual for his or her endorsement.

Here, however, because the prosecutors did not like the fact that Sorenson had been paid by a campaign to skirt his state ethics rules, but had no obvious way to prosecute members of the Paul campaign for those payments since they were legal payments, the prosecution instead proceeded on the novel theory that the defendants had caused reports to be filed with the FEC that falsely described the purpose of the payments as "audio/visual expenses" rather than some other, unnamed, purpose. Furthermore, the government charged that these reports not only violated FECA, but the statute prohibiting false statements to federal agencies (section 1001), the Sarbanes-Oxley Act (section 1519), and the conspiracy statute.

In so deciding, the Eighth Circuit has now issued an opinion which conflicts with other Circuits, as well as opinions of this Court, in holding that materiality under Section 1001 in the FEC reports equates to mere falsity and that the conspiracy count grounded in that statute also required only proof of falsity.

Section 1001 requires the government prove that a defendant "knowingly and willfully … falsifie[d] … a material fact" in a "matter within the [FEC's] jurisdiction." 18 U.S.C. § 1001(a)(1).3 Under this

3 Benton submits that the Eighth Circuit also misapplied settled law about "knowingly" falsifying anything, as it pertains to each count of

"rigorous" and "demanding" rule, an agency must demonstrate that it would have acted differently if the defendant had told the truth. *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S.Ct. 1989, 2002-03 (2016). In other words, "what is relevant" for purposes of establishing materiality "is what would have ensued from official knowledge of the misrepresented fact ... not what would have ensued from official knowledge of inconsistency between a posited assertion of the truth and an earlier assertion of falsehood." *Kungys v. United States*, 485 U.S. 759, 775 (1988).

Numerous circuit courts have adopted and applied this interpretation of the materiality requirement. *See, e.g. United States v. Moyer*, 674 F.3d 192, 208 n.8 (3d Cir. 2012); *United States v. David*, 83 F.3d 638, 648 (4th Cir. 1996); *United States v. Evans*, 42 F.3d 586, 593 (10th Cir. 1994); *United States v. Johnson*, 530 F.2d 52, 55 (5th Cir. 1976). Yet the Eighth Circuit has now ignored it and applied a new standard for defendants within its ambit.

The government never proved that the FEC would have made a different decision had the Paul campaign reported the payments to ICT as attributable to

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conviction, as he never saw the FEC reports, did not provide the information that went into the reports, never approved them, and never submitted them. As such, his entire case should have been dismissed. This Court should correct the entirety of the errors the Eighth Circuit has made in trying to use FEC reporting requirements as a way to prosecute the top levels of a campaign who have had nothing to do with the preparation of the FEC reports.

"Sorenson's endorsement" instead of "audio/visual expenses." In so doing, the Eighth Circuit has rendered every statement in every FEC expenditure report material and thus read "materiality out of the statute." *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 660 (4th Cir. 2004). As Judge Easterbrook has observed, for example, "[d]eliberately using the wrong middle initial … is not a felony—not unless the right middle initial could be important." *Kwiat*, 817 F.2d at 445 (emphasis added). The Court's guidance is needed on this recurring federal question that the Eighth Circuit incorrectly decided.

The Government's witness from the FEC reports analysis division, Michael Hartsock, conceded a "true" statement regarding purpose would have led to the same agency decision, because the process for publication of FEC reports is entirely automated. Tr. p. 550 (testifying regardless of what a report says, the FEC will publish it if it appears to be complete). Furthermore, Hartsock emphasized unless an item exceeds a certain threshold amount, the FEC will take no action to not publish the report—even if the information is incorrect. Tr. p. 567–68. It is unclear what the threshold amount is. In fact, Hartsock, an employee of the FEC, refused to name what the threshold amount is. Tr. p. 568.

Hartsock testified reports submitted by RPPCC were "sufficiently filled out to remain published on the internet." Tr. p. 547. The only other item of evidence presented by the Government was the forms

contained a warning that misstatements *could*—not *would*—result in criminal prosecution. Tr. p. 1113–14. In fact, it has been shown the reports themselves were automatically posted. No decision besides a scan of the form for completeness and potentially a scan for whatever the undisclosed triggering threshold amount is being made. Had RPPCC contained whatever the correct purpose was on the form, doing so would not influence or have the capability to influence a different action from the FEC to accept and publish the expenditure reports. A false statement that has *no impact* on the *agency decision* is not at all "material" as a matter of law. Benton's conviction under section 1001 should be overturned due to this lack of presented evidence of materiality. *See United States v. Talkington*, 589 F.2d 415, 417 (9th Cir. 1978) (illustrating a statement in a claim for government funds was not material where the information provided in the statement had no effect whatsoever on the processing of the claim).

The lack of evidence of materiality is even acknowledged by the Eighth Circuit's opinion. App. at 28a. In response to arguments that the false statements of purpose were not material because they did not influence the FEC in light of the fact accurate reports would have been published, just as the false reports were, the Eighth Circuit responded, "Perhaps so, but that does not foreclose the possibility that the [FEC] might have taken different action had the reports truthfully described the disbursements'

purpose." *Id.* This is simply not supported by the record. The Eighth Circuit correctly recognized that "[t]o prove materiality, the [FEC] needed to show only that the false reports were capable of influencing its decision and not that they succeeded in doing so." *Id.* at 17–18 (citing *United States v. Wintermute*, 443 F.3d 993, 1001 (8th Cir. 2006)). However, the Government in this case simply did not present any evidence the false reports were capable of influencing the FEC's decision on whether or not to publish the reports. Rather, Hartsock, a Government witness, testified only either (1) completeness or (2) dollar amount in excess of a secret threshold had the capability of influencing the FEC's decisions.

The Government failed to show any of the ITC line items listing "audio/visual purposes" were capable of influencing or affecting the FEC's administration.

This decision put the Eighth Circuit in direct conflict with the Second Circuit in *United States v. Litvak*, 808 F.2d 160, 172 (2d Cir. 2015) (holding the Government must submit *evidence* that misstatements, purposeful or not, were capable of influencing an *actual decision* of a branch of the government). This Court should resolve this conflict.

II. THIS COURT SHOULD RESOLVE THE QUESTION OF WHETHER THE SARBANES-OXLEY ACT CAN BE APPLIED TO ALLEGATIONS OF CAMPAIGN FINANCE VIOLATIONS PUNISHABLE UNDER FECA

SIMPLY BECAUSE THE FEC PUBLISHES EXPENDITURE REPORTS ON THE INTERNET.

In its analysis of Benton's conviction under 18 U.S.C. §1519, the Eighth Circuit erroneously applied the Sarbanes-Oxley Act to allegations of federal campaign finance violations punishable under FECA.

A conviction under 18 U.S.C. section 1519 requires the following:

> Whoever *knowingly* alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object *with the intent to impede, obstruct, or influence* the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . shall be fined under this title, *imprisoned not more than 20 years*, or both.

(emphasis added). Congress's stated purpose for the statute was "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the *securities laws* . . . ." Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (emphasis added); *see also Yates v. Unites States*, 135 S. Ct. 1074, 1079 (2015) ("Section 1519 was enacted as part of the Sarbanes-Oxley Act of 2002, . . . legislation designed to protect investors and restore trust in

financial markets following the collapse of Enron Corporation."). Prosecuting Defendants under both FECA and Sarbanes-Oxley is inapposite to legislative history and, moreover, to the spirit of justice.

The mens rea required for 18 U.S.C. section 1001 versus section 1519 differs is enough to give pause in allowing prosecution for the same action under both statutes. The statutes require a "knowing and willful" mens rea versus only a "knowing" mens rea, respectfully, yet impose a maximum sentence of five years versus a maximum sentence of twenty years, respectfully. The Federal Election Campaign Act, which is arguably the most applicable to the filing of an allegedly false expenditure report with the *Federal Election Commission*, requires a higher mens rea, yet imposes a lesser sentence than a conviction under section 1519. It strains credulity a prosecutor would be allowed to tack on a separate count requiring a lesser mens rea but which could result in a 400% sentence longer.

The Eighth Circuit dismisses this, stating each count requires a slightly different element to be proven beyond a reasonable doubt, and therefore, prosecution under each is permissible. This wholly ignores the assertion that section 1519 is not meant to apply to reports filed with the FEC, which is fully supported by the stated limited purpose of the Sarbanes-Oxley Act to securities violations as detailed in the Congressional legislative history.

Under section 1519, a "matter" must be "within the jurisdiction of any department or agency of the United States ...." 18 U.S.C § 1519. The Court has cautioned against broadly applying section 1519. *See Yates*, 135 S. Ct. 1074. It is not a "coverall" statute, *id.* at 1088; it should not be "cut … loose from its financial-fraud mooring," *id.* at 1079; and it should not be read as superfluous with other criminal statutes, *id* at 1084-85 & n.6.

At least three circuits have held that no "matter within the jurisdiction of" an agency is implicated when the agency receives false information that it has no power to act on. *See United States v. Blankenship*, 382 F.3d 1110 (11th Cir. 2004); *United States v. Holmes*, 111 F.3d 463 (6th Cir. 1997); *United States v. Facchini*, 874 F.2d 638 (9th Cir. 1989) (en banc).

The FEC has jurisdiction to bring civil-enforcement actions against individuals who violate federal campaign-finance laws. But the Paul campaign's statement about "audio/visual expenses" does not implicate the FEC's jurisdiction because paying for someone's endorsement does not violate federal law. In splitting from its sister circuits, the Eighth Circuit ignored that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *Yates*, 135 S. Ct. at 1088, and "'doubt will be resolved against turning a single transaction into multiple offenses,'" *Simpson v. United States*, 435 U.S. 6, 15 (1978 (citation omitted).

The Eighth Circuit's opinion also conflicts with this Court's precedent in *Marinello v. United States*, 138 S. Ct. 1101 (2018) and *United States v. Aguilar*, 515 U.S. 593 (1995). In *Marinello*, this Court held that to convict a defendant under a similar obstruction statute, the Government must prove the defendant was aware of a pending proceeding or could reasonably foresee such a proceeding would commence and the defendant acted with a narrowly-defined intent to obstruct or impede such a proceeding. *Marinello*, 138 S. Ct. at 1110.

In holding as much, the Court relied heavily on its reasoning in *United States v. Aguilar*, which is equally applicable to the facts in this case. In *Aguilar*, the Court interpreted a statute making it a felony when a person "corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to *influence, obstruct or impede*, the due administration of justice." *Aguilar*, 515 U.S. at 598 (emphasis added); *see* 18 U.S.C. § 1503(a). The statute in *Marinello* is similarly worded but instead concerns the administration of the Internal Revenue Code. *Marinello*, 128 S. Ct. 1101, 1106; *see* 26 U.S.C. § 7212 (2012). Here, section 1519 reads defendants must act "with the intent to impede, obstruct, or influence the investigation or proper administration of any matter . . . ." 18 U.S.C. § 1519.

In *Aguilar*, the Court required the Government show, in addition to "an intent to influence judicial or grand jury proceedings," there was a "nexus" between

the defendant's allegedly obstructive conduct and a particular judicial proceeding, stating the "act must have a relationship in time, causation, or logic with judicial proceedings." 515 U.S. at 599. The Court underlined it has "traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress[4] and out of concern that 'a fair warning should be given to the world in language . . . the common world will understand, of what the law intends to do if a certain line is passed.'"[5] *Id.* at 600 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)) (footnotes added). In *Marinello*, the Court held the reasoning applied with similar strength to a violation of 26 U.S.C. section 7212.

Any reading of Sarbanes-Oxley broader than handed down in *Aguilar* and *Marinello* is overbroad, vague, and violative of Benton's due process rights under the Fifth Amendment. *See Aguilar*, 515 U.S. 593 *passim* (reversing jury verdict convicting defendant under statute with similar language to section 1519 because simply making a false statement

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[4] The stated purpose of the Sarbanes-Oxley Act "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the *securities laws* . . . ." Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (emphasis added).

[5] Furthermore, even if the statute is worded commonly enough to give a fair warning of its parameters, federal election workers would not commonly know to comply with campaign finance laws they must also be familiar with securities law.

to law enforcement was insufficient to prove defendant intended to influence, obstruct, or impede the due administration of justice under 18 U.S.C. section 1503 because falsity alone was not sufficient to show intent). In *Aguilar*, the United States Supreme Court curtailed the government's broad reading of the statute and required proof—much like the proof missing here—the false statement was made with specific intent to obstruct justice. *Id.* at 601. As in *Aguilar*, this Court should too restrict the application of section 1519 to narrower circumstances which the statute was intended to apply—false statements intending to obstruct justice.

The Court further opined in *Marinello* Courts "'cannot construe a criminal statute on the assumption that the government will use it responsibly,'" 138 S. Ct. at 1109 (quoting *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016)), and the United States Supreme Court "[has] traditionally exercised restraint in assessing the reach of a federal criminal statute," 138 S. Ct. at 1109 (quoting *Aguilar*, 515 U.S. at 600).

The most applicable language of *Marinello* to Benton's case reads:

> [T]he Government must show . . . there is a "nexus" between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeting administrative action. That

> nexus requires a "relationship in time, causation or logic with the . . . proceeding." By "particular administrative proceeding" we do not mean every act carried out by IRS employees in the course of their "continuous, ubiquitous, and universally known" administration of the Tax Code. While we need not here exhaustively itemize the types of administrative conduct that fall within the scope of the statute, *that conduct does not include routine, day-to-day work carried out in the ordinary course by the IRS, such as the review of tax returns. . . . Just because a taxpayer knows that the IRS will review her tax return every year does not transform every violation of the Tax Code into an obstruction charge.*

Marinello, 138 S. Ct. at 1109–10 (citations omitted) (emphasis added).

The Court concluded:

> [T]he Government must show . . . the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant. *It is not enough for the Government to claim that the defendant knew the IRS may catch on to his unlawful scheme*

> *eventually*. To use a maritime analogy, the proceeding must at least be in the offing.

Id. at 1110 (emphasis added).

Indicating an unsatisfactory purpose to the FEC is a prime example of the actions described in *Marinello* as not enough to warrant a criminal prosecution, especially considering the conduct of the FEC falls outside of the scope of such a statute and is routine, day-to-day work of automatic publishing of complete campaign expenditure reports. Here, the Court's interpretations in *Aguilar* and *Marinello* should apply to Sarbanes-Oxley's language regarding an "intent to impede, obstruct, or influence the investigation or proper administration of any matter." The Eighth Circuit did not do so, and therefore, certiorari is required to clarify the correct legal standard to apply to Defendant's conduct.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Jesse Benton,

Petitioner,

-vs.-

United States of America,

Respondent.

Petition Appendix

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ATTORNEY FOR PETITIONER

United States Court of Appeals For the Eighth Circuit

No. 16-3861

United States of America
Plaintiff - Appellee

v.

Jesse R. Benton

Defendant - Appellant

No. 16-3862
United States of America
Plaintiff - Appellee

v.

John Frederick Tate, also known as John M. Tate

Defendant - Appellant

No. 16-3864

United States of America
Plaintiff - Appellee
v.

Dimitrios N. Kesari, also known as Dimitri Kesari

Defendant - Appellant

———————

Appeals from United States District Court for the Southern District of Iowa - Des Moines

———————

Submitted: April 6, 2017
Filed: May 11, 2018

———————

Before WOLLMAN and LOKEN, Circuit Judges, and NELSON,1 District Judge.

———————

WOLLMAN, Circuit Judge.

Jesse R. Benton, John Frederick Tate, and Dimitrios N. Kesari (Defendants) were convicted by a jury of causing false records, in violation of 18 U.S.C. §§ 2 and 1519 (Count 2); causing false campaign expenditure reports, in violation of the Federal Election Campaign Act (the Act), 52 U.S.C. §§ 30104(a)(1), (b)(5)(A), and 30109(d)(1)(A)(i) and 18 U.S.C. § 2 (Count 3); engaging in a false statements scheme, in violation of 18 U.S.C. §§ 2 and 1001(a)(1) (Count 4); and conspiring to commit the offenses listed above, in violation of 18 U.S.C. § 371 (Count 1). Defendants appeal, arguing that the district court2 erred in denying their motions to dismiss, for judgment of acquittal, and for a new trial; in instructing the jury; in issuing certain evidentiary rulings; in denying Tate's motion for severance; and in issuing a discovery ruling. We affirm.

1. The Honorable Susan Richard Nelson, United States District Judge for the District of Minnesota, sitting by designation.
2. The Honorable John A. Jarvey, Chief Judge, United States District Court for the Southern District of Iowa.

I. Background

Defendants were officials with Ron Paul's 2012 presidential campaign. Benton served as campaign chairman, Tate served as campaign manager, and Kesari served as deputy campaign manager. During the primary campaign for the Republican Party nomination, Defendants sought the endorsement of Iowa State Senator Kent Sorenson, who had previously endorsed rival Republican candidate Michelle Bachmann and was employed as Bachmann's Iowa campaign chairman, in which capacity he worked seventy to eighty hours a week and was paid $7,500 a month.

On October 29, 2011, Aaron Dorr, the brother of Sorenson's legislative aide, Chris Dorr, emailed Tate a proposal, which stated that Sorenson would need to be paid a salary of $8,000 a month to endorse Paul, Chris Dorr would need to be paid a salary of

$5,000 a month, and a $100,000 donation would need to be made to a political action committee established by Sorenson. Tate shared the proposal with Benton, among others, describing it as "insulting," "offensive," and "unethical," and stating that the Paul campaign could make a counter-proposal, simply refuse the proposal, or communicate the proposal to the press, which he believed "would destroy the Bachman[n] campaign, Kent, and possibly Aaron." In reply, Benton sent an email on October 31 addressed to Sorenson and Aaron and Chris Dorr, stating that although he was pleased that Sorenson was considering supporting Paul, he was surprised by the proposal because it appeared to be "trying to sell Kent's endorsement for hundreds of thousands of dollars and other in-kind support for future political ventures," which "would be unethical and illegal." Benton further stated that the Paul campaign "would be happy to employ [Sorenson] at fair market value," which the Bachmann campaign had set at $8,000 a month for Sorenson and $5,000 a month for Chris Dorr, and that Sorenson should respond to this offer by November 2. Later the same day, Kesari told Tate in an email that he and Sorenson had arranged to meet for dinner the following week. Tate responded by saying that Kesari should not "firm up anything yet."

Aaron Dorr responded to Benton's counter-offer on November 2, stating that he alone was responsible for the earlier proposal and that Sorenson was unaware of its details. He also stated that Sorenson would be unable to consider Benton's counter-offer until after November 8. Benton replied that the offer for Sorenson and Chris Dorr to join the Paul campaign remained open but that it would require a response by November 7.

On November 13, Benton emailed Tate and Kesari that he was considering telling the press about Sorenson's endorsement proposal in light of a "cheap shot" from Bachmann toward Paul. Tate replied that Benton should first contact Aaron Dorr regarding the possibility of Sorenson's endorsement. Kesari suggested that he could meet with Sorenson and Sorenson's wife, but Tate stated that Benton should contact Aaron Dorr instead, which Benton agreed to do that night. On November 15, after Dorr had failed to respond, Benton gave Kesari permission to meet with Sorenson and Sorenson's wife. Tate told Kesari, "Make sure you talk to Jesseabout how we want to do this and what you are supposed to say. We need to be very careful." Kesari agreed to do so.

On November 21, Kesari emailed Tate and Benton that he had spoken with Sorenson and his family over dinner the previous evening and learned that Sorenson wanted to defect to the Paul campaign but in a way that would cause the least harm to Bachmann. Tate replied, "Seems to me, next step is to make him an offer (in person, not in writing) and give him a firm but polite deadline. In my view we would want it to occur after Christmas, a few days before Caucus." On December 23,

Benton sent an email to Tate and others stating, "Sorenson is endorsing [Paul] on Monday. We have his statement already."

Sorenson requested a meeting with Kesari on December 26. Kesari, Sorenson, and Sorenson's wife met at a restaurant to discuss Sorenson's endorsement of Paul. In Sorenson's absence, Kesari gave Sorenson's wife a $25,000 check made out to Grassroots Strategy, a corporation owned by Sorenson. After the meeting, Kesari sent an email to campaign staffers saying, "The deal is done. Please draft a press release and send to me and Jesse." Attached to the email was Sorenson's draft statement endorsing Paul.

On December 27, however, Kesari sent an

email to Tate, Benton, and others saying, "Hold the release. Kent is getting cold feet. He wants to meet with me in about 2 hours. Any advice? Damn I was afraid of this." Tate asked, "Why is he getting cold feet? What can we do, say to help him? What time are you meeting him, and where?" Benton replied, "I am not interested in this game any more. Dimitri, pull the offer. If we can't depend on him, I don't want him involved." Benton then sent another email, saying, "In all seriousness, I am [not] sure what to do about this. The DMR [*Des Moines Register*] has his statement, I sent last night since Kent said [he] [was] [c]omfortable." Benton told Tate and Kesari in subsequent emails that he was considering telling the press about Sorenson's request for payment if Sorenson did not uphold his agreement to endorse Paul.

According to Sorenson, he had a heated argument with Bachmann's campaign staff on December 28. Later that day, he drove to a rally for Paul at the Iowa State Fairgrounds in Des Moines. Sorenson met Kesari in the parking lot and asked if Kesari, Benton, and Tate were still "on board" with his endorsement of Paul; Kesari replied that they were. Sorenson spoke with Benton and Kesari in the backstage area of one of the buildings at the Fairgrounds, where Tate was also present.

Sorenson testified that Benton told him something to the effect of, "[Y]ou bled for us, we'll

take care of you," which Sorenson understood to mean that he would be "financially taken care of and politically taken care of." Sorenson thereafter went on stage and publicly endorsed Paul. Shortly after Sorenson's endorsement, Kesari sent an email to Fernando Cortes, the Paul campaign's assistant controller, requesting a $25,000 wire transfer for the next morning. Copies of the email were sent to Benton and Tate and stated that Benton had approved the wire. Tate replied the following day that the wire was approved. The Paul campaign issued a press release announcing Sorenson's endorsement.

After Sorenson endorsed Paul, members of the Bachmann campaign began telling the press that the Paul campaign had paid Sorenson for his endorsement. Responding to media inquiries, Benton stated that Sorenson would not be paid by the Paul campaign, in one instance explicitly denying that Sorenson would be paid a salary by the campaign. Tate sent an email to Benton, saying, "We need to make sure anyone asked about this . . . is prepared to say the same thing. I would assume that is something like: The Ron Paul campaign has

not and is not paying Kent for his endorsement. Kent decided to endorse Ron because blah blah blah. Short sweet and truthful."

On December 29, the Paul campaign issued a press release that included a statement from Sorenson that he "was never offered money from the Ron Paul campaign or anyone associated with them and certainly would never accept any." The statement further stated, "Financial reports come out in just days which will prove what I'm saying is true." Benton had approved this release before it was made public. In television interviews, Sorenson also denied being paid by the campaign. He had been urged by Kesari to support this denial by referring to the forthcoming financial reports and was told by Kesari not to cash the $25,000 check that Kesari had given to Sorenson's wife. Also on December 29, Cortes sent an email to Kesari, Benton, and Tate, with the subject line "25k wire," asking "Is this invoice still on for today? Please send when you get." Benton told Cortes to "[h]old for a couple days."

Tate agreed that the wire should be held, and Kesari stated, "We are holding till after the filing." Kesari also explained that he did not want the wire "showing up on this quarter filings." Later that day,

Cortes sent Tate a list of outstanding invoices, which included "$25k - Dimitri's mystery wire." Tate responded, "Thanks. There will not be the 25k dimitri wire for now. Wipe it off the books."

Kesari then arranged to pay Sorenson through a third party. He asked his brother, Pavlo Kesari, if Pavlo could pay, via Pavlo's video production company, a graphic designer who had done work for the campaign. Pavlo replied that he could not do so, but referred Kesari to his friend Sonny Izon, who owned a video production company called Interactive Communications Technology (ICT). On January 24, 2012, Sorenson sent Kesari an invoice addressed to ICT from Grassroots Strategy Inc., the corporation owned by Sorenson, for "Consulting Services," consisting of $25,000 for "Retainer to provide services" and $8,000 for services provided during the month of January 2012. Kesari sent the invoice to Pavlo, saying, "Here is the invoice that needs to be taken care of. Send me an invoice for video services." Pavlo forwarded the invoice to Izon and added a $3,125 invoice for audio equipment that Pavlo had rented to the Paul campaign. On February 5, Izon sent Kesari an invoice charging the Paul campaign $38,125 for "Production Services."

After receiving the February 5 invoice, Kesari sent Tate an email asking "[d]id jesse get kent paid?" Tate replied, "No idea. Ask him." Kesari then emailed Benton, asking "Did you get kent paid? Or should I submit the payment and pay him?" Benton replied, "Yo[u] handle." Kesari forwarded the invoice to Cortes, saying "Please wire tomorrow morning[.] This is approved by jesse." On March 21, Izon sent Kesari an invoice charging the Paul campaign $8,850 for production services rendered in February. Kesari forwarded the invoice to Cortes, saying that it was "[a]pproved by jesse." Cortes forwarded the invoice to Tate, asking if the payment was approved, with Tate responding that it was. The same exchange took place regarding the invoice for services in March. After receiving the invoice for services

in April, Kesari forwarded it to Benton, asking "Kent's bill[.] Pay?" Kesari then forwarded the invoice to Cortes, saying that it was "[a]pproved by Jesse." After receiving the May invoice, Kesari forwarded it to Cortes, saying, "This should be the last one." Cortes forwarded the invoice to Tate, asking "[A]pproved? Dimitri said it is the last one." Tate approved the payment. After receiving the June invoice, Kesari forwarded it to Cortes, saying,

"This is the last one." Cortes forwarded the invoice to Tate, saying, "According to dimitri [this is] the last one (again)[.] Approved? 8k." Tate told Cortes, "I will find out what it is." Tate emailed Kesari, asking, "What is this? What is it for, who is it? Why do we keep paying them? The last payment was supposedly the last." Kesari replied, "This [is] the last payment for kent Sorenson. The deal jesse agreed to with kent." Kesari sent Tate another email, saying, "I[t] was for 6 months." Tate then approved the payment.

Sorenson testified that he performed some services for the Paul campaign while being paid by it. He posed for photographs, made two television appearances, sent emails, and recorded a phone call on behalf of the campaign. He traveled to South Carolina and appeared at rallies in support of Paul, although he did not organize these rallies, as he had done while working for the Bachmann campaign. While in South Carolina he also met with state legislators and encouraged them to endorse Paul.

Based on the invoices, Cortes and other campaign staff prepared wire instructions for the payments to ICT, using a code designating the payments as "audio/visual expenses." The campaign used this information to report the payments to the

Federal Election Commission (the Commission). The campaign reported the payments to ICT to the Commission as "audio/visual expenses," using the code assigned by Cortes.

In response to media reports regarding the $25,000 check that Kesari had given to Sorenson's wife, Sorenson sent Kesari a draft press release in August 2013, which stated that he had been offered the check but never cashed it and thus he "was never paid." Kesari told Sorenson to hold the release until after Kesari had returned from a trip abroad. Upon arriving in Toronto, Kesari placed phone calls to Sorenson, Tate, and Benton. He placed several more phone calls to Sorenson, Tate, and Benton after returning to Virginia. Kesari traveled to meet with Sorenson at his home. Sorenson testified that upon arriving, Kesari lifted up his shirt and asked Sorenson to do the same, to prove that neither was wearing a wire. Kesari asked Sorenson to give him the check back or to alter it to show either a smaller amount or to show "Loan" as the check's purpose. Sorenson refused these requests.

Defendants were indicted by a federal grand jury on Counts 1 through 4 as described above. Benton was indicted on a count of making false statements to law enforcement, in violation of 18

U.S.C. §§ 2 and 1001(a)(2) (Count 5) and Kesari was indicted on a count of obstruction of justice, in violation of 18 U.S.C. § 1512(b)(3) (Count 6). The district court dismissed without prejudice Counts 1 through 4 against Benton and Tate because the government had presented information to the grand jury that Benton and Tate had proffered to the FBI, in violation of their proffer agreements. The jury convicted Kesari of Count 2, causing false records; acquitted Kesari of Count 6, obstruction of justice; and acquitted Benton of Count 5, making false statements to law enforcement. The jury was unable to reach a verdict on the remaining counts.

By way of a superseding indictment, a grand jury again charged Defendants with Counts 1 through 4, except Kesari. who was not indicted on Count 2. After a second trial, the jury convicted Defendants on all counts.

II. Discussion

A. Statutory Construction and Sufficiency of the Evidence

Defendants argue that the district court erred in denying their motions for judgment of acquittal and for a new trial because the court

misconstrued the relevant statutes and the evidence was insufficient to support Defendants' convictions.[3] "The district court's statutory construction is a legal determination that we review de novo." United States v. Mack, 343 F.3d 929, 933 (8th Cir. 2003). "A motion for judgment of acquittal should be granted only if there is no interpretation of the evidence that would allow a reasonable jury to find the defendant guilty beyond a reasonable doubt." United States v. Boesen, 491 F.3d 852, 855 (8th Cir. 2007) (quoting United States v. Cacioppo, 460 F.3d 1012, 1021 (8th Cir. 2006)). "This court views the entire record in the light most favorable to the government, resolves all evidentiary conflicts accordingly, and accepts all reasonable inferences supporting the jury's verdict." Id. at 856. "We review the district court's denial of a motion for new trial for abuse of discretion." United States v. Davis, 534 F.3d 903, 912 (8th Cir. 2008).[4]

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[3]Benton also appeals from the denial of his motion to dismiss the indictment, a ruling that we review *de novo*. United States v. Sewell, 513 F.3d 820, 821 (8th Cir. 2008).

[4]We reject at the outset Benton's argument that the evidence was insufficient because the

district court erred in relying on Sorenson's testimony. In considering a motion for a new trial, "the district court may weigh the evidence and evaluate the credibility of the witnesses, but the 'authority to grant a new trial should be exercised sparingly and with caution.'" Davis, 534 F.3d at 912 (quoting United States v. Sturdivant, 513 F.3d 795, 802 (8th Cir. 2008)).

1. Federal Election Campaign Act

The Act requires the treasurer of a political campaign committee to file with the Commission a report disclosing "the name and address of each [] person to whom an expenditure in an aggregate amount or value in excess of $200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure." 52 U.S.C. § 30104(a)(1), (b)(5)(A). Violations of the Act's reporting requirements committed "knowingly and willfully" and "aggregating $25,000 or more during a calendar year" may be punished by up to five years' imprisonment. Id.
§ 30109(d)(1)(A)(i).

Defendants argue that the Act does not prohibit a campaign from paying a vendor, which in turn pays a sub-vendor, while reporting only the payment to the first vendor. As the district court noted in its order denying Defendants' motions, this argument is unavailing because Defendants were not charged with violating the Act merely by failing to report Sorenson as the ultimate recipient of the campaign's payments to ICT. Rather, the

government "was properly permitted to argue that [the] combination of a payee used to disguise the true payee, together with a false statement of purpose, was sufficient to violate the statutes alleged in the indictment."
D. Ct. Order of Oct. 24, 2016, at 4-5.

The district court's analysis does not conflict with the Commission's decisions. In Mondale for President, the Commission advised that a campaign may report expenditures to a corporation it hired to provide media consulting services without reporting the corporation's expenditures to its sub-vendors. FEC Advisory Opinion 1983-25 (Mondale for President). And in Kirk for Senate, the Commission concluded that a campaign had not violated the Act's reporting requirements by paying a vendor for media services, who in turn paid a sub-vendor that allegedly used some of the funds to pay the personal expenses of the candidate's girlfriend. Kirk for Senate,

Matter Under Review (MUR) 6510 (FEC July 16, 2013). In both matters, however, the Commission concluded that the vendors and sub-vendors had provided the services described by the campaign. Indeed, in Mondale, the Commission noted that

itemization of the vendor's payments to sub-vendors would not be required because the campaign would report "specific information describing the various purposes of each expenditure made" to the vendor, such as "media consulting fees, media photocopy expenses, media buys, media production, and other similar descriptive language that reflects the actual purpose of each" of the campaign's expenditures to the vendor. Here, by contrast, the government presented evidence that Defendants caused false reports to the Commission that the payments to ICT were for "audio/visual expenses," when in reality ICT had provided no such services to the campaign and the payments were instead for Sorenson's endorsement.

The Commission found a violation of the Act's reporting requirements in a matter whose facts are similar to those here, In the Matter of Jenkins for Senate 1996 and Woody Jenkins, MUR 4872 (FEC Feb. 15, 2002).[5] The campaign had contracted with a company called Impact Mail & Printing for computerized phone bank services. The campaign wanted to conceal its association with Impact Mail, however, and to that end it issued payments to its media firm, Courtney Communications, which then

transmitted the payments to Impact Mail. The campaign's reports to the Commission reflected disbursements to Courtney Communications and not to Impact Mail. The Commission reasoned that because Courtney Communications "had no involvement whatsoever with the services provided by Impact Mail," and served only "as a conduit for payment to Impact Mail so as to conceal the transaction with Impact Mail," the campaign had violated the Act's reporting requirements.

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[5]Defendants contend that this matter lacks persuasive value because the Commission's views were set forth in a conciliation agreement reached by the Commission and Respondents. We note, however, that the conciliation agreement was accepted by majority vote of the Commissioners.

Defendants cite Boustany, Jr. MD for Congress, MUR 6698 (FEC Feb. 23, 2016), in support of their argument, but we do not find that case persuasive. The supplement to the complaint in that matter set forth allegations similar to those in this case, and in a three-to-three vote the Commission failed to find legal violations. Those Commissioners voting to take no action pointed to the campaign's descriptions of the disbursement's purpose as "[d]oor-to-door get-out-the-vote," and noted that while "a portion of the disbursement was ultimately used for another kind of [get-out- the-vote] activity," it would not be "a prudent use of Commission resources" to investigate such a "minor discrepancy." Here, by contrast, reporting the payments to ICT as "audio/visual expenses," when the actual purpose of the payments was for Sorenson's endorsement, can hardly be characterized as a "minor discrepancy."

We also reject Defendants' argument that the coding of the disbursements to ICT as "audio/visual expenses" did not render the reports false. That Sorenson performed some work for the campaign that might arguably be described as an audio/visual expense is beside the point. The government's theory was that the payments to Sorenson were for his endorsement and not for any audio/visual

services, a theory bolstered by the fact that the payments were arranged before Sorenson performed any services. Based on Commission Branch Chief Michael Hartsock's trial testimony, Defendants contend that "a campaign is limited in the way that it can report disbursements and still comply with the Commission's facial review," that the Commission considers "audio/visual" to be an adequate expenditure purpose, and that it considers "political consulting" or "endorsement" to be inadequate purposes. Benton Br. 28-29. Hartsock's testimony, however, was that the Commission's lists of adequate and inadequate disbursement purposes are non-exhaustive, and he agreed that "while consulting is not an acceptable purpose, specifying the type of consulting services provided can help to ensure that the purpose is considered adequate." He also testified that "audio/visual" does not appear on either the list of adequate or the list of inadequate purposes. This testimony thus did not establish that "audio/visual" was an accurate description of the purpose for the disbursements to ICT, nor did it establish that Defendants could not have accurately described the purpose for the disbursements in a manner that would have been accepted by the Commission.

Benton and Tate contend that the evidence

was insufficient to support their convictions under the Act because it did not show that they were involved in preparing the false Commission reports. We disagree. The government presented evidence that Benton and Tate coordinated with Kesari to offer Sorenson money in return for endorsing Paul and that they approved a wire transfer to pay Sorenson after he had done so. After the Bachmann campaign claimed that Sorenson had been paid for his endorsement, Tate told Benton that everyone involved should be "prepared to say the same thing," namely, that Sorenson had not been paid for his endorsement. Benton told members of the media that Sorenson would not be paid by the Paul campaign. The Paul campaign issued a Benton-approved statement from Sorenson that Sorenson would not be paid by the campaign and that the campaign's forthcoming Commission reports would bear out this claim. Tate and Benton instructed Cortes to hold the previously-approved wire, which, Kesari explained, was intended to prevent it from appearing on that quarter's Commission report. Later, Tate told Cortes to "[w]ipe [the wire] off the books." Benton told Kesari to handle the payments to Sorenson. Kesari sent several invoices from ICT to Cortes, saying in nearly every case that the disbursements had been approved by Benton. Kesari

told Benton that the April invoice was for "Kent's bill." Tate approved the invoices after Cortes forwarded them to him. Although Tate asked what the June invoice was for, he approved the invoice immediately after Kesari told him that it was for "[t]he deal jesse agreed to with kent." The jury was entitled to infer from these facts that Benton and Tate had knowingly and willfully caused Commission reports to be filed which falsely reported the payments to Sorenson for his endorsement as payments to ICT for audio/visual services.

We reject Defendants' arguments that the reporting requirements are so vague or confusing that we should either apply the rule of lenity or determine that criminal enforcement is not appropriate in this case. As set forth above, Defendants were not convicted for an unsuccessful, good-faith attempt to accurately report the disbursements to ICT, but for knowingly and willfully causing false reports to be filed with the Commission, a conviction that we conclude finds ample evidentiary support in the record.

2. Causing False Records

Defendants challenge their convictions under

18 U.S.C. § 1519, which provides:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

Tate argues that applying § 1519 to false reports of campaign expenditures would render the Act superfluous. "Section 1519 was enacted as part of the Sarbanes-Oxley Act of 2002, 116 Stat. 745, legislation designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation." Yates v. United States, 135 S. Ct. 1074, 1079 (2015). The Supreme Court has cautioned against "cut[ting] § 1519 loose fromits financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent." Id. We conclude that applying § 1519 in the context of

this case does not pose such a risk. In Yates, the Court held that § 1519 was not applicable to a fisherman's actions in throwing undersized fish overboard in order to evade punishment. Id. at 1078-79. The Court concluded that "[a] tangible object captured by § 1519 . . . must be one used to record or preserve information." Id. at 1079. The production of false financial records by a political campaign falls within that framework. Accordingly, we join the Second Circuit in holding that a defendant may properly be convicted for violations of the Act and of § 1519. See United States v. Rowland, 826 F.3d 100 (2d Cir. 2016) (affirming convictions for violations of the Act and 18 U.S.C. §§ 371, 1001, and 1519), cert. denied, 137 S. Ct. 1330 (2017).

Tate also argues that Defendants' § 1519 convictions fail because the false reports alleged in this case do not implicate a "matter within the jurisdiction of" the Commission. Regarding the identical phrase used in 18 U.S.C. § 1001, the Supreme Court has stated that "[t]he most natural, nontechnical reading of the statutory language is that it covers all matters confided to the authority of an agency or department." United States v. Rodgers, 466 U.S. 475, 479 (1984). "A department or agency has jurisdiction, in this sense, when it has

the power to exercise authority in a particular situation." Id. "Understood in this way, the phrase 'within the jurisdiction' merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body." Id.

We conclude that the filing of campaign-expenditure reports constitutes a matter within the Commission's jurisdiction under § 1519. As set forth above, the Act requires campaigns to submit these reports and establishes penalties for their falsity. The Commission is statutorily required to make these reports available for public inspection. 52 U.S.C. § 30111(a); 11 C.F.R. § 5.4(a). Accordingly, and in contrast to the situation that existed in United States v. Facchini, 874 F.2d 638 (9th Cir. 1989) (en banc), where the Department of Labor's authorization was only to monitor the administrative structure of the state's unemployment benefits program, here the false Commission reports did not constitute "[m]ere access to information," but rather "information received [that was] directly related to an authorized function" of the Commission. Id. at 642. We conclude that for the same reasons as described above regarding the violation of the Act, the evidence was sufficient for the jury to find that

Defendants knowingly falsified documents with the intent to impede the Commission's administration of that matter.

3. False Statements Scheme

Under 18 U.S.C. § 1001(a)(1), "whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully [] falsifies, conceals, or covers up by any trick, scheme, or device a material fact" may be imprisoned for up to five years. Defendants argue that, even assuming that they caused false reports to be submitted to the Commission, the evidence was insufficient for the jury to convict them of violating § 1001(a)(1) because the false statements were not material. We disagree.

"A false statement is material if it has a natural tendency to influence or was capable of influencing the government agency or official to which it was addressed." United States v. Chmielewski, 218 F.3d 840, 842 (8th Cir. 2000); see also United States v. Gaudin, 515 U.S. 506, 509 (1995) ("The statement must have 'a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it

was addressed.'" (quoting Kungys v. United States, 485 U.S. 759, 770 (1988))). Defendants contend that this standard was not met in light of Hartsock's testimony that a completed report filed with the Commission is automatically posted on the Commission's website and is taken down only if a subsequent review determines that the report is incomplete. Defendants argue that the false statements of purpose were not material because they did not influence the Commission in light of the fact that accurate reports would have been published, just as the false reports were.

Perhaps so, but that does not foreclose the possibility that the Commission might have taken different action had the reports truthfully described the disbursements' purpose. To prove materiality, the Commission needed to show only that the false reports were capable of influencing its decision and not that they succeeded in doing so. United States v. Wintermute, 443 F.3d 993, 1001 (8th Cir. 2006). We conclude that the false statements in the reports satisfied § 1001(a)(1)'s materiality requirements.

4. Conspiracy

Under 18 U.S.C. § 371, "[i]f two or more

persons conspire [] to commit any offense against the United States . . . or any agency thereof . . . and one or more of such persons do any act to effect the object of the conspiracy," each conspirator may be imprisoned for up to five years. "Conspiracy is an . . . agreement to commit an unlawful act." United States v. Pullman, 187 F.3d 816, 820 (8th Cir. 1999) (quoting Iannelli v. United States, 420 U.S. 770, 777 (1975)). "Proof of a defendant's involvement in a conspiracy may of course be demonstrated by direct or circumstantial evidence." United States v. Lopez, 443 F.3d 1026, 1030 (8th Cir. 2006) (en banc).

We conclude that the evidence was sufficient for the jury to convict Defendants of conspiracy. The government presented evidence that Defendants coordinated with one another to conceal the payments to Sorenson by paying him through ICT and that Defendants knew that the purpose of those payments would ultimately be falsely reported to the Commission. That same evidence was sufficient to permit the jury to find that Defendants entered into an agreement to take such action.

B. Multiplicity

Kesari argues that Counts 2, 3, and 4 were

multiplicitous and thus violated his rights under the Fifth Amendment's Double Jeopardy Clause. We review this claim *de novo*. United States v. Emly, 747 F.3d 974, 977 (8th Cir. 2014). Kesari argues that we must determine "whether Congress intended the facts underlying each count

to make up a separate unit of prosecution." Id. (quoting United States v. Chipps, 410 F.3d 438, 447 (8th Cir. 2005)). This test applies, however, only when multiple counts of an indictment charge the same statutory violation. Id. Here, each count charged a violation of a different statute. Accordingly, we apply the test derived from Blockburger v. United States, 284 U.S. 299 (1932), which provides that "if each offense requires proof of an element not required by the other, the crimes are not considered the same, and a double jeopardy challenge necessarily fails." United States v. Sandstrom, 594 F.3d 634, 654 (8th Cir. 2010) (quoting United States v. Gamboa, 439 F.3d 796, 809 (8th Cir. 2006)). Each of the three counts requires proof of an element the others do not: the Act requires a monetary threshold to be met;
§ 1519 requires an intent to impede, obstruct, or influence a federal matter; and
§ 1001 requires a showing of materiality.

C. Severance

Prior to the second trial, Tate moved to sever his trial from his codefendants so that Kesari could testify on his behalf. A hearing was held before a magistrate judge,[6] during which Kesari's counsel stated that if Tate's trial were severed, Kesari would testify that on December 28, the day Sorenson endorsed Paul, Tate was told that Sorenson had not been promised anything in return for endorsing Paul; that Kesari did not tell Tate about the $25,000 check he gave to Sorenson's wife; that Kesari had no recollection of telling Tate about the $25,000 wire; that no deal to pay Sorenson existed until January 2012; that Kesari never passed on to Tate any information about ICT or the method of paying Sorenson; and that Kesari does not recall telling Tate anything about payments to Sorenson, including how they would be reported to the Commission, other than in the emails offered into evidence. In opposition, the government offered some of Kesari's emails and an interview with the FBI, in which Kesari stated that Paul and another campaign officer did not know about the deal to pay Sorenson but did not say the same about Tate. The district court adopted the magistrate judge's report and recommendation that the motion be denied in

light of the equivocal nature of Kesari's testimony and the impeachment evidence available to the government.

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[6]The Honorable Helen C. Adams, United States Magistrate Judge for the Southern District of Iowa.

"There is a preference in the federal system for joint trials of defendants who are indicted together." United States v. Anderson, 783 F.3d 727, 743 (8th Cir. 2015) (quoting Zafiro v. United States, 506 U.S. 534, 537 (1993)). "This preference is 'especially compelling when the defendants are charged as coconspirators.'" Id. (quoting United States v. Basile, 109 F.3d 1304, 1309 (8th Cir. 1997)). "It is settled in this circuit that a motion for relief from an allegedly prejudicial joinder of charges or defendants raises a question that is addressed to the judicial discretion of the trial court, and this court will not reverse in the absence of a clear showing of abuse of discretion." United States v. Starr, 584 F.2d 235, 238 (8th Cir. 1978) (quoting United States v. Rochon, 575 F.2d 191, 197 (8th Cir. 1978)). "[I]n view of the strong policies favoring joint trials where permissible, the defendant must show that the co-defendant's testimony would be substantially exculpatory. The defendant must show that the co-defendant's testimony would do more than 'merely tend to contradict a few details of the government's case against [him or her].'" United States v. DeLuna, 763 F.2d 897, 920 (8th Cir. 1985) (quoting United States v. Garcia, 647 F.2d 794, 796 (8th Cir. 1981)), abrogated on other grounds by United States v. Inadi, 475 U.S. 387 (1986). In

deciding whether a co-defendant's testimony would be substantially exculpatory, the district court was entitled to take into account "the other trial evidence and the impeachment evidence available to the government." United States v. Oakie, 12 F.3d 1436, 1441 (8th Cir. 1993).

Kesari's proffered statements that Tate was told that Sorenson was promised nothing for his endorsement, that Kesari could not recall telling Tate about the $25,000 wire, that no deal to pay Sorenson existed until January 2012, and that Kesari could not recall telling Tate about the payments to ICT or the method of paying Sorenson were contradicted by the record of emails between Benton, Tate, and Kesari. Accordingly, although some of Kesari's statements were unequivocal, and even though Kesari's failure to exonerate Tate during his interview with the FBI may have had only weak impeachment value, we conclude that the district court did not abuse its discretion in denying the motion.

D. Jury Instructions

Defendants argue that the district court erred in instructing the jury. "We review defense challenges to the district court's jury instructions

for abuse of discretion." United States v. Carlson, 810 F.3d 544, 554 (8th Cir. 2016). "The test is 'whether the instructions, taken as a whole and viewed in light of the evidence and applicable law, fairly and adequately submitted the issues in the case to the jury.'" Id. (quoting United States v. Beckman, 222 F.3d 512, 520 (8th Cir. 2000)). When review of jury instructions requires statutory interpretation, our review is *de novo*. Id. at 551.

Benton requested that the district court instruct the jury that it is not illegal: 1) for a campaign to pay for an endorsement; 2) for a campaign to delay the timing of payments from one reporting period to another; 3) for a campaign not to report payments from vendors to sub-vendors; 4) for a campaign to make an expenditure to a limited liability company without identifying its members or employees; or 5) for a campaign to pay a vendor more than market value for services. The district court instructed the jury on the first and third points. The court did not abuse its discretion in denying the proposed instructions because none of the issues set forth therein related to the government's proffered theory of conviction. See United States v. Wisecarver, 644 F.3d 764, 772 (8th Cir. 2011) ("A legally accurate but irrelevant jury instruction may be error to the extent it misleads

the jury.").

Benton also requested that the district court instruct the jury that the term "willfully," which appears in both the Act and § 1001, should be defined as follows: "A person acts willfully if he acts voluntarily and intentionally to violate a known legal duty. It means that the defendant had knowledge of what the law required and acted with the specific purpose to disobey the law." Instead, the district court issued the following instruction:

> A person acts willfully if he acts knowingly, purposely, and with the intent to do something the law forbids. That is, a person acts willfully when they act with the purpose to disobey or to disregard the law. A person need not be aware of the specific law or rule that his conduct may be violating, but he must act with the intent to do something that he knows the law forbids.

Benton argues that the term "willfully" is vague because this court recognizes more than one definition of the term and thus he was entitled to have the district court give his proposed instruction because it was the more lenient of the two. In Bryan v. United States, however, the Supreme Court

approved nearly identical jury instructions, except with regard to "highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct." 524 U.S. 184, 194-95 (1998). Because Benton has not shown that this case falls within such an exception, we find no abuse of discretion in the district court's denial of his proposed jury instruction.

Likewise, the district court did not abuse its discretion in refusing to give Benton's proposed "debatable law" instruction, which stated:

> One factor for you to consider in deciding whether the defendants "knowingly and willfully" broke the law is whether the requirements of the law were vague or highly debatable. The more uncertain and debatable a law may be, the more difficult it may be to know whether certain conduct may violate the law. Sometimes the applicability of a
>
> law may be very clear in some instances, but not in others. If the law is so uncertain or highly debatable that reasonable persons could disagree, then the defendants could not knowingly and willfully violate the law and you must find them not guilty.

The district court instead issued the following instruction:

> Good-faith is a complete defense to Counts 1, 2, 3 and 4 in this case because good faith on the part of the defendants is inconsistent with willfulness as alleged in Counts 1, 3, and 4 and an intent to impede as alleged in Counts 1 and 2. If the defendants acted in good faith, sincerely believing themselves to be exempt by the law from the conduct constituting any of the above charges, then the defendants did not intentionally violate a known legal duty, that is, the defendants did not act "willfully." The burden of proof is not on the defendants to prove good-faith intent because the defendant does not need to prove anything. The government must establish beyond a reasonable doubt that the defendants acted willfully as charged.

The district court's instruction accurately set forth the law, and Benton did not show that the law was "vague or highly debatable" so as to warrant the issuance of his proposed instruction. See United States v. Picardi, 739 F.3d 1118, 1126-27 (8th Cir. 2014) (holding that district court did not abuse its

discretion in refusing to issue "debatable law" instruction because the issue of vagueness was reserved for the court).

Kesari argues that the district court erred in failing to instruct the jury that a conviction for violation of § 1519 required a finding that the defendant acted willfully. Although Kesari concedes that the text of § 1519 includes no willfulness requirement, he contends that the relationship between the Act—which includes a willfulness requirement and authorizes comparatively lenient penalties—and § 1519—which includes no willfulness requirement yet authorizes comparatively harsh penalties—creates a "positive repugnancy" such that Congress must have intended for § 1519 to include a heightened *mens rea* requirement of willfulness. United States v. Batchelder, 442 U.S. 114, 122 (1979). Batchelder undermines Kesari's argument, however, because there the Court held that without further evidence of inconsistency, two statutes authorizing different punishments for the same conduct may coexist. Id. Further, the Court considered whether a later-enacted, more lenient statute should be read to implicitly repeal an earlier-passed harsher one. Id.; see also United States v. Richardson, 8 F.3d 15, 17 (9th Cir. 1993) (per curiam) (holding that 18 U.S.C.

§ 1920 narrowed § 1001, which predated § 1920 by 40 years). Here, by contrast, Kesari makes a far less intuitive argument—that § 1519, which was enacted after the Act and which, according to Kesari, is broader than the Act, must have been intended to include an implicit heightened *mens rea* element to avoid broadening the liability for conduct punishable under the Act. We decline to read § 1519 as including such an implicit element, all the more so because the cases Kesari cites in support of his argument included a willfulness requirement. See Bryan, 524 U.S. at 188-90; Ratzlaf v. United States, 510 U.S. 135, 138-40 (1994); Cheek v. United States, 498 U.S. 192, 194 (1991); United States v. Curran, 20 F.3d 560, 569 (3d Cir. 1994). Accordingly, we conclude that the district court did not err in refusing to give Kesari's proposed instructions.

E. Evidentiary Rulings

"We review evidentiary rulings for clear abuse of discretion, 'reversing only when an improper evidentiary ruling affected the defendant's substantial rights or had more than a slight influence on the verdict.'" Anderson, 783 F.3d at 745 (quoting United States v. Henley, 766 F.3d 893, 914

(8th Cir. 2014)).

1. Exclusion of Defense Experts

Defendants argue that the district court erred in excluding the testimony of two expert witnesses, David Mason and Jeff Link. Mason, a campaign consultant and former Commissioner and Commission Chairman, testified at the first trial in 2015. During direct examination, defense counsel asked several questions regarding general campaign-finance legal requirements, to which the district court sustained several relevance-based objections saying to defense counsel,

> This is not the subject matter that you represented would be his testimony. You were very specific about what you wanted this for. It
> was represented as associated with the campaigns, how hectic the campaigns and things like that were. That was the representation, and the organizational structure of campaigns, not the difficulty complying with the law.

After defense counsel asked Mason if there was "any confusion about the compliance issues with vendors and sub vendors," the court sustained another

objection and called counsel to a sidebar conference, during which the court stated,

> Confusion goes to the state of mind of another, whether it's one person or a whole bunch. This gets back to the exact same concern I had last week about whether the Mondale Campaign sought an advisory opinion. Until I find out that that's—that your client heard it and relied upon it and bases a good faith defense on that, it's not relevant. Confusion generally is not relevant.

The district court sustained a relevance objection when government counsel asked Mason on cross-examination if he had ever advised a campaign that it could report a disbursement to the Commission as an audiovisual expense when the disbursement was for something else. Government counsel then asked Mason a series of questions regarding the legality of paying sub-vendors through an "umbrella vendor," including whether the umbrella vendor would have to actually work with the sub-vendors. On redirect examination, defense counsel asked Mason about the rules regarding paying sub-vendors through an umbrella vendor and possible confusion surrounding those rules. The district court overruled the government's objections, ruling that the government had opened

the door to the issue through its line of questioning on cross-examination. Mason continued to testify on this topic during the remainder of his testimony.

Prior to the beginning of the second trial, the district court granted the government's motion *in limine* to exclude Mason's testimony. It did so because Mason's testimony at the first trial "did not provide helpful context regarding the inner workings of federal campaigns at all, and only arguably touched on any relevant standard of care by alluding to general confusion," and instead offered an impermissible legal conclusion that the Commission regulations were confusing and that payments to sub-vendors through an umbrella vendor did not violate these regulations. See S. Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc., 320 F.3d 838, 841 (8th Cir. 2003) ("[E]xpert testimony on legal matters is not admissible."). The court accordingly excluded the evidence under Rule 403 of the Federal Rule of Evidence, finding that the "helpfulness of Mr. Mason's testimony to the jury's clear understanding of the general context of a political campaign and how a political campaign operates is outweighed by the danger of confusion of the issues and impermissible instruction on the law." The court noted that it would instruct the jury that the use of an umbrella vendor to pay sub-

vendors would not alone violate the Act and that Defendants were free to elicit testimony from other witnesses "regarding the hectic nature of political campaigns."

Benton served pretrial notice that he intended to call Link as an expert witness to testify regarding "the operating environment within federal candidate campaigns and the customs and practices and standards of care with respect to organizational structure;" "the customs and practices of federal candidate campaigns with respect to paying outside consultants through the use of corporations . . . and other similar entities;" and "the customs and practices of federal candidate campaigns with respect to the use of vendors who subcontract for services intended for the benefit of the federal candidate campaign." The government filed a motion *in limine* to exclude Link's testimony, which the court orally granted during trial.

Tate contends that the district court abused its discretion in excluding the experts' testimony because the impermissible legal testimony that the district court was concerned about was elicited by the government. The record shows, however, that the testimony was elicited by both sides. As the district court noted, testimony about the "hectic

nature" and operational structure of the Paul campaign was available from other witnesses with direct knowledge thereof, and so the court acted well within its discretion in excluding the proposed testimony.

2. Admission of the $25,000 Check

Benton argues that the district court abused its discretion in admitting evidence of the $25,000 check because it was not relevant to the theory of conviction and that any tangential relevance was outweighed by the danger of unfair prejudice. We disagree. The check was relevant to show that the purpose of the payments to Sorenson was to purchase his endorsement, rather than for "audio/visual expenses," as was reported to the Commission. Any potential prejudice resulting from admission of this evidence was mitigated by the district court's instruction that paying for an endorsement alone is not illegal.

3. Admission of Cortes Email

Kesari argues that the district court abused its discretion in admitting an email sent from Cortes to other campaign staff. The email stated that

"Dennis is not a good guy . . . but neither is Dimitri IMO- but then again I don't know it all so I leave it to you." The email also included several attachments, including the ICT invoices; one attachment bore a lewd title. Cortes opined, "The last attachment is an email (sorry for the lewdness) I got about a month ago- not sure who its from- my two guesses Dennis or Dimitri using dummy accounts." The district court did not abuse its discretion in admitting this evidence. In any event, any prejudice to Kesari was so slight as to render any error harmless. United States v. Falls, 117 F.3d 1075, 1077 (8th Cir. 1997).

F. Impeachment Evidence

Kesari argues that the government withheld favorable information derived from an October 9, 2015, interview between Sorenson and agents of the FBI, in violation of the Jencks Act, 18 U.S.C. § 3500(b), and Giglio v. United States, 405 U.S. 150, 154-55 (1972).

Kesari did not establish a violation of the Jencks Act because he has not shown that notes of this meeting exist. The Jencks Act requires a court to order the government, upon request by the defendant, to produce any statement in the

government's possession which relates to the matter on which a witness called by the government has testified on direct examination. 18 U.S.C. § 3500(b). In response to subpoenas issued by Defendants, the government stated that Sorenson had met with FBI agents on October 9 and that no notes were taken at the meeting. Kesari argues that trial testimony established that notes were taken at the meeting, but that testimony was equivocal. During the first trial, Sorenson was asked if people at the meeting were taking notes, and he responded, "I don't recall." Then, when asked, "Were [note] pads out?" Sorenson said, "Yes." When asked "And were people writing on those pads as you spoke to them?" he replied, "I would assume so, yes." During the second trial, FBI Special Agent Karen LoStracco, who attended the October 9 meeting along with two other agents, testified, "I think I usually take at least some notes. I don't recall an occasion where I didn't take notes. If I wasn't taking notes, somebody else was taking notes, meaning another agent." In the absence of any probative evidence that notes were taken at the October 9 meeting, no Jencks Act violation was established.

Kesari argues that even if no tangible notes exist, Giglio nonetheless entitled him to impeachment evidence from the meeting. As Kesari

offers only the speculative claim that the October 9 meeting must have produced impeachment evidence in light of Sorenson's penchant for dishonesty, he has not shown that any impeachment evidence existed and thus has established no Giglio violation.

The judgments are affirmed.

United States Court of Appeals
For The Eighth Circuit
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RE: 16-3861 United States v. Jesse Benton 16-3862 United States v. John Tate
16-3864 United States v. Dimitrios Kesari

Dear Sirs:

A published opinion was filed today in the above case.

Counsel who presented argument on behalf of the appellant in 16-3861 was Angela L. Campbell, of Des Moines, IA.

Counsel who presented argument on behalf of the appellant in 16-3862 was
Patrick N. Strawbridge, of Arlington, VA. The following attorneys appeared on the brief; David

Warrington, of Alexandria, VA; Laurin Mills, of Alexandria, VA; Cameron Norris of Arlington, VA.

Counsel who presented argument on behalf of the appellant in 16-3864 was Jesse Ryan Binnal of Alexandria, VA. The following attorney appeared on the brief; Susan Wright, of Alexandria, VA.

Counsel who presented argument on behalf of the appellee was Sonja Ralston, of Washington, DC.

The judge who heard the case in the district court was Honorable John A. Jarvey. The judgment of the district court was entered on September 20, 2016.

If you have any questions concerning this case, please call this office.

Michael E. Gans Clerk of Court

MDS

Enclosure(s)
cc: MO Lawyers Weekly

District Court/Agency Case Number(s): 4:15-cr-00103-JAJ-1
4:15-cr-00103-JAJ-2
4:15-cr-00103-JAJ-3

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 16-3861

United States of America

Appellee

v.

Jesse R. Benton

Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines (4:15-cr-00103-JAJ-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Kelly and Judge Stras did not participate in the consideration or decision of this matter.

July 06, 2018

Order Entered at the Direction of the Court: Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Michael E. Gans