07-5514-cr

To Be Argued By:
RICHARD J. SCHECHTER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-5514-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

JEANETTE FOXWORTH,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Alan H. Nevas, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on November 15, 2007. Defendant's Appendix ("DA") 11, 16-18. On December 7, 2007, the defendant filed a notice of appeal pursuant to Fed. R. App. P. 4(b) that was later deemed timely by the district court pursuant to Fed. R. App. P. 4(a)(5). DA11, 13, 19. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issues Presented for Review

1. Was there sufficient evidence to convict defendant of engaging in a single unitary scheme to defraud where the case was indicted, tried and argued on the basis of a single scheme, the evidence demonstrated the existence of a single scheme, and defendant was convicted of two wire fraud counts that pertained only to the criminal conduct that defendant concedes constitutes a tenable scheme to defraud?

2. Is the honest services fraud statute, 18 U.S.C. § 1346, constitutionally valid and applicable where a defendant bribes a public official to take actions to benefit the defendant and the bribe is repeatedly concealed from the public and investigating agents?

3. Was there sufficient evidence to find that defendant and a public official with whom she conspired made material misrepresentations and omissions that deprived the public of the official's honest services, when the bribe payments were checks made out to "cash" and to the public official's son, and the conspirators repeatedly concealed the fact that defendant bribed the public official to take actions that benefitted the defendant?

4. Was there sufficient evidence to convict defendant of making material false statements where she repeatedly lied to FBI agents about the nature of her relationship with a public official that she had bribed in exchange for receiving the public official's help to obtain business?

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Preliminary Statement

On April 3, 2007, a jury returned a guilty verdict against defendant, Jeanette Foxworth, for conspiracy to commit wire fraud, five counts of wire fraud, and three counts of making false statements to FBI agents. The evidence at trial included numerous corrupt payments made by defendant to Ernest Newton, a Connecticut State Senator, and damaging wire tap telephone conversations in which defendant and Newton discussed how Newton

could use his public office to benefit defendant. On November 7, 2007, the district court sentenced defendant to a non-Guidelines sentence of 15 months in prison.

On appeal, defendant challenges her convictions on various grounds. For the reasons set forth below, all of her claims are meritless.

Statement of the Case

On March 30, 2006, a Connecticut federal grand jury returned an indictment charging defendant with one count of conspiracy in violation of 18 U.S.C. § 371, five counts of wire fraud in violation of 18 U.S.C. §§ 1343, 1346, and 2, and three counts of making false statements to federal agents in violation of 18 U.S.C. § 1001. DA22-41. Trial began before a jury on March 27, 2007. On April 3, 2007, the defendant was convicted of all nine counts of the indictment. DA20-21. On November 7, 2007, the defendant was sentenced to nine concurrent 15-month terms of imprisonment, followed by two years of supervised release. DA16-18. Judgment entered on November 15, 2007. DA11.

On December 7, 2007, the defendant filed a notice of appeal after the ten-day deadline for appeal had expired. DA19. On January 23, 2008, the district court (Alan H. Nevas, J.) construed the notice of appeal as a request for an extension of time pursuant to Fed. R. App. P. 4(a)(5) and granted that request, thereby allowing the notice of appeal to be filed past the ten-day deadline. DA13.

Defendant's application for bail pending appeal was denied by both the district court and this Court. DA13. Defendant reported to prison in January 2008 and has completed her 15-month sentence. She is presently on supervised release.

Statement of Facts and Proceedings Relevant to this Appeal

A. The Criminal Conduct

Defendant Jeanette Foxworth was President and CEO of a small company in Louisiana that provided computer consulting services. Government Appendix ("GA") 164-171, 462. The company, known as "Acetech," or "Applicable Computer Engineering Technology," provided services throughout the United States. GA474-75.

Ernest Newton was a long-serving public official from Bridgeport, Connecticut. He was a representative for the 124th District in the Connecticut House of Representatives and became a Connecticut State Senator for the 23rd District in March 2003. GA200-05. As a State Senator, he was Deputy President Pro Tempore, a chairman of the public safety committee, a member of the committees on commerce and finance, revenue and bonding, general and transportation bonding, and legislative management. GA70. Members of the "revenue, finance and bonding committee" submit, screen and lobby for State bond funding for projects for their respective districts. GA207-08.

Defendant was charged with engaging in a conspiracy with State Senator Newton to obtain money and property, and to deprive the State of Connecticut and its citizens of the intangible right to the honest services of a public official (Newton) via a wire fraud scheme. DA22-41. From September 2003 through January 2004, defendant provided Newton with five checks totaling $3,000:

> 1. A September 2003 check for $300 issued on defendant's bank account made payable to "Cash;"
>
> 2. An October 2003 check for $450 issued on defendant's bank account made payable to "Cash;"
>
> 3. A November 2003 check for $250 issued on defendant's bank account made payable to "Cash;"
>
> 4. A December 31, 2003, check for $1,650 issued on defendant's corporate account made payable to "Chad Newton" (Senator Newton's son) and endorsed by both Chad Newton and Ernest Newton; and
>
> 5. A January 2, 2004, check for $350 issued on defendant's bank account made payable to "Chad Newton" endorsed by both Chad Newton and Ernest Newton.

GA162-68, 384-85.

None of the checks were recorded or marked as being loans or campaign contributions. The $1,650 corporate

check was recorded on the books of defendant's company as "miscellaneous expense" and abbreviated as "educational support." GA174. Newton did not disclose the existence of these payments in his Annual Statement of Financial Interests filed with the State of Connecticut. GA388-89. Newton's campaign did not report these checks as being campaign contributions in connection with his 2004 run for the Connecticut State Senate. GA374-76, 821. When defendant warned Newton that he was suspected of taking money from people in exchange for doing things for those people, Newton explained to defendant that he had not disclosed his relationship with defendant. GA1026-34.

After making these payments to Newton in late 2003 and early 2004, defendant sought Newton's assistance to use his status as an elected official to benefit defendant. Newton and defendant sought to influence persons Newton dealt with in his official capacity to steer contracts to the defendant or her business. In order to carry out this agreement, Newton and defendant used interstate wire communications, telephone calls that were intercepted by a wire tap.[1] *See* GA1026-97. In one of these calls, defendant left a message on Newton's telephone complaining that even though she had "invested money" in Newton and others, all she received was "nickels and dimes" and that she was not "getting shit out of this thing." GA1044.

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[1] Five of these calls, all interstate calls, were the subject of the wire fraud counts, counts 2 through 6 of the indictment. DA34-36.

In March 2004, the Charles Smith Foundation ("CSF"), a not for profit organization headed up by former NBA player Charles Smith, sought to obtain $3 million in state bond funding to initiate a project to bring a shopping center and pharmacy to the east end of Bridgeport. GA117-22, 211-18, 358-59. The request was made to Charles Clemons, a representative of the State legislature from Bridgeport who had replaced Newton when Newton became a State Senator in March 2003. GA205, 358-59. Clemons explained that at a June 2004 meeting he attended with Newton and Smith, Newton demanded that CSF give defendant's company a $100,000 contract as a condition of receiving State funding. GA216-18. Newton explained to Smith that as the third-ranking member of the Connecticut Senate he could make funding for the project "happen," but only providing that defendant received the $100,000 contract from CSF. *Id*. Clemons explained that the views of a Senator from a district where a bonding project was proposed would carry more weight than the views of other committee members who were not from the affected area. GA209-10.

In a telephone conversation on June 9, 2004 (count 2), Newton and defendant discussed how Newton would not bring $3 million in state funding to CSF unless Smith "puts $100,000 aside" for defendant and her former husband A.E.[2] Newton admitted that he was taking this action because defendant had asked him to do so. GA1045-50.

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[2] A.E. was an unindicted coconspirator. DA23.

In a second telephone call on June 9, 2004 (count 3), Newton, defendant and A.E. again discussed how Newton made it "perfectly clear" to CSF that if it received $3 million in state funding, it had to provide a $100,000 contract for defendant and A.E. GA1051-52. Newton admitted that he was doing so to fulfill his "end of the bargain." GA1052. Newton explained how he would "hold it up" (the $3 million in funding) until he got the commitment from CSF to provide the funding for defendant. GA1062. Newton explained in a July 2004 telephone conversation (count 4) with defendant that he "love[d]" the idea that people thought he had pulled the funding for the CSF project. GA1064-65.

In June and July 2004, Newton and defendant tried to use Newton's status as an elected official to influence the superintendent of the City of Bridgeport Public Schools, Sonia Diaz, to provide an auditing contract to the defendant. GA80-102. As the Bridgeport School Superintendent, Diaz was seeking state funding to conduct an audit to look at how the school system received and spent funds and the impact of those expenditures on student performance. GA80-81. Diaz had discussed her need for state funds to conduct the audit with a number of Connecticut legislators and Senator Newton, and requested additional State funds be made available to her school district. GA81-82, 85-86, 94-95. Newton explained to defendant in a June 2004 telephone conversation that if the superintendent was not responsive to Newton and defendant, Newton would "stop that goddamn education money so fuckin fast she [the superintendent] won't know what hit her." GA1043.

On July 2, 2004, Newton, defendant, and the superintendent met at a Bridgeport restaurant. The meeting was about how Newton, as head of the State education committee, was going to try to identify funds to help the Bridgeport school district. GA91. Newton told the superintendent that he was going to work on helping the school district get funds for the audit. GA91. Newton talked about having the defendant receive the contract to perform the audit. GA92. Diaz described the conversation as a "quid pro quo": "We were gonna help Jeanette. Jeanette – He was gonna help us get funding, and he very much wanted Jeanette to be the person who conducted the audit." *Id*. The superintendent put off Newton and defendant, saying that she couldn't promise that defendant's firm would be hired. *Id.*

In a telephone conversation on July 6, 2004 (count 4), defendant demanded that Newton take action as part of her agreement with Newton to help defendant obtain work from the Bridgeport Schools. GA1064-69. As defendant explained, "I want that audit really bad with the school board because they have some nice dollars in that thing." GA1067. Newton assured defendant that he would do "everything [he could] to work on it." *Id*. Two days later, on July 8, 2004 (count 5), defendant demanded that Newton call the Bridgeport school superintendent and speak highly of defendant's company. Defendant advised Newton to tell the superintendent that she (defendant) could provide "positive results" if she were hired to perform the audit. GA1073-74.

Two hours later, Newton contacted Diaz and told her in a telephone conversation that the "strategy" would be that whoever was selected to perform the school audit, Newton would try to have that company hire defendant. GA1094-97. Newton learned from Diaz that three companies had submitted bids to obtain the audit contract. *Id*. Newton then spoke to defendant by telephone (count 6) and advised her that there were three companies that had submitted applications to perform the school district audit that defendant wanted to perform. GA1075-77. Newton then assured defendant that whatever company was selected to perform the audit services, that company would be contacted by Newton on his official stationery and told to hire defendant. *Id*. Newton had earlier agreed to provide defendant with his official stationery so defendant could write letters on it to mayors of other Connecticut cities in an effort to enrich defendant. GA1071.

By the middle of July 2004, defendant had not received any business from either CSF or the Bridgeport school district. In a July 20, 2004, telephone conversation, defendant described $2,000[3] of the payments she made to Newton by admitting that "we never did anything with that 2,000. We never could get any business" and that "I'm not gonna pressure you [Newton] anymore about any work . . . ." GA1078. Defendant did, however, seek $500 from contributions received by Newton from a campaign fund raiser that Newton had just held. Defendant requested that $500 of these funds be given to A.E., so A.E. could

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[3] The two checks provided by defendant to Newton that were made payable to Newton's son "Chad" totaled $2,000.

provide the money to the East End Council, a Bridgeport political organization, to increase defendant's influence in Bridgeport. GA1082-93. Defendant explained to Newton that she would give the money back to Newton "next week." GA1090. Newton directed his campaign manager to issue a $500 check to A.E. GA376-78.

Defendant was interviewed by two FBI agents on January 31, 2005, at her New Canaan home. GA404-27. Three days earlier, these same agents had interviewed A.E. and left their business card with A.E. to arrange an interview with defendant. GA404-07. Defendant contacted the agents and arranged for the interview to occur on January 31, 2005. GA404.

Agent Gary Jensen explained that defendant told the agents that the checks given to Newton were a loan and were for Newton's campaign. GA415-16. Defendant explained that Newton had approached her and asked her to help Newton's sister, his campaign treasurer, and provide $2,000 to help the sister conduct a fund raiser for Newton's first run[4] for State Senate. GA414-17. Defendant told the agents that the checks provided to Newton were from herself to A.E., and then in turn were provided to Newton. *Id.* Defendant claimed that she provided three checks to Newton for a total of $1,800 and that the checks were made out to a "campaign." *Id*. When the agents confronted her with the checks, her demeanor changed and she became agitated. GA423-24.

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[4] Newton first ran for State Senate in March 2003. GA203-04.

Defendant was also asked about $500 that Newton's campaign had given to A.E. She denied having had any conversation with Newton about the $500. GA420. Specifically, defendant denied ever having had a conversation with Newton about getting money to A.E. so that A.E. could give the money to the East End Council *Id.* Defendant claimed that the $500 was "strictly" to pay back part of a loan made to Newton in connection with his first run for State Senate. GA422.

B. The Defense Case

Defendant called three witnesses. GA460-786. Diane Bova, defendant's employee, claimed that she, defendant and Newton had a conversation in which Newton asked defendant for a loan. GA518-23. Bova admitted, however, that Newton requested that the check be made payable to Newton's son "Chad." GA576-77. Although defendant's business was routinely hired to ensure integrity of accounting systems, the check to "Chad" for $1,650 was not recorded as a loan in defendant's business records. GA532-33.

A.E. testified that it was he, and not defendant, who had provided defendant's checks to Newton as campaign contributions. GA712-14. A.E. had previously testified in the grand jury, however, that he had not seen any checks that were issued by defendant to the campaign. GA715-16. A.E. admitted that after Newton was unable to pay back the money provided to him, Newton agreed to help defendant's business interests. GA722-25. Nadine Jones, a Philadelphia city employee who worked with defendant,

explained that defendant often gave A.E. money. GA784-86.

The district court explained the theory of the defense as follows:

> The defendant in this case has presented evidence that she had no agreement with Ernest Newton to unlawfully obtain money or property, or to deprive the citizens of the state of Connecticut of the honest services of then Senator Newton.
>
> The defendant contends that she gave the $2,000 to Ernest Newton as a loan, and it was not . . . given to further any criminal scheme or corrupt . . . conduct.

GA884.

The jury convicted defendant on all counts.

C. The Sentencing

At sentencing, the district court found the total offense level to be 26, and that the defendant fell within criminal history category I. GA973. The Guideline range was 63-78 months. *Id.* The court sentenced defendant to a non-Guidelines sentences of 15 months on each count to avoid unwarranted sentencing disparities. GA1017-19. The court noted that a Guidelines sentence would exceed the sentences of those more culpable than the defendant. GA1017. Prior to imposing sentence on Foxworth, the

district judge had sentenced Newton to 60 months based on his guilty plea to corruption and tax charges. GA1017. Newton was not charged with, and was not sentenced upon, conduct involving defendant Foxworth.

Summary of Argument

1. This case was indicted, tried and argued to the jury on the theory that defendant and Newton engaged in a single unitary scheme to defraud the public of the honest services of Newton, a public official, for the financial benefit of defendant. Defendant's suggestion that the jury might have convicted her on an inadequate theory of fraud is not possible given the evidence presented and the fact that defendant was convicted of certain wire fraud counts pertaining only to a theory of fraud that she concedes was viable. Moreover, even assuming *arguendo* that one inadequate theory was presented to the jury, defendant cannot demonstrate that she was prejudiced. Accordingly, if there was any error presented to the jury, it was harmless error that would not require this Court to overturn the guilty verdict on most of the counts in the indictment. Since defendant received concurrent 15-month prison sentences on each of the counts upon which she was convicted, any error would not require her sentence to be vacated.

2. Defendant's belated challenge to the constitutionality of the honest services fraud statute, 18 U.S.C. § 1346, is foreclosed by this Court's opinion in *United States v. Rybicki*, 354 F.3d 124, 129 (2d Cir. 2003) (en banc). The honest services fraud statute is constitutionally valid on its face, constitutionality valid as applied to the facts of this case, and not overbroad. Honest services fraud prosecutions under section 1346 effectuate the legitimate governmental aim of punishing those who use interstate wire communications to carry out

fraudulent schemes to deprive others of their intangible rights to the honest services of public officials. Given that the evidence demonstrated that defendant Foxworth paid $3,000 in bribes to Newton in exchange for his efforts to find her business, and that Newton used his office to threaten to withhold state funding to a not for profit organization and the Bridgeport school district, this prosecution was constitutionally permissible in all respects.

3. The government presented sufficient evidence to demonstrate that the misrepresentations and omissions that formed the basis of the wire fraud counts were material. The actions taken by defendant and Newton to conceal the bribes were the type of material misrepresentations and acts of concealment that were capable of influencing the decision makers that defendant and Newton approached to further their conspiratorial action. When the evidence is viewed in the light most favorable to the prosecution, there was more than sufficient evidence to uphold the jury's conclusion that material misrepresentations and ommissions were made.

4. Similarly, the government presented sufficient evidence to demonstrate that defendant's statements to the agents were knowingly false and were material to the agents' investigation. The issue is not whether the agents relied upon or believed defendant's false statements. The issue is whether defendant's statements were capable of influencing a reasonable decision maker. When the evidence is viewed in the light most favorable to the prosecution, there was more than sufficient evidence to

uphold the jury's conclusion that defendant's statements were knowingly false and material.

Argument

I. The jury properly convicted defendant of engaging in a single-object conspiracy and a unitary scheme to defraud

A. Relevant facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing law and standard of review

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, we review the evidence in the light most favorable to the prosecution, drawing permissible inferences in its favor, and will not set aside a conviction that rests on evidence that would convince a reasonable juror that the crime charged was proved beyond a reasonable doubt." *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006) (citing *United States v. Zhou*, 428 F.3d 361, 369-70 (2d Cir. 2005)). The evidence must be viewed in conjunction, not in isolation, and its weight and the credibility of the witnesses is a matter for argument to the jury, not a ground for reversal on appeal. The task of choosing among competing, permissible inferences is for the fact-finder, not the reviewing court. *See*, *e.g.*, *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003); *United States v. Johns*, 324 F.3d 94, 96-97 (2d Cir. 2003).

"The ultimate question is not whether *we believe* the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find*." *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Where multiple theories of guilt are presented to a jury, and one of those theories is invalid, a general verdict rendered by the jury may be set aside only if the presentation of multiple theories prejudiced the defendant. *Hedgpeth v. Pulido*, 129 S.Ct. 530 (2008) (per curiam). "A reviewing court finding such error should ask whether the flaw in the instructions 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id*. at 530-31. "[V]arious forms of instructional error are not structural but instead trial errors subject to harmless-error review." *Id*. at 532. Under this harmless-error standard, the Court considers the error harmless "if there is 'fair assurance' that the jury's 'judgment was not substantially swayed by the error.'" *United States v. Estrada*, 430 F.3d 606, 622 (2d Cir. 2005) (quoting *United States v. Yousef*, 327 F.3d 56, 121 (2d Cir. 2003) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946))).

C. Discussion

Defendant contends that her convictions for conspiracy and wire fraud are flawed because the jury was presented with two legal theories, one of which she claims was untenable. Def. Brief at 12-37. Defendant never raised this issue below. In fact, defendant never requested that the

district court instruct the jury on multiple conspiracies or multiple schemes to defraud. In any event, given that defendant's argument misreads the indictment and distorts the unitary theory presented at trial, it should be rejected.

1. This matter involved a unitary scheme to defraud

Contrary to defendant's suggestion, this case involved a single-object conspiracy and a unitary scheme to defraud. The sole object of the conspiracy was that defendant, Newton, and A.E. engaged in a scheme to defraud in violation of 18 U.S.C. §§ 1343, 1346. While the scheme had various components, and each phone call constituted a separate execution of the scheme, it was a single scheme. The sole object of the scheme was that defendant sought to defraud the public by bribing Newton, a public official, and causing Newton to use his official position to act in defendant's financial interest. Thus, defendant is entitled to no relief by suggesting for the first time in her appeal that she could have been convicted on the basis of an "untenable" theory, as there was only one theory, completely tenable, underlying the prosecution of this case.

The indictment charged a conspiracy to commit "an offense"– not multiple offenses. DA24. The indictment names the single offense: "to devise and intend to devise a scheme and artifice to obtain money, and property, and to defraud the State of Connecticut and its citizens of the intangible right to the honest services of Public Official [Newton] . . . ." *Id.* The indictment makes clear that the

single offense is wire fraud by referencing "Title 18, United States Code, Sections 1343 and 1346." *Id*. Section 1343 is wire fraud; section 1346 defines a scheme or artifice to defraud to include a scheme to "deprive another of the intangible right of honest services."

The indictment describes the manner, means and purposes of the conspiracy and charges overt acts. DA25-34. The Overt Act section has various headings which divide the overt acts into sections. The first section, entitled "The Defendant's Payments to Public Official," details the five payments made by defendant to Newton. DA27-28. The next section, entitled "Acts in Furtherance of the Conspiratorial Agreement," lists three acts that pertained in general to the conspiracy. DA28-29. The remaining three sections describe acts pertaining to a specific component of the conspiracy: (1) the $100,000 that defendant sought from the $3 million funding to CSF; (2) the audit contract that defendant sought from the Bridgeport School Board; and (3) defendant's concealment of her true relationship with Newton by lying to the FBI agents. DA30-34.

The wire fraud counts in the indictment, counts 2 through 6, similarly describe a unitary fraud scheme by describing the single scheme "as set forth in paragraphs 1 through 7 of Count One of the Indictment." DA35. That the wire fraud counts describe more than one way in which the scheme was carried out does not mean that there was more than one scheme. It has long been settled that

"[a] single scheme to defraud may involve a

> multiplicity of ways and means of action and procedure. It may be such that the complete execution of it would involve the commission of more than one criminal offense. Mere details may be changed and the scheme remain the same. As the execution of the scheme (or the intention to devise the scheme) proceeds, new ways may be adopted or invented to effectuate the original design. The important thing is that the scheme, or the intention to devise it, shall remain the same."

Owens v. United States, 221 F.2d 351, 354 (5th Cir. 1955) (quoting *Weiss v. United States*, 122 F.2d 675, 680 (5th Cir. 1941)); *see United States v. Morse*, 785 F.2d 771, 774 (9th Cir. 1986) (factors to determine the existence of one scheme include nature of the scheme, identity of participants, and the commonality of time and goals).

The evidence demonstrated a single scheme to defraud. Defendant paid Newton $3,000 over a period from late 2003 to early 2004. Defendant "invested" in Newton with the intent that Newton would use his office to benefit defendant. GA1044. By June 2004, Foxworth complained that she was not receiving "shit out of this thing," meaning that she did not receive the benefit of her "bargain" with Newton. GA1044, 1052. Newton then tried to fulfill his end of the "bargain" by using his office to generate business for defendant. Newton first leaned on CSF to provide defendant with a $100,000 contract. Shortly thereafter, Newton tried to use his office to lean on the school superintendent to generate an auditing contract for defendant. Newton also agreed to provide defendant with

his official stationery so she could write letters on it to mayors of other Connecticut cities to generate business. GA1071. All of these actions were undertaken by the same participants (Newton and defendant) at the same time (June and July 2004) for the same purpose (to generate business for defendant). In fact, in one of the telephone calls that was the subject of a wire fraud count (count 4), defendant and Newton discussed both the $100,000 contract from CSF and the auditing contract that defendant wanted to obtain from the superintendent. Under these circumstances, it was certainly rational for the jury to find that defendant's actions were part of the same unitary scheme to defraud the public of Newton's honest services. GA1064-69.

The fact that defendant paid Newton in late 2003 and early 2004, but he did not reciprocate with corrupt actions until months later, does not mean that there was more than one scheme to defraud. *Cf. United States v. Ganim*, 510 F.3d 134, 145 (2d Cir. 2007), *cert denied*, 128 S. Ct. 1911 (2008) (specific acts of corruption need not be linked to a specific benefit). It simply means that the scheme existed over a significant period of time. Of course, defense counsel was free to argue, and did argue, that the government had failed to prove the existence of a conspiracy or a scheme to defraud since defendant's payments to Newton were made prior to the time that the CSF grant funds and the school audit funds were even being discussed. GA828-34. The jury was entitled to reject this argument, as their verdict shows.

Furthermore, the district court made it clear to the jury

that the government must prove beyond a reasonable doubt "that there was a scheme or artifice to defraud . . . as alleged in the Indictment." GA920; *see*, *e.g.*, *United States v. Frega*, 179 F.3d 793, 804 (9th Cir. 1999) ("the court's repeated use of words such as 'the' and 'a' scheme, rather than 'some' or 'any,' coupled with the direction that a verdict has to be unanimous, sufficiently informed the jury of the need to find a single scheme"). Thus, by convicting defendant on each of the wire fraud counts, the jury necessarily found that the government had proven the existence of the unitary scheme charged in the indictment.

When the evidence is now viewed in the light most favorable to the prosecution, the jury's conclusion that a single scheme to defraud existed should not be disturbed. *See Morse*, 785 F.2d at 774 ("[t]o disturb the jury's finding [of a single scheme to defraud] in the instant case, we would have to conclude, after viewing the evidence in the light most favorable to the prosecution, that *no* rational trier of fact could have found a single scheme to defraud"). Therefore, if this Court concludes that there was a single scheme to defraud as charged in this matter, and as proven at trial, it need not consider defendant's argument regarding the so-called "multiple alternative grounds for conviction." Def. Brief at 19.

2. Newton acted corruptly in his official capacity to obtain an auditing contract for defendant

Defendant contends that Newton's efforts to secure an audit contract for defendant could not be part of an honest

services fraud scheme. She suggests that Newton somehow acted outside his "official capacity" in connection with trying to obtain the audit contract for defendant. Def. Brief at 13-14, 24. This baseless suggestion is unsupported by the record or the jury's verdict. In fact, when the evidence in this case is examined more closely, it is evident that defendant's premise that the indictment charged, or that the government relied upon, a legally inadequate theory is flawed.

Newton approached the school superintendent and made it clear that as a "quid pro quo," the superintendent had to give defendant an auditing contract in order for the Bridgeport schools to receive state funding for the audit. GA92. During the conversation, it was openly discussed that Newton was head of the State education committee that directed State funding to school districts throughout Connecticut. GA91. In Newton's discussions with defendant, Newton promised to "stop that goddamn education money so fuckin fast she [the superintendent] won't know what hit her" if the superintendent did not take action to benefit the defendant. GA1043. When it looked like defendant would not get the auditing contract, Newton assured defendant that whatever company was selected to perform the audit, that company would be contacted by Newton on his official stationery and told to hire defendant. GA1075-77. It was therefore clear that Newton attempted to use the influence of his public office, with its leverage over the allocation of state funding to the Bridgeport school district, in order to enrich defendant.

These actions, coupled with the fact that the defendant had previously paid an undisclosed $3,000 bribe to Newton to take actions for defendant's benefit, constitutes a conspiratorial agreement and fraud scheme that deprived the public of its right to the honest services of its State senator. Thus, contrary to defendant's suggestion, it would have been totally proper for the grand jury to charge, and the government to try the case, on the basis of the conspirators' corrupt efforts regarding the school audit alone. In any event, the evidence presented was more than sufficient to convict defendant of engaging in a single scheme to defraud that included the school audit as well as the corrupt acts regarding the $3 million CSF funds.

Nor was there any problem with the district court's instructions regarding the scheme to defraud. The court instructed the jury that the government was required to prove that defendant acted with specific intent to defraud and to deprive the citizens of Connecticut "of their intangible right to the honest services of a public official; that is, either to bribe a public official, or to aid the public official in soliciting, demanding, accepting, or agreeing to accept a bribe." GA921. The defendant raised no objection to the instruction at trial and does not challenge the instruction in this appeal.[5] In light of the instruction, it is

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[5] Thus, cases cited by defendant (Def. Brief at 24-29) where a defendant challenged faulty jury instructions regarding the meaning of "honest services" are plainly inapposite. Similarly, the cases cited involving campaign contributions are also inapposite as the jury was entitled to conclude that (continued...)

readily apparent that the jury found that defendant's payments to Newton were a bribe and not a loan. Accordingly, the jury could have reasonably concluded that Newton's actions regarding the audit contract, taken after he had been bribed to enrich defendant, deprived the public of its right to the honest services of a public official free from deceit, favoritism, bias, conflict of interest, and self-enrichment.

The jury's verdict on counts 5 and 6 underscores the fact that the jury did not view the conduct to secure the audit contract as innocuous or mere "lobbying." The phone conversations that were the subject of these two fraud counts pertained only to the efforts taken by defendant and Newton regarding the auditing contract. There was no mention in these calls of the $100,000 contract that Newton tried to obtain for defendant by threatening to withhold $3 million in State funding from CSF. Thus, in convicting defendant on counts 5 and 6, the jury necessarily found that these two phone calls were part of the unitary scheme to defraud. In so doing, the jury rejected defendant's suggestion that Newton's actions regarding the audit contract were proper or that her actions in seeking Newton's help to obtain the school audit were somehow protected by the First Amendment.

Indeed, what is quite clear from the jury's verdict on the five wire fraud counts is that it found that defendant

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[5] (...continued)
defendant provided Newton with bribes, not campaign contributions.

engaged in a single unitary scheme to defraud. Since the jury convicted defendant on counts involving solely a discussion of the $3 million funding to CSF (counts 2 and 3), and on counts involving solely the auditing contract (counts 5 and 6), there is no confusion regarding what the jury's verdict means. The jury found that defendant engaged in a unitary fraud scheme that could not have been based solely on the so-called "legally inadequate 'Public Schools' ground." Def. Brief at 19.

Therefore, contrary to defendant's suggestion, there is no need for this Court to consider defendant's argument regarding alternative grounds for conviction.

3. Defendant was convicted on a theory that she concedes was tenable

As noted above, defendant seeks to take the single object of the conspiracy and the unitary scheme to defraud and divide it into two distinct schemes: (1) involving the $100,000 that defendant sought to obtain from the potential $3 million grant to CSF; and (2) the audit contract that defendant sought to obtain from the Bridgeport Public Schools. Defendant then suggests that the second object was legally untenable. Def. Brief at 13. By suggesting that the second theory above was untenable, defendant effectively concedes that the first of her so-called theories was legally tenable. Therefore, she effectively concedes that if the jury had convicted her on the first theory set forth above, her conviction would be proper.

She argues, however, that it is impossible to tell which theory the jury selected (Def. Brief at 13) and opines that the verdict could "have been based solely upon the second theory set forth above, the legally inadequate 'Public Schools' grounds." Def. Brief at 19. She then cites *Griffin v. United States*, 502 U.S. 46 (1991), and *United States v. Yates*, 354 U.S. 298 (1957), to suggest that she is entitled to automatic reversal. Since this argument ignores current Supreme Court case law, it should be rejected.

To be clear, the government maintains that: (1) there was only one scheme to defraud; and (2) it was a proper theory upon which to charge and convict defendant for honest services fraud. But even assuming *arguendo* that defendant's tortured analysis regarding two separate schemes or objects had any merit, her argument would not entitle her to any relief as she cannot establish prejudice as required by *Hedgpeth v. Pulido*, 129 S.Ct. 530 (2008). In *Hedgpeth*, the Court made it clear that that the error in *Yates,* that resulted in setting aside a verdict that could have been based on a legally flawed theory, was subject to harmless-error review. *Id.* at 531-32. As the following analysis demonstrates, defendant cannot establish any prejudice and thus, her purported claim of error should not result in any relief.

Defendant Foxworth was convicted on each of the five wire fraud counts in the indictment. Two of these counts, counts 2 and 3, pertained only to the $100,000 that defendant sought to obtain from the $3 million funding to CSF. Specifically, on June 9, 2004 (count 2), Newton and defendant discussed how Newton, a member of the State

bond committee, would not bring $3 million in state funding to CSF unless Charles Smith "puts $100,000 aside" for defendant. In this call, Newton admitted that he was taking this corrupt action because defendant had asked him to do so. GA1045-50.

In a second wire communication on June 9, 2004 (count 3), Newton, defendant and A.E. once again discussed how Newton made it "perfectly clear" to CSF that if it received $3 million in state funding, it had to provide a $100,000 contract for defendant and A.E. GA1051-52. Newton admitted that he was doing so to fulfill his "end of the bargain." Newton explained how he would "hold it up" (the $3 million in funding) until he got a commitment from CSF to provide the funding for defendant. GA1052.

Thus, by convicting defendant on counts 2 and 3, it is clear that the jury convicted defendant on the theory that she now concedes was tenable. This is necessarily the case since neither call that was the subject of count 2 or 3 ever mentioned anything to do with Newton's efforts to secure an audit contract from the school superintendent for defendant. Therefore, defendant's Herculean efforts to turn this case into one involving multiple schemes to defraud to create some type of jury uncertainty is not only baseless, it would not require this Court to overturn defendant's convictions on these two wire fraud counts.

Similarly, defendant's argument regarding multiple schemes to defraud, even assuming it had any merit, would not require this Court to disturb the guilty verdicts on the

conspiracy count (count 1) or the false statement counts (counts 7 to 9). Defendant has not demonstrated that she was prejudiced in any way by the introduction of evidence concerning her and Newton's efforts to obtain an audit contract, even assuming that this evidence could not form the basis of an honest services fraud. Indeed, the jury had more than sufficient evidence to convict defendant of engaging in a conspiracy with Newton on the bases of the conspirator's efforts to obtain the CSF contract. Thus, even if this Court were to find that the "Public Schools grounds" was not an adequate theory to support an honest services fraud, and that it was somehow "error" to present this argument, the error was harmless since "there is fair assurance that the jury's judgment was not substantially swayed by the error." *United States v. Estrada*, 430 F.3d 606, 622 (2d Cir. 2005) (citing *United States v. Yousef*, 327 F.3d 56, 121 (2d Cir. 2003) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946))). The same is true with respect to the false statement counts (counts 7 through 9), as those counts did not require any finding involving Newton's conduct to obtain an auditing contract for defendant from the superintendent of the Bridgeport schools.

Thus, even assuming *arguendo* that the government's theory regarding the audit contract was error, any such error would have been harmless regarding the conspiracy count, two of the wire fraud counts (counts 2 and 3), and the false statement counts (counts 7 through 9).[6] Given

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[6] If this Court were to find that an honest services fraud (continued...)

that defendant received concurrent sentences of 15 months on each count, her sentence would remain undisturbed.

4. Evidence regarding Newton's financial disclosures, campaign contributions and official stationery was properly admitted

Defendant now complains, for the first time on appeal, that the jury heard evidence about Newton's financial disclosures and campaign financing regulations.[7] Def. Brief at 33. She mischaracterizes the evidence and the government's theory of the case by complaining that "misuse or nondisclosure of campaign funds does not constitute 'honest services' fraud." Yet this argument rests on a false premise – that the $3,000 were campaign contributions – which the evidence of Newton's financial and campaign disclosures refuted, and which the jury properly rejected. The evidence demonstrated that Newton did not include the checks made out by defendant in the Annual Statement of Financial Interests that he filed. GA388-89. Thus, Newton did not consider the payments he received from defendant to be loans. The effort to conceal these payments was certainly relevant to prove the

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[6] (...continued)
scheme could not be based on Newton's efforts to secure an auditing contract for defendant, the Court would reverse the conviction on counts 4 through 6 as the wires that were the subject of those counts did pertain in part (count 4) or in whole (counts 5 and 6) to the audit contract.

[7] Defendant raised no objection at trial to this evidence. GA374-76, 389.

existence of the conspiracy, the fact that the payments were bribes, and the intent to defraud the public by concealing the material facts regarding Newton and defendant's financial relationship.

Similarly, evidence that Newton gave $500 of his campaign funds to A.E. at defendant's request when the purpose of the expense had nothing to do with Newton's campaign was also relevant to demonstrate the conspirators' relationship. The fact that defendant felt comfortable demanding that Newton use $500 of his campaign funds to provide the money to A.E. to increase defendant's influence in Bridgeport demonstrates that Newton and defendant were engaged in a corrupt relationship. The government did not argue that the misapplication of this $500 was by itself an honest services fraud. Rather, what is relevant is that: (1) defendant demanded that Newton misapply these funds for defendant's benefit; and (2) defendant later lied about it when speaking to the FBI agents. Thus, the admission of this evidence was proper.

Defendant also complains for the first time about evidence regarding Newton's "official" stationery. Def. Brief at 35-36. Once again, however, the government never argued that the use of Newton's stationery alone constituted a theft of honest services. Rather, the conspirators' relationship was demonstrated by evidence that (1) Newton assured defendant that whatever company was selected to perform the audit, that company would be contacted by Newton on his official stationery and told to hire defendant (GA1075-77); and (2) Newton agreed to

provide defendant with his official stationery so she could write letters on it to mayors of other Connecticut cities in an effort to enrich herself (GA1071). *See United States v. Frega*, 179 F.3d 793, 806 (9th Cir. 1999) (evidence regarding relationship of attorney and judges he bribed is relevant even if evidence did not pertain to "official acts" of judges). There was no danger that the jury somehow convicted defendant merely because Newton offered to use his "official" stationery as the defendant suggests. Def. Brief at 36.

II. The honest services fraud statute, section 1346, is not unconstitutional as applied to defendant, facially vague or overbroad

A. Relevant facts

The relevant facts are set forth in the Statement of Facts, above.

B. Governing law and standard of review

A statute is unconstitutionally vague if it "'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *United States v. Lanier*, 520 U.S. 259, 266 (1997) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). "A penal statute is void for vagueness if it does not define the criminal offense with sufficient definiteness to allow ordinary people to understand what conduct is prohibited or if the statute is sufficiently indefinite to allow arbitrary

or discriminatory law enforcement." *United States v. Ansaldi*, 372 F.3d 118, 122-23 (2d Cir. 2004) (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

"[C]laims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate 'only spoken words.'" *Broadrick v. Oklahoma*, 413 U.S 601, 612 (1973). The [O]verbreadth doctrine "has been employed by the [Supreme] Court sparingly and only as a last resort. . . . overbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct." *Id*. at 613.

Where an appellant, like Foxworth, fails to raise an issue below, the standard of review is plain error. *United States v. Venturella*, 391 F.3d 120, 133 (2d Cir. 2004) (applying plain-error review when vagueness challenge raised for first time on appeal); *cf. United States v. Amer*, 110 F.3d 873 (2d Cir. 1997) (concluding that defendant forfeited his overbreadth challenge to a criminal statute raised for the first time on appeal, but noting that there was no plain error "even under the somewhat less stringent version of plain-error analysis applicable to alleged 'errors of constitutional magnitude'") (quoting *United States v. Torres*, 901 F.2d 205, 228 (2d Cir. 1990) '"The framework of the analysis for plain error pursuant to Rule 52(b) is the four-pronged test set forth in *United States v. Olano*, 507 U.S. 725, 732 . . . (1993). Before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then

exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Rybicki*, 354 F.3d 124, 129 (2d Cir. 2003) (en banc) (quoting *United States v. Thomas*, 274 F.3d 655, 667 (2d Cir. 2001) (en banc)). An error is generally not "plain" under Rule 52(b) unless there is binding precedent of this Court or the Supreme Court, except "in the rare case" where it is "so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite defendant's failure to object." *United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) (internal quotation marks and citations omitted); *see also United States v. Irving*, 07-1312-cr, mem. op. at 28 (2d Cir. Jan. 28, 2009).

C. Discussion

At trial, defendant never complained in any manner about the constitutionality of the honest services statute, 18 U.S.C. § 1346. Nevertheless, she now suggests that her convictions for honest services wire fraud are improper due to constitutional concerns. Def. Brief at 37-50. As the case law plainly provides, however, section 1346 is not unconstitutionally vague as applied to the facts of this case, is not facially vague and is not overbroad. Thus, defendant's argument is baseless and should be rejected as it does not constitute error, let alone plain error.

1. Section 1346 is constitutionally valid as applied to this facts of this case and is not unconstitutionally vague

Defendant suggests that the honest services fraud statute did not provide her with adequate notice that her conduct was prohibited. Thus, she contends that section 1346 is unconstitutionally vague as applied to the facts of her case. Def. Brief at 41-45. The obvious flaw in her analysis is that she does not accurately acknowledge the facts of her case. In her sanitized characterization of the facts, Foxworth simply lent money to Newton, who "thereafter agreed to lobby on Foxworth's behalf." Def. Br. at 42. This version of the facts starkly contrasts, however, with the evidence presented at trial. When the facts of this case are evaluated, it is obvious that the honest services fraud statute is constitutional as applied to defendant and thus, her claim must fail. *United States v. Rybicki*, 354 F.3d 124, 129 (2d Cir. 2003) (en banc) ("[O]ne whose conduct is clearly proscribed by the statute cannot successfully challenge it for vagueness") (quotation marks omitted).

At trial, the evidence demonstrated that defendant bribed Newton in exchange for Newton using his official position to benefit defendant. As already noted, the evidence showed that defendant's payments were bribes rather than loans or campaign contributions. Moreover, when Newton corruptly demanded that CSF and the superintendent provide contracts to defendant or face the threat of losing grant funds or education funding, he was effectively engaging in extortion. And in neither situation

did he disclose the fact that he had received bribes from defendant. Similarly, when Newton publicly disclosed his financial interests, he concealed the fact that defendant had provided him with a series of bribes. Finally, when defendant was asked about payments to Newton, she lied about the nature of her relationship and the bribe payments. Under these circumstances, defendant's conduct falls squarely within the core meaning of honest services fraud. Any reasonable person would be on notice that such conduct is proscribed by § 1346.

Defendant also maintains that section 1346 is unconstitutionally vague and thus, facially invalid. Def. Brief at 45-50. Defendant's constitutional attack on section 1346 has previously been rejected in this Circuit and should be rejected here. *Rybicki*, 354 F.3d at 144 ("We conclude that the statute is not unconstitutional on its face . . . ."). Although *Rybicki's* holding was limited to private-sector cases, its analysis applies with equal force here. The point is illustrated by *United States v. Paradies*, 98 F.3d 1266, 1282-84 (11th Cir. 1996). In that case, the defendants were convicted of engaging in an honest services fraud by making payments to a city councilman who in turn acted in the defendants' financial interest. The *Paradies* defendants, like Foxworth here, argued on appeal that their convictions should be overturned because section 1346 was unconstitutionally vague. In rejecting that argument, the Eleventh Circuit explained that "[i]t should be plain to ordinary people that offering and accepting large sums of money in return for a city councilman's vote is the type of conduct prohibited by the language of § 1346." *Id*. at 1283. Furthermore, the Court noted that

"[t]he contentions of defendants who claim that it is unclear whether their conduct is covered by § 1346 have a hollow ring, because until the Supreme Court's decision in *McNally v. United States* . . . , federal courts had uniformly construed the mail fraud statute to cover the situation where public officials received bribes and kickbacks thereby depriving the citizenry of their 'intangible rights' to good and honest government." *Id*. at n. 30 (citations omitted).

Thus, defendant could quite easily understand that her conduct in bribing Newton in exchange for his using his office to benefit defendant was prohibited conduct proscribed by section 1346. *See Rybicki*, 354 F.3d at 142 ("We conclude that the statute, as applied to the defendants' intentionally fraudulent behavior, 'define(s) the criminal offense with sufficient definiteness that ordinary people (such as the defendants) can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement'") (citation omitted). Therefore, defendant's current suggestion that she was somehow entitled to provide funds to Newton as part of her right "to petition her elected representative" (Def. Brief at 42) rings hollow.

In short, defendant was not convicted simply because Newton tried to use his influence on her behalf. Rather, defendant was convicted because she bribed Newton to use his influence on her behalf, Newton used his office corruptly to coerce others to give defendant business, and defendant sought to conceal this corrupt activity.

Moreover, the fact that the jury was instructed on the requisite intent needed to engage in honest services fraud eliminates any possibility that the jury convicted defendant for conduct that was somehow protected by the First Amendment. At trial, the district court instructed the jury on the elements of wire fraud and the requisite intent required:

> The second element that the government must prove beyond a reasonable doubt is that the defendant participated in the scheme to defraud knowingly, willfully, and with the specific intent to defraud and to deprive the citizens of Connecticut of their intangible right to the honest services of a public official; that is, either to bribe a public official, or to aid the public official in soliciting, demanding, accepting, or agreeing to accept a bribe.

GA921. By finding defendant guilty of wire fraud, the jury necessarily found that defendant had the specific intent to defraud and to deprive the public of its intangible right to the honest services of Newton, an elected official. *See United States v. Margiotta*, 688 F.2d 108, 129 (2d Cir. 1982) (broad language of mail fraud statute is not unconstitutionally vague because there is a requirement that defendant must have acted willfully and with a specific intent to defraud); *United States v. Sorich*, 523 F.3d 702, 711 (7th Cir.), *reh'g denied*, 531 F.3d 501 (2008)(rejecting the claim that section 1346 is unconstitutionally vague as applied because "the specific intent requirement of mail fraud seriously undercuts any

claim to a lack of notice that [defendants'] behavior was criminal").

Defendant can point to no case where a court has held that section 1346 is unconstitutionally vague on its face or as applied. Indeed, every court that has addressed similar vagueness challenges to such charges has rejected them. *United States v. Warner*, 498 F.3d 666, 697-99 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 2500 (2008) ("The constitutionality of § 1346 has repeatedly been challenged, and every circuit to address this issue has upheld" the statute including *Rybicki* and cases from six other circuits); *accord Sorich*, 523 F.3d at 711. Defendant's suggestion that *Rybicki* was not a "public corruption" case (Def. Brief at 37, n.4) is of no moment. The *Rybicki* Court noted that while the "meaning of 'scheme or artifice to defraud' with respect to public corruption cases" was not before it, the Court explained that "we have been given no reason to doubt that it is susceptible to a similar mode of analysis . . . ." 354 F.3d at 138-39.[8]

Numerous appellate court have rejected the argument that section 1346 is unconstitutionally vague as applied to

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[8] Indeed, federal appellate courts have recognized that the application of "honest services" in the private sector creates more issues than in the public sector because a public official *inherently* owes a fiduciary duty to the public, while such a strict duty of loyalty ordinarily is not part of private sector relationships. *See*, *e.g.*, *United States v. deVegter*, 198 F.3d 1324, 1328-29 (11th Cir. 1999).

public corruption cases. *See*, *e.g.*, *Warner*, 498 F.3d at 697-98 (state official accepted personal financial benefits in exchange for official acts); *United States v. Hasner*, 340 F.3d 1261, 1269 (11th Cir. 2003) (per curiam) (public official and consultant convicted where public official recommends that consultant be hired by government agency but fails to disclose funds he was to receive from consultant); *United States v. Frega*, 179 F.3d 793, 803 (9th Cir. 1999) (bribes paid by attorney to judges within statute as a person of reasonable intelligence would conclude that accepting a bribe is criminal). Given the lengthy history of cases criminalizing the payment of bribes to a public official to induce the public official to take action, a person of reasonable intelligence would understand that the conduct engaged in by defendant was criminal. Indeed, defendant Foxworth herself understood this fact as the bribe payments were disguised as checks made out to "cash" or Newton's son "Chad," and defendant repeatedly lied to FBI agents when she was questioned about her payments to Newton. At a minimum, defendant certainly had adequate notice that Newton had a duty to refrain from taking bribes in exchange for the use of his office.

2. Section 1346 is not overbroad

Realizing that she will not succeed in her argument that section 1346 is facially invalid or unconstitutionally vague as applied, defendant resorts to the argument that the statute is overbroad. Def. Brief at 45-50. Since the statute is not overbroad, defendant's last-resort argument misses the mark.

In *United States v. Waymer*, 55 F.3d 564, 569 (11th Cir. 1995), a board of education member who received kickback commissions from a company doing business with the school board, challenged section 1346 on vagueness and overbreadth grounds. In rejecting the argument that the honest services fraud statute was overbroad, the Eleventh Circuit explained:

> We see no basis for facial invalidation of section 1346 on overbreadth grounds. Section 1346 effectuates the legitimate governmental aim of punishing those who use the mails to carry out fraudulent schemes to deprive others of their intangible rights to honest services. Assuming arguendo that certain marginal applications of section 1346 would impermissibly intrude on First Amendment rights, we hold that such potential problems with section 1346 are insubstantial when judged in relation to the statutes's plainly legitimate sweep. Thus, defects in the honest services amendment to the mail fraud statute can be effectively addressed on a case-by-case basis. Accordingly, section 1346 is not facially overbroad.

Id.

Defendant's suggestion that she has some type of First Amendment interest at play is equally baseless. Whatever right defendant had to petition government officials, like Newton, to make requests and demands, she had no First Amendment right to bribe a public official with the specific intent to defraud the public by turning that official

into an advocate for defendant. No case cited by defendant stands for the proposition that a bribe is somehow beyond the reach of section 1346 due to First Amendment concerns.

Defendant's citation of *United States v. Sawyer,* 85 F.3d 713 (1st Cir. 1996) ("*Sawyer I*"), does not support the proposition that she had a constitutional right to bribe Newton as part of her right to petition government officials. In *Sawyer I*, the First Circuit vacated an honest services fraud conviction of an insurance company lobbyist because of an error in the jury instructions, not because section 1346 was inapplicable or fatally overbroad. The First Circuit found it was error not to instruct the jury that it could acquit if it found that a lobbyist's intent to provide state legislators with meals, golf and entertainment was limited to cultivation of business or political friendship. *Id*. at 741. Indeed, in *United States v. Sawyer*, 239 F.3d. 31 (1st Cir. 2001) ("*Sawyer II*"), the First Circuit reinstated the lobbyist's conviction, noting that he paid for meals, travel, and entertainment for state court legislators in exchange for their votes on insurance legislation.

Since the jury in Foxworth's case found that she acted with intent to defraud by paying a bribe to Newton, the defect in *Sawyer I* is not an issue here. Similarly, the fact that Newton sought to use his office to threaten to withhold State funding from CSF and the superintendent eliminates any possibility that Newton was engaged in mere lobbying efforts or lawful conduct on Foxworth's behalf that was protected by the First Amendment. Thus,

defendant's reliance on another First Circuit case, *United States v. Urciuoli*, 513 F.3d 290 (1st Cir. 2008), is also misplaced.

In *Urciuoli* there was evidence that Celona, a Rhode Island State Senator, was paid as a consultant by an assisted living facility owned by a hospital. Urciuoli, the hospital CEO, was charged with engaging in honest services fraud as a result of the consulting arrangement with Celona even though the arrangement was disclosed in public filings. Part of the consulting job required Celona to urge local officials to obey state law to permit patients to be taken to the hospital of the patient's choice (the "ambulance law"). The government emphasized the evidence of Celona's requests to local officials to obey the ambulance law at Uricuoli's trial. On appeal, the First Circuit reversed finding that a public official's actions urging local officials to obey state law could not be a "deprivation of honest services."

Contrary to the facts in *Urciuoli*, Newton was not paid a consulting fee by Foxworth that was disclosed in public filings. On the contrary, both Newton and defendant hid the truth regarding the bribe payments. Furthermore, Newton was not engaged in urging local officials to obey state law. Rather, he was threatening CSF and the superintendent with a loss of state funding if they did not provide defendant with business contracts. Finally, the jury here necessarily found that Foxworth bribed Newton; the jury did not find that she provided Newton with the type of consulting fee at issue in *Urciuoli*.

In her continuous effort to convince this Court that she made campaign contribution to Newton, rather than bribe payments, defendant speculates that campaign contributors will "have reason to pause before petitioning their representatives to undertake tasks on their behalf." Def. Brief at 48-49. Defendant's fear is unfounded. People who contribute funds to a public official do not make the checks out to "cash" or to the public official's son "Chad" as happened in the case at bar. Indeed, if a constituent is asked to make a campaign contribution to a public official by writing the check out to "cash" or to the official's family member, a constituent should have reason to pause since the nature of the payment should raise a red flag.

III. The evidence demonstrated that there were material misrepresentations and omissions that support the honest services fraud convictions

A. Relevant facts

The relevant facts are set forth in the Statement of Facts, above.

B. Governing law and standard of review

The elements of wire fraud under 18 U.S.C. § 1343 are: (1) the existence of a scheme to defraud, (2) that money or property was the object of the scheme, and (3) that the defendant used interstate wires in furtherance of that scheme. *United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999). Section 1346 defines scheme or artifice to defraud to include a scheme to "deprive another

of the intangible right of honest services." "[W]hen § 1346 is read together with . . . § 1343 three additional elements define and limit the conduct proscribed. A defendant must specifically intend to harm or injure the victim of the fraud scheme; he must misrepresent or conceal a material fact, *see Neder v. United States*, 527 U.S. 1, 22 . . . (1999); and the . . . wires must be used to further the scheme." *Rybicki*, 354 F.3d at 153 (Katzmann, J., concurring). A misrepresentation is material "if it has a natural tendency to influence, or [is] capable of influencing, the decision of the decision making body to which it was addressed." *Neder v. United States*, 527 U.S. 1, 16 (1999) (internal quotation marks omitted).

C. Discussion

Defendant challenges her conviction on the wire fraud counts by claiming that the evidence failed to establish any material misrepresentation or omission. Def. Brief at 51-58. When the evidence is viewed in the light most favorable to the prosecution, a reasonable jury could easily conclude that there were material misrepresentations and acts of concealment. Defendant's challenge to her wire fraud convictions should be rejected.

The district court properly instructed the jury, without objection, that the government was required to prove "materiality." The instruction required the government to prove "a scheme or artifice to defraud, to obtain money or property, or to deprive the citizens of Connecticut of their intangible right of the honest services of a public official, by *materially false and fraudulent pretenses,*

representations, or promises, as alleged in the Indictment." GA920 (emphasis added).

Defendant now suggests that the evidence did not support the jury's finding that the conspirator's misrepresentations or omissions were "material." She also seeks to downplay the amount of the bribes ($3,000) and the fact that Newton and defendant concealed the existence of the bribes. Contrary to defendant's suggestion, the conspirators' actions were material and were more than capable of influencing the decision makers that Newton and defendant approached.

First, defendant misconstrues the nature of her payments to Newton. Contrary to defendant's description of the payments as a "donation," "contribution," or "nominal loan" (Def. Brief at 54), the jury found that defendant's payments to Newton were a bribe. This is necessarily the case since the district court instructed the jury that to convict defendant, the jury needed to find that defendant engaged in conduct "*either to bribe a public official, or to aid the public official in soliciting, demanding, accepting, or agreeing to accept a bribe.*" GA921 (emphasis added). Thus, the jury did not convict defendant by concluding that a loan or campaign contribution had been concealed. Rather, the jury reasonably found that the manner in which the bribes were paid (checks made out to "cash" and "Chad Newton") were material acts.

Second, whether the failure to disclose total bribe payments of $3,000 was "material" was certainly a

question for the jury to decide. The jury reasonably concluded that if Newton could be bought by defendant for $3,000, the failure to disclose this fact was material.[9] "When official action is corrupted by secret bribes or kickbacks, the essence of the political contract is violated." *DeVegter,* 198 F.3d at 1328 (internal quotation marks omitted. Therefore, when viewing the evidence in the light most favorable to the prosecution, the jury reasonably concluded that $3,000 in bribes was significant enough to affect the political process and that a failure to disclose that fact was material.

Third, the number of times that Newton failed to disclose the bribe payments was also a factor the jury could consider to find that material misrepresentations and omissions had occurred. Newton repeatedly failed to disclose his bribery when dealing with CSF and the school superintendent, or when filing his financial disclosure form. GA388-89. Moreover, Newton's campaign did not report defendant's checks as campaign contributions in connection with his 2004 run for office. GA374-75, 821.

Fourth, the jury reasonably concluded that the failure to disclose the bribes was the type of information that was capable of influencing a decision maker such as CSF or the superintendent. The conspirators certainly thought that

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[9] Defendant's quote from *Rybicki* (Def. Brief at 55-56) that "a *de minimis* bribe" might not be material conveniently omits this Court's examples of a *de minimis* bribe – "the free telephone call, luncheon invitation, or modest Christmas present." *Rybicki*, 354 F.3d at 146.

it was necessary to conceal their relationship. When defendant warned Newton that he was suspected of taking money from people in exchange for doing things for those people, Newton explained that he had not disclosed his relationship with defendant. GA1026-34. Thus, the concealment of the bribes was a material act.

Fifth, the jury finding of "materiality" was not based on the fact that $500 of Newton's campaign funds was used to benefit the defendant. Def. Brief. at 56. Rather, the fact that defendant later lied to two FBI agents about the facts surrounding this $500 was certainly a misrepresentation that the jury could find was material. This act of concealment by defendant was capable of influencing the agents' investigation as it obfuscated the true relationship between Newton and Foxworth.

Finally, defendant is simply mistaken when she suggests that CSF would not have changed its conduct if it had known that defendant had bribed Newton to obtain a $100,000 contract from CSF. Def. Brief at 57-58. If CSF had known that a member of the State bond committee (Newton) had taken a bribe, CSF would have contacted the authorities to disclose the criminal conduct as their ability to obtain State bond financing was at stake. In any event, the failure to disclose the truth about the Newton-Foxworth relationship to CSF was a material event.

IV. There was more than sufficient evidence that defendant made material and knowingly false statements

A. Relevant facts

The relevant facts are set forth in the Statement of Facts, above.

B. Governing law and standard of review

According to 18 U.S.C. § 1001(a)(2), "whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . (2) makes any materially false, fictitious, or fraudulent statement or representation" is guilty of an offense. A statement is material "if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decision making body to which it was addressed.'" *Neder v. United States*, 527 U.S. 1, 16 (1999) (quoting *United States v. Gaudin*, 515 U.S. 506, 509 (1995)); *see also United States v. Stewart*, 433 F.3d 273, 318 (2d Cir. 2006) (a false statement is material if the statement is capable of distracting government investigators during the course of an investigation).

C. Discussion

Defendant contends that there was insufficient evidence to support her convictions on the three false statement counts. Def. Brief at 58-65. Since there was more than sufficient evidence to support these charges,

defendant's attack on her conviction for counts 7 through 9 must fail.

1. Each of the false statements made by defendant was "material"

Defendant incorrectly suggests that the government did not prove that any of her false statements were "material." *Id*. at 61. A review of the record, and the applicable definition of "materiality" indicates, that each of defendant's multiple lies to the agents was "material."

The court properly instructed the jury, without objection, that to convict defendant of the false statement counts, the government must prove that

> the statement or representation was material. *A statement is material if it has a natural tendency to influence, or could have influenced the government agency's decision or activities, However, proof of actual reliance on the statement by the government, is not required.*

GA930-31 (emphasis added). Defendant complains, however, that the agents had all the evidence needed to convict her prior to interviewing her on January 31, 2005. Thus, defendant claims that her false statements could not have been capable of distracting the investigators and therefore, could not be "material." This argument misconstrues the law of materiality and the facts of this case. *See*, *e.g.*, *United States v. Robertson*, 324 F.3d 1028, 1030 (8th Cir. 2003) (even where a defendant confesses to

agents, false statements made at the time of the confession are "material" as they had "a natural tendency to influence the course of the investigation"); *see also United States v. Hasner*, 340 F.3d 1261, 1273-74 (11th Cir. 2003) (per curiam) ("The government is not required to show actual reliance on the statement for it to be material; instead a false statement must simply have the capacity to impair or pervert the functioning of a government agency") (internal quotation marks omitted).

The court properly instructed the jury, without objection, that:

> it is not necessary for the government to prove that the government agency [the FBI] was, in fact, misled as a result of defendant's actions. It does not matter that the agency was not misled, or even that it knew of the misleading or deceptive act, should you find that the act occurred. These circumstances would not excuse or justify a false, fictitious or fraudulent statement . . . .

GA929-30. Thus, it was not necessary to prove that the FBI agents relied on defendant's statements to convict her of making a false statement. *United States v. Stewart*, 433 F.3d 273, 318 (2d Cir. 2006) ("[T]he 'essential issue' is whether Defendant knowingly and willfully falsified, concealed, or covered up information relevant to the investigation."); *United States v. McBane*, 433 F.3d 344, 350 (3d Cir. 2005) (even where agents did not rely on defendant's statements, false statement conviction affirmed because statements were of the type capable of

influencing a reasonable decisionmaker). Furthermore, the fact that the agents may have thought that defendant was lying when she attempted to describe her relationship with Newton, does not mean that her statements were not material as they were still relevant to, and capable of influencing, the investigation. *Brogan v. United States*, 522 U.S. 398, 402 (1998) (the possibility of "perversion of function . . . exists *whenever* investigators are told a falsehood relevant to their task").

In January 2005, the agents were conducting a broad investigation involving Newton, defendant, and corruption in Bridgeport. The investigation was seeking to determine whether public officials had taken funds that constituted a bribe or a payoff as opposed to a campaign contribution. GA413-14. By trying to convince the agents in January 2005 that her previous payments to Newton were campaign contributions, defendant had the requisite intent and hope of misleading and distracting the agents from the truth. Indeed, at the time of the interview in January 2005, Newton was under investigation and had not yet pled guilty.

The false statements made by defendant in January 2005 had the capability of influencing the investigation of Newton as well as defendant. Each of defendant's answers sought to depict her relationship with Newton as innocent, as opposed to corrupt. The three false statements charged in counts 7 through 9 had the natural tendency to influence the FBI's decision as to who to charge, and what to charge. Therefore, the statements were certainly "material."

Defendant's reliance on Application Note 4(g) to U.S.S.G. § 3C1.1 is misplaced. Def. Brief at p. 61. That provision concerns whether a sentencing court should enhance a sentence under the Guidelines where a defendant lies to a law enforcement agent but the false statement is not charged as a separate count.[10] The application note does not attempt to impose a requirement in a false statement case that the defendant's lies must "significantly obstruct[] or impede[] the official investigation"– nor could a Sentencing Guideline alter the elements of a statutory offense.

Defendant tries to minimize the impact of her false statements by suggesting that the number of checks, and the payee listed on the checks (count 7), were irrelevant. On the contrary, how often defendant bribed Newton, and the manner in which she did so, was central to the agents' investigation. When defendant claimed that her checks to Newton were made out to the campaign, she was seeking

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[10] The end of Application Note 4 to U.S.S.G. § 3C1.1 states that "[t]his adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense *where there is a separate count of conviction for such conduct."* (Emphasis added.) Thus, a defendant can receive an enhancement under U.S.S.G. § 3C1.1 even if his false statement to law enforcement agents did not significantly obstruct justice, if he is convicted of a separate count of making a false statement. *See United States v. Fiore*, 381 F.3d 89, 95 (2d Cir. 2004).

to distract the agents from thinking that the payments were bribes. By minimizing the number of checks, defendant conveniently left out the last two checks totaling $2,000 made payable to Newton's son. When viewed in the light most favorable to the prosecution, a reasonable juror could easily conclude that defendant's statements were material, as the statements all sought to cast the payments as part of a loan arrangement rather than as part of a conspiratorial and corrupt relationship.

Defendant also ignores the significance of her false statements regarding the $500 payment she demanded from Newton. What is critical to the issue of materiality is that defendant tried to describe this payment to A.E. as the repayment of a loan. When defendant demanded that Newton provide A.E. with $500, defendant assured Newton that she would get the money back to Newton. GA1091. Thus, when defendant lied about having any conversation with Newton about the $500 (count 8) and then tried to explain it away by saying it was "strictly" a loan repayment (count 9), she tried to make the FBI agents conclude that defendant had merely lent money to Newton. Since the false statements charged in count 8 and 9 concerned the central question of whether defendant bribed Newton, it was clearly material.

2. Defendant's statements were knowingly false

Defendant claims that the evidence failed to demonstrate that her statements to the agents were knowingly false. Def. Brief. at 63. The jury rejected this

argument below. Defendant will not fare any better with this argument on appeal.

Defendant was interviewed by FBI agents on January 31, 2005, at her home in New Canaan, Connecticut. GA404-27. Despite having advance warning of the interview, defendant repeatedly lied to the agents about the nature of her relationship with Newton and the reason she provided funds to, and received funds from, Newton.

The government demonstrated that defendant's statements were knowingly false. First, the government proved that defendant's payments to Newton were bribes, not innocent loans to a family friend. Indeed, none of the checks were recorded or marked as being loans or contributions. Three of the checks were made payable to "cash" and two of the checks (totaling $2,000) were made payable to Newton's son "Chad." When defendant was confronted with the checks during her interview, her demeanor changed and she became agitated. GA423-24.

Second, while defendant told the agents that the payments were contributions to Newton's first campaign for State Senate, the bribe payments did not begin until six months after the March 2003 election. Hearing that evidence, a jury could certainly find that defendant knew she was lying by suggesting the payments that began in September 2003 had anything to do with a March 2003 election.

Third, defendant herself described $2,000 of the payments she made to Newton, by admitting that "we

never did anything with that 2,000. We never could get any business" and that "I'm not gonna pressure you [Newton] anymore about any work . . . ." GA1078. Fourth, when defendant sought $500 from Newton's campaign, a payment defendant falsely claimed was "strictly" a repayment of a loan made to Newton, she was recorded admitting that she would give the money back to Newton "next week." GA1091. Fifth, defendant and Newton had three telephone conversations in July 2004 in which defendant demanded that Newton provide $500 from his 2004 campaign funds to A.E. GA1082-93. Thus, when defendant denied having any such conversation in January 2005, a mere seven months later, a jury could reasonably conclude that defendant knew she was lying.

Finally, when defendant claimed that the $500 that she demanded from Newton was "strictly" to repay a loan that defendant had made to Newton in connection with his March 2003 election (GA422), a jury could easily conclude that she was knowingly making a false statement. Indeed, there was no loan made to Newton in connection with the March 2003 election, as the checks started in September 2003. Furthermore, by telling Newton that she would give him back the $500 (GA1091), a jury would easily realize that Foxworth herself never considered the $500 as any type of repayment. Thus, it is not surprising that the jury would find that defendant knowingly made a false statement when she described the purpose of this $500 payment as "strictly" to repay part of a loan.

CONCLUSION

For the foregoing reasons, the jury's guilty verdict on each of the nine counts of the indictment should be affirmed.

Dated: February 3, 2009

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,588 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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ADDENDUM

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States (Relevant portions)

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. . . .

18 U.S.C. § 1343. Fraud by wire, radio, or television (Relevant portions)

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. . . .

18 U.S.C. § 1346. Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 2 . Principals

(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. § 1001 Statements or entries generally (Relevant portions)

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . .

(2) makes any materially false, fictitious, or fraudulent statement or representation shall be fined under this title, imprisoned not more than 5 years, or both. . . .

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Foxworth

Docket Number: 07-5514-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 2/3/2009) and found to be VIRUS FREE.

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February 3, 2009

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