19-2423(L)

19-3164(CON)

To Be Argued By:
ANDREY SPEKTOR

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

—against—

CHARLES GALLMAN, also known as T.A.,
RICHARD MARSHALL, also known as LOVE,
REGINALD SHABAZZ-MUHAMMAD, also known as REGGIE,

Defendants,

SCOTT BRETTSCHNEIDER, also known as MIGHTY WHITEY,
JOHN SCARPA, JR.

Defendants-Appellants.

On Appeal From The United States District Court
For The Eastern District of New York

BRIEF AND APPENDIX FOR THE UNITED STATES IN RESPONSE TO SCOTT BRETTSCHNEIDER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL RULES

OTHER AUTHORITIES

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BRIEF FOR THE UNITED STATES

PRELIMINARY STATEMENT

Defendant-Appellant Scott Brettschneider appeals from a judgment entered on July 29, 2019, in the United States District Court for the Eastern District of New York (Amon, J.), convicting him, after a

jury trial, of (1) conspiracy to make false statements, in violation of 18 U.S.C. § 371 (Count One), and (2) making false statements, in violation of 18 U.S.C. § 1001(a)(2) (Count Two). The district court sentenced Brettschneider to four years of probation with special conditions including 60 days of community confinement and 80 hours of community service and a $2,000 fine.

On appeal, Brettschneider contends: (1) there was insufficient evidence to convict him of the charges; (2) the district court constructively amended the indictment by expanding the definition of materiality in its jury charge; and (3) the district court erroneously denied suppression of a New York State-issued electronic eavesdropping warrant, fruits of which were introduced at trial. As discussed below, these claims are unavailing.

STATEMENT OF FACTS

I. Overview

Scott Brettschneider was indicted for making, and conspiring to make, false statements to the Bureau of Prisons ("BOP"). (A20-26).[1] The charges stemmed from a wiretap-based investigation conducted by the Queens County District Attorney's Office ("QCDA") into Charles Gallman and a group of attorneys, including Brettschneider, with whom he worked as a case "fixer." (A61, 1492 (Judge Amon's observation at sentencing)). Although the QCDA's investigation focused on bribery, it intercepted — and provided to federal authorities — evidence that Gallman, Brettschneider, and Reginald Shabazz-Muhammad were conspiring to submit a false letter (the "Letter") to the BOP on behalf of a federal inmate, Richard Marshall. (See, e.g., A311-40). This evidence served as the basis of the federal indictment against Brettschneider.

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[1] "A," "GA," "GX," "DE," and "Br," refer to, respectively, Brettschneider's appendix, the government's appendix and trial exhibits, district court docket entries, and Brettschneider's brief. Transcripts of the wiretap calls cited throughout this brief are available on the district court docket. (DE225-1).

As superseded, the indictment alleged that the Letter was written to induce the BOP to admit Marshall into a Residential Drug Treatment Program ("RDAP"), at his place of confinement, United States Penitentiary ("USP"), Lewisburg. (A20-22). Completion of the program could have qualified Marshall for early release from prison (A604) — the co-conspirators' only goal in submitting the Letter.

In his underlying federal narcotics case, United States v. Wright et al., 12-CR-014, Dkt. Entry No. 339 (N.D.N.Y) (FJS), Marshall had been sentenced on August 8, 2014 to 36 months. Although all indicators in Wright demonstrated that Marshall did not suffer from active drug or alcohol dependence — he sold narcotics but did not consume them — soon after he arrived at USP Lewisburg, Marshall began claiming just the opposite to gain admission into the RDAP. (A640). To help Marshall deceive the BOP, Brettschneider recruited Shabazz-Muhammad, a licensed substance abuse counselor and Brettschneider's part-time paralegal, to write the Letter and send it to USP Lewisburg. (See, e.g., A339).

The government's evidence at trial consisted primarily of (1) the Letter, (2) incriminating communications intercepted over

Gallman's cell phone, including some with Brettschneider, discussing the creation and completion of a false letter for Marshall, and (3) testimony of a Regional Treatment Programs Coordinator, Dr. Kit Hoffman, who was the Psychology Treatment Programs Coordinator for the Northeast Region during the period relevant to this case.

II. Trial: Government's Case

A. The Shabazz-Muhammad Letter

The envelope enclosing the Letter indicated that it was from "Reginald Shabazz Muhammad, Dir. of Services," at "Muhammad Mosque No. 7." (GA1-2). It was postmarked November 20, 2014, addressed to "Dr. Diana Banks," and noted that it had been sent "In the Matter of R. Marshall," listing Marshall's (correct) BOP inmate number. (Id.). The Letter, itself, dated November 6, 2014, repeated the address field and was signed by "Reginald Shabazz-Muhammad, CASAC CLA Director of Program Services." (A538-40).

The Letter purported to provide information to Dr. Banks about Marshall's "participation" in Shabazz-Muhammad's "community outreach program." (Id.). It described Marshall's supposed alcohol abuse, marijuana dependence, and treatment in an outpatient program

from 2003 until, "without any notice or explanation," Marshall stopped attending in 2010. (A540). The program was a "faith based initiative [combined] with a traditional clinical approach to assist...program participants to break and overcome the vicious cycle of their active substance dependence." (A538). The Letter detailed Marshall's "clinical treatment plan," which ostensibly included, among other things, "modified cognitive behavioral therapy," "educational seminars/lectures that [focus] on the underlying emotional issues that impact and affect drug use," "one-on-one [and] group counselling" sessions, and the "pharmacology of drugs and the health and dangers of drug use." (A539). The Letter asserted that Marshall was "clinically responsive to his treatment plan," and had a "good attendance and participation record" until he abruptly left. (Id.).

B. Intercepted Communications

In the course of intercepting Gallman's cell phone to investigate his bribery scheme with several attorneys, the QCDA heard Brettschneider and the co-conspirators plot to send a false letter. The communication revealed their intention to reduce Marshall's prison term. (See, e.g., A340 (Marshall remarking that "they might be giving nig**s

the whole year off" for competing RDAP)); A314, 317 (Marshall telling Brettschneider that he needed a letter to get into RDAP to "push me out next year," and Brettschneider stating, "I know who to talk to" to produce false documentation).

To maximize his chances of admission into RDAP, Marshall instructed Brettschneider that a false letter "got to have the letterhead...[i]t got to look real official [be]cause...[t]hey don't want some bullshit over here." (A316). Brettschneider understood that the false letter had to appear persuasive (id. (responding "[r]ight, ok")), and instructed his paralegal and certified drug counselor, Shabazz-Muhammad, to draft it (A339 (Brettschneider telling Marshall that he would have the letter come from the "Shabazz program")); GA11-15 (Shabazz-Muhamad's certifications)). As evident by the Letter, Shabazz-Muhammad — who relied on Brettschneider for work (A404, 406 (Brettschneider describing Shabazz-Muhammad as a reliable paralegal willing to do the "grunt work" who had been "calling me for work.")) — obliged.[2]

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[2] The QCDA was not authorized to intercept communication that did not include Gallman, and, therefore, there was no call

The co-conspirators brainstormed the contents of the Letter over several telephone calls. (See, e.g., A314, 316, 317 (Marshall telling Brettschneider that the letter had to be created by "somebody in the program" and that it should say that Marshall had been "drinking forever," that Marshall was an "alcoholic," and that Marshall had relapsed); A327-28 (Marshall telling Brettschneider that the letter could say he was in an "outpatient" program, that he "always" had a "drinking problem," and that Brettschneider should feel free to "put drugs too, whatever")). They also knew the identity of the decision-maker for the RDAP program in Marshall's prison, Dr. Diana Banks. (A333-34, 427).

The co-conspirators decided to simultaneously send copies of the Letter to Marshall and to Dr. Banks, so that Marshall would be prepared to answer questions about his purported treatment. (A335 ("Like if she [i.e., Dr. Banks] get a letter and she get to question you about

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intercepted solely between Brettschneider and Shabazz-Muhammad. In a three-way call between Gallman, Marshall, and Shabazz-Muhammad, however, Shabazz-Muhammad confirmed that he had discussed the Letter with Brettschneider. (A382 ("I told Scott [Brettschneider] that [the co-conspirators would need progress reports, not just a letter] man, I told him that… You know, he — I think he should've listened to me on this one. I told him that.")).

shit, and you give different answers than what's in the letter, then you fucked.")). Before the BOP received the Letter, the lead QCDA investigator notified the BOP about the co-conspirators' plan to submit a fraudulent letter. (A989, 1022). When the BOP received the Letter, a BOP investigator forwarded a copy of it to the QCDA investigator and to federal authorities. (A844, 998). The BOP also allowed Marshall to take receipt of the copy that was sent to him, and he, in turn, discussed the Letter's contents in intercepted communications. (Id.).

After Shabazz-Muhammad drafted and sent the Letter, Brettschneider stayed informed of its status, asking Marshall over the phone whether the Letter secured Marshall's place in the RDAP. (A365). Marshall told Brettschneider that although the Letter was "great, don't get me wrong," they "messed up on the date." (A366-67). Marshall elaborated that "Shabazz-Muhammad put January 2010, [but] it gotta be in 11, like 2011." (A366). Brettschneider said he would reach out to Shabazz-Muhammad the following Tuesday. (A367).

Marshall wanted Brettschneider and Gallman to falsify progress notes: "what she [Dr. Banks] need[s] is progress. She wants progress notes along with that [the Letter]." (A356); see also A365 ("[T]he

lady [Dr. Banks] wants session notes."). Gallman responded that he and Brettschneider would "find somebody to make them [the progress notes] up," but was unsure whether Shabazz-Muhammad would agree. (A356 (Gallman telling Marshall that Shabazz-Muhammad, "I don't know, that's Scott [Brettschneider's] man...like I know the dude, but I don't know what he'll do.")). Brettschneider promised Marshall that he would check with Shabazz-Muhammad the following Tuesday, and that he was optimistic that Shabazz-Muhammad could deliver session notes. (A366-67).

When Shabazz-Muhammad learned about the request for session notes, he disappeared. All three of the co-conspirators attempted to communicate with Shabazz-Muhammad, but the attempts went unacknowledged. (A385) (during the telephone call, stating that Shabazz-Muhammad had to get a "notebook" to write down what Marshall needed, but Shabazz-Muhammad never returned); (A393 (one of Gallman's and Marshall's attempts to reach Shabazz-Muhammad); GX12b (Shabazz-Muhammad's phone records, showing furious activity between Brettschneider and Shabbazz-Muhammad during the drafting stage of the letter, but an absence of communications between December

6, 2014 and December 30, 2014)). After learning about Shabazz-Muhammad's disappearance, Brettschneider told Gallman they should, perhaps, stop pursuing the matter. (A406 (Brettschneider telling Gallman that what Marshall was looking for is "not really that easy to uh —" and "I don't think we should [laughing] — I think we just, you know what, I don't know.")).

C. The RDAP

1. The RADP Program

Dr. Kit Hoffman, the Regional Treatment Programs Coordinator, is responsible for overseeing drug treatment program coordinators at all the federal prisons in the Northeast (including at USP Lewisburg), and once served as a program coordinator at a federal penitentiary. (A599, 605). Coordinators at the institution level contact Dr. Hoffman to discuss particular inmates in order to determine "if someone meets the criteria for qualification" into the RDAP. (A605).

According to Dr. Hoffman, inmates participating in the RDAP live in a unit separate from the rest of the inmate population so they can participate in a nine-month program that is "more intense" and "more time-consuming" than any other substance abuse treatment program

available in prison. (A601-04). The treatment providers heavily rely on participants' involvement with the group so participants can "recognize common problems that they've had, common thinking patterns..., [and] to provide support to each other while they're living on the unit." (A602). RDAP inmates who successfully complete the program qualify for early release from prison, assuming they meet other criteria. (A604).

2. The RDAP Admission Process

i. Generally

Unlike with non-residential treatment programs — for which any inmate may volunteer — placement into the RDAP requires a verified diagnosis of a substance use disorder. (A605). Inmates may apply for admission or may be referred by BOP staff, if they have sufficient prison time remaining to complete the program so they can be placed in a halfway house for at least 180 days and a basic level of comprehension necessary to understand the course. (A606-07). "[A]ny inmate who meets the initial screening criteria for getting into the program, ...receives a clinical interview from the RDAP coordinator from the institution." (A606). If that RDAP coordinator, "based on the interview[,] believes [the inmate] meet[s] the criteria for a substance use

disorder diagnosis in the year prior to [the inmate's] arrest for the current offense," the inmate may be placed on the list for the RDAP. (Id.).

The RDAP coordinators' discretion is driven by several factors. They "look at the history of drug use" to determine if there is "document[ed] drug use in the 12 months prior to [the inmates'] arrest." (A607). If the history of substance abuse precedes 12 months prior to arrest, then the inmate's substance abuse is "considered in remission." (Id.). In making this assessment, RDAP coordinators generally first consider information in the presentence investigation report ("PSR") prepared by the United States Probation Department ("Probation") for the inmate. (Id.). If the PSR discloses a history of recent substance abuse "then that's enough to move [the inmate] onto the interview with the RDAP coordinator." (Id.).

Absence of such information in the PSR, however, does not disqualify the inmate from admission into the RDAP.[3] If the PSR does

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[3] Brettschneider wrongly represents that, "If the Pre-Sentence Report does not reflect a documented substance abuse problem in the 12 months preceding the arrest, the treatment specialist will automatically determine the inmate is currently ineligible." (Br. 7 (citing A608)).

not indicate a recent history of substance abuse, then a treatment specialist will meet with the inmate and inform him that he may either seek different treatment or provide additional documentation to substantiate a claim of recent substance abuse. (A608). These "outside records" are themselves sufficient to qualify inmates for RDAP interviews if they "mention drug use, documentation of a positive drug test, some type of documentation that exists in [the 12 months preceding arrest]." (Id.).

Dr. Hoffman, who has reviewed hundreds of such outside records in making RDAP-admission decisions, explained that there is a "range" of what the records look like — some more professional than others. (A609). But to be sufficient, the additional documentation must issue from a "physician or counselor of some kind" who provided the treatment, and they must show, like the PSRs, that the inmate was treated or suffered from substance abuse within a year leading up to his arrest on current charges. (Id.).

Among the materials Dr. Hoffman has received to substantiate an inmate's recent substance abuse, are session and

progress notes, which are, respectively, documentations of particular meetings and summaries of a lengthier period of treatment.[4] (A609-10).

Unlike with other judicial recommendations for substance abuse treatment, even a judge's recommendation for an inmate to participate in the RDAP does not by itself qualify inmates for an RDAP interview, much less admission. (A616-17; see also A617 (noting the same is true with Probation recommendations)). But, as is the case with all outside records, the coordinator weighs the "totality of the evidence" to determine if the recommendation would, for example, "corroborate" other statements in the inmate's application for the RDAP. (A616).

Enforcing these admission standards, Dr. Hoffman explained, is important to ensure that only inmates needing the treatment are admitted, and that those who would choose to abuse the program in an effort to shorten prison time are not. (A613). Lack of enforcement means that entitled inmates would not receive needed treatment or that such treatment could be delayed. (A613-14). Failure to enforce also could

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[4] These records range in their appearance as well, including handwritten notes on loose-leaf paper, which could raise suspicion and result in follow-up calls to providers. (A610-11).

detract from the group-therapy model, which depends on recognition of similar problems in fellow inmates. (A614-15).

Even the review process is detrimentally impacted by inmates who falsely claim to have active substance abuse. Applications from these inmates "consume[] a lot of time," pulling "treatment specialists and the RDAP coordinators" from their other duties, including providing treatment. (A615). At Dr. Hoffman's supervisory level, the false applications distract him "from providing oversight in more treatment-oriented related areas because [he is] focusing on [asking, 'I]s this documentation accurate, does it meet the criteria[?']." (Id.).

ii. Marshall's Application

A submission like the Letter, Dr. Hoffman explained as he reviewed Marshall's application, is considered, among other documentation, when assessing admission into RDAP.[5] (A623-24). While the Letter, itself, was insufficient to qualify Marshall for the RDAP

[5] As noted above, the decision to admit an inmate into the RDAP is "discretionary" because it is made on the basis of the coordinator's "clinical judgment, on the interactions that he or she has with the inmate[, after] asking diagnostic interview questions and judging [the inmate's] reliability and validity before [the RDAP coordinators]...reach a diagnosis." (A639).

(A623, 625) because it did not purport to document contemporaneous treatment or recent substance abuse (A636-37), Dr. Hoffman stated that Marshall would likely have been permitted to submit additional records to further substantiate his substance abuse or treatment history (A624). Compared to the hundreds of records that Dr. Hoffman had reviewed in the past, the Letter was "fairly professional looking" as it included "descriptions...relative to treatment oriented terminology" (A639) and, thus, would be "consider[ed]...as [a] corroborative document[]" as part of a BOP official's "clinical judgment in making the ultimate diagnosis and determination whether the inmate gets into the [RDAP] program" (A638-39).

Here, Dr. Hoffman observed that the USP Lewisburg RDAP coordinator at the time, Dr. Banks,[6] had interviewed Marshall after a BOP staff member had already determined in an October 1, 2014 screening summary that Marshall did not meet the RDAP criteria for

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[6] At the time of trial, Dr. Banks was no longer employed by the BOP. (A292, 618). Dr. Hoffman had been Dr. Banks's counterpart in a prison facility in Texas before Dr. Hoffman's promotion in May 2013 to his current role, in which he has overseen drug treatment programs in 19 facilities, including Marshall's. (A599).

placement. (A535-37; A640). During his screening interview (A619), Marshall "[s]elf-reported" substance abuse but did not disclose that it had been recently treated. (A536-37). Nevertheless, Dr. Banks recommended on October 3, 2014, that Marshall be placed, alternatively, into the RDAP or a non-residential drug treatment program (A620; (A536-37) (GX4, at 3)).[7] Ultimately, Marshall was not admitted into the RDAP. (A626).

III. Trial: Defense Case

The defense called two character witnesses. (A1255-88). Lonnie Soury testified about Brettschneider's "excellent reputation for his honesty." (A1259). Jason Russo testified about his own experiences with Brettschneider and Marshall — the former purportedly was unable to use computers, was assigned "his own judge" to handle his many cases, and was highly regarded, while the latter could be observed "high" in

[7] Brettschneider thus wrongly represents that the "decision to reject Marshall from RDAP was made on October 3, 2014," i.e., prior to Dr. Banks's receipt of the Letter. (Br. 8).

2011-12. (A1260-88). Brettschneider also introduced a recorded prison call between Marshall and his sister to "impeach" Marshall.[8] (A1300-01).

IV. Conviction and Sentencing

Brettschneider was convicted of both counts on April 5, 2019. (A1460).

The district court sentenced Brettschneider, principally, to concurrent terms of four years of probation, including a term of 60 days community confinement and a $2,000 fine. (A1496-97). In sentencing Brettschneider, the district court weighed Brettschneider's mitigating circumstances against the "seriousness of this particular false statement case." (A1491-97). It also noted Brettschneider's history of working with Gallman to obtain and sell at least one false recantation from a criminal case witness in order to institute a civil action under 42 U.S.C. § 1983. (A1493-94) (quoting Brettschneider's conversation with Gallman, who "trades in...false recantations," that "[w]e've got a real winner here, kid is gonna do whatever it is we need him to do").

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[8] In rebuttal, the government offered an intercepted call between Gallman and Brettschneider, where the two discussed their dire financial straits. (A1295).

SUMMARY OF ARGUMENT

First, the record does not support Brettschneider's claim that the Letter was "meaningless." Nor does the law require that, to be material, the false statements contained therein be sufficient, on their own, to gain Marshall's admittance into the RDAP. The statements were capable of influencing the BOP and had the tendency to do so because they had probative weight in the admission process and because they were capable of distracting the BOP from critical matters.

Second, the district court did not constructively amend the indictment when it accurately quoted the definition of materiality to the jury. The indictment alleged that the statements in the Letter were "materially false," and that is what the government established at trial.

Third, the district court correctly declined to suppress intercepted communications obtained pursuant to a court-authorized wiretap. Brettschneider offers no response to the district court's thorough analysis of the wiretap's necessity and its application of this Court's precedent, which, contrary to Brettschneider's claim, does not require incidentally-intercepted communications to be related to a Title III-enumerated offense.

ARGUMENT

POINT ONE

THE EVIDENCE WAS SUFFICIENT TO CONVICT BRETTSCHNEIDER AND THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN WEIGHING THE EVIDENCE

Brettschneider contends that the Letter's false statements were insufficient to support a conviction for Count Two (the substantive false statements charge) for three reasons: (1) Dr. Banks did not give the Letter "anything other than a cursory examination" (Br. 35); (2) a mere "potential" to influence a decision-maker does not meet this Court's "materiality" standard (Br. 35); and (3) the Letter never could have affected the BOP's decision to admit Marshall into the RDAP (Br. 36). These claims are all unavailing.

I. Relevant Facts

At trial, Brettschneider argued, among other things, that the Letter was not material to any BOP decision concerning placement in the RDAP. For example, in summation, defense counsel asserted that "[the question for the jury is] whether the [L]etter had the natural tendency to influence or was capable of influencing the decision of the [BOP] to admit [] Marshall to the RDAP[,]...the answer...is that it did not." (A1394).

Prior to summations and in briefing after his April 5, 2019 conviction, Brettschneider moved to set aside the jury's verdict pursuant to Federal Rules of Criminal Procedure 29 and 33, again arguing that the Letter did not contain materially false statements. (A1250-53, 1460; DE215). The district court denied those motions on July 26, 2019. (A1465-72).

In denying Brettschneider's Rule 29 motion with respect to Count Two (the substantive false statements count), the district court noted that Dr. Hoffman had testified that the Letter "would have been considered in assessing an inmate for RDAP placement." (A1469). Drawing on this Court's precedent, the district court determined that the "jury need not have found the [L]etter sufficient or dispositive but only capable of influencing the determination." (A1470).

Furthermore, even assuming the BOP "could not have been influenced or distracted by the false statements," the district court found that the verdict could not be set aside because a statement could still be material if it is capable of "distracting the body away from critical material matters." (Id.). Evidence supported this potential effect on the BOP as well. (Id.).

The challenge to Count One (the conspiracy count) failed for the same reasons. (Id.). In addition, the district court observed that

> what matters in a conspiracy prosecution is whether defendants agreed to commit the underlying offense, not whether their conduct would have actually constituted that offense, and here it is clear that the intention was to have the statement be material and to affect the decision of the Bureau of Prisons.

(A1471).

As to Brettschneider's Rule 33 motion for a new trial, the district court saw "no reason to disagree with the jury's weighing of evidence." (Id.). Indeed, as Judge Amon noted, had she been the "finder of fact, [she] would have had little trouble, based on the evidence presented by the government, finding beyond a reasonable doubt that the defendant was guilty of both charges." (A1470-71).

II. The Law

A. Standard of Review

Where a defendant challenges the sufficiency of the evidence before the district court, this Court reviews the challenge on appeal de novo. See United States v. Harvey, 746 F.3d 87, 89 (2d Cir. 2014) (per curiam).

A trial court's decision to deny a motion under Rule 33, however, is reviewed for "abuse of discretion." United States v. Ferguson, 246 F.3d 129, 133, 136 (2d Cir. 2001). That discretion is "broad," and the trial court's "ruling is deferred to on appeal because, having presided over the trial, [the court] is in a better position to decide what [the] effect...might have [been] on the jury." United States v. Gambino, 59 F.3d 353, 364 (2d Cir. 1995).

B. Fed. R. Crim. P. 29: Sufficiency of the Evidence

"A defendant challenging the sufficiency of the evidence...at trial bears a heavy burden, as the standard of review is exceedingly deferential." United States v. Coplan, 703 F.3d 46, 62 (2d Cir. 2012) (internal quotation marks and citations omitted). A jury verdict must be upheld if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original).

In considering the sufficiency of the evidence supporting a guilty verdict, the Court views the evidence in the light most favorable to the government. See United States v. Temple, 447 F.3d 130, 136–37 (2d Cir. 2006). The Court must "credit[] every inference that the jury might

have drawn in favor of the government," id. (internal quotation marks omitted), because "the task of choosing among competing, permissible inferences is for the [jury], not for the reviewing court," United States v. McDermott, 245 F.3d 133, 137 (2d Cir. 2001). See also United States v. Guadagna, 183 F.3d 122, 129 (2d Cir. 1999) (a sufficiency challenge does "not provide the [reviewing] court with an opportunity to substitute its own determination of the weight of the evidence and the reasonable inferences to be drawn for that of the jury" (internal quotation marks and ellipsis omitted)). "In order to avoid usurping the role of the jury, courts must defer to the jury's assessment of witness credibility and the jury's resolution of conflicting testimony when reviewing the sufficiency of the evidence." United States v. Triumph Capital Grp., Inc., 544 F.3d 149, 158-59 (2d Cir. 2008) (quotation marks and citations omitted).

This Court analyzes the evidence adduced at trial "in conjunction, not in isolation," United States v. Persico, 645 F.3d 85, 104 (2d Cir. 2011) (internal quotation marks omitted), and must apply the sufficiency test "to the totality of the government's case and not to each element, as each fact may gain color from others," Guadagna, 183 F.3d at 130. "So long as any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt, the jury's verdict will stand." United States v. Snow, 462 F.3d 55, 61–62 (2d Cir. 2006).

"In other words, the [district] court may enter a judgment of acquittal only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." Guadagna, 183 F.3d at 130 (internal quotation marks omitted). Moreover, this Court has "emphasize[d] that the high degree of deference we afford to a jury verdict is especially important when reviewing a conviction of conspiracy." United States v. Anderson, 747 F.3d 51, 72-73 (2d Cir. 2014) (internal citation marks omitted). "This is so because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." Id. at 73 (internal quotation marks omitted).

C. Fed. R. Crim. P. 33: Weight of the Evidence

To grant a Rule 33 motion, "[t]here must be a real concern that an innocent person may have been convicted." United States v. Canova, 412 F.3d 331, 349 (2d Cir. 2005) (internal quotation marks omitted). Ordering a new trial is an extraordinary remedy that is

"disfavored in this Circuit," and, as a result, "the standard for granting such a motion is strict." Gambino, 59 F.3d 353, 364 (2d Cir. 1995). A district court "must exercise the Rule 33 authority sparingly and in the most extraordinary circumstances." Ferguson, 246 F.3d at 134 (internal quotation marks omitted).

While in assessing a Rule 33 motion a district court "may weigh the evidence," United States v. Coté, 544 F.3d 88, 101 (2d Cir. 2008), it must "review the record as a whole," United States v. Bell, 584 F.3d 478, 485 (2d Cir. 2009), and it "must defer to the jury's resolution of conflicting evidence," United States v. McCourty, 562 F.3d 458, 475 (2d Cir. 2009). See also United States v. Sanchez, 969 F.2d 1409, 1414 (2d Cir. 1992) ("It long has been [the] rule" in the Second Circuit that district courts ordinarily "must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses." (internal quotation marks omitted)). "The court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." United States v. Martinez, 763 F.2d 1297, 1312-13 (11th Cir. 1985); see also Coté, 544 F.3d at 101 ("[T]he court may not wholly usurp the jury's role.").

D. Applicable Substantive Law: Materiality Defined[9]

Title 18, United States Code, Section 1001(a)(2) provides that "whoever...knowingly and willfully...makes a materially false, fictitious, or fraudulent statement or representation" shall be guilty of a crime. A statement is material within the meaning of § 1001 "if it has a natural tendency to influence, or be capable of influencing, the decision of the decision-making body to which it was addressed, or if it is capable of distracting government investigators' attention away from a critical matter." United States v. Adekanbi, 675 F.3d 178, 182 (2d Cir. 2012) (internal quotation marks and citations omitted).

"Courts have broadly construed materiality." United States v. Regan, 103 F.3d 1072, 1084 (2d Cir. 1997) (internal quotation marks omitted); see also United States v. White, 270 F.3d 356, 365 (6th Cir. 2001) (observing that a showing of materiality "is a fairly low bar for the government to meet"). For example, "it is not necessary for an allegedly false statement to have any ill effect at all, so long as it is capable of having such an effect." United States v. Turner, 551 F.3d 657, 663 (7th

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[9] Purported lack of materiality is the sole basis of Brettschneider's sufficiency challenge.

Cir. 2008) (internal quotation marks omitted) (collecting cases); see also United States v. Litvak, 889 F.3d 56, 65 (2d Cir. 2018) ("A finding of materiality does not require proof of actual reliance." (internal quotation marks omitted)); United States v. Serv. Deli Inc., 151 F.3d 938, 941 (9th Cir. 1998) ("[T]he test [for materiality] is the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances." (internal quotation marks omitted) (emphasis in original)); United States v. Mercedes, 401 F. App'x 619, 620-21 (2d Cir. 2010) (finding a false statement material even though the interviewing agent had "ruled out the possibility of relying on the statement" prior to its solicitation).

That is so because "[i]t has never been the test of materiality that the misrepresentation or concealment would more likely than not have produced an erroneous decision." Kungys v. United States, 485 U.S. 759, 771 (1988). Indeed, "the phrase 'natural tendency' connotes qualities of the statement in question that transcend the immediate circumstances in which it is offered and inhere in the statement itself.'" United States v. McBane, 433 F.3d 344, 351 (3d Cir. 2005) (quoting United States v. Gaudin, 515 U.S. 506, 512 (1995)); accord United States

v. Foxworth, 334 F. App'x 363, 364 (2d Cir. 2009). In other words, the inquiry is entirely objective. See, e.g., United States v. Frenkel, 682 F. App'x 20, 22 (2d Cir. 2017) ("[A] matter is material if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question[.]" (internal quotation marks omitted) (emphasis in original)). Thus, where the "point" of a false statement was to influence an agency's decision and the statement had "in the ordinary course...an intrinsic capability" to do so, the materiality standard is met. Turner, 551 F.3d at 664.

This Court has distilled the materiality test into familiar terms: "To be 'material' means to have probative weight, i.e., reasonably likely to influence the tribunal in making a determination required to be made." United States v. Rigas, 490 F.3d 208, 234 (2d Cir. 2007) (quoting Weinstock v. United States, 231 F.2d 699, 701 (D.C. Cir. 2015) (interpreting § 1001)); accord United States v. Litvak, 808 F.3d 160, 174 (2d Cir. 2015) (drawing on the definition of materiality in Rigas when passing on the materiality requirement of 18 U.S.C. § 1001(a)(2)); United States v. Stadd, 636 F.3d 630, 638 (2d Cir. 2011) (citing Rigas among authority that has uniformly interpreted the term "materiality").

III. Discussion

A. The Jury Acted Rationally in Convicting Brettschneider on Count Two

Brettschneider's first claim, that Dr. Banks only cursorily examined the Letter, is not only legally irrelevant but finds no support in the record. BOP records unequivocally demonstrate that Dr. Banks, herself, evaluated the information in the Letter and, at the very least, reviewed Marshall's file to determine the date of his arrest in order to assess his eligibility for RDAP. (A535-40). Specifically, the BOP records show that the Letter was uploaded into the BOP system on December 10, 2014, and Dr. Banks noted that information provided in the Letter failed to show Marshall "[met the] criteria of one year [regarding substance abuse] before his arrest, 2/12 [i.e., the date and month of Marshall's arrest]." (A535).

Furthermore, the time expended by a decision-maker on a false statement is irrelevant because "it is not necessary for an allegedly false statement to have any ill effect at all, so long as it is capable of having such an effect." Turner, 551 F.3d at 663 (internal quotation marks omitted). "A statement can be material even if it is ignored or never read by the agency receiving the misstatement." United States v.

Diaz, 690 F.2d 1352, 1358 (11th Cir. 1982); accord United States v. Richardson, 676 F.3d 491, 505 (5th Cir. 2012); United States v. Williams, 865 F.3d 1302, 1315-16 (10th Cir.), cert. denied, 138 S. Ct. 567 (2017) ("[A] statement can be objectively material even if the decision maker did not consider it.").

Nor is it relevant that the BOP had been alerted by law enforcement of an incoming false letter.[10] (Br. 35). Even a statement that has been "ruled out" by the agency "prior to its solicitation" is material because it can still be "capable of influencing the agency's decision-making process." Mercedes, 401 F. App'x at 619-20; see also Foxworth, 334 F. App'x at 366 (that the agency "knew that the statements were false when they were made is irrelevant to their materiality").

In short, it is the "intrinsic capabilities of the statement itself, rather than the possibility of the actual attainment of its end," that is

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[10] Because Dr. Banks's notation referred to the contents of the Letter rather than to any warning she received about its falsity, it is unclear how (if at all) the QCDA investigator's warning (A989) affected the review process.

relevant to the materiality inquiry. Serv. Deli Inc., 151 F.3d at 941 (internal quotation marks omitted). Here, the "point" of the false statements in the Letter was to influence the BOP, and any prior warning to the BOP does not change whether "in the ordinary course" the statement could have influenced the decision. Turner, 551 F.3d at 664. See also Brogan v. United States, 522 U.S. 398, 403 (1998) (rejecting the argument that "§ 1001 does not apply where a perversion of governmental functions does not exist"); United States v. Najera Jimenez, 593 F.3d 391, 400-01 (5th Cir. 2010) (holding that the agency's knowledge of the statement's falsity "does not factor into the materiality analysis"; it is sufficient that the agency "would have been impaired had [it] relied on the defendant's statement" (internal quotation marks and ellipsis omitted)); United States v. Moore, 612 F.3d 698, 701 (D.C. Cir. 2010) (holding that materiality analysis that is faithful to Gaudin, 515 U.S. at 509, is not made "by reference only to the specific circumstances of the case at hand"); United States v. Edgar, 82 F.3d 499, 510 (1st Cir. 1996) (rejecting materiality challenge based on the fact that a decision "had already been made"; the "standard is not whether there was actual influence, but whether there would have been a tendency to influence").

Brettschneider's second and third claims on appeal, i.e., that in order to meet the materiality requirement, a "potential" to influence a decision-maker is "exactly the type of 'mere metaphysical possibility' the Second Circuit [has] rejected" (Br. 35), and, relatedly, that the Letter "never had the ability to affect any decision-making process for Marshall's admission into RDAP" (Br. 36), are similarly unavailing. These arguments loosely track the unsuccessful assertion Brettschneider made below, i.e., that because the Letter was itself insufficient to admit Marshall into the RDAP, then the false statements contained in it are immaterial. On appeal, Brettschneider adds that the statements were not just insufficient, but were actually "meaningless." (Br. 36).

Brettschneider misstates the record when he asserts the decision to deny Marshall's admission into the RDAP had been made "before [the Letter] was submitted," and that "BOP officials never even considered the [L]etter." (Br. 36). As described above, Marshall's application was reviewed by the RDAP coordinator and rejected only because the information contained in the Letter was judged, at that time, to be insufficient to qualify Marshall for the program. Brettschneider also misrepresents Dr. Hoffman's testimony when he ascribes to him the

conclusion that the Letter was "meaningless." (Br. 36). Indeed, Dr. Hoffman specifically testified that the "professional" Letter would most certainly have been considered, among other records, when assessing an inmate for RDAP placement.[11] (A624, 638-39).

Moreover, factual misrepresentations aside, Brettschneider is also wrong on the law. Contrary to Brettschneider's assertions (Br. 35, 36), sufficiency has never been a component of materiality. The question,

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[11] Brettschneider's argument also assumes a rigid and unyielding application of the RDAP admission criteria. (Br. 36). While Dr. Hoffman testified that an RDAP coordinator's discretionary decision is exercised within the confines of BOP regulations (A642), the jury had other evidence to consider. See, e.g., Triumph Capital Grp., Inc., 544 F.3d at 158-59 (observing that it is up to the jury to choose between conflicting evidence and inferences). For example, despite Marshall's failure to meet the RDAP criteria — even before the Letter was sent, when the only information before the BOP was Marshall's remote drug use — Dr. Banks recommended him for the RDAP or non-residential treatment. (A536, 620). She did so just two days after a reporting employee stated that Marshall did not qualify for the RDAP. (A536, 640). No BOP guideline, on which Brettschneider so heavily relies, supported Dr. Banks's alternative recommendation for RDAP placement. So, just as the jury was entitled to consider Dr. Hoffman's testimony about the BOP guidelines in evaluating the ability of the false statements to affect the BOP, it did not have to ignore the reality of how these guidelines could have been and were applied. See United States v. Whab, 355 F.3d 155, 163 (2d Cir. 2004) (finding a false statement material based on the "practices" of an agency in interpreting regulations, the wording of which, the defendant claimed, made the false statement immaterial).

instead, is whether a false statement has "probative weight" for the decision-maker, not whether it will guarantee success. Rigas, 490 F.3d at 234. And Dr. Hoffman's testimony provided unrefuted proof at trial that false statements like those contained in Letter are probative when an RDAP coordinator weighs the "totality of the evidence" in assessing placement. (A616).

While Brettschneider analogizes the lies in the Letter to the false statements in Litvak, 808 F.3d 160 (Br. 33-35), that case is inapposite. Litvak held that statements at issue were not material because they were made to an agency — the Department of Treasury — that was not the decision-maker. Litvak, 808 F.3d at 172 (quoting "unequivocal" testimony that the relationship structured between Treasury and certain investment funds "deliberately...kept the Treasury away from making buy and sell decisions" (internal quotation marks omitted)). Indeed, Treasury retained "no authority" to exercise the decision that was charged to have been influenced (purchasing mortgage-backed securities). Id. Thus, there was no evidence to support the assertion that the Treasury's "ability to reap optimal returns" could have been frustrated by the misstatements. Id. Without such evidence, the

Litvak court concluded, there would only be "speculation," not exceeding "mere metaphysical possibility," that an "actual decision of the Treasury" was "reasonably capable of being influenced." Id. at 172-73 (emphasis added); see also id. at 174 (emphasizing that the Treasury retained "no authority" over the relevant decision).

By contrast, here the false statements were not directed at some entity other than the BOP; nor was the BOP shielded from decision-making. In fact, Brettschneider and his co-conspirators not only aimed their misstatements at the one agency — BOP — whose decision they sought to influence, but they targeted a particular person within BOP, the RDAP coordinator, Dr. Banks, who had unilateral decision-making authority. (A639; A426 (Brettschneider confirming with Gallman that Marshall's "counselor" [i.e., decision-maker for RDAP-placement] was Dr. Banks)). And unlike in Litvak, where there was "unequivocal" testimony that Treasury was not involved in the ultimate decision at issue, here there was uncontroverted testimony by Dr. Hoffman that the Letter was capable of influencing the determination of the BOP. In short, the materiality here is "obvious as a matter of common sense" because the false statements were "made to the same government agency." Adekanbi,

675 F.3d at 184; see also id. at 183 (distinguishing cases where materiality element was not met because "false statements made to one agency" were not necessarily "material to a different agency").

Finally, while Brettschneider's challenge of the jury's verdict should be rejected because his false statements were capable of influencing, and had the natural tendency to influence, the BOP's decision, his argument also fails to address the second — and independent — means by which the proof established the materiality of the false statements: their capability to distract the BOP in its review process from other critical matters. (A615 (Dr. Hoffman testifying that false applications take treatment-providers away "from providing oversight in more treatment-oriented related areas" and "consume[] a lot of time"); A1470 (district court noting that Dr. Hoffman's testimony supported this basis for finding materiality). See, e.g., Adekanbi, 675 F.3d at 182; United States v. Stewart, 433 F.3d 273, 318 (2d Cir. 2006); United States v. Carrasquillo, 239 F. App'x 634, 635 (2d Cir. 2007); Moore, 612 F.3d at 701 (collecting cases and joining other Courts of Appeals in recognizing that a statement can be material if it is "capable of influencing" not just a decision but "any other function of the agency").

Contrary to Brettschneider's claim, there is a difference between a Letter written by one professional treatment provider meant to deceive another professional treatment provider, and the "worthless" paper the Letter was written on (Br. 42); the former requires review of its contents and an inmate's file, while the latter can be immediately discarded without wasting the time of an RDAP coordinator or any of her staff. Thus, even if the false statements in the Letter were not capable of influencing the decision to admit Marshall into the RDAP, they were still material because they were capable of distracting the BOP. See, e.g., Stewart, 433 F.3d at 318 (finding materiality where the false statement was capable of distracting agents away from another target); Moore, 612 F.3d at 701-02 (holding that signing a fictitious name was a material lie, where the defendant was not asked for his name or identification and would have been arrested regardless, because "signing a false name on a delivery form may adversely affect the ability of the Postal Service to perform this function").

* * *

In sum, the false statements in a professionally-written, detailed letter, calculated to influence the BOP in its decision to admit

an inmate into a consequential program, are not the type of statements about a "trifling collateral circumstance," Kungys, 485 U.S. at 769, or a "trivial falsehood," United States v. Baker, 626 F.2d 512, 514 (5th Cir. 1980) (internal quotation marks omitted), that the statute forgives; accord United States v. Chandler, 752 F.2d 1148, 1151 (6th Cir. 1985). Instead, the false statements went to the heart of the scheme by attempting, via the representations of an attorney and a certified drug counselor, to mislead a federal agency. Further, the statements in the Letter were capable of distracting, and did distract, the BOP from the critical matter of effectively administering the RDAP program at USP Lewisburg. It is not necessary to view the evidence in the light most favorable to the government or draw every inference in its favor — as the district court was required to do — to find that the jury acted rationally in finding the element of materiality satisfied.

B. The Jury Did Not Irrationally Convict Brettschneider on Count One

Brettschneider also contends that the proof was insufficient as to Count One (the conspiracy charge) because he had no "stake in the outcome of submitting a false letter to the [BOP]." (Br. 38).

Brettschneider further adds that any "discussion of illegality" among the co-conspirators occurred in his absence. (Br. 39).

Again, Brettschneider misstates the record. The intercepted communications demonstrated that Brettschneider learned early in the conspiracy that Marshall needed a letter from a "program" so that, as Marshall put it bluntly to Brettschneider, he could get "push[ed]...out [of prison] next year." (A314, 317). In response to Marshall's request, Brettschneider never asked Marshall for contact information for a program that Marshall had actually attended — and knew, as a result of his representation of Marshall that Marshall had not recently attended one — stating, instead, "I know who to talk to," and, "we'll get it to you next week." (Id.). Marshall even dictated to Brettschneider what he wanted the false letter to say: Marshall had been "drinking forever" and "relapsing and all that kind of, you know" — information Brettschneider knew was false because it was inconsistent with Marshall's PSR (GX15)[12] and his own advocacy in Wright et al. (id.; GA4-5 (report submitted by

[12] A copy of Marshall's redacted PSR will be sent to the Court under seal.

Brettschneider that claimed Marshall had been "clean and sober for over 20 years); see also A327-328 (Marshall advising Brettschneider to obtain a representation that Marshall had "always" been in drug treatment, "put drugs too, whatever," and Brettschneider responding that he would "take care of it").

Indeed, it was Brettschneider who informed Marshall of the name of the purported treatment program that Marshall allegedly had attended. (A339 (Marshall inquiring from Brettschneider which program Brettschneider would say Marshall had attended, and Brettschneider responding, "it's Shabazz's program")). Furthermore, after assigning his dependable (and dependent) paralegal, Shabazz-Muhammad, to manufacture the details of the fraudulent representations, Brettschneider continued to oversee the creation of the false representations, confirming the identities of the individuals at the BOP who needed to be deceived (A427) and updating Gallman on the status of the Letter (A344).[13]

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[13] As described above, Brettschneider remained involved in the conspiracy even after the Letter was mailed, requesting that Shabazz-Muhammad perpetuate the fraud by falsifying progress notes. (A367 (telling Marshall he would ask Shabazz-Muhammad for progress notes);

Finally, the argument that Brettschneider had no stake in having Marshall released earlier also ignores the evidence — much of which came from his own witness, Russo — that Marshall was a source of referrals for Brettschneider. (A1261, 1272-73; see also A422 (suggesting that Brettschneider's practice was struggling)).

In any event, the government is not required to prove a co-conspirator benefited from the goal of the conspiracy, as Brettschneider contends. (Br. 37-38). "[P]urposeful behavior aimed at furthering the goals of the conspiracy," which was in abundance here (e.g., A427 (recruiting the author of the false letter and helping to correctly address it)), is sufficient, as long as there is proof of at least a "tacit understanding among the participants" to work together to commit an unlawful act. United States v. Desimone, 119 F.3d 217, 223 (2d Cir. 1997). See also United States v. Torres, 901 F.2d 205, 245 (2d Cir. 1990) (no requirement

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GX12b, at 309 (telephone tolls demonstrating that Brettschneider and Shabazz-Muhammad spoke on the same day); A406 (Brettschneider saying to Gallman that, "I gotta tell you, what Love's [i.e., Marshall] looking for...that's not really that easy to uh.... Well you know what, I don't think we should [laughing]—I think we just, you know what, I don't know)).

for the defendant to have had some "personal financial interest in the outcome of the conspiracy. It is sufficient that the defendant was not indifferent to the outcome of the venture.") (quotation marks omitted)), abrogated on other grounds, United States v. Marcus, 628 F.3d 36, 41-43 (2d Cir. 2010).

C. The District Court Did Not Abuse Its Discretion in Denying Brettschneider's Motion for a New Trial

Brettschneider also contends that the district court abused its discretion in refusing to set aside the verdicts pursuant to Federal Rule of Criminal Procedure 33 because, according to Brettschneider, there was insufficient evidence that he was a "knowing and willing participant in the conspiracy" (Br. 41; see also id. (labeling himself an "unknowing participant")), and the Letter was "worthless" (Br. 42).

These arguments are unavailing for the same reasons the jury was not irrational in convicting Brettschneider. What is more, the district court, having heard all the communications before and during trial, and having observed the witnesses testify, concluded that had it been the fact finder, it would have had "little trouble" finding Brettschneider guilty of both counts. (A1470-71). There is simply no

indication that an "innocent person may have been convicted," Canova, 412 F.3d at 349 (internal quotation marks omitted), or that the district court abused its broad discretion in failing to apply the "extraordinary" and "sparingly"-used remedy of ordering a new trial, Gambino, 59 F.3d at 364; Ferguson, 246 F.3d at 134 (internal quotation marks omitted).

POINT TWO

THE DISTRICT COURT DID NOT CONSTRUCTIVELY AMEND THE INDICTMENT

Brettschneider contends that the district court's belated revision to the materiality jury charge in response to defense counsel's sufficiency argument resulted in a constructive amendment of the indictment. Specifically, Brettschneider claims that, in combination with the government's purported change in its theory of materiality, the court's erroneous expansion of the definition of "materiality" to include the phrase "a natural tendency to influence" amended the indictment. (Br. 43-54). This claim, too, is unavailing.

I. Relevant Facts

The indictment charged Brettschneider with making particular statements (quoted from the Letter) that were "materially false, fictitious and fraudulent" (Count Two) and conspiring to do the same (Count One). (A20-22). In proposed jury charges, the parties largely agreed on the definition of "materiality" (A164, 183), tracking Judge Sand's model jury instructions. See Sand, et al., Modern Federal Jury Instructions, Inst. 36-5 ("A fact is material if it was capable of influencing the government's decisions or activities. However, proof of

actual reliance on the statement by the government is not required."). In its draft charges released to the parties, the district court quoted the Sand formulation. (A224).

In making his Rule 29 challenge, Brettschneider's counsel argued that for the false statements in the Letter to be "material," they would have had "to actually be capable of influencing" the BOP's decision to permit or deny admission into the RDAP. (A1250-52). Counsel added that false statements that merely distract the agency cannot be material. (A1251). When Brettschneider renewed his motion, he pressed the district court to distinguish between the "importan[ce]" of the Letter to the BOP's decision and its "capab[ility] of influencing" its decision. (A1304).

Before Brettschneider's counsel delivered her summation, the district court alerted the parties to a change it intended to make to the jury charge in light of Brettschneider's focused arguments on materiality. (A1340). Specifically, the court stated that it would provide a "more complete...definition of a [']material false statement[']." (Id.). It cited Gaudin, 515 U.S. 506, and Stewart, 433 F.3d 273, and accurately described the particulars of how the Supreme Court and this Court have

explained what it means for a lie to be "material." (Id.). It then recited what the revised charge would say: "A fact is material if it has a natural tendency to influence or is capable of influencing the government's decisions or activities." (Id.). Brettschneider's counsel objected to the revised charge because, she argued, "I certainly laid my case out to the jury [assuming a different charge would be given]," and asked the court to adjourn trial for the day so she would have an opportunity to adjust her summation. (A1341-42). The court obliged. (A1342).

In summation, defense counsel quoted the full definition of materiality that the district court eventually provided. (A1394, 1438). Counsel then argued, as Brettschneider has repeated in his oral motions, post-trial briefing, and now on appeal, that the false statements in the Letter were not material because even if believed, they would not have sufficed to gain Marshall's admittance into the RDAP. (A1395-97).

II. The Law

A. Standard of Review

This Court reviews a constructive amendment challenge de novo. See United States v. Banki, 685 F.3d 99, 118 (2d Cir. 2012).

B. Constructive Amendment Law

To prevail on a claim of constructive amendment, "a defendant must demonstrate that either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." United States v. Agrawal, 726 F.3d 235, 259 (2d Cir. 2013) (internal quotation marks omitted). This Court has "proceeded cautiously in identifying such error, consistently permitting significant flexibility in proof, provided that the defendant was given notice of the core of criminality to be proven at trial." Id. at 260 (internal quotation marks omitted) (emphasis in original).

III. Discussion

The district court did not constructively amend the indictment. (Br. 43-54). From the moment he was charged, Brettschneider was on full notice that the government would prove the crime by establishing that particular material statements in the Letter were false. And that is what the government did at trial. It did not offer

any argument or evidence that was inconsistent with the allegations in the indictment.

Despite those facts, Brettschneider now contends that the materiality charge given by the district court was too expansive, and that it, combined with the government's "changing the theory of prosecution during its rebuttal argument[,] constituted an impermissible constructive amendment of the indictment." (Br. 52). In support, Brettschneider relies on an unpublished opinion in United States v. Roberts, 770 F. App'x 563, 566 (11th Cir. 2019), where the government conceded error and the panel "readily conclude[d] that the district court constructively amended the indictment." In Roberts, the indictment alleged that the defendant sex-trafficked a minor, "knowing[] and in reckless disregard of the fact" that the minor victim had not yet turned 18 years old. Id. (internal quotation marks omitted). The jury instructions, however, provided that the "government did not have to prove that [the defendant] knew, or recklessly disregarded" the fact that the victim had not yet turned 18. Id. at 566-67 (emphasis added). The government conceded that this jury charge contradicted the indictment and thus improperly broadened the possible grounds for conviction. Id.

Brettschneider can point to no similar tension between the indictment and the jury charge in this case, let alone the type of stark disparity that was present in Roberts. Nor was there in this case a complete abandonment of the government's theory, which — from allegations through trial — was always the same: Brettschneider and his co-conspirators made false statements in the Letter in order to induce the BOP to admit Marshall to the RDAP. None of the government's evidence or arguments were tailored any more or less to the "capable of influencing" part of the definition than to the "tendency to influence" portion. Indeed, the government addressed materiality only once in summation, arguing that the lies in the Letter were material because "[t]he whole point of the [L]etter was to influence the BOP's decision to admit Marshall into this program." (A1311). After the district court alerted the parties to the slight modification in its instruction and after Brettschneider attacked materiality in his summation, the government simply quoted the full definition of "material" in rebuttal to track the anticipated jury charge. (A1417-18).

Even if the government had somehow "changed" its theory at trial and its proof thus varied from the indictment, Brettschneider was

not prejudiced. See Agrawal, 726 F.3d at 259-60 (explaining that variance, unlike constructive amendment, requires a show of prejudice). He fails to explain how the jury could have believed the Letter had a "natural tendency to influence" the BOP but, at the same time, was also not "capable of influencing" the BOP. (Br. 52-54 (Brettschneider arguing that the government switched its theory in rebuttal by arguing the natural-tendency portion of the definition but failing to explain how that is different from a capability to influence the BOP)).

In an effort to draw a contrast between the two phrases, Brettschneider again misstates the record. According to Brettschneider, "[t]hroughout the trial, the Government's theory" of materiality was that the Letter was "capable of diverting resources away from treatment." (Br. 46). That is not true. Although the government adduced evidence to support this basis for finding materiality, the "diversion" theory was one the government never explicitly pursued in argument because it was forbidden from doing so by the district court. (A1405 (the district court precluding the government from arguing the distraction theory of materiality to the jury but permitting it to brief the issue after trial as an additional basis to support the verdict); A1470 (district court ultimately

agreeing with the government on the issue)). The government's primary theory — the one discussed in all three jury addresses by the parties — was that the Letter had the cability to help gain Marshall admittance into the RDAP.[14]

[14] In informing Brettschneider about the change in the instruction prior to his summation (and even granting a continuance request), the district court complied with Rule 30 of the Federal Rules of Criminal Procedure. See United States v. James, 239 F.3d 120, 124 (2d Cir. 2000) (noting that the rule is "frustrated if the judge, after informing counsel of his proposed charge, then changes the charge after the summations are completed" (internal quotation marks omitted)). Despite arguing that the jury charge was an "eleventh hour" switch by the court that undercut his arguments, (e.g., Br. 43), Brettschneider does not invoke Rule 30; nor would he be able to show a violation, much less any prejudice, necessary to warrant reversal. See James, 239 at 125-26.

POINT THREE

THE DISTRICT COURT DID NOT ERR IN DECLINING TO SUPPRESS EVIDENCE OBTAINED FROM A COURT-AUTHORIZED WIRETAP

Lastly, Brettschneider claims that the district court should have suppressed communications derived from QCDA's wiretap because the issuing judge erred in authorizing it in October 2014 and by permitting an amendment in November 2014. (Br. 55-68). The October 2014 application, according to Brettschneider, did not establish that a wiretap was necessary, as other investigative techniques had not been exhausted. And the November 2014 order allowed interception of communications that did not relate to a Title III-enumerated offense, which Brettschneider argues is impermissible. These claims are meritless.

I. Relevant Facts

The QCDA's investigation began with a state criminal case against Frederick Freeman, who ordered the complaining witness, Roshown Williams, at gunpoint, to "back the fuck up" and open the door

to Williams's apartment.[15] (A61). After his arrest, Freeman demanded a trial while his father worked behind the scenes to bribe the primary prosecution witness, Williams. (Id.). Recorded jail calls between Freeman and his father led the QCDA to Gallman as the source of the bribes. (Id.). The QCDA also received information from Williams, who began cooperating with the QCDA after he received a nighttime home visit from Gallman. (Id.). According to Williams, Gallman told him to "come with me to one of my lawyers and put stuff in writing. I'll pay you." (Id.).

Gallman continued pressuring Williams, including in a recorded call, to accept money and refuse to testify. (Id.). During that call, Gallman again told Williams that for Williams to get paid for his refusal to testify, he simply needed to meet with Gallman and see a lawyer: "All we gotta do is go talk to the lawyer." (Id.). Describing his job, Gallman told Williams that, "I'm a n**** who gone and had a life in

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[15] The facts are undisputed and are drawn from the government's opposition below, which in turn relied on affidavits submitted by a QCDA Investigator and an Assistant District Attorney to the wiretap-issuing state court. (DE106 (Brettschneider's motion, attaching the affidavits)).

jail. I work with a lot of lawyers. I work with a lot of lawyers. I had had life in jail, I'm a motherfucking homie." (Id.). Gallman added that he is a "n**** who helps n****s speak their cases." (Id.). In one call Gallman stated, "I said I worked with lawyers. That's what I said to you. I told you, you could ask anybody in the street about me." (A61-62).

The initial wiretap affidavits summarized the information as including the following: (1) Gallman was working with an attorney who could help Freeman fix his case by bribing a witness; (2) Gallman, by his own repeated admissions, "work[ed] with a lot of lawyers" to help defendants "speak their cases"; and (3) Gallman was recorded on jail calls speaking with other inmates about helping them with their cases. (A62).

The QCDA submitted a wiretap application on October 15, 2014 to a New York State Supreme Court justice. (Id.). The QCDA argued that there was reason to believe Gallman was "being paid by other criminal defendants, possibly with the knowledge and assistance of criminal defense attorneys, to fix their cases as well." (Id.). The issuing justice agreed that the wiretap was necessary for the QCDA to obtain information that other investigative tools could not uncover, namely,

"which lawyers [Gallman] may be working with, or the extent of their knowledge and involvement in the scheme." (Id.).

During the initial interception period, the QCDA intercepted — in addition to Gallman's discussions about fixing other cases — Gallman, Brettschneider and Marshall discussing the Letter. (Id.). When it was time to seek reauthorization in November 2014 for continued interception, the QCDA notified the authorizing judge about these communications. (Id.).

In the federal criminal case below, Brettschneider moved to suppress the wiretap. Following oral argument, the district court denied Brettschneider's motion. (A98-113). In a detailed analysis, the district court described all the investigative steps that Brettschneider asserted below — and continues to assert on appeal (Br. 64) — were at New York State's disposal. For example, it noted that, contrary to Brettschneider's suggestion, Williams could not have simply "been sent to a meeting with Gallman to determine the identity of the attorney" with whom Gallman said he worked, because, as the supporting wiretap affidavits made clear, it would have been unsafe for Williams to "accompany [Gallman]

anywhere, certainly not to meet with anyone that [Gallman] ha[d] thus far refused to even identify." (A105).

More fundamentally, the district court rejected Brettschneider's implicit suggestion (again, repeated on appeal) that the underlying investigation could have been completed by merely identifying the lawyer or that it had ended with the Freeman case. (A106). As to the former, "[t]o determine if the attorney had criminal intent and was complicit in Gallman's bribery scheme, it would be important to monitor the conversations between the two parties." (Id.). As to the latter, the court explained, the QCDA was attempting to identify all the participants that Gallman claimed he had worked with to fix, not just the Freeman case, but other cases as well — a goal that was supported by ample probable cause. (A106-07).

The district court also rejected the contention that the QCDA's November 10, 2014 request to amend and extend its initial wiretap was unlawful. Brettschneider argued, as he does now (Br. 66), that the application failed to present probable cause that Gallman and his co-conspirators were working to falsify business records in the first degree under New York Penal Law § 175.10, which is a "designated" or

"enumerated" offense incorporated in Title III through New York State law. (A108).

The district court found, however, that it was unnecessary to address this claim in order to dispose of the motion. (A111). Instead, it rejected the "novel" and unsupported premise underlying Brettschneider's argument — that investigators cannot collect evidence uncovered while lawfully intercepting communication (of an ongoing bribery scheme, a designated offense) unless that evidence itself pertains to an enumerated offense. (A110). There was no serious claim, the court observed, that the initial wiretap order was obtained in "bad faith" or that the investigation was a "subterfuge search." (A109). As a result, the QCDA was permitted to intercept communication about any other crimes. (A111). In reaching its decision, the court relied on, among other precedent, In re Grand Jury Subpoena Served on Doe, 889 F.2d 384 (2d Cir. 1989), characterizing as "absurd" the claim "that the government could not seize evidence allegedly related to non-enumerated criminality merely because it happened to discover such evidence during the course of otherwise lawful electronic surveillance." (A109-11 (internal quotation marks omitted)).

II. The Law

A. Standard of Review

This Court reviews the district court's "'resolution of a suppression motion'" for clear error as to findings of fact and legal questions de novo. Levy v. United States, 626 F. App'x 319, 321 (2d Cir. 2015) (quoting United States v. Stewart, 551 F.3d 187, 190-91 (2d Cir. 2009)). But the Court grants "considerable deference to the issuing court's decision whether to allow a wiretap, ensuring only that the facts set forth in the application were minimally adequate to support the determination that was made." Id. (internal quotation marks and alterations omitted); see also United States v. Concepcion, 579 F.3d 214, 217 (2d Cir. 2009) (reversing suppression of a wiretap because the reviewing judge failed to accord sufficient deference to the issuing judge's decision); United States v. Wagner, 989 F.2d 69 (2d Cir. 1993) (same).

B. Wiretap Law

1. Necessity Requirement for Wiretap Applications

The necessity requirement of 18 U.S.C. § 2518(1)(c) and (3)(c) — that other investigative measures must reasonably appear to be unlikely to succeed, to be too dangerous, or to have been tried and failed

— is "simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." United States v. Kahn, 415 U.S. 143, 153 n.12 (1974). A wiretap application must provide a practical basis for concluding that other investigative techniques are not feasible. See United States v. Lilla, 699 F.2d 99, 103 (2d Cir. 1983) (citing S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968)).

The necessity requirement does not mean that the wiretap must be a tool of last resort; law enforcement need only inform the issuing court "of the nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods." Torres, 901 F.2d at 231 ("[T]he purpose of the statutory requirements is not to preclude resort to electronic surveillance until after all other possible means of investigation have been exhausted by investigative agents." (internal quotation marks omitted)). "The issue of whether a normal investigative method has been exhausted must be tested in a practical and common sense manner." United States v. Diaz, 176 F.3d 52, 111 (2d Cir. 1999).

2. Incidental Interception of Non-Designated Offenses

Title 18, United States Code, Section 2516 limits the offenses that may be investigated through eavesdropping. The provision balances privacy interests against "effective control of crime[s]" deemed serious enough by federal and state legislatures. United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div., 407 U.S. 297, 302 (1972). Section 2516(2) permits states to designate such crimes, which New York State has done by, for example, proscribing witness-bribery. See New York Crim. Proc. Law § 700.05(8)(f).

There is no requirement in § 2516 that post-authorization, incidentally-captured communication fit within a "designated offense"; nor is there a requirement that only the predicate offenses be the topics of anticipated interception. Incidental interception of criminal activity is instead covered by § 2517(5). That provision allows the government to use incidentally-captured communication as long as the original application was made in good faith and the judicial officer supervising the wiretap was timely notified. See 18 U.S.C. § 2517(5).[16] There is no

[16] The provision provides:

additional requirement, in the provision or elsewhere, that the incidentally-captured communication, itself, must fit within a predicate offense enumerated in § 2516.

Nor has this Court read any such requirement into the statute. It has long held that if a wiretap investigation is authorized because a Title III predicate offense is being committed, the authorities are under no obligation to ignore talk of other crimes; nor are they precluded from using that evidence in a subsequent proceeding. In re

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> When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter [18 U.S.C. §§ 2510 et seq.]. Such application shall be made as soon as practicable.

Grand Jury Subpoena, 889 F.2d at 387 ("We believe...that Congress intended that amended orders under Section 2517(5) could encompass federal crimes not listed in Section 2516."); accord United States v. Goffer, 721 F.3d 113, 123 (2d Cir. 2013) ("[W]hen the government investigates insider trading for the bona fide purpose of prosecuting wire fraud, it can thereby collect evidence of securities fraud, despite the fact that securities fraud is not itself a Title III predicate offense." (internal quotations marks omitted)).[17] The rationale behind the incidental-interception rule is derived from the "plain view" doctrine, allowing law enforcement "lawfully engaged in a search for evidence of one crime" to

[17] See also United States v. Marcy, 777 F. Supp. 1400, 1403 (N.D. Ill. 1991) (collecting authority) ("Federal courts have made it clear that the government may use lawfully obtained wiretap evidence to prove crimes not specified in the wiretap order, and may do so even if those are crimes not specifically targeted by Title III."); United States v. Pacheco, 489 F.2d 554, 564 (5th Cir. 1974) (holding that non-enumerated offenses can be prosecuted based on incidentally-intercepted communication); United States v. Arellano, 315 F. Supp. 3d 1207, 1213 (D.N.M. 2018) (same, where the "wiretap is properly executed and there is no bad faith or pretext"); United States v. Lanza, 341 F. Supp. 405, 413 (M.D. Fla. 1972) (observing that nothing in Title III's text or history suggests that incidentally-captured communication obtained pursuant to a valid wiretap warrant could not be used in prosecution of crimes not enumerated in Title III).

seize what is in plain view if it "inadvertently comes upon evidence of another crime." United States v. Masciarelli, 558 F.2d 1064, 1067 (2d Cir. 1977).

III. Discussion

A. Necessity

In arguing that the QCDA's initial wiretap application failed to satisfy the necessity requirement, Brettschneider recycles the same arguments he made below, without any attempt to explain why the district court's analysis was flawed. (Br. 64-65). He again asserts that the "authorities had a ready means of ascertaining both the attorney's identity and the extent of his criminal knowledge"; and he offers the same methods to accomplish that goal — by having Williams ask for the name of the lawyer with whom Gallman said he worked to fix the Freeman case, or by having Williams accompany Gallman to a meeting. (Br. 64).

As the district court correctly explained — drawing on the thorough analyses in the wiretap affidavits — that assertion (1) ignores that Gallman had refused to identify the lawyer's name, (2) elides the danger in sending a cooperating witness to an unknown location with

Gallman (who had a long and violent criminal history),[18] and (3) assumes that gathering evidence against the lawyer would be materially advanced by simply learning his name. (A105-06). More fundamentally, it attempts to rewrite the wiretap application by limiting the investigation to the Freeman case alone and ignoring its stated goal — supported by probable cause based on Gallman's own statements and calls — to uncover and prosecute all the co-conspirators (including other lawyers) with whom Gallman worked to fix all of the cases he referenced in recorded jail calls.[19] (A106).

The standard of review the district court correctly applied (A104) only reinforces the court's conclusion. Its review was limited to

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[18] At trial below, Brettschneider's own witness accurately described Gallman as someone who "has committed homicides, has smoked crack, and has no credibility whatsoever." (A1275). Gallman's long criminal history report was introduced in Brettschneider's co-defendant John Scarpa, Jr.'s trial.

[19] The investigation ultimately did uncover a group of highly unethical criminal defense attorneys working with Gallman to fix cases. For example, Brettschneider was captured working with Gallman in selling a false recantation to a potential beneficiary (a criminal defendant), and Scarpa was charged and convicted for bribing a witness in a double-homicide case. Other lawyers engaged in unethical conduct but were not federally charged. See DE 259, at 30; DE147, at 11-13; DE23, at 6-12.

asking whether there were facts "minimally adequate" to support issuing the wiretap order, under a "practical and commonsense" approach to investigations, which, among other things, does not require the authorities to "exhaust all conceivable investigative techniques" or pursue means that are "too dangerous." Concepcion, 579 F.3d at 217-20 (internal quotation marks, citation omitted). Under that standard, or any other, Brettschneider has failed to show why the issuing judge should not have authorized the wiretap.

B. Incidental Interception

Brettschneider also argues that the issuing judge erred in allowing the interception of, and the district court erroneously failed to suppress, the communications related to the Letter because there was no probable cause to believe the anticipated communications would fall under a designated New York State offense, falsifying business records in the first degree, N.Y. Penal Law § 175.10.[20] (Br. 66). He asserts, as

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[20] That provision provides:

> A person is guilty of falsifying business records in the first degree when he commits the crime of falsifying business records in the second degree, and when his intent to defraud includes an

he did below, that there was no underlying offense that constituted a crime independent of the falsification of the business records, as is required by § 175.10.[21] (Br. 66-67).

Brettschneider fails to address the district court's ruling, and has therefore waived such argument on appeal. The district court rejected Brettschneider's position — underlying his claim — that authorities have to ignore incriminating communications intercepted from an otherwise lawfully-obtained wiretap if that communication, while criminal,[22] does not itself fit within an enumerated offense. (A108-11). Although in his reply brief and oral argument below Brettschneider

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> intent to commit another crime or to aid or conceal the commission thereof.

[21] Brettschneider writes that the wiretap affidavit claimed the communication constituted a crime under § 175.05, rather than the enumerated offense of § 175.10 (Br. 63 (citing A38, which in turn cites the affidavit)). As his own citation demonstrates, however, that is not so — the affidavit correctly referred to § 175.10. The government construes his argument liberally to assert, as he did below, that while the affidavit claimed to be investigating a violation of § 175.10, the issuing judge erred in finding probable cause underlying that crime.

[22] Brettschneider concedes, as he did below, that the communication constituted the crime of falsifying business records in the second degree, N.Y. Penal Law § 175.05. (Br. 68).

offered (strained) arguments[23] as to why the district court should ignore the clear wording of the statute and this Court's precedent, he has abandoned even those arguments on appeal.

Instead, Brettschneider simply asserts that the district court "sidestepped the question [of whether the intercepted communication related to a designated offense] entirely," and asserts that "[t]his was error." (Br. 67). He offers no explanation as to why the district court erred, beyond repeating the truism that wiretaps "issue only upon a showing of probable cause to believe that communications pertaining to a designated offense will be obtained." (Br. 67-68 (internal quotation marks, citation omitted)). The question, however, is not about when wiretaps should issue; it is about incidental interception.

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[23] In his reply brief, Brettschneider argued that a deeper analysis of this Court's precedent supports incidental interception only for conduct factually indistinguishable from that which gives rise to the lawful wiretap (A93-96); at oral argument, Brettschneider appeared to walk away from that unsupported claim and instead advanced a novel definition for the term "subterfuge," which in his view was synonymous with failing to demonstrate necessity (A547-48). Pressed by the court, counsel admitted that no case supported Brettschneider's view. (A549 ("Actually, there are no cases that fall directly on this point.")).

As a result, Brettschneider has waived any challenge to the district court's holding that incidental interception in this case was proper even if it did not pertain to a separate enumerated offense. His complaint that the district judge "sidestepped" the question — as it was it entitled to do — does not preserve the argument, even if he ultimately develops it on reply. See United States v. Yousef, 327 F.3d 56, 115 (2d Cir. 2003) ("We will not consider an argument raised for the first time in a reply brief."); Sherman v. Town of Chester, 752 F.3d 554, 568 n.4 (2d Cir. 2014) (same, noting that the arguments are waived even if proponent "pursued those arguments in the district court"); Norton v. Sam's Club, 145 F.3d 114, 117 (2d Cir. 1998) (same, listing ways that appellants fail to preserve arguments on appeal, including "stating an issue without advancing an argument"); Fed. R. App. P. 28(a)(8)(A)) (appellant's brief "must contain appellant's contentions and the reasons for them").

In any event, the district court's analysis was sound, and its conclusion — driven by clear statutory language and this Court's precedent — was correct. Amended orders may encompass crimes "not listed in Section 2516" unless the law enforcement "by connivance...used the initial order as a pretext for uncovering evidence of crimes

unauthorized by Section 2516." In re Grand Jury, 889 F.2d at 387-88. This Court reaffirmed Grand Jury's holding in Goffer, 721 F.3d 113, 123, observing that incidental interception of a non-designated crime that was not the result of a "subterfuge search," complies with the strictures of Title III. The panel added that there is

> no reason why the principle undergirding this rule that disclosure or use of communications intercepted incidentally to an otherwise lawful, good faith wiretap application does not violate Title III — should not apply when the Government forthrightly discloses the probability of intercepting communications relating to other offenses ex ante, at the time it makes its initial wiretap application.

Id. (internal quotation marks omitted).

This case is indistinguishable. There is no dispute that the QCDA was investigating, in good faith, the enumerated crime of bribery. Indeed, it had no reason to believe that it would happen upon communications regarding a federal drug program, the RDAP. The investigation remained primarily focused on bribery, but as early as its first application for an extension, the QCDA disclosed the incidentally-intercepted communication about the Letter, and the issuing judge granted the QCDA's request for an amendment. Nothing in Title III or

this Court's precedent required the QCDA to continue intercepting conversations about bribery but ignore other criminal discussions merely because they did not relate to a designated offense. Such a rule would lead to the absurd result of immunizing a defendant because he has a "'diversified criminal portfolio.'" Id. (quoting United States v. McKinnon, 721 F.2d 19, 23 (1st Cir. 1983)).

Finally, although this Court need not decide the issue, Brettschneider is also wrong that the issuing judge lacked "minimally adequate" facts to support its finding that the co-conspirators' intent to falsify business records also included an intent to commit another crime. (Br. 67). See N.Y. Penal Law § 175.05; Concepcion, 579 F.3d at 217. Applying the deferential standard of review, there was, as the government argued below (A79-80), at least a substantial basis for finding probable cause that the co-conspirators were committing the federal offense of which they were ultimately convicted (18 U.S.C. § 1001) or the New York State crime of offering a false instrument for filing in the second degree, in violation of New York Penal Law § 175.30 (or [the]

aiding and abetting and conspiracy thereof).[24] The latter criminalizes "offering a false instrument...to a public office or public servant." N.Y. Penal Law § 175.30.

Accordingly, the district court did not err in refusing to suppress the intercepted communication obtained from an authorized wiretap.

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[24] The QCDA was not required to specify the underlying offense it believed the co-conspirators were committing as part of their violation of § 175.10. Indeed, it was not even required to specify what crime the incidentally-intercepted communication constituted, as long as it disclosed the "material facts" underpinning it. See Masciarelli, 558 F.2d at 1068-69 (approving "implicit" authorization, disagreeing with district court that § 2517(5) required the government to identify the statute when informing the court of the incidentally-captured communication); accord United States v. Ardito, 782 F.2d 358, 362 (2d Cir. 1986) ("[A]uthorization under 18 U.S.C. § 2517(5) may be inferred when a judicial officer grants a continuation of the surveillance, even though the offense was not listed in the original order, so long as he was made aware of material facts constituting or clearly related to the other offenses in the application for the continuance" (internal quotation marks omitted)).

CONCLUSION

For the reasons stated above, the judgment against Brettschneider should be affirmed in all respects.

Dated: Brooklyn, New York
May 4, 2020

Respectfully submitted,

RICHARD P. DONOGHUE,
United States Attorney,
Eastern District of New York.

By: /s/
ANDREY SPEKTOR
Assistant U.S. Attorney

JO ANN M. NAVICKAS,
ANDREY SPEKTOR,
MARGARET GANDY,
Assistant United States Attorneys,
(Of Counsel).

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Second Circuit Rule 32.1(a)(4) because the brief contains 13,636 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: Brooklyn, New York
May 4, 2020

/s/
JO ANN M. NAVICKAS
Assistant U.S. Attorney,

A P P E N D I X

TABLE OF CONTENTS

Page

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GOVERNMENT EXHIBIT
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18-CR-123 (S-1) (CBA)

* In the matter of
R. Marshall
69944-053

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JANOSON
FORENSIC PSYCHOLOGY
SERVICES PC

August 7, 2014

Scott Brettschneider, Esq.
Scott Brettschneider, P.C.
626 Rxr Plz, Fl 6
Uniondale, NY 11556-0626

Re: Richard Marshall Psychological Evaluation

Dear **Attorney Brettschneider:**

The present psychologist examined Richard Marshall on August 6 and 8, 2014 at my office located at 75 Plandome Road, Manhasset, New York 11030.

Attached is my *curriculum vitae* attesting to my qualifications in the field of forensic psychology.

REASON FOR REFERRAL

Psychological Evaluation/Psychodiagnostic Evaluation – Richard Marshall was referred to ascertain his current Emotional and Psychodynamic Status. Mr. Marshall is facing sentencing for Criminal Sale of a Controlled Substance. Forensic mental health assessment is requested to assist the Court in imposing a sentence.

INFORMED CONSENT

The issue of confidentiality was discussed with Richard Marshall. It was explained to him that anything he told the current examiner could be presented in Court and/or in any testimony this psychologist provides. He understood that both written and oral testimony might be required of this examiner. Richard Marshall repeated back to this psychologist

the content of the aforementioned statements and affirmed his agreement to these conditions. Therefore, the evaluation was completed with full informed consent.

COLLATERAL INTERVIEWS

Edwina Marshall (age 72) is Mr. Marshall's mother. She was interviewed on August 6, 2014. She said, "My son is a very good human being. He is very giving. He is always helping someone. He is a very good father and a good son who has helped me out tremendously. If I am behind in my bills, he helps me with that. When I was in the hospital with heart failure, he visited every day that he could be there. If his brothers and sisters need help, and he can help them, he will.

"My son has been the moral support when his father died, when his brother died, and when his grandparents died. He helped me pay for the funerals because I didn't have the money. He goes to the grotto at the church every Sunday and often brings me back holy water."

Charleen Meertins (age 40) is Mr. Marshall's fiancée. She was interviewed on August 6, 2014. She has known Mr. Marshall for 16 years. She is the mother of their son Omarti. "He suffers from depression. He doesn't communicate his feelings. I think he should be seeing a psychologist or a psychiatrist."

Asked about his case, she said, "I think he wanted to provide for his family and children. He associated with the wrong people and got caught up in something that is not his norm."

BACKGROUND/INTERVIEW

Richard Marshall is a 52-year-old (DOB: [redacted]) divorced man. He has seven children with four mothers. He resides with his son Jamall (23), his daughter Lexus (21), and, on a part-time basis, with daughter Mercedes (11) in Spring Valley, New York.

Mr. Marshall grew up under very harsh circumstances. Born in Queens, Mr. Marshall was raised by a single mother who had eight children. She was unable to work due to a viral infection in her heart. She also had diabetes, high cholesterol, a thyroid condition, and kidney stones. They were supported by public assistance. Often, there was no gas, heat, or electricity in his home. There were repeated threats of eviction.

Mr. Marshall attended public schools in Queens. He was held back in the seventh grade. He attended Springfield Gardens High School, where he was placed in special education classes in the tenth grade due to both academics and behavior. Mr. Marshall dropped out in the eleventh grade. He has not earned his GED.

As a young man (age 17–23), he used alcohol and snorted cocaine and heroin on a daily basis. He also smoked cigarettes. Mr. Marshall has been clean and sober for over 20

years. This writer believes that Mr. Marshall has had a diagnosable mental disorder since his youth. Mr. Marshall was likely attempting to self-medicate the depression through substance abuse. Mr. Marshall has never received any mental health care.

Mr. Marshall has worked continuously since dropping out of high school. He has worked at an oil change place, managed a musical act (Dante Thomas), and has produced records. Mr. Marshall has owned several businesses: a liquor store, a car wash, and a sneaker store. Mr. Marshall's current employment is delivering auto parts for Big City Auto. He has held this job for almost 2 years.

Prior to his arrest in February of 2012, Mr. Marshall was beset with unbelievable financial pressures. His home had been in foreclosure for 5 or 6 years because he could not pay his mortgage. He could not pay his electric bill, his gas bill, or put food on the table for himself and his children. Mr. Marshall was desperate for cash to care for his children.

Mr. Marshall has excellent ambitions and goals. He wants to take care of his seven children and his 14-month-old grandson. His goal is to earn his GED. Mr. Marshall expects Big City Auto to promote him to a salesperson or a dispatcher. Mr. Marshall hopes to talk to young children, telling them, "The fast life is not the life."

Mr. Marshall has instilled the value of education in his children. All his children who are of age have graduated from high school. Several of his older children are in college. None have had legal problems. Jamall has taken the exam to be a NY State Police Trooper and is currently working with disabled persons as a direct care counselor at Spectrum For Living in River Vale, NJ.

Mr. Marshall has acid reflux disease and is a borderline diabetic.

EVALUATION PROCEDURES

The following assessment techniques were utilized to evaluate Richard Marshall:

- *Minnesota Multiphasic Personality Inventory–2 (MMPI-2), Caldwell Report*
- *Client Interviews*
- *Collateral Interviews*

VALIDITY

Objective personality inventory:

MMPI-2

The validity scales of the Minnesota Multiphasic Personality Inventory–2 (MMPI-2) stand alone in the area of personality assessment in terms of the variety and usefulness of

measures to assess a broad range of dimensions related to response styles, attitudes, and approaches to self-presentation.

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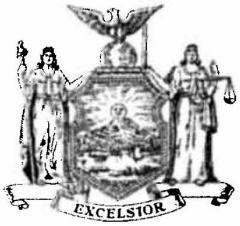
Respectfully submitted by:

Marc Janoson, Ph.D.
Janoson Forensic Psychology Services
N.Y.S. License #006325

State of New York



GOVERNMENT EXHIBIT
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18-CR-123 (S-1) (CBA)

Office of Alcoholism and Substance Abuse Services

Be It Known That

Reginald S. Muhammad

Having satisfied the associated requirements is recognized by the State of New York as a

CREDENTIALED ALCOHOLISM AND SUBSTANCE ABUSE COUNSELOR TRAINEE

Trainee Certificate Number: **13226**

Neil C. Grogin

NEIL C. GROGIN
ASSOCIATE COMMISSIONER

EFFECTIVE DATE: **08/02/2002**
EXPIRATION DATE: **07/26/2007**

The State of New York

Office of Alcoholism and Substance Abuse Services

Be it Known That

Reginald S. Muhammad

Having given satisfactory evidence of fitness and having demonstrated the basic knowledge, skills and professional competencies prescribed by regulation, has been found duly qualified as a

CREDENTIALED ALCOHOLISM AND SUBSTANCE ABUSE COUNSELOR

by the State of New York

Neil C. Grogin
Neil C. Grogin
Associate Commissioner

13226
Credential Number

Effective Date: 10/25/2003
Expiration Date: 01/23/2006

The State of New York

Office of Alcoholism and Substance Abuse Services

Be it Known That

Reginald Shabazz-Muhammad

Having given satisfactory evidence of fitness and having demonstrated the basic knowledge, skills and professional competencies prescribed by regulation, has been found duly qualified as a

CREDENTIALED ALCOHOLISM AND SUBSTANCE ABUSE COUNSELOR

by the State of New York

Neil C. Grogin
Neil C. Grogin
Associate Commissioner

13226
Credential Number

Effective Date: **01/24/2006**
Expiration Date: **01/23/2008**

The State of New York

Office of Alcoholism and Substance Abuse Services

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by the State of New York

Karen M. Carpenter-Palumbo
Commissioner

13226
Credential Number

Effective Date: 01/24/2008
Expiration Date: 01/23/2011

GA15

The State of New York

Office of Alcoholism and Substance Abuse Services

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by the State of New York

IC&RC
Internationally Certified
Alcohol & Drug Counselor

Arlene González-Sánchez

Arlene González-Sánchez
Commissioner

13226

Credential Number

Effective Date: **10/11/2013**
Expiration Date: **10/10/2016**