

No. 12-4004

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES C. DIMORA,

Defendant-Appellant.

APPEAL OF JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

DEFENDANT-APPELLANT JAMES C. DIMORA'S OPENING BRIEF

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Mr. Dimora requests oral argument under Federal Rule of Appellate Procedure 34(a)(1) and Sixth Circuit Rule 34(a), which will aid the Court in reviewing the record and assessing the errors made in this case.

I. INTRODUCTION

Former Cuyahoga County Commissioner James Dimora was convicted of 32 bribery-related offenses and sentenced to 28 years in prison. The key issue at trial was whether he acted with criminal intent. The government sought to establish that he acted with criminal intent by proving that he did not disclose the things of value that he received from the alleged bribers. The government argued to the jury, powerfully and persuasively, that the reason Dimora needed to conceal receiving things of value was because they were bribes.

Dimora was prepared to refute the government's evidence by showing that he had disclosed, on publicly filed state ethics reports, that he received the things of value from the alleged bribers. The district court denied the government's pretrial motion *in limine* to exclude his ethics reports. In reliance on the court's ruling, Dimora informed the jury in opening statement that he would show that the government's theory was false because he had in fact disclosed receiving the things of value.

In its case-in-chief, the government was permitted, over defense objection, to introduce evidence repeatedly that Dimora had not disclosed his receipt of things of value. But when he sought in his case to introduce the undisputed evidence, in the form of his publicly filed ethics reports, that he did disclose receiving the things of value, the government again objected, and this time the court barred their admission.

Thus, Dimora was prevented from introducing key exculpatory evidence, which he had promised the jury it would see in accord with the court's pretrial ruling. And the government was permitted to mislead the jury regarding whether Dimora had concealed his receipt of the alleged bribes.

The court's ruling excluding the ethics reports was wrong as a matter of law. His ethics reports were not hearsay, because they were not introduced to show that he had actually received the things of value listed in the reports, which was not in dispute and the government had already established. And they were not properly excluded under Rule 403, because they represented key exculpatory evidence refuting testimony the court had already permitted the government to introduce. The cumulative effect of the court's rulings was to deprive Dimora of a fair trial by permitting the government to mislead the jury regarding whether he concealed, which the government argued proved criminal intent.

The district court also erred by applying inconsistent legal standards when deciding whether to admit "other acts" evidence offered by the government and the defense. The court applied the correct standard when admitting the government's proposed 404(b) evidence, but incorrectly applied a different, stricter standard to exclude all of Dimora's 404(b) evidence. Again, this erroneous ruling allowed the government to mislead the jury regarding whether Dimora acted with criminal intent.

Similarly, the jury was misinformed regarding the most important legal issues in the case: when is it a federal crime for a public official to receive a thing of value; what must the government establish regarding the intent of the public official; and what acts are “official acts.” Dimora proposed instructions that accurately explained each of these issues, which the court refused to give.

The government again took improper advantage of this error. For example, the government told the jury that anything Dimora did remotely connected to the county, such as having his secretary make dinner reservations, was an official act. And the government told the jury that any connection between a thing of value and an official act, except for friendship or “coincidence,” was a bribe. The inadequate instructions given by the court did not inform the jury that the government was misstating the law.

As a result of these errors, Dimora was deprived of a fair trial. He was barred from introducing key exculpatory evidence that would have prevented the government from misleading the jury regarding whether he acted with criminal intent. And the court’s inadequate instructions permitted the jury, at the government’s urging, to convict based on lawful conduct. His convictions must be reversed.

II. JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. § 3231 because Dimora was charged with a federal crime. This Court has jurisdiction under 28 U.S.C. § 1291 because the district court's August 1, 2012 judgment is a final order. District-Court Record Entry ("R.") 957, PageID #19979. Dimora timely filed a notice of appeal on August 13, 2012. R. 967, PageID #20034.

III. STATEMENT OF ISSUES

1. (a) The government elicited testimony on sixty occasions, from twenty witnesses, that Dimora did not disclose receiving things of value from the alleged bribers, arguing that concealment showed criminal intent. Dimora was prepared to rebut these allegations by showing that he disclosed receiving the things of value on his publicly filed state ethics reports. Before trial, the court ruled that Dimora could introduce this evidence. Relying on this ruling, Dimora promised the jury in opening statement that he would show that the government's theory was false, because he had disclosed receiving the things of value from the alleged bribers on his ethics reports. Did the district court err by changing its pretrial ruling during the defense case and barring Dimora from introducing this evidence?

(b) Cuyahoga County Auditor Frank Russo admitted taking over \$1 million in bribes unrelated to Dimora. The government alleged that Dimora and Russo acted together to solicit and conceal bribes. Did the district court err by excluding Russo's ethics reports as "irrelevant," where they showed that, unlike Dimora, Russo never disclosed receiving anything of value?
2. The district court excluded evidence that Dimora provided similar assistance to others without receiving anything of value, and the government repeatedly relied on the absence of that evidence in asking the jury to convict. Did the district court err by applying a different and stricter standard to exclude Dimora's reverse 404(b) evidence than what it applied in admitting the government's 404(b) evidence?
3. Did the district court err by refusing to give requested jury instructions that accurately explained the important difference between bribery and lobbying?
4. Did the district court err by refusing to give requested jury instructions that accurately explained the limits on what constitutes an official act?
5. Did the district court err by refusing to grant judgment of acquittal on four counts where, applying the correct law omitted from the jury instructions, the undisputed evidence showed that Dimora did not conspire to or accept things of value in exchange for official acts?

IV. STATEMENT OF THE CASE

On September 14, 2010, a federal grand jury returned a 31-count indictment against former Cuyahoga County Commissioner James Dimora and five others. R. 1, PageID #1. Superseding indictments were returned on March 30, 2011, R. 261, PageID #1894, and August 17, 2011, R. 401, PageID #4675. The third and final superseding indictment was returned on September 7, 2011. R. 444, PageID #9630.

The Third Superseding Indictment named Dimora and Michael Gabor as defendants and contained 37 counts. Mr. Dimora was charged in 34 counts, Counts 1-30 and 34-37: one count of conspiracy to violate the RICO statute, 18 U.S.C. § 1962(d); two counts of conspiracy to commit mail fraud and honest services mail fraud, 18 U.S.C. §§ 1341, 1346, and 1349; one count of mail fraud, 18 U.S.C. § 1341; one count of conspiracy to commit wire fraud and honest services wire fraud, 18 U.S.C. §§ 1343, 1346, and 1349; eight counts of conspiracy to violate the Hobbs Act, 18 U.S.C. § 1951; nine counts of violating the Hobbs Act, 18 U.S.C. § 1951; two counts of conspiracy to commit bribery concerning programs receiving federal funds, 18 U.S.C. §§ 371 and 666; four counts of bribery concerning programs receiving federal funds, 18 U.S.C. § 666(a)(1)(B); one count of conspiracy to obstruct justice, 18 U.S.C. §§ 371 and 1512(b); one count of destruction, alteration, or falsification of records in federal investigation, 18 U.S.C. § 1519; and four counts of making and subscribing a false tax return, 26 U.S.C. § 7206(1).

The government moved *in limine* to exclude: (1) evidence that Dimora disclosed in his publicly filed ethics reports that he received things of value from the alleged bribers, R. 532, Gov't Mot. in Limine at 41-42 - sealed; and (2) evidence that Dimora provided the same sort of assistance to many others without asking for, expecting, or receiving anything of value, *id.* at 42-47 - sealed. The district court granted the motion to exclude evidence of other acts, R. 602, Op. & Order at 41-45, PageID #12712-16, but reserved ruling on Dimora's ethics reports, *id.* at 40-41, PageID #12711-12.

Just before opening statements, the district court ruled that Dimora could introduce his ethics reports to establish lack of criminal intent, but only during the defense case and not through government witnesses. R. 1010, Tr. Vol. 4 at 890-91, 899, PageID #22266-67, 22275. Relying on the court's ruling, Dimora promised the jury that he would show that he publicly disclosed that he received things of value from the alleged bribers. *Id.* at 1005-07, PageID #22379-81.

When Dimora sought to introduce his ethics reports in his case-in-chief, the government again objected. R. 1029, Tr. Vol. 31 at 7373-74, PageID #26965-66. This time, the district court sustained the government's objection and ruled them inadmissible. R. 1030, Tr. Vol. 32 at 7574-76, PageID #27166-68.

Dimora was convicted on 33 counts and acquitted on one count of mail fraud, Count 30. R. 1050, Tr. Vol. 41 at 8484-8504, PageID #30640-60. The district court

entered a judgment of acquittal on one count of Hobbs Act conspiracy, Count 10, and denied Dimora's motions for judgment of acquittal or a new trial on the other 32 counts. R. 930, Mem. Op. & Order, PageID #18871.

The district court sentenced Dimora to 28 years in prison. R. 957, Judgment, PageID #19979. This appeal follows.

V. STATEMENT OF FACTS

James Dimora was first elected one of three Cuyahoga County Commissioners in 1998 and served until 2010. He began his public service career as an employee at the Bedford Heights Wastewater Treatment Plant, working his way up to mayor of the City of Bedford Heights before becoming a county commissioner and head of the Democratic Party in Cuyahoga County. Before this case, he had never been arrested or charged with a crime.

The government prosecuted Dimora for bribery and conspiracy to commit bribery, alleging that he accepted or agreed to accept things of value in exchange for official acts; for conspiracy to commit RICO, alleging that he operated the county as a corrupt enterprise with Cuyahoga County Auditor Frank Russo; and for obstruction of justice and filing false tax returns, both flowing as consequences of the bribery counts.

A. Bribery, Mail Fraud, and Wire Fraud (Counts 2-9 & 11-27)

Dimora was charged with federal bribery crimes relating to things of value he received from eleven different people.¹ *See* R. 735-1, Jury Instructions at 14-16, PageID #16979-81 (summary of charges). With few exceptions, Dimora did not dispute that he received the things or that he took the actions that the government alleged.² The primary issue in dispute at trial was his intent: whether he solicited or accepted the things of value knowing they were given in exchange for official acts. The government asked the jury to infer criminal intent by introducing evidence that he concealed receiving things of value from the alleged bribers, which was not true. R. 1045, Tr. Vol. 36 at 7980-81, PageID #30136-37.

1. Evidence of Intent - Secrecy and Concealment

The government moved *in limine* to exclude evidence that Dimora publicly disclosed on his ethics reports that he received things of value from the alleged bribers. R. 532, Gov't Mot. in Limine at 41-42 - sealed. Dimora argued that his ethics reports were "wholly probative and relevant to intent. Just as the Government will argue that any attempt to conceal things of value from the alleged co-conspirators

¹ The eleven: Kevin Kelley (Counts 2-3); Ferris Kleem (Counts 1.E, 4-7); Kevin Payne (Count 8); Gina Coppers (Count 9); John Valentin (Count 11); Nick Zavarella (Counts 12-13); William Neiheiser (Counts 14-16); Steven Pumper (Counts 17-21); Anthony Melaragno (Counts 1.F, 22-23); Robert Rybak (Counts 24-25); and Charles Randazzo (Counts 26-27).

² Dimora disputed that Kevin Kelley paid for his airline tickets on a trip to Las Vegas; that Steven Pumper gave him \$30,000 in cash; and that Ferris Kleem gave him \$6,000 in cash. He also disputed that Samir Mohammad, referred to solely in Count 1, gave him anything.

is evidence of criminal intent, Mr. Dimora should be able to argue that the disclosure of things of value is relevant to refuting intent.” R. 629, Resp. at 3, PageID #12922.

Before opening statements, the district court ruled that it “will permit Defendant Dimora to get into that subject matter” and that the government in response would “be able to bring in witnesses regarding the purpose of the ethics reports and also other factual matters related to the ethics report.” R. 1010, Tr. Vol. 4 at 890, PageID #22266. However, the court ruled that Dimora “could not do it on the cross-examination of Government witnesses. They would have to do it in their own case in chief.” *Id.* at 899, PageID #22275.

In opening statement, the government asserted that Dimora and Russo developed a “conspiracy handbook” with an “unwritten set of rules” to enrich themselves; rule three was to deal only “with people who will keep the secret,” *id.* at 925, PageID#22299, and “cover[ing] your tracks,” thereby keeping this “dark and secret world . . . shut and locked and bolted,” *id.* at 927-28, PageID #22301-02. In his opening, Dimora promised the jury that his ethics reports would refute those accusations of concealment and framed his defense around that question:

And most importantly, these are people that Commissioner Dimora, people that gave him gifts, people that bought him dinner, these are people that Commissioner Dimora put on his state ethics reports.

And you will see, ladies and gentlemen, and the evidence will show that there was no attempt to hide this. These reports, these state ethics reports, are required to be filed by all public officials. There is a

place on those reports to list who is giving you a gift over a certain amount and who has bought you a meal.

Jimmy Dimora filled out those reports. He filed them with the state. Those are publicly available reports so that people can monitor, the Government, the citizens, can monitor who is giving gifts to public officials. . . .

. . . .

He didn't cover it up. He didn't hide it. And you may disagree with a public official being able to get a gift from somebody that does work with the county. You may disagree with a public official being able to be bought dinner by somebody who is a friend and a businessman and a contractor. But it's not illegal.

. . . .

The FBI didn't need permission to go into this dark room to find out who Jimmy Dimora had relationships with. The FBI didn't need a judge to open the door to a world that was hidden. The FBI just had to go online and look at Commissioner Dimora's ethics reports. There was everybody that bought him dinner, everybody that gave him things of value.

They didn't need to do wiretaps. They didn't need to learn these things through these manners because it wasn't hidden. There wasn't a closed door on the world of Jimmy Dimora.

Id. at 1005-07, PageID #22379-81.

The government repeatedly elicited testimony—at least sixty times, through twenty different witnesses—that Dimora did not disclose that he received things of value. *See* Summary Chart: Nondisclosure Questions, *infra* at 57-63; *see, e.g., R.* 1027, Tr. Vol. 19 at 4759, PageID #26680 (“Was it ever disclosed in public, to your knowledge, that the union was sponsoring dinners and drinks for Commissioner Dimora and others?”). Dimora objected, and the government argued that Dimora’s failure to disclose established that he had criminal intent—that he received the things of value knowing that they were given in exchange for official acts. *See, e.g., R.* 1020,

Tr. Vol. 13 at 3459, PageID #25129 (“[S]ecrecy is very relevant evidence of intent in a bribery case.”). The court overruled every defense objection (except for occasionally instructing that a question be rephrased), and agreed that Dimora’s failure to disclose was key to the government’s case. R. 1021, Tr. Vol. 14 at 3614, PageID #25284 (“[I]t’s important I understand the government’s case to be able to indicate there wasn’t any disclosure.”).

But when Dimora sought to prove that he had publicly disclosed receiving the things of value from the alleged bribers on his official state ethics reports, as he had told the jury in opening, the government objected on the basis of hearsay. R. 1029, Tr. Vol. 31 at 7373-74, PageID #26965-66. Dimora argued that his ethics reports were not being offered for the truth of the matters asserted—that he was not seeking to establish that he actually received things of value from the alleged bribers, which the government had already established—but instead were being offered to show that “he disclosed them in a venue that was accessible to the entire public. . . . What we’re talking about is the disclosure.” *Id.* at 7374-75, PageID #26966-67. The district court ruled the ethics reports inadmissible, concluding that Dimora’s disclosures were hearsay and that they would be “very confusing” to the jury. R. 1030, Tr. Vol. 32 at 7574-77, PageID # 27166-69.

In closing, the government repeatedly encouraged the jury to infer criminal intent from its unrefuted evidence that Dimora had concealed things of value from

the alleged bribers, arguing that they needed to be concealed if they were bribes. *See, e.g.*, R. 1045, Tr. Vol. 36 at 7981, PageID #30137 (“But . . . there sure is a need to cover your tracks, to cover up the connection, to cover up the bribe.”); R. 1046, Tr. Vol. 37 at 8328, PageID #30484 (“But people who are taking bribes, accepting bribes, selling, cashing in the power of their public offices, those people need to keep that a secret.”).

After trial, the district court, acting sua sponte, expanded on its decision to exclude Dimora’s ethics reports. R. 930, Mem. Op. & Order at 37-43, PageID #18907-13. After repeating that the ethics reports contained inadmissible hearsay, the court also stated that they were inadmissible under Federal Rule of Evidence 403 (although neither party had ever raised Rule 403). The court found that evidence about the requirements and purposes of the reports—evidence that the court had ruled before trial the government could introduce in response to Dimora’s ethics reports—would have confused the jury, *id.* at 41-42, PageID #18911-12, and that certain preprinted portions of the ethics report forms would cause confusion and unfair prejudice to the government, *id.* at 42-43, PageID #18912-12.³ The court also found that the probative value of the ethics reports was “limited,” because the government’s evidence at trial already demonstrated that Dimora was “often seen in

³ Although the court earlier considered redacting parts of Dimora’s ethics reports, *see* R. 1030, Tr. Vol. 32 at 775-76, PageID #27167-68, it did not mention the possibility of redacting the offending portions of the forms in its post-trial order.

public dining with contractors who were seeking county work” and thus did not hide his “associations.” *Id.* at 43, PageID #18913. The court did not explain how evidence that Dimora publicly dined with contractors was of similar probative value to evidence that he had disclosed receiving the things of value from the alleged bribers, contrary to the government’s evidence and theory of prosecution.

2. Evidence of Intent - Rule 404(b)

The government also moved *in limine* (1) to admit instances of other acts of Dimora, as “evidence of knowledge and intent,” R. 532, Gov’t Mot. in Limine at 9-35 - sealed; and (2) to exclude evidence of other acts of Dimora offered by the defense, which it termed the “good guy” defense, *id.* at 42-47 - sealed. Dimora opposed the motion, arguing (1) that the government’s proposed evidence failed to satisfy Federal Rule of Evidence 404(b), R. 547, Opp. to Gov’t Mot. in Limine at 5-13 - sealed; and (2) that he would not present evidence of other acts to prove he was a “good guy,” but rather would “specifically disprove the claim he acted with the expectation of receiving something in return and did not possess the criminal intent alleged by the Government,” *id.* at 19; *see also id.* at 15-22.

Applying the well-established standard for admission of evidence under Rule 404(b), the district court admitted the majority of the government’s proffered evidence. R. 602, Op. & Order at 18-38, PageID #12689-12709. Addressing Dimora’s “reverse 404(b)” evidence, the court first noted the Sixth Circuit’s holding

that the same familiar Rule 404(b) standard applied, *id.* at 42, PageID #12713, but then adopted a different and stricter standard—that reverse 404(b) evidence is admissible only “where a defendant is alleged to have ‘always’ or ‘continuously’ committed the acts alleged,” *id.* Applying this new standard, the court barred Dimora from offering evidence of any other acts to prove his intent, with the exception of “policies or training Dimora promoted as County Commissioner.” *Id.* at 42-45 & n. 17, PageID #12713-16.

Before opening statements, the court clarified that “you are certainly permitted to get into facts that would go to what the intent was,” regarding criteria that Dimora used to make decisions as a commissioner. R. 1010, Tr. Vol. 4 at 895, PageID #22271. Dimora said in opening statement that the evidence would show that he did not take official actions in exchange for things of value, but instead responded to requests for assistance regardless of whether he received anything:

His criteria was to help people that made a legitimate request, whether they were friends, whether they were rich, or whether they didn’t have two nickels to rub together. It was his job.

The evidence will show you, and some of the Government’s own witnesses will tell you, what it was like to be out in public with Mr. Dimora, what it was like to be out in public with Commissioner Dimora, the people coming up to him, thanking him for assisting them, asking him to give them some help, shaking hands with him, telling him how much it meant to them that he was there for them, as their commissioner. He was there for them because they were his constituents.

His job as a commissioner is to do these things. His job as a commissioner is to help people navigate the county. His job is to let people know about the procedures, the red tape, the different things

that you need to do in order to operate in the county, in order to get a job with the county, in order to bid on a contract with the county.

....

It was perfectly legitimate, and it was part of Commissioner Dimora's job, and it was part of the job of everybody that worked in the county to respond to these requests, to respond to these issues.

....

As a commissioner, as I said, it was his job. And you will hear this from the evidence. He thought so. His staff thought so. It was his job to make recommendations for people, to help businesses, contractors, ordinary citizens work in the county and navigate what's happening in the county.

Id. at 993-94, 996-97, PageID #22367-68, 22370-71.

The government objected, and the district court stated that these statements violated her "good guy defense" ruling:

First of all, you are -- and I didn't say anything when an objection wasn't lodged until just now, but you do seem to be getting into what I said you cannot get into which is the good acts defense. So I'm just going to caution you to be very careful. You've already stepped over the line.

I'm just going to caution you and tell you my original ruling, and that's why I think there was confusion last night and I think there was confusion today relative to your request that I permit you to get into intent.

You're certainly permitted to do that when it comes to the specific items involved here. You are morphing over into an area that I'm staying firm on from my initial ruling which is the good guy -- other good acts defense which is not permissible.

Id. at 999-1000, PageID #22373-74.

In closing argument, the government repeatedly relied on the absence of that very evidence to argue that Dimora acted with criminal intent. For example, the government urged the jury to "consider what Dimora said to Tracey Nichols, the fact that he didn't call and ask about anyone else's grant application. . . . He asked about

Kleem, the same person that was sitting there --” R. 1045, Tr. Vol. 36 at 8013-14, PageID #30169-70.⁴ Dimora objected, and the district court ordered the government to “clarify” that it was referring only to one particular phone call. R. 1045, Tr. Vol. 36 at 8014, PageID #30170; R. 1046, Tr. Vol. 37 at 8264-68, PageID #30420-24. The jury was not told that Dimora had been barred from introducing evidence that he took similar actions on behalf of others from whom he received nothing.

B. Obstruction (Counts 28 & 29)

Dimora was charged with one count of conspiracy to obstruct justice, 18 U.S.C. §§ 371 and 1512(b) (Count 28), and one count of destruction, alteration, or falsification of records in federal investigation, 18 U.S.C. § 1519 (Count 29). With one exception, Dimora did not dispute that he took the actions alleged.⁵ But he disputed that he acted with criminal intent. The obstruction counts largely depended on the same evidence of intent as the bribery counts. *E.g.*, R. 444, 3d Superseding Indictment ¶444 (Count 28), PageID #9752 (“It was the object of the conspiracy . . . to conceal from law enforcement and the Grand Jury the fact that Dimora had solicited and accepted bribes, kickbacks and gratuities.”).

⁴ *See also, e.g.*, R. 1045, Tr. Vol. 36 at 7980, PageID #30136 (“[O]f all the bids he’s calling back to his office about, about all the projects he wants Pat Smock to get back to him as soon as possible, it’s Ferris Kleem’s, who, by the way, is the person who’s paying for the Bare Pool, who’s financing that trip to Las Vegas.”).

⁵ Dimora disputed that he instructed Steven Pumper to backdate a contract.

C. Conspiracy to Commit RICO (Count 1)

Count 1 charged Dimora with conspiracy to commit RICO. The charged predicate acts included: all of the substantive bribery counts; three additional acts of bribery allegedly involving Dimora; the two substantive obstruction counts; and two acts of bribery allegedly involving Dimora's codefendant, Michael Gabor. R. 444, 3d Superseding Indictment at ¶¶102-25, PageID #9643-48.

D. Tax (Counts 34-37)

Finally, Dimora was charged with four counts of making and subscribing a false tax return, one count for each year from 2004 to 2007. As the government argued in closing, the tax counts depended entirely on the bribery counts—if the things of value Dimora received were bribes, then he underreported his income and his tax returns were false; if not, then his tax returns were accurate. R. 1045, Tr. Vol. 36 at 8090-91, PageID #30246-47.

VI. SUMMARY OF ARGUMENT

The government convinced the district court to exclude relevant, admissible, and powerful exculpatory evidence of Dimora's intent—that he did not solicit or accept things of value knowing they were given in exchange for official acts—then repeatedly relied on the absence of that evidence in asking the jury to convict. First, the district court erred by excluding Dimora's official state ethics reports, which publicly disclosed that he received the things of value from the alleged bribers and contradicted the government's theory of prosecution. His ethics reports were not inadmissible hearsay, because they were not offered to prove that he actually received things of value. And his ethics reports were, by the government's and the court's own admissions, of far more probative value than the court acknowledged later in its order excluding them from evidence. The court's error excluded evidence central to Dimora's defense, allowing the government to portray—falsely—that Dimora concealed receiving things of value and to encourage the jury to infer criminal intent from that false fact. The court compounded its error by excluding Frank Russo's ethics reports, which would have refuted the accusations that Dimora and Russo acted together to solicit and conceal bribes. Unlike Dimora, admitted bribe-taker Russo never disclosed receiving a single thing of value.

Second, the district court applied a different and stricter standard than what it applied to the government's 404(b) evidence to exclude Dimora's reverse 404(b)

evidence: that he provided the same sort of assistance to many others without asking for, expecting, or receiving anything of value. The government relied on the absence of that very evidence in asking the jury to convict, further demonstrating that it was relevant to showing that Dimora did not solicit or accept things of value knowing they were given in exchange for official acts, and that the court's error in excluding that evidence was not harmless.

The government convinced the district court to omit requested jury instructions, then repeatedly relied on the absence of those instructions in asking the jury to convict. The court omitted instructions that explained the important difference between bribery and lobbying, which permitted the government to repeatedly argue that any connection between things of value and a hope of official action beyond friendship or "coincidence" was a bribe. The court also omitted instructions that explained what acts are not "official acts," which permitted the government to argue that almost anything Dimora did involving the county—including asking his secretary to make dinner reservations—was an official act. The government misstated the law, and the jury instructions did not inform the jury that the government had done so.

Finally, applying the correct law omitted from the jury instructions, there was insufficient evidence to support conviction on Counts 9 and 11-13. The undisputed evidence was insufficient as a matter of law to establish that Dimora conspired to

accept or actually accepted things of value from Nick Zavarella, John Valentin, or Gina Coppers in exchange for official acts.

VII. ARGUMENT

A. **The District Court Committed Reversible Error by Excluding Evidence Central to Dimora's Defense—His Ethics Reports—and Thereby Allowing the Government to Mislead the Jury on a Key Issue in the Case.**

The district court erred by excluding Dimora's ethics reports, and its error was not harmless. The exclusion of this key evidence allowed the government to establish—falsely and without rebuttal—that Dimora concealed his receipt of things of value, and to argue that the jury should therefore infer criminal intent. The government's argument—that receipt of these things needed to be concealed only if they were bribes—was powerful and persuasive, and the excluded evidence that Dimora did not conceal his receipt of things of value was equally powerful in establishing that he did not believe they were given in exchange for official acts.

1. **The district court erred by changing its pretrial ruling and excluding Dimora's ethics reports.**

The district court erred by excluding Dimora's ethics reports as hearsay. On his ethics reports, Dimora disclosed that he received things of value from alleged bribers. He was not offering his reports to prove that he actually received things of value from them—the government had already proven that, and Dimora did not

dispute it. He was offering his ethics reports to refute the allegation, made expressly and repeatedly by the government, that he concealed that fact.

The district court also erred in its alternative ruling excluding Dimora's ethics reports under Rule 403. The court initially ruled that Dimora could introduce his ethics reports, and that the government could respond with evidence regarding their content and purpose. The government proceeded to elicit testimony, no less than sixty times, that Dimora did not disclose that he received things of value. But when Dimora attempted to introduce his ethics reports into evidence to refute the government, the court, as an alternative ground for its flawed hearsay ruling and without either party raising Rule 403, reversed its earlier ruling allowing him to introduce them in his case-in-chief and concluded that they would be of "limited probative value," outweighed by "serious concerns" of prejudice and confusion.

- a) **Dimora's ethics reports were not hearsay because they were not offered to prove that he actually received things of value.**

Whether certain evidence constitutes hearsay is a conclusion of law, which this Court reviews de novo. *United States v. Rodriguez-Lopez*, 565 F.3d 312, 314 (6th Cir. 2009). Hearsay is "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." FED. R. EVID. 801(c). "A statement offered as evidence of the bare fact that it was said, rather than for its truth, is not

hearsay.” *Rodriguez-Lopez*, 565 F.3d at 314; *see also United States v. Reyes*, 406 F. App’x 405, 408 (11th Cir. 2010) (statements in report not hearsay because offered only to prove they were said).

The statements in Dimora’s ethics reports were not hearsay, because they were not offered to prove the truth of the matter asserted. Dimora’s ethics reports contain two types of relevant statements: (1) that he received things of value over \$75 from the people listed, including alleged bribers; and (2) that he received meals, food, or beverages valued over \$100 from other people listed, also including alleged bribers. *See, e.g., R. 940-2, Dimora Ethics Reports at 150-52, PageID #19168-70.*⁶ But Dimora was not attempting to prove the truth of those statements, i.e., that he actually received things of value, meals, food, or beverages. Instead, Dimora offered them “as evidence of the bare fact it was said,” to prove that he had disclosed that he received things of value from alleged bribers and to refute the government’s repeated accusations of secrecy and concealment.

The district court purported to rely on one case in support of its ruling, *United States v. Hatchett*, 918 F.2d 631 (6th Cir. 1990), *see R. 930, Mem. Op. & Order at 40, PageID #18910*, but that case actually demonstrates the court’s error. In *Hatchett*, this Court affirmed a district court’s ruling excluding out-of-court

⁶ Dimora proffered his ethics reports as Exhibits F-3 through F-15, R. 1031, Tr. Vol. 33 at 7707, PageID #27299, and later attached them as an exhibit to his sentencing memorandum, R. 940-2, PageID #19019.

statements made by Hatchett to his attorney, which he attempted to offer in support of an advice-of-counsel defense. 918 F.2d at 637-38. To establish his defense, however, Hatchett had to prove both: (1) that he disclosed facts to his attorney; and (2) that those facts were accurate and complete. *Id.* at 638; *see also United States v. Geiger*, 303 F. App'x 327, 330 (6th Cir. 2008) (“The prima facie elements of an advice-of-counsel defense are (1) full disclosure of all relevant facts and (2) good faith reliance on the advice of counsel.”). Hatchett did not proffer any other evidence that would prove the truth of his disclosures besides his out-of-court statements. *Hatchett*, 918 F.2d at 638.

The *Hatchett* Court contrasted its decision with another decision admitting out-of-court statements much more similar to the case here, *United States v. Eisenstein*, 731 F.2d 1540 (11th Cir. 1984). In *Eisenstein*, evidence of the underlying truth of the disclosures was introduced through other testimony. *See Hatchett*, 918 F.2d at 638 n.8. Accordingly, the out-of-court statements were properly admitted, not to establish their underlying truth but to prove that they were made. *Id.* Similarly, the government here introduced evidence that Dimora received things of value from the alleged bribers, and Dimora offered his ethics reports to show that he did not conceal that he received them.

- b) **The district court abused its discretion by changing its pretrial ruling and excluding evidence that would refute misleading testimony the court permitted the government to introduce repeatedly.**

Under Federal Rule of Evidence 403, a court may exclude relevant evidence only if its probative value is “substantially outweighed” by the danger of unfair prejudice or confusion of the issues. FED. R. EVID. 403. This Court “generally review[s] a district court’s evidentiary rulings for an abuse of discretion, which occurs when the court relies on clearly erroneous findings of fact, improperly applies the law, or employs an erroneous legal standard.” *Griffin v. Finkbeiner*, 689 F.3d 584, 592 (6th Cir. 2012) (internal quotation marks omitted). The district court here committed clear error in its findings of limited probative value and in its findings of likelihood of confusion and unfair prejudice, and further abused its discretion in making one-sided rulings in the government’s favor.

First, the district court relied on a clearly erroneous finding of fact in concluding that Dimora’s ethics reports would have been of “limited probative value” simply because the evidence had already established that he was “often seen in public dining with contractors seeking county work.” R. 930, Mem. Op & Order at 43, PageID #18913. Being seen in public dining with contractors is fundamentally different from publicly reporting that the contractors picked up the check, much less publicly reporting that the contractors paid for things other than dinner. The government’s own case demonstrated as much; even though its evidence showed that

Dimora was seen in public dining with contractors, the government repeatedly elicited testimony that Dimora did not disclose that he received things of value. *See* Summary Chart: Nondisclosure Questions, *infra* at 57-63. Left unrebutted, this created a false impression that Dimora concealed his receipt of things of value, from which the government encouraged the jury to convict.

The district court recognized that showing that Dimora did not disclose his receipt of things of value was key to the government's case. *See* R. 1021, Tr. Vol. 14 at 3614, PageID #25284 (“[I]t’s important I understand the government’s case to be able to indicate there wasn’t any disclosure.”). But when Dimora sought to directly refute the government’s case by introducing evidence that he did make such disclosures, this “important” evidence somehow became of “limited probative value.” That clearly erroneous finding of fact infected the court’s Rule 403 balancing and by itself constituted an abuse of discretion. *See, e.g., Doe v. Claiborne County*, 103 F.3d 495, 515 (6th Cir. 1996) (finding an abuse of discretion where “the court’s ruling indicates that it may not have appreciated the nature of the evidence and the purpose for which plaintiff was offering it”); *United States v. Lueben*, 812 F.2d 179, 184 (5th Cir. 1987) (“We hold that the district court abused its discretion in this case because it allowed the government to offer evidence on the issue of materiality but not the defense.”), *amended on other grounds*, 816 F.2d 1032.

The district court also committed clear error in its assessment of the likelihood of confusion and unfair prejudice to the government from two preprinted portions of the ethics report form: an explanation that disclosure “increases public awareness of potential conflicts and reassures Ohio citizens in the integrity of government,” and a warning that the forms are signed under penalty of perjury. R. 930, Mem. Op & Order at 43, PageID #18913; *see, e.g.*, R. 940-2, Dimora Ethics Reports at 146, 158, PageID #19164, 19176. Neither of those portions of the form would confuse the jury nor unfairly prejudice the government. They would, like the completed forms, prejudice the government only in that they contradicted the government’s theory of prosecution: that Dimora concealed his receipt of these things of value because they were bribes by which he turned the county government into a criminal enterprise. But even crediting the district court’s analysis, the court erred by excluding the evidence. Its concerns, however misplaced, could have been addressed by limiting instructions or redaction.⁷ *See, e.g., United States v. Whitmore*, 359 F.3d 609, 621 (D.C. Cir. 2004) (finding an abuse of discretion where the district court “could have adequately guarded against any risk of unfair

⁷ The district court acknowledged earlier that it could address its concerns via redaction, R. 1030, Tr. Vol. 32 at 775-76, PageID #27167-68 (“So even if at some point the form does get admitted in some fashion, and I’m not suggesting that certain things still wouldn’t be redacted because there are things that I could mention that are contained within those stipulated documents that would be very misleading to the jury.”), but did not express concerns regarding the two preprinted portions of the ethics report form until after the trial, when it did so *sua sponte*.

prejudice or undue delay” by limiting cross-examination, giving limiting instructions, or setting reasonable limits on responsive evidence); *Doe*, 103 F.3d at 515 (“Apparently, the district court did not even consider . . . the alternative of a jury instruction . . .”).

Finally, the district court abused its discretion in concluding that Dimora’s ethics reports would “open the door” for the government to seek to show that he did not fully satisfy state reporting requirements; and because evidence presented by the government would be confusing, Dimora’s reports should be excluded. R. 930, Mem. Op & Order at 41-42, PageID #18911-12. Before trial, the court ruled that Dimora could introduce his ethics reports, and that the government could, if it chose, respond with evidence “regarding the purpose of the ethics reports and also other factual matters related to the ethics report.” R. 1010, Tr. Vol. 4 at 890, PageID #22266. Neither the court nor the parties suggested any concerns about potential confusion. Thereafter, over defense objection, the court permitted the government to ask repeatedly whether Dimora disclosed in phone calls, in official county agendas, and in certain other forums that he received things of value. The court did not express any concern that those questions were confusing or misleading, or that they “opened the door” to confusing evidence regarding whether disclosure was even

required in those forums.⁸ But when Dimora sought to refute the government's misleading evidence of secrecy and concealment, the court sua sponte found that the government's proposed responsive evidence would be confusing; and instead of limiting or excluding that evidence, the court excluded Dimora's exculpatory evidence in its entirety. That conclusion was also, by itself, an abuse of discretion. *See, e.g., Whitmore*, 359 at 621 (finding an abuse of discretion where the district court "could have adequately guarded against any risk of unfair prejudice or undue delay" by, among other things, setting reasonable limits on responsive evidence); *Lueben*, 812 F.2d at 184 ("We find it difficult to understand why this testimony would not confuse the jury when offered by the government but would confuse the jury when offered by the defendant.").

Each of the district court's three errors by itself requires reversal. And in general, where, as here, "a decision to exclude evidence on the basis of Rule 403 is overly restrictive such that it precludes a [party] from the full opportunity to present his case to a jury, it will be deemed an abuse of discretion." *Doe*, 103 F.3d at 515.

⁸ In fact, there was no evidence that there was a disclosure requirement in any of the circumstances that the government asked about. If any evidence on this subject was confusing, it was the government's questions, which implied a disclosure requirement where none existed—other than in the excluded ethics reports—and which the court continuously allowed over defense objection.

2. The error excluded evidence central to Dimora’s defense and allowed the government to mislead the jury on a key issue in the case.

The district court’s error was not harmless. Dimora’s ethics reports would have refuted the government’s accusations on a central issue in the case; instead, the government was able to portray to the jury—falsely—that Dimora concealed receiving things of value, and to argue that the jury should therefore infer criminal intent. This error affected every charge in the case: the bribery counts, traditional fraud counts, obstruction counts, RICO count, and tax counts.

a) Bribery (Counts 2-9 & 11-27)

This Court “will presume that the district court’s error was reversible unless we can say, ‘with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error[.]’” *United States v. Haywood*, 280 F.3d 715, 724 (6th Cir. 2002) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). In making this determination, this Court “consider[s] the weight of all the evidence on that issue and the centrality of the issue to the verdict.” *Covington v. MCI Worldcom Network Servs.*, 93 F. App’x 837, 842 (6th Cir. 2004). Only “[i]f, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand.” *Kotteakos*, 328 U.S. at 764. If the

error “had substantial influence . . . or if one is left in grave doubt, the conviction cannot stand.” *Id.* at 765.

The government and the district court recognized that this issue was “central[] to the verdict.” The government argued repeatedly that evidence of non-disclosure was admissible because “secrecy is very relevant evidence of intent.” R. 1020, Tr. Vol. 13 at 3459, PageID #25129. The government insisted in opening and closing that his secrecy and concealment showed that Dimora knew that things of value were given to him in exchange for official acts, arguing that they needed to be concealed only if they were bribes. *See, e.g.*, R. 1045, Tr. Vol. 36 at 7981, PageID #30137 (“But . . . there sure is a need to cover your tracks, to cover up the connection, to cover up the bribe.”); R. 1046, Tr. Vol. 37 at 8328, PageID #30484 (“But people who are taking bribes, accepting bribes, selling, cashing in the power of their public offices, those people need to keep that a secret.”). The government asked sixty questions, to twenty witnesses, regarding whether Dimora disclosed that he received things of value from alleged bribers, beginning with the first government witness and ending with the last defense witness. *See* Summary Chart: Nondisclosure Questions, *infra* at 57-63. All of this led the district court to recognize that “it’s important [to] the government’s case to be able to indicate there wasn’t any disclosure.” R. 1021, Tr. Vol. 14 at 3614, PageID #25284.

But in fact, there was disclosure, in the ethics reports required by Ohio law, *see* OHIO REV. CODE §§ 102.01 & 102.02,⁹ and in a manner accessible to any member of the public, R. 1030, Tr. Vol. 32 at 7399, PageID #26991 (“They were and are stored and maintained by the Ohio Ethics Commission and are available to the public. Any member of the public may request access to these documents in person without identifying himself or herself, or may request they be provided by E-mail or regular mail.”). Dimora promised the jury in opening statement that it would see this evidence, based on the court’s pretrial ruling, then was prevented from keeping that promise. R. 1010, Tr. Vol. 4 at 1005, PageID #22379 (“And most importantly . . . these are people that Commissioner Dimora put on his state ethics reports.”); *cf. United States v. Onumonu*, 967 F.2d 782, 789 (2d Cir. 1992) (finding error excluding promised testimony not harmless and noting that “it is difficult to assess the degree of additional harm to the credibility of [the defendant’s] case caused by the timing of the ruling”).

Left un rebutted because of the district court’s later erroneous ruling, the government was permitted to create a false impression that Dimora concealed his receipt of things of value, from which the government encouraged the jury to infer criminal intent and to convict. For nine of the eleven alleged bribers, Dimora’s ethics

⁹ Dimora moved to admit sections 102.01 and 102.02 of the Ohio Revised Code in conjunction with his ethics reports. R. 1031, Tr. Vol. 33 at 7692, PageID #27284; *see United States v. Alexander*, 467 F. App’x 355, 360-61 (6th Cir. 2012).

reports would have directly refuted the accusations that he concealed his receipt of things of value. For those nine, he disclosed his receipt of things of value, meals, food, and beverages in every year for which the government charged him with accepting bribes, plus additional years:

	Things of Value Disclosed	Meals/Food/Beverages Disclosed
Kevin Kelley (Counts 2-3)	2008	2004-2008
Ferris Kleem (Counts 1.E, 4-7)	2006-2008	2005-2008
John Valentin (Count 11)	2006-2007	
Nick Zavarella (Counts 12-13)	2000-2002 2004-2007 2009	2008-2009
William Neiheiser (Counts 14-16)	2000-2001 2006-2008	2006
Steven Pumper (Counts 17-21)	2001-2009	2001-2008
Anthony Melaragno (Counts 1.F, 22-23)	2002-2007	
Robert Rybak (Counts 24-25)	2004-2008	2008
Charles Randazzo (Counts 26-27)	2003-2007	2002-2010

R. 940-2, Dimora Ethics Reports at 58, 71-73, 86-87, 97-98, 108-09, 121-22, 135-37, 151-52, 168-69, 187, 189, 202, PageID #19076, 19089-91, 19104-05, 19115-16, 19126-27, 19139-40, 19153-55, 19169-70, 19186-87, 19205, 19207, 19220. Moreover, given his full disclosures of receipt of things of value from nine alleged

bribers, Dimora's disclosures also would have had a substantial influence on the jury's view of the other two alleged bribers.¹⁰

b) Mail and Wire Fraud (Counts 2, 9, & 16)

In three counts, Count 2, 9, and 16, Dimora was charged with conspiracy to commit honest services mail or wire fraud and traditional mail or wire fraud. In each traditional fraud count, however, the government's primary alleged fraudulent concealment was identical to the bribery charge: that Dimora was receiving a thing of value in exchange for his action. R. 1045, Tr. Vol. 36 at 7995, PageID # 30151; *id.* at 8026, PageID #30182; *id.* at 8045, PageID #30201. Thus, for the same reason that the error excluding Dimora's ethics reports was not harmless as to the bribery counts, the error was not harmless as to the traditional fraud counts. *Cf. United States v. Wright*, 665 F.3d 560, 576-77 (3d Cir. 2012) (spillover effect of reversed honest services fraud charges warranted reversal of traditional fraud charges).

c) Obstruction (Counts 28 & 29)

In Count 28, Dimora was charged with conspiracy to obstruct justice by knowingly corruptly persuading another person to: (1) influence testimony; and (2)

¹⁰ One, Gina Coppers, was a woman Dimora worked with when he was mayor of Bedford Heights and with whom he was having an affair. The things of value he purportedly received in exchange for helping her get a job with a local municipal court were a hotel room for them one night, and sex. The second, Kevin Payne, also provided Dimora with intangible things of value: limo service and access to a condo, both of which Payne obtained for free, and the services of prostitutes. We submit it is unlikely that the jury would have concluded that Dimora did not list Coppers and Payne on his ethics reports because he was trying to conceal bribes.

alter, destroy, or conceal documents. R. 1045, Tr. Vol. 36 at 8075-77, PageID #30231-33. In Count 29, Dimora was charged with knowingly falsifying or causing to be falsified those same documents. *Id.* at 8079, PageID #30235. For both charges, the primary issue disputed at trial was intent. *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005) (“Only persons conscious of wrongdoing can be said to ‘knowingly . . . corruptly persuade.’”) (Count 28); 18 U.S.C. § 1519 (requiring “intent to impede, obstruct, or influence the investigation”) (Count 29).

Dimora’s ethics reports would have altered the jury’s view of the alleged obstructive conduct. Regarding testimony, the evidence established (1) that Dimora told others that Steven Pumper had been arrested, might be cooperating, and that the FBI was investigating; and (2) that they wanted to talk in person, rather than potentially be monitored. *E.g.*, R. 1038, Tr. Vol. 25 at 6030-51, PageID #28622-43. But there was no evidence that Dimora told anyone to lie. *Cf. United States v. Doss*, 630 F.3d 1181, 1190 (9th Cir. 2011) (encouraging spouse not to testify not a crime); *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997) (encouraging alleged co-conspirator not to testify not a crime). The government encouraged the jury to infer that Dimora asked others to lie to “get their story straight,” R. 1045, Tr. Vol. 36 at

8076, PageID #30232, because he took bribes and concealed them,¹¹ which Dimora's ethics reports would have directly refuted.

Similarly, Dimora's ethics reports may have altered the jury's view of the allegedly obstructive documents. The government referred to two sets of documents: checks to Pumper and invoices and an unsigned backdated contract from Pumper; and checks to Nick Zavarella, John Valentin, and Anthony Melaragno and invoices from them. All four owned construction companies and did work in Dimora's backyard. Regarding Pumper, the evidence showed that Dimora began sending him checks on May 23, 2008, the day Pumper was arrested; and that Dimora asked Pumper for invoices around the same time. But Pumper admitted on cross examination that Dimora asked for invoices on "[a]t least two occasions" earlier. R. 1035, Tr. Vol. 22 at 5370-71, PageID #27962-63. He admitted that Dimora paid Pumper's suppliers for the first phase of work, *id.* at 5376, PageID #27968, and that he told Dimora that he would keep track of all expenses for the later work as well, *id.* at 5377, PageID #27969. But Pumper failed to do so. *Id.* It is no surprise, then, that when Dimora learned that the FBI had arrested Pumper and was potentially

¹¹ The indictment alleged that "[i]t was the object of the conspiracy . . . to conceal from law enforcement and the Grand Jury the fact that Dimora had solicited and accepted bribes, kickbacks and gratuities." R. 444, 3d Superseding Indictment ¶444, PageID #9752 (emphasis added). That portion of the indictment was read to the jury. R. 1044, Tr. Vol. 35 at 7923, PageID #30079.

investigating him, he wanted to immediately pay for the work that Pumper had been lax in billing him for.

Similarly, Dimora wrote checks to Zavarella, Valentin, and Melaragno on May 23, and asked for invoices around the same time. Had the jury known that Dimora had already disclosed—publicly and repeatedly—that he received things of value from them, however, they may have been persuaded that Dimora did not intend to “impede, obstruct, or influence” an investigation. *See* 18 U.S.C. § 1519. Zavarella, Valentin, and Melaragno were friends of Dimora’s; he gave gifts to them just as they did to him. *See* R. 1036, Tr. Vol. 23 at 5642, 5668, 5671, PageID #28234, 28260, 28263; R. 1037, Tr. Vol. 24 at 5751-53, PageID #28343-45. Dimora knew that he had disclosed publicly in his ethics reports that he received things of value from them, and made no effort to alter, destroy, or hide his ethics reports. Had the jury known that Dimora had already publicly disclosed that he received things of value from Zavarella, Valentin, and Melaragno, and made no effort to hide those disclosures, its view of the checks he wrote may have been different.

d) Conspiracy to Commit RICO (Count 1)

For the same reasons that the exclusion of Dimora’s ethics reports requires reversal of the bribery, mail fraud, and obstruction charges, so does it require reversal of Count 1, the charge that Dimora conspired to operate the county as a

corrupt enterprise by committing those offenses. *See* R. 444, 3d Superseding Indictment at ¶¶102-25, PageID #9643-48.

e) Tax (Counts 34-37)

Because the exclusion of Dimora’s ethics reports requires reversal of the bribery counts, it follows that the tax counts (Counts 34-37) must be reversed as well. The tax counts depended entirely on the bribery counts—if the things of value Dimora received were bribes, then he underreported his income and his tax returns were false; if not, then his tax returns were accurate. R. 1045, Tr. Vol. 36 at 8090-91, PageID #30246-47.

B. The District Court Compounded Its Error by Excluding the Ethics Reports of Dimora’s Alleged Co-Conspirator, Who, Unlike Dimora, Admitted Taking Bribes and Disclosed Nothing.

The district court compounded its error in excluding Dimora’s ethics reports by also excluding Frank Russo’s ethics reports as “irrelevant.” R. 1029, Tr. Vol. 31 at 7349, PageID #26941. The government argued that Dimora and Russo worked together to solicit and conceal bribes. Russo testified that he took bribes for jobs and kickbacks for contracts totaling well over \$1 million, in schemes unrelated to Dimora. But from 1996 through 2006, Russo never disclosed in his ethics reports that he received anything of value from anyone, and in 2007 and 2008, he failed to disclose that he received the things of value that he admitted in his testimony. *See* Exs. G-1 through G-13, Russo Ethics Reports, App. Vol. 1 at 170a. Russo’s ethics

reports showed that, on the key issue of secrecy, Dimora did things differently from his alleged co-conspirator.

“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” FED. R. EVID. 401. Throughout opening statement and closing argument, the government argued that Dimora and Russo worked together to solicit and conceal bribes, to operate the county as a corrupt enterprise, and to “cover their tracks.” *See, e.g.*, R. 1010, Tr. Vol. 4 at 989, PageID #22363; R. 1045, Tr. Vol. 36 at 7975, PageID #30131. A comparison of their ethics reports would have shown something very different: that admitted bribe-taker Russo concealed everything, while Dimora publicly disclosed that he received things of value from the alleged bribers.

The district court’s error in excluding Russo’s ethics reports compounded the error in excluding Dimora’s. In addition to the effect on the verdict that Dimora’s ethics reports would have had directly, the stark difference with Russo’s ethics reports would have undermined the government’s allegations that they worked together to solicit and conceal bribes.

C. The District Court Committed Reversible Error by Excluding Dimora's Evidence that He Provided Similar Assistance to Many Others Without Receiving Anything of Value.

The district court applied one standard for analyzing the government's proposed evidence of "other acts," but applied a different, stricter standard to exclude Dimora's "other acts" evidence. The court's error was not harmless; the government repeatedly relied on the absence of Dimora's other acts evidence in asking the jury to convict.

- 1. The district court erred by applying a different and stricter standard to exclude Dimora's reverse 404(b) evidence than what it applied in admitting the government's 404(b) evidence.**

After admitting evidence of other acts offered by the government to prove Dimora's intent, the district court correctly stated that "the admission of 'reverse 404(b)' evidence is subject to the same standard Rule 404(b) analysis applicable to 'other acts' evidence most often offered by the government." R. 602, Op. & Order at 42, PageID #12713; see *United States v. Lucas*, 357 F.3d 599, 606 (6th Cir. 2004). Under the standard analysis, which the district court used to analyze the government's evidence, a court must decide: (1) "whether there is sufficient evidence that the other act in question actually occurred;" (2) if so, "whether the evidence of the other act is probative of a material issue other than character;" and (3) if so, "whether the probative value of the evidence is substantially outweighed by its potential prejudicial effect." *Haywood*, 280 F.3d at 720 (internal quotation marks omitted).

But the court failed to apply any steps of the standard analysis when it addressed Dimora's evidence. Instead, the court adopted a blanket rule that "reverse 404(b)" evidence is only admissible "where a defendant is alleged to have 'always' or 'continuously' committed the acts alleged," R. 602, Op. & Order at 42, PageID #12713, then made an exception for "policies or training Dimora promoted as County Commissioner," *id.* at 45 n. 17, PageID #12716. That, by itself, was an abuse of discretion. *See Griffin*, 689 F.3d at 592 (holding that an abuse of discretion "occurs when the court . . . improperly applies the law or employs an erroneous legal standard").

Under the correct legal standard, the court should have admitted Dimora's evidence of other acts: that he provided the same sort of assistance to many others without asking for, expecting, or receiving anything of value. This evidence was not offered to prove that Dimora had good character. It was offered to demonstrate his intent. The government's own case showed that Dimora's other acts evidence was relevant to intent; the government repeatedly argued and elicited testimony that would have been rebutted by that evidence. For example, the government:

- argued in closing that the jury should "consider what Dimora said to Tracey Nichols, the fact that he didn't call and ask about anyone else's grant application. . . . He asked about Kleem, the same person that was sitting there --" R. 1045, Tr. Vol. 36 at 8013-14, PageID #30169-70;

- argued in closing that “of all the bids [Dimora]’s calling back to his office about, about all the projects he wants Pat Smock to get back to him as soon as possible, it’s Ferris Kleem’s, who, by the way, is the person who’s paying for the Bare Pool, who’s financing that trip to Las Vegas,” R. 1045, Tr. Vol. 36 at 7980, PageID #30136;
- argued in closing that “[t]he more you gave [Dimora], the more open he was to what you wanted,” *id.* at 8067, PageID #30223; and
- elicited testimony from Russo that people “got special treatment because they bought us dinner and took us out,” R. 1043, Tr. Vol. 26 at 6312, PageID #29761.

By its arguments, the government acknowledged that evidence that Dimora took similar actions on behalf of other people from whom he received nothing was very relevant to his intent. *Cf. United States v. Hayes*, 219 F. App’x 114, 115-16 (3d Cir. 2007) (error to exclude evidence that defendant did not ask certain employees to fabricate tests where government charged conspiracy to fabricate test results); *Ansell v. Green Acres Contracting Co.*, 347 F.3d 515, 521 (3d Cir. 2003) (evidence of favorable treatment to other employees is as relevant to discriminatory intent as unfavorable treatment); *United States v. Garvin*, 565 F.2d 519, 521 (8th Cir. 1977) (error to exclude truthful responses to similar questions on other insurance applications where government charged scheme to defraud insurance companies).

2. The government repeatedly relied on the absence of Dimora's reverse 404(b) evidence in arguing for his conviction.

This Court presumes that the district court's error was reversible, unless it is "sure that the error did not influence the jury, or had but very slight effect." *Kotteakos*, 328 U.S. at 764; *see also Haywood*, 280 F.3d at 724. Dimora's intent was the primary—and in most counts, only—disputed issue, and the government repeatedly made arguments and elicited testimony that would have been rebutted by Dimora's evidence of other acts. Given the government's repeated reliance in its own case on the absence of the excluded evidence, the district court's error was not harmless. *Cf. United States v. Foster*, 128 F.3d 949, 956 (6th Cir. 1997) (error excluding evidence not harmless where government relied on circumstantial evidence and cooperating witness).

D. The District Court's Inadequate Instructions Permitted the Jury, at the Government's Urging, to Convict Based on Lawful Conduct.

Because of inadequate jury instructions, the government was able to persuade the jury to convict for noncriminal conduct. "This court reviews the jury charge as a whole to determine whether it fairly and adequately submits the issues and the law to the jury." *United States v. Newcomb*, 6 F.3d 1129, 1132 (6th Cir. 1993). Omitting requested instructions is reversible error if: "(1) the instructions are correct statements of the law; (2) the instructions are not substantially covered by other delivered charges; and (3) the failure to give the instruction impairs the defendant's theory of the case," *id.*, and "a trial court commits reversible error in a criminal case

when it fails to give an adequate presentation of a theory of defense,” *id.* (internal quotation marks omitted). “Even a facially correct instruction may, in light of record proof, the totality of the jury charges, or other circumstances of the case, be incomplete, misleading, confusing, or otherwise prejudicial.” *United States v. Harris*, 200 F. App’x 472, 492 (6th Cir. 2006).

A verdict must be reversed “in situations where the instruction, viewed as a whole[,] is confusing, misleading, and prejudicial.” *United States v. Adams*, 583 F.3d 457, 469 (6th Cir. 2009) (internal quotation marks omitted) (alteration in *Adams*). The proper inquiry is “whether there is a reasonable likelihood” that the jury convicted based on conduct that was not criminal. *Harris*, 200 F. App’x at 522. Here, the government’s arguments demonstrate the inadequacy of the instructions and the prejudice that resulted.

1. The district court rejected instructions that accurately explained the important difference between bribery and lobbying.

Under the federal bribery statutes, it is not illegal for a public official to accept a thing of value, even if it is given because he is a public official, and even if it is an attempt to influence him. *See United States v. Garcia*, 992 F.2d 409, 415 (2d Cir. 1993) (holding that it is “not enough for the jury to have concluded that [a public official’s] acceptance of money was ‘in connection with [his] official duties’ or ‘reasonably’ could have ‘affected’ the performance of his official duties” (second alteration in *Garcia*)). Gifts are not bribes if they are “motivated by some generalized

hope or expectation of ultimate benefit,” *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976), or given “to cultivate a business or political ‘friendship,’” *United States v. Sawyer*, 85 F.3d 713, 741 (1st Cir. 1996). A public official violates federal bribery laws only if he solicits or accepts things of value knowing that they are given in exchange for official acts. *See United States v. Ganim*, 510 F.3d 134, 141 (2d Cir. 2007) (noting that each of the federal bribery statutes at issue here—the Hobbs Act, 18 U.S.C. § 1951, bribery concerning programs receiving federal funds, 18 U.S.C. § 666(a)(1)(B), and honest services fraud, 18 U.S.C. §§ 1341, 1343, & 1346—“criminalizes, in some respect, a quid pro quo agreement—to wit, a government official’s receipt of a benefit in exchange for an act he has performed, or promised to perform, in the exercise of his official authority”).

Because of “the close relationship between lobbying activities that are lawful from the standpoint of federal law, even if deplorable, and associated or slightly more extreme versions of such conduct that can constitute federal violations,” the court must “take pains to explain the difference to the jury.” *Sawyer*, 85 F.3d at 741. The district court here refused to give three proposed instructions defining the key difference between bribery and lobbying. Each rejected instruction was a correct statement of the law and included crucial aspects of Dimora’s theory of defense not covered by the other instructions.

First, the court instructed that “property given with the sole motive of cultivating friendship is not a bribe.” R. 735-1, Jury Instructions at 23, PageID #16988. But the court omitted the critical concepts of business and political friendship from the instruction Dimora requested:

Payments for entertainment, lodging, travel, and the like are not bribes if the aim of the giver is to cultivate a business, political, or personal “friendship” with the public official.

R. 665, Proposed Supp. Jury Instructions at 2, PageID #13706; *see Sawyer*, 85 F.3d at 741.

As given, the instructions would lead jurors to believe that if a donor was motivated by the fact that Dimora held public office, rather than with the “sole motive” of personal affection, that would be a bribe. That is not the law. *See Garcia*, 992 F.2d at 415. In fact, because of the fine line between criminal and legal conduct and the possibility of juror confusion, the First Circuit held that it was reversible error in political corruption cases not to give the instruction that Dimora requested. *See Sawyer*, 85 F.3d at 741 (“Absent some explicit explanation of this kind, the conventional charge will be slanted in favor of conviction. . . . [W]here, as here, the line between the merely unattractive and actually criminal conduct is blurred, the court must take pains to explain the difference to the jury.”).

Second, Dimora requested two instructions emphasizing that a public official can legitimately be viewed as a potential customer, and that things of value are not bribes if given out of a hope of, rather than in exchange for, official action:

The generalized hope or expectation of ultimate benefit on the part of the giver does not constitute a bribe.

R. 665, Proposed Supp. Jury Instructions at 2, PageID #13706; *see United States v. Whitfield*, 590 F.3d 325, 350 (5th Cir. 2009); *Arthur*, 544 F.2d at 734; and:

The traditional business practice of promoting a favorable business climate by entertaining and doing favors for potential customers does not become bribery merely because the potential customer is the government. Such expenditures, although inspired by the hope of greater government business, are not conditioned upon the performance of an official act or pattern of acts or upon the recipient's express or implied agreement to act favorably to the giver when necessary.

R. 875-1, Mot. for New Trial, Ex. A at 5, PageID #18189; *see Arthur*, 544 F.2d at 734. The court's instructions omitted any mention of hope of government business, of the concept of the government as a potential customer, or of hope of official action, and talked only of "generalized goodwill":

[B]ribery or kickbacks are not proved if the benefit is intended to be, and is accepted as, simply an effort to buy favor or generalized goodwill from a public official who either has been, is, or may be at some unknown, unspecified later time, in a position to act favorably on the giver's interests.

R. 735-1, Jury Instructions at 22, PageID #16987. As given, the instructions would lead jurors to believe that if a donor saw the government as a potential customer and acted on a hope of securing government business or favorable official action, rather

than out of an effort to build “generalized goodwill,” that would be a bribe. That is also not the law. *See Arthur*, 544 F.2d at 734. No other instruction defined when things of value do not constitute bribes.

The government’s arguments in closing demonstrated that the jury instructions failed to adequately present the theory of defense and were, on the whole, confusing, misleading, and prejudicial. Throughout its closing, the government argued that any connection between things of value and a hope of official action beyond friendship or “coincidence” was a bribe. *See R. 1045*, Tr. Vol. 36 at 7979, PageID #30135. For example, the government argued that one phone call conclusively established that a particular dinner Kelley paid for was a bribe. *See id.* at 7999, PageID #30155; *R. 1046*, Tr. Vol. 37 at 8339, PageID #30495. But the call was insufficient evidence to convict under correct jury instructions:

Kelley: Right. Now, here’s what they want to talk to you about. . . .
I guess there’s some money in the sheriff’s accounts that they’re going to start, um, putting prisoners, you know, into some of these halfway houses.

Dimora: Yeah.

Kelley: So, that’s what they want to talk to you about a little bit.
And

Dimora: Yeah. We already know about it.

Kelley: Thank you for everything else you did.

Ex. 212, 3/6/08 Conversation Between Dimora & Kelley, App. Vol. 2. Paying for a dinner to talk with a public official about potential future funding and express thanks for past funding is consistent with lobbying—a hope of favorable action and the

cultivation of business and political friendship. But without the requested instructions, the government was able to argue that lobbying actually constituted bribery. *See also infra* Section VII.E.1; *cf. Adams*, 583 F.3d at 470 (error not harmless where government’s argument would have been limited by omitted instruction). The government misstated the law, and the jury instructions did not inform the jury that the government had done so.

2. The district court rejected instructions that explained the limits on what acts are official acts.

The district court also gave an expansive and confusing definition of “official act,” while refusing to give proposed instructions that explained the limits on what constitutes an official act. The court first gave the statutory definition of official act found in 18 U.S.C. § 201(a)(3):

The term “official act” includes any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.

R. 735-1, Jury Instructions at 23-24, PageID #16988-89. The court then added two provisions, over defense objection, that expanded the statutory definition:

Official acts include the decision or actions generally expected of the public official. In addition, “official action” includes the exercise of both formal official influence (such as a public official’s votes) and informal official influence (such as a public official’s influence on other public officials).

Id. at 24, PageID #16989; R. 1032, Tr. Vol. 34 at 7717-18, PageID #27309-10 (defense objections). The court refused to give two additional instructions:

It is not an official act for a public official merely to recommend or introduce a giver to other decision makers, where the public official is not himself a decision maker on the matter at hand. It is not enough for the government to prove that the giver knew the public official could “gain him a friendly ear.”

R. 875-1, Mot. for New Trial, Ex. A at 5-6, PageID #18189-90; *see United States v. Rabbit*, 583 F.2d 1014, 1028 (8th Cir. 1978), *abrogated on other grounds by McNally v. United States*, 483 U.S. 350 (1987); *see also United States v. Loftus*, 992 F.2d 793, 796 (8th Cir. 1993) (interpreting *Rabbit*); and

Encouraging or directing subordinate employees to assist givers does not constitute an official act, unless the public official’s actions involve a matter or issue that could properly, by law, be brought before him as a public official—here, as a County Commissioner.

R. 875-1, Mot. for New Trial, Ex. A at 6, PageID #18190; *see United States v. Muntain*, 610 F.2d 964, 969 (D.C. Cir. 1979); *see also Valdes v. United States*, 475 F.3d 1319, 1324 (D.C. Cir. 2007) (en banc) (applying *Muntain*).

The district court’s definition was overly expansive and included non-criminal conduct. While official acts include actions taken both by law and by settled practice, they do not include “every action within the range of official duties” or “any action taken in an official capacity.” *Valdes*, 475 F.3d at 1323; *see also United States v. Urciuoli*, 513 F.3d 290, 296-97 (1st Cir. 2008) (rejecting argument that use of title, letterhead, and state house office for advocacy necessarily meant actions were official

acts). For those very reasons, the First Circuit reversed a verdict based on an instruction strikingly similar to that given here:

It includes the official's behind-the-scenes activities and influence in the legislation, and it also includes other actions that the official takes in an official capacity, not what he does as a private individual but what he does under the cloak of his office.

Urciuoli, 513 F.3d at 295 n.2.¹² Likewise, the district court's expansive instruction, coupled with its rejection of Dimora's proposed instructions, failed to appropriately limit what constitutes an official act.

Again, the government's closing argument established that the jury instructions failed to adequately define "official act" and were confusing, misleading, and prejudicial. Relying on inadequate and inaccurate jury instructions, the government repeatedly argued that official acts included actions that were not part of Dimora's job as a commissioner, neither by law nor by settled practice, and thereby expanded

¹² In its order denying Dimora's motion for a new trial, the district court stated that its instruction was "substantially similar" to the instruction upheld by the Fourth Circuit in *United States v. Jefferson*. But the instruction in *Jefferson* only added a statement about settled practice:

An act may be official even if it was not taken pursuant to responsibilities explicitly assigned by law. Rather, official acts include those activities that have been clearly established by settled practice as part of a public official's position.

United States v. Jefferson, 674 F.3d 332, 338 (4th Cir. 2012). The instruction here, which added any acts "generally expected" and any "formal official influence" or "informal official influence," is much more similar to the definition rejected in *Urciuoli*.

the definition of official act beyond the limits set by the law. For example, the government argued that any time Dimora directed a staff member to do anything, he engaged in an official act, including scheduling dinner, placing appointments on his schedule, opening mail, or sending faxes. R. 1046, Tr. Vol. 37 at 8313-14, PageID #30469-70. That is not the law. *See Muntain*, 610 F.2d at 969. The government argued that writing a letter to a U.S. Senator asking for help getting someone a tourist visa is an official act, R. 1045, Tr. Vol. 36 at 8034, PageID #30190, as is writing a letter of recommendation for a friend's daughter seeking a job as a teacher, R. 1045, Tr. Vol. 36 at 8037, PageID #30193. But that is not the law either—using a title and letterhead on a letter, regarding a matter that cannot be brought before a county commissioner, is not an official act. *See Urciuoli* 513 F.3d at 296. The government argued that calling a local mayor to ask him to meet with a potential skating rink developer was an official act. R. 1045, Tr. Vol. 36 at 8043, PageID #30199. But that, again, is not the law—introducing a person to a decision maker is not, by itself, an official act. *Rabbit*, 583 F.2d at 1028. The government misstated the law, and the jury instructions did not inform the jury that the government had done so.

E. There Was Insufficient Evidence to Convict Dimora on Four Counts Under the Correct Law Defining Bribery and Official Acts.

Finally, applying the correct law that the district court omitted from its jury instructions, four counts must be reversed and dismissed based on insufficient evidence. This Court must reverse if, after viewing the evidence in the light most

favorable to the prosecution, no rational jury applying the correct statement of law could have found the elements of the crime proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Applying this standard, the counts related to Zavarella (Counts 12-13), Valentin (Count 11), and Coppers (Count 9) must be reversed.

1. Zavarella (Counts 12-13)

Nick Zavarella's testimony conclusively established that Dimora did not conspire with him to violate the Hobbs Act, nor actually violate the Hobbs Act. A Hobbs Act conspiracy requires "an agreement between two or more individuals," *United States v. Benton*, 852 F.2d 1456, 1465 (6th Cir. 1988), to "engage in conduct that would violate the statute," *United States v. Di Carlantonio*, 870 F.2d 1058, 1061 (6th Cir. 1989) (internal quotation marks omitted). The substantive crime requires proof that "a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans v. United States*, 504 U.S. 255, 268 (1992).

Zavarella's testimony, however, established that there was no agreement to violate the Hobbs Act, and that the things of value he gave Dimora were not in return for official acts. When asked why he did free brickwork for Dimora, Zavarella answered: "Well, he was a friend and a political official, and I figured if I could help

him, I'm sure he could help me.”¹³ R. 1037, Tr. Vol. 24 at 5739, PageID #28331. Zavarella's testimony establishes that he was “motivated by some generalized hope or expectation of ultimate benefit,” *Arthur*, 544 F.2d at 734; *see also Whitfield*, 590 F.3d 325 at 350, which is insufficient to violate the Hobbs Act or conspire to violate it. *See Evans*, 504 U.S. at 268; *Garcia*, 992 F.2d at 415; *see also United States v. Martinez*, 83 F.3d 371, 374 (11th Cir. 1996) (agreement to do something other than violate charged statute insufficient to establish criminal conspiracy).

2. Valentin (Count 11)

Likewise, John Valentin's testimony conclusively established that Dimora did not violate the Hobbs Act. Valentin testified that he considered the granite countertops he gave to Dimora “like a favor that I did to him in expecting in the future same favors from him, too.” R. 1036, Tr. Vol. 23 at 5641, PageID #28233. But there was no evidence that the favors he was “expecting” were official acts; in fact, the evidence indicated the opposite. Valentin testified that he told Dimora that a friend of his was a natural healer who could help Dimora's wife, but that he needed a tourist visa. *Id.* at 5650-51, PageID #28242-43. Dimora offered to help by writing a letter to a U.S. Senator asking for his help. *Id.* at 5651, PageID #28243.

¹³ Zavarella and Dimora have been friends since the 1980s. Dimora and his wife often went out to dinner with Zavarella and his wife; Dimora performed the wedding ceremony for Zavarella's brother; and Dimora sent Zavarella gift baskets for the holidays and free tickets to his annual golf outings. R. 1037, Tr. Vol. 24 at 5751-53, PageID #28343-45.

That was not an official act; there was no evidence that law or settled practice gave Dimora any influence over tourist visas as a county commissioner.¹⁴ *See Urciuoli* 513 F.3d at 296 (using title and letterhead not an official act).

3. Coppers (Count 9)

Finally, there was insufficient evidence to establish that Dimora conspired with Gina Coppers, with whom he was having an affair, to commit honest services mail fraud or traditional mail fraud by helping her get a job with a local municipality. Regarding honest services mail fraud, there was no evidence that any actions Dimora took were “official acts.” The government argued that Dimora directed his staff to pick up Coppers’s resume off of a fax machine and put it in a file. R. 1045, Tr. Vol. 36 at 8030, PageID #30186. But directing staff is not an official act. *See Muntain*, 610 F.2d at 969. In its order denying judgment of acquittal, the district court relied on a different argument: that Dimora, as a county commissioner, had authority to approve grant funds for municipalities, including the municipality Coppers obtained a job with. R. 930, Mem. Op. & Order at 23-24, PageID #18893-94. But there was no evidence that, by law or by settled practice, county commissioners had any role in hiring matters for municipalities. That Dimora approved grant funds and performed

¹⁴ Dimora also gave Valentin two cases of “very good red wine,” R. 1036, Tr. Vol. 23 at 5668, PageID #28260, invited Valentin out to dinner and to Dimora’s backyard pool, *id.* at 5642, PageID #28234, and invited Valentin to his home for family dinners, *id.* at 5671, PageID #28263. Nobody contended that any of those favors were official acts.

other official acts “during the conspiracy,” as the district court found, *id.* at 24, PageID #18894, does not transform his job assistance into an official act.

Regarding traditional mail fraud, the district court found that Dimora made a “material omission” by failing to disclose that Coppers had paid for a hotel room and that they were having sex. *Id.* at 21, PageID #18891. To be material, however, “the information withheld either must be of some independent value or must bear on the ultimate value of the transaction.” *United States v. Frost*, 125 F.3d 346, 361 (6th Cir. 1997) (failure to disclose conflict of interest to employer insufficient to establish mail fraud). There was no evidence that Coppers failed to perform her job, and although her pay was higher than her predecessor, “[t]here is no evidence in this case that [the employer] would have had to pay less money or would have received more services” if a sexual relationship was disclosed. *Id.* Thus, the omission was not material.

VIII. CONCLUSION

The judgment of conviction should be reversed. Judgment of acquittal should be entered on Counts 9 and 11-13, and the case should be remanded for a new trial on Counts 1-8, 14-29, and 34-37.

Summary Chart: Nondisclosure Questions

	Witness	Question
1.	Massie	Did you intercept any calls or see any documents in the course of your investigation in which Commissioner Dimora disclosed the fact that he was going to be traveling to Las Vegas with Mr. Kleem? (R. 1010, Tr. Vol. 4 at 1160, PageID #22534.)
2.	Kleem	Did Mr. Dimora disclose any of those things to Council President Sweeney in that phone call? (R. 1015, Tr. Vol. 8 at 2043-44, PageID #23713-14.)
3.	Dever	If Mr. Kelley had disclosed to you that Ferris Kleem had just provided hotel rooms, limousines, cabanas, food, drink, and other entertainment for Mr. Kelley and Commissioner Dimora the week before that call, what would you have done? (R. 1015, Tr. Vol. 8 at 2126, PageID #23796.)
4.		During the time that these projects were going through your office, did Mr. Melaragno or anybody else disclose that Vandra Brothers was doing free work at the Dimora residence during those years? (R. 1015, Tr. Vol. 8 at 2169, PageID #23839.)
5.		Did anybody disclose to you that on the day that you received that call about Commissioner Dimora's interest, or in any later time as you were evaluating this, did anybody disclose to you that William Neiheiser had given a \$3,600 check to Mr. Dimora on the date that you got that call? (R. 1015, Tr. Vol. 8 at 2172, PageID #23842.)
6.	Massie	On any of those documents is it disclosed anywhere that Alternatives Agency provided Commissioner Dimora with a \$826 meal, approximately, at Delmonico's Restaurant on March 6, 2008? (R. 1016, Tr. Vol. 9 at 2327, PageID #23997.)
7.		Do any of these documents disclose anywhere that Kevin Kelley paid for Commissioner Dimora, Auditor Russo, and Michael Calabrese's first class airfare to Las Vegas? (R. 1016, Tr. Vol. 9 at 2327, PageID #23997.)
8.	McDonnell	Did you know whether Alternatives Agency had any -- contributed financially to Commissioner Dimora's trip to Las Vegas in 2008? (R. 1017, Tr. Vol. 10 at 2498, PageID #24168.)

9.		Were you aware that Alternatives Agency, who held the work release contract, hosted a dinner, an \$800 dinner for Commissioner Dimora at DelMonico's in the spring of 2008? (R. 1017, Tr. Vol. 10 at 2499, PageID #24169.)
10.	Nemec	Ms. Nemec, at the time that we've been talking about, the fall of 2007 all the way through July of 2008, did anyone tell you that Commissioner Dimora had been offered or given anything of value from Alternatives Agency? (R. 1017, Tr. Vol. 10 at 2561-62, PageID #24231-32.)
11.		During the bid process that you were involved in, did anything about Alternatives Agency's bid disclose anything of value that was given to Commissioner Dimora? (R. 1017, Tr. Vol. 10 at 2572, PageID #24242.)
12.	Massie	During any of those conversations, did he disclose anything of value that Ms. Coppers offered or gave to him? (R. 1019, Tr. Vol. 12 at 3154, PageID #24824.)
13.		Having reviewed all of the OPERS documents and all of the Bedford court application files that you have, anywhere in those documents does it disclose that Ms. Coppers offered or provided Commissioner Dimora anything of value in connection with her employment? (R. 1019, Tr. Vol. 12 at 3159, PageID #24829.)
14.		Does it disclose that Ms. Coppers paid cash for one of the rooms at the Holiday Inn? (R. 1019, Tr. Vol. 12 at 3159, PageID #24829.)
15.		And through your review of all of those calls, during any of them, did it disclose that Ms. Coppers offered or provided Commissioner Dimora anything of value? (R. 1019, Tr. Vol. 12 at 3159-60, PageID #24829-30.)
16.	Spielmaker	And is there anything in that time frame in her personnel file disclosing that anything of value were given by Rob Rybak or the Plumbers Union to Commissioner Dimora? (R. 1020, Tr. Vol. 13 at 3462-63, PageID #25132-33.)
17.		And anywhere in that personnel file did you find any information about Mr. Rybak or the plumbers having given things of value to Commissioner Dimora? (R. 1021, Tr. Vol. 14 at 3479, PageID #25149.)
18.		Anything of -- anything else of value in the personnel file? (R. 1021, Tr. Vol. 14 at 3479, PageID #25149.)

19.		How about entities related to the Plumbers Union, such as JATC? (R. 1021, Tr. Vol. 14 at 3480, PageID #25150.)
20.		How about other things of value, such as meals or entertainment? (R. 1021, Tr. Vol. 14 at 3480, PageID #25150.)
21.	Farmer	During the period of your employment at the local up until 2010, did anybody tell you whether any member of the union or anyone affiliated with the union did plumbing work on the residence of Commissioner Dimora? (R. 1021, Tr. Vol. 14 at 3555, PageID #25225.)
22.	Ross	During the time that you were working on this issue, did anyone disclose to you that Mr. Rybak had given or was giving things of value to Commissioner Dimora? (R. 1021, Tr. Vol. 14 at 3587, PageID #25257.)
23.		While you were working on the initial phases of the project and making the decision to contract with DAS, did anyone disclose to you that DAS or Steve Pumper had provided anything of value to Commissioner Dimora? (R. 1021, Tr. Vol. 14 at 3591, PageID #25261.)
24.		Did anyone disclose to you in the course of working on the purchase of this garage that Mr. Pumper was and DAS were providing things of value to Commissioner Dimora? (R. 1021, Tr. Vol. 14 at 3597, PageID #25267.)
25.		During the times that you prepared to do this walk-through, during the walk-through and later, did anybody disclose to you that Steve Pumper had been giving and was giving things of value to Commissioner Dimora? (R. 1021, Tr. Vol. 14 at 3605, PageID #25275.)
26.	Kelley	Did you tell Maria Nemec, Judge Pokorny, Administrative Judge McDonnell, Commissioner Jones, Commissioner Hagan, any of those people at the county that Alternatives Agency offered or gave anything of value to Commissioner Dimora or Auditor Russo in connection with the funding? (R. 1022, Tr. Vol. 16 at 4010, PageID #25394.)
27.		To your knowledge, was it ever disclosed in public anywhere that the union was working on Commissioner Dimora's house? (R. 1027, Tr. Vol. 19 at 4759, PageID #26680.)

28.		Was it ever disclosed in public, to your knowledge, that the union was sponsoring dinners and drinks for Commissioner Dimora and others? (R. 1027, Tr. Vol. 19 at 4759, PageID #26680.)
29.	Jaworski	Was there anything in the paperwork that you reviewed that revealed that Gina Coppers gave or offered to give anything of value to Commissioner Dimora with respect to her employment? (R. 1033, Tr. Vol. 20 at 4806, PageID #27398.)
30.		Did anyone tell you whether or not Ms. Coppers gave or offered to give anything of value to Commissioner Dimora related to her employment? (R. 1033, Tr. Vol. 20 at 4806, PageID #27398.)
31.	Oyaski	During the time that this project was being considered by the department of development, did you know whether or not Ferris Kleem or Blaze Construction had provided or had promised to provide anything of value to Commissioner Dimora? (R. 1034, Tr. Vol. 21 at 4969, PageID #27561.)
32.		Nothing in the documents suggested that? (R. 1034, Tr. Vol. 21 at 4969, PageID #27561.)
33.		And Commissioner Dimora did not disclose that when he called you? (R. 1034, Tr. Vol. 21 at 4969, PageID #27561.)
34.		During the time that you were working on this extension, did any of the documents you reviewed or any of the people you talked to ever disclose that -- whether or not Commissioner Dimora was obtaining things of value from Steve Pumper, DAS, or any of his companies? (R. 1034, Tr. Vol. 21 at 4988-89, PageID #27580-81.)
35.	Herron	During the time that you were working on this issue, did anyone disclose to you or did the documents disclose to you whether or not Steve Pumper or DAS or any of Steve Pumper's companies, whether or not they had given things of value to Commissioner Dimora? (R. 1034, Tr. Vol. 21 at 5031, PageID #27623.)

36.		During the time that those loans were pending in your department, did those documents or did any person disclose to you whether or not GreenSource or Steve Pumper were giving things of value to Commissioner Dimora or had promised things of value to Commissioner Dimora? (R. 1034, Tr. Vol. 21 at 5052, PageID #27644.)
37.	Clark	Now, during the time that you were having these conversations with Mr. Pumper, you had the conversation with Mr. Smock, and you were reviewing documents, did anyone disclose to you, or did the document disclose to you, whether or not Steve Pumper or DAS or GreenSource was giving things of value to Commissioner Dimora or had promised things of value to Commissioner Dimora? (R. 1034, Tr. Vol. 21 at 5062, PageID #27654.)
38.	Pumper	What, if anything, was discussed in front of Adrian Maldonado about the kickback Commissioner Dimora would receive through Michael Gabor from GreenSource? (R. 1035, Tr. Vol. 22 at 5231-32, PageID #27823-24.)
39.	Zavarella	Did your neighbor know that you had done all of this work for Mr. Dimora free at his residence? (R. 1037, Tr. Vol. 24 at 5780, PageID #28372.)
40.		Did Mr. Neshkin know that you had done \$33,000 worth of free work for Mr. Dimora? (R. 1037, Tr. Vol. 24 at 5780, PageID #28372.)
41.	Oliver	Anywhere on there was there any disclosure of the Cavaliers tickets from December 20, 2007? (R. 1037, Tr. Vol. 24 at 5843, PageID #28435.)
42.		Anywhere in here does it disclose whether or not Steve Pumper, DAS Construction, or DAS Development gave or offered to give anything to Commissioner Dimora of value? (R. 1037, Tr. Vol. 24 at 5895, PageID #28487.)
43.		Anywhere in this document does it disclose whether or not DAS or Steve Pumper or DAS Development was giving or offering to give anything of value to Commissioner Dimora? (R. 1037, Tr. Vol. 24 at 5896, PageID #28488.)
44.		Does it state whether or not Commissioner Dimora received or was offered anything of value from Financial Network of America? (R. 1038, Tr. Vol. 25 at 6182, PageID #28774.)

45.	Shaw	Were you aware that at that time, DAS had workers at Mr. Dimora's house in October of 2004 working on an outdoor overhang? (R. 1028, Tr. Vol. 30 at 7196, PageID #26788.)
46.		You are not aware that they were doing approximately \$20,000 of work on the residence of Mr. Dimora? (R. 1028, Tr. Vol. 30 at 7196, PageID #26788.)
47.		Mr. Pumper didn't tell you that? (R. 1028, Tr. Vol. 30 at 7196, PageID #26788.)
48.		Mr. Ross didn't tell you that? (R. 1028, Tr. Vol. 30 at 7196, PageID #26788.)
49.		Mr. Dimora didn't tell you that? (R. 1028, Tr. Vol. 30 at 7196, PageID #26788.)
50.		Mr. -- did Mr. Pumper ever tell you that he was going out for drinks and dinner with Mr. Dimora three or four nights a week during that time frame? (R. 1028, Tr. Vol. 30 at 7200-01, PageID #26792-93.)
51.	C. Kleem	And you don't know whether Ferris Kleem was providing things of value to Mr. Dimora at the time that these conversations occurred, do you? (R. 1029, Tr. Vol. 31 at 7312, PageID #26904.)
52.	Maldonado	Did you know at the time this request was made of you that Commissioner Dimora was in Las Vegas as a guest of Ferris Kleem? (R. 1030, Tr. Vol. 32 at 7449, PageID #27041.)
53.		Did you know at the time this request was made of you to research this issue, whether or not Ferris Kleem had given Commissioner Dimora \$6,000 in cash several days before? (R. 1030, Tr. Vol. 32 at 7449, PageID #27041.)
54.		Did you know that Ferris Kleem had given Commissioner Dimora a television and a refrigerator? (R. 1030, Tr. Vol. 32 at 7450, PageID #27042.)
55.		Nobody told you whether or not Commissioner Dimora, Steve Pumper and Michael Gabor had agreed that Commissioner Dimora would share in the commissions that Mr. Gabor earned from GreenSource; isn't that correct? (R. 1030, Tr. Vol. 32 at 7452, PageID #27044.)

56.		Now, at the time of these conversations about GreenSource, did anybody tell you whether or not Steve Pumper had been performing free work on the residence of Commissioner Dimora? (R. 1030, Tr. Vol. 32 at 7461, PageID #27053.)
57.	Nichols	Did anybody disclose to you that in November and December of 2006 -- did anybody disclose to you that in November and December of 2006 whether or not Ferris Kleem had provided \$2,000 in cash towards a Rolex watch and a refrigerator to Commissioner Dimora? (R. 1030, Tr. Vol. 32 at 7524, PageID #27116.)
58.		At the time that Commissioner Dimora called you and asked you to meet with Mr. Bobeck, did he disclose to you whether or not Steve Pumper's company, DAS, had done considerable work on his backyard free of charge? (R. 1030, Tr. Vol. 32 at 7525, PageID #27117.)
59.		Did Commissioner Dimora tell you during these multitude of calls about this loan, that he often -- whether or not he ate at LockKeepers for free? (R. 1030, Tr. Vol. 32 at 7536, PageID #27128.)
60.		And during those conversations, he never disclosed to you that Mr. Pumper had been doing free work on his house, did he? (R. 1030, Tr. Vol. 32 at 7537, PageID #27129.)

Respectfully submitted,

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Dated: March 30, 2013

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is written in a proportionately spaced, 14-point Baskerville Old Face font, and contains 17,195 words, exclusive of the material not counted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ Christian J. Grostic
Christian J. Grostic

*Counsel for Defendant-Appellant
James C. Dimora*

CERTIFICATE OF SERVICE

I certify that on this 30th day of March, 2013, I filed *Defendant-Appellant James C. Dimora's Opening Brief* electronically with the Clerk of the United States Court of Appeals for the Sixth Circuit. The Court's ECF system will automatically generate and send by e-mail a Notice of Docket Activity to all registered attorneys currently participating in this case, constituting service on those attorneys.

/s/ Christian J. Grostic
Christian J. Grostic

*Counsel for Defendant-Appellant
James C. Dimora*

**ADDENDUM:
Designation of Relevant District Court Documents**

Relevant district court documents in the electronic record are designated below, pursuant to 6 Cir. R. 30(g).

(“R.” = Record-Entry Number from District Court Docket)

R.	Description	PageID #
1	Indictment	1
261	Superseding Indictment	1894
328	Order [Motions to Continue Trial]	3051
401	Second Superseding Indictment	4675
444	Third Superseding Indictment	9630
532	Government’s Motions in Limine	<i>Scaled</i>
547	Opposition to Government’s Motion in Limine	<i>Scaled</i>
602	Opinion & Order [Motions in Limine]	12672
629	Response to Doc. 607 and Supplement to Motion in Limine and Response to the Court’s 1/4/12 Order	12920
1010	Trial Transcript Volume 4 (Excerpts of Pretrial Rulings, Opening Statements, & Massie Testimony)	22266-67 22271 22275 22299 22301-02 22363 22367-68 22370-71 22373-74 22379-81 22534
1015	Trial Transcript Volume 8 (Excerpts of Kleem & Dever Testimony)	23713-14 23796 23839 23842
1016	Trial Transcript Volume 9 (Excerpts of Massie Testimony)	23997
1017	Trial Transcript Volume 10 (Excerpts of McDonnell & Nemecc Testimony)	24168-69 24231-32 24242

R.	Description	PageID #
1019	Trial Transcript Volume 12 (Excerpts of Massie Testimony)	24824 24829-30
1020	Trial Transcript Volume 13 (Excerpts of Trial Proceedings & Spielmaker Testimony)	25129 25132-33
1021	Trial Transcript Volume 14 (Excerpts of Trial Proceedings & Spielmaker, Farmer, & Ross Testimony)	25149-50 25225 25257 25261 25267 25275 25284
1022	Trial Transcript Volume 16 (Excerpts of Kelley Testimony)	25394
1027	Trial Transcript Volume 19 (Excerpts of Kelley Testimony)	26680
1033	Trial Transcript Volume 20 (Excerpts of Jaworski Testimony)	27398
1034	Trial Transcript Volume 21 (Excerpts of Oyaski, Herron, & Clark Testimony)	27561 27580-81 27623 27644 27654
1035	Trial Transcript Volume 22 (Excerpts of Pumper Testimony)	27823-24 27962-63 27968-69
1036	Trial Transcript Volume 23 (Excerpts of Valentin Testimony)	28233-34 28242-43 28260 28263
1037	Trial Transcript Volume 24 (Excerpts of Zavarella & Oliver Testimony)	28331 28343-45 28372 28435 28487-88
1038	Trial Transcript Volume 25 (Excerpts of Oliver Testimony)	28774
1043	Trial Transcript Volume 26 (Excerpts of Russo Testimony)	29761

R.	Description	PageID #
1028	Trial Transcript Volume 30 (Excerpts of Shaw Testimony)	26788 26792-93
1029	Trial Transcript Volume 31 (Excerpts of Trial Proceedings & Cyril Kleem Testimony)	26904 26941 26965-67
1030	Trial Transcript Volume 32 (Excerpts of Trial Proceedings & Maldonado & Nichols Testimony)	26991 27041-42 27044 27053 27116-17 27128-29 27166-69
1031	Trial Transcript Volume 33 (Excerpts of Trial Proceedings)	27284 27299
940-2	Exhibits F-3 through F-15: Dimora Ethics Reports	19019
1032	Trial Transcript Volume 34 (Excerpts of Trial Proceedings)	27309-10
665	Proposed Supplemental Jury Instructions	13705
875-1	Exhibit A to Motion for a New Trial - Emails Regarding Jury Instructions	18185
735-1	Jury Instructions	16966
1044	Trial Transcript Volume 35 (Excerpts of Jury Instructions)	30079
1045	Trial Transcript Volume 36 (Excerpts of Closing Arguments)	30131 30135-37 30151 30169-70 30182 30186 30190 30193 30199 30201 30223 30231-33 30235 30246-47

R.	Description	PageID #
1046	Trial Transcript Volume 37 (Excerpts of Closing Arguments)	30420-24 30469-70 30484 30495
1050	Trial Transcript Volume 41 (Verdict)	30640-60
930	Memorandum Opinion & Order [Motions for Judgment of Acquittal and New Trial]	18871
957	Judgment	19979
967	Notice of Appeal	20034