No. _____

IN THE
Supreme Court of the United States

CLARENCE NAGELVOORT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

TERENCE H. CAMPBELL
COTSIRILOS, TIGHE, STREICKER, POULOS & CAMPBELL
33 North Dearborn St.
Chicago, IL 60602
(312) 263-0345

ADAM G. UNIKOWSKY
Counsel of Record
DEVI M. RAO
JENNER & BLOCK LLP
1099 New York Ave., NW, Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

QUESTION PRESENTED

In *Hyde v. United States*, 225 U.S. 347 (1912), this Court held that passively ceasing participation in a conspiracy is insufficient to establish withdrawal from the conspiracy. Rather, "affirmative action. . . . to disavow or defeat the purpose" of the conspiracy is required to establish withdrawal. *Id.* at 369.

The question presented is:

Whether completely severing ties with an organization engaged in a conspiracy constitutes "affirmative action . . . to disavow or defeat the purpose" of the conspiracy that establishes withdrawal from the conspiracy.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Clarence Nagelvoort petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the Seventh Circuit (Pet. App. 1a-25a) is reported at 856 F.3d 1117 (7th Cir. 2017). The District Court's Order regarding Petitioner's motion for a limiting instruction (Pet. App. 38a-51a) is unreported.

JURISDICTION

The judgment of the Seventh Circuit was entered on May 12, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The pertinent portion of Federal Rule of Evidence 801(d) provides:

> A statement that meets the following conditions is not hearsay: . . . (2) . . . The statement is offered against an opposing party and: . . . (E) was made by the party's coconspirator during and in furtherance of the conspiracy.

INTRODUCTION

This case concerns the legal standard for withdrawal from a conspiracy. In *Hyde v. United States*, 225 U.S. 347 (1912), this Court held that passively ceasing participation in a conspiracy is insufficient to establish withdrawal from the conspiracy. Rather, an "affirmative action" is required to establish withdrawal. *Id.* at 369. The Court held that a conspirator does not

withdraw from the conspiracy "until he does some act to disavow or defeat the purpose" of the conspiracy. *Id.*

This Court subsequently explained that "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment." *United States v. United States Gypsum Co.*, 438 U.S. 422, 464-65 (1978). Most recently, in *Smith v. United States*, 568 U.S. 106 (2013), this Court held that the defendant bears the burden of proving the requisite "affirmative action … to disavow or defeat the purpose" that would establish withdrawal. *Id.* at 113 (quoting *Hyde*, 225 U.S. at 369).

Smith resolved a circuit split on the procedural question of who bears the burden to establish withdrawal. But it did not address the substantive question of what type of "affirmative" act can establish withdrawal from a conspiracy. An acknowledged circuit split has developed on that question, in the context of conspiracies occurring within an organization, where a person completely terminates his relationship with an organization engaged in a conspiracy—such that he neither participates in, nor benefits from, the conspiracy thereafter—and that termination is communicated to his co-conspirators. The question is: does the person's complete termination of his relationship with the organization engaged in the conspiracy satisfy *Hyde*'s "affirmative action" requirement?

In the decision below, the Seventh Circuit answered that question in the negative. In the Seventh Circuit's view, some additional "affirmative act" to "disavow or

defeat the purpose" of the conspiracy, above and beyond proactively severing the relationship with the organization, is necessary to establish withdrawal.

As the Seventh Circuit acknowledged, its opinion conflicts with decisions of the Second, Third, and Eleventh Circuits. Those circuits have held that the *bona fide* termination of a relationship with an organization *is* an "affirmative act" to "disavow or defeat the purpose" of the conspiracy, and thus is sufficient to establish withdrawal as a matter of law. Of course, as those circuits recognize, merely nominal termination of a relationship with an organization is insufficient to show withdrawal. If a person departs from an organization engaged in a conspiracy, but still participates in or benefits from the conspiracy after he departs, he obviously has not withdrawn from the conspiracy. But when a person unequivocally terminates his relationship with an organization engaged in a conspiracy, that termination is communicated to his coconspirators, and he neither participates in nor benefits from the conspiracy thereafter, those circuits hold that the termination marks the person's withdrawal from the conspiracy as a matter of law.

The circuit split stems from a disagreement over the proper interpretation of this Court's decision in *Hyde*. In *Hyde*, the Court held that an act to "disavow or defeat the purpose" of a conspiracy is necessary to establish withdrawal. 225 U.S. at 369. When a person severs his ties with an organization engaged in a conspiracy, he deprives the conspiracy of his *own* services. In the Second, Third, and Eleventh Circuits, depriving a conspiracy of one's own services constitutes

"disavow[ing] or defeat[ing] the purpose" of a conspiracy within the meaning of *Hyde*. In the Seventh Circuit, however, it does not: the defendant must take some additional act, like actively interfering with the conspiracy's future operations or going to the police, in order to establish withdrawal.

This case is an ideal vehicle to resolve the circuit split. The parties entered into a factual stipulation in the District Court that made clear that this case presents the precise legal question on which the courts of appeals have divided. Specifically, the parties stipulated that after Petitioner left the organization engaged in the conspiracy, he "did not perform any work for [the organization] after that date," and he "did not receive any payments or benefits of any kind from [the organization] after that date." Pet. App. 61a. That is the exact scenario which establishes withdrawal from a conspiracy as a matter of law in the Second, Third, and Eleventh Circuits. But the Seventh Circuit expressly rejected that out-of-circuit authority, and held that these stipulated facts were insufficient to establish withdrawal. Pet. App. 21a. This Court's review is warranted to resolve this circuit conflict.

STATEMENT OF THE CASE

A. District Court Proceedings and Conviction

Between August 2007 and April 28, 2011 Petitioner Clarence Nagelvoort worked for Sacred Heart Hospital in Chicago, Illinois as an outside consultant and Vice President of Administration and Chief Operating Officer. Pet. App. 2a. On April 28, 2011, Petitioner went to his superior, Edward Novak, and asked to be

terminated. Pet. App. 19a. Novak complied with Petitioner's wishes. The next day, Novak sent a notice to all department managers at the Hospital informing them that Petitioner was no longer associated with Sacred Heart. *id.*; Pet. App. 37a. Petitioner never returned to the Hospital and did not receive any payments or benefits from the Hospital after that date. Pet. App. 19a.

On March 18, 2014, Petitioner, co-defendant Edward Novak, and others were charged with participating in a scheme by which, from 2001 to 2013, Sacred Heart Hospital paid illegal kickbacks to physicians in exchange for referring patients to the Hospital. Pet. App. 11a.

Some of the most incriminating evidence offered against Petitioner consisted of tape-recorded conversations in which Petitioner's alleged co-conspirators (but not Petitioner) discussed the payment of kickbacks to physicians. Pet. App. 2a-3a, 7a-10a, 14a-15a, 41a-44a, 48a-49a. Among those conversations were 43 tape-recorded conversations introduced at trial through a government agent, who did not participate in any of those conversations. Brief for Appellant at 34-35, *United States v. Nagelvoort*, 856 F.3d 1117 (7th Cir. 2017) (Nos. 15-2766 and 15-2821). Notably, all of those conversations occurred after Petitioner departed from Sacred Heart—indeed, the *earliest* of those 43 tape-recorded conversations occurred in February 2013, *more than 21 months after Petitioner had completely severed his relationship with Sacred Heart. Id.*

Petitioner was not a party to any of those incriminating conversations, and a dispute arose at trial as to whether they were inadmissible hearsay as to

Petitioner. The admissibility of these statements turned on whether Petitioner was a member of the conspiracy at the time they were made. The government's position was that the statements were admissible against Petitioner under Federal Rule of Evidence 801(d)(2)(E), which excludes statements "made by the party's co-conspirator during and in furtherance of the conspiracy" from the bar on introducing hearsay. Fed. R. Evid. 801(d)(2)(E); Pet. App. 39a. The government contended that, despite leaving Sacred Heart and not performing any work or receiving any benefit after that date, Petitioner remained a member of the conspiracy, and that statements by his co-conspirators that postdated his departure from Sacred Heart were nonetheless admissible against him. Pet. App. 39a. In response, Petitioner argued that these statements were inadmissible because Petitioner's departure from Sacred Heart and severance with all ties with the organization marked his withdrawal from the conspiracy as a matter of law. Pet. App. 38a-39a. Thus, Rule 801(d)(2)(E) did not authorize the admission of hearsay statements that postdated his withdrawal. Pet. App. 39a.

Petitioner raised his hearsay objection to the District Court on four separate occasions. First, before trial, Petitioner argued that the evidence postdating his departure from Sacred Heart was inadmissible hearsay, and sought a limiting jury instruction. Pet. App. B (26a-36a). The court denied Petitioner's motion without prejudice, holding that it was "not in a position to determine as a matter of law, before trial, that

Nagelvoort withdrew when he resigned," and denied Petitioner's motion. Pet. App. 39a-40a.

Second, at trial, Petitioner renewed his request for a jury instruction. Pet. App. 55a. The court observed that "the real question here is whether there is more to it than just leaving your job." Pet. App. 57a. But the court ruled that it would need to hear all the evidence before ruling on the renewed motion, and observed that Petitioner "preserved the point." *Id.*

In view of the District Court's desire for a clearer factual record, the parties entered into a stipulation on the pertinent facts related to Petitioner's departure from Sacred Heart. That stipulation was as follows:

> Clarence Nagelvoort's consulting employment agreement with Sacred Heart Hospital was terminated on April 28, 2011. Mr. Nagelvoort did not perform any work for Sacred Heart Hospital after that date, and Mr. Nagelvoort did not receive any payments or benefits of any kind from Sacred Heart Hospital's operations or payroll accounts after that date.

Pet. App. 61a.

At the initial instruction conference, Petitioner renewed, for a third time, his request for a jury instruction that any purported co-conspirator statements or conduct occurring after April 28, 2011 were inadmissible against him as a matter of law because he had withdrawn from the alleged conspiracy. Pet. App. 68a-69a. The court denied Petitioner's motion. Pet. App. 69a-70a. Instead, the court instructed the jury that if it found that Nagelvoort showed "that it's more likely

than not that he withdrew from the alleged conspiracy as of April 28, 2011, then you may not consider as evidence against him any statements made by any alleged co-conspirators after that date." Transcript of Record at 6910:22-25, *United States v. Novak*, No. 13 CR 312 (N.D. Ill. Mar. 12, 2015).

In light of the District Court's decision, in its closing argument the government relied heavily on the tape-recorded statements, all of which occurred well after Petitioner had severed his relationship with the Hospital. For instance, the government's counsel told the jury:

> Conspiracy, it's an agreement to do something illegal. And a lot of times, ladies and gentlemen, you might not have a meeting where people are in that smoke-filled room talking about doing something illegal, but here you actually had that. You had those meetings on tape. People are talking about quid pro quos. People are talking about referrals going down when they get the kickback payment. So you can build the relationship and get what we want in return. Those are conspiratorial conversations, ladies and gentlemen. That's how you know this conspiracy happened, and that's how you know these defendants participated in it.

Id. at 7064:11-21. Indeed, the government explicitly relied on tape-recorded conversations long post-dating Petitioner's departure to establish Petitioner's own state of mind:

> And you heard Ernie Velasquez talk about this relationship this arrangement, in a recording. And, ladies and gentlemen, you couldn't have described it any clearer. What he said to Mr. Puorro in February 2013 was when [Petitioner] wanted to get Kuchipudi here, Kuchipudi said: I can bring the patients in, but I need some help. [Petitioner] thought about this program, which was a program where the hospital is going to hire the PAs or the NPs. 'You will make money and guarantee that your patient will be protected, that it's not going to be stole from you, and we make money from the Medicare admission.' When he says 'we,' he means the hospital, right.

Id. at 6998:15-6999:1; *see also id.* at 6974:4-10 ("[A physician] was getting paid for his patients, not for his teaching work, not for his work with medical students. And you know this is true because Dr. Maitra told you. … Mr. Puorro recorded him in a conversation").

On March 25, 2015, a jury convicted Petitioner of conspiracy and all but one of the substantive counts with which he was charged. Pet. App. 11a.

Petitioner filed a motion for judgment of acquittal or, in the alternative, a new trial. Pet. App. 71a. Petitioner raised his hearsay objection for a fourth time: he argued that the court should have instructed the jury that the post-April 28, 2011 evidence was inadmissible against Petitioner because he had completely and permanently severed his relationship with Sacred Heart Hospital. Pet. App. 101a-108a. The court denied the motion. Pet. App. 136a-137a.

B. Seventh Circuit's Decision

The Seventh Circuit affirmed Petitioner's conviction. Pet. App. 2a. There was no dispute about the facts: "Nagelvoort's employment with Sacred Heart ended on April 28, 2011," his termination as of that date was communicated to the co-conspirators, and he "never returned to the Hospital and did not receive any payments or benefits after that date." Pet. App. 19a. Before the Seventh Circuit, Petitioner argued "that he withdrew from the conspiracy on that date, and any co-conspirator statements or conduct occurring after April 28, 2011, should have been held inadmissible against him." *Id.*

The Seventh Circuit set out the relevant background principles. Under Federal Rule of Evidence 801(d)(2)(E), statements of a co-conspirator are admissible against a party if the party was a member of the conspiracy and the statements were made during the course of and in furtherance of the conspiracy. Pet. App. 20a. Thus, if Petitioner withdrew from the conspiracy on April 28, 2011, the co-conspirator statements postdating his withdrawal would be inadmissible against him. *Id.*

The Seventh Circuit summarized the issue before it:

> Nagelvoort argues that by his termination from Sacred Heart and Novak's communication of that fact to the Hospital's managers, he effectively withdrew from the conspiracy as a matter of law, and therefore, any coconspirator statements after his termination were inadmissible against him. He does not contend that he took any other

> affirmative actions toward withdrawal, nor does he argue that any such actions would have been necessary.

Pet. App. 20a-21a.

The Seventh Circuit observed that "our sister circuits . . . have found that ending one's relationship with a company was sufficient to establish withdrawal from a conspiracy occurring within that company." Pet. App. 21a (citing, *e.g.*, *Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 838-39 (11th Cir. 1999), *amended in part*, 211 F.3d 1224 (11th Cir. 2000); *United States v. Nerlinger*, 862 F.2d 967, 974-75 (2d Cir. 1988); *United States v. Steele*, 685 F.2d 793, 803-04 (3d Cir. 1982)).

But the Seventh Circuit declined to follow that out-of-circuit authority: "Our cases, however, require something more." *Id.* It explained: "We have held consistently that simply ending one's involvement in the conspiracy, even voluntarily, is not enough to constitute withdrawal." *Id.* It cited Seventh Circuit authority holding that "retirement from an organization" does not "'constitute[] effective withdrawal' without affirmative act to disavow the criminal objective." *Id.* (quoting *United States v. Morales*, 655 F.3d 608, 640 (7th Cir. 2011)). Under this precedent, "[t]he termination of Nagelvoort's employment alone does not constitute withdrawal." *Id.* Rather, "additional action aimed at defeating or disavowing the objectives of the conspiracy" is required. *Id.*

The court acknowledged that Petitioner's affirmative "request to be terminated"—and his actual

termination—was communicated to his co-conspirators, by means of "the notice Novak sent to the Hospital managers," after granting Petitioner's request to be terminated Pet. App. 22a. Nonetheless, it concluded that to establish withdrawal, "the defendant's announcement must also disavow the conspiracy and its criminal objectives," and "Nagelvoort made no such disavowal." *Id.* Accordingly, the court "agree[d] with the district court's finding that Nagelvoort had not carried his burden of proving that he had withdrawn from the conspiracy as a matter of law." *Id.*

REASONS FOR GRANTING THE WRIT

In *Hyde v. United States*, 225 U.S. 347 (1912), this Court held that "affirmative action" to "disavow or defeat the purpose" of a conspiracy is necessary to establish withdrawal. *Id.* at 369. In *Smith v. United States*, 568 U.S. 106 (2013), this Court clarified that the burden to establish such "affirmative action" lies on the defendant. *Id.* at 113.

But these cases leave unresolved a fundamental question: what does it mean to "disavow or defeat the purpose" of a conspiracy? Is fully severing one's ties with the organization engaging in the conspiracy—and thus depriving the conspiracy of one's *own* services, and receiving no future benefits from the conspiracy—enough? Or does "disavowing or defeating the purpose" of a conspiracy require taking some additional act of hindering the conspiracy, like interfering with the conspiracy's operations or going to the police? The circuits have divided over that question, and this case is the ideal vehicle to resolve that split.

I. THERE IS A CIRCUIT SPLIT ON THE QUESTION PRESENTED.

As just explained, the Seventh Circuit held below that a person who severs his relationship with an organization engaged in a conspiracy—such that he neither participates in nor benefits from the conspiracy thereafter—nonetheless does not "withdraw" from the conspiracy. Rather, in the Seventh Circuit's view, an unspecified "additional action aimed at defeating or disavowing the objectives of the conspiracy" is required. Pet. App. 21a.

The Seventh Circuit's decision conflicts with decisions from three other circuits. Those circuits reject the Seventh Circuit's "additional action" requirement; they hold that resignation from an organization engaged in a conspiracy, where no evidence exists of a post-resignation relationship or benefit, constitutes withdrawal from the conspiracy as a matter of law.

Third Circuit. As the Seventh Circuit recognized, its opinion conflicts with *United States v. Steele*, 685 F.2d 793 (3d Cir. 1982). In that case, Robert Naples resigned from an organization engaged in a conspiracy. He argued that his resignation "constituted withdrawal from the conspiracy as a matter of law, and therefore that he cannot be prosecuted on an indictment returned more than five years after that date" (the applicable statute of limitations). *Id.* at 803. In response, "[t]he government . . . pointed to no evidence that Naples participated in the conspiracy in any way following his resignation, but it argue[d] that his silence thereafter

could be considered by the jury as evidence of his continuing participation." *Id.*

The Third Circuit held that Naples had established withdrawal as a matter of law. It explained that "Naples presented evidence that he resigned and permanently severed his employment relationship" with the organization beyond the five-year limitations period. *Id.* at 804. In the absence of any contrary evidence from the government that Naples had maintained his relationship with the organization, the court held that Naples' mere resignation and severance of his employment relationship satisfied *Hyde*'s "affirmative action" requirement as a matter of law. *See id.* That holding squarely conflicts with the decision below, which held that "additional action," above and beyond termination of the relationship with the organization, is necessary to establish withdrawal. Pet. App. 21a.

In *Steele*, the Third Circuit relied on its prior decision in *United States v. Lowell*, 649 F.2d 950 (3d Cir. 1981). *See Steele*, 685 F.2d at 804. In *Lowell*, the Third Circuit held that "where fraud constitutes the 'standard operating procedure' of a business enterprise, 'affirmative action' sufficient to show withdrawal as a matter of law from the conspiracy embodied in the business association may be demonstrated by the retirement of a co-conspirator from the business, severance of all ties to the business, and consequent deprivation to the remaining conspirator group of the services that constituted the retiree's contribution to the fraud." *Lowell*, 649 F.2d at 955. *Lowell* illustrates the conceptual divide between the Third Circuit and the Seventh Circuit. In the Third Circuit's view, *bona fide*

retirement from an organization deprives the organization of the conspirator's own services, and therefore *is* the "affirmative action" required to establish withdrawal under *Hyde*. The Seventh Circuit disagrees, instead holding that "retirement from an organization" is insufficient to establish withdrawal: the defendant bears the burden of showing "additional action" beyond the "termination of … employment alone." Pet. App. 21a.

The Third Circuit's most recent decision on this issue reinforces the divergence in legal standards between the Third and Seventh Circuits. In *United States v. Antar*, 53 F.3d 568, 583-84 (3d Cir. 1995), *overruled on other grounds by Smith v. Berg*, 247 F.3d 532, 534 (3d Cir. 2001), the Third Circuit articulated the legal standard as follows:

> (1) resignation from the enterprise does not, in and of itself, constitute withdrawal from a conspiracy as a matter of law; (2) total severing of ties with the enterprise may constitute withdrawal from the conspiracy; however (3) even if the defendant completely severs his or her ties with the enterprise, the defendant still may remain a part of the conspiracy if he or she continues to do acts in furtherance of the conspiracy and continues to receive benefits from the conspiracy's operations.

Id. at 583. In other words, in the Third Circuit, the "total severing of ties with the enterprise"—such that the defendant no longer does "acts in furtherance of the conspiracy" or "continues to receive benefits from the conspiracy's operations," *id.*—*is* an "affirmative action

… to disavow or defeat the purposes" of a conspiracy under *Hyde*. That view is inconsistent with the view of the court below.

Second Circuit. The Seventh Circuit also acknowledged that its opinion conflicts with *United States v. Nerlinger*, 862 F.2d 967 (2d Cir. 1988). The facts of *Nerlinger* were closely similar to the facts of this case. Before March 1983, Gary Nerlinger worked at a company called FCCB which engaged in a conspiracy. *Id.* at 974. In March 1983, he resigned from the company and closed his account. *Id.* The government nonetheless tried to admit the hearsay statements of his co-conspirators which post-dated his withdrawal from the company. *Id.* As in this case, "the propriety of the district court's admission against Nerlinger of hearsay statements made by various of the conspirators [after March 1983] … depend[ed] on whether Nerlinger effectively withdrew from the conspiracy when he resigned from, and closed his account at, FCCB in March 1983." *Id.*

The court held that "Nerlinger unquestionably disavowed the conspiracy when he resigned from, and closed the … account at, FCCB." *Id.* The court framed "[t]he only question" as whether his actions "constitute[d] an 'affirmative action' in light of the rules that mere cessation of conspiratorial activity is not enough, and that withdrawal must be accompanied by a 'communication of the abandonment in a manner reasonably calculated to reach co-conspirators.'" *Id.* (citation omitted). The court held that it did: his actions "disabled him from further participation and made that disability known to [his superior]," and no case "requires

the hiring of a calligrapher to print formal notices of withdrawal to be served upon co-conspirators." *Id.*

This case is materially identical to *Nerlinger*. As the Seventh Circuit acknowledged, Petitioner resigned, and notice was given to the hospital managers. Pet. App. 19a. Nonetheless, unlike the Second Circuit, the Seventh Circuit held that Petitioner had not withdrawn from the conspiracy because, in its view, unequivocally severing ties with an organization—thereby disabling the conspirator from future participation or receipt of future benefits—is not an "affirmative action" sufficient to establish withdrawal. Pet. App. 21a.

The Second Circuit's most recent opinion addressing this issue sheds further light on the disparity in legal standards between the Second and Seventh Circuits. In *United States v. Berger*, 224 F.3d 107 (2d Cir. 2000), the court reaffirmed its prior holding that a defendant satisfies the burden of proving withdrawal by showing "resignation plus the absence of any subsequent activity." *Id.* at 118 (citing *United States v. Goldberg*, 401 F.2d 644, 649 (2d Cir. 1968)). It explained that although "resignation from a criminal enterprise standing alone, does not constitute withdrawal as a matter of law," the defendant can show withdrawal so long as he does "not take any subsequent acts to promote the conspiracy" or "receive any additional benefits from the conspiracy." *Id.* It then explicitly adopted the Third Circuit's legal standard in *Antar*, block-quoted above (*supra* at 15), as its own. *Id.* at 119 (quoting *Antar*, 53 F.3d at 583). Again, the Second Circuit's view that "resignation plus the absence of any subsequent activity" establishes withdrawal, *id.* at 118, conflicts

with the decision below, which held that "resignation plus the absence of any subsequent activity" does *not* establish withdrawal.

Eleventh Circuit. The Seventh Circuit also recognized that its decision conflicted with *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823 (11th Cir. 1999), *amended in part*, 211 F.3d 1224 (11th Cir. 2000). *Morton's Market* was a civil antitrust case involving a conspiracy of dairies, one of which was owned by Pet, Inc. *Id.* at 826. In 1985, Pet sold its dairy; the question was whether this sale sufficed to establish Pet's withdrawal as a matter of law, thus entitling Pet to summary judgment.

Pet argued that "its exit from the dairy business constituted an affirmative step sufficient to effectively withdraw it from the conspiracy." *Id.* at 838. The plaintiffs argued in response that "Pet did nothing more than cease its participation in the conspiracy and did nothing to disavow or defeat the purposes of the conspiracy." *Id.* The Eleventh Circuit framed the question as "whether Pet's sale of its dairy, without more, effectively withdrew it from the milk price-fixing conspiracy, or whether some further affirmative step was required to end its liability." *Id.* at 839.

The Eleventh Circuit acknowledged the "merit to plaintiffs' contentions." *Id.* at 838. It recognized that "[t]he sale of Pet's dairy was not a disavowal of the conspiracy so much as a business decision not to produce milk anymore. Nor did it do anything to defeat the continuation of the other dairies price-fixing. It simply sold its dairy and walked away." *Id.* Nonetheless, the Eleventh Circuit concluded that Pet had established

withdrawal as a matter of law. Citing *Nerlinger*, *Steele*, and *Lowell*, the Eleventh Circuit stated the law as follows:

> In the context of a business conspiracy, one in which the conspiracy is carried out through the regular activities of an otherwise legitimate business enterprise, the law has given effect to a conspirator's abandonment of the conspiracy only when the conspirator can demonstrate that he retired from the business, severed all ties to the business, and deprived the remaining conspirator group of the services which he provided to the conspiracy.

Id. at 839. The Eleventh Circuit concluded that, as a matter of law, "[t]he conspirator's break with the other conspirators" in the milk price-fixing conspiracy was "both clean and permanent" when defendant company sold its dairy. *Id.* That holding is irreconcilable with the Seventh Circuit's legal standard, in which "depriv[ing] the remaining conspirator group of the services which he provided to the conspiracy," *id.*, is *not* enough to establish withdrawal.

A recent case from the Eleventh Circuit further illustrates the conflict of authority. In *United States v. Bergman*, 852 F.3d 1046 (11th Cir. 2017), Bergman departed from a company that was engaged in a conspiracy. The question before the court was whether Bergman's departure sufficed to establish withdrawal as

a matter of law, or whether there was a dispute of fact over withdrawal to be resolved by the jury. *Id.* at 1063.

The Eleventh Circuit concluded that the withdrawal issue presented a jury question—but the court's reasoning reflects how its legal standard diverges from the Seventh Circuit's legal standard. The court explained that there was "conflicting testimony over why he ceased working at [the company]." *Id.* Bergman testified that he voluntarily resigned; his superior, Valera, testified that he was forced out of the company. *Id.* at 1064. The court held that the issue was properly submitted to the jury because "Bergman's withdrawal defense depended on who the jury believed." *Id.* It found that "the district court properly let the jury consider all the evidence about Bergman's cessation of work at ATC and decide whether Valera took the affirmative step of getting rid of Bergman or whether Bergman took an affirmative step to disavow or defeat the conspiracy." *Id.* Applying its prior decision in *Morton's Market*, the court acknowledged that "an employee's resignation" can "be an effective withdrawal," but held that "the jury could reasonably find that Bergman only resigned under threat of firing and that his departure in those particular circumstances was not an affirmative step on his part 'to disavow or defeat' the objectives of the conspiracy." *Id.* at 1065.

This analysis would have been completely different in the Seventh Circuit. In the Seventh Circuit, Bergman's withdrawal defense would *not* have "depended on who the jury believed," *id.* at 1064, because *neither* Bergman's *nor* Valera's testimony would have sufficed to establish withdrawal. Bergman

testified that he voluntarily resigned from the company. In the Eleventh Circuit, this testimony, if believed, would have established withdrawal because voluntary resignation "depriv[es] the remaining conspirator group of the services which he provided to the conspiracy." *Morton's Mkt.*, 198 F.3d at 839. In the Seventh Circuit, however, even Bergman's testimony would not have established withdrawal, because an "additional action" beyond voluntary resignation would have been necessary to establish withdrawal.

Thus, if this case had arisen in the Eleventh Circuit, Petitioner would have been entitled to a jury instruction that he withdrew from the conspiracy as a matter of law—it was undisputed that Petitioner "asked to be terminated," Pet. App. 19a, and unlike in *Bergman*, there was no suggestion that Petitioner resigned under threat of firing. But the Seventh Circuit held that Petitioner was not entitled to such a jury instruction because it rejected the Eleventh Circuit's rule that "an employee's resignation" can "be an effective withdrawal," *Bergman*, 852 F.3d at 1064, and instead imposed a *sui generis* "additional action" requirement. Pet. App. 21a.

II. THIS CASE IS WORTHY OF THIS COURT'S REVIEW.

This Court should grant certiorari to resolve the split between the Seventh Circuit and the Second, Third, and Eleventh Circuits.

The question presented is important and recurring. The factual scenario presented by the case recurs frequently—it arises whenever a person works at a

company engaged in a conspiracy, quits his job, and never participates in or benefits from the conspiracy again. Moreover, the legal question of whether a person has withdrawn from a conspiracy arises in several contexts. For instance, it may determine whether evidence is admissible under the co-conspirator exception to the hearsay rule, as in this case; whether the statute of limitations has expired on a conspiracy charge, as in *Hyde* and *Smith*; or whether a defendant is liable for a co-defendant's substantive act in furtherance of the conspiracy under *Pinkerton v. United States*, 328 U.S. 640 (1946).

Moreover, the circuit split is particularly problematic because of the prospect of venue manipulation. In conspiracy cases, venue is proper in any jurisdiction where any co-conspirator has committed an overt act in furtherance of the conspiracy. *See Hyde*, 225 U.S. at 356-57. Federal investigators conducting sting operations will have a powerful incentive to induce conspirators within an organization to commit overt acts within the Seventh Circuit. Such acts would open the door to criminal prosecution within the Seventh Circuit for *all* co-conspirators. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253 (1940) (holding that acts "by any one of the [conspirators] in the [relevant district] bound all"). Critically, this includes persons who had left the organization and who would not be deemed co-conspirators under the law of the Second, Third, and Eleventh Circuits, but who would be deemed co-conspirators within the Seventh Circuit based on the Seventh Circuit's *sui generis* definition of "withdrawal." And, having indicted such defendants within the

Seventh Circuit, the government could then take advantage of the Seventh Circuit's favorable law; for instance, it could seek to admit co-conspirators' statements that occurred even after the defendants left the organization, even when those statements would have been inadmissible hearsay in other circuits. Federal law should be uniform; the incentives of law enforcement officials should not be affected by diverging interpretations of federal law in different jurisdictions. Only this Court can harmonize the meaning of federal law nationwide.

No additional percolation would be helpful. Numerous courts have considered the question presented, dating back decades. The debate in the courts of appeals centers on the interpretation of the statement in this Court's decision that withdrawal requires an "affirmative action … to disavow or defeat the purpose" of the conspiracy. *Hyde*, 225 U.S. at 369. Only this Court can clarify the meaning of its own opinions.

Finally, this case is a strong vehicle for three reasons. First, Petitioner cleanly preserved this issue, as he raised it four times in the District Court and again in the Seventh Circuit. *Supra*, at 6-9.

Second, in an effort to make the record as clear as possible, the parties entered into a stipulation confirming that this case presented the exact scenario on which the circuit split has developed. The government expressly stipulated that Petitioner neither "worked for," not "receive[d] any payments or benefits of any kind from," Sacred Heart after his departure. Pet. App. 61a. As explained above, in the Second, Third, and

Eleventh Circuits, those are the precise facts that mandate a finding that the defendant has withdrawn from the conspiracy as a matter of law. *Supra*, at 13-21.

Third, the Seventh Circuit's application of its legal standard was outcome-determinative. The Seventh Circuit never disputed that Petitioner had completely severed his ties with Sacred Heart. Instead, its decision turned entirely on its determination that an "additional action," beyond complete severance, was required to establish withdrawal. Pet. App. 21a. The Seventh Circuit made no effort to reconcile that holding with its sister circuits; to the contrary, it expressly acknowledged the conflict of authority. *Id.* Thus, this case is the perfect vehicle to determine whether the Seventh Circuit's legal standard is correct.

III. THE SEVENTH CIRCUIT'S DECISION IS WRONG.

The Seventh Circuit erred in holding that an "additional action," beyond severance of ties to an organization, is required to establish withdrawal. The Seventh Circuit should have followed the law of the Second, Third, and Eleventh Circuits: "'affirmative action' sufficient to show withdrawal as a matter of law from the conspiracy embodied in [a] business association may be demonstrated by the retirement of a co-conspirator from the business, severance of all ties to the business, and consequent deprivation to the remaining conspirator group of the service that constituted the retiree's contribution to the fraud." *Lowell*, 649 F.2d at 955; *see Morton's Mkt.*, 198 F.3d at 839; *Nerlinger*, 862 F.2d at 974.

Conspiracy law rests on the premise that "conspirators are partners in crime," and that "[a]s such, the law deems them agents of one another." *Anderson v. United States*, 417 U.S. 211, 219 n.6 (1974). Thus, a conspirator is deemed to have committed "the acts of his co-conspirators in pursuit of their common plot," *Smith*, 568 U.S. at 111, and to have uttered the statements of his co-conspirators in furtherance of the conspiracy. *Anderson*, 417 U.S. at 219 n.6. When a person totally severs his relationship with an organization engaged in a conspiracy, however, it makes little sense to treat him as the agent of his co-conspirators within the organization. A defendant who neither assists, nor controls, nor benefits from the organization cannot plausibly be deemed an agent of his co-conspirators within the organization, regardless of whether he takes any additional steps to hinder the conspiracy.

In reaching its contrary conclusion, the Seventh Circuit emphasized that withdrawal requires some act to "disavow or defeat the purpose" of the conspiracy. Pet. App. 20a. But as other circuits have explained, complete severance of ties *does* "disavow or defeat the purpose" of the conspiracy, by depriving the conspiracy of the conspirator's services. *Supra*, at 13-21.

More fundamentally, the Seventh Circuit misunderstand the requirement to "disavow or defeat the purpose of the conspiracy." That requirement comes directly from this Court's decision in *Hyde*. There, the Court explained: "Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the

purpose he is in no situation to claim the delay of the law." 225 U.S. at 369.

In context, however, it is clear the Court was simply rejecting the argument that *mere inaction* established withdrawal. *Hyde* concerned the statute of limitations for a defendant charged with being in a continuing conspiracy—that is, a conspiracy which "contemplated that acts should be done from time to time through a series of years until the purposes of the conspiracy should be accomplished." *Id.* at 368. The defendants argued that the statute of limitations should run from the last overt act in which the defendant was in "conscious participation." *Id.*

The Court rejected this argument. Instead, it upheld a jury instruction that if the defendant was a member of a continuing conspiracy, and the defendant "'remained acquiescent, expecting and understanding' that further acts should be performed," the defendant would remain a member of the conspiracy for statutes of limitations purposes. *Id.* The Court explained that if a conspiracy has "continuity of purpose" and "contemplate[s] the performance of acts through a series of years," then "the relation of the conspirators to it must continue, being to it during its life as it was to it the moment it was brought into life." *Id.* at 639. "If each conspirator was the agent of the others at the latter time, he remains an agent during all of the former time." *Id.* In other words, if a conspiracy maintains a continuous existence, then the conspirators are guilty of conspiracy during that entire continuous existence—even if the conspiracy is periodically dormant. And the co-conspirator cannot merely point to the conspiracy's dormancy as evidence

he withdrew from the conspiracy, thus triggering a statute of limitations bar.

Nothing in *Hyde*, however, supports the Seventh Circuit's "additional action" requirement. *Hyde* holds that a conspiracy's dormancy cannot establish withdrawal. It does not hold that the *bona fide* severance of ties with an organization engaged in a conspiracy is insufficient to establish withdrawal, as the Seventh Circuit concluded.

The Seventh Circuit's decision also conflicts with *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). In that case, an antitrust conspirator argued that "resumption of competitive behavior, such as intensified price cutting or price wars" was "affirmative action showing a withdrawal from the price-fixing enterprise." *Id.* at 464. The district judge, however, instructed the jury that "[t]o withdraw, a defendant either must have affirmatively notified each other member of the conspiracy he will no longer participate in the undertaking so they understand they can no longer expect his participation or acquiescence, or he must make disclosures of the illegal scheme to law enforcement officials." *Id.* at 463-64. This Court held that the jury instruction was too narrow. In its view, "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment"—and that included affirmative acts other than the ones identified in the jury instruction. *Id.* at 464-65.

There can be little doubt that Petitioner's affirmative act of permanently and irrevocably quitting his job and not receiving any future benefits from the conspiracy were "inconsistent with the object of the conspiracy"—and there is no dispute that Petitioner directly communicated his resignation to his primary co-conspirator and that news of his departure from Sacred Heart reached the remaining co-conspirators the day after Petitioner's departure. Moreover, if the mere "resumption of competitive behavior" constitutes an affirmative act that can establish withdrawal—even without any additional act to hinder the conspiracy—then surely the severance of a relationship with an organization constitutes an affirmative act as well. The Seventh Circuit's "additional action" requirement has no basis in this Court's decisions.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

TERENCE H. CAMPBELL
COTSIRILOS, TIGHE,
STREICKER, POULOS &
CAMPBELL
33 North Dearborn St.
Chicago, IL 60602
(312) 263-0345

ADAM G. UNIKOWSKY
Counsel of Record
DEVI M. RAO
JENNER & BLOCK LLP
1099 New York Ave., NW,
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

APPENDIX

TABLE OF CONTENTS

Appendix A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 15-2766 & 15-2821

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CLARENCE NAGELVOORT and
EDWARD J. NOVAK,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 13 CR 312 — Matthew F. Kennelly, *Judge*.

ARGUED DECEMBER 7, 2016 — DECIDED MAY 12, 2017

Before WOOD, *Chief Judge*, BAUER, *Circuit Judge*, and SHADID,[*] *District Judge*.

---

[*] Of the United States District Court for the Central District of Illinois, sitting by designation.

BAUER, *Circuit Judge*. On March 25, 2015, after a seven-week trial, a jury convicted Edward Novak and Clarence Nagelvoort of knowingly and willfully causing Sacred Heart Hospital in Chicago, Illinois, to offer and pay kickbacks to physicians in return for patient referrals, in violation of 42 U.S.C. § 1320a–7b(b)(2)(A) (Anti-Kickback Statute), and conspiracy to do so in violation of 18 U.S.C. § 371. They now challenge their convictions on a number of grounds. For the reasons that follow, we affirm the convictions.

I. BACKGROUND

On March 18, 2014, Novak and Nagelvoort were charged with participating in a scheme by which, from 2001 through 2013, Sacred Heart Hospital paid illegal kickbacks to physicians in exchange for referring patients to the Hospital. During that time, Novak was the owner of Sacred Heart and served as the President and Chief Executive Officer. Between August 2007 and April 2011, Nagelvoort worked as an outside consultant for the Hospital, and at various times during that period, he served as the Hospital's Vice President of Administration and Chief Operating Officer.

In 2011, federal agents began investigating and securing the cooperation of physicians and other Sacred Heart employees, some of whom began recording conversations with Sacred Heart administrators and physicians. On April 16, 2013, federal agents executed warrants authorizing the search of the Hospital and its administrative and storage facilities.

At trial, the government presented the audio recordings, testimony from cooperating physicians and

staff, and documents gathered in the search as evidence that the Hospital paid kickbacks to physicians by concealing them as payments under various types of contractual arrangements. The government's case focused on four types of agreements: (1) direct personal services contracts; (2) teaching contracts; (3) lease agreements for the use of office space; and (4) agreements to provide physicians with the services of other medical professionals.

A. Personal Service Agreements With Physicians

Doctor Jagdish Shah, an oncologist, gained privileges and began seeing patients at Sacred Heart in 2000. At trial, Shah testified that in 2009, after another clinic where he was working closed, he told Novak that he could direct approximately 250 patients to Scared Heart. Novak said he was interested and directed Shah to speak with Nagelvoort about the arrangement. Shah relayed the same information to Nagelvoort, who then said he would speak with Novak. A couple days later, Novak called Shah and told him that there was a contract for him to pick up. Until that point, Shah had not discussed with Novak or Nagelvoort any specific additional services that Shah might provide the Hospital.

The contract provided that Shah would devote 20 hours per month to developing a cancer screening program and consult on oncology and hematology cases in exchange for a monthly payment of $2,000. Shah then met with Nagelvoort to explain that he would be unable to devote 20 hours per month to such work. Nagelvoort responded that Shah should "just sign the contract." Shah testified that he understood this to mean that he did not have to do the work required by the contract. It

was his understanding that in exchange for $2,000 per month, he was required only to bring patients to Sacred Heart. Shah and Nagelvoort then signed the contract.

From July 2009 through January 2012, Shah submitted time sheets to Sacred Heart that showed he performed work and services that he did not actually perform. Shah testified that during that time period, he never spent 20 hours in one month performing any of the duties set forth in the contract. He also submitted time sheets showing time spent on services that were not outlined in the contract. Still, he received $2,000 every month.

In April 2012, Doctor Rajiv Kandala entered into an agreement with Sacred Heart to provide education to patients and staff regarding palliative care and hospice services. The contract provided that Kandala would be paid $175 per hour for up to 23 hours of such work per month. He submitted time sheets for the maximum number of hours each month and was paid the monthly maximum amount of $4,025. Numerous administrators and staff testified that there was no such palliative care educational or screening program at the Hospital. According to these witnesses, Kandala was rarely, if ever, seen at the Hospital. Additionally, some of Kandala's time sheets showed his attendance at meetings that did not occur on the dates recorded.

Between April 2012 and March 2013, Chief Operating Officer Anthony Puorro had numerous conversations with Kandala and Novak regarding Kandala's patient admission numbers. On at least three occasions, Puorro noted that Kandala's admission numbers were down and asked Kandala if he could increase the number of

patients he sent to Sacred Heart. In February 2013, after discussing Kandala's declining numbers, Novak suggested to Puorro that they take Kandala out and talk to him because "we need his patients over here."

B. Teaching Contracts

Doctor William Noorlag was the Director of Sacred Heart's Podiatric Residency Program from 1999 to 2010. In 2001, Novak told Noorlag that he wanted to create paid teaching positions for podiatrists as a way to bring more podiatric patients to the Hospital. Noorlag testified that prior to creating these teaching contracts, the attending podiatrists at Sacred Heart already taught the residents as part of their regular duties, without any additional compensation. According to Noorlag, the attending physicians did not perform duties that justified additional teaching salaries. He also testified that in 2008 or 2009, Novak instructed him that there must be evaluations and other paperwork to justify the contracts, and explained, "If I go down for this, you're going down with me."

In late 2001, Sacred Heart entered into a teaching contract with Doctor Richard Weiss. At trial, Weiss testified that when he first met with Novak to discuss a teaching contract, it was Weiss' understanding that Sacred Heart would be compensating him for bringing surgical cases to the Hospital. There was no discussion at that meeting of Weiss' qualifications or any details of the residency program. Weiss and Novak eventually signed a contract, under which Weiss would receive $2,000 per month for teaching and performing various other services related to the residency program. From 2002 through 2008, Weiss received his monthly salary

from Sacred Heart, but performed none of the services listed in the teaching contract. Instead, he simply allowed residents to observe his surgeries in the same manner he had done, without additional compensation, before signing the contract.

In November 2006, Novak signed a contract with Doctor Shanin Moshiri, which contained the same duties as Weiss' contract, and stated that Moshiri would be the "Director of External Office Rotations" for the residency program. Noorlag, the Director of the program, testified that he did not consider Moshiri to hold that position and that another podiatrist was, in fact, in charge of arranging external rotations for the residents. Like Weiss, Moshiri was paid $2,000 per month under the contract. According to Noorlag, Moshiri did not perform the duties outlined in his contract and his instruction of residents was limited to allowing them to observe and participate in surgical procedures. Additionally, records showed that other attending podiatrists who were not compensated under teaching contracts had significantly more contact with residents than Moshiri did.

In May 2010, Nagelvoort drafted a teaching contract for Doctor Subir Maitra, which mirrored the contracts for Weiss and Moshiri. Under the contract, Sacred Heart would pay Maitra $2,000 per month to serve as a faculty member of the Hospital's "Medical Student Program." At this time, there was already a medical student program at the Hospital, which was run by an outside organization called Affiliated Institute for Medical Education (AIME). This organization independently paid physicians to allow medical students

to rotate with them. Maitra received his teaching compensation from Sacred Heart, not AIME.

Students who rotated with Maitra were to record their time in a logbook, which Maitra was then required to sign. Nagelvoort directed his assistant to maintain this logbook. At Maitra's request, he was allowed to sign blank log sheets, which were to be filled in later by the students. By June 2012, students stopped recording their time altogether, but Maitra's signature continued to appear on blank logs. Sacred Heart continued to pay Maitra under the contract through April 2013. During a meeting with Puorro in February 2013, Puorro told Maitra that Novak wanted to know how many patients Maitra was referring to the Hospital. Maitra responded: "Every month, I'm bringing at least three to four insurance cases … . He should be giving me more [money], a little bit." There was no discussion during that meeting of any of Maitra's teaching duties under his contract.

C. Lease Agreement

In March 2004, Novak signed a lease to rent space from Doctor Percy Conrad May, Jr. at the May Medical Center. Sacred Heart agreed to pay $5,000 per month to rent three exam rooms, the clinic's pharmacy, and its waiting area. In December 2009, Nagelvoort signed an addendum to this lease, lowering the monthly payment to $2,000, with no changes to the other terms. At trial, Noorlag testified that in 2006, Ed Lorgeree, the Chief Operating Officer, explained to him that this lease was established so that May would refer podiatry patients to Sacred Heart. In April 2012, during a recorded conversation, Chief Financial Officer, Roy Payawal

noted that when the rent was $5,000, "we were getting five or six referrals a month," but when the rent was reduced, May's referrals "dried up." In September 2012, prior to his cooperation, Puorro was recorded stating: "[May]'s getting 2,000 dollars a month … . That's his check, and ah, it's in exchange for continuing his relationship. It's a quid pro quo. We expect admissions to be sent to Sacred Heart Hospital, otherwise it doesn't make any financial sense for us."

D. Agreements for Services of Other Medical Professionals

In early 2009, Nagelvoort discussed with the Director of Nursing, Deborah Savage, an arrangement whereby the Hospital would hire physician's assistants (PAs) for some of their attending physicians. At trial, Savage testified that Nagelvoort explained that this arrangement would create an incentive for physicians to refer patients to the Hospital.

Savage's successor, Michael Castro, also testified that he had multiple meetings in 2010 and 2011 with Novak, Nagelvoort, and the Director of Respiratory Practice, Ernie Velasquez. During those meetings, Nagelvoort explained that the Hospital needed to provide Doctor Ventkateswara Kuchipudi with a PA in order to obtain more patient referrals from him. In a conversation recorded in February 2013, Velasquez explained the arrangement:

> When Clarence [Nagelvoort] wanted to get Kuchipudi here, … Kuchipudi said I can bring the patients in, but I need some help. Clarence thought about this program, which was a

> program whereby the Hospital is gonna hire the PAs … . You will make money and guarantee that your patient will be protected, that it's not gonna be stole from you, and we make money from the Medicare admission.

Doug Willaman began working as a PA at Sacred Heart in February 2009. Shortly thereafter, Willaman had a meeting with Doctor Shah and Nagelvoort. Willaman testified that during that meeting, Nagelvoort told Shah that Willaman would provide services for Shah's patients both at the clinic and the Hospital, and in return Nagelvoort expected Shah to refer five to ten patients per month to Sacred Heart. Willaman saw patients at Shah's clinic between February 2009 and December 2010, and was paid a salary by the Hospital, but was never compensated by Shah.

Joanna Swajnos began working as a PA at Sacred Heart in November 2009. In December 2009, Nagelvoort assigned Swajnos to work at May's clinic treating his patients for two and a half days per week. May did not compensate Swajnos for her work, but did bill for the services she provided his patients. Sacred Heart paid Swajnos' salary and did not bill for her services. In July 2010, Debra Savage asked Roy Payawal for May's admission numbers. She testified that she thought Swajnos was needed more at the Hospital than at May's clinic, but that if May was bringing enough admissions to the Hospital, she would keep Swajnos at the clinic in some capacity. Between January and July 2010, May had admitted four patients to the Hospital. After she received that information and

discussed it with Nagelvoort, Nagelvoort made the decision to recall Swajnos from the clinic.

Beginning in 2010, Nagelvoort assigned Swajnos, Willaman, and nurse practitioners (NPs) Jean Rush and Myrline Jeudy to assist Doctor Kuchipudi with his patient care. They worked with Kuchipudi's patients both in the Hospital and at various nursing home facilities. Swajnos, Rush, and Jeudy each testified that they spent at least 90% of their time working with Kuchipudi's patients and understood him to be their boss. Kuchipudi never paid Rush and Jeudy, who received all of their compensation from the Hospital. From March 2011 to April 2013, Swajnos received between 25% and 30% of her compensation from Kuchipudi, but estimated that, during that period, 60% of her time was devoted to his patients. She still received her full salary from the Hospital, as well. In a recorded conversation in March 2013, regarding these arrangements, Payawal explained: "I think that was the main reason, uh, we created that, uh, PA to do … the work for uh, the doctor, and particularly Kuchipudi. Because I don't think he will come here, if that was not set up for him." In this same conversation, Payawal also confirmed that Nagelvoort set up these arrangements and that Novak knew about them.

On numerous occasions, Novak and Nagelvoort conferred with Sacred Heart's outside counsel, Joan Lebow, when creating these arrangements. Lebow testified that Nagelvoort told her that the Hospital intended to employ the PA or NP full time, but only use them at the Hospital 70% of the time and sell the balance of the time to attending physicians for market value.

Upon that information, Lebow drafted a memorandum in August 2010, in which she advised that the relationship did not fit into any of the safe harbor provisions of the Anti-Kickback Statute, but that it might not violate the law so long as referral inducement was not a purpose of the arrangement. Nagelvoort responded to the memorandum in an email by first explaining that he had discussed it with Novak. Among other suggested revisions to the memorandum, Nagelvoort requested that Lebow "remove bullet point three as it refers to referrals!!! [P]lease delete this."

For the next few months, Lebow continued to confer with and provide advice to Novak and Nagelvoort regarding these arrangements. In February 2011, another memorandum from Lebow reiterated that when the PAs and NPs were working at the Hospital, only the Hospital was allowed to bill for the services, not the attending physician. Lebow stated that allowing a PA or NP to work for a physician while the PA or NP was working a shift at the Hospital could be considered an illegal inducement for referrals.

E. Indictment, Trial, and Post-Trial Motions

On March 18, 2014, Novak and Nagelvoort were charged in a superseding indictment with violating 42 U.S.C. § 1320a–7b(b)(2)(A), and conspiring to do so in violation of 18 U.S.C. § 371. Novak was charged with 27 substantive counts of violating the Anti-Kickback Statute and Nagelvoort was charged with 10 such counts. After a seven-week trial, the jury found both Novak and Nagelvoort guilty of the conspiracy count, and all but one of the substantive counts with which they were charged.

At trial, and in post-trial motions, Novak and Nagelvoort argued that there was insufficient evidence to prove that they acted with the requisite knowledge and willfulness under the statute. They also argued that the government failed to prove that certain of the agreements fell outside the statute's safe harbor provisions. Nagelvoort separately argued that he withdrew from the conspiracy when he resigned his position at Sacred Heart on April 28, 2011, and as such, any coconspirator statements made after that date were not admissible against him.

The district court rejected these challenges. It held that there was sufficient evidence for the jury to find that Novak and Nagelvoort acted knowingly and that the contracts did not fall within any of the statute's safe harbors. The court also affirmed its ruling that Nagelvoort had not proven his withdrawal as a matter of law.

II. DISCUSSION

On appeal, both Novak and Nagelvoort argue that the government did not present sufficient evidence to support their convictions for violating the Anti-Kickback Statute. Nagelvoort also challenges the district court's rulings and jury instruction regarding his withdrawal from the conspiracy. Finally, Nagelvoort argues that the Anti-Kickback Statute is unconstitutionally vague as applied to him.

A. Sufficiency of the Evidence

Novak and Nagelvoort make two challenges to the sufficiency of the evidence. First, they argue that the government failed to present sufficient evidence that the

agreements at issue fell outside of the statute's safe harbor provisions. Then, they contend that there was insufficient evidence for the jury to determine that they knowingly or willfully violated the Anti-Kickback Statute.

When reviewing a challenge to the sufficiency of the evidence, "we view the evidence in the light most favorable to the prosecution and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Salinas*, 763 F.3d 869, 877 (7th Cir. 2014) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We do not reweigh the evidence nor judge the credibility of witnesses. *United States v. Galati*, 230 F.3d 254, 258 (7th Cir. 2000). "As long as there is a reasonable basis in the record for the jury's verdict, it must stand." *Id.* (citation omitted).

Under 42 U.S.C. § 1320a–7b(b)(2)(A), it is a felony to knowingly or willfully pay any remuneration, directly or indirectly, to refer a person for a service for which payment may be made, in whole or in part, under a federal health care program. The statute's corresponding regulations provide certain "safe harbors" that protect from liability payments made pursuant to personal services contracts and rental agreements if they satisfy specific criteria. *See* 42 C.F.R. § 1001.952(b) and (d). Generally, the safe harbors exempt written agreements for space rental and personal services if the terms are for less than a year; the compensation is consistent with fair market values; and the services or space are reasonably necessary to accomplish the business goals of the contracting entity.

Id. These safe harbors, however, do not protect any payment that "takes into account the value or volume of any referrals" for services to be paid for under a federal health care program. *Id.* § 1001.952(b)(5) and (c)(5).

The jury was properly instructed on the application of these safe harbor provisions, and Novak and Nagelvoort do not contend otherwise. Instead, they simply argue that the jury's conclusions were incorrect because the evidence showed that the leases, personal service contracts, and teaching agreements met each of the elements of the respective safe harbor. However, there was ample evidence from which the jury could determine that the arrangements at issue "[took] into account the value or volume of any referrals" from the doctors.

Doctor Shah signed a contract to spend 20 hours per month developing a cancer screening program at the Hospital in exchange for $2,000 per month. Shah testified that it was his understanding that he was not actually required to perform the work outlined, and instead, was required only to bring patients to Sacred Heart. Additionally, multiple witnesses testified that Kandala was rarely at the Hospital, despite his time sheets showing that he spent 23 hours per month providing education on palliative and hospice services. The jury also heard recorded conversations between Kandala, Puorro, and Novak discussing Kandala's declining referral numbers, as well as Novak's desire to make Kandala happy because "we need his patients over here." Based on this evidence, a reasonable jury could conclude that the agreements took into account the

physician's potential referrals, thereby placing them outside the safe harbor.

As to the teaching contracts, Doctor Noorlag testified that the attending podiatrists were already teaching residents as part of their normal duties before the creation of separate teaching contracts. He said there were no additional duties created that would have justified the additional payments made under the contracts. Doctor Weiss, who had one such contract, testified that it was his understanding he was being compensated for bringing surgical cases to the Hospital. The jury heard testimony indicating that Doctors Moshiri and Maitra were paid pursuant to these contracts, but did not perform all of the corresponding duties. The jury also heard a conversation between Maitra and Puorro, during which Maitra referenced the number of referrals he had made and that he thought the Hospital should be paying him more.

Finally, the evidence regarding the lease agreement with Doctor May also supported the jury's conclusion. Puorro was recorded stating that the arrangement with May was "a quid pro quo. We expect admissions to be sent to Sacred Heart Hospital, otherwise it doesn't make financial sense for us." Clearly, this indicates the consideration of May's potential referrals.

The evidence summarized here, and outlined in more detail above, when viewed in the light most favorable to the prosecution, certainly could have lead a reasonable jury to find that the agreements took into account the referrals that the doctors would make to Sacred Heart. Thus, because there was a reasonable basis for the jury to conclude that the contracts were not protected by the

safe harbors, that conclusion must stand. *See Galati*, 230 F.3d at 258.

Next, Novak and Nagelvoort contend that the evidence presented at trial was insufficient to prove that they knowingly or willfully violated the Anti-Kickback Statute when they entered into the arrangements at issue. Again, however, there was sufficient evidence from which the jury could have concluded that both appellants knew the contracts were illegal.

As an initial matter, the government presented evidence that Novak and Nagelvoort had knowledge of the Anti-Kickback Statute, its purpose, and its prohibitions. The jury heard that both men were involved in the Hospital's Corporate Compliance Program, which produced a manual that discussed these very issues. Additionally, Sacred Heart's outside counsel Joan Lebow testified that she discussed the statute with appellants and counseled them on its provisions. The jury saw numerous memoranda from Lebow to Novak and Nagelvoort wherein she clearly set forth the types of arrangements the statute prohibits.

Having established their knowledge of the statute, the government also presented ample evidence indicating that both Novak and Nagelvoort played significant roles in the creation and oversight of the arrangements at issue. Novak signed the lease agreement with May, the initial contract with Moshiri, and the teaching contracts with Weiss and Maitra. He also reviewed and signed mileage requests submitted by Szwajnos for her travel to and from May's and Kuchipudi's clinics. Nagelvoort signed the second

agreement with Moshiri, the contract with Shah, and the amendment to May's lease agreement.

In addition, Noorlag, the Director of Podiatric Residency, testified that Novak sought his input in creating and drafting the language of the teaching contracts. Weiss testified that, after a discussion with Novak, it was his understanding that his teaching contract was a means for compensating him for bringing surgical cases to the Hospital. Noorlag also testified that Novak directed him to create paper files justifying the teaching agreements, and explained to Noorlag, "if I go down for this, you're going down with me."

As further evidence of their knowledge, Shah testified that he discussed bringing patients to Sacred Heart with both Novak and Nagelvoort before he was offered a contract to develop a Cancer Screening Program. He told Nagelvoort he could not devote the amount of time the contract required, and Nagelvoort told him to "just sign the contract." Shah testified that, based on these conversations, he believed his only obligation was to bring patients to the Hospital. Savage testified that Nagelvoort told her that the provision of PAs and NPs would create an incentive for physicians to refer their patients to Sacred Heart. She also testified that Nagelvoort oversaw this program and assigned the professionals to particular physicians. Payawal stated in a recorded conversation that Nagelvoort was responsible for creating these arrangements and that Novak had knowledge of them. All of this evidence could lead a reasonable jury to conclude that Novak and Nagelvoort knew that they were compensating doctors for referrals.

Finally, documents showed that Novak and Nagelvoort provided Lebow with false and incomplete information when seeking her counsel on the legality of these arrangements. On multiple occasions, and after consulting with Novak, Nagelvoort informed Lebow that the individual physicians would compensate the PAs and NPs provided to them, when in fact, the Hospital paid those professionals. Nagelvoort also told Lebow that the Hospital alone would be billing for the PAs' and NPs' services, which was not true. From that evidence, a reasonable jury could make the inference that Novak and Nagelvoort knew the arrangements were illegal, but provided false information so as to obtain a record of approval from their outside counsel.

Both Novak and Nagelvoort argue that their numerous consultations with Lebow showed their intent to ensure the contracts were legal. Novak similarly argues that many of the recorded conversations the government presented were, in fact, exculpatory. He contends that these conversations show that he was attempting to follow the law and, therefore, cannot be found to have knowingly or willfully violated the Anti-Kickback Statute. For example, in some of these recordings, Novak is heard directing others to make sure that the arrangements were "kosher" and that employees and physicians were documenting the work that was required under the contracts.

However, the jury heard and rejected these arguments. Instead, it accepted the government's theory that these conversations indicated that Novak and Nagelvoort knew these arrangements were illegal and that they were attempting to cover their tracks.

This is a reasonable inference based upon all of the evidence presented, and it is not for us to decide that the jury was wrong to accept it. *See Galati*, 230 F.3d at 258 (we will not reweigh evidence if there is a reasonable basis in the record for the verdict); *see also United States v. Hale*, 448 F.3d 971, 984–85 (7th Cir. 2006) (where there are competing views of the evidence, "[w]e will not substitute our judgment for the jury's").

In sum, there was sufficient evidence, when viewed in the light most favorable to the government, for the jury to conclude that both Novak and Nagelvoort violated the Anti-Kickback Statute knowingly or willfully.

B. Nagelvoort's Challenge to Admission of Coconspirator Statements

Nagelvoort's employment with Sacred Heart ended on April 28, 2011, when he went to Novak and asked to be terminated. The next day, Novak sent a notice to all the department managers at the Hospital informing them that Nagelvoort was no longer associated with Sacred Heart. Nagelvoort never returned to the Hospital and did not receive any payments or benefits after that date.

Nagelvoort argues, therefore, that he withdrew from the conspiracy on that date, and any coconspirator statements or conduct occurring after April 28, 2011, should have been held inadmissible against him. He requested such an instruction at trial, which the district court denied. Instead, the court instructed the jury that if it found that Nagelvoort showed "that it's more likely than not that he withdrew from the alleged conspiracy

as of April 28, 2011, then you may not consider as evidence against him any statements made by any alleged coconspirators after that date."

We review a district court's decision to admit coconspirator statements under Federal Rule of Evidence 801(d)(2)(E) for an abuse of discretion. *United States v. Pust*, 798 F.3d 597, 602 (7th Cir. 2015) (citation omitted). Any relevant findings of fact are reviewed for clear error. *Id.*

Under Rule 801(d)(2)(E), statements of a coconspirator are admissible against a party if the party was a member of the conspiracy and the statements were made during the course and in furtherance of the conspiracy. *United States v. Powers*, 75 F.3d 335, 339 (7th Cir. 1996) (citation omitted). Thus, if Nagelvoort was no longer a member of the conspiracy after April 28, 2011, the coconspirator statements made after that date would not be admissible against him under that rule. It is the defendant's burden to prove that he withdrew from the conspiracy. *United States v. Hall*, 212 F.3d 1016, 1023 (7th Cir. 2000). Ceasing one's active participation in the conspiracy, by itself, is not sufficient to prove withdrawal. *United States v. Vallone*, 752 F.3d 690, 697 (7th Cir. 2014) (citation omitted). Withdrawal requires an "'affirmative action … to disavow or defeat the purpose' of the conspiracy." *Smith v. United States*, 133 S. Ct. 714, 720 (2013) (quoting *Hyde v. United States*, 225 U.S. 347, 369 (1912)).

Nagelvoort argues that by his termination from Sacred Heart and Novak's communication of that fact to the Hospital's managers, he effectively withdrew from the conspiracy as a matter of law, and therefore, any

coconspirator statements after his termination were inadmissible against him. He does not contend that he took any other affirmative actions toward withdrawal, nor does he argue that any such actions would have been necessary. As support, Nagelvoort cites to a number of cases from our sister circuits, in which the courts have found that ending one's relationship with a company was sufficient to establish withdrawal from a conspiracy occurring within that company. *See, e.g.*, *Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 838–39 (11th Cir. 1999), *amended in part*, 211 F.3d 1224 (11th Cir. 2000); *United States v. Nerlinger*, 862 F.2d 967, 974–75 (2d Cir. 1988); *United States v. Steele*, 685 F.2d 793, 803–04 (3d Cir. 1982).

Our cases, however, require something more. We have held consistently that simply ending one's involvement in the conspiracy, even voluntarily, is not enough to constitute withdrawal. *See, e.g.*, *Vallone*, 752 F.3d at 697 (defendant did not withdraw where he did not perform an affirmative act "to defeat or disavow the unlawful goal of the conspiracy"); *United States v. Morales*, 655 F.3d 608, 640 (7th Cir. 2011) ("neither retirement from an organization nor mere inactivity constitutes effective withdrawal" without affirmative act to disavow the criminal objective); *United States v. Julian*, 427 F.3d 471, 483 (7th Cir. 2005) (same). Here, there was no evidence presented at trial, nor does Nagelvoort now contend, that he took any additional action aimed at defeating or disavowing the objectives of the conspiracy. The termination of Nagelvoort's employment alone does not constitute withdrawal.

Nagelvoort points out that in *United States v. Wilson*, we held that "communication by the defendant of the fact of his withdrawal in a manner designed to reach his coconspirators" can suffice as proof of withdrawal. 134 F.3d 855, 863 (7th Cir. 1998). He argues that his request to be terminated and the notice Novak sent to the Hospital managers constitutes such a communication. We clarified that holding, however, in *Vallone*, where the defendant made a similar argument. *United States v. Vallone*, 698 F.3d 416, 494 (7th Cir. 2012), *vacated on other grounds sub nom.*, *Dunn v. United States*, 133 S. Ct. 2825 (2013), *opinion modified and reinstated, Vallone*, 752 F.3d 690. Expanding on the language in *Wilson*, we held that "in order to effectuate legally meaningful withdrawal from the conspiracy, the defendant's announcement must also disavow the conspiracy and its criminal objectives." *Id.* (internal quotation marks and alteration omitted). Nagelvoort made no such disavowal. He simply expressed his desire to end his employment at the Hospital. Thus, we agree with the district court's finding that Nagelvoort had not carried his burden of proving that he had withdrawn from the conspiracy as a matter of law. The court did not abuse its discretion, therefore, when it allowed the coconspirator statements into evidence and denied the limiting instruction Nagelvoort requested.

Nagelvoort then attempts to argue that, despite the court's findings, he was prejudiced by the court's decision to allow the jury to consider the issue of withdrawal. We fail to see any prejudice this may have caused. Based on the court's instruction, the jury could have determined that Nagelvoort had withdrawn, in

which case any statements after April 28, 2011, could not be considered against him. Particularly in light of the court's finding that he had not proven withdrawal as a matter of law, we fail to see how Nagelvoort was prejudiced by allowing the jury the opportunity to make a contrary factual finding. If anything, it appears that he only could have benefitted from the instruction. Therefore, we do not find any error in the court's instruction.

C. Constitutionality of Anti-Kickback Statute

Finally, Nagelvoort contends that this Court's interpretation of the Anti-Kickback Statute renders it unconstitutionally vague. Specifically, Nagelvoort takes issue with the district court's instruction, and the government's argument to the same effect, that the statute is violated if "any part or purpose" of a payment or remuneration was to induce referrals to the Hospital.

We review issues of statutory interpretation *de novo*. *United States v. Ford*, 798 F.3d 655, 661 (7th Cir. 2015) (citation omitted). A challenge to a statute's constitutionality is also reviewed *de novo*. *United States v. Sylla*, 790 F.3d 772, 774 (7th Cir. 2015) (citation omitted).

A statute is unconstitutionally vague if it: "(1) does not provide a person of ordinary intelligence a reasonable opportunity to know what is prohibited, or (2) fails to provide explicit standards to prevent arbitrary discriminatory enforcement by those enforcing the statute." *United States v. Plummer*, 581 F.3d 484, 488 (7th Cir. 2009) (citation omitted). Unless the vagueness challenge implicates the First

Amendment, which is not the case here, the statute is analyzed as applied to the specific facts of the case. *Id.*

Nagelvoort argues that by allowing the jury to find a violation if "any part or purpose" of the payments was meant to induce referrals, the statute is unconstitutionally vague. He contends that "every contractual relationship a Hospital has with a doctor" might run afoul of the statute with such an interpretation, and that one could not know in advance whether a particular arrangement might be deemed illegal by a prosecutor. He urges us, therefore, to overturn our precedent and adopt an interpretation (also set forth in his proposed jury instruction) that a payment or remuneration violates the Anti-Kickback Statute only if its "primary or substantial purpose" is to induce referrals.

We considered, and rejected, an almost identical theory in *United States v. Borrasi*, 639 F.3d 774, 781–82 (7th Cir. 2011). In fact, Nagelvoort relies on the same case, *United States v. Bay State Ambulance & Hospital Rental Serv., Inc.*, 874 F.2d 20 (1st Cir. 1989), to support his argument as the defendant in *Borassi* did. In *Bay State*, the First Circuit affirmed convictions after the district court instructed the jury that defendants were guilty only if payments were made "primarily as [referral] inducements." 874 F.2d at 30. That case did not persuade us in *Borassi*, and instead, we followed the holdings of the Third, Fifth, Ninth, and Tenth Circuits on this issue. *See Borrasi*, 639 F.3d at 782 (collecting cases). We held that "if part of the payment compensated past referrals or induced future referrals,"

it constitutes a violation of the Anti-Kickback Statute. *Id.*

We see no reason to overturn *Borassi* and alter that interpretation now. We reject Nagelvoort's contention that our interpretation of the statute criminalized his otherwise "innocent, legitimate business arrangements and conduct." As we said in *Borrasi*, "nothing in the [Anti-Kickback Statute] implies that only the primary motivation of remuneration is to be considered in assessing" the conduct at issue. *Id.* We hold, therefore, that the Anti-Kickback Statute is not unconstitutionally vague as applied to Nagelvoort's case.

III. CONCLUSION

For the foregoing reasons, we affirm the convictions of both Novak and Nagelvoort.

Appendix B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 13 CR 312 – 10
v.	)	
	)	Hon. Matthew F. Kennelly
CLARENCE NAGELVOORT,	)	
Defendant.	)	

DEFENDANT NAGELVOORT'S MOTION FOR LIMITING INSTRUCTION AT TRIAL REGARDING POST-WITHDRAWAL EVIDENCE

Defendant Clarence Nagelvoort, by and through his attorney, Terence H. Campbell, respectfully moves the Court to give a limiting instruction to the jury, at times appropriate during the trial, stating in substance that "Because Mr. Nagelvoort severed his ties with Sacred Heart on April 28, 2011, the Court is instructing the jury that you may not consider any evidence of activity, conduct or conversations which occurred after April 28, 2011 against Mr. Nagelvoort for any purpose." In support of this motion, Defendant Nagelvoort states as follows:

1. The government has alleged a conspiracy to violate the Anti-Kickback Statute which spans from

"2001 through in or about April 2013." (Indictment at ¶ 2, p. 7).

2. Defendant Clarence Nagelvoort worked on behalf of Sacred Heart Hospital, through a consulting contract with his [Nagelvoort's] company, Aydant International, from on or about August 15, 2007[1] to April 28, 2011. Thus, on that date (April 28, 2011), the president of Sacred Heart wrote a letter to Mr. Nagelvoort stating in part, "It is with regret to inform you that Sacred Heart Hospital is terminating our agreement with Aydant International, effective immediately, pursuant to our telephone conversations this morning." (Ex. A, April 28, 2011 letter to Clarence Nagelvoort). Accordingly, on April 28, 2011, Mr. Nagelvoort's relationship with Sacred Heart was terminated completely and permanently.

3. The next day, April 29, 2011, a memo went out from Sacred Heart's president to "All Department Managers" with heading "SUBJECT: CLARENCE NAGELVOORT'S DEPARTURE" and stating, "Mr. Clarence Nagelvoort is no longer associated with Sacred Heart Hospital." (Ex. B, April 29, 2011 Memo.). The termination of Mr. Nagelvoort's association with Sacred Heart was openly made known to all concerned.

4. After April 28, 2011, Mr. Nagelvoort did not perform any work or services for Sacred Heart Hospital (or anyone affiliated with Sacred Heart), and Mr.

---

[1] Sacred Heart signed a contract with Aydant International on July 29, 2007, with Mr. Nagelvoort to begin work under that contract on August 15, 2007.

Nagelvoort did not receive any salary, profits, proceeds, money or other benefits from Sacred Heart Hospital after April 28, 2011.

5. It is counsel's belief that these facts are not disputed, and counsel knows of no evidence – whether from the discovery produced by the government in this case or his own investigation – to the contrary.

6. Under the law, the above facts constitute Mr. Nagelvoort's withdrawal from the alleged conspiracy as of April 28, 2011. Any number of courts have held that when a person (a) resigns his position with the entity through which the conspiratorial activity is being conducted (here, according to the indictment, Sacred Heart Hospital); and (b) receives no subsequent monies or profits from the conspiracy, that person has legally "withdrawn" from the conspiracy.

7. For example, in *United States v. Nerlinger*, the Second Circuit held that the defendant had "unquestionably disavowed the conspiracy when he resigned from, and closed the [subject] account at, FCCB [the business through which the conspiracy was conducted]." 862 F.2d 967, 974 (2nd Cir. 1988). "By closing his FCCB account, Nerlinger foreclosed his continuing in that role and relinquished any claim to subsequent profits." *Id.* The court held this constituted "withdrawal" under the law: "Nerlinger's closing of the account does satisfy this standard [for withdrawal] because it disabled him from further participation and made that disability known to [coconspirator] DeAngelis. ***That is enough.***" *Id.* (emphasis added). The court continued, ***"Nothing in [United States v.] Borelli or any other case requires the hiring of a***

calligrapher to print formal notices of withdrawal to be served upon coconspirators." *Id.* (emphasis added).

8. This basic principle about what constitutes "withdrawal" from a business conspiracy has been reaffirmed in numerous cases. *United States v. Lowell*, 649 F. 2d 950, 955 (3d Cir. 1981)("[W]here fraud constitutes the 'standard operating procedure' of a business enterprise, 'affirmative action' sufficient to show withdrawal as a matter of law from the conspiracy …may be demonstrated by the retirement of a coconspirator from the business, severance of all ties to the business, and consequent deprivation to the remaining conspirator group of the services that constituted the retiree's contribution to the fraud."); *Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 839 (11th Cir. 1999) *amended in part*, 211 F.3d 1224 (11th Cir. 2000)(sale of dairy business effectively constituted defendant's withdrawal from dairy price fixing conspiracy, as defendant had no further participation in conspiracy and sale communicated to co-conspirators that they would be deprived of defendant's future services in furtherance of the conspiracy).

9. Accordingly, based on facts which we believe to be undisputed, Mr. Nagelvoort legally withdrew from the alleged conspiracy on April 28, 2011.[2]

---

[2] We do not in any way concede or suggest that a conspiracy did, in fact, exist nor that Mr. Nagelvoort joined any such conspiracy. But regardless of whether the government can prove a conspiracy or not, or Mr. Nagelvoort's participation therein, the post-April 28, 2011 evidence is inadmissible against Mr. Nagelvoort.

10. Because the facts set forth above constitute withdrawal from the alleged conspiracy on April 28, 2011, no statements by putative coconspirators made after that date (nor any activities occurring after that date) are admissible against Mr. Nagelvoort. As stated by the Second Circuit in *Nerlinger*,

> Under Fed.R.Evid. 801(d)(2)(E), "a [hearsay] statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is admissible as non-hearsay. As the language of the rule indicates, ***once a party withdraws from a conspiracy subsequent statements by a coconspirator do not fall within this exemption.***

Nerlinger, 862 F.2d at 974 (citations omitted)(emphasis added). See also, 4 Jones on Evidence §27:54 (7th ed.)("[E]vidence of conduct – or statements – by other conspirators after a participant has withdrawn are not admissible against that defendant."); *United States v. Lillie*, 2009 WL 3617495 at *5 (N.D. Ill. 2009)(statements made or actions taken after defendant no longer actively involved in alleged conspiracy are not admissible against that defendant).

WHEREFORE, for the reasons set forth above, Defendant Clarence Nagelvoort respectfully requests that the Court find that evidence of conduct, activity, or conversations after April 28, 2011 are inadmissible as against Clarence Nagelvoort, and give the jury a limiting instruction at appropriate times during the trial stating in substance that "Because Mr. Nagelvoort severed his ties with Sacred Heart on April 28, 2011, the Court is instructing the jury that you may not consider

any evidence of activity, conduct or conversations which occurred after April 28, 2011 against Mr. Nagelvoort for any purpose."

Respectfully submitted,

By: */s/ Terence H. Campbell*
Attorney for Defendant
Clarence Nagelvoort

Terence H. Campbell
Cotsirilos, Tighe, Streicker, Poulos & Campbell
33 North Dearborn Street, Suite 600
Chicago, Illinois 60602
(312) 263-0345

CERTIFICATE OF SERVICE

Terence H. Campbell, an attorney, hereby certifies that in accordance with Fed.R.Crim.P. 49, LR 5.5, and the General Order on Electronic Case Filing (ECF), the following documents:

1. Defendant Clarence Nagelvoort's Motion for Limiting Instruction At Trial Regarding Post-Withdrawal Evidence

was served pursuant to the District Court's ECF system as to ECF filers, including the United States Attorney's Office.

/s/ Terence H. Campbell
Terence H. Campbell

EXHIBIT A

Sacred Heart Hospital · 3240 West Franklin Boulevard · Chicago, Illinois 60624 · (773) 722-3020

Edward J. Novak
President

April 28, 2011

Clarence Nagelvoort
President
Aydant International
1478 South Prairie, Unit B
Chicago, Illinois 60605

Dear Clarence,

It is with regret to inform you that Sacred Heart Hospital is terminating our agreement with Aydant International, effective immediately, pursuant to our telephone conversations this morning. You stated that you wanted me to fire you and that you were "miserable working here".

Therefore, I must regretfully terminate our relationship. It does neither party any good to be miserable. You have done a very good job and I was unaware that you had felt that way.

As such, I am enclosing an additional check to Aydant International as a goodwill gesture on my part. I will always consider you a friend and hold no animosity. And, again, I am grateful and thank you for what you have accomplished for Sacred Heart Hospital. My door is always open to you.

Also, we will send any personal belongings to your home in the next several days.

Yours truly,

/s/

Edward J. Novak
President & CEO

Enclosure

SHH_084-001381

EXHIBIT B

Sacred Heart Hospital

3240 WEST FRANKLIN BLVD. · CHICAGO, IL 60624 · 773-722-3030 · Fax: 773-722-5535

MEMORANDUM

DATE: April 29, 2011

TO: All Department Managers

FROM: Edward J. Novak, President & CEO

SUBJECT: CLARENCE NAGELVOORT'S DEPARTURE

Mr. Clarence Nagelvoort is no longer associated with Sacred Heart Hospital. Please forward any operational issues to me.

SHH_084-001380

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES	)	
	)	
vs.	)	Case No. 13 CR 312
	)	
EDWARD NOVAK, ROY PAYAWAL, VENKATESWARA KUCHIPUDI, and CLARENCE NAGELVOORT	)	

ORDER REGARDING DEFENDANT NAGELVOORT'S OBJECTIONS TO SANTIAGO PROFFER AND MOTION FOR A LIMITING INSTRUCTION

In the order, the Court addresses defendant Clarence Nagelvoort's objections to portions of two conversations offered by the government pursuant to Federal Rule of Evidence 801(d)(2)(E) and his motion for a limiting instruction regarding his claimed withdrawal from the charged conspiracy.

1. Limiting instruction

Nagelvoort requests a limiting instruction to the jury that evidence postdating April 28, 2011, the date he resigned his employment with Sacred Heart Hospital, cannot be considered against him. Nagelvoort contends that on that date, he withdrew from the charged

conspiracy. Typically withdrawal is an issue only when combined with a statute of limitations defense (i.e., the defendant argues he withdrew more than five years before the indictment) or in connection with an attempt to impose criminal responsibility under *Pinkerton* for substantive crimes by others committed in furtherance of the conspiracy. *See* 7th Cir. Crim. Jury Instr. 5.13, 5.14(A) & 5.14(B). Neither of those points is involved in Nagelvoort's request. Rather, Nagelvoort contends that it is improper to admit against him under Federal Rule of Evidence 801(d)(2)(E) co-conspirator statements—or actions—that postdate his claimed withdrawal. *See* Nagelvoort's Mot. for Limiting Instruction at 4 (citing *United States v. Nerlinger*, 862 F.2d 967, 974 (2d Cir. 1988)).

The government argues, among other things, that Nagelvoort's mere resignation from his position is insufficient to operate as a withdrawal from the alleged conspiracy. The Court acknowledges, however, that there are cases suggesting that when a conspiracy is operating as part of a business enterprise, and a conspirator's participation arises from his employment with the enterprise, resignation from or cessation of employment in the enterprise may in appropriate circumstances amount to a withdrawal. *See Nerlinger*, 962 F.2d at 974; *United States v. Lowell*, 649 F.2d 950, 955 (3d Cir. 1981); *see also Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 839 (11th Cir. 1999), *amended in part*, 211 F.3d 1224 (11th Cir. 2000). That said, the Court is not in a position to determine as a matter of law, before trial, that Nagelvoort withdrew

when he resigned. More evidence about the surrounding circumstances may be appropriately considered.

One of the difficult issues arising from Nagelvoort's request for a limiting instruction involves the burden of persuasion. As the government points out, *Smith v. United States*, 133 S. Ct. 714 (2013), holds that in the withdrawal / statute of limitations context, the defendant claiming withdrawal bears the burden of proving that by a preponderance of the evidence. *Id.* at 719. On the other hand, Nagelvoort is arguing withdrawal not in that context but rather as a matter of evidence law: he challenges the admissibility against him of post-withdrawal evidence. The proponent of evidence, here the government, typically bears the burden of showing its admissibility, and that is certainly the case for co-conspirator declarations. The Court raised these apparently conflicting doctrines with counsel and asked for authority on when, how, and under what burden admissibility is determined in the present context, but counsel could find no such authority.

One option is to leave it to the jury to decide whether Nagelvoort has proven his withdrawal by a preponderance of the evidence and instruct the jury that if so decides, then it may not consider post-withdrawal evidence against Nagelvoort. This, however, arguably would come close to allowing the jury to decide evidentiary admissibility depending on the existence of some other fact, a decision that Federal Rule of Evidence 104(a) and (b) confer upon the Court.

Given these uncertainties, the Court falls back, at least for present purposes, on *Smith*. Nagelvoort will have to prove withdrawal by a preponderance of the

evidence, and at this point he has not yet done so. Thus the Court denies, albeit without prejudice, Nagelvoort's motion for a limiting instruction.

2. Rule 801(d)(2)(E) issue

Nagelvoort has raised a second issue regarding the admissibility of certain purported co-conspirator declarations that postdate his resignation from his position at Sacred Heart Hospital. The Court has previously found that the government has proffered evidence sufficient to provisionally admit co-conspirator declarations against the defendants pursuant to Federal Rule of Evidence 801(d)(2)(E). Nagelvoort argues, however, that portions of two particular conversations are inadmissible on the ground that they are not in furtherance of the conspiracy, as the Rule requires.

a. The April 10, 2012 conversation

On April 10, 2012, defendant Noemi Velgara, who was cooperating with government investigators, recorded a conversation that she had with defendant Anthony Puorro (who was not a cooperating witness at the time), defendant Roy Payawal, and an uncharged alleged co-conspirator named Michael Castro. Near the outset of the conversation, Puorro asks Velgara how the hospital is doing with admissions. A discussion about that follows. Puorro then asks Velgara, "What do we have to do to expand the . . . patient population that we have? What ideas do you have?" Apr. 10, 2012 Tr. at 3. Velgara replies that she "got [an] idea from you (Puorro) which I think is excellent." *Id.* She proceeds to discuss giving an "incentive" to physicians for admitting patients to the hospital, which she describes, and she

asks for permission to offer this to others so she can "get this place to the boiling room." *Id.* at 3-4. Puorro then describes an "incentive": "send us admissions and in exchange for that, we would be providing some type of payment but it would be masked as an educational payment, or if they own property we could actually rent some space from them." *Id.* at 4. Further discussion ensues. *Id.* at 4-7.

The conversation between Velgara and Puorro then turns to Dr. May (defendant Percy May, who is not currently on trial). *Id.* at 7. Velgara notes that the hospital is paying rent for Dr. May at an outside office, a total of $2,000 per month, but "he doesn't give no admission." *Id.* Puorro replies, "that's the problem . . . it backfired on us when we were paying him five thousand." *Id.* at 8. The following exchange between Velgara, Puorro, and Payawal occurs (in the following, "UI" stands for "unintelligible"):

PAYAWAL: . . . You remember Rick?

VELGARA: Yeah Rick Schneider.

PAYAWAL: He was hired by Clarence.

VELGARA: Clarence right.

PAYAWAL: And he reduced it to two thousand, and that's when he dried up. We were paying give thousand, before we were getting five or six referrals a month.

PUORRO: It's worth it.

PAYAWAL: Yeah, maybe he got upset when, ah, when he cut the three thousand. But you lose $15,000.

. . .

PUORRO: That's why we need to meet with him to understand what it takes to get him to a higher level. That's Dr. May.

. . .

PAYAWAL: As I said, his practice on the west side is one of the busiest.

PUORRO: Uh hum.

VELGARA: (UI)

PUORRO: And he's not that far away, I heard West Adams.

PAYAWAL: Washington.

PUORRO: Washington, ah, he's right around with he's near us. Those patients can easily come here.

VELGARA: I heard that he had a waiting line out to the outside.

PAYAWAL: Oh yeah. Yeah.

VELGARA: He's right.

PUORRO: Have you ever been to the practice site?

PAYAWAL: Ah, I know the place but I haven't been to ah . . . . You know the person who goes over there? Our podiatrist. Or even ah ah.

VELGARA: Who? I don't know.

CASTRO: Joanna.

PAYAWAL: Ah, that's the reason we're paying rent and also Joanna.

VELGARA: Who's Joanna?

PUORRO: P.A.

PAYAWAL: She's P.A.

VELGARA: Your Joanna goes there?

CASTRO: Yeah. She used to until Clarence cut her.

PAYAWAL: She used to.

PUORRO: What do you mean he cut her?

CASTRO: No I mean not cut her, but he ordered her not to go because ah, he was not – no longer referring patients.

PAYAWAL: Yeah, but when he was referring patients she goes there.

CASTRO: Yeah.

PAYAWAL: But ah, who stop the it?

CASTRO: (UI) Clarence.

PAYAWAL: Oh Clarence. But where does she go now? Because I noticed every months ah, she got a mileage report. Where does she go?

CASTRO: Oh, ah Kuchipudi's?

PAYAWAL: Where?

CASTRO: Dr. Kuchipudi (UI). Nursing homes.

Id. at 8-10.

Nagelvoort argues that the speakers' statements about what happened in the past, "and most particularly the entirely speculative statements about why Nagelvoort allegedly told the PA ['Joanna'] not to go to the space Sacred Heart had rented at Dr. May's clinic anymore" are "statements about past events" that are not in furtherance of the alleged conspiracy. Nagelvoort's Resp. in Opp. to Gov't's *Santiago* Proffer at 5. The government responds that in context, the statements are part of an exchange of "ideas about how to induce May to resume his referrals of patients to Sacred Heart—and to earn the money he was receiving each month" and as such were in furtherance of the conspiracy. Gov't's Consol. Reply at 23. The participants, the government contends, "recounted May's payment and referral history as a means of determining a course of action so as to spur more referrals from him as part of their ongoing kickback conspiracy." *Id.* As such, the government argues, the statements were part of the "information flow between conspirators intended to help each perform a role." *Id.* at 23-24 (quoting *United States v. Santos*, 20 F.3d 280, 286 (7th Cir. 1994)).

With regard to the statement, quoted above, in which Castro says that Nagelvoort had cut the payments to Dr. May "because ah, he was not – no longer referring patients," the government argues that these are not speculative statements and that they will be supported by other evidence. The government also says that it intends to call Castro to testify and that he will "explain the basis of his knowledge that Nagelvoort ordered [Joanna Szwajnos] to stop going to May's clinic when the

number of May's patient referrals dropped." *Id.* The statement Nagelvoort challenges was in furtherance of the conspiracy, the government argues, because the link between sending a physician's assistant (PA) to Dr. May's office and his referrals is clear from the conversation, and the participants discussed this in trying to figure out what it would take to increase his referrals again. *Id.*

The Court agrees with the government that the topic and context of this conversation, taken as a whole, involves discussions that were in furtherance of the conspiracy, namely a discussion about ways to get physicians affiliated with the hospital to increase their patient referrals. Thus the discussion about historical events was not mere idle chatter; it provided pertinent background for how to proceed going forward. For this reason, the government has made the necessary showing that the participants' discussions about the event—Nagelvoort's purported reduction of the rent payments and his purported removal of Szwajnos from Dr. May's clinic and reassignment to Dr. Kuchipudi—were in furtherance of the conspiracy. The Court also concludes that the admission of these particular statements is not unfairly prejudicial to Nagelvoort. *See* Fed. R. Evid. 403.

The Court reaches a different conclusion regarding Castro's statement in the recorded conversation in which he attributes a motive to Nagelvoort—that is, that Nagelvoort cut Dr. May's rent payments "because ah, he was not – no longer referring patients." This particular statement may well be admissible under Rule 801(d)(2)(E), though this is, to be sure, a *far* closer

question for this than for the rest of the conversation. The question of admissibility, however, does not end with that Rule. There is nothing in the conversation itself suggesting Castro's basis for attributing this motive to Nagelvoort, who had left the employ of the hospital a little less than a year earlier. The Court concludes that without such evidence, Nagelvoort would suffer significant and unfair prejudice that far outweighs the probative value of Castro's unexplained attribution of a motive. Thus the government must redact this particular statement by Castro as follows (omitting the part the Court has lined-through): "No I mean not cut her, but he ordered her not to go ~~because ah, he was not – no longer referring patients~~."

The Court notes that, as indicated earlier, the government says that it will call Castro and that he can testify regarding the basis for his statements in the recorded conversation. The Court as not yet heard Castro's testimony, of course, and the government has not made an offer of proof regarding an appropriate evidentiary foundation for Castro's attribution of this motive to Nagelvoort. Admissibility of testimony by Castro along these lines will have to await the government's attempt to lay the foundation. If it is able to do so and thereby admit Castro's live testimony on this point into evidence, it would be appropriate for the government to seek reconsideration of the admissibility of the excluded portion of the April 10, 2012 conversation, because at that point the Rule 403 balance may tilt the other way.

a. The March 21, 2013 conversation

On March 21, 2013, Puorro, who by this time was himself cooperating with law enforcement, recorded a telephone conversation with Payawal. Puorro tells Payawal that he has called because of a discussion he had with the hospital's outside attorney regarding putting together a contract for a hospital physician, a "hospitalist" named Dr. Stamboliu, who was seeing Dr. Kuchipudi's patients on the weekends. Puorro says that the attorney had told him there may already be an agreement in place with Dr. Stamboliu and suggested he check with Payawal to find out. Payawal indicates that he thinks there is an agreement with Dr. Stamboliu involving a clinic owned by the hospital called the Golden Light Clinic that also "includes inpatient billing." Mar. 21, 2013 Tr. At 2. Puorro and Payawal discuss who is billing for these services, Dr. Stamboliu or Dr. Kuchipudi. Payawal says that he assumes that Dr. Kuchipudi is billing for the inpatient services performed on Dr. Kuchipudi's patients, and he also says, "The problem about that, the issue that we have in this hospital that's why, uh, it's hard to attract uh, attending to come here, because we don't have a house physician who does the coverage." *Id.* at 3.

The following exchange then takes place:

PAYAWAL: But I assume uh, Kuchipudi is billing for those services for doing the rounds.

PUORRO: Yeah, I was gonna ask you that, because uh, it just seems very unusual. This whole deal was put together I think by uh, by Clarence and the …

PAYAWAL: Uh, . . .

PUORRO: . . . couple of other people.

PAYAWAL: Yeah, again I think it's uh, it's one of the reasons it was done, because I, I know I discussed it with Clarence before uh, this is problem that we have here, we don't have house physician who can do the rounds.

PUORRO: Like other hospital they do. And I think that was the main reason uh, we created that uh, PA to do, to do the, do the work for uh, for the doctor, and particularly Kuchipudi. Because I don't think he will come here, if that was not set up for him.

PUORRO: I see, I see.

PAYAWAL: Because he's got a lot of patients, I, I don't think he's gonna do all the, the rounds himself.

PUORRO: But was it Clarence in the original meeting that put this whole thing together?

PAYAWAL: Yeah, yeah.

PUORRO: It was?

PAYAWAL: Uh-huh.

PUORRO: And and Ed knows about it, right?

PAYAWAL: Yeah, yeah.

Id. at 3-4.

In this part of the conversation, Puorro, who is in effect acting as an agent of the government, solicits from Payawal a statement that is incriminatory of Nagelvoort. Puorro first volunteers that *he* thinks Nagelvoort put together the "deal" regarding Stamboliu, and then later in the conversation he elicits

an affirmation of this from Payawal (PUORRO: "But was it Clarence in the original meeting that put this whole thing together?" PAYAWAL: "Yeah, yeah.").

It is undisputed that because Puorro was acting as a government informant at the time, his statements are not admissible under Rule 801(d)(2)(E). Rather, his statements are admissible only if they provide context or were adopted by the conspirator during the course of the conversation. *See, e.g.*, *United States v. Schalk*, 515 F.3d 768, 775 (7th Cir. 2008). Payawal, an alleged conspirator, arguably "adopted" Puorro's statement regarding Nagelvoort's involvement, and thus Puorro's statements are admissible to put Payawal's in context, so long as Payawal's statements were in furtherance of the conspiracy. On that point, the government argues that Payawal's responses to Puorro's questions furthered the conspiracy because he was trying "to assist Puorro, and thus Sacred Heart, in bringing the hospitalist contract to fruition so that Sacred Heart could pay [Dr. Stamboliu] and thereby secure [his] continued coverage of patients Kuchipudi referred." Gov't's Consol. Reply at 27. Though Payawal's comments about Nagelvoort "may have referred to past events," the government argues, "the impact of Nagelvoort's involvement existed at the time of the conversation and the point of the conversation was to accomplish a future act." *Id.*

The Court finds this argument persuasive. Payawal's statement about how the hospital's arrangement with Dr. Stamboliu was formed is not mere commentary on past events; as the government argues, Payawal is attempting to help explain how the

arrangement was formed in order to assist Puorro in going forward. Thus his statements, although they largely were made in response to prompts by Puorro, were in furtherance of the charged conspiracy. And as indicated earlier, Puorro's statements to Payawal, though not admissible under Rule 801(d)(2)(E), are admissible to put Payawal's statements in context. (The Court will leave it to defense counsel to propose an appropriate limiting instruction.)

The Court also does not find these statements to be unfairly prejudicial to Nagelvoort in a way that significantly outweighs their probative value. Unlike the statement that the Court has excluded in the April 2012 conversation, neither Puorro's statements nor Payawal's attribute a motive to Nagelvoort. One might argue (on either side of the ledger) that this is a nuance, but the Court considers the current statements to be less unfairly prejudicial given the absence of an attribution of a motive.

Conclusion

For the reasons described above, the Court denies without prejudice defendant Nagelvoort's motion for a limiting instruction [dkt. no. 575], and it excludes some, but not all, of the statements he challenges as not being in furtherance of the charged conspiracy.

/s/
MATTHEW F. KENNELLY
United States District Judge

Date: January 31, 2015

Appendix D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. EDWARD J. NOVAK, et al., Defendants.	Docket No. 13 CR 312 Chicago, Illinois March 4, 2015 9:30 a.m.

VOLUME 21
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MATTHEW F. KENNELLY, and a jury

APPEARANCES:

For the Plaintiff: UNITED STATES ATTORNEY'S OFFICE
BY: MR. JOEL M. HAMMERMAN
MR. RYAN S. HEDGES
MS. KELLY GREENING
MS. DIANE MAC ARTHUR
219 South Dearborn Street
Chicago, Illinois 60604

For the Defendant: HINSHAW & CULBERTSON, LLP
BY: MR. SERGIO E. ACOSTA
MR. JOEL D. BERTOCCHI
222 North LaSalle Street
Suite 300
Chicago, Illinois 60601

DRINKER, BIDDLE & REATH, LLP
BY: MR. DANIEL J. COLLINS
191 North Wacker Drive
Suite 3700
Chicago, Illinois 60606

MR. ROBERT G. CLARKE
123 West Madison
Chicago, Illinois 60603

LAW OFFICES OF PATRICK E. BOYLE
BY: MR. PATRICK E. BOYLE
155 North Michigan Avenue
Suite 562
Chicago, Illinois 60601

COTSIRILOS, TIGHE, STREICKER, POULOS & CAMPBELL, LTD.
BY: MR. TERENCE H. CAMPBELL

MR. MICHAEL P.
HOHENADEL
33 North Dearborn Street
Suite 600
Chicago, Illinois 60602

* * * * *

[5583] MR. CAMPBELL: All right. I have another issue on --

THE COURT: This same one.

MR. CAMPBELL: -- a different topic, so I will wait until the tapes are done and come back.

THE COURT: Okay. All right.

A different topic on Mr. Theiler, though?

MR. CAMPBELL: No.

THE COURT: Okay.

MR. CAMPBELL: Well, related to that. It has to do with the requests for the jury instruction based on Mr. Nagelvoort's withdrawal from the conspiracy. I'm happy to deal with it now.

THE COURT: Well, you tell me when you want me to deal with it.

MR. CAMPBELL: I will talk to you about it now and [5584] then we can come back to it.

You recall that I filed a pretrial motion asking for the limiting instruction.

THE COURT: Yes.

MR. CAMPBELL: The Court's ruling on that was it is unclear given that this is really an evidentiary ruling and the government as the proponent of the evidence, whether they have the burden of persuasion or by a preponderance in order for it to be admissible versus the general law of withdrawal which puts the initial burden on me.

Regardless of which standard you apply, the question is whether or not we have shown now that Mr. Nagelvoort no longer had any association with Sacred Heart and withdrew under the case law -- as a matter of law under the case law that I cited in my motion. We have now proven that. There has not been any contradiction of anyone on the testimony that Mr. Nagelvoort terminated his employment, was terminated as of April 28th. He had zero contact with anybody at the hospital, had zero financial benefits of any sort and contributed absolutely nothing to the conspiracy going forward, nor did he receive any benefits from it.

That is sufficient under Nerlinger and the other cases that I have cited. I can also tell the Court that based on my discussions with government counsel, we're in agreement in principle that there will be a stipulation to the effect [5585] that Clarence Naglevoort, one, his employment was terminated as of that date, and the government has no information of any sort that he received any payments from Sacred Heart going forward.

And so based on the fact that the Court, as it said in its order, will be in a much better position after hearing evidence, I think it is appropriate to give the instruction that I asked for to the jury in particular before Agent Theiler starts putting on tapes of coconspirator statements.

THE COURT: Is Agent Theiler the next witness?

MR. HEDGES: Yes, your Honor.

THE COURT: Do you want to deal with this?

MR. HEDGES: Well, Judge, we filed a written response on this back when this issue --

THE COURT: Back when I --

The last thing I said about this was in that same order of January 31st, and I basically came to the conclusion that Nagelvoort will have to prove withdrawal by a preponderance of the evidence, and at this point -- of course, it's two days after the trial started -- he has not yet done so, and denied without prejudice his motion for a limiting instruction.

See, the real question here is whether there is more to it than just leaving your job. That's really the whole question. And it's -- and maybe I'm seeing complexities, and [5586] I said this before. Maybe I'm seeing complexities or nuances in this issue that really are not there, but, you know, I think in some ways this merges -- the evidentiary issue merges with the overall issue, which is really something for the jury to decide.

At least as I sit here right now, I mean, I'm not precluding the possibility that, you know, that you could convince me at the end of the case, the end of the government's case, the end of the case as a whole, that you're entitled to a jury instruction that Mr. Nagelvoort withdrew as of X. But I think I need to hear all the evidence to do that. So I think it's premature. So you have preserved the point.

MR. CAMPBELL: Thank you.

* * * * *

Appendix E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. EDWARD J. NOVAK, et al., Defendants.	Docket No. 13 CR 312 Chicago, Illinois March 10, 2015 9:30 a.m.

VOLUME 24
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MATTHEW F. KENNELLY, and a jury

APPEARANCES:

For the Plaintiff: UNITED STATES ATTORNEY'S OFFICE
BY: MR. JOEL M. HAMMERMAN
MR. RYAN S. HEDGES
MS. KELLY GREENING
MS. DIANE MAC ARTHUR
219 South Dearborn Street
Chicago, Illinois 60604

For the Defendant: HINSHAW & CULBERTSON, LLP
BY: MR. SERGIO E. ACOSTA
MR. JOEL D. BERTOCCHI
222 North LaSalle Street
Suite 300
Chicago, Illinois 60601

DRINKER, BIDDLE & REATH, LLP
BY: MR. DANIEL J. COLLINS
191 North Wacker Drive
Suite 3700
Chicago, Illinois 60606

MR. ROBERT G. CLARKE
123 West Madison
Chicago, Illinois 60603

LAW OFFICES OF PATRICK E. BOYLE
BY: MR. PATRICK E. BOYLE
155 North Michigan Avenue
Suite 562
Chicago, Illinois 60601

COTSIRILOS, TIGHE, STREICKER, POULOS & CAMPBELL, LTD.
BY: MR. TERENCE H. CAMPBELL

MR. MICHAEL P.
HOHENADEL
33 North Dearborn Street
Suite 600
Chicago, Illinois 60602

LAURA M. BRENNAN - Official Court Reporter
219 South Dearborn Street - Room 2102
Chicago, Illinois 60604
(312) 435-5785

* * * * *

[6582] The parties agree and stipulate that Clarence Nagelvoort's consulting employment agreement with Sacred Heart Hospital was terminated on April 28th, 2011. Mr. Nagelvoort did not perform any work for Sacred Heart Hospital after that date, and Mr. Nagelvoort did not receive any payments or benefits of any kind from Sacred Heart Hospital's operations or payroll accounts after that date.

So stipulated?

MR. CAMPBELL: Yes, so stipulated.

* * * * *

Appendix F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. EDWARD J. NOVAK, et al., Defendants.	Docket No. 13 CR 312 Chicago, Illinois March 11, 2015 9:30 a.m.

VOLUME 25
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MATTHEW F. KENNELLY, and a jury

APPEARANCES:

For the Plaintiff: UNITED STATES ATTORNEY'S OFFICE
BY: MR. JOEL M. HAMMERMAN
MR. RYAN S. HEDGES
MS. KELLY GREENING
MS. DIANE MAC ARTHUR
219 South Dearborn Street
Chicago, Illinois 60604

For the Defendant: HINSHAW & CULBERTSON, LLP
BY: MR. SERGIO E. ACOSTA
MR. JOEL D. BERTOCCHI
222 North LaSalle Street
Suite 300
Chicago, Illinois 60601

DRINKER, BIDDLE & REATH, LLP
BY: MR. DANIEL J. COLLINS
191 North Wacker Drive
Suite 3700
Chicago, Illinois 60606

MR. ROBERT G. CLARKE
123 West Madison
Chicago, Illinois 60603

LAW OFFICES OF PATRICK E. BOYLE
BY: MR. PATRICK E. BOYLE
155 North Michigan Avenue
Suite 562
Chicago, Illinois 60601

COTSIRILOS, TIGHE, STREICKER, POULOS & CAMPBELL, LTD.
BY: MR. TERENCE H. CAMPBELL

MR. MICHAEL P.
HOHENADEL
33 North Dearborn Street
Suite 600
Chicago, Illinois 60602

LAURA M. BRENNAN - Official Court Reporter
219 South Dearborn Street - Room 2102
Chicago, Illinois 60604
(312) 435-5785

* * * * *

[6779] MR. HAMMERMAN: Moving to page 36, your Honor, which is the withdrawal.

THE COURT: The withdrawal thing, yes.

MR. HAMMERMAN: The government has taken a position that we didn't think there was a sufficient basis for the instruction. We understand the Court is putting it in. We don't intend to further argue it. Our objection there was noted, but we have some suggested changes to the instruction, your Honor.

[6780] THE COURT: Okay, go ahead.

MR. HAMMERMAN: With respect to the first sentence, first, the evidentiary basis for it, I don't know if it's necessary to put that in there, but even more importantly --

THE COURT: I could just say "you have heard evidence."

MR. HAMMERMAN: That would be preferable.

THE COURT: Okay.

MR. HAMMERMAN: It says that Clarence Nagelvoort terminated his consulting employment relationship. That was not the evidence that it was terminated. He was fired by Mr. Novak, and the stipulation reads that he was terminated.

THE COURT: Clarence's consulting employment relationship with Sacred Heart Hospital was terminated.

MR. HAMMERMAN: Yes, your Honor.

THE COURT: Okay. I just changed it. You're right.

MR. HAMMERMAN: We would also suggest that the third sentence "to withdraw from conspiracy" be placed in front of the second. It kind of --

If the jury doesn't understand how you withdraw, then talk about the evidentiary burden. It should be, if he withdrew, then you don't consider that evidence. It seems to me like --

THE COURT: Wait a second. The sentence that says "to withdraw from a conspiracy, a person must take an [6781] affirmative act to disavow the conspiracy's goals" should be moved, you say?

MR. HAMMERMAN: That whole paragraph, that paragraph. The third paragraph --

THE COURT: I see. In other words --

MR. HAMMERMAN: -- should come before the second paragraph.

THE COURT: In other words, what you are saying is this.

MR. HAMMERMAN: Yes.

THE COURT: Do you care?

MR. CAMPBELL: If we're going to address this paragraph, I have a number of things to say.

THE COURT: Do you care about this one thing, just switching the paragraphs 2 and 3?

MR. CAMPBELL: No, it is not my --

THE COURT: Let me get the rest of the government's issues on this page and then we'll take out --

MR. HAMMERMAN: On this page, that's it.

THE COURT: So what other issues do you have on this page, Mr. Campbell?

MR. CAMPBELL: Um --

THE COURT: Let me turn those mikes back on.

MR. CAMPBELL: Let's start with what the government just said about whether or not Mr. Nagelvoort was terminated [6782] or he did something to terminate the relationship.

Defense Exhibit B1 is the letter to Mr. Nagelvoort from Mr. Novak. I've got a copy if you want it. But here's how it reads. "It is with regret to inform you that Sacred Heart Hospital" --

THE COURT: Is this all about who did it? I'm going to take out the word "was." If I could just say "Clarence Naglevoort's consulting employment relationship terminated"?

MR. CAMPBELL: Well, here's the thing. So here is the sense of it.

Here is the thing I want to get to is, you know, there is certainly an issue of some affirmative act. And what the letter states is you, Clarence Naglevoort, stated you wanted me to fire you and that you were miserable working here. So he did take an affirmative act that is related to his termination.

THE COURT: Right, so you will argue that.

MR. CAMPBELL: Understood.

So I don't want it to read differently.

The bigger issue, of course, Judge, is the alternative instruction that I sent last night, and then a slightly modified one today, which I think is certainly more tied to the facts of this case and more tied to the law that governs situations like these.

THE COURT: So what aspect of it are you talking [6783] about? I've got it in front of me.

MR. CAMPBELL: Yes. The second paragraph: "Merely ceasing active participation in the conspiracy is" --

THE COURT: Yes, there was that typo in there.

MR. CAMPBELL: Yes, I'm sorry. It's insufficient, is not sufficient. The "to" should be "not."

THE COURT: Right, and I said that.

MR. CAMPBELL: Yes. And so that comes straight from the pattern. It's the next part of paragraph 2, what withdraw means in this context, and that comes from the case law that addresses these specific types of situations.

THE COURT: What do you think is wrong with what I've put in the instruction which says, "to withdraw from a conspiracy, a person must take an affirmative act to disavow the conspiracy's goals"?

MR. CAMPBELL: Well, I think that it is not as clear as what I have suggested.

The fact is disavowing the goals can be accomplished, and what the law says that we have cited says, if you can -- if you sever your ties in a way that disables you from further participation in the conduct that was reasonably made known to other alleged coconspirators and that you didn't receive any benefits from the conduct going forward, those are the things that a jury in this case ought to consider in determining whether or not there has been withdrawal.

[6784] THE COURT: Let me hear from the government on this.

MR. HAMMERMAN: It appears to us that the withdrawal instruction that Mr. Campbell is suggesting is effectively an argument. There is a straight, very clear forward pattern instruction on the law in the Seventh Circuit.

"To withdraw from a conspiracy, you have to take an affirmative act to disavow the conspiracy's goals." These facts that he's trying to incorporate -- an argument that he's trying to incorporate in the instruction are things that he can, of course, argue to the jury. But he's trying to in a sense put his argument into the instruction which this Seventh Circuit approved law, supported by the case law in this circuit, not the Second Circuit cases cited by Mr. Campbell, clearly addresses.

THE COURT: I think it's a matter for argument, not instruction, so the objection is overruled.

MR. CAMPBELL: In light of that, I would rather have no instruction than this one.

THE COURT: Really? Okay. Okay. So I will take it out.

* * * * *

Appendix G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	No. 13 CR 312
vs.	)	Judge Matthew F. Kennelly
EDWARD NOVAK, *et al.*	)	

DEFENDANT CLARENCE NAGELVOORT'S POST TRIAL MOTIONS FOR JUDGMENT OF ACQUITTAL, OR ALTERNATIVELY FOR A NEW TRIAL

Terence H. Campbell
Michael P. Hohenadel
Cotsirilos, Tighe, Streicker, Poulos & Campbell
33 North Dearborn Street
Suite 600
Chicago, Illinois 60602
(312) 263-0345
Attorneys for Defendant Clarence Nagelvoort

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Other

DEFENDANT CLARENCE NAGELVOORT'S POST TRIAL MOTIONS FOR JUDGMENT OF ACQUITTAL, OR ALTERNATIVELY FOR A NEW TRIAL

Defendant Clarence Nagelvoort, by and through his attorneys, Terence H. Campbell and Michael P. Hohenadel, respectfully moves this Honorable Court, pursuant to Federal Rules of Criminal Procedure 29 and 33, for the entry of an order granting a judgment of acquittal, or alternatively for a new trial. In support thereof, Defendant Clarence Nagelvoort submits the following:

I. INTRODUCTION

Clarence Nagelvoort was charged in 13 counts of a 28 count indictment alleging that he and others conspired to, and did, knowingly and willfully violate the federal Anti-Kickback statute. Mr. Nagelvoort's trial was conducted before this Court from January 26, 2015 through mid-March 2015. On March 19, 2015, after three days of deliberations, the jury returned verdicts of guilty against Mr. Nagelvoort on 12 of the 13 counts against him, and a "not guilty" verdict on the remaining count. The Court extended the time for the filing of these post-trial motions until May 11, 2015.

As discussed below, the evidence in this case fell woefully short of proving all elements of the offenses charged beyond a reasonable doubt. Accordingly, we respectfully request that this Court enter a Judgment of Acquittal. In the alternative, based on certain prejudicial errors at trial specified herein, we request that the Court grant Mr. Nagelvoort a new trial. The

bases for each of these requests, as well as the evidence supporting them, is set out in the relevant sections below, and in the contemporaneously-filed Motion for New Trial.

II. CLARENCE NAGELVOORT IS ENTITLED TO A JUDGMENT OF ACQUITTAL

A. Legal Standards Governing A Motion for Judgment of Acquittal

Federal Rule of Criminal Procedure 29 states that "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed.R.Cr.P. 29. A Rule 29 motion should be granted when "after viewing the evidence in the light most favorable to the United States, the trial court finds that no rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also United States v. Howard*, 179 F.3d 539, 542 (7th Cir.1999) ("[A] judgment of acquittal should only be granted if the evidence, looked at in the government's favor, is so scant that the jury could only speculate as to the defendant's guilt, and a reasonably minded jury must have had a reasonable doubt as to the defendant's guilt."). A guilty verdict, however, can be sustained only if the government introduces sufficient credible and probative evidence that the defendant was guilty of each element of the offense on each of the charges. *Neder v. United States*, 527 U.S. 1, 15 (1999); *In re Winship*, 397 U.S. 358, 364 (1970). Failure to prove an essential element entitles a defendant to an acquittal. *Jones v. United States*, 526 U.S. 227 (1999).

Though a defendant moving for judgment of acquittal under Rule 29 may "bear[] a heavy burden," it "is not insurmountable." *United States v. Cassese*, 428 F.3d 92, 98 (2nd Cir. 2005)(affirming district court's judgment of acquittal after jury verdict of guilty)(citations omitted). While the evidence must be construed in the light most favorable to the government, in a case based on circumstantial evidence the standard "is not so heavily weighted in favor of the prosecution that in ruling on a Rule 29 motion the Court must blindly and uncritically accept that every inference the prosecution argues can reasonably be drawn from the circumstantial evidence in the record." *United States v. General Elec. Co.*, 869 F. Supp. 1285, 1290 (S.D. Ohio 1994). Rather, the district court must enter judgment of acquittal "if the trier of fact is called upon to choose between reasonable probabilities of equal weight, one innocent and the other guilty." *Id.*

As the Seventh Circuit has emphasized in this context, "We will 'not permit a verdict based solely upon the piling of inference upon inference.' In this regard, we emphasize the indirect, inconclusive nature of the evidence in establishing Defendant's intent. ... ***Where the evidence as to an element of a crime is equally consistent with a theory of innocence as a theory of guilt, that evidence necessarily fails to establish guilt beyond a reasonable doubt.***" *United States v. Harris*, 942 F.2d 1125, 1129-30 (7th Cir. 1991)(granting judgment of acquittal), quoting *United States v. Delay*, 440 F.2d 566, 568 (7th Cir. 1971)(emphasis added). See also *United States v. Miller*, 761 F. Supp. 1368, 1380-81 (S.D. Ind. 1991)(granting motion for acquittal where circumstantial evidence failed to establish defendant's

intent; "[w]here the government's evidence is equally strong to infer innocence of the crime charged as it is to infer guilt, the verdict must be one of not guilty and the court has a duty to direct an acquittal").

Similarly, "[w]hile it is true that a conviction may be based solely on reasonable inferences from circumstantial evidence, a conviction cannot rest on mere speculation or conjecture." *United States v. Pinckney*, 85 F.3d 4, 7 (2d Cir. 1996), citing *United States v. Fermin*, 32 F.3d 674, 678 (2d Cir.1994) and *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir.1994). The Seventh Circuit has held similarly. *United States v. Sanchez*, 615 F.3d 836, 845 (7th Cir. 2010) (overturning jury verdict, stating a guilty verdict cannot rest solely on the "piling of inference upon inference.")(quoting *United States v. Moore*, 115 F.3d 1348, 1364 (7th Cir. 1997)). *See also United States v. Fearn*, 589 F.2d 1316, 1321 (7th Cir.1978) (a motion for judgment of acquittal should be granted "when the evidence ... is so scant that the jury could only speculate as to the defendant's guilt, and is such that a reasonably-minded jury must have a reasonable doubt as to the defendant's guilt.").[1]

[1] Nagelvoort moved for a directed verdict under Rule 29 at the close of the government's case and again at the close of all the evidence. The Court took those motions under advisement.

B. The Government Failed To Prove Beyond A Reasonable Doubt That Nagelvoort Was Guilty Of Violating the Anti-Kickback Statute, Or *Conspiring To Do So*

In order to convict Nagelvoort of violating the Anti-kickback statute, the Government was required to prove (1) that he knowingly and willfully offered or paid remuneration; (2) with the specific intent to induce referral of patients to Sacred Heart; and (3) the services to be provided were to be paid by Medicare or Medicaid. (Dkt. No. 636, Jury Instrs. at p. 25-26). Importantly, with respect to these elements, "It is insufficient if the defendant merely hoped or expected that referrals might result from remuneration that was designed wholly for other purposes. Likewise, mere encouragement to refer patients, or the mere creation of an attractive place to which patients can be referred does not constitute inducement." *Id.* at p. 25.

As discussed below, the government's evidence fell woefully short of proving either that Nagelvoort acted "willfully" or that he acted with the specific intent to induce referrals in exchange for the payments at issue. Indeed, the evidence demonstrated that (1) the contracts at issue fell under the "safe harbors" specified under the Anti-kickback statute; (2) Nagelvoort acted in good faith; and/or (3) the evidence was "equally consistent with a theory of innocence as a theory of guilt, [which] necessarily fails to establish guilt beyond a reasonable doubt." *Harris*, 942 F.2d at 1129-30.

The contracts and agreements at issue in this case – which underlie the payments the government claims were kickbacks – fall into three categories: (1) personal

service contracts with doctors to provide teaching or other services; (2) lease agreements; and (3) the agreement with Dr. Kuchipudi to share the employment of Joanna Szwajnos. We address the evidence and applicable law as to each, *seriatim*.

1. The Personal Service Contracts With Doctors

Sacred Heart Hospital entered into a number of personal service contracts with various doctors. For example, Sacred Heart had contracts with Dr. Moshiri and Dr. Maitra for them to teach residents and medical students, respectively. (GX 3509, GX 3510, and GX 3511 (Moshiri); GX 5410 (Maitra)). Similarly, Sacred Heart entered into a contract with Dr. Jagdish Shah to provide certain teaching and medical consulting services. (GX 5701 and GX 5703). Recognizing that hospitals, almost by definition, will have contractual and financial relationships with doctors who practice at those hospitals, the law provides certain "Safe Harbors" which set out criteria that, if met, exclude those relationships and the payments of remuneration thereunder from the Anti-kickback statute. Thus, there is a specific "safe harbor" with respect to personal services contracts which states as follows:

> [A] payment made by a principal to an agent as compensation for the services of the agent does not violate the law, as long as all of the following requirements are met:
>
> > 1. The agency agreement is set out in writing and signed by the parties;

2. The term of the agreement is for not less than one year;

3. The agreement covers all of the services the agent provides to the principal for the term of the agreement and specifies the services to be provided by the agent;

4. If the agency agreement is intended to provide for the services of the agent on a periodic, sporadic or part-time basis, rather than on a full-time basis for the term of the agreement, the agreement specifies exactly the schedule of such intervals, their precise length, and the exact charge for such intervals;

5. The total compensation paid to the agent over the term of the agreement is set in advance, is consistent with fair market value in arms-length transactions and is not determined in a manner that takes into account the volume or value of any referrals or business otherwise generated between the parties for which payment may be made in whole or in part under Medicare or Medicaid;

6. The services performed under the agreement do not involve the counselling or promotion of a business arrangement or other activity that violates any State or Federal law; and

7. The aggregate services contracted for do not exceed those which are reasonably

> necessary to accomplish the commercially reasonable business purpose of the services.

(Dkt. No. 636, Jury Instr. at p. 34-35).

Importantly, it is *not* the burden of the defendant to prove that his conduct and/or the subject payments fell within a safe harbor. Rather, the government is required to prove beyond a reasonable doubt that the payments did not fall within the safe harbor. (42 CFR 1001.952(d); Dkt. 636, Jury Instr. at 32-35). Moreover, if the evidence shows a good faith attempt to fit one's conduct within a specified safe harbor – even if one does not actually comply with the safe harbor's requirements – then the defendant has not acted willfully, and must be acquitted. Here, the personal services contracts at issue fit squarely within the safe harbor. Thus, right in line with the safe harbor's requirements, Dr. Moshiri's contract contained the following:

(1) was in writing and signed by the parties (GX 3509; GX 3510; GX 3511);

(2) had a term of not less than one year. (*id.* at Sec. 3.1 ("This Agreement shall commence on the date hereof and shall continue for a one-year period."));

(3) set forth the services to be provided (*id.* at Sec. 2.1 "Duties");

(4) specified the schedule of intervals, length, and exact charge/pay for the services (*id.* at Sec. 2.1(d) – 2.1(f));

(5) the compensation is fair market value and not determined by referrals from the doctor (*id.* at Schedule A);

(6) the services don't counsel or promote illegal activities (GX 3509; GX 3510; GX 3511); and

(7) the services do not exceed what is reasonably necessary (*id.* at Sec. 2.1 ("Duties").

The safe harbor's requirements are similarly followed in the contracts with Dr. Maitra and Dr. Shah. (GX 5410 (Maitra contract); GX 5703 and GX 5701 (Shah contract documents)). In short, the personal services contracts, drafted by Sacred Heart's attorneys, follow each of the specifics of the personal services safe harbor, and that is an absolute shield to criminal liability. Moreover, as the Court knows from having presided over the trial, the evidence clearly established that these doctors did do the work specified in those contracts. In brief summary, the evidence established, *inter alia*, the following:

Dr. Moshiri - Work Peformed Pursuant to His Contract:

- Every podiatric resident that testified stated that they engaged in multiple surgical teaching procedures with Dr. Moshiri which were required for them to complete their course requirements. (*E.g.* Tr. 5088);
- The Podiatric Residency Resource (PRR) database tracked procedures performed by Sacred Heart residents and showed that Dr. Moshiri conducted 585 procedures with

residents during the term of his contract. (DX B-303; DX B-304);

- Dr. Moshiri brought residents with him to the clinical space Sacred Heart leased from Dr. Lasala. (Tr. 5216-17);
- Dr. Moshiri hosted two journal club meetings for residents. (*e.g.*, Tr. 5129-30).

Dr. Maitra - Work Performed Pursuant to His Contract:

- All four medical students who were called—Syyeda Ali (Tr. 5226-5235); Simran Malhotra (Tr. 5564); Mohammed Nasim (Tr. 5759-5760); and Ajit Chary (Tr. 6677-78)—testified that they performed surgeries and/or worked in the clinic with Dr. Maitra;
- Sacred Heart kept a log book that was signed by medical students after they worked with Dr. Maitra. (GX 6330). Each and every witness who testified about the log book stated that every procedure listed was in fact performed and that the book was their good-faith effort to track the surgeries that they had performed with Dr. Maitra. (Tr. 1836-37 (Serena Sumrell describing how she captured information in the log book)); (Tr. 5240, 5567, 5760-61)(students describing entries in the log book)).

Dr. Jagdish Shah - Work Performed Pursuant to His Contract:

- Dr. Shah helped plan and conduct the Community Health Fairs at which he would administer mammograms and PSA screenings to check for prostate cancer and would also direct other oncology doctors who were also providing screenings for members of the community (Tr. 1415-16, 1421, 1435-37, 1470);
- Dr. Shah routinely consulted with other doctors at Sacred Heart about hematology and oncology (his specialties), including on difficult cases of blood transfusions. (Tr. 1470-72). Dr. Shah consulted on approximately 20 cases per month like this. (Tr. 1484-85);
- Within the specialty clinic, Dr. Shah set up an Infusion Center for administering chemotherapy – a project which was strongly supported by Clarence Nagelvoort. (Tr. 1432, 1441). Dr. Shah gave lectures to other doctors as part of this program and described it as a "wonderful program," which only diminished after Nagelvoort left Sacred Heart. (Tr. 1449-51).
- Dr. Shah provided a variety of educational presentations to the Sacred Heart medical staff, including delivering lectures to nurses in both formal settings and while rounding on patients. (Tr. 1420-21, 1472-73). The education he provided went hand-in-hand with the cancer early-detection program

> because it taught the nurses what to look for regarding potential indications of cancer. (Tr. 1439-41).

Even if one concluded that there was some deficiency in complying with the technical requirements of this personal services safe harbor, the evidence clearly establishes that Nagelvoort was making a good faith attempt to comply with that safe harbor with respect to the contracts he was involved with. For example, outside lawyers were consulted with respect to the contracts; experienced healthcare lawyers drafted the contracts; the work set forth in the contracts was performed; the contracts and payments thereunder were documented and run through the normal finance and accounting structures; etc. And, as with the safe harbor, it is not Nagelvoort's burden to prove his good faith; rather, the government must prove beyond a reasonable doubt that he acted willfully in violation of the law. (Dkt. 636 at p. 29). That, the prosecution did not do.

We believe the evidence demonstrated both compliance with the safe harbor and/or good faith on the part of Mr. Nagelvoort, either of which is sufficient to command a judgment of acquittal. But even in its worst light, the evidence regarding Clarence Nagelvoort's conduct is "equally consistent with a theory of innocence as a theory of guilt [which] necessarily fails to establish guilt beyond a reasonable doubt" and requires this Court to enter a judgment of acquittal. *Harris*, 942 F.2d at 1129-30; *Delay*, 440 F.2d at 568; *Sanchez*, 615 F.3d at 845 *Miller*, 761 F.Supp. at 1380-81. The jury's verdict as to Nagelvoort was incorrect under the facts presented and

the applicable law – and that can happen, particularly when the government provides misleading information and arguments to the jury (as discussed in Nagelvoort's Motion for a New Trial (below) regarding misleading argument about the so-called "bright-line rule" and the improper opinion testimony of Dr. Petrov). *E.g.*, *United States v. Fenzl*, 670 F.3d 778 (7th Cir. 2012)(overturning jury verdict of guilty because evidence and law did not support it); *United States v. Farinella*, 558 F.3d 695 (7th Cir. 2009)(similar). The erroneous jury verdict must be corrected by the Court.

2. The Lease Agreements With Doctors' Offices

Sacred Heart Hospital also had certain lease agreements with various doctors, from whom Sacred Heart leased medical office space. For example, Sacred Heart had lease agreements with Dr. May's Clinic, Dr. Lasala, and Dr. Olivo. (GX 2701 (lease with Lasala's Armitage Family Practice), and GX 3801 (Olivo lease)). Just as with the personal services contracts discussed above, there is a specific "safe harbor" which sets out criteria for such lease agreements which, if followed, immunize one from prosecution under the Anti-kickback law. Thus, the lease agreement "safe harbor" states as follows:

> [A] payment made to lease or rent space does not violate the law, as long as all of the following requirements are met:
>
> > 1. There must be a written lease agreement that is signed by the parties;

> 2. The term of the lease must be for not less than one year;
>
> 3. The lease agreement must cover all of the space leased for the length of the lease and must describe the space being leased;
>
> 4. If the lease is intended to provide the lessee with access to the premises for periodic intervals, rather than on a full-time basis, the lease must specify exactly the schedule of the periodic intervals, their precise length, and the exact rent for the intervals. (If the lease is not intended to provide access only for periodic intervals, then this requirement does not apply.);
>
> 5. The rental charge must be set in advance, must be consistent with fair market value in arm's length transactions, and must not be determined in a way that takes into account the volume or value of any referrals or business otherwise generated between the parties for which payment may be made in whole or in part under Medicare or Medicaid;
>
> 6. The total amount of space rented must not be more than what is reasonably necessary to accomplish the commercially reasonable business purpose of the rental.

(Dkt. No. 636 at p. 32-33). Again, the defendant does not bear the burden of proving his conduct fits within the safe harbor, nor that he acted in good faith in attempting to comply with the safe harbor; rather the government

is required to prove beyond a reasonable doubt that the safe harbor does not apply and that the defendant did not act in good faith, but acted willfully. (Dkt. 636, Jury Instr. at 32-35).

The evidence in this case established that the leases at issue fit within this safe harbor. At worst, the evidence demonstrated that Nagelvoort intended to comply with the safe harbor, and that good faith attempt is an independent and sufficient basis to require an acquittal. Thus, tracking the safe harbor's requirements, the lease documents with Dr. May's Clinic had the following provisions:

(1) was in writing and signed by the parties (GX's 3217, 3219, and 3220);

(2) had a term of not less than one year. (GX. 3217 at p. 1 (one year term specified); GX 3219 (one year renewals specified));

(3) covered all the space lease for the length of the lease, and set forth the speace to be leased. (*Id.* ("The lease provides three exam rooms, the pharmacy, and the use of the waiting room."));

(4) (the fourth factor is not applicable, as the lease was not for periodic intervals);

(5) set the rental charge in advance, consistent with fair market value[2] and not determined in a

[2] The government put forth no evidence to support its claim that the $5,000/month rent or the later reduced $2,000/month rent was not "fair market value." Supposition and conjecture are no substitute for evidence.

way that takes into account the volume or value of referrals from the lessor. (GX 3217 (rent set at $5,000 per month for the space specifically identified in GX 3219); GX 3220 (rent reduced to $2,000 per month by Nagelvoort in Dec. 2009));

(6) the total amount of space rented was not more than what was reasonably necessary to accomplish the commercially reasonable business purpose of the rental. (GX 3217 (originally three exam room and the pharmacy, along with fair share of common areas); GX 3220 (reduction by Nagelvoort in 2009)).

The safe harbor's requirements are similarly followed in the leases with Dr. Lasala's Clinic and Dr. Olivo's Clinic. (GX's 2701 (Lasala lease); GX. 3801 (Olivo lease)). Just like the personal services contracts, these leases, which were drafted and approved by Sacred Heart's attorneys, follow each of the specifics of the safe harbor, and that is an absolute shield to criminal liability. And even if the Court thought there was some technical defect in the leases' compliance with the safe harbor, based on the evidence there can be no doubt that Nagelvoort intended that the leases he was involved with would be in compliance with the safe harbor. For example, the only *evidence* about what Nagelvoort intended with respect to the use of the Lasala Clinic was his statement to Dr. Petenzi that "in order to make it legal, [Dr. Petenzi] needed to bring residents" with her when she went to the Lasala Clinic. (Tr. 5135). Thus, Nagelvoort's stated intent was to comply with, and specifically *not* to violate, the law. Nagelvoort's intent to comply with the law – and this conversation with Dr.

Petenzi is the only evidence of his intent – standing alone, requires a judgment of acquittal. The government's only argument is that Nagelvoort's words mean the opposite of what he said. This type of rank speculation is insufficient as a matter of law to support a conviction. *Sanchez*, 615 F.3d at 845; *Moore*, 115 F.3d at 1364; *Pinckney*, 85 F.3d at 7; *D'Amato*, 39 F.3d at 1256; *United States. v. Martellano*, 675 F.2d 940, 946 (7th Cir. 1982)(the jury must have substantial evidence upon which to base a verdict of guilty beyond a reasonable doubt; a jury is not entitled to "guess" and a defendant "may not be assumed into the penitentiary.").

3. The Shared Employment Agreement With Dr. Kuchipudi

The shared employment agreement between Sacred Heart and Dr. Kuchipudi underlies Counts 2, 4, 18, and 20, as well as constituting part of the alleged "overt acts" as to Count 1, the conspiracy count.

Starting in approximately June 2010, Clarence Nagelvoort began discussing with one of Sacred Heart's outside attorneys, Joan Lebow, the possibility of sharing a mid-level medical professionals – a physician's assistant ("PA") or nurse practitioner ("NP") – with a doctor or doctors, in an effort to share costs and enhance Sacred Heart's treatment of nursing home patients it received by promoting continuity of care. (*See* GX 2801; Tr. 5342-45). While the exact model that Sacred Heart would use changed during the iterative process with attorney Lebow, Ms. Lebow's advice remained constant that sharing the cost or employment of the mid-level practitioners would not violate the Anti-Kickback Statute "as long as the purpose of the above

arrangement is continuity of care for patients and not to induce referrals." (GX's 2804, 2807, 2819, 2820).

About two months later, on August 24, 2010, Lebow sent a draft legal memo, prepared by Ms. Gawne, to Nagelvoort providing her law firm's opinion that the project would not violate the Anti-kickback Statute. (GX 2804). This version of the memo called for Sacred Heart create a staffing agency of mid-level practitioners with physicians then paying Sacred Heart fair market value for the services of those mid-level practitioners. (*Id.*). The memo stated that "as long as the purpose of the above arrangement is continuity of care for patients and not to induce referrals" that they believed it would not violate the anti-kickback statute. (*Id.*)

Mr. Nagelvoort then followed up to make a few corrections to the memo's factual assumptions—which included clarifying the wording of what could be read to be a requirement that the doctor with whom the agreement was made refer patients to Sacred Heart. (GX 2805). In this email, Nagelvoort provided Ms. Lebow an explanation of the purpose of the NP/PA program:

> The basis of this new program is to efficiently care for patients during their transition from nursing home to hospital and back to nursing home. The NP by following the patient continuously and seamlessly can provide needed care without delay and the need for the patients to be worked up by another practioner [sic] not familiar w the patient."

(*Id.*). Thus, Nagelvoort's own words demonstrate that the purpose of the program was not to induce referrals, but was to provide for continuity of care.[3]

Following Nagelvoort's email, Lebow's firm provided an updated memo dated August 26, 2010. (GX 2807). This memo corrected Nagelvoort's issues with the factual assumptions, but also set forth a new model whereas Sacred Heart would no longer create a "staffing agency" but would hire advanced practice nurses, pay their full salary, and then have physicians pay Sacred Heart for the services the nurses provided based on a fair market value as set by a third-party consultant. (*Id.*). In fact, Lebow's firm had already been working on determining fair market value for nurses. (DX B-55). Moreover, Nagelvoort engaged a consultant named Joan Worthem to research the fair market value issue, and Worthem worked with Lebow to discuss fair market value in September 2010. (Tr. 5384, 5460-62). Once again, this August 26 memo stated "as long as the purpose of the arrangement described in this memorandum is to provide continuity of care for patients and efficient processes to admit and discharge patients and not to induce referrals . . . *we believe that the risk of a court finding the arrangement violates the Anti-Kickback Statute is low*." (GX 2807 at p.2 (emphasis added)).

---

[3] Multiple witnesses explained that this type of system whereby one practitioner would see patients at both nursing homes and the hospital is part of what health care providers refer to as continuity of care and that this type of continuity of care is good for the patient.

On November 11, 2010, Lebow informed Nagelvoort and Novak that she thought the "leased employee" framework, as currently conceived, was inefficient and scheduled a call with them the following day. (GX 2852). Email communications between Sacred Heart and Lebow then resumed in early January 2011, at which point the business model had changed to have a shared employment contract with the doctor(s), whereby Sacred Heart and the doctor would each employ the mid-level practitioner part-time. This was the structure Sacred Heart actually pursued.

Lebow's firm again provided legal memos to Sacred Heart on January 25, 2011 (GX 2819) and February 10, 2011(GX 2820). These memos described the form of agreement that Sacred Heart actually entered into with Dr. Kuchipudi and opined on the legality of that type of agreement, stating, "we believe that the risk of a court finding the arrangement violates the Anti-Kickback Statute is low." (GX 2820). After receiving Lebow's advice, Sacred Heart went forward with the shared employment agreement with Dr. Kuchipudi, and they agreed Sacred Heart would pay 70% of Szwajnos's salary, and Dr. Kuchipudi would pay 30% -- which was a good faith estimate of the split of her time at the outset of the relationship.[4] Szwajnos was, in fact, paid separately by both Sacred Heart and Dr. Kuchipudi, and she received a W-2 from each of them individually at year-end, just as the agreement contemplated.

The sum of these unfiltered contemporaneous communications between Nagelvoort and Lebow clearly

[4] Nagelvoort left Sacred Heart permanently just two months later.

reveals that Nagelvoort's intent from June 2010 through February 2011 was to create a shared employment relationship which enhanced continuity of care to patients, and shared the costs of the mid-level professional – and he did so only with the advice and consent of Sacred Heart's outside attorney every step of the way.

The Government's sole responses to the fact that Nagelvoort sought, obtained, and followed attorney Lebow's advice is to say (1) that Nagelvoort gave "nonsense" facts to her in seeking that advice, so the advice was meaningless in establishing his good faith (Tr. 7052); and (2) Sacred Heart did not follow Lebow's advice that "When the [mid-level] Providers are working at the Hospital, the Hospital alone may bill for the Provider's services." (GX 2819). We address these two contentions in turn.

As to the "nonsense" facts, the sole fact the government claims was inaccurate, and therefore vitiates any validity to Lebow's legal opinion, is that in December 2010 Nagelvoort told Lebow that Sacred Heart could not afford full-time NP's or PA's, so they wanted to pursue a shared employment relationship with a doctor, when in fact Sacred Heart did employ several mid-level practitioners full-time. (Tr. 7052-53). In light of the testimony of attorney Lebow on this precise point, however, the government's argument is meritless.

Thus, Lebow specifically testified that the status of the employees as part-time or full-time was "irrelevant to [her] analysis" and "not material to [her] opinion in any way." (Tr. 5499). The government falsely argued to

the jury that the inaccurate claim that Sacred Heart could not afford to hire a full-time physician's assistant made Lebow's advice entirely irrelevant, when the facts were just the opposite. Despite this dispositive testimony from Lebow on this topic, the government remained undettered in its closing argument:

> You know that's not true, ladies and gentlemen. They employed Doug Willaman full time. They employed Joanna Szwajnos full time. They had Ursula Baldoceda as a PA at one point. They didn't have a problem employing people, ***but they didn't want the lawyer to know that. They didn't want the lawyer to understand the true facts because if the lawyer understood the true facts, they wouldn't get the legal opinion that they wanted. They wouldn't get the opinion that they needed to cover the relationship they wanted to do with Dr. Kuchipudi. So they only told the lawyer part of the story***.

(Tr. 7052-53 (emphasis added)). This argument was made up of whole cloth; indeed it was directly contradictory to the testimony of the only witness with actual knowledge about the materiality (or lack thereof) of the claimed falsehood: Joan Lebow.

As to the government's argument that Nagelvoort willfully disobeyed Lebow's advice that only the Hospital could bill for the mid-level practitioner's work done at the Hospital (Tr. 7289), the government similarly misses the mark. The undisputed evidence is that not one person at Sacred Heart knew that Dr. Kuchipudi was billing for work performed by the mid-level practitioners when they were at Sacred Heart, and

none of Dr. Kuchipudi's billing documents or information was ever conveyed to anyone at Sacred Heart. (*E.g.*, Tr. 3819-20; 3888; 3891; 3920)(testimony of Dr. Kuchipudi's billing service providers)). Perhaps more telling, the evidence was undisputed that Sacred Heart *never* billed for the services of its mid-level practitioners, a practice which extended back to early 2009 when they hired Doug Willaman as a PA and well in advance of this shared employee arrangement with Dr. Kuchipudi. (Tr. 6258-60). Thus, the government's argument that the Defendants gave up the billing for services rendered by Szwajnos at the Hospital was without any foundation in fact. Speculation, conjecture, and spin are no substitute for facts and evidence.

The actual evidence shows that Nagelvoort created this program for the good faith purpose of providing continuity of care, and that Lebow provided Nagelvoort and Sacred Heart with a legal opinion, after being provided with all material facts – and her opinion was that this arrangement would not violate the Anti-Kickback Statute. Nagelvoort did not act willfully; he acted in good faith, either of which defeats the charges based on the shared employment agreement with Kuchipudi. At a minimum, the inference from these facts points at least as strongly toward innocence as guilt, and that state of equipoise, too, requires a judgment of acquittal be entered.

III. ALTERNATIVELY, CLARENCE NAGELVOORT IS ENTITLED TO A NEW TRIAL

A. Legal Standards

A district court may grant a new trial "if the interest of justice so requires," and the Court is afforded wide discretion in that determination. Fed.R.Crim.P. 33(a). A defendant is entitled to a new trial if there is a ***reasonable possibility*** that a trial error had a prejudicial effect upon the jury's verdict. *United States v. Berry*, 92 F.3d 597, 600 (7th Cir.1996), and this Court is afforded wide discretion in that determination. *United States v. Inglese*, 282 F.3d 528, 538 (7th Cir. 2002) (district court's decision on "prejudice" is afforded "great deference"); *United States v. Gillaum*, 372 F.3d 848, 857 (7th Cir. 2004)(district court's decision to grant a new trial is reviewed for abuse of discretion).

B. The Court Was Required To Rule On, And Instruct The Jury, That The Post-April 28, 2011 Evidence Was Inadmissible Against Mr. Nagelvoort

The evidence in this case was undisputed that (1) Clarence Nagelvoort completely and permanently severed his relationship with Sacred Heart (and all of the alleged coconspirators) on April 28, 2011; (2) after that date, Nagelvoort did nothing whatsoever for, or in furtherance of, anything alleged to be part of the conspiracy in this case; (3) he did not receive any compensation or other benefits from Sacred Heart or deriving from the alleged scheme after that date; and (4) his severance from the activity was communicated in a

manner designed to reach his alleged co-conspirators. Based on these facts – and starting pre-trial – Nagelvoort moved to have the Court instruct the jury that it could not consider any evidence of purported co-conspirator statements or conduct occurring after April 28, 2011 against Mr. Nagelvoort for any purpose. (Dkt. Nos. 575 and 584).

Nagelvoort's request was based on the many cases holding, in similar alleged business conspiracies, defendants have effected withdrawal, as a matter of law, when they resign their position with the entity that constitutes the conspiratorial enterprise; communicate that resignation in a manner reasonably calculated to reach co-conspirators; eliminate any continuing role in the conspiracy; and receive no further benefits from the conspiratorial conduct. *United States v. Nerlinger*, 862 F.2d 967, 974 (2nd Cir. 1988)(defendant "unquestionably disavowed the conspiracy when he resigned from, and closed the [subject] account at, FCCB [the business through which the conspiracy was conducted]. ... "[Defendant's] closing of the account does satisfy this standard [for withdrawal] because it disabled him from further participation and made that disability known to [coconspirator] DeAngelis. That is enough."); *United States v. Lowell*, 649 F.2d 950, 955 (3d Cir. 1981)("[W]here fraud constitutes the 'standard operating procedure' of a business enterprise, 'affirmative action' sufficient to show withdrawal as a matter of law from the conspiracy …may be demonstrated by the retirement of a coconspirator from the business, severance of all ties to the business, and consequent deprivation to the remaining conspirator

group of the services that constituted the retiree's contribution to the fraud."); *United States v. Steele*, 685 F.2d 793, 804 (3d Cir. 1982) (reversing conviction where the defendant "presented evidence that he resigned and permanently severed his employment relationship" with the allegedly conspiring business); *Glazerman v. United States*, 421 F.2d 547, 551-52 (10th Cir. 1970)(finding that the defendants' termination of their employment with the company through which the conspiracy operated constituted withdrawal); *Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 839 (11th Cir. 1999) *amended in part*, 211 F.3d 1224 (11th Cir. 2000)("Resignation from the conspiring business has frequently been held to constitute effective withdrawal."); *United States v. Goldberg*, 401 F.2d 644, 648 (2nd Cir. 1968)(same).

In response to the motion at the outset of trial, the Court indicated that it viewed the issue as potentially a "hybrid of a substantive law question and an evidence question" which might affect which party bears the burden of establishing admissibility (or inadmissibility), and recognized the likely applicability of Federal Rule of Evidence 104(a) because the issue of "withdrawal" raised by Nagelvoort was not being offered as a defense, but as a preliminary issue of fact that would dictate the admissibility of evidence. (Tr. at 1156, 1272). It is axiomatic that ruling on the admissibility of evidence is the duty and sole province of the Court, not the jury. Fed.R.Evid. 104(a); *United States v. Echeles*, 222 F.2d 144, 155 (7th Cir. 1955)("this is a question relating to the admissibility of evidence and is not a question of fact for the jury, but on the contrary is the duty of the court

alone to hear and decide upon the evidence offered.")(citation omitted).

At the outset of the trial (*i.e.*, before the evidence relevant to Nagelvoort's withdrawal had been adduced by any party), the Court stated that it did not have sufficient facts before it to make the determination requested by Nagelvoort as to whether he had withdrawn from the conspiracy as of April 28, 2011. (Tr. 1273-74.) After establishing through witness testimony the facts supporting his withdrawal, and right before Agent Theiler was to be called by the government to introduce all the taped conversations, Nagelvoort renewed his request for a ruling and instruction to the jury that the post-April 28, 2011 evidence was inadmissible against Mr. Nagelvoort. (Tr. 5584-85.) This request, too, was denied without prejudice, pending completion of the evidence. (Tr. 5585-86.)

At the end of trial, the evidence was undisputed as to the facts relating to Mr. Nagelvoort's claimed withdrawal, including a stipulation with the government stating, "The parties agree and stipulate that Clarence Nagelvoort's consulting employment agreement with Sacred Heart Hospital was terminated on April 28th, 2011. Mr. Nagelvoort did not perform any work for Sacred Heart Hospital after that date, and Mr. Nagelvoort did not receive any payments or benefits of any kind from Sacred Heart Hospital's operations or payroll accounts after that date." (Tr. 6582.) This, of course, was in addition to the testimony and evidence establishing those facts, and more, with respect to Mr. Nagelvoort's conduct effectively constituting withdrawal from the alleged conspiracy. (*E.g.*, DX B-1;

DX B-2; Tr. 1483 (Nagelvoort left Sacred Heart in April 2011 and Dr. Shah had no contact of any sort with Nagelvoort after that)); (Tr. 1931-35 (Serena Sumrell testimony that (a) Nagelvoort terminated his working relationship with Sacred Heart on April 28, 2011 and was never at Sacred Heart again, and (b) that DX B-1 and B-2 documented Nagelvoort's termination and that termination was communicated to all managers at Sacred Heart)); (Tr. 2918 (Castro testimony that Nagelvoort left Sacred Heart on April 28, 2011)).

Based on the evidence and the case law cited above – and regardless of which party bore the burden of proof by a preponderance as to the admissibility of the evidence – Nagelvoort again requested that the Court find, and instruct the jury, that the post-April 28, 2011 evidence was inadmissible against Mr. Nagelvoort. (Dkt. No. 628 at p. 17 (Def. Proposed Jury Instr. No. 14)). This request was denied, and instead the Court gave that decision to the jury by giving it the following instruction:

> You've heard evidence Clarence Nagelvoort's consulting employment arrangement with Sacred Heart Hospital terminated on April 28, 2011. If you find that the government has proven that the charged conspiracy existed, but that Mr. Nagelvoort has shown that it's more likely than not that he withdrew from the alleged conspiracy as of April 28, 2011, then you may not consider as evidence against him any statements made by any alleged coconspirators after that date. ...

(Tr. 6910.)

Federal Rule of Evidence 104(a) provides: "Preliminary questions concerning ... the admissibility of evidence shall be determined by the court." F.R.E. 104(a). The issue of a defendant's withdrawal from a conspiracy is a preliminary question of fact for purposes of admissibility under Rule 104 (a), Federal Rule of Evidence. As the Supreme Court stated in *Bourjailly v. United States*, "the existence of a conspiracy ***and [defendant's] involvement in it*** are preliminary questions of facts that, under Rule 104, must be resolved by the court." 483 U.S. 171, 175 (1987)(emphasis added).

The Seventh Circuit made this point clear in its en banc decision in *United States v. Martinez de Ortiz*, stating:

> Every court that has considered the question after the adoption of Rule 104 has concluded that the judge's decision is conclusive — that the jury may not reexamine the question whether there is 'enough' evidence of the defendant's participation to allow the [co-conspirator] hearsay to be used. We are among them.

907 F.2d 629, 633-34 (7th Cir. 1990)(*en banc*)(collecting cases); *id.* at 632 ("Under *Bourjaily* and Rule 104(a) admissibility is a question for the judge.").

Thus it is clear that the Court – *not the jury* – must make the decision about whether purported co-conspirator evidence is *admissible* against a defendant, and that question of admissibility can turn, as in this case, on whether a defendant has withdrawn from the alleged conspiracy. *United States v Ferra*, 900 F.2d 1057, 1059–60 (7th Cir 1990)("Whether [the challenged

evidence] is admissible depends on whether the conspiracy is over, which depends in part on whether the conspirator-turned-informant has withdrawn."); *United States v. Cardall*, 885 F.2d 656, 668 (10th Cir. 1989). As the court in *Cardall* specifically found, ***"the court's determination of the effectiveness of [defendant's] withdrawal is a preliminary question of fact for purposes of admissibility under Fed.R.Evid. 104(a)."*** *Cardall*, 885 F.3d at 668, citing *Bourjaily*, 483 U.S. at 175 (emphasis added).

Here, the Court gave that decision to the jury. Thus, after both sides had rested and all the evidence was in, the Court declined to rule on whether Mr. Nagelvoort had withdrawn from the alleged conspiracy as of April 28, 2011, which would dictate the decision on whether the post-April 28, 2011 evidence was *admissible* against him. Instead, the Court left that evidentiary decision to the jury, giving it the above-quoted instruction. (Tr. 6910.) This was error.

There can be little doubt about the prejudice from this error. *First*, application of the case law cited by Nagelvoort to the undisputed facts of this case makes clear that Mr. Nagelvoort did withdraw from the alleged conspiracy as of April 28, 2011, and we respectfully urge that the Court erred in not so finding. *Nerlinger*, 862 F.2d at 974; *Lowell*, 649 F.2d at 955; *Steele*, 685 F.2d at 804; *Glazerman*, 421 F.2d at 551-52; *Morton's Mkt., Inc.*, 198 F.3d at 839; *Goldberg*, 401 F.2d at 648.

Second, well more than half of the evidence presented by the government at trial – including *all* the tape recorded conversations containing purported co-conspirator statements – post-dated April 28, 2011. Had

the jury been instructed that none of this evidence could be considered against Mr. Nagelvoort, it is clear, at a minimum, there is a ***"reasonable possibility"*** that this error had a prejudicial effect upon the jury's verdict. *Berry*, 92 F.3d at 600.[5]

Third, the government rested significantly on this tape recorded evidence in arguing to the jury that the conduct of the defendants was willful, and that the documentation created and preserved at Sacred Heart were mere "cover" or a "sham." (*E.g.*, Tr. 6965, 6983-85, 6998-99, 7020-21, 7034-36, 7044-45). All of these conversations were with persons alleged to be co-conspirators with Nagelvoort, even though he was not a participant in any of them.

Fourth, for all the reasons set forth in our Motion for Judgment of Acquittal, the evidence in this case was anything but overwhelming – particularly as to Clarence Nagelvoort. Accordingly, a new trial is required.

---

[5] As the Second Circuit has stated, "a court should be especially loathe to regard any error as harmless in a close case, since in such a case even the smallest error may have been enough to tilt the balance." *United States v. Colombo*, 909 F.2d 711, 713-14 (2d Cir. 1990), citing 3A C. Wright, *Federal Practice and Procedure* §854, at 305 (2d Ed. 1982) (other citations omitted). See also, *Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763 (7th Cir. 2006) (order granting new trial should be affirmed where evidence presents a close case).

C. The Government's Repeated Misstatements of the Law And What It Needed To Prove During Its Closing Arguments Improperly Diminished the Burden of Proof and Prejudiced the Defendant, Requiring a New Trial

"It is well established that a prosecutor's misstatements of law in closing argument can be grounds for reversal. Included within this restriction are statements that in effect distort the burden of proof by suggesting incorrectly what the jury must find in order to reach a certain verdict." *United States v. Vargas*, 583 F.2d 380, 386 (7th Cir. 1978)(emphasis added); *United States v. Phillips*, 527 F.2d 1021, 1023-24 (7th Cir. 1975)(reversing conviction for prosecutor's misstatement of the law in closing argument). It is axiomatic that a "[a] prosecutor should not not mistate the law during closing argument." *United States v. Artus*, 591 F.2d 526, 528 (9th Cir. 1979)(holding that prosecutor's misstatement of law during closing argument constituted plain error requiring reversal). See also *United States v. Sandoval-Gonzalez*, 642 F.3d 717, 727 (9th Cir. 2011)("[T]he court's failure to correct the prosecutor's misstatements of law were reversible error . . . ."); *United States v. Rodrigues*, 159 F.3d 439, 450 (9th Cir. 1998)(reversing where prosecutor's "account of what the government had to prove to convict under § 215 was simply wrong.").

Throughout its closing argument – and in particular during its rebuttal argument to which the defense had no opportunity to respond and correct the prosecutor's erroneous and misleading argument – the government

repeatedly misstated the law and improperly diminished its burden of proof. The government repeatedly argued its so-called "bright line rule": if any part of any payment to a physician intended to induce patient referrals to Sacred Heart, then it was a kickback and the defendants are guilty; nothing more is necessary. But that is not the law. The government's overly reductive shorthand statement of the law was inaccurate and misleading – including that it disregarded the fact in order to violate the Anti-kickback statute, the defendant must act *willfully*, that is, knowing that his conduct violated the law.

The government forcefully hammered home its misleading "bright-line rule" throughout its closing arguments. In his rebuttal closing argument alone, the prosecutor invoked the government's faulty statement of the law repeatedly, *inter alia*:

> 1) There is nowhere in those instructions that says kickbacks must be cash in white envelopes. There is simply no such rule. The rule is you cannot pay for patients, and that means you can't pay cash and you can't pay benefits in kind. (Tr. 7250).
>
> * * *
>
> 2) So the question you may be asking yourself is: Well, how much of that $2000 check was so that those students could watch Dr. Maitra, and how much of it was for all of those surgeries that Dr. Maitra brought to Sacred Heart? Here is the answer. You don't have to do the math. ***It doesn't matter, because if any part or payment***

of that $2000 check was for Dr. Maitra's surgeries, then they broke the law. (Tr. 7266 (emphasis added)).

3) And it's the same for Dr. Stamelos; it's the same for Dr. Kandala. If any part of their monthly checks was for patient referral, then it doesn't matter if they did some work. *Id.*

4) It doesn't matter if Dr. Shah went to a health fair. ***If the rest of the check is a kickback, then it's a kickback and they broke the law.*** *Id.* (emphasis added)

* * *

5) When special Agent Ben Folger testified, he showed you, you know, the exceptional rate at which Subir Maitra did surgeries at Sacred Heart. It was a kickback. That was the purpose of the payments. And, frankly, it doesn't matter if there was any value to the teaching he did because you know that those checks also included a kickback, and ***if any part or purpose of those checks was a kickback, then it is a kickback, and they broke the law.*** (Tr. 7269 (emphasis added)).

* * *

6) So why was [Dr. Moshiri] paid? Because when he did do his surgeries, he did them at Sacred Heart. And once again, ladies and gentlemen, all that you have to know is this. If any part of his check was a kickback, then it's a kickback. ***If any part or purpose of the payment was to do those***

> ***surgeries at Sacred Heart, then it's a kickback. And in paying him, these gentlemen broke the law***. (Tr. 7274-75 (emphasis added)).
>
> * * *
>
> 7) The one thing that these exceptions, the personal services exception [defense counsel] talked to you about this afternoon and this fair market value exception, the one thing that cannot be considered is referrals. And you know that these contracts were all about referrals. And what that really means is this, and that is these exceptions, these safe harbors, incorporate the fundamental principle that I've talked about this afternoon. ***That is, if any part or purpose of the payment is for patients for referrals, then it's still a kickback and these exceptions don't apply***. (Tr. 7282 (emphasis added)).

The fundamental problems with the government's "shorthand" argument to the jury is that it (1) condensed the multiple, independent inquiries the jury had to answer into a single, over-simplified question; and (2) it reduced or eliminated not only the inquiries into all the essential elements of the offense but also the government's burden of proof. Moreover, throughout its argument, the government improperly collapsed these multiple legal requirements as both a factual and legal matter.

First, if all the government could prove in this case is that there was a payment by Defendants to a doctor which caused or resulted in referrals, it would not factually prove the charged offenses. The government's

proof would also have to demonstrate, among others, that the purpose of the payment was in exchange for the referrals, and that the defendants had acted *willfully*. More significantly, the government reduced its proof of a myriad of factual and legal issues into a single issue: is it a "kickback?" But the term "kickback" is not a talisman which proves the government's case simply by invoking its name. A host of other issues raised by the evidence and charges in this case – whether the defendants acted in good faith, whether they relied properly on legal counsel, whether they did not act willfully, whether the safe harbor provisions inoculated their conduct – all had to be answered before the government had proved its case. Indeed, a positive answer to *any one* of those questions would have required the jury to acquit. The government's incessant argument that proof a "kickback" meant that the defendants are guilty was not mere shorthand simplification, it was misleading and prejudicially so.

In other words, contrary to the government's argument, a rational jury could easily have concluded that the various agreements entered into in this case had as one of its parts or purposes the referral of patients and still properly have found the defendants not guilty. For example, the jury might have believed that the Moshiri contract, or the Maitra contract, or the Shah contract, was motivated in part by a hope or expectation to get patient referrals, but *also* found that the safe harbor for personal services contracts applied. Nothing in the law regarding personal services contracts disqualifies such a contract if motivated in part by a desire to gain referrals; instead it simply requires that

the level of remuneration not be tied to "the volume or value of any referrals." Or the jury may have believed that even if the payment was a "kickback," the defendant(s) did not act willfully in violation of the law. The same analysis is true with respect to the lease contracts and the shared employment agreement with Dr. Kuchipudi.

The government misstated the law when it claimed safe harbors forbade any arrangement motivated in "any part" by the expectation of referrals. The government wrongly argued: "The one thing that these exceptions, the personal services exception Mr. Campbell talked to you about this afternoon and this fair market value exception, the one thing that cannot be considered is referrals. And you know that these contracts were all about referrals. In what that really means is this, and that is these exceptions, these safe harbors incorporate the fundamental principle that I talked to you about this afternoon. That is, if any part of purpose of the payment is for patients [sic] referrals, then it's still a kickback and these exceptions don't apply." (Tr. 7282). Indeed, it is precisely to cover such situations that the safe harbors exist. The safe harbor provisions expressly repudiate that argument only requiring certain enumerated provisions and requiring that the payment (or rent) not be influenced by "the volume or value of any referrals or business otherwise generated between the parties." Thus, the government's argument contradicted the language of the safe harbor requirements, reduced the jury's inquiry to a single question which utterly obfuscated the willfulness requirement. This argument

was both powerful in its simplistic mantra, and extremely misleading.

The government's "bright-line rule" argument here is quite similar to the comments and arguments made by the prosecutor in *United States v. Farinella*, which the Seventh Circuit found to be both misleading and prejudicial. 558 F.3d 695 (7th Cir. 2009). In *Farinella*, the government misleadingly equated a "best when purchased by" date with an "expiration" date both in presenting its case and arguing to the jury during its closings. *Id.* at 697 ("The government calls these [best when purchased by dates] the dates on which 'the dressing would expire.' That is itself false and misleading."); *id.* at 698 ("The government wants us to believe that ['best when purchased by'] is a synonym for 'expires on' but presented no evidence for this interpretation, and indeed argues this point by innuendo, simply by substituting in its brief, as in the indictment and in the prosecution's statements at the trial in the hearing of the jury, 'expires on' for 'best when purchased by.'"). The Seventh Circuit found the government's over-simplified argument to be both misleading and prejudicial. The reasoning of *Farinella* applies equally to the government's claimed "bright-line rule" here.

Moreover, in virtually every iteration of the government's "bright line rule" during the prosecutor's rebuttal closing, the element of "willfullness" was completely absent[6] and proof required to convict was

---

[6] To be sure, there were isolated instances where the prosecutor gave lip service to the term "willfullness" (*e.g.*, Tr. 7250; Tr. 7317-

stated in an inaccurate, over-simplified and misleading way. When the prosecutor first made this faulty argument, the defense objected. (Tr. 7249). But the Court, rather than providing a curative instruction, merely told the jury that if a lawyer said anything contrary to the jury instructions previously provided, then the jury should disregard it. (Tr. 6923; Tr. 7249).

The government also improperly argued that the more general language regarding "hoping for" or "expecting" a referral as being factually equivalent to a kickback. (Tr. 7247 ("These two parts of the same instructions are two ways of saying the same thing.")). While the Court properly instructed the jury that "it is insufficient if the defendant merely hoped or expected that referrals might result from remuneration that was designed wholly for other purposes. Likewise, mere encouragement to refer patients, or the mere creation of an attractive place to which patients can be referred does not constitute inducement," the Court did not correct the government's misstatements, and the defense had no chance to. These are contrasting definitions of what it means to induce a kickback – one lawful, the other not. They are hardly the same thing.

By continually using its inaccurate and oft-repeated "bright-line rule," the government improperly diminished its burden of proof to less than that which the

---

18), but the clear thrust of his oft-repeated argument was the incorrect "bright-line" rule: if any part of the payment is to induce referrals, the Defendants are guilty. (*E.g.*, Tr. 7269 ("if any part or purpose of those checks was a kickback, then it is a kickback, and they broke the law.")). As set forth above, over and over again, the prosecutor told the jury nothing more was required

law requires and the Constitution commands. And by effectively eliminating the willfulness requirement, the prosecutor made the case, in essence, into a strict liability offense – which is at the opposite end of the continuum from the proof required to prove a "willful" offense, as was charged here. According to the prosecutor, Nagelvoort was guilty simply because some portion of a payment to a physician was to induce patient referrals, nothing more was required. This was both erroneous and highly prejudicial in this close case.

If this Court agrees that the prosecution's statements as to the law in this case were inaccurate, then there can be no doubt that the repeated references to a so-called "bright line rule" affected the verdicts. In *United States v. Wolfe*, 701 F.3d 1206 (7th Cir. 2012), the Seventh Circuit reiterated those factors to be considered in determining whether a prosecutor's remarks affected the fairness of the trial: "'(1) the nature and seriousness of the misconduct; (2) the extent to which the comments were invited by the defense; (3) the extent to which any prejudice was ameliorated by the court's instruction to the jury; (4) the defense's opportunity to counter any prejudice; and (5) the weight of the evidence supporting the conviction.' *United States v. Adams*, 628 F.3d 407, 418-19 (7th Cir. 2011)."

Consideration of each of the above factors demonstrates that Nagelvoort was severely prejudiced by the prosecutor's misstatement of the law, and a new trial is required. Factors (2) and (4) clearly support Defendant's argument for a new trial: the defense did not invite the government to misstate the law, and since the government persistently misstated the law during

its rebuttal closing argument, the defense had no opportunity to counter or respond to the prejudice. Factors (1), (3), and (5), discussed below, also counsel strongly in favor of a finding of prejudice under the facts of this case.

As to the first factor, undoubtedly a prosecutor's statement in closing argument that misstates the law and diminishes the burden of proof below its constitutional threshold constitutes serious misconduct. The reasonable doubt standard is the touchstone of our criminal justice system. Errors that denigrate or diminish a state's burden of proof to establish guilt beyond a reasonable doubt often lead to reversals owing to the possibility of error. *In Re Winship*, 397 U.S. 358, 362 (1970). The error here is manifest and clearly affected the substantial rights of Nagelvoort, including his fundamental Constitutional right to be convicted only upon competent evidence that establishes his guilt *beyond a reasonable doubt. See In re Winship*, 397 U.S. at 364 (proof beyond a reasonable doubt is fundamental right under Fifth Amendment's Due Process Clause); *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) (denial of right to proof beyond a reasonable doubt is structural error); *Chapman v. United States*, 500 U.S. 453, 465 (1991). Indeed, perhaps the biggest flaw with the government's posited "bright-line" is that even innocent conduct, including conduct not willfully undertaken, falls within it.

The constant repetition of the government's so-called "bright line rule" that misstated the law and distorted the prosecution's burden of proof adversely impacted the fairness of the trial. *United States v. Segna*, 555 F.2d

226, 230 (9th Cir. 1977). As courts have recognized, such misstatements by a prosecutor "can have a significant impact on jury deliberations 'because a jury generally has confidence that a prosecuting attorney is faithfully observing his obligations as a representative of a sovereignty.'" *United States v. Carter*, 236 F.3d 777, 785-86 (6th Cir. 2001)(quoting *Washington v. Hofbauer*, 228 F.3d 689, 700 (6th Cir. 2000)).

This persistent argument by the prosecutor consisted reversible error because it had the effect of depriving Mr. Nagelvoort of his primary defenses: that the evidence was insufficient to prove his guilt beyond a reasonable doubt, and that the government had not proven beyond a reasonable doubt that he had *willfully* violated the Anti-kickback statute. For example, if the jury believed the government's repeated (mis)representation of the law's requirements, then the jury would not even have had to consider the willfulness element. Under these circumstances, it is likely that the prosecutor's misstatement of the law affected the outcome – certainly, that is a reasonable possibility that the prosecutor's misstatement of the law caused the jury to return a guilty verdict against Nagelvoort, when it otherwise may have found him not guilty. *See United States v. Van Eyl*, 468 F. 3d 428 (7th Cir. 2006)(upholding trial court's grant of a new trial for prosecutor's misstatements during closing argument); *United States v. Catton*, 89 F.3d 387, 388-91 (7th Cir. 1996) (misstatement by prosecutor during closing argument can warrant new trial, particularly in a "close case").

Next, regarding the third factor, the Court's response to the defense objections did not ameliorate the

prejudice to Nagelvoort from the prosecution's misstatement of the law. Here, the defense objected as soon as it became aware that the prosecution would argue a faulty notion of the elements it was required to prove. (Tr. 7249). Continued objections would have cast the defense in an impossible situation such that it was reasonable not to continue to object. The Court did not provide a curative instruction specifically correcting the prosecutor's misstatements, so the jurors here were especially likely to rely on them. The lack of a curative instruction may be considered in determining the prejudicial impact of the government's misconduct, even in case – unlike here – where the defendant fails to request such an instruction. See *United States v. Carter*, 236 F.3d 777, 787 (6th Cir. 2001) (finding reversible error based on prosecutor's improper closing argument despite fact that defense counsel did not request curative instruction in response to the improper argument). Notably, in *Carter*, the Sixth Circuit held that the trial court's failure to provide a curative instruction at the time of the prosecutor's improper comments rendered those comments sufficiently prejudicial to warrant reversal. *Id.*

Indeed, not only was no curative instruction given in this case, the prosecutor explicitly asserted that the jury instructions the Court had previously read to the jury before closing arguments supported the government's "bright line rule." (Tr. 7249 (in response to the defense objection to this argument, the prosecutor stated that this "bright line" is "exactly as Judge Kennelly has now instructed you. If any part or purpose of a payment is for a referral, that's a kickback.")(emphasis added)). In

light of this sequence, the jury likely interpreted the absence of a curative instruction or correction from the Court at this time as the Court's tacit approval of the prosecutor's argument.

Finally, regarding the fifth factor concerning the weight of the evidence in support of the conviction, the government repeatedly ignored the willfulness element of the crime because its proof on that point was essentially non-existent. There was no evidence whatsoever that Nagelvoort subjectively believed, much less *knew*, that any of the payments made to physicians violated the Anti-kickback statute. To the contrary, the bulk of the evidence supported a finding that Nagelvoort was trying to comply with the law. Moreover, the government's misleadingly simplistic "bight line rule" was directly at odds the myriad evidence about the undisputedly complex regulations that govern the legality of such payments and which are the basis for an entire "cottage industry" of highly-paid consultants and experts to help health care professionals navigate this particular Anti-kickback regulatory scheme. (Tr. 5500-01 (Joan Lebow testifying that she works in the regulatory compliance industry almost full time)).

For all these reasons, the government "bright line rule" argument was inaccurate, misleading, and highly prejudicial in this close case. A new trial is required.

D. The Evidence Regarding Kuchipudi's Improper Billing Was Both Irrelevant And Highly Prejudicial

Nagelvoort adopts herein the entirety of the argument advanced by codefendant Novak regarding the inadmissibility of the evidence of Dr. Kuchipudi's separate fraudulent billing scheme in which he claimed as his services, the services of mid-level professionals such as physician's assistants and nurse practitioners. This evidence was extensive, covering days of testimony by not fewer than ten witnesses. The billings themselves were summarized in a number of summary charts and totaled well more than one million dollars. The undisputed evidence from the witnesses was that the billing practices and records of Dr. Kuchipudi were entirely unknown, and indeed inaccessible, to Nagelvoort (or any other defendant on trial). Given that there was no evidence of any knowledge by Nagelvoort of this independent fraudulent billing scheme, in which neither Nagelvoort nor any other Sacred Heart defendant participated, this evidence could only be admissible against these defendants under Rule 404(b) to the extent it demonstrated knowledge, preparation, plan or some other proper purpose.[7] But given that

---

[7] Although the government claimed that the theory of admissibility of the evidence was that Nagelvoort not only was involved in providing the mid-level professionals services as part of the exchange for patient referrals but also that Nagelvoort and the others specifically intended that Kuchipudi bill for those services on his own, thus providing a double benefit, ***no evidence was introduced at trial to support such a theory of admissibility***. Indeed, the evidence was to the contrary. Sacred Heart never billed Medicare/Medicaid for any mid-level professionals' services, at any

Defendant Nagelvoort had no knowledge of the billings, the manner of keeping the billings, and the claims made by Dr. Kuchipudi's billing staff, any inference of knowledge, by definition, was rendered a nullity. This Court thus erred in admitting this extensive evidence at trial against Nagelvoort.

The erroneous admission of this evidence particularly prejudiced Defendant Nagelvoort in three ways above and beyond the prejudice articulated against all defendants in Mr. Novak's motion. *First*, Dr. Kuchipudi's relationship with Sacred Heart began when Mr. Nagelvoort was at Sacred Heart, Nagelvoort was involved in creating the contract Dr. Kuchipudi had with Sacred Heart, and Dr. Kuchipudi's patients began to arrive at Sacred Heart when Nagelvoort was still working at the hospital. Thus, unlike a significant amount of evidence introduced at trial, Dr. Kuchipudi's activities were more closely linked with Nagelvoort's term as COO of Sacred Heart. In addition, the legitimate and ostensible purpose of introducing evidence of the activities of the mid-level professionals, to demonstrate that there was a benefit provided to Dr. Kuchipudi at Sacred Heart's expense, involved evidence that was closely overlapping with the independent, and subsequent fraudulent billing conducted by Dr.

---

time, for any service provider. (Tr. 6258-60). Nor was there evidence that any of the other doctors who were served by these individuals also billed for the services, which would have made Dr. Kuchipudi unique in that regard. And, of course, no witness testified that such an arrangement was actually entered into. Thus, the government's theory for direct admissibility was just that, a theory, unsupported by any actual evidence.

Kuchipudi. Because of these facts, the ability of the jury to discriminate between the legitimate and illegitimate uses of the evidence was clouded and obscured. Aside from the general proposition that the jury might have punished Nagelvoort for his association with Dr. Kuchipudi as a corrupt and greedy doctor, is the more specific and likely result that the jury would have punished Nagelvoort for Dr. Kuchipudi's subsequent criminal conduct either because Nagelvoort made it possible for Kuchipudi to take advantage of the system (even though it was unwitting on Nagelvoort's part) or because the jury could not distinguish between the legitimate use of the evidence and the illegitimate use.

Second, the vast majority of the fraudulent billings submitted by Dr. Kuchipudi occurred after Nagelvoort severed his relationship with Sacred Heart *(i.e.*, after April 28, 2011). Thus, this evidence, which had no relevance to Nagelvoort substantively also had no relationship to him temporally. This additional fact highlights even further the need for the Court to have instructed the jury that this evidence should not have been considered against Nagelvoort in particular (as is more directly argued above).

Third, the government featured the Kuchipudi relationship with Nagelvoort especially in an effort to link Nagelvoort to the charged fraudulent scheme. Because Kuchipudi was the largest referrer of patients to Sacred Heart in 2011 and 2012, and who was himself engaged in a separate fraudulent billing scheme, and because he predated Tony Puorro's employment and Nagelvoort's departure, this evidence was particularly important to the government's argument against

Nagelvoort. (Tr. 7290, 7287-89, Tr. 7300, Tr. 7312). The government could arguably point to other allegedly fraudulent activities with respect to the other defendants to make its case contemporaneous with Kuchipudi's billing misconduct; it could not do so with regard to Nagelvoort.

These additional considerations demonstrate that the prejudice of the separate billing scheme evidence was greater against Nagelvoort than perhaps the other defendants. Had this evidence been excluded, or the jury been instructed about what it could, and could not, consider regarding Dr. Kuchipudi's billing conduct with regard to the trial defendants, there is certainly a "reasonable possibility" that the result would have been different. A new trial therefore is required.

E. The "Expert" Testimony of Dr. Petrov Regarding What Was A Reasonable/Fair Market Value Teaching Stipend Had No Foundation And, As The Only Evidence Regarding the Reasonableness Of the Payments to Doctors Who Taught Residents At Sacred Heart, It Was Prejudicial

The opinion testimony from the government's expert on podiatric residency programs, Dr. Oleg Petrov, as to the fair market value for podiatric residency teaching salaries should not have been permitted because Dr. Petrov did not have a sufficient basis to testify about that topic – whether as an expert or otherwise. Importantly, Dr. Petrov's testimony was the only evidence proffered as to "fair market value" of teaching salaries which was an essential fact to prove Mr. Nagelvoort's guilt on Counts 44 and 46, based on

teaching payments to Dr. Moshiri, making manifest the prejudice.

The government called Dr. Petrov as an expert witness. Petrov testified to a variety of topics related to credentialing and running of podiatric residency programs, and Nagelvoort did not object to his qualifications to testify about the majority of the topics covered.

However, Nagelvoort objected prior to Dr. Petrov's testimony that (1) he should not be able to say that it is usual/unusual for podiatrists to be paid to teach and (2) he should not say what is a "normal stipend" for teaching. (Tr. 5250). The Court deferred its ruling on this objection until it had heard the foundation. (Tr. 5252). During testimony, the Government first sought to illicit such testimony and the court held a sidebar at which it ruled that the proper foundation had not been laid. (Tr. 5269-71). After the Government once again attempted to lay foundation, the court held another sidebar and ruled that the testimony was admissible and that Mr. Nagelvoort's objection went to the weight of the testimony, not its admissibility. (Tr. 5271-77).

Dr. Petrov was then permitted to offer the following opinions: (1) only "on occasion" is compensation paid to non-Director podiatrists who teach residents; (2) the "average" payment to such doctors is $3,000 per year; and (3) he has never "known of a [non-Director doctor] receiving $4,000 a month or $48,000 per year for their participation in a podiatric residency program." (Tr. 5277-5279).

Dr. Petrov's testimony on these points should have been excluded under Federal Rule of Evidence 702. Under Rule 702, for an expert witness to give opinion testimony on a topic, it is required that "the testimony is based on sufficient facts or data." Fed.R.Evid. 702(b). In the Court's role as "gatekeeper" it is required under Rule of Evidence 702 to exclude expert testimony which lacks reliability. *Driver v. AppleIllinois, LLC*, No. 06 C 6149, 2011 WL 4007337, at *2 (N.D. Ill. Sept. 9, 2011)(citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 589 (1993)).

Dr. Petrov's putative expert opinion as to salaries is the exact type of unreliable, anecdotal evidence which Rule 702 precludes. He testified that he based his opinion on (1) a handful of on-site visits to podiatric programs where he did not review budgets but discussed salaries with directors; (2) his experience directing his own podiatric residency program; and (3) anecdotal conversations with directors of other programs which he had sporadically over the last ten years approximately two or three times per year. (Tr. 5271-76). Petrov admitted that he had neither done nor relied on any statistically valid surveys or systematic studies of the nearly 300 podiatric residency programs in the United States. (Tr. 5282-83). He also conceded that for the programs which did pay doctors to teach, he did not know how much they paid their doctors. (Tr. 5283).

In sum, Petrov's opinion testimony on this topic – the only evidence relating to the reasonableness or "fair market value" of the teaching payments Sacred Heart made which is one prong of the safe harbor the

government bore the burden of disproving – was not based on any reliable, verifiable, or testable information, and should have been precluded under Rule 702. See *Driver v. AppleIllinois, LLC*, 2011 WL 4007337, at *8 (holding that putative expert on salaries of restaurant servers was unreliable under Rule 702 and thus not admissible because it was not based on reports such as the Bureau of Labor Statistics but rather was based on his recollection and general understanding of what servers earn); *Jinro Am. Inc. v. Secure Investments, Inc.*, 266 F.3d 993, 1004 (9th Cir. 2001)(finding admission of opinion evidence improper under Rule 702 where putative expert because his opinion "cited no research or study, nor any empirical data, and had made only generalized, anecdotal references to his personal experience.").[8]

Petrov's testimony on these topics was both unreliable and prejudicial. A new trial is required.

F. Evidence of Defendant Novak's Wealth Was Unfairly Prejudicial

Nagelvoort adopts the arguments made by Defendant Novak regarding the government's

---

[8] Dr. Petrov's testimony was improper lay testimony under Rule of Evidence 701, as well. Rule 701 prohibits testimony by a lay witness which relies upon "scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed.R.Evid. 701(c). As the Advisory Committee Notes to Rule 701 from the 2000 Amendments state, subsection (c) was "amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Fed.R.Evid. 701.

introduction of extensive evidence about his wealth. This evidence was prejudicial as to Novak, but doubly so as to Nagelvoort because (a) he did not share any interest in the profits made by Sacred Heart; and (b) there was no evidence that Nagelvoort knew how much money Sacred Heart made. The evidence and argument about Mr. Novak's wealth was designed to appeal to the emotions of the jury, and it succeeded.

G. Cumulative Error

Each of the errors discussed herein individually warrant relief. Viewed collectively, there can be no doubt that Nagelvoort's convictions should be reversed. "Cumulative errors, while individually harmless, when taken together can prejudice a defendant as much as a single reversible error and violate a defendant's right to due process of law." *United States v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001).

Mr. Nagelvoort also adopts the other arguments of his co-defendants to the extent they apply to him.

CONCLUSION

WHEREFORE, for all the reasons set forth herein, as well as those stated in the post-trial motions of Mr. Nagelvoort's co-defendants, we respectfully request that the Court enter a judgment of acquittal on all counts. Alternatively, we request that the Court enter an Order granting Mr. Nagelvoort a new trial.

Respectfully submitted,

/s/ Terence H. Campbell
An Attorney for Defendant
Clarence Nagelvoort

Terence H. Campbell
Michael P. Hohenadel
COTSIRILOS, TIGHE, STREICKER,
POULOS & CAMPBELL LTD.
33 North Dearborn Street, Suite 600
Chicago, Illinois 60602
(312) 263-0345

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the following document:

- CLARENCE NAGELVOORT'S MOTION FOR JUDGMENT OF ACQUITTAL, OR ALTERNATIVELY FOR NEW TRIAL

was served on today's date, in accordance with Fed.R.Crim.P. 49, Fed.R.Civ.P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as the ECF filers.

Respectfully submitted,

By: /s/ *Terence H. Campbell*

Appendix H

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. EDWARD J. NOVAK, et al., Defendants.	Docket No. 13 CR 312 Chicago, Illinois July 28, 2015 9:30 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MATTHEW F. KENNELLY
VOLUME 1-A

APPEARANCES:

For the Plaintiff: UNITED STATES ATTORNEY'S OFFICE
BY: MR. JOEL M. HAMMERMAN
MR. RYAN S. HEDGES
MS. KELLY GREENING
MS. DIANE MacARTHUR
MR. BRIAN S. WALLACH
219 South Dearborn Street
Chicago, Illinois 60604

For the Defendants: HINSHAW & CULBERTSON, LLP
BY: MR. SERGIO E. ACOSTA
MR. JOEL D. BERTOCCHI
222 North LaSalle Street
Suite 300
Chicago, Illinois 60601

DRINKER, BIDDLE & REATH, LLP
BY: MR. DANIEL J. COLLINS
191 North Wacker Drive
Suite 3700
Chicago, Illinois 60606

MR. ROBERT G. CLARKE
123 West Madison
Chicago, Illinois 60603

LAW OFFICES OF PATRICK E. BOYLE
BY: MR. PATRICK E. BOYLE
155 North Michigan Avenue
Suite 562
Chicago, Illinois 60601

COTSIRILOS, TIGHE, STREICKER, POULOS & CAMPBELL, LTD.
BY: MR. TERENCE H. CAMPBELL

MR. MICHAEL P.
HOHENADEL
33 North Dearborn Street
Suite 600
Chicago, Illinois 60602

Court Reporter: MS. CAROLYN R. COX, CSR,
RPR, CRR, FCRR
219 South Dearborn Street,
Room 2102
Chicago, Illinois 60604
(312) 435-5639

* * * * *

[19] The last -- well, the second to last point has to do -- with just Mr. Nagelvoort has to do with admission of evidence after April 28th, 2011. Mr. Nagelvoort contended that he withdrew from the alleged conspiracy in April of 2011 when or near when his employment with Sacred Heart terminated. He asked me to determine as a matter of law that he had [20] withdrawn, but withdrawal, which is an issue on which the defendant bears the burden of proof under Smith v. United States, 133 S.Ct. 714, at pages 720 to 21, that is a question for the jury, not the court. And for that I cite Hyde, H-y-d-e, v. United States, 225 U.S. 347, at page 370 to 372. The issue is legitimately disputed in this case, and a reasonable jury could have found either way, thus precluding me from taking the issue away from the jury.

* * * * *

Appendix I

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 6,1
Eastern Division

UNITED STATES OF AMERICA

Plaintiff,

v. Case No.: 1:13–cr–00312

Edward J Novak, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Wednesday, July 29, 2015:

MINUTE entry [838] is corrected as follows: MINUTE entry before the Honorable Matthew F. Kennelly: Status hearing and ruling on post–trial motions of defendants Novak, Payawal and Nagelvoort hearing held on 7/28/2015. Defendant Roy Payawal's motion to adopt co–defendant Novak and Nagelvoort's motions for new trial [688] is granted. For reasons stated in open court, defendant Novak's motion for judgment of acquittal [682] and motion for new trial [683] are denied. Defendant Payawal's motion for judgment of acquittal and new trial [686] is denied. Defendant Nagelvoort's motion for acquittal or alternatively for

new trial [687] is denied. The 7/29/2015 sentencing date for defendant Novak remains as previously set. The 7/30/2015 sentencing date for defendant Payawal remains as scheduled. The 7/31/2015 sentencing date for defendant Naglevoort remains as scheduled. Mailed notice. (pjg,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If an order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at *www.ilnd.uscourts.gov*.