No. 10-4658

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

IAN P. NORRIS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(JUDGE EDUARDO C. ROBRENO)

BRIEF FOR THE UNITED STATES

CHRISTINE A. VARNEY
Assistant Attorney General

SCOTT D. HAMMOND
Deputy Assistant Attorney General

LUCY P. MCCLAIN
RICHARD S. ROSENBERG
KIMBERLY A. JUSTICE
Attorneys
U.S. Department of Justice
Antitrust Division

JOHN J. POWERS, III
KRISTEN C. LIMARZI
Attorneys
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., NW
Room 3224
Washington, D.C. 20530-0001
(202) 353-8629

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

MISCELLANEOUS

STATEMENT OF JURISDICTION

The District Court's jurisdiction rested on 18 U.S.C. § 3231. This Court's jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

1. Whether the district court erred in finding that the jury's guilty verdict was supported by sufficient evidence.

2. Whether the district court abused its discretion when it declined to give a proposed instruction.

3. Whether the district court committed plain error when it instructed the jury on the overt act element.

4. Whether the district court erred in finding that the defendant did not establish that a personal attorney-client privilege protected his communications with his employer's counsel, Sutton Keany, and thus, nothing precluded Keany from testifying against the defendant.

STATEMENT OF THE CASE

On September 28, 2004, a federal grand jury sitting in the Eastern District of Pennsylvania returned a four-count indictment that

charged defendant Ian P. Norris, in Count 1, with conspiring to fix prices for certain carbon products sold in the United States in violation of 15 U.S.C. § 1, and in Count 2, with conspiring, in violation of 18 U.S.C. § 371, to corruptly persuade and attempt to corruptly persuade other persons with intent to influence their testimony in an official proceeding, and to corruptly persuade and attempt to corruptly persuade other persons to alter, destroy, mutilate, or conceal documents with the intent to impair their availability for use in an official proceeding. JA-178-195. Counts 3 and 4 charged Norris with corruptly persuading and attempting to corruptly persuade other persons with intent to influence their testimony in an official proceeding in violation of 18 U.S.C. § 1512(b)(1), and corruptly persuading other persons to alter, destroy, mutilate, or conceal documents with the intent to impair their availability for use in an official proceeding in violation of 18 U.S.C. § 1512(b)(2)(B). *Id.*

On March 23, 2010, Norris was extradited from the United Kingdom to face prosecution on Counts 2-4.[1] JA-2. Before trial began,

[1] Under the terms of the U.K. Order for Extradition Pursuant to Section 93(4) of the Extradition Act 2003, dated September 22, 2008,

the government moved in limine for an order permitting Sutton Keany, former counsel to Norris's former employer, The Morgan Crucible Company ("Morgan"), to testify at trial. Morgan had waived its attorney-client privilege as to communications with Keany regarding his previous representation of the company. JA-40, 3415. After an evidentiary hearing at which both Keany and his former partner Jerry Peppers testified, the court found that Norris had no individual attorney-client privilege that would bar Keany's testimony and that, even if Norris had such a privilege, the crime-fraud exception would apply. JA-33-47. For these reasons, the court granted the government's motion to permit the testimony. JA-46-47. Norris sought reconsideration of the district court's decision during trial, and on July 19, 2010, the district court denied the motion in an oral ruling. JA-1492-98.

On July 27, 2010, after a seven-day trial, the jury convicted Norris on Count 2, conspiracy to obstruct justice, and acquitted him on Counts 3 and 4. JA-2208-10. On November 30, 2010, after extensive

---

Norris could not be prosecuted on the charge of price fixing (Count 1). JA-2-3.

briefing and oral argument, the district court denied Norris's Motion for Acquittal or, in the Alternative, for a New Trial. JA-57-142. On December 10, 2010, the court sentenced Norris to 18 months imprisonment, followed by three years supervised release, a $25,000 fine, and a $100 special assessment. JA-144-49. Norris, who is currently incarcerated, timely filed a notice of appeal on December 15, 2010. JA-150-51.

STATEMENT OF THE FACTS

This case is about a corporate CEO who, upon learning that his company was being investigated for price fixing by a U.S. grand jury, concocted an elaborate scheme to mislead and obstruct that investigation. Together with his co-conspirators, Ian Norris encouraged Morgan's employees and its competitors to lie about their price-fixing meetings and directed his subordinates to destroy incriminating documents to keep them out of the hands of the grand jury.

I. Price Fixing in the Markets for Carbon Brushes

The Morgan Crucible Company plc and its subsidiaries manufacture and sell various carbon products, including carbon brushes, around the world. Carbon brushes transfer electrical current in motors used in many types of vehicles, as well as numerous consumer products. JA-796. For decades, Morgan and its competitors, including Le Carbone Lorraine ("Carbone"), Schunk Kohlenstofftechnik GmbH ("Schunk"), and Hoffmann & Co. Electro-Carbon AG ("Hoffmann"), had been fixing the prices of carbon brushes sold in Europe. JA-899. The firms met about twice a year to discuss the price levels for various products, make adjustments for inflation and currency variations, and agree on a price schedule that all would follow. JA-803-08. The firms' pricing coordinators then had regular telephone contact throughout the year to coordinate pricing. JA-801-03.

From 1986 until January 1998, defendant Norris was the Chairman of the Carbon Division at Morgan. During this period Morgan and its competitors expanded their price-fixing conspiracy into the U.S. market. In February 1995, Norris directed Bruce Muller,

then-CEO of Morgan's U.S. subsidiary Morganite, to meet with Carbone in Toronto "to discuss not competing on price." JA-1081. Morgan's pricing coordinator, Robin Emerson, attended a follow-on meeting with Carbone and described the purpose as creating "a dialog to exchange information on prices in America" so that Morgan and Carbone could "support each other's prices." JA-825, 830; *see also* JA-930 (Perkins: purpose of meeting was "to see if we could get some sort of understanding of cooperation in the U.S. market with the Carbone people").

In all, Morgan employees met with Carbone approximately fourteen times between 1995 and 1998 to discuss price coordination in the United States. JA-941; JA-3217-41 (GX-11-GX-24: false meeting summaries). Norris himself attended several of these meetings, JA-943-46, and his own handwritten notes of the meetings reflect the firms' "[a]bsolute commitment" to exchange information before quoting prices to customers. JA-3166 (emphasis in original); *see also* JA-3169 (GX-1: "Principle of Toronto was–'How do we increase prices!'"). Norris's notes also show that Morgan and Carbone were supporting

each other's prices with respect to particular U.S. customers. JA-3167-68, 3171 (GX-1: " Delco, supported by [Carbone] . . . [Price Increase] was +20%. . . . Auto [Carbone] pushing to increase prices on ABS. Need our support.").

In 1996, Morgan and Carbone began inviting Schunk and Hoffmann to some of their U.S. price-fixing meetings. Schunk executive Heinz Volk attended five or six meetings with U.S. competitors and described the purpose of these meetings as the "harmonization of the pricing structures." JA-1428; *see also* JA-946-47. Again, Morgan shared price information with Schunk at these meetings so that Schunk would "respect that and not try to undercut [Morgan] in the marketplace." JA-951; JA-1429 (Volk: "Mr. Emerson gave everybody a price list from Delco Remy starter brushes, and asked us to protect these prices, not to undercut them."); JA-3336 (GX-91: Price list for Delco Remy). Hoffmann executive Thomas Hoffmann summarized his first such meeting as follows: "In principle no competition based on price should occur" and "[g]iven that no communication system exists at

this time in the USA, everything should pass through Europe." JA-3286.

II. The Grand Jury Investigation and Norris's Response

In April 1999, a federal grand jury was investigating price fixing in worldwide sales of various carbon and engineered graphite products and issued a subpoena duces tecum to Morganite. JA-3177-89 (GX-5: grand jury subpoena and cover letter). The subpoena required the production of documents reflecting communications with a competitor for the sale of carbon products. JA-3186. Although the subpoena covered documents in the company's possession, custody, or control "wherever the documents are located," the government investigators represented in the cover letter to the subpoena that, "[u]nless and until we notify you otherwise in writing, we will not seek to enforce the subpoena to compel the production of documents that were located outside the United States at the time you received the subpoena." JA-3189. The cover letter requested, however, that the recipient "produc[e] any such documents on a voluntary basis." *Id.*

Norris was, by then, CEO of Morgan, and he responded to the subpoena by meeting with those Morgan employees most involved in

U.S. price fixing: Robin Emerson, Morgan's pricing coordinator; Melvin Perkins, Vice President of Sales and Marketing for Morganite; William Macfarlane, head of Morgan's Electrical Carbons Division; and Jack Kroef, President of Morgan's Industrial and Traction Carbon business worldwide. JA-860-65, 967-69, 1207-11, 1671-73. Norris realized that Morgan's numerous price-fixing meetings with its competitors needed an innocent explanation, JA-862-64, so he and his subordinates decided "to create evidence that it wasn't cartel meetings, that these were meetings on other topics which were allowed to take place." JA-1212. They agreed to claim that the meetings with Carbone were joint venture discussions and the meetings with Schunk were general market or acquisition discussions.[2] JA-1214 (Kroef: "the idea came to our minds during that meeting that that could be an excellent way of saying that [joint venture discussions or acquisition discussions] would

[2] Norris had previously suggested that his employees use joint venture discussions as a cover for price-fixing meetings. JA-1090 (Muller: the cover story "was raised before when we went up to Toronto. Mr. Norris basically said if people ask why you're up there, this is—the reason that you're up there is the—to discuss Joint Ventures in South America.").

be the things that could have been discussed during those meetings"); JA-1223, 1672-73.

Norris directed his subordinates to create written summaries reflecting this cover story and to be "very careful" about what was included. JA-968-70 (Perkins: "There was a decision taken that we should draft some notes of the meetings . . . . The emphasis was to make it more seem as though they were joint venture meetings"); JA-1224, 3193-3216. The primary purpose of the competitor meetings was not to discuss joint ventures; indeed many of the attendees had nothing to do with joint ventures. JA-1663-67, 1898-99, 828-29. As Macfarlane testified, if Perkins, Emerson, or Morgan executive Michael Cox attended the meeting, it was to discuss price coordination. JA-1665-67.

Perkins, who attended every competitor meeting, drafted many of the summaries. JA-988-89. Perkins wanted the summaries to look real, but he had a problem—he had no involvement in the joint ventures and knew nothing about them. JA-995-96; *see also* JA-1664-65. So, he consulted with those Morgan employees who did work with the joint ventures to make sure the summaries looked realistic. JA-

995-97. Emerson testified about his reaction when Perkins showed him the summaries:

> A. I told [Perkins], these are false minutes.
> Q. And what did Mr. Perkins say to you in response?
> A. You're right. You're correct. They are false minutes.

JA-870. *See also* JA-998-1002, 1094-96.

The false minutes—or scripts—were to form the employees' "new memory" in the event they were ever questioned about the competitor meetings. JA-1229-31. The first test of the plan came when Morgan's outside counsel began interviewing employees. JA-1676; *see also* JA-1232 (Kroef: Before interview with outside counsel, Norris told Kroef "they should not know or learn the truth. You have to stick to the scripts . . . "). And it worked. Morgan employees told the false story in interviews with Morgan's outside counsel. JA-1233, 1013-14. Morgan's counsel, Sutton Keany, passed the false story on to the government investigators and informed Norris he was doing so. JA-1515-16; JA-2314 (DX-9: email reporting Keany told investigators "no agreements were ever reached (indeed, never discussed)"); JA-3278 (GX-41: email

informing Norris the government investigators "dismissed any idea the meetings in question were limited . . . to the implementation of a 'joint venture exit' strategy"). When Keany discovered that Morgan employees had drafted summaries of the meetings, Norris gave him permission to produce the false summaries in response to the grand jury subpoena. JA-1534-36. Norris also agreed that Morgan should offer to make its employees—including several who had been involved in drafting the false scripts—available to testify before the grand jury. JA-1538-40, 3279-80.

III. Norris and His Co-Conspirators Work to Persuade Others to Lie About the Competitor Meetings

As the grand jury investigation continued, Norris and his subordinates worked together to persuade their fellow Morgan employees to stick to the false story. Norris told Bruce Muller and Michael Cox, who also attended meetings with Carbone, to "adhere to the story of the Joint Venture for South America as—as the cover story for why we were in Toronto." JA-1089; *see also* JA-1088 (Muller: Norris said "we needed a story to put forth to the Justice Department of what happened at the Toronto meeting [with Carbone]"). Later, Perkins sent

Muller a copy of the false script for the meeting Muller attended so that Muller would "stick with that as the approach of what happened at the meeting." JA-1011-12; *see also id.* (Perkins: "I think it was Mr. Norris" who asked me to send the script to Muller); JA-1091-92. Macfarlane also summoned Cox to review the summaries of meetings Cox had attended. JA-1886-88.

When Perkins wavered and told Norris and Macfarlane that he "did not feel able to carry the party line forward, and needed . . . to fess up," Norris and Macfarlane made a special trip to Wales the very next day to meet with Perkins and show him just how costly it would be for Morgan if Perkins told the truth. JA-1016-18. After Kroef retired, Norris summoned him to England to meet, not at Morgan's offices but at Norris's home. There Norris and Macfarlane assured Kroef that the investigation was "becoming a little bit more difficult for the group" but that "everything was going to be okay as long as everybody kept calm." JA-1274-75.

Norris was particularly concerned that pricing coordinator Robin Emerson "would perhaps not be able to stay to the story." JA-1687-88.

Fearing that Emerson would "have to tell the truth," Norris and Macfarlane arranged for Emerson to retire from Morgan five years early and made sure that he was fully compensated for his reduced pension, because they believed that if Emerson were no longer a Morgan employee he would be inaccessible to the investigation. *Id.*; JA-878-81; JA- 3190-91 (GX-6: letter re: severance agreement); JA-3337 (GX-92: letter re: termination date). Even after Emerson's retirement, Macfarlane continued to encourage the pricing coordinator to tell the false story, suggesting that he meet with the company lawyer "to confirm . . . your role in the many meetings we held to exit our joint ventures with Le Carbone." JA-3192. But Emerson had *no* role in forming or exiting any joint venture with Carbone. JA-828.

In the fall of 2000, the grand jury investigation was continuing despite all these efforts to derail it, and Norris became concerned that Morgan's competitors might be telling investigators a different story about the price-fixing meetings. Norris asked Kroef to meet with the head of Schunk's carbon division, Helmut Weidlich, to find out how Schunk was responding to the investigation and to "encourage Dr.

Weidlich to do things or to start doing things according to the way or similar to the way [Morgan] did things." JA-1250, 1308.[3]

Kroef met with Weidlich on November 30, 2000, and explained the "Morgan strategy [of using] joint venture discussions, acquisition discussions, all sort of legal possible activities to explain the meetings we had . . . about the United States' customers." JA-1254-55. Kroef told Weidlich he expected Schunk to be interviewed about the meetings, and he gave Weidlich copies of the false scripts that Morgan had drafted for the meetings Schunk had attended, as well as Kroef's own typed summary of the Morgan cover story. JA-1255, 1783-86, 3273-77 (GX-36: false meeting summaries). Kroef asked Weidlich to distribute the "protocol" to the four Schunk and Hoffmann employees[4] who had attended the meetings "to make sure that the testimony that they would be giving would be the same as or similar to what the Morgan people have said." JA-1783-86. And Weidlich complied, sharing copies of the Morgan scripts he received from Kroef with his

---

[3] Norris also tried to contact Carbone to discuss the subpoena, but Carbone was unresponsive. JA-1688-89.

[4] Schunk acquired Hoffmann in 1999.

colleagues. JA-1787-88, 1401-05, 1432, 3268-77 (GX-35, GX-36: false meeting summaries).

Kroef reported to Norris that Weidlich did not appear to be taking the investigation as seriously as Morgan would like, so Norris decided to meet with Weidlich's boss, Dr. Kotzur. JA-1256-57. Norris tried to conceal the purpose of that meeting by falsely claiming on his restaurant receipt that he met with Kotzur at Macfarlane's request to discuss an acquisition. JA-3283 (GX-51: receipt); JA-1689 (Macfarlane: "To the best of my recollection, I did not" ask Mr. Norris to meet with Schunk to discuss an acquisition).

A few weeks later, Norris and Kroef met again with Weidlich and Kotzur, and again, Norris tried to persuade the Schunk executives to have their employees tell Morgan's false cover story when questioned. JA-1794 (Weidlich: Norris "strongly suggested that we make sure our people answer in the same way"); JA-1265-68. Norris explained that, if the investigation into price fixing spread to Europe, it would be "very costly" for Schunk—which had a much larger presence in the European market. JA-1794-95, 1266, 1268. Norris also suggested that Schunk

"should identify those persons who would most probably be interviewed who are key people in these price discussions" and force any that seemed unlikely to tell the false story into early retirement or a consultancy arrangement because "if they are no longer employees, they cannot be forced by the company to be a witness." JA-1795. Finally, Norris suggested that Schunk "filter through all the documents [in its offices] and take out those documents which might be compromising at a future time and destroy them." JA-1796. The last thing Norris said before the meeting ended was, "Okay. But be aware that meeting here never happened." *Id.*

IV. Norris Initiates a "Clean Up" of Morgan's Files

Norris also took steps to ensure that Morgan's incriminating documents would not be produced in the grand jury investigation. Shortly after the grand jury subpoena was issued, Norris asked Kroef if it was time to do another "check" on Morgan's sales files. JA-1245. Morgan and its competitors had long been careful to store any documents related to their European cartel meetings offsite, but occasionally Morgan employees would make notes about prices they

learned from their competitors on copies of customer inquiries, which were then placed in the regular sales files. JA-1240-43. Kroef had been involved in "cleaning" the sales files of these incriminating documents about five times in his twenty years in the cartel, so when Norris told him it was time to do a check on the files after the subpoena was served, Kroef knew just what to do. JA-1244-45.

Kroef called three other Morgan employees, including Robin Emerson, and directed them to visit each of Morgan's European sales offices and review the sales files. JA-1245-46. "Every time they found a copy of . . . a quotation to a customer, which had some . . . indication of cartel activities handwritten on them, they would take them out of the file, and throw them away, destroy them." JA-1246; *see also* JA-872-74.[5] Kroef testified that this check was "triggered" by the grand jury subpoena to Morganite. JA-1245.

STANDARD OF REVIEW

This Court exercises plenary review over a district court's denial of a motion for acquittal based on the sufficiency of the evidence,

[5] Emerson also testified that he was directed to destroy his own notes regarding price fixing in the United States. JA-875, 905.

examining the evidence in the light most favorable to the government and resolving all reasonable inferences in favor of the guilty verdict. *United States v. Riley*, 621 F.3d 312, 328-29 (3d Cir. 2010).

This Court reviews the refusal to give a particular instruction for abuse of discretion. *United States v. Flores*, 454 F.3d 149, 156 (3d Cir. 2006). When the defendant fails to object to an instruction during trial, this Court reviews the instruction for plain error. *United States v. Lee*, 612 F.3d 170, 191 (3d Cir. 2010). "Under the plain error doctrine," correction is required for "only 'particularly egregious errors,' which seriously affect the fairness, integrity or public reputation of judicial proceedings." *Gov't of the Virgin Islands v. Knight*, 989 F.2d 619, 631 (3d Cir. 1993) (citations omitted).

Issues of law underlying the application of the attorney-client privilege, including legal issues in applying the crime-fraud exception, are reviewed *de novo*, while factual determinations in applying the privilege are reviewed for clear error. *United States v. Doe*, 429 F.3d 450, 452 (3d Cir. 2005); *United States v. Inigo*, 925 F.2d 641, 656 (3d Cir. 1991).

SUMMARY OF ARGUMENT

This case involves a corporate CEO who conspired to obstruct a grand jury investigation that threatened to uncover his company's price-fixing cartel. After a seven-day trial, the jury correctly concluded that Ian Norris had conspired with his subordinates to corruptly persuade others to give false testimony to the grand jury and to destroy documents to keep them from the grand jury. None of Norris's arguments, either individually or collectively, warrants disturbing that guilty verdict.

1. Ample evidence establishes that Norris conspired to corruptly persuade others with intent both to influence grand jury testimony and to keep documents from the grand jury. The trial evidence showed that when Norris and his subordinates learned that a U.S. grand jury was investigating Morgan for price fixing, they agreed to create a cover story for their price-fixing meetings and then to persuade others at Morgan and Schunk to tell that cover story if they were ever questioned by anyone about the price-fixing meetings. The jury reasonably concluded that the "natural and probable effect" of the

conspirators' actions was that, if called before the grand jury, the Morgan and Schunk employees would lie to the grand jury. *United States v. Vampire Nation*, 451 F.3d 189, 205 (3d Cir. 2006).

The evidence also showed that, after receiving the grand jury subpoena, Norris and his subordinate directed other Morgan employees to "clean out" Morgan's European sales files of any documents that would reveal cartel activity, and encouraged executives at Schunk to do the same. The destroyed documents were responsive to the grand jury subpoena, which sought all documents wherever located reflecting communications with competitors for the sale of carbon products anywhere in the world. JA-3177-89. The fact that these documents were located outside of the United States is irrelevant. By its language § 1512 applies to conduct taken outside of the United States (18 U.S.C. § 1512(h)), and even if the grand jury were unable to compel the production of the foreign-located documents, the documents could have been made available to the grand jury in other ways, had Norris and his co-conspirators not destroyed them.

2. Norris's proposed instruction that corrupt persuasion does not include persuading others to lawfully withhold testimony was unsupported by the evidence, and the district court properly refused to give it. Norris was not charged with persuading others to withhold testimony, but rather to give false testimony. The evidence showed that Norris and his co-conspirators encouraged others to adhere to the scripts they had drafted, and as numerous witnesses testified, those scripts were not merely incomplete—they were false. The court's instruction regarding corrupt persuasion "fairly and adequately submit[ted] the issues in the case to the jury," *Bennis v. Gable*, 823 F.2d 723, 727 (3d Cir. 1987), and nothing in the charge suggested to the jury that it could convict if it found only that Norris sought to persuade others to lawfully withhold information.

3. Norris did not object at trial to the district court's instructions on the overt act requirement, and therefore, his claim that the district court erred by failing to identify for the jury the overt acts included in the indictment can only be reviewed for plain error. But any error here was harmless. The court properly instructed the jury

that it had to unanimously find at least one overt act in order to convict. Because a jury may convict based on overt acts not alleged in the indictment, *United States v. Adamo*, 534 F.2d 31, 38-39 (3d Cir. 1976), any speculation by the jury as to whether an overt act was alleged in the indictment or not is irrelevant. And, to the extent that Norris argues that the jury's acquittals on the substantive counts cast doubt on the proof of the overt acts, he is wrong. *United States v. Powell*, 469 U.S. 57, 64-66 (1984).

4. The district court did not err in permitting the trial testimony of Morgan's former counsel, Sutton Keany. As a corporate officer, Norris cannot claim attorney-client privilege for his communications with corporate counsel in his representative capacity. After an extensive evidentiary hearing, the district court concluded that Norris had failed to establish a personal claim of privilege over his communications with Morgan's counsel. Indeed, all of the testimony about which Norris complains on appeal concerned communications by Norris in his role as CEO of Morgan. Because Norris failed to establish an individual attorney-client privilege with respect to his

communications with Keany, the district court properly permitted Keany's testimony.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S VERDICT

A. Standard of Review

This Court applies a "particularly deferential" standard of review to a challenge to the sufficiency of the evidence supporting a jury verdict, *United States v. Cothran*, 286 F.3d 173, 175 (3d Cir. 2002), examining the evidence in the light most favorable to the government and resolving all reasonable inferences in favor of the guilty verdict. *United States v. Riley*, 621 F.3d 312, 329 (3d Cir. 2010). The jury's verdict should be overturned "'only when the record contains no evidence, regardless of how it is weighted, from which the jury could find guilt beyond a reasonable doubt.'" *Id.* (quoting *United States v. Miller*, 527 F.3d 54, 62 (3d Cir. 2008)). Because this Court "must treat all of the incriminating evidence as true and credible, '[t]he burden on a defendant who raises a challenge to the sufficiency of the evidence is

extremely high.'" *Id.* (quoting *United States v. Lore*, 430 F.3d 190, 203-04 (3d Cir. 2005)).

This standard of review applies equally in cases, such as this, where the jury reaches a split verdict. There is no way to know whether, as Norris suggests (Br. at 18-19), the jury found that he lacked the intent to violate § 1512(b), or whether it acquitted for other reasons, such as leniency, compromise, or mistake. *See United States v. Powell*, 469 U.S. 57, 65 (1984). Thus, appellate review of the sufficiency of the evidence "'should be *independent* of the jury's determination that evidence on another count was insufficient.'" *United States v. Vastola*, 989 F.2d 1318, 1331 (3d Cir. 1993) (quoting *Powell*, 469 U.S. at 67).[6]

Norris was convicted of a conspiracy which had two objects: corruptly persuading others with intent to influence grand jury testimony and corruptly persuading others to destroy documents with

---

[6] Norris cites *United States v. Alston*, 77 F.3d 713, 718 (3d Cir. 1996), to support his claim that the jury's acquittals on the substantive offenses suggest that "the intent supporting the conspiracy count is lacking." Br. at 18. But *Alston* says nothing of the kind, and, Norris's argument is contrary to the Supreme Court's holding in *Powell*.

intent to keep them from the grand jury. The conviction may be upheld as long as the evidence is sufficient as to one of the two objects of the conspiracy. "'[W]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged.'" *Griffin v. United States*, 502 U.S. 46, 56-57 (1991) (quoting *Turner v. United States*, 396 U.S. 398, 420 (1970)). In this case, ample evidence establishes that Norris conspired to corruptly persuade others with intent both to influence grand jury testimony and to keep documents from the grand jury, and the jury's conviction should be affirmed.

B. The Evidence Showed Norris Conspired to Corruptly Persuade Others With Intent to Influence Grand Jury Testimony

Norris argues that his conviction should be reversed because the evidence established only an agreement to mislead the company's attorneys and government investigators but not to influence grand jury testimony. Br. at 22-24. This claim relies on a selective and highly misleading account of the evidence. Indeed, it defies common sense to have an agreement to lie to company attorneys and government

investigators but not to lie to the grand jury that could charge the company and its employees with a crime. In any event, the government presented ample evidence that when Norris and his subordinates learned that a U.S. grand jury was investigating Morgan for price fixing, they agreed to create a cover story for their price-fixing meetings and then to persuade others at Morgan and Schunk to tell that cover story if they were ever questioned by anyone—including the grand jury.

It was the grand jury subpoena to Morganite that provided the impetus for the entire scheme.[7] In the fall of 1999, Norris had a copy of the grand jury subpoena, which he showed to Emerson and other Morgan employees. JA-868-69. Shortly thereafter, Norris gathered those Morgan employees who had been most involved in the U.S. price

[7] In his brief, Norris suggests that the scripts were written, not in the fall of 1999 after Norris received a copy of the grand jury subpoena, but in the fall of 2000 in response to a request from Morgan's outside counsel, Sutton Keany. Br. at 8, 22. Several witnesses testified that the scripts were written in the fall of 1999. *See, e.g.*, JA-1210-12, 1072-73, 1687. Witnesses also confirmed that Emerson, who retired from Morgan in July 2000, JA-3337, was still employed when the scripts were drafted. JA-1320, 1686-87. Emerson himself testified that he saw the completed scripts before his retirement from Morgan. JA-868-70. Viewing the evidence in the light most favorable to the government, the jury could conclude that the scripts were drafted in the fall of 1999.

fixing to discuss the subpoena and possible cover stories for their meetings with competitors. JA-860-68, 967-69, 1207-15, 1671-73. Together Norris and his co-conspirators agreed to draft false scripts, which were to form the employees' "new memory" to be used if they were ever questioned by anyone about the competitor meetings:

> Q. And once you—you memorized the notes for what purpose?
> A. To be used later, if you would be questioned.
> Q. Questioned by whom?
> A. By—it could be anybody.

JA-1229-30; *see also* JA-1091-92, 1097, 1011-12, 1886-88. When some employees wavered, Norris and his co-conspirators redoubled their efforts to ensure that the cover story was maintained. JA-1016-18, 1274-75. And when Norris became convinced that one employee, Robin Emerson, would be unable to parrot the false script, Norris had him retired in an effort to keep him from being called as a witness. JA-1687-88, 878-81, 3190-91, 3337.

The fact that Norris and his co-conspirators contemplated that their own counsel would provide the first test of their "new memory" does not preclude the jury's conclusion that they intended to stick to

the false story if called before the grand jury. The Morgan employees knew they were supposed to "follow[] the party line" whenever they were asked about the price-fixing meetings by "anybody." JA-1014, 1230. Thus, when Morgan's counsel proposed offering to make several of those same employees available to the grand jury, Norris could agree to counsel's request, secure in the knowledge that his subordinates had memorized their scripts and would tell their cover story to the grand jury. *See* JA-1538-40, 3279, 3280.

Similarly, and contrary to Norris's suggestion (Br. at 23), the evidence established that Norris and his co-conspirators sought to ensure that the Schunk and Hoffmann employees told the same false tale—not only to their own counsel—but to anyone who asked. Norris first initiated contact with Schunk in an effort to discover if Schunk, like Morgan, was being investigated by a grand jury. JA-1250. Schunk executive Helmut Weidlich testified that Kroef asked him to distribute Morgan's scripts to Schunk and Hoffmann employees "to make sure that the testimony that they would be giving would be the same as or similar to what the Morgan people have said." JA-1783. Weidlich also

testified about a follow-up meeting with both Kroef and Norris in which Norris "strongly suggested that we make sure that our people answer in the same way . . . because that would help to convince the US authorities that the Morgan story was right." JA-1794. Norris went on to suggest that Schunk "identify those persons who would most probably be interviewed" and either make them consultants or force them into early retirement "to stop the company from having to produce these people as—as witnesses." JA-1795.

Norris's argument that he could not have conspired to influence grand jury testimony because his co-conspirators were not aware that grand juries could hear testimony is also unsupported by the record. The evidence established that Norris had a copy of the grand jury subpoena to Morganite, titled "Subpoena to Testify Before the Grand Jury," and that he showed that document to other Morgan employees. JA-859, 3177-89. Moreover, there can be no dispute that Norris understood that grand juries can hear testimony when he agreed to Keany's suggestion that Morgan make certain employees available to testify before the grand jury. JA-1542. A rational jury could conclude,

based on this evidence, that Norris and his co-conspirators were aware that people could be called to testify before a grand jury.

Likewise, the fact that no Morgan or Schunk employees did, in fact, testify before the grand jury is of no moment. The crime of conspiracy is committed the moment that Norris and his co-conspirators entered the agreement to influence grand jury testimony and commited any overt act in furtherance of the scheme. Section 1512 itself is not limited to successful efforts to influence the testimony of subpoenaed witnesses. *See United States v. DiSalvo*, 631 F.Supp. 1398, 1402 (E.D. Pa. 1986), *aff'd*, 826 F.2d 1057 (Table) (3d Cir. 1987) (term "any person" in § 1512 was intended to reach "potential" witnesses); *see also* 18 U.S.C. § 1512(f)(1) ("an official proceeding need not be pending or about to be instituted at the time of the offense").

Norris's argument that the government failed to prove that he acted with the requisite intent because the evidence did not establish the required nexus between the corrupt persuasion and any particular proceeding is unavailing. Br. at 29 (citing *Arthur Andersen LLP v. United States*, 544 U.S. 696, 707-08 (2005)). This Court has explained

that, under § 1512(b) "'[t]he touchstone for the nexus requirement . . . is an act taken that would have the natural and probable effect of interfering with a judicial or grand jury proceeding . . . ; that is, the act must have a relationship in time, causation, or logic with the judicial proceedings.'" *United States v. Vampire Nation*, 451 F.3d 189, 205 (3d Cir. 2006) (quoting *United States v. Quattrone*, 441 F.3d 153, 171 (2d Cir. 2006)).

Here the government proved that, in response to the grand jury subpoena to Morganite, Norris and his subordinates concocted a cover story and encouraged those individuals with knowledge most relevant to the grand jury's investigation to tell this false tale to anyone who asked them about their meetings with competitors. This evidence easily establishes that Norris's actions were related "in time, causation [and] logic" with the grand jury investigation. *Id.* at 205. The jury was properly instructed on the nexus requirement of § 1512, JA-2137; indeed Norris does not challenge the court's instruction on this point.[8]

[8] Thus, *United States v. Floresca*, 38 F.3d 706 (4th Cir. 1994), which reversed a conviction because the jury was instructed it could convict for an unindicted offense, is irrelevant. *See* Br. at 24.

The jury reasonably concluded that, in this context, the "natural and probable effect" of encouraging these Morgan and Schunk employees to lie to anyone and everyone who asked about competitor meetings was that, if called before the grand jury, they would lie to the grand jury. *See Vampire Nation*, 451 F.3d at 205. That conclusion is reasonable and should not be disturbed on appeal.

Contrary to Norris's claim, *United States v. Aguilar*, 515 U.S. 593 (1995), does not dictate a different result in this case. In *Aguilar*, the defendant was convicted of endeavoring to obstruct justice in violation of 18 U.S.C. § 1503, by lying to two FBI agents. *Id.* at 597. After noting that the FBI agents were not authorized by or acting on behalf of the grand jury, the court found the evidence that defendant had uttered false statements to an investigating agent "who might or might not testify before a grand jury" was insufficient to support a violation of § 1503. *Id.* at 600. In *Aguilar*, there was nothing to suggest that the defendant intended anything more than to mislead the investigator, and the evidence did not establish that the natural and probable

consequence of defendant's action was that his false statement would be repeated to the grand jury.

In contrast, here, the Morgan and Schunk employees that Norris conspired to persuade were the likely grand jury witnesses. Norris and his co-conspirators were aware of the ongoing grand jury investigation, and they targeted those individuals with the knowledge most relevant to that investigation and encouraged them to memorize a false script to use if they were ever questioned by anyone about their price-fixing activities. For example, Norris told Bruce Muller, the CEO of Morganite who had attended the first price-fixing meeting with Carbone in Toronto, that he should "adhere to the story of the Joint Venture for South America as—as the cover story for why we were in Toronto." JA-1089. Ultimately, the government did express an interest in having Muller testify before the grand jury, and Morgan's counsel offered, with Norris's consent, to make him available to the grand jury. JA-3279-80.

Aguilar does not require, as Norris suggests, that the defendant have actual knowledge that a false statement will be presented to the

grand jury. Br. at 26-27. It is sufficient if the defendant acted in a way that would have the natural and probable effect of influencing grand jury testimony. Nor is it necessary that evidence of the connection to the grand jury be explicit, because "[t]he jury could make that connection from considering the evidence as a whole." *United States v. Furkin*, 119 F.3d 1276, 1283 (7th Cir. 1997).

Moreover, the *Aguilar* Court was applying 18 U.S.C. § 1503, a different statute than the one Norris was charged with violating. While *Arthur Andersen* holds that a conviction under § 1512(b) requires some nexus between the obstructive conduct and an official proceeding, it is not at all clear that the Supreme Court intended the precise nexus described in *Aguilar* to apply to § 1512(b), 544 U.S. at 707-08, and differences in the two statutes suggests that a different nexus requirement is appropriate. Unlike § 1512(b), which is quite specific, the catchall provision of § 1503 criminalizes a broad range of conduct, which is one of the reasons the *Aguilar* court required the nexus it did. *Aguilar*, 515 U.S. at 600. Moreover, unlike § 1503, a conviction under § 1512(b) does not require a pending judicial proceeding, *DiSalvo*, 631

F. Supp. at 1402,, suggesting that a defendant need not have the same level of confidence that his efforts will actually influence grand jury testimony to be convicted of violating § 1512(b). Indeed, § 1512 reaches corrupt persuasion, not just of "witnesses," but of "persons." *Id.* In any event, the evidence here satisfies the nexus requirement for § 1503 as articulated in *Aguilar*, and thus, this Court need not address whether § 1512 has a lower standard.

The jury in this case could reasonably infer that Norris's ongoing and multi-faceted scheme was aimed not merely at misleading Morgan's own lawyers or government investigators, but also ensuring that the persons with knowledge of the price-fixing meetings who were called before the grand jury would tell the cover story that Norris and his co-conspirators had concocted. Thus, the jury's conviction should be affirmed.[9]

---

[9] Norris also argues that the district court erred when it concluded that a § 1512(b)(1) violation could lie if the evidence showed Norris had deliberately used Morgan's own counsel or government investigators "as a conduit to ultimately influence testimony at contemplated grand jury proceedings." JA-71-72. While the language of § 1512(b)(1) does prohibit the corrupt persuasion of one person with the intent to influence the testimony of another, 18 U.S.C. § 1512(b)(1) ("Whoever knowingly uses intimidation, threatens, or corruptly

C. The Evidence Showed Norris Conspired to Corruptly Persuade Others to Destroy Documents With Intent to Keep Them from the Grand Jury

Norris also contends that his conviction should be reversed because the evidence established only an agreement to destroy documents with the intent to keep them from European investigators, and not the U.S. grand jury. Substantial evidence demonstrates, however, that Norris and his co-conspirators intended, at least in part, to keep the incriminating documents from the U.S. grand jury.

The evidence established that in the fall of 1999, Norris had a copy of the grand jury subpoena to Morganite, which required the production of all documents wherever located (¶ III(D)) reflecting communications with a competitor for the sale of carbon products (¶¶ IV(C), V(C)(1)) anywhere in the world (¶ III(C)), including documents possessed by Morganite's affiliates (¶ IV(E)). JA-3177-86.

---

persuades *another person* . . . with intent to influence, delay, or prevent the testimony of *any person* in an official proceeding") (emphasis added), the evidence here established that Norris conspired to corruptly persuade Morgan and Schunk employees with the intent to influence *their own* testimony before the grand jury. Accordingly, this Court need not address the viability of the conduit theory, and we have not addressed it in this brief.

Kroef testified that it was this subpoena that "triggered" Norris to ask Kroef to clean out Morgan's European sales files of any documents that would reveal cartel activity. JA-1244-45. Kroef recruited Emerson and two other Morgan employees and directed them to visit each of Morgan's European sales offices and retrieve and destroy all incriminating documents. JA-1245-46, 872-74.

Norris disputes the timing of the document destruction, suggesting that the Morgan employees destroyed these documents before receiving the grand jury subpoena. Br. at 39-40. The document on which Norris relies for this argument, a competitor's internal report of a pre-subpoena cartel meeting in Europe, states only the following:

> 2. Security
>
> * * *
>
> – proposal of National [Morgan]: to employ any guy with good relationship to the company (attorney) for investigate the documents.
> – Morgan has done this by their own attorneys.

JA-3164. Even assuming that this document accurately reflects what was said in this meeting, and that "investigate the documents" means cleanse the files of any incriminating documents, the jury need not

have concluded that this referred to the same document destruction that Kroef testified about—for which Morgan plainly did not use "their own attorneys." Moreover, Kroef's testimony that this file clean up was triggered by the grand jury subpoena was confirmed by Emerson, who testified that the document destruction took place after he had seen copies of the false scripts, in "2000, probably in April." JA-871-73. Based on this evidence, the jury could reasonably conclude that the documents were destroyed following receipt of the subpoena.

The evidence also was sufficient to find that Norris and Kroef conspired to corruptly persuade Schunk to destroy documents. Weidlich testified that during the February 2001 meeting with Norris and Kroef, Norris told Weidlich and Kotzur "we should be very careful about all the documents which we have in our offices. And he suggested again that we should do the same thing as Morgan obviously had done. . . . [F]ilter through all the documents and take out those documents which might be compromising . . . and destroy them." JA-1796.

Norris contends that this evidence proves only that he intended to keep the documents from European investigators, and thus fails to satisfy the Supreme Court's requirement that document destruction occur "in contemplation [of] any particular official proceeding." *Arthur Andersen*, 544 U.S. at 708. The two motives—rendering these incriminating documents unavailable both to the U.S. grand jury and to any European investigation—are not inconsistent, particularly given that the U.S. conspiracy was an extension of the pre-existing European cartel. By destroying the documents, Norris and his co-conspirators ensured that they were not available to either authority. Moreover, given Kroef's testimony that the U.S. grand jury subpoena "triggered" the document destruction, JA-1245, as well as the ongoing scheme to persuade Morgan employees to give false testimony to the U.S. grand jury, the jury in this case could reasonably conclude that Norris conspired to destroy documents with the requisite intent to prevent their use by the U.S. grand jury.

The fact that these documents were located outside the United States does not change this result. By its language, § 1512 applies to

conduct taken outside the United States. 18 U.S.C. § 1512(h). Moreover, even if the grand jury were unable to compel production of these foreign-located documents, the documents could have been made available to the grand jury in other ways, such as with the assistance of foreign states, or in the event the documents were brought into the United States for other reasons and were thus placed within the grand jury's reach. *See, e.g.*, *In re Grand Jury Subpoenas*, 627 F.3d 1143 (9th Cir. 2010). Alternatively, Morgan could have voluntarily produced the foreign-located documents to the grand jury, as the cover letter to the subpoena specifically requested, JA-3189, and as Morgan did, first by producing copies of the false scripts in response to the grand jury subpoena and later by providing documents pursuant to its plea agreement. *See* JA-2317-18 (DX-12: cover letter from Morgan's counsel, dated 12/21/2000). When Norris and his subordinates destroyed Morgan's documents, however, they made them unavailable to the grand jury by any means.

Nor is it relevant that the cover letter to the subpoena stated that the government would temporarily defer seeking to compel production

of foreign-located documents. Br. at 34. Because the enforcement of a subpoena with respect to documents currently located in a foreign country may raise concerns for that foreign government, the Justice Department's Antitrust Division, as a matter of prosecutorial discretion, usually defers the production of foreign-located documents when it serves a grand jury subpoena. This allows the party to negotiate compliance with the subpoena and any foreign government to express its views on the production of documents located within its borders, if it wishes to do so. This exercise of restraint, however, does not immunize the conspirators' destruction of documents expressly covered by a pending grand jury subpoena.

Finally, there is no meaningful dispute that these documents "might be material" to the U.S. grand jury investigation. *See Arthur Andersen*, 544 U.S. at 708. The grand jury was investigating price fixing in the sale of carbon and engineered graphite products in the United States. The destroyed documents were evidence of price fixing among the same companies and involving many of the same individuals for the sale of the same types of products. Norris contends that "[t]here

is no evidence that [the destroyed] documents related to the limited carbon products under investigation in the U.S. grand jury proceeding," Br. at 41, but the grand jury's investigation encompassed "all carbon and engineered graphite materials or products including, but not limited to, isostatic or isotropic graphite, extruded graphite, molded graphite, carbon black, glassy carbon, carbon brushes, brush blades and impervious graphite." JA-3181 (¶ IV(C)). When Norris instructed Kroef to destroy documents that reflected price fixing, he did not limit the instruction to particular products. *See* JA-1246.[10] Nor did Norris qualify his suggestion to Schunk that it destroy any incriminating documents in its files. JA-1796. Moreover, even if the documents only concerned sales in Europe, evidence of price fixing in Europe was relevant to assessing Morgan's intent and to determining whether Morgan and its competitors were engaged in a single, worldwide conspiracy or a separate conspiracy in the United States.[11]

---

[10] Of course, it is impossible to know definitively what Morgan's documents showed because Norris had them destroyed.

[11] Norris contends that the district court failed to consider whether Norris knew that the destroyed documents were likely to be "material" to the grand jury investigation and instead applied a lower

II. NO ERRORS IN THE JURY INSTRUCTIONS WARRANT REVERSAL

A. The Jury Was Properly Instructed Regarding the Meaning of "Corruptly Persuades"

Norris contends that the district court erred when it refused to give his proposed instruction regarding the meaning of corrupt persuasion. Norris's proposed instruction was unsupported by the evidence, and the district court did not abuse its discretion when it refused to give it. *See United States v. Flores*, 454 F.3d 149, 156 (3d Cir. 2006) (this Court "review[s] the refusal to give a particular instruction . . . for abuse of discretion").

---

standard of "responsive[ness]." Br. at 40. But documents responsive to a grand jury subpoena are *per se* material to its investigation. *See United States v. Quattrone*, 441 F.3d 153, 171 (2d Cir. 2006) ("nexus requirement is met when one directs or attempts to direct the destruction or concealment of documents known to be generally responsive to a grand jury subpoena"). It would be an absurd result if a defendant could destroy documents responsive to a grand jury subpoena with impunity by claiming that he had made an independent determination that the responsive documents were not material—a determination that cannot be reviewed once the documents are destroyed.

Relying on *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), and *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997), Norris contends that the district court ought to have instructed the jury that:

> it is not "corrupt persuasion" to persuade a co-conspirator to withhold, or fail to volunteer, information, no matter how important that information may be to the grand jury proceeding. In other words, you may not find someone has "corruptly persuade[d]" another person if all he did was to persuade co-conspirators to withhold incriminating information.

JA-335. Neither *Arthur Andersen* nor *Farrell* provides support for Norris's proposed instruction here. In *Farrell*, the defendant was convicted of corruptly persuading his co-conspirator to withhold information from government investigators. 126 F.3d at 486. This Court reversed, holding that corrupt persuasion does not include a noncoercive attempt to persuade a co-conspirator to assert his Fifth Amendment privilege against self-incrimination. *Id.* at 488-89.[12]

---

[12] The defendant in *Farrell* was also charged with corruptly persuading another person to provide false information to government investigators, but this Court declined to affirm the conviction on that basis because the district court had made no findings as to that theory. 126 F.3d at 491. Instead, this Court remanded the case for further findings of fact. *Id.* On remand, the district court held that the defendant's urging of his co-conspirator to "stick to the story" that the

Similarly, the Supreme Court said in *Arthur Andersen*, that "innocent" efforts to persuade another to withhold information that the person has no legal duty to provide is not unlawful. 544 U.S. at 703-04, 707.

Norris was not charged with persuading others to withhold testimony. Rather, the indictment alleged—and the evidence established—that Norris conspired to corruptly persuade others to give false testimony. Norris's claim that his actions do not violate § 1512(b) because he only persuaded persons to omit incriminating evidence rests upon a selective and misleading recitation of the evidence and a misunderstanding of the privilege against self-incrimination.

Norris conspired to persuade others to adhere to the scripts that he and his co-conspirators drafted when asked about their price-fixing meetings, and, as numerous witnesses testified, those scripts were false. *See* JA-870 (Emerson: "I told [Perkins], these are false minutes."); JA-1212 (Kroef: script writing was an effort "to create

---

meat was for dogs when it was actually sold for human consumption in violation of federal law was corrupt persuasion. *United States v. Farrell*, No. 95-453, 1998 WL 404518, at *2 (E.D. Pa. July 14, 1998).

evidence that it wasn't cartel meetings"); JA-1010, 1093, 1433, 1435-36, 1403-05, 1672.

The scripts identify joint venture discussions as the only purpose of Morgan's meetings with Carbone, when that was plainly not the purpose, and state that extensive joint venture discussions took place, when they did not. *Compare* JA-3195 (GX-10 (1995 Paris Meeting Summary): "[P]rimary reason for meeting was to get the dialogue going on JV exits."), *with* JA-823 (Emerson: Purpose of 1995 Paris meeting was "[t]o try to establish an effort of communication between ourselves and Le Carbone, to exchange price information on customers in the USA."); *compare* JA-3193 (GX-10 (1995 Toronto Meeting Summary): "Bruce [Muller] basically set up [the] meeting . . . wanting to develop business in South America."), *with* JA-1094-96 (Muller: "I did not set up the meeting. . . . We did not discuss any of that."). *See also* JA-1001-02, 1009-10, 1673. Similarly, the scripts state that the meetings with Schunk and Hoffmann were only general market discussions, when that was not the case. *See* JA-1403-05, 3286. And the scripts state that Carbone was interested in discussing price cooperation, but that

Morgan, Schunk, and Hoffmann all rejected Carbone's overtures, when they had not. JA-1672, 1435-36. These scripts are not merely incomplete—they are false, and, as this Court made clear in *Farrell*, "attempting to *persuade* someone to provide *false* information" is corrupt persuasion punishable under § 1512(b). 126 F.3d at 488 (emphasis in original); *see also United States v. Doss*, __ F.3d __, No. 07-50334, 2011 WL 117628 (9th Cir. 2011) ("non-coercive attempts to persuade a witness to lie are clearly covered by § 1512(b)").

Moreover, even if all Norris had done was to instruct others not to mention their price discussions when answering questions about the competitor meetings, withholding such material information without asserting a privilege while providing other information about the meetings would amount to a lie. "In other words, half of the truth may obviously amount to a lie, if it is understood to be the whole" W. Prosser & W. Keeton, *The Law of Torts* § 106 at 738 (5th ed. 1984).[13]

---

[13] Grand jury witnesses under subpoena have a legal obligation to answer all of the grand jury's questions truthfully, until they validly invoke their Fifth Amendment privilege against incrimination. *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (the grand jury "'has a right to every man's evidence'"). And, even then, if the government grants the witness immunity, that legal obligation is restored.

The Fifth Amendment does not protect such lies of omission, and nothing in *Farrell* or *Arthur Andersen* immunizes such conduct.

The court's instruction regarding corrupt persuasion "fairly and adequately submit[ted] the issues in the case to the jury" and did not confuse or mislead the jury. *Bennis v. Gable*, 823 F.2d 723, 727 (3d Cir. 1987). The district court followed this Court's pattern jury instruction and charged the jury that:

> to corruptly persuade, that means to corrupt another person by persuading him or her to violate a legal duty, to accomplish an unlawful end or an unlawful result or to accomplish some other lawful end or lawful result by an unlawful manner. To persuade, that means to cause or induce a person to do something or not to do something.

JA-2136; *see also* Third Circuit Model Jury Instructions (Criminal) 6.18.1512B (2009). The court said nothing about an effort to persuade others to withhold testimony, and nothing in this instruction would have permitted the jury to convict if it found only that Norris had urged others to withhold testimony. Moreover, there was no need to define the term "legal duty." Norris was charged with corruptly persuading

---

Kastigar v. United States, 406 U.S. 441, 462 (1972).

others to give false testimony, and no specific instruction was required to tell the jury that giving false testimony violates a witness's legal duty.[14]

Nothing in the district court's jury charge nor anything argued at trial suggested to the jury that it could convict if it found only that Norris sought to persuade others to lawfully withhold information. Thus, Norris's proposed instruction was unnecessary, and the district court did not abuse its discussion in refusing to give it.

B. Any Error in the District Court's Instruction Regarding the Overt Acts Element Was Harmless

Norris's argument that the district court erred by failing to identify for the jury the overt acts alleged in the indictment, Br. at 46-49, is similarly unavailing because any error in the instruction was harmless. Because Norris failed to object to the court's instructions during the trial, this argument has been waived and can only be

---

[14] Norris also complains that the district court's definition of "persuade" allowed the jury to convict him for innocent conduct. Br. at 46. This definition was added only after Norris requested an instruction on the meaning of "persuade." JA-337. The definition is accurate and, when read in light of the court's clear instruction that the jury must find *corrupt* persuasion, cannot be said to have confused or misled the jury.

reviewed for plain error.[15] *United States v. Lee*, 612 F.3d 170, 191 (3d Cir. 2010). A mistake should be characterized as plain error only "'sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *Gov't of Virgin Islands v. Knight*, 989 F.2d 619, 631 (3d Cir. 1993). "Under the plain error doctrine," correction is required for "only 'particularly egregious errors,' which 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *Id.* (citation omitted)

In claiming plain error here, Norris relies on *United States v. Small*, 472 F.2d 818, 819 (3d Cir. 1972), in which the district court failed to instruct the jury that it must find at least one overt act was

---

[15] Norris's claim that he "identified" a problem with the court's instructions during the charge conference is misleading. *See* Br. at 46. During the charge conference, defense counsel asked whether the court would provide the indictment to the jury in light of the references to the indictment in the instructions. JA-1933-34 (Counsel: "Okay. I just wanted to . . . clarify that they're actually not getting–" "Okay. So they'll get a hard copy of the instructions . . . but not the indictment."). This inquiry was not an objection, much less a specific one stating the grounds in support. *Gov't of the Virgin Islands v. Knight*, 989 F.2d 619, 631 (3d Cir. 1993) ("Without a clearly articulated objection, a trial judge is not apprised sufficiently of the contested issue and the need to cure a potential error to avoid a new trial."). Nor was Norris's pre-trial proposal of a redacted indictment, *see* Br. at 49, an objection to the error he now claims.

committed and instead, told the jury that the overt acts listed in the indictment were "unimportant." Br. at 47. *Small* is irrelevant because the district court here correctly instructed the jury as to the elements of the offense of conspiracy, including instructing the jury that in order to convict, it had to find that "at some time during the existence of the agreement or conspiracy, at least one of its members performed an overt act in order to further the objective of the agreement" and that they "must unanimously agree on the overt act that was committed." JA-2129, 2133.

Nor can Norris claim to have been prejudiced if the jury convicted him based on overt acts not alleged in the indictment. This Court has long held that a jury can properly convict based on an overt act that was not alleged in the indictment. *United States v. Adamo*, 534 F.2d 31, 38-39 (3d Cir. 1976). Norris suggests that this rule does not apply where the jury has been instructed that it must find an overt act alleged in the indictment, but this is not the case. In the case cited by Norris, *United States v. Schurr*, 794 F.2d 903 (3d Cir. 1986), the district court had instructed the jury that it had to find that an overt

act alleged in the indictment took place within the statute of limitations period. *Id.* at 907. This Court, sitting *en banc*, held that the instruction was erroneous because the government can prove overt acts not listed in the indictment, but that error was harmless because, if anything, it hurt the government by limiting the overt acts upon which the jury could rely. *Id.* at 907 & n.4. This Court went on to conclude, however, the instruction, together with the panel decision that cast doubt on the sufficiency of the evidence as to the single overt act alleged in the indictment that fell within the statute of limitations period, could have harmed the defendant if he had relied on the instruction in deciding what issues to controvert on appeal. *Id.* at 908 n.5; *see also United States v. Negro*, 164 F.2d 168, 173 (2d Cir. 1947) ("the substitution of proof of an unalleged for an alleged overt act does not constitute a fatal variance. At most, [it] justifies a request for continuance because of surprise."). Norris does not contend that he relied on the district court's instructions to his detriment in challenging his conviction; thus, *Schurr* provides no support for his argument.

United States v. Bosch Morales, 677 F.2d 1 (1st Cir. 1982), is also distinguishable because there the district court repeatedly identified the specific acts alleged in the indictment and instructed the jury that it must find one of them, but the jury's acquittals on the substantive counts amounted to a finding that none of the alleged acts had occurred. *Id.* at 2. *Bosch Morales* is no longer good law. *United States v. Bucuvalas*, 909 F.2d 593, 594 (1st Cir. 1990) ("the rule of consistency embraced by *Bosch Morales* is no longer viable").

In contrast here, the district court did not identify the specific overt acts, and there was ample evidence of numerous overt acts alleged in the indictment as well as acts not alleged in the indictment. For example, the indictment alleged that:

> ¶ 19(i) In or around November 1999, the defendant called several of the co-conspirators . . . to a meeting at Morgan's headquarters in Windsor, England, to discuss the antitrust investigation being conducted in the United States and how to deal with it.
>
> ***
>
> ¶ 19(k) During the meeting described in Paragraph 19(i), the defendant and the co-conspirators agreed that they would prepare

> summaries of the meetings Morgan had with its competitors; that the summaries would falsely characterize the meetings as joint venture meetings; and that the summaries would purposely exclude mention of pricing discussions Morgan had with its competitors at those meetings (hereinafter referred to as the "script").

JA-187-88. As set forth above, substantial evidence establishes these overt acts. *See supra* at 8-11, 27-28.

Unable to establish that the district court's instructions were legally incorrect, Norris argues that they must have left the jury confused and that the jury either "ignored the 'overt act' element or engaged in impermissible speculation." Br. at 48. There is no reason to suspect that the jury ignored the overt act requirement, because the district court carefully and correctly instructed that the jury had to unanimously find at least one overt act in order to convict and the jury is presumed to have followed its instructions.[16] *See United States v. Olano*, 507 U.S. 725, 740 (1993). Moreover, because the jury could convict Norris based upon overt acts not alleged in the indictment, any

[16] Norris notes that the district court did not separately define the term "overt act." Again, Norris did not object to the district court's decision not to separately define the term, nor can he point to any authority that such a definition is required.

speculation by the jury as to whether an overt act was or was not alleged in the indictment would have been harmless.

Finally, Norris's contention that the jury's temporary impasse prior to reaching a verdict indicates uncertainty about the overt act element is nothing more than speculation. *See* Br. at 48. To the extent that Norris argues that the acquittals on the substantive counts cast doubt on the proof of the overt acts, Br. at 47, he is wrong, and to the extent that *Small* supports this argument, it is no longer good law. For even truly inconsistent verdicts, "'[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt.'" *United States v. Powell*, 469 U.S. 57, 64-65 (1984). In short, the jury's acquittals have no legal significance, and "an individualized assessment of the reason for [an inconsistent verdict] would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake." *Id.* at 66.[17]

[17] There is, of course, nothing inherently inconsistent with the jury finding Norris guilty of conspiracy but not guilty of the substantive

Norris has not established that the court's instruction was "sure to have had an 'unfair prejudicial impact on the jury's deliberations.'" *United States v. Santos*, 932 F.2d 244, 250 (3d Cir. 1991) (quoting *United States v. Young*, 470 U.S. 1, 16 n.14 (1985)). And, in light of the ample evidence of overt acts, any error was harmless and did not seriously affect the fairness of the proceeding. *Neder v. United States*, 527 U.S. 1, 16-17 (1999).

III. THERE WAS NO INVASION OF THE ATTORNEY-CLIENT PRIVILEGE

The district court did not err in permitting the trial testimony of Morgan's former counsel, Sutton Keany, because Norris did not establish that Keany's testimony invaded any individual attorney-client privilege, and Morgan had waived its privilege with respect to any communications by Norris in his corporate capacity. *See* JA-3415.

---

offenses of attempting to commit or committing obstruction of justice. As the district court properly instructed the jury, conspiracy requires only an overt act, which need not be criminal in nature nor actually committed by the defendant, while "attempt" requires that the defendant have performed an act constituting a substantial step toward the commission of the offense. JA-2139-40, 2147; Third Circuit Model Jury Instructions (Criminal) 6.18.371F, 7.01 (2009).

While a corporate officer cannot claim attorney-client privilege for communications made to corporate counsel in his official capacity, in some cases it can be difficult to determine whether communications are made within an officer's representative capacity or in the scope of a personal attorney-client relationship. This Court has adopted a five-factor test to determine whether a corporate officer can assert a personal claim of attorney-client privilege with respect to communications with corporate counsel:

> First, they must show they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And, fifth, they must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.

In the Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 123 (3d Cir. 1986). Here, Norris asserts a personal attorney-

client privilege over his communications with Morgan's counsel. As the party asserting this privilege, Norris bears the burden of establishing each element of it. *Id.* at 126.

Norris argues that *Bevill* does not apply where the corporate officer had a personal attorney-client relationship with counsel. Br. at 58. This argument misunderstands *Bevill*. In *Bevill*, two corporate officers claimed that their communications with corporate counsel during the period when counsel was still considering representing the officers individually were protected by a personal attorney-client privilege that the corporation could not waive. 805 F.2d at 121-22, 124. The district court held that the officers could assert a personal claim of privilege over the communications with corporate counsel only if they satisfied the five-factor test, and this Court affirmed. *Id.* at 123, 125. In so doing, this Court noted that, the officers' communications with counsel while counsel was still considering representing them individually would ordinarily be privileged because the attorney-client privilege presumptively protects communications between counsel and prospective, as well as actual, clients. *Id.* at 124, n.1. But, because the

attorney was counsel for the corporation and the officers' communications concerned corporate matters, the privilege belonged solely to the corporation unless the officers satisfied the *Bevill* test. *Id.* at 124-25.[18] *See also In re Grand Jury Subpoena*, 274 F.3d 563 (1st Cir. 2001) (applying the *Bevill* factors even where officers had a personal attorney-client relationship with corporate counsel).

---

[18] The cases cited by Norris are not to the contrary. *Montgomery Acad. v. Kohn*, 82 F. Supp. 2d 312 (D.N.J. 1999), concerns the disqualification of counsel. The court noted that when an employee seeks personal legal representation and communicates confidential information to an attorney prior to the attorney's retention by her employer, "*Bevill, Bresler* supports [the employee's] claim that statements she made to [counsel] *prior to* [counsel's] formal retention by the [employer] are privileged." *Id.* at 316 (emphasis added). This dicta is not inconsistent with or even relevant to the district court's ruling here, where it is undisputed that Keany represented Morgan during the entire relevant period. *In re Benun*, 339 B.R. 115 (Bankr. D.N.J. 2006), merely reaffirms that individuals "may assert their personal privilege as to matters not related to their role as officers of the corporation." *Id.* at 124. Because all of Keany's testimony concerned Norris's corporate communications, *see infra* at 64-65, *Benun* is irrelevant. And, in *In re Grand Jury*, 211 F. Supp. 2d 555 (M.D. Pa. 2001), the parties did not dispute, and the court did not decide, whether the CEO's communications with corporate counsel were protected by a personal attorney-client privilege. The only issue was whether the joint defense agreement allowed the corporation to waive a personal privilege. *Id.* at 558-59.

After holding an evidentiary hearing in which both Keany and his former partner Jerry Peppers testified, the district court found that Norris could not assert a personal claim of privilege over his communications with Morgan's counsel because he failed to satisfy the *Bevill* test. Nothing in Norris's appeal demonstrates that the district court clearly erred in reaching that conclusion. *See United States v. Doe*, 429 F.3d 450, 452 (3d Cir. 2005) (factual determinations in applying the attorney-client privilege are reviewed for clear error). There is no evidence that Norris approached Keany or his firm, Winthrop, Stimson, Putnam & Roberts ("Winthrop"), for personal legal representation. JA-440-41, 451-52, 539-40. Morgan contacted the law firm to represent it during the grand jury investigation. JA-430-31, 521-22. At no time did Keany think that he was representing Norris individually. Keany specifically advised Norris that he represented Morgan and that Norris should get his own counsel. JA-441-42.

Unable to establish that Norris sought personal legal representation from Keany or his firm, Norris points to a letter that Keany sent to government investigators stating that Winthrop

"presumptively" represented all current Morgan employees and that, if the government subpoenaed any current Morgan employees, "I assume that we would also represent those individuals." Br. at 53-54 (quoting JA-3419). The district court properly concluded that this tentative language does not establish an attorney-client relationship. Rather, it "refer[s] to a future decision to be made, if and when, the employees, including Norris, were called before the grand jury," and was meant only to designate Keany as the contact person in the event the grand jury issued subpoenas. JA-45.

Norris also relies on testimony by Keany's partner, Jerry Peppers,[19] that he understood "generally, . . . that the firm represented a parent company, and in representing a parent company, sometimes it's consistent to represent affiliates, . . . and sometimes officers and employees, and in this case, it included officers and employees." JA-524-25. Peppers also testified that in late September 2001 Norris asked him, outside of Keany's presence, if Keany could "continue to"

[19] The district court noted that Peppers was "not a totally disinterested party since, as he testified, Peppers is a personal friend of Norris." JA-44.

represent Norris. JA-538-39. Peppers' apparent assumption that Winthrop generally represented some unnamed group of Morgan officers and employees, as well as Norris's vague comment about Keany's continued representation are wholly insufficient to establish that Norris sought legal advice from Keany or his firm or that Keany was communicating with Norris in his individual capacity.[20]

Finally, Norris relies on a letter from Winthrop to Norris advising him what to do in the event that he is stopped at the border to be served with a grand jury subpoena, and on two letters that Winthrop provided Norris identifying the law firm as Norris's counsel in case he had difficulty with immigration officials while entering the United States.[21] Again, these letters, which Peppers described as "standard in

---

[20] Even though Norris had the burden of establishing Keany represented him in his personal capacity, Norris did not testify at the evidentiary hearing and explain why he believed he had an individual attorney-client relationship with Keany. Thus, Keany's testimony that he told Norris he represented Morgan and that Norris should get his own counsel is not contradicted. Peppers' testimony, even if credited, does not change this reality. Accordingly, this is not a case in which a corporate executive is misled into making statements to corporate counsel thinking that counsel also represented him individually.

[21] Norris did not produce these letters at the pre-trial hearing on this matter, but only when seeking reconsideration of the district

the circumstances," JA-525, do not establish that Norris sought individual legal representation or that Keany understood that he represented Norris individually. Dispensing basic advice to corporate executives who might encounter immigration problems was entirely consistent with Keany's duty to the corporation as a whole.

Regarding the fifth *Bevill* factor, the district court found Norris had failed to present evidence of a single confidential communication with Keany regarding Norris's personal liability as opposed to Morgan's, JA-44, and Norris points to none in his appeal. To the contrary, Keany testified that other Morgan officials were present during his meetings with Norris, JA-437, 1534, 1547-48, and that all of his communications with Norris concerned Morgan and its conduct and exposure in the grand jury investigation. JA-444-45. *See also* JA-3278-79, 3414 (email communications from Keany to Norris copying other Morgan officials). And all of the trial testimony about which Norris

---

court's ruling. JA-1457. The district court found that these letters "were at all times in the possession of the defendant" and, therefore, were not newly discovered evidence. JA-1493. Nevertheless, the court held that they "do not add to the Court's previous calculus" that no individual attorney-client privilege precluded Keany's testimony. JA-1495.

complains concerned Morgan's criminal exposure and how Morgan ought to respond to the subpoena issued to Morganite. *See, e.g.*, JA-1521, 1547-48 (whether Morgan had engaged in price fixing); JA-1524 (whether Carbone was lying to the government "as a way of creating problems for Morgan"); JA-1535-36 (what documents Morgan ought to produce in response to the subpoena); JA-1540, 1542-43 (whether Morgan ought to make employees available to the investigation). *Bevill* holds that corporate officers "may assert their personal privileges as to matters not related to their role as officers of the corporation," 805 F.2d at 125, but Keany's testimony here only concerned communications by Norris in his role as CEO of Morgan.

Even if Keany's testimony were protected by a personal attorney-client privilege, the district court properly concluded that the government had made a prima facie showing that Norris's communications were in furtherance of the criminal obstruction of justice. JA-46 (citing *In re Grand Jury Subpoena*, 223 F.3d 213, 217 (3d Cir. 2000)). This conclusion is supported by the trial evidence, which established that Norris lied and encouraged his subordinates to

lie to Morgan's counsel with the intent that Keany would pass the false cover story on to government investigators. JA-1676, 1232. Norris also authorized Keany to turn the false scripts over to government investigators, JA-1534-36, and to offer to make those Morgan employees who had been involved in drafting the false scripts available to testify before the grand jury. JA-1538-40.

Because Norris failed to establish an individual attorney-client privilege with respect to his communications with Keany, the district court properly permitted Keany's testimony.

CONCLUSION

For the reasons set forth above, the Court should affirm the judgment of conviction.

Respectfully submitted.

/s/ Kristen C. Limarzi

LUCY P. MCCLAIN
RICHARD S. ROSENBERG
KIMBERLY A. JUSTICE
Attorneys
U.S. Department of Justice
Antitrust Division

CHRISTINE A. VARNEY
Assistant Attorney General

SCOTT D. HAMMOND
Deputy Assistant Attorney General

JOHN J. POWERS, III
KRISTEN C. LIMARZI
Attorneys
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., NW
Room 3224
Washington, D.C. 20530-0001
(202) 353-8629

February 11, 2011

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 12,996 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X4 with 14-point Century font.

February 11, 2011

/s/ Kristen C. Limarzi
KRISTEN C. LIMARZI
Attorney

CERTIFICATION OF IDENTICAL COMPLIANCE
AND VIRUS CHECK

1. The text of the electronic version of the foregoing brief filed using the CM/ECF system is identical to the text of the paper copies furnished to the Court, as required by Local Appellate Rule 31.1.

2. A virus check of the electronic version of the foregoing brief was performed using Symantec Endpoint Protection, as required by Local Appellate Rule 31.1, and no virus was detected.

February 11, 2011

/s/ Kristen C. Limarzi
KRISTEN C. LIMARZI
Attorney

CERTIFICATE OF SERVICE

I, Kristen C. Limarzi, hereby certify that on this 11th day of February, 2011, I electronically filed the foregoing Brief for the United States with the Clerk of the Court using the CM/ECF System. In addition to electronic service through the CM/ECF System, two paper copies of the foregoing Brief were sent by U.S. mail to:

Christopher Curran
White & Case LLP
701 Thirteenth Street, NW
Washington, D.C. 20005
202-626-3643
ccurran@whitecase.com
Counsel for Appellant Norris

February 11, 2011

/s/ Kristen C. Limarzi
KRISTEN C. LIMARZI
Attorney