

05-5965-cr-L

consolidated with No. 06-0949-cr

To be argued by Peter Goldberger

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

RAFIL DHAFIR,

Defendant – Appellant.

On Appeal from Judgment in a Criminal Case filed and entered
October 27, 2005, as amended February 6, 2006, in the United States District Court
for the Northern District of New York at Syracuse
in No. 5:03-CR-0064-01 (Norman A. Mordue, U.S.D.J.)

OPENING BRIEF OF APPELLANT DHAFIR

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	vi
PRELIMINARY STATEMENT	1
STATEMENT OF JURISDICTION	2
STATEMENT OF THE ISSUES	2
STATEMENT OF THE CASE	4
a. <u>Course of Proceedings</u>	4
b. <u>Statement of the Facts</u>	10
- Help the Needy	11
- The Government’s Motivation for the Investigation	12
- Islamic Principles Relating to Charity	13
- Money Sent Abroad	14
- Funds Invested by Dr. Dhafir	15
- Charitable Tax Deductions	16
- Jarwan Visa Application	18
- Medical Billing	20
SUMMARY OF ARGUMENT	21

ARGUMENT

I. THE TRIAL COURT IMPROPERLY PROHIBITED CROSS-EXAMINATION THAT WOULD HAVE DEMONSTRATED THE GOVERNMENT’S BIAS AGAINST DR. DHAFIR BASED ON ITS INITIAL, BUT MISTAKEN AND ULTIMATELY FRUITLESS, INVESTIGATION OF DR. DHAFIR AS A SUSPECTED SUPPORTER OF TERRORISM

Standard of Review 25

Discussion 25

II. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT DR. DHAFIR OF MAIL AND WIRE FRAUD WHERE THE EVIDENCE FAILED TO ESTABLISH THAT FUNDS RETURNED TO DR. DHAFIR WERE, IN FACT, THE FUNDS DONATED BY THE PURPORTED VICTIMS OF CHARITY FRAUD AS OPPOSED TO FUNDS DONATED BY NON-UNITED STATES TAXPAYERS OR BY DR. DHAFIR, HIMSELF, AND WHERE THE EVIDENCE FAILED TO DEMONSTRATE THAT DR. DHAFIR MADE ANY MATERIALLY FALSE REPRESENTATIONS

Standard of Review 31

Discussion 31

A. The government failed to establish the charged scheme to defraud, because it did not establish that donor money, as opposed to Dr. Dhafir’s own funds, was invested in the private businesses 32

B. The government failed to establish that Dr. Dhafir misrepresented or actively concealed any material fact from HTN donors 37

III.	<p>APPELLANT DHAFIR'S TRIAL WAS RENDERED FUNDAMENTALLY UNFAIR ON ALL COUNTS BY THE GOVERNMENT'S EVIDENCE AND FINAL CLOSING ARGUMENT SUGGESTING THAT A CRIMINALLY FRAUDULENT INTENT COULD BE INFERRED FROM DR. DHAFIR'S ALLEGED FAILURE TO ADHERE TO THE GOVERNMENT'S INTERPRETATION OF ISLAMIC RELIGIOUS DOCTRINE</p>	
	Standard of Review	41
	Discussion	41
IV.	<p>JOINDER OF THE HEALTH CARE FRAUD COUNTS WITH THE REST OF THE CHARGES WAS PLAINLY ERRONEOUS BECAUSE THE ALLEGATIONS RELATING TO MEDICAL BILLINGS WERE COMPLETELY SEPARATE, DISTINCT AND UNRELATED TO THE ACTS AND TRANSACTIONS SET FORTH IN THE OTHER COUNTS OF THE INDICTMENT, AND LIKELY PREJUDICED THE DEFENSE ON THE LATTER COUNTS ON THE QUESTION OF INTENT TO DEFRAUD</p>	
	Standard of Review	50
	Discussion	50

V. AS THE EVIDENCE SHOWED NO MORE THAN ONE AGREEMENT, THE CONVICTIONS ON COUNTS 1 AND 15 ARE MULTIPLICITOUS. THE SENTENCES ON COUNTS 1, 15 AND 50 ARE ALSO ILLEGAL INsofar AS THE COURT RAN TWO YEARS OF THESE FIVE YEAR TERMS CONSECUTIVELY TO OTHER COUNTS

Standard of Review 54

Discussion 55

A. One of the Two § 371 Conspiracy Convictions Must Be Vacated and the Case Remanded for Resentencing 56

B. Because the Partially-Consecutive Sentences on Counts 1, 15, and 50 Are Unlawful, Dr. Dhafir Is Entitled to Resentencing 61

VI. THE DISTRICT COURT IMPROPERLY CALCULATED THE ADVISORY SENTENCING GUIDELINES BY IGNORING THE PLAIN LANGUAGE OF U.S.S.G. § 2S1.1 AND CONSIDERING DR. DHAFIR A THIRD-PARTY MONEY LAUNDERER (UNDER § 2S1.1(a)(2)) AS OPPOSED TO SOMEONE WHO HAD COMMITTED (AND INDEED WAS CONVICTED OF) THE UNDERLYING OFFENSES FROM WHICH THE FUNDS WERE DERIVED (UNDER § 2S1.1(a)(1))

Standard of Review 64

Discussion 64

VII. HUNDREDS OF THOUSANDS OF DOLLARS OF
RESTITUTION WERE ORDERED PAID TO ENTITIES
WHICH WERE NOT "VICTIMS" OF ANY OFFENSE, IN
VIOLATION OF GOVERNING STATUTORY
RESTRICTIONS

Standard of Review71

Discussion 71

CONCLUSION 77

CERTIFICATE OF TYPE-VOLUME COMPLIANCE

CERTIFICATE OF VIRUS COMPLIANCE

ADDENDUM (SPECIAL APPENDIX)

- Orders Involved and Judgment Appealed From SPA-1

- Guideline Provision and Statute Involved SPA-13

CERTIFICATE OF FILING AND SERVICE

TABLE OF AUTHORITIES

	<u>Page(s)</u>
 <u>CASES</u>	
<i>Albernaz v. United States</i> , 450 U.S. 333 (1981)	55
<i>American Tobacco Co. v. United States</i> , 328 U.S. 781 (1946)	55
<i>Braverman v. United States</i> , 317 U.S. 49 (1942)	58, 60-61
<i>Chapman v. California</i> , 386 U.S. 18 (1967)	41
<i>Davis v. Alaska</i> , 415 U.S. 308 (1973)	28
<i>Gall v. United States</i> , 552 U.S. —, 128 S. Ct. 586 (2007)	64, 70
<i>Henry v. Speckard</i> , 22 F.3d 1209 (2d Cir. 1994)	28
<i>Hughey v. United States</i> , 495 U.S. 411 (1990)	72-73
<i>Jones v. Wolf</i> , 443 U.S. 595 (1979)	47
<i>Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.</i> , 312 F.3d 94 (2d Cir. 2002)	47
<i>Pointer v. Texas</i> , 380 U.S. 400 (1965)	28

<i>Ray v. United States</i> , 481 U.S. 736 (1987) (per curiam)	61
<i>Serbian Orthodox Diocese v. Milivojevich</i> , 426 U.S. 696 (1976)	47
<i>Smith v. North Babylon Union Free School Dist.</i> , 844 F.2d 90 (2d Cir. 1988)	47
<i>Stirone v. United States</i> , 361 U.S. 212 (1960)	33
<i>United States v. Anderson</i> , 872 F.2d 1508 (11th Cir. 1989)	58
<i>United States v. Ansaldi</i> , 372 F.3d 118 (2d Cir. 2004)	54, 58, 60
<i>United States v. Aracri</i> , 968 F.2d 1512 (2d Cir. 1992)	59
<i>United States v. Autuori</i> , 212 F.3d 105 (2d Cir. 2000)	37
<i>United States v. Ballard</i> , 322 U.S. 78 (1944)	47
<i>United States v. Berardini</i> , 112 F.3d 606 (2d Cir. 1997)	71, 75
<i>United States v. Bellomo</i> , 176 F.3d 580 (2d Cir. 1999)	57
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	62
<i>United States v. Chacko</i> , 169 F.3d 140 (2d Cir. 1999)	54, 58

<i>United States v. Coiro</i> , 922 F.2d 1008 (2d Cir. 1991)	60-61
<i>United States v. Coriaty</i> , 300 F.3d 244 (2d Cir. 2002)	71
<i>United States v. Cotton</i> , 535 U.S. 625 (2002)	71
<i>United States v. Crowley</i> , 318 F.3d 401 (2d Cir. 2003)	25
<i>United States v. D’Amato</i> , 39 F.3d 1249 (2d Cir. 1994)	31
<i>United States v. Davila</i> , 461 F.3d 298 (2d Cir. 2006)	50
<i>United States v. Delano</i> , 55 F.3d 720 (2d Cir. 1995)	28
<i>United States v. Dhafir</i> , 461 F.3d 211 (2d Cir. 2006)	1, 5
<i>United States v. Dien</i> , 598 F.2d 743 (2d Cir. 1979)	63
<i>United States v. Fagans</i> , 406 F.3d 138 (2d Cir. 2005)	65
<i>United States v. Finley</i> , 245 F.3d 199 (2d Cir. 2001)	54
<i>United States v. Flores</i> , 447 F.3d 145 (2d Cir. 2006)	64
<i>United States v. Fuller</i> , 332 F.3d 60 (2d Cir. 2003)	62

<i>United States v. Germosen</i> , 139 F.3d 120 (2d Cir. 1998)	73
<i>United States v. Handakas</i> , 286 F.3d 92 (2d Cir. 2002)	58
<i>United States v. Helmsley</i> , 941 F.2d 71 (2d Cir. 1991)	56
<i>United States v. Jones</i> , 482 F.3d 60 (2d Cir. 2006)	60
<i>United States v. Kimbrough</i> , 552 U.S. —, 128 S. Ct. 558 (2007)	68
<i>United States v. Klein</i> , 247 F.2d 908 (2d Cir. 1957)	56
<i>United States v. McCarthy</i> , 271 F.3d 387 (2d Cir. 2001)	31
<i>United States v. McLeod</i> , 251 F.3d 78 (2d Cir. 2001)	62
<i>United States v. Moon</i> , 718 F.2d 1210 (2d Cir. 1983)	48
<i>United States v. Naiman</i> , 211 F.3d 40 (2d Cir. 2000)	31
<i>United States v. Nersesian</i> , 824 F.2d 1294 (2d Cir. 1987)	59
<i>United States v. Papadakis</i> , 510 F.2d 287 (2d Cir. 1975)	61
<i>United States v. Porter</i> , 41 F.3d 68 (2d Cir. 1994)	75

<i>United States v. Rahman</i> , 189 F.3d 88 (2d Cir. 1999) (per curiam)	47
<i>United States v. Regan</i> , 103 F.3d 1072 (2d Cir. 1997)	26, 29-30
<i>United States v. Reifler</i> , 446 F.3d 65 (2d Cir. 2006)	71-72, 74-75
<i>United States v. Reyes</i> , 302 F.3d 48 (2d Cir. 2002)	31
<i>United States v. Rosado</i> , 728 F.2d 89 (2d Cir. 1984)	29-30
<i>United States v. Rosario</i> , 386 F.3d 166 (2d Cir. 2004)	64
<i>United States v. Rybicki</i> , 354 F.2d 124 (2d Cir. 2003) (en banc)	58
<i>United States v. Shellef</i> , 507 F.3d 82 (2d Cir. 2007)	51-52
<i>United States v. Simmons</i> , 923 F.2d 934 (2d Cir. 1991)	41
<i>United States v. Skoczen</i> , 405 F.3d 537 (7th Cir. 2005)	65
<i>United States v. Southland Corp.</i> , 760 F.2d 1366 (2d Cir. 1985)	56, 59
<i>United States v. Thomas</i> , 274 F.3d 655 (2d Cir. 2001) (en banc)	54, 71
<i>United States v. Turoff</i> , 853 F.2d 1037 (2d Cir. 1988)	51

<i>United States v. Walker</i> , 191 F.3d 326 (2d Cir. 1999)	33
<i>United States v. Wilkerson</i> , 361 F.3d 717 (2d Cir. 2004)	28-29
<i>United States v. Williams</i> , 205 F.3d 23 (2d Cir. 2000)	59
<i>United States v. Young</i> , 470 U.S. 1 (1985)	29
<i>Willette v. Fischer</i> , 508 F.3d 117 (2d Cir. 2007)	55

STATUTES

18 U.S.C. § 371	<i>passim</i>
18 U.S.C. § 982(a)	8
18 U.S.C. § 1001	7
18 U.S.C. § 1341	<i>passim</i>
18 U.S.C. § 1343	<i>passim</i>
18 U.S.C. § 1347	7, 72
18 U.S.C. § 1546	7
18 U.S.C. § 1956(a)	6, 66, 68
18 U.S.C. § 1956(h)	6, 55
18 U.S.C. § 3013	61
18 U.S.C. § 3231	2

18 U.S.C. § 3553(a)	9, 64, 68, 70
18 U.S.C. § 3553(b)	62-63
18 U.S.C. § 3556	72
18 U.S.C. § 3584(a)	63
18 U.S.C. § 3585	63
18 U.S.C. § 3621(a)	63
18 U.S.C. § 3624(b)	63
18 U.S.C. §§ 3663-3664	72
18 U.S.C. § 3663A	72, 73, 75
18 U.S.C. § 3664	2, 71, 75
18 U.S.C. § 3742(a)	2
21 U.S.C. § 846	60
26 U.S.C. §§ 511-513	40
26 U.S.C. § 7201	7
26 U.S.C. § 7206(2)	7
28 U.S.C. § 1291	2
28 U.S.C. § 1826(a)	63
50 U.S.C. § 1705(b)	6, 56

RULES

Fed. R. App. P. 4(b) 2

Fed. R. App. P. 4(c) 2

Fed. R. Crim. P. 29(b) 31

Fed. R. Crim. P. 32(i) 24, 76

Fed. R. Crim. P. 52(b) 50, 60, 71

Fed. R. Evid. 403 47, 54

Fed. R. Evid. 404(b) 54

Fed. R. Evid. 701 46-47

REGULATIONS

31 C.F.R. § 575.201 et seq. 6, 56

31 C.F.R. § 575.210 11

SENTENCING GUIDELINES

U.S.S.G. § 1B1.3 73

U.S.S.G. § 2S1.1 3, 23, 64-70

U.S.S.G. § 3D1.2 69, 70

U.S.S.G. § 3D1.4 70

U.S.S.G. § 5G1.2 62

MISCELLANEOUS

- Executive Order No. 12722 (signed on August 2, 1990) 6, 11, 56
- Executive Order No. 12724 (signed on August 9, 1990) 6, 11, 56
- U. S. Sentencing Commission, Money Laundering Working Group Report (1995),
available at: <http://www.ussc.gov/moneylau/MONILAUN.HTM> 67
- U.S. Sentencing Commission, Report to the Congress: Sentencing Policy for
Money Laundering Offenses, including Comments on Department of Justice
Report (Sept. 18, 1997) available at
http://www.ussc.gov/r_congress/LAUNDER.PDF 67

PRELIMINARY STATEMENT

This appeal arises out of a conviction and sentencing in the Northern District of New York, before United States District Judge Norman A. Mordue. The court wrote several memoranda in support of orders, but none is published or available in any electronic database. There were four co-defendants on the indictment, Maher Zagha (who was not in the United States when the indictment was filed, and has not returned), Ayman Jarwan, Osameh Al Wahaidy, and Help the Needy (a corporation). Help the Needy Endowment, Inc., was added as a sixth defendant in a third superseding indictment. Jarwan and Al Wahaidy pleaded guilty. Of these, only Al Wahaidy appealed, and the decision of his appeal (No. 05-4770-cr) is reported *sub nom. United States v. Dhafir*, 461 F.3d 211 (2d Cir. 2006). (A prior interlocutory appeal by Al Wahaidy was docketed at No. 03-1444.) Priscilla Dhafir, William Hatfield, and Ahmed Ali pleaded guilty to related charges in separate cases. None appealed. This case has been before this Court previously in the form of two interlocutory appeals: Nos. 03-1441 (denial of motion to dismiss and later for bail) and 04-0812 (second pretrial bail appeal). *See also* footnote 4 *infra*.

The defendant is confined at a Federal Correctional Institution, serving the 22-year sentence imposed in this case.

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged offenses against the United States. Appellate jurisdiction rests upon 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). Id. Judge Mordue imposed sentence on October 27, 2005. Joint Appendix (hereinafter: "A-") 1130. Although proceedings on restitution were postponed pursuant to 18 U.S.C. § 3664(a)(5), an incomplete judgment was filed and entered on the docket on November 2, 2005. A-1135. The defendant filed a protective notice of appeal, (A-1143), on November 1, which was entered on the trial court's docket November 2 (docketed in this Court at No. 05-5965).¹ Proceedings on restitution were completed by the filing of a memorandum and order dated January 24, 2006. Special Appendix (included as addendum and hereinafter: SPA-) 3. The district court filed and entered an amended judgment incorporating the restitution award on February 6, 2006. SPA-5. The defendant filed a timely, *pro se* notice of appeal from that judgment (via "prisoners' mailbox") on February 16, 2006, within the 10-day time limit set by Fed.R.App.P. 4(b), (c)(1). *See* A-1197 (placed on docket February 24, 2006).

STATEMENT OF THE ISSUES

1. Whether the trial court improperly prohibited cross-examination that would have demonstrated the government's bias against Dr. Dhafir based on its initial, but mistaken and ultimately fruitless, investigation of Dr. Dhafir as a suspected supporter of terrorism?

¹ The defendant respectfully suggests that such a judgment is not "final" and does not confer jurisdiction on this Court.

2. Whether there was insufficient evidence to convict Dr. Dhafir of mail and wire fraud where the evidence failed to establish that funds returned to Dr. Dhafir were, in fact, the funds donated by the purported victims of charity fraud as opposed to funds donated by non-United States taxpayers or by Dr. Dhafir, himself, and where the evidence failed to demonstrate that Dr. Dhafir made any materially false representations?

3. Whether appellant Dhafir's trial was rendered fundamentally unfair on all counts by the government's final closing argument that a criminally fraudulent intent could be inferred from Dr. Dhafir's alleged failure to adhere to the government's interpretation of Islamic religious doctrine?

4. Whether joinder of the health care fraud counts with the rest of the charges was plainly erroneous because the allegations relating to medical billings were completely separate, distinct and unrelated to the acts and transactions set forth in the other counts of the indictment, and yet likely prejudiced the defense on those other counts on the question of intent to defraud?

5. Whether Count One and Count Fifteen, both charging conspiracies in violation of 18 U.S.C. § 371, are multiplicitous, because there was, in fact and in law, at most one illegal agreement and thus only one conspiracy?

6. Whether the district court improperly calculated the advisory Sentencing Guidelines by ignoring the plain language of U.S.S.G. § 2S1.1 and considering Dr. Dhafir a third-party money launderer (under § 2S1.1(a)(2)) as opposed to someone who had committed (and indeed was convicted of) the underlying offenses from which the funds were derived (under § 2S1.1(a)(1))?

7. Whether the restitution awarded to two New York State agencies was illegal because neither agency was a victim and neither represented any victim?

STATEMENT OF THE CASE

This appeal challenges convictions and a 22-year sentence imposed upon appellant Rafil Dhafir following a 14-week trial on charges of conspiring to violate the pre-2003 economic sanctions against Iraq, and related tax, visa and mail fraud charges. The defendant-appellant, a medical doctor who founded and operated a charitable organization to send aid to Iraqi civilians during the sanctions period, was also convicted in the same trial of Medicare fraud.

a. Course of Proceedings.

A grand jury in the Northern District of New York returned a sealed, 14-count indictment on February 19, 2003, against appellant Rafil Dhafir and four co-defendants: Maher Zagha, Ayman Jarwan, Osameh Al Wahaidy, and Help The Needy ("HTN"), a corporation. The indictment charged a conspiracy among the individual defendants and others, from at least 1995, to violate the United States sanctions against Iraq which had existed since 1990. It also alleged a conspiracy to transfer funds out of the United States to promote violations of those sanctions, and 12 particular international funds transfers for that purpose. In a coordinated sweep, arrest and search warrants were executed on February 26, 2003. Appellant Dhafir was detained pending trial, and several subsequent bail motions in the district court and in this Court were refused. On February 28, 2003, Dr. Dhafir pleaded not guilty to all charges.

On April 9, 2003, a superseding indictment was returned in 20 counts. A-55. The additional counts charged Dr. Dhafir with personal income tax evasion, based on having deducted his own extensive contributions to HTN over a six-year period. Co-defendant Al Wahaidy pleaded guilty to a one-count superseding information on April 23, 2003, reserving the right to appeal any adverse ruling on

his pending motion to dismiss.² Docket Entry (hereinafter: "DE") 147-50. Similarly, on April 25, 2003, co-defendant Jarwan pleaded guilty to a two-count superseding information.³ DE 153-156. Dr. Dhafir filed a motion to dismiss (challenging the constitutional validity of the sanctions), to recuse the judge, and for other relief, on May 20, 2003. DE 167. Following argument on June 19, 2003, the motions were taken under advisement. DE 185. Judge Mordue denied these motions by memorandum and order filed July 3, 2003.⁴ A-115.

Meanwhile, a second superseding indictment, in 50 counts, was filed July 2, 2003, against appellant Dhafir, co-defendant Zaghera, and HTN, as well as adding a new defendant, Help the Needy Endowment, Inc. ("HTNE"). A-75. The added counts charged conspiracy to defraud the IRS in relation to the amount of income tax due from donors who would deduct their contributions to HTN, the filing of a false application for tax exemption for HTNE, a false application for a visa for co-defendant Jarwan, 26 counts of health care fraud relating to Dr. Dhafir's Medicare billings, and one of making a false statement during a Medicare audit. Forfeiture

² Al Wahaidy later received a sentence of two years' probation, with 100 hours of community service, and a \$5000 fine. DE 501, 518. He took an appeal, as discussed in the Preliminary Statement.

³ Jarwan later received an 18-month prison sentence. DE 536, 537. He did not appeal.

⁴ Appellant Dhafir and co-defendant Al Wahaidy attempted to take interlocutory appeals from this order. DE 197, 198 (docketed in this Court at Dkt. Nos. 03-1441, 03-1444). This Court summarily dismissed Al Wahaidy's interlocutory appeal by Order dated October 22, 2003; so far as this Court's dockets show, no disposition was made of appellant Dhafir's identical interlocutory appeal of the dismissal motion at that time. On February 12, 2004, appellant Dhafir appealed the denial of a renewed bail application (DE 270), and that appeal was joined in this Court under the same docket (No. 03-1441). On August 16, 2004, a panel issued a Summary Order affirming the denial of bail. *United States v. Dhafir*, 104 Fed.Appx. 782 (2d Cir. 2004) (not precedential). The mandate on that affirmance terminated Dr. Dhafir's interlocutory appeal.

allegations were also added. A third superseding indictment, in 60 counts, was filed April 21, 2004, naming the same four defendants.⁵ A-129. The new counts charged mail and wire fraud, on the theory that HTN's donors were defrauded into making contributions by false promises as to how HTN's funds would be expended.

On July 29, 2004, Dr. Dhafir moved to dismiss the indictment on account of selective prosecution. DE 298. This motion was taken on submission, (DE 306, 308), and denied by Order filed September 13, 2004. A-223. Meanwhile, on August 18, 2004, the grand jury returned a Fourth superseding indictment against appellant Dhafir alone, including "sentencing allegations." A-175. This final version of the indictment contains 60 counts. A-175.

Count One charged that Dr. Dhafir, operating as Help the Needy, conspired with others unnamed from sometime before February 1995 until February 2003, in violation of 18 U.S.C. § 371, knowingly and willfully to violate 50 U.S.C. § 1705(b) by violating Executive Orders 12722 and 12724 and regulations (31 C.F.R. § 575.201 et seq.) prohibiting the transfer of funds and other financial and economic resources to anyone in Iraq (the "Iraq Sanctions"). Count Two charged Dr. Dhafir with conspiring during the same time frame, again with unnamed others, in violation of 18 U.S.C. § 1956(h), to violate *id.* § 1956(a)(2)(A) by transferring funds from the United States to a foreign location (Jordan and Iraq) for the purpose of carrying on a "specified unlawful activity," that is, violations of the Iraq Sanctions. Counts 3 through 10 charged eight particular transfers of funds, and Counts 11 through 14 another four such transfers, from banks in upstate New York to an account of Maher Zagha in Amman, Jordan, in amounts of \$20,000 to

⁵ The district court docket mistakenly notes only 49 counts.

\$200,000 each, on dates from October 1999 through November 2001, each in violation of 18 U.S.C. § 1956(a)(2)(A).

Count 15 charged another conspiracy, like Count One with unnamed others from a time prior to January 1995 through February 2003 in violation of 18 U.S.C. § 371, "to defraud the United States," by impeding the IRS in its function of ascertaining the income taxes due from donors to HTN who deducted their contributions to HTN, even though HTN was not recognized under § 501(c)(3) of the Internal Revenue Code. Count 16 charged that Dr. Dhafir violated 26 U.S.C. § 7206(2) by aiding in the preparation and submission between June and August of 2002 of a false IRS Form 1023 for recognition of exemption from tax of Help the Needy Endowment, Inc. Counts 17 through 22 were individual counts of attempted evasion of personal income tax owing from Dr. and Mrs. Dhafir for the years 1996 through 2001, respectively, in violation of 26 U.S.C. § 7201, in that each of their tax returns for those years claimed substantial deductions for the contributions they had made to HTN. In Count 23, the indictment charged that in August 2001 Dr. Dhafir caused an application for a particular immigration visa, containing a material false statement, to be presented to the INS on behalf of Ayman Jarwan to work for HTN, in violation of 18 U.S.C. § 1546.

Counts 24 through 49 of the superseding indictment charged that Dr. Dhafir executed a health care fraud in violation of 18 U.S.C. § 1347 by causing 26 specific requests for reimbursement to be submitted to Medicare, each containing the false material statement that services had been rendered by himself as a physician, when in fact they had been rendered either by a laboratory technician or by a nurse practitioner. Count 50 charged that on September 16, 2002, Dr. Dhafir knowingly and willfully made false statements to a Medicare auditor, in violation of 18 U.S.C. § 1001(a)(2), that he was always present in the office when the nurse practitioner was on site, and that he had not used any backup physicians that year.

In Counts 51-57, the indictment charged that Dr. Dhafir devised a scheme to defraud the donors to HTN, and used the mails on seven particular dates from April 2000 to February 2003 to execute that scheme, in violation of 18 U.S.C. § 1341, by assuring them that donations to HTN would be used "primarily" for the charitable purpose of alleviating hunger in Iraq, while diverting some of those funds for other projects, "including the defendant's private businesses and other commercial projects in the Middle East and the United States." Similarly, Counts 58-60 charged that he used interstate wires on three occasions in late 2002 and early 2003 for the purpose of executing the same "scheme," in violation of 18 U.S.C. § 1343.

The fourth superseding indictment concluded with criminal forfeiture allegations under 18 U.S.C. § 982(a) founded on Counts 2-14, the money laundering charges, and founded on Counts 24-49, a criminal forfeiture under 18 U.S.C. § 982(a)(7) of a sum equal to the gross proceeds of the alleged health care fraud.⁶ The prosecution filed a motion *in limine* to restrict the scope of the defense on Sept. 14, 2004.⁷ A-227. The defense responded, (A-239), and the government replied. A-245. The trial court granted the government's motion by letter-order filed October 14, 2004.⁸ SPA-1. On October 18, as trial was about to begin, the

⁶ Finally, the indictment included "sentencing allegations" referring to various guidelines adjustments, in anticipation of a possible Supreme Court decision in *Booker* which never eventuated.

⁷ The government also moved to terminate the appointment of counsel under the CJA for the corporations. DE 315. Before the court ruled on that motion, Dr. Dhafir waived any conflict and one of his attorneys agreed to act as defense counsel for the corporations. DE 336.

⁸ In the same order the court denied as untimely the defendant's request, (DE 354, 358), to take a Fed.R.Crim.P. 15 deposition of co-defendant Zagher in Jordan.

government moved orally for severance of the corporate co-defendants, HTN and HTNE, which the court granted.⁹ DE 365.

Trial before Judge Mordue began with jury selection on October 19, 2004. Counsel opened to the jury and the first witnesses were called on October 21, 2004. Trial continued for 52 days over a period of 14 weeks. Following summations and instructions, the jury deliberated for two days, issuing eight notes, before returning its verdicts. A-1113. On February 10, 2005, the jury acquitted Dr. Dhafir on Count 3, but found him guilty on all other counts.¹⁰ A-1113.

The U.S. Probation Office prepared a Pre-Sentence Investigation Report ("PSI"). Both parties filed objections to the report, and the Probation Office issued a revised report on August 23, 2005, increasing the Guidelines applicable to the money laundering counts, and on that basis the final imprisonment range. The defense then pursued its objections to the Guidelines calculation (DE 513), and responded to government objections. DE 512. Judge Mordue issued a memorandum and order on August 31, 2005, sustaining the increased guideline range as found in the revised report. A-1125.

Sentencing was held on October 27, 2005. In keeping with the memorandum filed earlier, the court determined a guideline range of 41. A-1132. Exercising his discretion under 18 U.S.C. § 3553(a) to sentence lower than the range based on Dr. Dhafir's career history of good works both as a doctor and in his pursuit of religious and charitable causes, Judge Mordue then imposed a 22-

⁹ All charges against the corporate defendants were eventually dismissed, following Dr. Dhafir's sentencing. DE 559 (filed 1/26/06).

¹⁰ Count 3 had charged a transmission of \$20,000 from the HTN account at Key Bank in Syracuse to Maher Zagher's account at the Jordan Islamic Bank on October 25, 1999. The evidence at trial did not bear out this accusation. By agreement of the parties, the forfeiture allegations were withdrawn from jury consideration after the verdicts were returned. The parties accepted Judge Mordue's suggestion at that time that the forfeiture claims be resolved on papers. (A-710).

year prison sentence, to be followed by three years supervised release, and special assessments totaling \$5900. The court waived imposition of any fine, and deferred the determination of restitution pending further hearing. Although sentencing was thus not final, the court filed and entered a judgment on November 2, 2005, (A-1135), from which the defendant filed a protective notice of appeal. A-1143.

Further submissions concerning restitution were made in writing. A-1144. On January 24, 2006, the court issued a memorandum and order directing payment of \$865,272.76 in restitution to five recipients. SPA-3. About half of the total, \$484,988, was to be paid to the New York State Attorney General's restitution account on account of the convictions on the mail and wire fraud counts.¹¹

An amended judgment reflecting the final sentence¹² was filed and entered February 6, 2006. SPA-5. Dr. Dhafir filed a timely, *pro se* notice of appeal (via "prisoners' mailbox") on February 16, 2006. *See* A-1197 (placed on docket February 24, 2006). This appeal followed.

b. Statement of the Facts.

Appellant Rafil Dhafir, M.D., a naturalized United States citizen, is almost 60 years old. Prior to his incarceration, Dr. Dhafir was an established oncologist and active member of the Muslim community in Central New York. A native of

¹¹ Upon resolution of the restitution issues, the government moved for dismissal of the indictments as to the two corporations, and to dismiss the criminal forfeiture averments. The district court granted these motions on January 25, 2006. DE 559.

¹² The judgment reflects imposition of the total 22-year (264-month) sentence as follows: concurrent sentences of 20 years each were imposed on Counts 2, 4-14 and 53-60; concurrent terms of 120 months were imposed on Counts 24-29; concurrent terms of 60 months were imposed on Counts 1, 15, 17-23, and 50-52; and a concurrent 36 month term on Count 16. The judgment further states that of the sentences imposed on Counts 1, 15 and 50, two years are to be served consecutively to the 20-year terms.

Iraq, he has been married to his American born wife, Priscilla, for 35 years. Faith has always played a central role in Dr. Dhafir's life. He is known throughout the community as an Islamic scholar and caring physician.

Help the Needy

This case arises from Dr. Dhafir's efforts to aid the civilian population of Iraq during the rule of Saddam Hussein. A-324. To that end, Dr. Dhafir in the 1990s created the charitable organization Help the Needy. A-324-25. Help the Needy's primary goal was to alleviate the suffering of the Iraqi people, especially hunger—particularly among women and children—after the devastation caused during the first Gulf War and harsh conditions resulting from the post-war U.S. sanctions. A-324; 360-61.

Soon after Iraqi forces invaded Kuwait, President George H.W. Bush issued Executive Orders to forbid trade and financial transactions with Iraq. A-426. *See* Executive Order No. 12722 (signed on August 2, 1990) and Executive Order No. 12724 (signed on August 9, 1990). A-426. Regulations to implement these Orders are found in Title 31 of the Code of Federal Regulations, Part 575. The regulations prohibit any U.S. person from transferring, directly or indirectly, funds or other financial or economic resources to the Government of Iraq or any person in Iraq. 31 C.F.R. § 575.210.

On January 16, 1991 the United States and coalition forces, as authorized by the United Nations, initiated a six-week bombing campaign inside Iraq. The bombing completely destroyed Iraq's infrastructure and economy. A-361. Hospitals, schools, water and food treatment facilities, homes, and roads were demolished. A-360-63. Besides this devastation, the sanctions prevented innocent Iraqi citizens from obtaining food, water, health care, or medication – especially women and children. A-471-72. Although living in the United States at the time,

Dr. Dhafir decided he needed to take humanitarian and non-political action to help his fellow Iraqis. A-324-25. To this end, he created Help the Needy. A-324-25.

In order to raise funds for Help the Needy, Dr. Dhafir spoke at mosques throughout the country. A-328-31. His Power Point presentation to potential donors included pictures of starving children in Iraq—the authenticity of which the government has never disputed— which he used to explain why his charity was needed to distribute food, medicine, medical supplies, and clothing to needy families. A-328-31; 501-03.

The Government's Motivation for the Investigation

The investigation of Dr. Dhafir – which ended with a tax and health care fraud prosecution, as well as a charge of conspiracy to violate the Iraq sanctions – was motivated by suspicions of terrorist funding. This started out as an investigation of structuring of bank transactions and soon turned into a multi-agency task force. A-265-66. According to a defense offer of proof at a pretrial hearing, a grand jury witness testified that an FBI agent told the witness that the reason for this investigation was a theory that Dr. Dhafir had defrauded Medicare and used the money to fund terrorism. A-259. In other words, the health care fraud investigation did not begin because there were suspicions that Dr. Dhafir was submitting false claims; rather, according to government witness Nina Carosella, the Medicare fraud investigators had no interest in Dr. Dhafir until the FBI asked them to review his billing files in 2002. A-259. (The original indictment did not even include any healthcare charges). Consistent with this imagined terrorist connection, the government executed arrest and search warrants in an aggressive manner (A-636-39), and sought and obtained Dr. Dhafir's pretrial detention, despite his being a non-violent, religiously-motivated, middle-aged professional with a stable home and family life, no criminal record, and deep ties to the

community. A-53 (highlighting that among items seized from Dr. Dhafir were photographs of Afghan fighters with AK-47s).

In addition, when questioning witnesses during their investigation, government agents made clear but inapt references to September 11, 2001. A-580; 586. The government's own witness, CPA Colleen Williams, testified that Agents Sweeney and Kolbe and AUSA Sannes came to her house three days in a row "waiving the flag and doing everything you can imagine" to get her to surreptitiously record meetings with her client, Help the Needy and its principal, Dr. Dhafir. A-580; 586. The agents went so far as to tell Ms. Williams that "9/11 would not have happened if people were more involved" and that she should be "a good citizen," implying that her accounting client was thought to be planning deadly terrorist acts. A-586.

Islamic Principles Relating to Charity

During the course of the trial, a cooperating government witness on direct examination testified regarding Islamic principles relating to charitable donations. A-331-36. Under Islamic religious law, a Muslim is obligated to help people in need. A-366-68; 508. Waleed Smari was asked to explain to the jury how one of the "five pillars of Islam" is "zakat," a requirement that all Muslims donate 2.5% of any annual increase in their net worth. A-365-66. Zakat can be used only for eight specific purposes, while "general charity," called "sadaqah," can be used for any charitable purpose. A-331-36. However, if individuals give money for a specific purpose, like buying rice, Mr. Smari testified the money must be used for that purpose. A-334-35. If it cannot be used for that purpose, under Islamic law it must be returned to the donor, the government had its witnesses explain. A-334.

In addition, Agent Kolbe testified about the Muslim concept of "hawallah," which was used by Help the Needy. Hawallah is a staple of Islamic economics, in

which the equivalent of bank transfers are accomplished on a system of trust between exchange agents in different locations. A-608-11. For example, relying on hawallah, an individual in the United States could donate \$100,000 for use in Jordan or Iraq, while someone in Jordan could invest \$100,000 in the United States, with no bank transfer occurring and no money actually changing hands. Each individual would spend the money in their geographic area according to the wishes of the other. A-608-10.

Money Sent Abroad

At trial the government presented testimony that Dr. Dhafir, in violation of the established, U.S. government-imposed sanctions, transferred money to Maher Zagher in Jordan, who would spend some of that money for food and medicine to be taken into Iraq and the rest for stipends given directly to selected families in Iraq, using couriers or through the exchange office in Amman, Jordan.¹³ A-303-04. At trial the government presented testimony by Agent Kolbe and bank statements of Oneida Savings showing the transfer of checks to Maher Zagher in Amman, Jordan. A-288-89; 691. The government also introduced ledgers and emails which, according to Agent Kolbe, revealed funds were disbursed to Mustafa Qhatan Mustafa or Iyad Abdallatif Ibrahim, who in turn took the money into Iraq. A-300. Waleed Smari also testified that he acted as the liaison between Dr. Dhafir and Mustafa and Iyad, and that his role was to assist in the disbursement of funds to Mustafa and Iyad for distribution in Iraq. A-339-42.

¹³ Although named as a defendant, Zagher has not been in the United States since before the filing of the indictment, and has therefore never been arraigned or tried.

Funds Invested by Dr. Dhafir

Mark Sweeney, a retired IRS agent, testified that he traced donations from accounts in the United States, to an account in Jordan, back to accounts in the United States, and then to businesses that were associated with Dr. Dhafir. A-432-33. While there were multiple bank accounts both in Jordan and in the United States, it appeared that each account had some connection to Dr. Dhafir and/or HTN. A-429-33. According to Sweeney, approximately \$2.5 million in donations went through the HTN account at Oneida Savings Bank (A-429), \$1.9 million went from there to Maher Zagha's account at Fleet bank (A-430), and from there \$1.5 million went to a Jordan Islamic Bank account associated with HTN and Dr. Dhafir. A-430. Sweeney testified that he traced \$298,979.04 of that money back to Dr. Dhafir's businesses (or business interests). A-456-60.

Although some of the accounts examined by Agent Sweeney, through which the traced funds passed, were opened prior to 1995, Sweeney's analysis did not include funds which existed in the account before that date. A-428-31; 462-63. Because of this it was unclear where all the funds originated, whether some were from Dr. Dhafir's substantial contributions to HTN (at least \$1.4 million)(A-377), money existing in the accounts before 1995 (A-428-31; 462-63; 601-03), business dealings he had in the Middle East (A-347), or money he sent to the Middle East prior to 1995 (A-408). Dr. Dhafir had his own personal money in the accounts used by HTN. A-347, A-372. Because of poor bookkeeping by Maher Zagha, HTN's money and Dr. Dhafir's money was sometimes confused. A-347; 372. In a September 1997 email to Maher Zagha requesting the return of funds from a HTN account to the United States, for example, Dr. Dhafir wrote "I am in need of **my** money with you. Will you please send the \$100,000 in checks of less than \$10,000 each in the name of Osameh Al Wahaidy as we did before." A-453 (emphasis added).

Donations did in fact actually reach Iraq. A-411. Agents claimed to have found a summary report in the trash of HTN's office, which Agent Kolbe used in conjunction with a ledger kept by Maher Zagha and bank statements from the Jordan Islamic Bank joint account held by Mustafa and Iyad to describe disbursements made by HTN in Iraq. A-292; 294-97. For example, from November 1999 until April 2000, these documents show that monthly disbursements to agents in Iraq ranged from \$9,000 to \$12,900. A-300. Help the Needy also shipped hospital equipment (including 50 dialysis machines), which was couriered to Iraq.¹⁴ A-302. In addition, the HTN Annual Report dated October 12, 2000, which agents also said they found in the trash, showed that money was spent on 30,000 breakfasts for people fasting in Ramadan, 10,000 cows distributed to more than one million people, the construction of four mosques, and \$20,000 a month for orphans and poor families in Iraq. A-302.

Charitable Tax Deductions

Because Help the Needy was not a registered tax exempt charitable organization (A-578), Dr. Dhafir, in approximately 1995, approached Ahmed Ali, who ran the Somali Relief Fund, an IRS-recognized charity. Dr. Dhafir asked Mr. Ali if HTN could use the Somali Relief Fund's employer identification number temporarily (while HTN was in the process of getting its own number) so that HTN donors could treat their contributions to HTN as having been made to a tax-exempt organization. Mr. Ali agreed.¹⁵ A-551-57. Dr. Dhafir did, in fact, advise

¹⁴ The medical equipment was apparently stopped at the border for some reason. A-302.

¹⁵ Mr. Ali, charged separately, pled guilty to making false statements in connection with this case.

donors that contributions were tax deductible.¹⁶ A-309. Dr. and Mrs. Dhafir themselves deducted their substantial donations to the charity.¹⁷ A-375-77.

Between approximately 1995 and approximately 2001, The Somali Relief Fund filed tax returns (Form 990s) which combined the income from its own fund raising and from HTN's. A-558-59. There was no evidence presented that Dr. Dhafir knew that HTN donations, which went through the Somali Relief Network's account, were not tax deductible for HTN's donors or for himself, and the government surveillance videotape from the Washington board of directors meeting appeared to show his good faith belief. *See* Ex. 1.404.26 A-H.

In approximately December of 2001, Dr. Dhafir requested that Ayman Jarwan, an employee of HTN, make the necessary arrangements to file a Form 1023 application with the IRS to obtain tax exempt status for a successor charity, Help the Needy Endowment (HTNE). A-522-27;1072. Mr. Jarwan consulted with accountant Colleen Williams of the CS Williams Business and Tax Service, but after reviewing the materials provided by Mr. Jarwan, Ms. Williams refused to proceed with the application and terminated her services. A-529-31.

After receiving the letter from Ms. Williams, Dr. Dhafir sought the assistance of his own tax preparer, William Hatfield, in preparing the Form 1023 for HTNE. A-591-95. Where the application asks whether the organization is an outgrowth or successor to another organization, Hatfield wrote "no," despite

¹⁶ This was the basis for many mail fraud counts.

¹⁷ This was the basis for the personal income tax evasion counts.

knowing about the prior existence of HTN. However, Hatfield admitted he never discussed this question with Dr. Dhafir.¹⁸ A-597-98.

In 2002, Mr. Ali received a letter from the New York Attorney General's Charities Bureau requesting that the Somali Relief Fund register with the state and that it provide certain information as part of the registration process. A-561-63; 1068; 1070. Mr. Ali contacted Dr. Dhafir and requested financial information relating to HTN's portion of the charity's income. A-564-66. Ultimately, Dr. Dhafir stated to Mr. Ali that as of December 31, 2001, HTN's balance with the Somali Relief Fund would be zero as HTN would have its own tax-exempt status. A-573. In approximately January of 2003, when the Charities Bureau was still seeking information about HTN donations, Dr. Dhafir asked Mr. Ali to meet him in person. A-574-75. Mr. Ali claimed that at this meeting he resisted Dr. Dhafir's request to close down the Somali Relief Network because this would not satisfy his obligations to the Charities Bureau. A-575.

Jarwan Visa Application

Ayman Jarwan came to the United States as a student in 1989. A-509. Originally, he is from Saudi Arabia and had an F1 student visa that allowed him to reside legally in the United States during his enrollment in Kansas and Michigan. A-509; 511.

Mr. Jarwan moved to Syracuse and began working for Help the Needy in August 2001. A-511. Because of his change from student to full-time employee, Mr. Jarwan needed an H-1B work visa, and he had 60 days after graduation (until August of 2001) to submit a petition for that visa. A-512; 535. Mr. Jarwan's

¹⁸ The submission of this false application was the basis for conviction on Count 16.

employer, Help the Needy, was the sponsor of his H-1B petition. A-512. Mr. Jarwan testified that in order for his visa to be approved, he had been advised that he needed to earn a salary of \$63,669 and have the title of his position changed from “office manager” to “executive director.” A-520-21. At the time, Mr. Jarwan was only earning \$30,000 a year as the office manager of Help the Needy. A-516. When he brought this to Dr. Dhafir’s attention, Dr. Dhafir told Mr. Jarwan to retain an immigration attorney for help submitting his H-1B visa. A-537.

The attorney filled out Mr. Jarwan’s visa application. Dr. Dhafir did not review the application for accuracy before Mr. Jarwan filed it with the government. A-541. On the application, Mr. Jarwan wrote that he earned the necessary \$63,669 annual salary. A-545. Mr. Jarwan testified that Dr. Dhafir told him to put down \$63,669 as his salary and that Help the Needy would pay that salary to him if the application were approved.¹⁹ A-545; 521.

After September 11, 2001, Mr. Jarwan and his wife decided to move to Jordan, since the atmosphere in this country was hostile towards Muslims and his H-1B visa still had not been approved. A-532. Before the move, he resigned his position with Help the Needy. A-532. On February 25, 2002, one day before he left for Jordan, Mr. Jarwan’s visa was approved, based on his working for Help the Needy. A-532-33. Nevertheless, Mr. Jarwan made his move and stayed in Jordan for four months before deciding to return to the United States. A-533. He contacted Dr. Dhafir and asked if he could come back and work for Help the Needy. A-533. Dr. Dhafir and the board of directors agreed to re-hire Mr. Jarwan with an annual salary of \$30,000. A-534. Dr. Dhafir specifically told Mr. Jarwan that Help the Needy hired two new salaried employees, so they could not afford to pay him \$63,669 a year. A-548. Dr. Dhafir instructed Mr. Jarwan to contact his

¹⁹ The submission of this visa application underlies the conviction on Count 16.

immigration attorney, in order to change his status with the immigration office. A-548. According to Mr. Jarwan, he contacted his attorney who submitted a new application on his behalf before he returned to the United States. A-549.

Medical Billing

As an oncologist, Dr. Dhafir treated his cancer patients with chemotherapy. A-600. Dr. Dhafir's billing manager was his wife, Priscilla Dhafir. A-627. Mrs. Dhafir submitted bills which were inconsistent with Medicare's "incident to" billing requirements, i.e., payment for services incident to a physician's services. A-648.

From March 1998 to October 2001, Mrs. Dhafir submitted bills to Medicare for "incident to" services provided by nurse practitioners when Dr. Dhafir was out of the country, thereby receiving 100% reimbursements instead of 85%. A-648; 670. During this period, Dr. Dhafir was over-reimbursed \$316,252.51, according to the government's figures. A670. In addition, both Dr. and Mrs. Dhafir allegedly made erroneous statements to Medicare investigator Nina Carosella. A-641; 643. Specifically, Ms. Carosella asked Mrs. Dhafir if Dr. Dhafir had taken any time off in 2002. Mrs. Dhafir said no, although she knew Dr. Dhafir had taken time away from the office during that period. A-641; 643. Dr. Dhafir also told Ms. Carosella, according to her testimony, that he was always physically present when Medicare was billed for chemotherapy services. A-653-54.

There was extensive testimony about the confusion, even among experts, about the "incident to" rule, and whether a doctor must be physically present in the office for Medicare to approve billing for services rendered by other members of the doctor's staff. A-630-35; 659-61. For example, Ms. Carosella, a government employee who investigated compliance with the "incident to" rule, admitted that she had to send a follow-up email to an FBI agent, in this very case, because she

was concerned she had incorrectly explained the rule in their initial correspondence. A-659-60. In addition, Ms. Carosella admitted that she had to defer questions by another doctor about the “incident to” rule to her superior, Dr. Cox, even though it was her job to investigate compliance with the rule. A-661.

SUMMARY OF ARGUMENT

1. Ruling on a prosecution motion *in limine*, the district court entered an order restricting the appellant Dhafir's right to argue or present evidence at trial concerning the government's "alleged motives in investigating or prosecuting" the case, the "integrity and/or credibility of the government's investigation," and "related issues." Pursuant to this order, the defendant was prevented from cross-examining and impeaching government witnesses to show bias or motive that would affect the credibility of their testimony. The defense theory was, in part, that the government was pursuing exaggerated charges on evidence it had misconstrued, as a result of its frustration at having found no indication, after a lengthy and in-depth investigation, of material support for terrorism or any similar charges, as the agents at first had sought. The defendant's right to present a defense, including his constitutional right to confront the witnesses against him, was thus gravely impaired throughout the trial.

2. The trial evidence was insufficient to prove the mail and wire fraud charges (Counts 51-60). Some donors requested that their contributions be earmarked in particular ways, and the evidence was uncontradicted that care was taken to use those funds as specified. As for the \$300,000 (of the millions that were donated) returned from a HTN account in Jordan to New York State and invested in private businesses in which Dr. Dhafir had an interest, the government failed to show beyond a reasonable doubt that these funds did not represent either (a) money of Dr. Dhafir already held in the Jordan account prior to 1995, (b) some

of his own donations (exceeding \$1 million in all) that he chose to recall, or (c) contributions from donors who had no objection to HTN funds' being invested at a profit for the purpose of generating increased support for HTN's charitable activities. The evidence did not show – and certainly not beyond a reasonable doubt – that the \$300,000 was in effect simply embezzled from HTN for the defendant's personal purposes, as the prosecution insinuated.

The government did not prove beyond a reasonable doubt that Dr. Dhafir made false statements to prospective donors to Help the Needy about how their contributions would be spent, as alleged in the indictment. HTN represented that contributions would be used "primarily" to send food to needy persons in Iraq, and the evidence showed that that is predominantly how the money was used. These ten counts must be reversed and remanded for entry of judgments of acquittal.

3. The trial was also rendered unfair by the government's examination of witnesses and rebuttal argument suggesting to the jury that intent to defraud could be inferred by evaluating Dr. Dhafir's conduct against certain concepts of Islamic law – as viewed by the government – rather than on purely secular and neutral principles of criminal law. The defense objection to this irrelevant and confusing testimony was overruled, and the prosecutor then exploited it in the final moments of the closing speech. For this reason, appellant is entitled to a new trial.

4. Appellant Dhafir was charged in Counts 24-50 with executing a healthcare fraud scheme by overbilling Medicare for the administration of chemotherapy in his oncology practice. These counts had nothing to do with the remaining charges in the indictment. All of the other counts concerned, one way or another, aspects of the operation of Help the Needy, the charity through which Dr. Dhafir raised money for Iraqi civilians suffering during the period of U.S. sanctions against the Saddam Hussein regime. Thus, Counts 24-50 were mis-joined with Counts 1-23 and 51-60 for trial, with a devastating impact on the jury's

view of Dr. Dhafir's integrity, which undermined his defense on the rest of the case. The failure to sever these counts was plain error, requiring a new trial.

5. Counts One and 15 of the Fourth superseding indictment both charged that Dr. Dhafir conspired with unnamed others, in violation of 18 U.S.C. § 371, during the same period of time. Both conspiracies concerned aspects of his administration of Help the Needy: Count One was the conspiracy to violate the Iraq Sanctions, while Count 15 charged a conspiracy to defraud the United States by impeding the assessment of income tax from HTN donors, whose contributions, contrary to Dr. Dhafir's assurances, were allegedly not deductible. Since the evidence did not show the existence of two separate agreements, but rather that there was, at most, one multi-faceted agreement to operate Help the Needy in violation of several federal laws, the two conspiracy counts were multiplicitous. The district court erred in entering two judgments of conviction and two sentences on these counts.

6. The court erred in its interpretation of the U.S. Sentencing Guidelines when it determined a range based on money laundering by a person not involved in the underlying offense conduct ("third party money laundering") rather than the lower range applicable to "direct laundering." Under the plain language of U.S.S.G. § 2S1.1(a), the starting point for the determination of appellant's 22-year prison sentence should have been several levels lower. SPA-13. A remand for resentencing is therefore required.

7. Finally, the court erred in ordering that Dr. Dhafir pay restitution to two entities – both of them agencies of the New York State government – which were not victims of any offense of conviction. The healthcare fraud counts concerned a scheme to defraud the Medicare program only, yet Dr. Dhafir was also ordered to make restitution to New York for losses allegedly incurred by the Medicaid program. The rationale given below was that the latter scheme was "relevant

conduct," but that concept does not apply under the restitution statute. In addition, certain funds seized from Dr. Dhafir were ordered paid over to the state's Law Department as "restitution," where the purpose was to dispose of those funds as nearly as possible to the intentions of the original donors. The "*cy pres*" concept from the law of charitable trusts has nothing to do with restitution in federal sentencing. The New York state government was simply not a "victim" of any offense, and that part of the restitution order is unlawful. Finally, the court failed to resolve a substantial objection that the defense raised to the government's proposed restitution figure, as to whether it included the value of items which were not fraudulent, or at least not within the charged fraud scheme. The court's failure to address this objection violated Fed.R.Crim.P. 32(i). For all these reasons, a remand to correct and reconsider the order of restitution is required.

ARGUMENT

I. THE TRIAL COURT IMPROPERLY PROHIBITED CROSS-EXAMINATION THAT WOULD HAVE DEMONSTRATED THE GOVERNMENT'S BIAS AGAINST DR. DHAFIR BASED ON ITS INITIAL, BUT MISTAKEN AND ULTIMATELY FRUITLESS, INVESTIGATION OF DR. DHAFIR AS A SUSPECTED SUPPORTER OF TERRORISM

Standard of Review. Review of a Confrontation Clause issue is for abuse of discretion. *United States v. Crowley*, 318 F.3d 401, 417 (2d Cir. 2003). This issue was preserved. The district court granted the government's motion *in limine* over the defense objection to preclude the defense from arguing at trial, introducing evidence or examining witnesses regarding the government's motives in prosecuting Dr. Dhafir. A-227; 239; SPA-1.

Discussion. Dr. Dhafir attempted to establish as a core defense theme that the investigation against him arose from a mistaken belief that he was a supporter of terrorism. The defense sought to show that the government witnesses, and the government itself, was biased against Dr. Dhafir because of this erroneous perception, and that it was further biased because of the enormous amount of resources that it had dedicated to the ultimately fruitless terrorism investigation. The court's restriction on the defense examination of witnesses and its closing argument deprived Dr. Dhafir of his Sixth Amendment right to confront the evidence and witnesses against him, and as a result, Dr. Dhafir's convictions should be vacated.

In an October 14, 2004 ruling, the district court granted the government's motion *in limine* to preclude Dr. Dhafir's attorneys from arguing at trial or offering any evidence concerning 1) the Government's alleged motives in investigating and prosecuting defendants; 2) the integrity and/or credibility of the Government's

investigation and prosecution of defendants; 3) the fact that defendant Dhafir was not charged with other crimes; and 4) “related issues.” SPA-1. The court, citing *United States v. Regan*, 103 F.3d 1072, 1082-82 (2d Cir. 1997), found that these issues have “no bearing on whether defendants are innocent or guilty of the charged crimes” and thus they should not be considered by the jury. SPA-1. At a conference following the issuance of the order, defense counsel expressed concern that the order would preclude the defense from “cross-examining or making arguments relative to the credibility and the integrity of the agents investigating the case.” A-262. The court responded that the defense “certainly ha[s] a right to impeach every witness.” A-263. However, in spite of the court’s assurance, the trial court repeatedly sustained government objections when defense counsel attempted to cross-examine witnesses as to bias or to discuss this theory in closing.²⁰ A-275-79; 378-404; 418-425; 615-17; 656-58; 691-92; 694-98; 702-03.

Thus, the defense was prohibited from conducting such cross-examination and demonstrating bias with government witnesses like Chad Munroe and Agent James Kolbe. The defendant was prevented from asking questions about the underlying motivations of Chad Munroe in sending defendant’s case to the task force. A-276. During cross-examination, Dr. Dhafir’s attorney attempted to question Mr. Munroe about the existence of any terrorism element to his

²⁰ Although the court’s order did not so find, the government argued that the defense did not have a good faith basis for suggesting that the government’s underlying motivation for the investigation was suspected terrorism. The defense in its September 29, 2004 opposition to the government’s motion set forth its factual predicate for its belief which included testimony before the grand jury and a letter written by a representative of Medicare to the FBI. In addition, Colleen Williams’ testimony during the course of the trial further supported this good faith basis because in attempting to obtain her proactive cooperation, the agents implied that 9/11 would not have occurred if people like Ms. Williams had cooperated. A-585.

investigation and was prohibited from doing so. A-278. Although the government claimed that Mr. Munroe was testifying as to the “modus operandi” of the entire crime (A-278), Mr. Munroe’s subjective opinions about the defendant’s activities were elicited before the jury. As an expert witness on financial transactions who has investigated “thousands” of financial crimes, Mr. Munroe’s opinion that “every part of this thing” that he investigated seemed “suspicious” spoke directly to the egregiousness of Dr. Dhafir’s activity. A-270.

The subjectivity of the officers’ analysis was confirmed during the cross-examination of Agent James Kolbe. A-620. Given this subjectivity, it was critical for the defense to explore the witness’s bias to demonstrate how his subjective impressions were affected by his pre-existing beliefs and the amount of time that he had dedicated to this investigation. Thus, the limits imposed on the defense went beyond preventing any kind of inappropriate defense, but instead prevented any cross-examination on critical issues of bias.

Then, early in the defense closing, counsel attempted to convey the defense theme that the agents did not conduct themselves as if this were a typical “white collar case involving tax evasion, allegations of health care fraud and visa fraud,” but rather like it was the kind of operation that would be mounted “if they’re going after people that they believe were dangerous human beings.” A-691. Before he could further develop this theme, the government’s objection (based on the pretrial order) was sustained. A-691-92. Immediately after that, when defense counsel was arguing that the government agents’ remarks during the interview of Colleen Williams revealed that the government was “interested in a lot more than health care fraud and visa fraud and tax evasion,” the government’s objection was again sustained and the court, after a colloquy, struck that statement. A-694-99.

By restricting Dr. Dhafir’s counsel from cross-examining the government witnesses on issues relating to bias and from arguing its bias theory in closing, the

trial court improperly prohibited Dr. Dhafir from exercising his well-established rights under the Sixth Amendment's Confrontation Clause to cross-examine witnesses and to present a defense. *See Pointer v. Texas*, 380 U.S. 400 (1965); *Davis v. Alaska*, 415 U.S. 308 (1973); *Henry v. Speckard*, 22 F.3d 1209 (2d Cir. 1994). As the Supreme Court noted in *Davis*, the "main and essential" purpose of the Confrontation Clause is to secure the opportunity to cross-examine an opposing witness, and a witness's underlying motivations are one of the "principal subjects" for cross-examination. *Davis*, 415 U.S. at 315-17.

This Court has repeatedly recognized the importance of cross-examination on issues of bias. In *United States v. Delano*, the Court held that the exclusion of certain hearsay evidence did not violate the Confrontation Clause because defendant's counsel was provided the opportunity to reveal any possible biases or self-interested motivations during cross-examination. *United States v. Delano*, 55 F.3d 720, 732 (2d Cir. 1995). Most recently, in *United States v. Wilkerson*, this Court held that the trial judge did not violate the Confrontation Clause where, although defense counsel was prohibited from discussing the results of a prior trial during cross-examination, he was still able to "vigorously cross-examine[] all of the Government's witnesses concerning their prior inconsistent statements, biases, and allegedly dubious credibility." *United States v. Wilkerson*, 361 F.3d 717, 736 (2d Cir. 2004) (emphasis added).

Unlike in *Delano* and *Wilkerson*, the court's order in this trial completely restricted Dr. Dhafir's opportunity to confront the witnesses on the critical issue of bias. The district court's finding that evidence regarding the government's motivations during the investigation was an "issue for the Court, not the jury" (citing *Regan*, October order) misapprehended the reason that the defense wanted to delve into this subject matter. While the defense conceded that the government's motivations did not provide a substantive defense to the underlying

charges in the case, the defense wanted to illustrate how this initial motivation caused the government agents to be biased against Dr. Dhafir. By failing to distinguish relevance to the witness' motivation from relevance to the charges against the defendant, the trial judge wrongly prohibited Dr. Dhafir from exercising his Sixth Amendment rights.

Similarly, this restriction was not necessary in order to avoid jury confusion. The government relied on preliminary statements made by Dr. Dhafir's attorneys about the relationship between the investigation and terrorism to establish the risk that Dr. Dhafir's attorneys would attempt to "distract and confuse the jury" during the trial. A-228. Without explaining which aspects of the investigation could possibly confuse the jury, the government requested a sweeping ban on information that it claimed was not relevant to Dr. Dhafir's guilt or innocence and information that is relevant to establishing bias.

The government relied on *United States v. Young*, 470 U.S. 1 (1985), to support its proposition that "district courts have the responsibility to prevent arguments of defense counsel from 'going out of bounds'." A-228. However, this case is completely inapplicable. In *Young*, the Court held that a prosecutor's subjective statements before a jury did not constitute plain error where they were in response to the defendant's prosecutorial attacks. *Young*, 470 U.S. at 12-13. The Court suggested that district judges should take "prompt corrective action" when arguments are made, but it did not endorse any kind of sweeping ban on certain types of arguments or a restriction of cross-examination. *Id.* at 13.

The government's motion and the judge's order improperly rely on *United States v. Regan* and *United States v. Rosado* as authority for limiting the introduction of evidence related to the investigation. *Regan*, 103 F.3d 1072, 1081-82 (2d Cir. 1997); *Rosado*, 728 F.2d 89 (2d Cir. 1984). Both of those cases, however, concern issues of alleged prosecutorial misconduct and not the

Confrontation Clause. In *Regan*, the Second Circuit held that the defendant was not entitled to present a “contrived materiality” defense to the jury. *Id.* at 1082. Citing *Rosado*, the Court held that a motion to dismiss an indictment on account of “outrageous government conduct” is an issue for the court and not the jury. *Id.* It is this language that the district court quotes in its order. Unlike the defendant in *Regan*, however, Dr. Dhafir’s counsel did not intend to present a defense of prosecutorial misconduct. In fact, during the pretrial conference, Dr. Dhafir’s counsel expressly stated that the defendant “took no issue” to “being precluded from raising the issue of selective prosecution.” A-258.

Finally, although the government’s motion *in limine* requests that the court prohibit the introduction of evidence related to the investigation in order to protect the jury from being confused by irrelevant evidence, the government argued during the trial that the prohibition of evidence and information related to the investigation was necessary to prevent an appeal based on prosecutorial misconduct. The government’s contention that the defense should not be able to reference the relationship between terrorism and the investigation in order to prevent them from raising an appeal “based on the fact that there was this 600-pound gorilla of terrorism” (A-278) in the courtroom does not justify limiting Dr. Dhafir’s Sixth Amendment rights. That strategic choice was for the defense side to make.

Neither the arguments presented by the government’s motion *in limine*, the arguments presented by the government during trial, nor any of the relevant case law justified the district court’s restriction on cross-examination or argument relevant to the government’s bias. Because the district court’s order violated Dr. Dhafir’s rights under the Confrontation Clause, the trial court’s order constituted an abuse of discretion. This error permeated the trial and effectively foreclosed Dr.

Dhafir from presenting a crucial portion of his defense. Accordingly, all of the convictions must be reversed.

II. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT DR. DHAFIR OF MAIL AND WIRE FRAUD WHERE THE EVIDENCE FAILED TO ESTABLISH THAT FUNDS RETURNED TO DR. DHAFIR WERE, IN FACT, THE FUNDS DONATED BY THE PURPORTED VICTIMS OF CHARITY FRAUD AS OPPOSED TO FUNDS DONATED BY NON-UNITED STATES TAXPAYERS OR BY DR. DHAFIR, HIMSELF, AND WHERE THE EVIDENCE FAILED TO DEMONSTRATE THAT DR. DHAFIR MADE ANY MATERIALLY FALSE REPRESENTATIONS

Standard of Review: The court reviews *de novo* a challenge to the sufficiency of the evidence, *United States v. McCarthy*, 271 F.3d 387, 394 (2d Cir. 2001), but views the evidence in the light most favorable to the government. *United States v. Naiman*, 211 F.3d 40, 46 (2d Cir. 2000). Evidence is insufficient if a properly instructed jury could not find every element of the offense, properly construed, beyond a reasonable doubt. *E.g.*, *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994). At the close of the government's case, Judge Mordue reserved on the defense motion for judgment of acquittal, (A-672-73), thereby preserving Dr. Dhafir's right to appeal for lack of sufficiency of the evidence. Fed.R.Crim.P. 29(b); *see United States v. Reyes*, 302 F.3d 48, 50 (2d Cir. 2002) (sufficiency of the evidence is determined based on the state of the record at the time the motion is reserved).

Discussion: In counts 51-60, the indictment charged Dr. Dhafir with mail and wire fraud, 18 U.S.C. §§ 1341, 1343, based on executing a scheme to defraud which involved his allegedly diverting a portion of HTN donor funds to his own personal interests. Dr. Dhafir did not contest that certain HTN funds were invested in businesses that he controlled, but he maintained that this was done in order to

increase the charity's revenues. The government's theory, however, was that these funds were diverted by Dr. Dhafir from the charity for his personal benefit and in any event contrary to promises made to donors concerning how their contributions would be used. Specifically, the charged scheme to defraud involved alleged misrepresentations to donors by Dr. Dhafir and concealment of the facts regarding the true purpose for the donations. Agent Sweeney testified that he could trace funds from HTN accounts to Dr. Dhafir's businesses. But the evidence failed to demonstrate either that these funds represented contributions originating with supporters who had been promised that their donations would not be used in this way, or that the HTN funds used for business investment purposes represented *donor* contributions at all, as opposed to a retraction of some of Dr. Dhafir's *personal* contributions (which far exceeded the amount of money returned to be invested in his businesses) or from some other source. Given the government's complete failure to establish that donors' contributions were improperly invested in these businesses, no rational trier of fact could have found appellant Dhafir guilty beyond a reasonable doubt. In addition, the government failed to establish that Dr. Dhafir made any materially false or fraudulent pretenses, representations or promises to HTN's donors.

A. The Government Failed to Establish the Charged Scheme to Defraud, Because It Did Not Establish that Donor Money, as Opposed to Dr. Dhafir's Own Funds, Was Invested in the Private Businesses.

The alleged scheme to defraud, as charged in Counts 51-60 of the fourth superseding indictment, involved soliciting donations "by focusing primarily on the needs of starving children in Iraq, but then divert[ing] those donations to support activities other than those identified in HTN's solicitations, including the defendant's private businesses and other commercial projects in the Middle East

and the United States.” A-212-13 (¶ 80). Thus, the government argued in closing that the “core” focus of the mail and wire fraud counts was on Dr. Dhafir’s “using HTN’s money as if it’s his own.” A-678-79. While evidence at trial demonstrated that some money was transferred out of HTN’s accounts to Dr. Dhafir’s own personal business interests, the government failed to demonstrate that these funds were not from (1) Dr. Dhafir’s own substantial contributions to HTN (at least \$1.4 million over an eight-year period) (A-377), (2) money existing in HTN accounts before 1995 (A-428-31; 462-63; 601-603), and/or (3) donors who gave for HTN’s general charitable purposes, including investments designed to increase the value of donations, without reliance on any promise that the funds would be used exclusively for direct food aid. Where the government at trial fails to establish the scheme to defraud as charged, there is insufficient evidence to support the defendant’s conviction of mail or wire fraud. *See United States v. Walker*, 191 F.3d 326, 334 (2d Cir. 1999). In addition, neither the government nor the court may revise the scheme to defraud charged in the indictment without creating a “constructive amendment” that violates the Fifth Amendment. *See Stirone v. United States*, 361 U.S. 212, 217 (1960).

The first gaping hole in the government’s evidence on these counts arose from its failure to prove that the money Dr. Dhafir withdrew from HTN accounts and used to invest in his personal business interests was donor money, rather than his own – either from pre-1995 funds or given as donations. According to the government’s witness, IRS Agent Sweeney, and the government’s own money flow charts (A-780-82), from 1995 to 1999 Dr. Dhafir allegedly diverted \$298,979.04 of money that had been deposited to HTN accounts to his personal

business interests.²¹ A-458. In the same time period, Dr. Dhafir's personal income tax deductions show that he donated \$1,157,386.00 – more than three times the amount he withdrew for investment in his private businesses, and Agent Kolbe confirmed that these donations did in fact occur because they found “actual bank records,” tax returns, and copies of checks in Dr. Dhafir's house that verify these amounts. A-376-77.

Agent Sweeney explained in great detail how he traced the \$298,979.04 from HTN's account in Jordan, back to bank accounts in the U.S. and eventually to Dr. Dhafir's businesses in New York State. A-456-60. This occurred primarily in two large transactions from the Jordan Islamic Bank. A-307; 431-32.

First, on January 2, 1997, a check for \$100,000 was sent from the Jordan Islamic Bank to Osameh Al Wahaidy, which he deposited in HTN's account he opened at M&T Bank. A-284; 307; 435-40. Next, in a series of three wire transfers totaling \$147,000, money was transferred from HTN's account at the Jordan Islamic Bank to Maher Zagha's account at Fleet Bank. A-448-50. From there, \$200,000 was sent to the M&T account Mr. Al Wahaidy opened in HTN's name in two series – \$100,000 in each series – in a total of 22 checks, all for amounts under \$10,000. A-451-452; 1079. The first series of 11 checks occurred in August and September of 1997 and the second series of 11 checks occurred in January and February of 1998. A-45153. According to the government, this \$300,000 in total transfers from the Jordan Islamic Bank, with one transaction going through Fleet Bank, to the M&T account represents the funds Dr. Dhafir diverted to his personal business interests. A-451-58.

²¹ The government's second money flow chart, which covers the period of September 1999 to February 2003, shows that no money was diverted to Dr. Dhafir's personal business interests during these 3½ years.

Agent Sweeney also testified in great detail about how he traced these funds to Dr. Dhafir's business interests.²² Some of Dr. Dhafir's personal funds (not previously designated as donated) were mixed in with the \$300,000 of donor money in the same M&T account, so Agent Sweeney excluded the amount of Dr. Dhafir's personal funds from his calculations. A-456-58. Because "money loses its character" in the account, he "looked at the total amount of money that was deposited into the account and the total checks that were written on the account, and ... the sources" A-456-57. In the end, Agent Sweeney testified that after he "backed out the money that Dr. Dhafir put in" the M&T account, the checks drawn on that account and sent to Dr. Dhafir's business interests totaled \$298,979.04. A-457-58. There was a balance remaining in the account of \$1,020.96, which together is exactly \$300,000. A-458.

Agent Sweeney's analysis implicitly recognized a crucial point: to be guilty, Dr. Dhafir had to have defrauded innocent donors; he could not "defraud" himself. Thus, the money "diverted" to his businesses had to be other donors' money, not his own. Agent Sweeney's analysis, however, did not go far enough: While Sweeney factored out Dr. Dhafir's personal non-donation funds which were commingled in the M&T account in New York, he never determined how much of the "donation" money returned from Jordan represented donations *from Dr. Dhafir*, as opposed to donations from third-parties. Since, according to the government's witnesses and evidence, Dr. Dhafir contributed over a \$1,000,000 of his own money to HTN during the time period (1995-1999),²³ the government's

²² Agent Sweeney traced the money to the following business affiliated with Dr. Dhafir: Clean Tech, ALBERR, Sunderson's, and MCMC. A-440-46; 455-56.

²³ Dr. Dhafir's donations account for more than one-fifth of the total donations to HTN and its predecessor organization, which according to the government, totaled \$5.5 million. A-377. The PSR (¶43) contains a finding, adopted by the judge at

evidence fails to prove that the money he allegedly “diverted” was anything but his own.

Although there is some ambiguity in the transcript because Agent Sweeney used the phrase “public donations” when describing the invested funds, the only reasonable reading of the record is that these “public donations” included the donations made by Dr. Dhafir. *See* A-456-58. In fact, when Agent Sweeney testified about “backing out” Dr. Dhafir’s personal money from the \$300,000 in commingled donor money in the M&T account (which served as the pool of funds “diverted” to Dr. Dhafir’s businesses), he specified that Dr. Dhafir’s funds (excluded from the calculation) were an \$82,000 deposit from Madison Medical Center (“MMC”) which represented money Dr. Dhafir was owed and it was deposited in the M & T account so Dr. Dhafir could make expenditures; a \$1,000 check Dr. Dhafir himself deposited in the account; and several other smaller deposits from various sources that totaled \$5793.17. A-458.

In addition to the invested funds belonging to Dr. Dhafir rather than to third party donors, the government’s conclusion that these funds came from others’ donations is rendered invalid because both Agent Kolbe and IRS Agent Sweeney testified that no government agent traced or tried to account for the sources of the money that was in HTN’s New York accounts before 1995. A-428-31; 462-63; 601-03. Without knowing how much money was in those accounts before 1995 and whom that money came from, there is no way to conclude that the money sent from New York to Jordan from 1995-2001 represented third party donor money, as opposed to other funds that had been held in those accounts.

sentencing, that the total amount of Dr. Dhafir’s donations over this eight year period was \$1,450,134. This corresponds almost exactly with Agent Kolbe’s totals. A-377.

Thus, the evidence, even viewed in the light most favorable to the government, reveals that no rational juror could have found that the money invested in Dr. Dhafir's business interests represented funds from third party donors as opposed to a recall of a portion of his own generously donated money. Accordingly, the government failed to prove its charged scheme to defraud and the mail and wire fraud convictions must be reversed.

**B. The Government Failed to Establish that Dr. Dhafir
Misrepresented or Actively Concealed any Material Fact
from HTN Donors**

The government also failed to establish the charged scheme to defraud because it did not establish that Dr. Dhafir made any materially "false or fraudulent pretenses, representations or promises," as required by both the mail and wire fraud statutes. See 18 U.S.C. §§ 1341, 1343; *see also United States v. Autuori*, 212 F.3d 105, 115 (2d Cir. 2000) (misrepresentations must be "material"). Specifically, based on the testimony that the government presented at trial from individual donors, it is clear that (1) either the representations made to that donor were not false or fraudulent, and did not involve active concealment of a material fact; and/or (2) the government failed to prove that any donor's money was not used in the manner expected by that donor, insofar as that expectation was based on any representations for which Dr. Dhafir was responsible.

The charged scheme to defraud is that Dr. Dhafir solicited donations "by *focusing primarily* on the needs of starving children in Iraq," but then, *inter alia*, diverting the donations for his own benefit. A-212-13 (¶ 80) (emphasis added). For the most part, the testimony from the donors supported the notion that there was no specific or express promise made about how the donated funds would be used within the broad outline of HTN's stated charitable purposes (to "help the

needy” who were suffering in Iraq due to the effect on innocent individuals of the sanctions directed by the United States against the Saddam Hussein regime). For example, Dr. Mahir Majid testified that Dr. Dhafir told him that HTN was raising money “basically [as] charity to help the needy people, to help the needy, the children, people, to feed the people, and to help with children, medication, food, all that stuff.” A-413. While Dr. Majid was never told that part of the HTN money was also being used to buy religious items or to build mosques, he did not testify that had he known that some fraction of the funds was being used for these projects, he would not have donated to HTN. A-414-16.

Mr. Muhammad Massod Naim testified that he donated to HTN after hearing Dr. Dhafir speak about the “hardship on the people of Iraq and sending money to them.” Mr. Naim understood that the hardship involved “[b]asically [the] lack of food and shelter and health facilities.” A-467(emphasis added). Mr. Naim also identified a brochure that he saw prior to donating to HTN that discussed the organization’s purpose as “officially in the United States of America for *helping and assisting* the needy, *especially* the Iraqi Muslims.” A-471 (emphasis added). Mr. Naim also read from other portions of the brochure that focused on malnourishment and unemployment in Iraq. A-471-72. Finally, Mr. Naim testified that he would not have made the same donation if he had been told that “the money” would be used in part to promote religious objectives like buying books or building mosques. A-472-73. However, the government never established that “the money” that Mr. Naim donated was used for any such religious objective, or that such objectives were outside any reasonable understanding, by the class of persons to whom the HTN literature was directed, of the terms “helping and assisting the needy.” Indeed, Prof. Smari, the government’s witness, testified that when a donor specified how a donation should be used, HTN was always careful to make sure that the donor’s wishes were respected. A-331.

Smari also carefully distinguished between the terms “needy” (a broader concept) and “poor,” as used in the context of Islamic religious charitable giving. A-366.

Dr. Khalid Qazi testified that Dr. Dhafir told him that HTN “*primarily* would deal with sending relief to . . . Iraqi people.” A-475(emphasis added). The materials provided to Dr. Qazi “in general, described the plight of the Iraqi people and the dictatorship and the need for sending the relief to the people of Iraq.” A-476. Dr. Qazi decided to donate because of “the perception of the real need in Iraq, dictatorship, and the . . . overwhelming emotions and support that was available in the community to help that cause.” A-479. Dr. Qazi thought that the donations would reach the intended recipients. *Id.* However, Dr. Qazi was uncertain about whether he would have donated had he known that some of the money would be used for something other than “children or food or medicine in Iraq.” A-480-81. When Dr. Qazi sent in his donation, he wrote a letter stating the money should be used for “clothing, medication and food.” A-483-84. Dr. Qazi testified that he perceived that his donation “was used for the purpose it was sent for.” A-490. There was no evidence or testimony introduced that refuted this witness’s perception. Indeed, Prof. Smari’s testimony suggests that Dr. Qazi’s perception was correct.

Mr. Maqsood Ahmen similarly testified that Dr. Dhafir, in soliciting donations, generally discussed the “plight of the Iraqi people and the children and the families.” A-493. Mr. Ahmen did not believe his contributions were going, in some measure, to support a “dawa” (religious teacher, sometimes translated as “missionary”) or for any investment purpose, (A-497), but he did not testify that had he known that some of the donations were so used he would have refrained from giving to HTN. Moreover, the government never proved that any of Mr. Ahmen’s donations, in fact, went to anyone other than hungry children and

families in Iraq, and Mr. Ahmen is not aware that his donation was used in a manner other than as he intended. A-499.

Again, Prof. Smari's uncontradicted testimony was that some HTN donors *requested* that their money be spent on "books" and "cassettes" (A-331), that is, on religious instruction materials. Under Islamic law, as under the Internal Revenue Code, education (including religious education) is a proper charitable purpose. And while the prosecution pooh-poohed it, the evidence also showed that HTN funds were not used for business investment purposes before Dr. Dhafir had consulted several shaikhs ("scholars," or advisers on religious law) whether attempting to leverage donated funds in that way was permissible in aid of HTN's goals. A-354-55, A-372A-372T. While conformity with religious law (or belief) may not be a defense to fraud charges, the undisputed evidence of prior religious consultation defeats any claim that the funds were simply "diverted" to a private purpose rather than used within a broader context of advancing the charitable cause. *Cf.* 26 U.S.C. §§ 511-513 (governing taxation of "unrelated business income" of otherwise tax-exempt charities).

Finally, Mr. Ahmed Elantably testified that he donated after seeing HTN brochures that depicted "destitute people, basically children and schools that was [sic] very bad facilities." A-502. Mr. Elantably thought his donations would be used "[b]asically to help poor people in Iraq" who were suffering as a result of "poor conditions after the war . . . [and] the schools in particular." A-503 (emphasis added). But, as with the other witnesses, Mr. Elantably believed that his money had in fact been used in the manner he intended for it. A-504-05. There was no evidence to the contrary.

Thus, none of the donor witnesses testified – nor was there any other evidence presented at trial – that there was a specific representation by Dr. Dhafir that donations to HTN would be used exclusively for feeding starving children.

Nothing presented at trial established (and certainly not beyond a reasonable doubt) that any material facts were actively concealed or that the statements actually made about HTN in its literature or by Dr. Dhafir were untrue. The indictment charged that HTN's promise was to use donated funds "primarily" for this purpose, and the evidence failed to show that promise was not kept. To the extent that the donors wanted their money used for a specific purpose, the only evidence in the record supports the proposition that the donations were used as donors intended. Accordingly, the government failed to establish a critical element of mail/wire fraud, and the convictions on these counts must be vacated.

**III. APPELLANT DHAFIR'S TRIAL WAS RENDERED
FUNDAMENTALLY UNFAIR ON ALL COUNTS BY THE
GOVERNMENT'S EVIDENCE AND FINAL CLOSING ARGUMENT
SUGGESTING THAT A CRIMINALLY FRAUDULENT INTENT COULD
BE INFERRED FROM DR. DHAFIR'S ALLEGED FAILURE TO ADHERE
TO THE GOVERNMENT'S INTERPRETATION OF ISLAMIC
RELIGIOUS DOCTRINE.**

Standard of Review. The district court's failure to sustain defense objections to unfair testimony and argument is reviewed for abuse of discretion. *United States v. Simmons*, 923 F.2d 934, 948 (2d Cir. 1991). Because of the government's improper placing of the defendant's religious practices in issue, in violation of the First Amendment, any error requires reversal unless harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

Discussion: Appellant Rafil Dhafir was accused in a 60-count indictment of committing numerous different federal crimes, almost all of which included an element requiring intent to defraud. Ten of those counts, charged as mail or wire fraud, specifically accused Dr. Dhafir of defrauding donors to Help the Needy by misrepresenting how their donated funds would be spent. Rather than simply identifying statements made to prospective donors to show (if they could) how in

fact those statements were untrue, and presenting evidence that the difference would have been of some significance to the donors in making their choice whether to contribute, the government attempted to persuade the jury by evidence and argument that Dr. Dhafir committed fraud when he departed from a supposedly correct understanding of one of the Five Pillars of Islam, as pertains to charitable activity. This approach, pursued over defense objection, violated Dr. Dhafir's First Amendment right to religious freedom and exceeded the bounds of cognizable "fraud" under either 18 U.S.C. § 1341 or § 1343. This error infected the entire trial with unfairness, requiring reversal and a new trial.

Early in the trial, the prosecution called as a witness Waleed Smari, a professor of computer engineering at the University of Dayton (Ohio). When he was 25, Smari immigrated to New York State from Iraq, and he earned his Ph.D. at Syracuse University. A-317-21. Smari's landlord in Syracuse was an old friend of the family, Dr. Dhafir, who became "my closest friend," like an "older brother." A-321. Smari played a part in forming the idea, that developed into Help the Needy, for extending relief to ordinary people in Iraq who were suffering on account of the U.S. sanctions after 1991. During the entire period of the 1990's, Smari was in touch with Dr. Dhafir as often as three times each week. A-325. Based on his years of personal experience with and intimate knowledge of Dr. Dhafir, Smari had total confidence in the appellant's integrity and truthfulness. A-326. Smari always believed that HTN was approved as a charity to receive tax deductible contributions.²⁴ *Id.*

According to Smari's testimony, most fundraising presentations for HTN occurred during Friday evening "circles" after being announced at Friday noon

²⁴ Prof. Smari testified under a judicial grant of statutory immunity. A-359.

prayer services at mosques and Muslim community centers. A-330. At the "circle" events, Dr. Dhafir:

goes in more details about the situation, what people are suffering, how they are suffering. It [sic] may bring some reports from like UNICEF or some UN organization or some human [rights] organizations like here in the states who were interested in the Iraqi situation

A-330. A "big part" of the presentation concerned "the children of Iraq":

because we – we kept hearing that there were about 5 to 6,000 children dying every month, because of lack of medicine, lack of good nutrition and food, of diseases and, you know, bad water, bad ... food and so on.

Id.

When the prosecutor asked Prof. Smari whether HTN represented that a contributor's money would be used in a particular way when someone chose to make a donation, the witness responded in terms of Islamic religious law:

... Generally, any form of charity was accepted[,] and the person can give general charity or they can specify the charity. It could be, for example, zakat, there is their zakat they want to pay. In that case, it will be spent only as zakat. If they wanted to give general charity or what we call sadakah will be spent in general, but the majority of the donations that we were spending were on ... food

(A-331).²⁵ A few moments later, Smari was asked, over defense objection, whether "it [would] be proper or appropriate for that money to be used" to accomplish the donor's purpose indirectly rather than directly. Although the

²⁵ Zakat, the witness explained on cross-examination, is one of the Five Pillars of Islam – a religious duty to give to charity 2.5% of one's annual income, after paying debts, to the extent that it has remained in the person's possession for a full year without being spent (that is, in effect, 2.5% of any addition to savings annually). Zakat can be paid for any of eight specified purposes, one of which is to aid the "needy" (a category defined in distinction from "poor"). A-365-66. Zakat can also be used to compensate those involved in the collection and distribution of charity, for those who have "recently been reconciled to the truth," and "for the cause of Allah," among other purposes. A-366-67.

question plainly asked for the witness's opinion on a question of Islamic law, the objection was overruled on the basis that the witness "ha[d] an understanding." A-332. This was error, which opened the door to an unfair trial on the fraud charges, and this unfairness spilled over to all counts.

The witness clearly understood the contested question to call for an explanation of the religious concepts referred to in his answers. Thus, he replied:

There are many categories of charities in Islam. Some of them would require very specific usage, and so if you tell me this is my zakat, I have only eight categories for which I can use ... this money. If you tell me this is zakat for Eid ur Fitr[,] for example[,] I can only use it for zakat ur fitr, so the spending is very specific, and it's very structured.

A-332.²⁶ Prof. Smari did not fully acquiesce, however, in the prosecutor's leading question whether "if they didn't make any specification, are you saying that it would be used for Help the Needy's primary purpose[,] which was represented to be providing food." Instead, Smari replied, again in religious terms: "They can make it in general as any charity or sadakah, and in that case it's supposed to be used for the needs, the needy people, and so mostly for food and clothing." A-332.

The prosecutor tried repeatedly to get Prof. Smari to endorse the theory that donors had been misled if any of HTN's funds were not spent on food. Instead, the witness was only able to answer in terms of Islamic law, which he repeatedly emphasized was complex on this subject. Thus, as to whether HTN's advertisements "continue to focus on the need to provide people with food throughout the entire period you were involved with the organization," Smari replied:

²⁶ Neither the prosecutor nor anyone else objected to the answer as unresponsive, thus further confirming that the government was seeking its witness's opinion testimony on a theological question as key to its presentation on fraud.

Well, generally, as I said, any category that is acceptable as charity was solicited, but again, generally, it was for food and medicine and clothing and things of that kind. But people would give other things, for example they may want to ... help orphans, or they may want to, for example, have books sent or cassettes or anything, so they may sometimes be very specific and say, I want you to do such and such, can you, and if we can we will say yes, we will.

A-331. Taking another run at the question that the court had allowed over objection, the prosecutor asked twice more for an opinion that would imply that Dr. Dhafir violated religious law, an issue far outside the jury's ken or anything allowable at a federal criminal trial.

First, the prosecutor asked, "If people gave for that purpose, that very specific purpose that was explained in the literature and in the presentations, would it be proper or appropriate, right to use that money for something other than what they had intended?" A-334. In response, Prof. Smari gave a long explanation about how the proper use of the money in the Islamic system of charity depends on the specificity of the donor's stated intention. He never concurred in the prosecutor's suggestion that anything depended on the general terms of the solicitation. A-334-35. Pressing the objected-to question yet again, the prosecutor asked, "But if I make a donation to Help the Needy because someone has told me that my donation will be used to feed starving children, is it in your view appropriate to use that for anything else?" A-335. To this, the witness replied "if that's all," that is, "you said we will use this money to feed the children and the poor and the needy," then "that's all you can use it for[;] you can't use it for other things." A-335. Thus, "if you tell me that that's what Help the Needy was going to use it for," "and if that's my belief [as a donor] and my understanding," then "I [as the charity] cannot use it for anything else." A-336.

Even with this basic principle established, Prof. Smari explained in response to further government questioning that issues arose in the conduct of HTN's

operations concerning "whether something is acceptable, something is allowable to do," (A-349), on which Dr. Dhafir sought theological advice from Islamic scholars ("shaikhs"). A-356. For example, the question was raised whether HTN could invest in projects from which "the income from the [invested] funds can support the charity and the relief. That was their idea. We had made a decision, we cannot do that[,] and we have asked many scholars and they all agreed we cannot do that because that was not the way, the reason for the collection of the money, people did not give [with] that [in mind]." A-351.

The prosecution then presented before the jury the religious questions that HTN had posed to the shaikhs for their advice (A-354-55), and inquired what the shaikhs' answers had been. A-355-56. However, Smari explained:

[Islamic] jurisprudence is a very big field, scholars have different opinions, you read pages and pages on what each of these words that you just mentioned may mean. There are scholars who are specialized in zakat and those are usually the ones who issue the order to spend, [or] not to spend in a given situation, if there is any question about it.

A-368. In fact, several scholars had been consulted, and had offered various responses to the question about investment of donations. A-372A – 372T. Prof. Smari did not question any of HTN's expenditures. Rather, "They made their decisions to the best of their ability. If there is no abuse, then that's between them and God, I am not going to second [guess] them." A-358.

The prosecution's decision in this case – upheld by the trial court's evidentiary ruling – to ignore the wisdom of their cooperating witness and instead ask the jury to second guess decisions made by HTN and Dr. Dhafir on religious grounds, as a basis for finding fraud against HTN's donors, violated the First Amendment, as long interpreted by the Supreme Court. Accordingly, the admission of this extensive evidence concerning matters of what was "proper or appropriate," that is, "right," as measured against a religious test necessarily

violated both Fed.R.Evid. 701, as unhelpful lay opinion, and Fed.R.Evid. 403, as it was substantially more unfairly prejudicial and confusing than probative. *See United States v. Rahman*, 189 F.3d 88, 134-38 (2d Cir. 1999) (per curiam) (opinion evidence of whether defendant's conduct conformed to Islamic teachings and traditions properly excluded as irrelevant and confusing; evidence should have been limited to explanation of Arabic words and religious concepts necessary to understand references in exhibits).

It has been settled for more than 60 years that a jury hearing a federal mail fraud case cannot be asked to judge questions of what is true or correct in the belief system of any religion. *United States v. Ballard*, 322 U.S. 78, 88 (1944). Citing *Ballard*, this Court has stated, "Generally it is not proper for courts to evaluate the truth or correctness of an individual's sincerely held religious beliefs." *Smith v. Board of Educ., North Babylon Union Free School Dist.*, 844 F.2d 90, 93 (2d Cir. 1988). If the government had evidence to present that any donor to HTN gave money in reliance on a specific promise that was false when made, and that promise was material to the decision to give, then it might be that fraud could be proven. But a jury could not, consistent with the First Amendment, be asked to judge – as this line of evidence confusingly suggested they should – whether Dr. Dhafir directed the use of donated funds in accordance with the Islamic religious rules of zakat or in accordance with the advice of various shaikhs.

The *Ballard* rule is essentially the same as that which prevents the secular courts from adjudicating internal church property disputes which depend on the correct application of religious doctrine or practices. *See, e.g., Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724-25 (1976). Instead, the Court must not allow any but "neutral principles of law" which are "completely secular in operation" to be applied. *Jones v. Wolf*, 443 U.S. 595, 603 (1979); *see Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 99-100 (2d

Cir. 2002) (per curiam). Needless to say, appellant recognizes that activities taken in a religious context are not immune from regulation, even by the criminal law. *See United States v. Moon*, 718 F.2d 1210, 1226-28 (2d Cir. 1983). But when a jury is repeatedly invited to consider whether the defendant's conduct is consistent with the principles of the religion he professes, with the suggestion that the jury can make the determination of what those principles – properly understood – may be and require, and on that basis decide whether other adherents of the same religion have been "defrauded," then a constitutional line has been crossed. That is what occurred in this case.

The extensive evidentiary error in the presentation of Waleed Smari's testimony might conceivably have affected only the mail and wire fraud counts to which it was principally directed, had it not been for the exploitation of and emphasis on that very testimony in the prosecutor's final closing argument. Nearing the conclusion of the rebuttal, the Assistant U.S. Attorney stated, "oh, let me talk to you at the end about zakat." A-705.

One thing is clear, there are eight different purposes to which zakat can be put, but as I believe you've heard from each of the witnesses, if you say, take your zakat and spend it on food for children, then that's what has to happen to it. ... Now in this case they say we're raising money, we're raising money to help starving children and if you have any question of what the donors thought, the donors have testified. They said, when I gave that money, I thought it was going to starving children.

A-705-06. Of course, the testimony was that HTN said its charitable funds would go primarily to alleviate hunger, and they did. Some of the funds, however, went for other purposes, and the government asked the jury to assess whether those other purposes were "proper" – not under the terms of promises made to the donors whose funds were used, judged by "neutral principles of law" which are "completely secular in operation" – but under Islamic religious law:

So there's some letter [from a shaikh] that says, oh, if you get, you know, you can spend money ... to buy property, an investment, and have the investment profits, if there are any, go to the charity.

A-706. The prosecutor then proceeded to argue against the wisdom of the shaikh's interpretation ("One of the problems with doing that, of course is when you lose money, what do you do? Well, you've just lost the money that was supposed to go to save the starving children" *id.*). And then in final conclusion, the prosecutor uses this very evidence to attack the defendant's credibility and to endorse that of the government witnesses. A-707-09. In this way, at the very end of the rebuttal argument when it would have the greatest impact, the lead prosecutor utilized the improper testimony his colleague had elicited about "appropriate" use of donated funds under Islamic law to attack the defense on all counts.

The government's mail and wire fraud theory in this case was premised, in critical part, on a contention that appellant Dhafir failed to adhere to Islamic religious principles as interpreted and critiqued by officials of the U.S. Department of Justice. Perhaps a federal prosecutor would be (in his own opinion) a wiser steward of funds donated for Islamic religious purposes than a shaikh. Or perhaps not. But (just as Prof. Smari realized, as applied to himself) no jury may be permitted to second guess the wisdom or correctness of religious advice, beliefs or practices. The error of any such approach is grievous and blatant. Given the emphasis and use of this evidence in the conclusion of the prosecutor's closing rebuttal argument, the First Amendment error prejudiced the defendant on all counts. Reversal of the convictions is required.

IV. JOINDER OF THE HEALTH CARE FRAUD COUNTS WITH THE REST OF THE CHARGES WAS PLAINLY ERRONEOUS BECAUSE THE ALLEGATIONS RELATING TO MEDICAL BILLINGS WERE COMPLETELY SEPARATE, DISTINCT AND UNRELATED TO THE ACTS AND TRANSACTIONS SET FORTH IN THE OTHER COUNTS OF THE INDICTMENT, AND LIKELY PREJUDICED THE DEFENSE ON THE LATTER COUNTS ON THE QUESTION OF INTENT TO DEFRAUD.

Standard of Review: As no objection to joinder was lodged in the district court, the issue is reviewed for plain error on appeal. *See United States v. Davila*, 461 F.3d 298, 307 (2d Cir. 2006); Fed. R. Crim. P. 52(b).

Discussion: The fourth superseding indictment charges Dr. Dhafir with an array of offenses, most of which arise from his relationship to his charity, Help the Needy and its successor Help the Needy Endowment.²⁷ But, the indictment also includes completely unrelated charges relating to Dr. Dhafir's medical practice. Specifically, counts 24-50 charge Dr. Dhafir with Medicare fraud and making false statements to a Medicare auditor. Given that there is essentially no connection or relationship between the healthcare charges (24-50) and the other counts in the indictment, it was plainly erroneous for the healthcare charges to be joined in this charging instrument. Moreover, the addition of the healthcare charges substantially prejudiced Dr. Dhafir because it provided the government with an opportunity to solidify its prosecution theory on the other counts that Dr. Dhafir was a liar and cheater, and somebody who only selectively followed the rules.

In cases like this, involving a single defendant with multiple counts, Fed. R. Crim. P. 8(a) sets forth the standard for determining whether joinder of counts is permissible. *See, e.g., United States v. Shellef*, 507 F.3d 82, 97 (2d Cir. 2007).

²⁷ These charges include sanction violations (counts 1 through 14), tax fraud (counts 15 through 22), causing a false statement to be made to the INS in support of a visa application (count 23), and mail fraud (counts 51-57).

Rule 8(a) only allows joinder of offenses that “are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute part of a common scheme or plan.” *See, e.g., Shellef*, 507 F.3d at 97 (Rule 8(a) permits joinder of offenses that are of the same nature or involve similar conduct).

This Court applies “a commonsense rule to decide whether, in light of the factual overlap among charges, joint proceedings would produce sufficient efficiencies such that joinder is proper notwithstanding the possibility of prejudice....” *Id.* at 98 (internal quotations omitted). Applying this rule, the Court in *Shellef* held joinder improper where the defendant was charged with three tax offenses and several non-tax offenses, including conspiracy, wire fraud and money laundering. *Id.* at 98-99. It explained, “[t]ax counts may be joined with non-tax counts where it is shown that the tax offenses arose directly from the other offenses charged....[and] [t]he most direct link possible between non-tax crimes and tax fraud is that funds derived from non-tax violations either are or produce the unreported income.” *Id.* at 98 (quoting *United States v. Turoff*, 853 F.2d 1037, 1042-43 (2d Cir. 1988)). The court found no such connection in *Shellef*, however, because the “funds generated by the wire fraud, money laundering and conspiracy schemes...were unrelated to the unreported income that was the basis for ...[one of the] [t]ax [c]ounts.” *Id.* at 99.

Thus, under Rule 8(a), the joinder in this case of the sanctions, money laundering, mail/wire fraud and tax evasion counts in the indictment was proper. All of the charges arose from the operation of Dr. Dhafir’s charity, and the money generated by the alleged wire fraud and tax evasion served as the basis for the alleged money laundering and sanctions violations. Thus, the latter charges arose directly from the former ones, and as such, joinder was appropriate.

The healthcare charges, however, present a different situation. As in *Shellef*, the healthcare counts against Dr. Dhafir are not of the same or similar character nor

did they arise directly from the other offenses charged. Also, as in *Shellef*, the government in this case offered no evidence that there was a “direct link” between the charges. No evidence was offered to show that the relatively small amount of revenue generated by the Medicare offenses formed the basis for any other counts in the indictment. Indeed, the separateness of the healthcare portion of the case was reflected in the fact that those counts of the superseding indictment had a different prosecutor. *See e.g.* A-681 (closing by AUSA West).

Given the obvious disconnection between the healthcare charges and the other counts in the indictment, the lack of defense objection is likely explained by the fact that prosecution’s lodging of these additional, unrelated charges was consistent with the defense position that the government’s initial mistaken suspicion that Help the Needy had some connection to terrorist funding caused the government to over-charge Dr. Dhafir. But, due to the judge’s ruling shortly before trial and his rulings during the course of the trial (as set forth in Section I, *ante*), the defense was never able to develop this critical defense theory for the jury. The prejudice flowing from the judge’s erroneous restriction on cross-examination and closing argument was thus exacerbated.

The addition of the healthcare fraud charges, which first appear in the second superseding indictment more than four months after the original charges were lodged, provided a huge strategic advantage for the government. The simultaneous trial of these counts with the others improperly highlighted the government’s theme at trial, that Dr. Dhafir was a liar and did not play by any rules that might apply to him, other than his own. For example, as part of the government’s case, the prosecution relied heavily on testimony that Dr. Dhafir had lied to a government auditor about having been physically present whenever chemotherapy services were performed and then billed to Medicare. The government tied this together in its closing argument. First, Mr. Olmsted, who was

not even addressing the healthcare portion of the case, used that evidence to attack the defendant's character before the jury:

this is a man who bills if he's doing it when he was overseas or out of state. . . . He's in Jacksonville at the Sawgrass Resort when his lab technician is doing chemotherapy. First off, she's not authorized to do chemotherapy, she's left alone to do it and he's in the Sawgrass Resort, or he's in Saudi Arabia, but that's how he bills it, he bills it as if he's there.

A-675. Then, Mr. Olmsted added – openly admitting that his argument didn't go to proof of a count under discussion – that “Nina Carosella calls him up and says, I'm focusing on how you bill when you're out of town and his answer, I never go out of town, I haven't gone out of town this last year. Well, he'd been out of town two weeks earlier, and he went to Cairo the next day. Greg West is going to cover that” A-675-76.

AUSA West, during his separate closing argument, also took the opportunity to argue that the healthcare allegations reflected on Dr. Dhafir's general character: “Is Rafil Dhafir, based on the evidence that you've heard, a man who decides for himself what he wants to do? And when he finds out what the rules are, he'll say whatever is necessary in order to get what he wants?” A-685. Mr. West further noted that the key issue “in connection with these charges . . . [is] [t]his man's intent.” A-686. But the prosecutor did not seek to keep his argument focused on that point. Instead, summing up, Mr. West referred to Dr. Dhafir's “absolute patent lie” to Ms. Carosella, and that this demonstrates Dr. Dhafir's bad character. Dr. Dhafir “didn't care if he had to lie . . . because he was going to decide what was right and what rules he would follow.” A-690. In a case which turned largely on Dr. Dhafir's intent, the all-important line between character and intent had to be

strictly policed, not blurred by prosecutorial rhetoric.²⁸ As actually deployed by the government here, the healthcare charges, evidence and argument were devastating to Dr. Dhafir's defense on the other counts in the indictment. Accordingly, the mis-joinder of the health counts constitutes plain error and requires vacating all of Dr. Dhafir's convictions.

V. AS THE EVIDENCE SHOWED NO MORE THAN ONE AGREEMENT, THE CONVICTIONS ON COUNTS 1 AND 15 ARE MULTIPLICITOUS. THE SENTENCES ON COUNTS 1, 15 AND 50 ARE ALSO ILLEGAL INsofar AS THE COURT RAN TWO YEARS OF THESE FIVE YEAR TERMS CONSECUTIVELY TO OTHER COUNTS.

Standard of Review. Multiplicity is a question of law concerning the legality of the sentence. *See United States v. Finley*, 245 F.3d 199, 205 (2d Cir. 2001); *United States v. Chacko*, 169 F.3d 140, 146 (2d Cir. 1999). Even when not raised below, this Court will recognize and correct illegal sentences on appeal as plain error. *See United States v. Thomas*, 274 F.3d 655, 664 (2d Cir. 2001) (en banc); *United States v. Ansaldi*, 372 F.3d 118, 124 (2d Cir. 2004) (multiplicity

²⁸ In light of Federal Rules of Evidence 403 and 404(b), evidence regarding how Dr. Dhafir conducted his medical practice or engaged in billing would never have been admissible at trial had these charges not been improperly joined in the indictment. Under Fed.R.Evid. 404(b), other crimes or bad act evidence may be admissible where it is not for purposes of proving general bad character but because it establishes some other relevant factor like motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Here, as the government's closings clearly illustrate, the healthcare allegations only provided – insofar as the other counts were concerned – evidence of bad character. The government did not (and indeed could not) argue that the conduct had any probative value with regard to the permissible factors under Rule 404(b). Even if there were some basis to argue that this “other crime” evidence fell within one of the exceptions to Rule 404(b), the substantial prejudice to Dr. Dhafir arising from the introduction of this “other crime” evidence far outweighed any possible probative value. *See Fed.R.Evid. 403.*

issue corrected after being noted *sua sponte* during oral argument); cf. *Willette v. Fischer*, 508 F.3d 117, 121 (2d Cir. 2007) (multiplicity violation corrected on federal habeas, despite being raised for the first time only in state court direct appeal).

Discussion: In section 371 of title 18, the federal criminal code, Congress criminalized not only conspiracies to commit any federal crime but also conspiracies to defraud the United States in any manner. The fourth superseding indictment in this case charged appellant Rafil Dhafir in two of its 60 counts with engaging in each kind of conspiracy – one to commit an offense, that is, to operate Help the Needy in violation of the Iraq sanctions decree, and the other to defraud the United States and IRS by inducing Help the Needy's donors to declare less taxable income by claiming non-deductible contributions. Because the trial evidence showed that there was in fact no more than one agreement among Dr. Dhafir and his associates to accomplish these two objectives (and others), only one conviction under § 371 was permissible in this case.²⁹ For this reason, the convictions on Count One and Count 15 merge, and the judgment on one of these counts must be vacated.

In addition, to the extent that the court below purported to run two years of the five-year terms imposed on Counts 1, 5 and 50 consecutively to 20-year terms imposed on other counts, those sentences are illegal. For all these reasons, Dr. Dhafir is entitled to be resentenced.

²⁹ The indictment also charged a third conspiracy, to commit international money laundering violations, but that conspiracy violates a different statute (18 U.S.C. § 1956(h), not *id.* § 371). For this reason, even though that conspiracy was also in fact part of the same multifaceted agreement, the law allows a separate conviction. *See Albernaz v. United States*, 450 U.S. 333, 343-44 (1981); *American Tobacco Co. United States*, 328 U.S. 781, 788-89 (1946).

**A. One of the Two § 371 Conspiracy Convictions Must Be Vacated
and the Case Remanded for Resentencing.**

Count One of the indictment in this case charged that Dr. Dhafir was part of a conspiracy, lasting from February 1995 until February 2003, knowingly and willfully to evade and violate presidential Executive Orders 12722 and 12724 and Treasury Department regulations (31 C.F.R. § 575.201 et seq.) prohibiting the transfer of funds and other financial and economic resources to anyone in Iraq (the "Iraqi Sanctions"). Evasion of the sanctions constituted an offense against the United States, that is, a violation of 50 U.S.C. § 1705(b). Count One of the fourth superseding indictment also articulated 30 overt acts, in 13 lettered subparagraphs, which included the acts alleged in Counts 3-14, the international money laundering transactions (overt act "d"), and the act alleged in Count 16, submission of the false Form 1023 application for recognition of HTNE's tax exempt status (overt act "m"). The latter labels accountant William Hatfield, albeit not by name, as a "conspirator."

The second conspiracy under § 371 is found in Count 15 of the fourth superseding indictment. J-188-94. This count charged Dr. Dhafir with participating from January 1995 to February 2003 in a conspiracy "to defraud the United States," 18 U.S.C. § 371, "for the purpose of impeding, impairing, obstructing, and defeating the lawful governmental functions of the IRS in ascertaining, computing, assessing, and collecting income taxes from donors who improperly deducted contributions" to HTN and HTNE.³⁰ A-189-90. Overt acts

³⁰ Count 15 thus charges what is known as a "*Klein* conspiracy" (from *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957); *see also United States v. Helmsley*, 941 F.2d 71, 90-91 (2d Cir. 1991)), that is, "a conspiracy to defraud the United States by impeding the functioning of the IRS." *United States v. Southland Corp.*, 760 F.2d 1366, 1382-83 (2d Cir. 1985). This Court upheld a conviction under §

"g" to "j" and "m" under Count 15 concerned HTNE's submission of the IRS Form 1023, and names co-defendant Jarwan as an active participant. A-193.

No co-conspirator is named with Dr. Dhafir in either Count One or Count 15 of the Fourth superseding indictment – the indictment on which the case was tried – nor was anyone named in earlier iterations of the latter count of the indictment. Appellant's co-conspirators under Count 15, presumably, would not be the donors themselves, for lack of any proof of knowledge on their part concerning the deductibility of contributions to HTN. Rather, the unnamed co-conspirators must be those who assisted Dr. Dhafir in the accomplishment of HTN's mission, who knew of the plan to defy the sanctions by distribution of humanitarian aid, and of the fundraising campaign that supported that effort – the co-defendants originally named in various counts of the indictment (Zagha, Al Wahaidy and Jarwan) and those separately charged with related offenses who pleaded guilty (Ali and Hatfield). Count One of the original indictment had charged that Dr. Dhafir's co-conspirators included co-defendants Zagha, Al Wahaidy, and Jarwan.³¹

Appellant Dhafir was convicted by the jury on each of these separate conspiracy counts. No instruction was requested or delivered asking the jury to determine whether the agreement constituting the Count 1 conspiracy was the same in fact as the agreement constituting the conspiracy charged in Count 15. Nevertheless, on the evidence presented at trial, and in light of the virtual identity of time periods and the significant overlap in personnel and overt acts, these two

371 for conspiracy to defraud the IRS through the misuse of a charitable organization in *United States v. Bellomo*, 176 F.3d 580, 590-92 (2d Cir. 1999).

³¹ The names of co-conspirators steadily disappeared as the indictment was repeatedly superseded, until in the fourth superseding indictment, on which the case was tried, no co-conspirator was named in any of the three conspiracy counts.

alleged conspiracies were in truth one and the same offense, in fact and in law. The imposition of separate sentences was therefore illegal and plain error.

Multiplicity exists where a single crime is charged in separate counts. *United States v. Handakas*, 286 F.3d 92, 97 (2d Cir. 2002).³² If multiple convictions result in multiple sentences for what is in fact or law but one offense, there is *ipso facto* a violation of the Fifth Amendment's Double Jeopardy Clause. *United States v. Ansaldi*, 372 F.3d 118, 124 (2d Cir. 2004); *United States v. Chacko*, 169 F.3d 140, 145 (2d Cir. 1999).

Whether an indictment is multiplicitous when separate counts charge instances of an offense under the same statute depends on the definition of the allowable "unit of prosecution" for that offense. *Ansaldi*, 372 F.3d at 124; *Handakas*, 286 F.3d at 98. In the case of conspiracy under § 371, that question was authoritatively resolved more than 60 years ago, in *Braverman v. United States*, 317 U.S. 49, 52 (1942). *Braverman* held, *inter alia*, that the agreement is the essence of a conspiracy offense and is thus the unit of prosecution under § 371.

It matters not how many criminal objectives the conspiracy may have. If, in fact, there was but a single agreement, then there is only one offense.

Where the gist of the crime is a conspiracy or an agreement to commit one or more unlawful actions proscribed by different statutes, but each count charges a violation of the same general conspiracy statute, and the proof reveals a single ongoing conspiratorial agreement, only a single penalty under that conspiracy statute can be imposed.

United States v. Anderson, 872 F.2d 1508, 1520 (11th Cir. 1989). Moreover, a single agreement both to defraud the United States and to commit one or more

³² *Handakas* was overruled in part on other grounds by *United States v. Rybicki*, 354 F.2d 124 (2d Cir. 2003) (en banc).

offenses against the United States is a single conspiracy. *See United States v. Southland Corp.*, 760 F.2d 1366, 1369 (2d Cir. 1985).

This Court has frequently examined whether the evidence at trial established one conspiracy or several. In some of those cases, the indictment had charged a single conspiracy and the defendant on appeal claimed material variance because the evidence proved several separate agreements. In other cases, as here, the indictment charged multiple conspiracies and the defendant on appeal claimed the evidence showed only one. In either type of case, the principle is the same. As the Court has explained:

‘[A] single conspiracy is not transposed into a multiple one simply by lapse of time, change in membership, or a shifting emphasis on its locale of operations.’ [*United States v. Cambino Valencia*, 609 F.2d [603,] 625 [(2d Cir. 1979)]]. The jury need not have concluded that the same people were involved throughout the entire period of the conspiracy in order to find one conspiracy. ... [S]ome members of the conspiracy [may have] participated throughout the entire period of the conspiracy, while others were involved in its early stages, and still others became involved in its late stages.

United States v. Nersesian, 824 F.2d 1294, 1303 (2d Cir. 1987). Similarly, in *United States v. Williams*, 205 F.3d 23, 32-33 (2d Cir. 2000), this Court reiterated that a single conspiracy often involves various participants performing different roles in an overall plan to accomplish a single overriding purpose. Moreover, the fact that accomplishment of the conspiratorial objective may require several arguably independent steps to be taken at separate times by different people does not undermine the conclusion of a single conspiracy. *See United States v. Aracri*, 968 F.2d 1512, 1518-19, 1521 (2d Cir. 1992).

The evidence at trial was clear and consistent that the arrangement appellant Dhafir orchestrated to provide humanitarian relief to the people of Iraq despite the U.S. sanctions, conducted as and through the organization he called Help the Needy, was but a single, multifaceted agreement among various individuals

playing various roles. This is not a case where a single "defendant participated in more than one conspiracy in violation of the same statutory provision ... [which] existed for different – albeit overlapping – periods of time, and [where] the defendant, in each alleged conspiracy, had different groups of conspirators" *United States v. Jones*, 482 F.3d 60, 72 (2d Cir. 2006). The evidence at trial revealed an integrated although complex plan which nevertheless reflected a single "agreement" as that term is used in conspiracy law, and thus only a single violation of § 371, even though some people worked with Dr. Dhafir to raise the money and others worked with him to move that money overseas for delivery to the needy in the form of food and other necessities. Nothing encompassed by Count 15 was not already within the scope of Count One.

Since the evidence at trial did not establish (and certainly not beyond a reasonable doubt) that the conspiracies alleged in Counts 1 and 15 were actually separate, only one count under § 371 and one sentence on that count is valid. In light of *Braverman*, the agreement to operate Help the Needy, including all the facets of that operation, was but one continuous offense under the general conspiracy statute. Accordingly, one of the two convictions under 18 U.S.C. § 371, presumably Count 15, must be vacated, and the case remanded for resentencing.

Multiplicity of counts is plain error, Fed.R.Crim.P. 52(b), to be noticed on appeal even if not presented below. Thus, in *United States v. Ansalidi*, 372 F.3d 118, 124-25 (2d Cir. 2004), this Court raised at oral argument the question – apparently not even identified, much less briefed, by the appellants there – whether a defendant's convictions on two counts of conspiracy under 21 U.S.C. § 846 actually reflected but a single statutory offense where there was only one agreement. Finding this to be so, the Court reached out to reverse and vacate one of the two redundant convictions. *See also United States v. Coiro*, 922 F.2d 1008,

1013 (2d Cir. 1991) (where multiplicity of counts not evident from face of indictment, issue not waived by failing to raise before trial; cognizable under plain error doctrine even though defendant failed even to raise post-trial). The issue of multiplicity is therefore properly before the Court at this time.

The appropriate remedy is to vacate the excess conviction and require a correction of the defendant's sentence. *See Braverman*, 317 U.S. at 55. The fact that concurrent sentences were imposed on the redundant counts – once thought to render a multiplicity error harmless, *see United States v. Papadakis*, 510 F.2d 287, 295-96 (2d Cir. 1975) – is no longer a proper basis to deny relief. *See Ray v. United States*, 481 U.S. 736 (1987) (per curiam) (in light of Special Assessment provision, 18 U.S.C. § 3013, federal sentences on two counts are no longer ever fully concurrent); see also *Coiro*, 922 F.2d at 1015, 1018 (resentencing required at least unless unvacated count only runs concurrently with unchallenged counts, which is not the case here). As the remedy for the multiplicitous indictment in this case, the Court should remand for dismissal of the narrower of the two § 371 conspiracy counts (that is, Count 15), and for the imposition of a single sentence on the other not to exceed five years.

B. Because the Partially-Consecutive Sentences on Counts One, 15, and 50 Are Unlawful, Dr. Dhafir Is Entitled to Resentencing

Judge Mordue imposed what he characterized as a total 264-month (22-year) sentence on Dr. Dhafir, which consisted of a cumulation of sentences on the 59 separate counts. Specifically, the judgment as imposed comprises a statutory maximum sentence on every count, running as follows: twenty-year terms (240 months) on each of Counts 2, 4-14, and 53-60; ten-year terms (120 months) on each of Counts 24-49; five-year terms on counts 1, 15, 17-23 and 50-52; and three

years on Count 16.³³ As stated in the judgment, all the terms of imprisonment run concurrently with one another, except that "The terms on each of Counts 1, 15, and 50 shall be served concurrently with each other and, on each of which, 24 months shall be served consecutively to the 20-year terms" A-1138. This arrangement conformed precisely to the sentence as orally pronounced. A-1132-33.

Nevertheless, this final stipulation for partial consecutiveness finds no support in federal sentencing law, and requires that the judgment be vacated and remanded for resentencing.

In *United States v. McLeod*, 251 F.3d 78, 83-84 (2d Cir. 2001), this Court attempted to explain how sentences on multiple counts should be pronounced to comply with U.S.S.G. § 5G1.2 in cases where no single count carried a maximum term sufficient to reach a total punishment within the guidelines range. In particular, the Court construed the mandate of § 5G1.2(d), calling for consecutive sentences "only to the extent necessary to produce an aggregate sentence equal to the 'total punishment'" as authorizing the imposition of a sentence on a particular count that runs partially concurrently and partially consecutively. The Court did not address whether there was any statutory basis for such split sentencing in any statute other than 18 U.S.C. § 3553(b), which required – before it was held unconstitutional and stricken in *United States v. Booker*, 543 U.S. 220 (2005) – that the district court impose a sentence in compliance with the Guidelines unless a departure was authorized. In fact, there is no such authority. Accordingly, after *Booker*, partially consecutive sentences as described in *McLeod*, and as imposed here, are unlawful.³⁴ Dr. Dhafir is entitled to be resentenced.

³³ A judgment of acquittal was entered on Count 3.

³⁴ This Court has cited and followed *McLeod* a number of times (*see, e.g., United States v. Fuller*, 332 F.3d 60, 67-68 (2d Cir. 2003)) but never since *Booker* in a

Section 3584 of Title 18 provides that the sentence on each count in a multicount case may be imposed either concurrently or consecutively to any other count, with the presumption that all counts run concurrently unless otherwise stated. 18 U.S.C. § 3584(a). There is no provision in § 3584 for a sentence that is partially concurrent and partially consecutive. This simple reading of the statute is confirmed by the companion provision, *id.* § 3585(a), which states that "[a] sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served" – in other words, the sentence on each count begins as soon as the defendant is placed in federal custody following imposition of sentence. The defendant is then to serve that sentence until it expires, *id.* § 3621(a), less credit for time served, *id.* § 3585(b), and deductions for good conduct, *Id.* § 3624(b). Until it expires, a sentence that begins to run concurrently cannot stop running after it commences, only to resume later,³⁵ nor can the sentence commence at any date later than that specified in § 3585(a). Accordingly, "partially consecutive" sentences pursuant to *McLeod*, even if once valid on the authority of § 3553(b), are no longer lawful.

precedential opinion, much less has it addressed the statutory argument presented here.

³⁵ The one exception is a commitment for civil contempt imposed on a prisoner serving a sentence. *See United States v. Dien*, 598 F.2d 743 (2d Cir. 1979) (per curiam). This sort of interruption, however, has its own statutory support in an interpretation of 28 U.S.C. § 1826(a). Of course, one concurrent sentence may be partially consecutive to another if both commence on the same date, but one is for a longer term.

The complex judgment of sentence imposed on Dr. Dhafir clearly constituted a "sentencing package," *see, e.g., United States v. Rosario*, 386 F.3d 166, 170 (2d Cir. 2004), in which individual terms were dependent on the sentences imposed on other counts. Accordingly, on account of the imposition of unlawful "partially consecutive" terms on Count 1, 15 and 50, the entire sentence should be vacated and the case remanded for resentencing.

VI. THE DISTRICT COURT IMPROPERLY CALCULATED THE ADVISORY SENTENCING GUIDELINES BY IGNORING THE PLAIN LANGUAGE OF U.S.S.G. § 2S1.1 AND CONSIDERING DR. DHAFIR A THIRD-PARTY MONEY LAUNDERER (UNDER § 2S1.1(a)(2)), AS OPPOSED TO SOMEONE WHO HAD COMMITTED (AND INDEED WAS CONVICTED OF) THE UNDERLYING OFFENSES FROM WHICH THE FUNDS WERE DERIVED (UNDER § 2S1.1(a)(1))

Standard of Review: A federal sentence is reviewed both for procedural and substantive reasonableness. *Gall v. United States*, 552 U.S. — , 128 S.Ct. 586 (2007); *United States v. Florez*, 447 F.3d 145, 147 (2d Cir. 2006).

Discussion: Despite the clear language of the applicable Guideline provisions, the sentencing court selected a base offense level based on Dr. Dhafir's being a third-party money launderer (i.e., one who did not commit the crimes which generated the financial proceeds) even though the government conceded – indeed, argued vigorously at trial – that the funds used in the money laundering transactions were generated from Dr. Dhafir's fraud and tax offenses. As a result of this error, the sentencing court began its analysis under 18 U.S.C. § 3553(a) at a Guideline range which was substantially higher than it should have been. Although the district court after considering all of the factors under § 3553(a) ultimately imposed a sentence (264 months, that is, 22 years imprisonment) which was below the otherwise applicable Guideline range (A-1132), the court started from an

artificially high baseline. The resulting sentence is therefore unreasonable and imposed in violation of law. *See United States v. Fagans*, 406 F.3d 138, 141 (2d Cir. 2005) (noting that in many instances an incorrect calculation of the applicable Guideline range taints a non-Guidelines sentence because it “may have been explicitly selected with what was thought to be the applicable Guidelines range as a frame of reference”). *See also United States v. Skoczen*, 405 F.3d 537, 549 (7th Cir. 2005) (where district court makes mistake in calculating guideline score, its judgment about the ultimate sentence is presumably affected by that error).

The sentencing dispute in this appeal turns on which base offense level set forth in U.S.S.G. § 2S1.1³⁶ (money laundering) applies where a defendant commits the underlying offense which generated the proceeds for the financial transactions (mail/wire fraud and tax evasion), but also is charged with engaging in international financial transactions to promote a different offense (violating the sanctions). Section 2S1.1(a) provides that in money laundering cases there are two possible base offense levels:

- (1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense . . .; and (B) the offense level for that offense can be determined; or
- (2) **8** plus the number of offense levels from the table in § 2B1.1 . . . corresponding to the value of the laundered funds, otherwise.

Although all of the parties and the Probation Officer agreed that for purposes of sentencing Dr. Dhafir had committed the underlying offense and the offense level for that offense could be determined (PSR Addendum pp. 1-2), the sentencing court, at the government’s suggestion and contrary to the Probation

³⁶ The relevant text of U.S.S.G. § 2S1.1 and commentary are set forth at SPA-13.

Officer's original recommendation, calculated the base offense level as if Dr. Dhafir were a third-party money launderer under § 2S1.1(a)(2). The sentencing court found that the money laundering counts were not "based on the source of the funds but rather on the offense which their transfer was intended to promote," and accordingly "the source of the funds is immaterial." A-1128. This decision had implications beyond the base offense level as it also affected how the various convictions were grouped.

The court erred by ignoring the plain language of § 2S1.1(a)(1) which requires that where, as here, the defendant committed the underlying offense from which the laundered funds were derived, the base offense level is calculated based on the underlying offense. In objecting to the original PSR and in its sentencing memorandum, the government essentially argued that sentencing Dr. Dhafir under § 2S1.1(a)(1) would produce the anomalous result that the defendant would receive a lower base offense level for using criminally-derived funds than he would have obtained if he had used legally-obtained monies. The court accepted the government's argument. A-1128-29.

Neither the government nor the district court take any real issue with the fact that the plain language of § 2S1.1(a) required that Dr. Dhafir be sentenced under (a)(1), rather than (a)(2). Indeed, not only do the plain terms of the Guideline dictate that result, but also the entire reason for the amendment, which became effective on November 1, 2001, was to ensure that "the offense level for money laundering was determined with[] sufficient consideration of the defendant's involvement in, or the relative seriousness of, the underlying offense." U.S.S.G. App. C (Reason For Amendment #634). The amendment thus "ties offense levels for money laundering more closely to the underlying conduct *that was the source of the criminally derived funds.*" *Id.* (emphasis added).

The government suggested, and the district court accepted, that because the instant case involves promotional international money laundering, *see* 18 U.S.C. § 1956(a)(2)(A), rather than proceeds laundering, § 2S1.1(a)(1) is inapplicable. A-1128. In so doing, the government and district court imply that the Commission did not anticipate this particular kind of promotional money laundering case when it amended § 2S1.1 in 2001. But, that suggestion ignores the Commission's lengthy and comprehensive analysis of this particular amendment over a period of approximately ten years.

The Commission began considering such an amendment in the early 1990s, proposed an amendment to Congress in 1995 (which was rejected), submitted a Report to the Congress in 1997, and finally passed the current version as an amendment in 2001. Moreover, the Sentencing Commission certainly took promotional money laundering cases into consideration when drafting and adopting this amendment; indeed, promotional money laundering cases often served as the "poster-children" for why such an amendment was necessary. *See* U. S. Sentencing Commission Money Laundering Working Group Report (1995), available at: <http://www.ussc.gov/moneylau/MONILAUN.HTM>; U.S. Sentencing Commission, Report to the Congress: Sentencing Policy for Money Laundering Offenses, including Comments on Department of Justice Report (Sept. 18, 1997) at 5-6, 12 available at http://www.ussc.gov/r_congress/LAUNDER.PDF (noting that promotional money laundering had been defined broadly by the courts and also recognizing "the importance of supporting heightened international law enforcement efforts"). Given the Commission's acute awareness of promotional money laundering cases and its concern about the international enforcement of the money laundering statutes, there is no basis to conclude that the Commission did not consider cases such as the present one when it adopted § 2S1.1. Accordingly,

given the clear language of the amended Guideline, the sentencing court erred in ruling that § 2S1.1(a)(1) does not apply in promotion cases.

The sentencing court's other rationale for rejecting the plain terms of the Guideline was that the resulting range would have produced an anomalous result. Specifically, by committing the underlying offense, Dr. Dhafir would obtain a lower offense level than if he had used legally obtained funds to engage in the financial transactions, according to the court below. *See* A-1125. As noted in the preceding paragraph, given its lengthy study, its focus on promotional money laundering and its concern about international laundering, the Commission was obviously well aware of this potential anomaly. But, in any case, where the court disagrees with the particular Guideline range, the remedy is not to disregard the plain meaning of the Guideline's terms, but rather to account for this disagreement when analyzing all of the sentencing factors under 18 U.S.C. § 3553(a). *See, e.g., United States v. Kimbrough*, 552 U.S. —, 128 S.Ct. 558, 575-76 (2007) (affirming district court's decision to sentence less harshly because of its disagreement with the crack Guidelines). Indeed, to the extent it is true that the Guidelines appear to presume that all money laundering prosecutions will involve transactions conducted with criminal proceeds, while a few, infrequently invoked subsections of § 1956(a) permit prosecutions for which this is not a prerequisite, the remedy at sentencing would be a downward departure (or *Kimbrough*-style variance) in those cases. It would not be, as here, a misreading and misapplication of the Guidelines' plain language to increase the sentence in other, covered cases.

The sentencing court's mistaken analysis of the base offense level to be applied in this case also resulted in the court's improperly grouping the money laundering conviction with the IEEPA conspiracy count. Under § 2S1.1(a)(1), where the defendant "is convicted of a count of laundering funds and a count for the underlying offense from which the laundered funds were derived, the counts

shall be grouped pursuant to subsection (c) of § 3D1.2 (Groups of Closely-Related Counts).” U.S.S.G. § 2S1.1, comment. (n.6). Under this rule, the money laundering counts should first have been grouped under subsection (c) with the tax offenses and mail/wire fraud offenses given that there is no dispute that the charged money laundering transactions involved the proceeds from these offenses. *See* A-1122 (Government’s Sentencing Memorandum). The sentencing court, however, based on its incorrect application of § 2S1.1(a)(2), grouped the money laundering counts with the conspiracy to violate the sanctions. As is apparent from a comparison of the calculation contained in the original PSR (which applied § 2S1.1(a)(1) and grouped the money laundering with the fraud and tax counts) with that contained in the Second Addendum to the PSR, the selection of the incorrect base offense level and the improper grouping of offenses resulted in Dr. Dhafir’s having a total offense of 41 (324-405 months), rather than an offense level of 37 (210-262 months) – a potential difference of nearly ten years’ imprisonment. *See* PSR Second Addendum at 6; PSR at 28.

The government’s argument and the court’s decision below were premised on a fallacy. Because there is no requirement in the criminal statute that (a)(2)(A) international promotional money laundering have been conducted with “proceeds,” the district court inferred, the Guideline that is triggered by the defendant’s having committed the offense which generated the laundered funds must not apply. The conclusion of the court below simply does not follow. The Guideline does not ask whether the defendant has been convicted of a money laundering offense with a “proceeds” element. It simply asks whether the laundered funds were the proceeds of an offense the defendant committed. Here, based on the jury’s verdicts and the

government's own theory of the case, the answer to that basic question was "yes." Accordingly, subsection (a)(1) of § 2S1.1 applied, not subsection (a)(2).³⁷

Thus, the sentencing court began its § 3553(a) analysis four levels higher than it should have. Looked at another way, the sentencing court began its analysis at 324 months (the low end of offense level 41, criminal history category I) rather than at 210 months (the low end of offense level 37, criminal history category I). *See Gall*, 128 S.Ct. at 596-97 (endorsing the practice generally followed by most district courts: first calculate the advisory Guideline sentence and then consider traditional Guideline departures or statutory bases for a non-Guideline sentence). Although the court ultimately imposed a sentence below the incorrectly inflated Guideline range, the reduction proceeded from an artificially high starting point. *See Sentencing Transcript at 39* ("Taking into account all of the required factors, the Court finds that the purposes of 3553(a) are satisfied by a sentence below that recommended by the Guidelines.") In these circumstances, this Court should remand to the district court for resentencing, including a complete recalculation of the advisory Guideline range.³⁸

³⁷ To the extent there is any ambiguity within the Guidelines, it involves how to apply the first party/third party distinction in cases (unlike this one) where the funds are *not* criminally derived.

³⁸ While we contend that at a minimum the court should have followed the grouping approach recommended by the probation officer in the original PSR, we believe that even that original grouping recommendation exaggerated the number of units that should have been assessed against Dr. Dhafir, pursuant to U.S.S.G. § 3D1.4. There should have been only one group of offenses: as previously noted, the money laundering, tax and mail/wire fraud counts all group pursuant to the cited application note; the IEEPA violation groups with the money laundering counts because those counts involve the same victim (the societal interest in the Iraq Sanctions) and a common scheme pursuant to § 3D1.2(b); the healthcare offenses group pursuant to § 3D1.2(d), because they are covered by the same Guideline (§ 2B1.1) as the other fraud offenses; and the visa fraud, which was

VII. HUNDREDS OF THOUSANDS OF DOLLARS OF RESTITUTION WERE ORDERED PAID TO ENTITIES WHICH WERE NOT "VICTIMS" OF ANY OFFENSE, IN VIOLATION OF GOVERNING STATUTORY RESTRICTIONS.

Standard of Review. In general, an award of restitution is reviewed for abuse of discretion, although legal issues of statutory interpretation receive *de novo* consideration. *United States v. Reifler*, 446 F.3d 65, 120 (2d Cir. 2006); *United States v. Berardini*, 112 F.3d 606, 609 (2d Cir. 1997). An illegal sentence, although not objected to on the same grounds below, will be reversed as plain error, Fed.R.Crim.P. 52(b), unless harmless beyond a reasonable doubt. *United States v. Cotton*, 535 U.S. 625, 627 (2002); *United States v. Thomas*, 274 F.3d 655, 672 (2d Cir. 2001) (en banc). The plain error rule is applicable to restitution issues. *United States v. Coriaty*, 300 F.3d 244, 252 (2d Cir. 2002).

Discussion: In an amended judgment entered upon post-sentence proceedings for the determination of restitution, *see* 18 U.S.C. § 3664(d)(5), the trial court ordered appellant Rafil Dhafir to pay \$865,272.76 to four specified payees: Centers for Medicare and Medicaid Services (\$316,262.61), New York State Medicaid Restitution Fund (\$45,366.75), Excellus Blue Cross Blue Shield (\$18,655.40), and State of New York Law Department, Restitution Account (\$484,988). The defendant objected to the restitution order on various grounds, (A-1185)(letter brief, 1/9/06), but the court ordered the amounts requested by the government to be paid, without addressing the defendant's objections except to state that the award was based "on a preponderance of the evidence." SPA-3.

inextricably linked to the operation of HTN, involves the same victim as the mail/wire fraud offenses and was part of the charged common scheme involving HTN – thus grouping under § 3D1.2(b).

Because neither of the New York agencies was a "victim" of any offense for which Dr. Dhafir was convicted in this case, the restitution to those entities was entirely unlawful. The judgment of sentence must therefore be reversed.

The Victim Witness Protection Act, as amended by the Mandatory Victim Restitution Act, 18 U.S.C. §§ 3556, 3663-3664, directs that restitution be included in the judgment of sentence for certain federal offenses, including the mail and wire fraud and healthcare fraud counts in this case. Those statutes, however, must be strictly construed and applied in accordance with the rule of lenity. *Hughey v. United States*, 495 U.S. 411, 422 (1990). The applicable provision makes restitution payable only to a "victim of the offense." 18 U.S.C. § 3663A(a)(1).³⁹ A "victim" for this purpose is "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered" *Id.*(a)(2). In the case of any "offense that involves as an element a scheme," the term "victim" also includes "any person directly harmed by the defendant's criminal conduct in the course of the scheme" *Id.* Because 18 U.S.C. §§ 1341, 1343 and 1347 all involve the execution of a "scheme" as an element, the latter definition applies to all the restitution issues in this case. The statute "does not authorize the court to order a defendant to pay restitution to any person who was not a victim of the offense of which the defendant was convicted." *Reifler*, 446 F.3d at 121. Even under the broader definition, the two New York state agencies were not "victims" of any "scheme" that was an element of any offense for which Dr. Dhafir was convicted.

The healthcare fraud scheme charged in Counts 24-49, for example, was expressly directed against the Medicare program. A-208-11. The victims of this scheme are represented by the Center for Medicare Services and by Excellus,

³⁹ The text of 18 U.S.C. § 3663A is set forth at SPA-15.

which was a supplemental insurer for Medicare. As described in the indictment, however, the healthcare fraud scheme did not purport to reach any claims submitted to Medicaid, an entirely different program. Nothing in the PSI or in the affidavit of Sabrina Stagnitti, submitted by the government with its November 15, 2005, supplemental sentencing memorandum (A-1144) would support a conclusion that any false claims to Medicaid were made as part of the scheme described in the introduction to Counts 24-49.⁴⁰ Accordingly, the judgment must be vacated in part and corrected to delete the order to pay \$45,366.75 to the New York State Medicaid Restitution Fund.

Similarly, the mail and wire fraud counts involved an alleged "scheme to defraud donors to Help the Needy and Help the Needy Endowment, Inc.," by obtaining donations on false representations. The theory for awarding \$484,988 to the State of New York Law Department, Restitution Account, based upon these offenses was advanced in the government's supplemental sentencing memorandum only in the "Conclusion," as follows: "Finally, for the reasons set forth in paragraph 43 of the Presentence Report, as amended by the third addendum, we respectfully submit that restitution of charitable contributions in the amount of

⁴⁰ The government did not contend otherwise in its submission. Rather, it argued that restitution could be awarded to Medicaid on "relevant conduct" principles under U.S.S.G. § 1B1.3(a)(2). That rule is wholly irrelevant to the instant issue, since "relevant conduct," by its own terms, is a concept used for the determination of base offense levels, specific offense characteristics, cross references, and adjustments under the Guidelines. None of these has anything to do with the scope of the statutory concept "victim" in § 3663A of Title 18. Restitution awards are circumscribed by the counts of conviction, not the broader relevant conduct principle. *See Hughey*, 495 U.S. at 419-20; *United States v. Germosen*, 139 F.3d 120, 131 (2d Cir. 1998) (government conceded, and Court held, that amounts of "loss" attributable only to Guidelines "relevant conduct" and not to counts of conviction are not subject to restitution).

\$484,988.00 should be paid to the New York State Department of Law, Restitution Account." A-1153.

The PSI's rationale, thus endorsed by the government and presumably adopted by the lower court's otherwise unexplained order, is this:

On June 22, 2005, the Court issued an order recognizing that the New York State Supreme Court signed an order of judgment dissolving Help the Needy and authorizing the New York State Attorney General to oversee the transfer of Help the Needy assets to a bona fide charitable organization(s) for distribution in a manner consistent with the intent of the individuals who donated money to Help the Needy. The Court's order directs the transfer of certain funds to the New York Attorney General's Office in an instrument payable to 'New York State of Law, Restitution Account.'

PSI ¶ 44 (sic). The amount proposed for restitution was calculated in the PSI, based on Gov't Exhibit 1.900.104 at trial,⁴¹ as a sum of the amounts contributed to HTN that were expended on the organization's expenses, plus the amount expended for "non-charitable" purposes, plus the amount paid for "preachers" (dauud or dawat), less amounts contributed to HTN by Dr. Dhafir. The conclusion that an amount equal to the balance (\$484,988) should be awarded to the New York State fund, as receiver for HTN and HTNE, *as restitution*, does not follow at all.

According to the indictment, HTN and HTNE were co-conspirators, co-schemers, and co-defendants of Dr. Dhafir. The contributions in question, if fraudulently obtained, were ill-gotten *gains* of HTN and HTNE, not *losses* to those entities. The statute does not permit an award of restitution to a co-conspirator, *Reifler*, 446 F.3d at 124-32, and thus cannot allow an award to the co-conspirator's

⁴¹ The government's initial sentencing memorandum had requested a restitution award of a larger amount to the same payee, but with no explanation at all. A-1123. The Third Addendum (10/05) adjusted the figure downward but did not alter the theory behind it.

receiver or successor in interest. The concept behind this aspect of the district court's restitution order appears to sound in the law of charitable trusts, not in the restitution statutes.⁴² The order of restitution on account of the mail and wire fraud counts must therefore be reversed.

Nor can the same amount be awarded on remand to a different class of "victims." The Probation Officer reported that "approximately 17,000 donations were deposited into Help the Needy bank accounts by hundreds or possibly thousands of donors." PSI ¶ 43. Even if those individuals are viewed as "victims" (a proposition this brief disputes above), this is simply a case in which "the number of identifiable victims is so large as to make restitution impracticable." 18 U.S.C. § 3663A(c)(3)(A).⁴³ And even if the number were not too large, the process of determining how much to refund to whom would "complicate or prolong the sentencing proceedings to a degree that the need to provide restitution ... is outweighed by the burden on the sentencing process." *Id.*(c)(3)(B). None of the donors applied to the court below for restitution as "victims" and the government never named them as such. Any such claims are therefore now waived. *See* 18 U.S.C. § 3664(d). No restitution of their contributions – already expended, directly or indirectly, for charitable purposes – should be made to them.

⁴² Even if there were some basis to award restitution on these counts to someone, it could not lawfully be done by delegating to the state government's Law Department the identification of recipients and the amounts due them. *See United States v. Porter*, 41 F.3d 68, 71 (2d Cir. 1994).

⁴³ The indictment in this case did not break down the mail and wire fraud charges into counts linked to "victims." The putative "victim" donors were never named; it is not merely that they were identified but not located. *Compare United States v. Berardini*, 112 F.3d 606 (2d Cir. 1997).

Finally, the defense raised specific objections to the inclusion of the cost of certain items (medicine, for example) in the amounts set for restitution, pointing out that these were not subject to the "incident to" rule that underlay the allegation of fraud. A-1122. The government never responded to this objection and the court below improperly placed the burden on the defense to prove what in the government's figure was improper. SPA-3. *See Reifler*, 446 F.3d at 122 (burden is on the government). The failure to address the defendant's objections violated Fed.R.Crim.P. 32(i)(3)(B) (court must resolve any disputed matter bearing on sentencing). On remand, after striking entirely the improperly included \$530,354.75 (\$484,988 + \$45,366.75), the court below should be required to address this objection and delete the improperly included items, so that only amounts billed fraudulently under the scheme alleged in the indictment are made the subject of any restitution order.

For all of these reasons, the restitution portion of the sentence must be reversed and remanded.

CONCLUSION

For the foregoing reasons, this Court should reverse the Appellant's convictions on the mail and wire fraud counts, remanding for entry of judgments of acquittal, and vacate the convictions on all of the other counts with directions to allow a new trial. In the event that any convictions are affirmed, the case should be remanded for resentencing, both with respect to the term of imprisonment and as to the order of restitution.

Respectfully submitted,

Dated: February 7, 2008

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CERTIFICATE OF TYPE-VOLUME COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), I certify, based on the word-counting function of my word processing system, that this brief is in a 14-point, proportionally-spaced format using MS Word's Times New Roman font. This brief exceeds the type-volume limitations of Rule 32(a)(7)(B) because it contains 23,728 words. On February 7, 2008, this Court (per Hall, J.) granted leave to the appellant to file this brief with up to 24,000 words.

/s/ Peter Goldberger

CERTIFICATE OF VIRUS COMPLIANCE

Pursuant to Local Rule 32(a)(1)(E), I certify that the PDF version of the Brief for the Appellant, that was submitted in this case as an email attachment to briefs@ca2.uscourts.gov, was scanned for viruses, using Command Antivirus for Windows Enterprise, and Avast! Antivirus (ver. 4.7, with current updates) for Windows XP, and no viruses were detected.

*/s/ Peter Goldberger*_____

TABLE OF CONTENTS

Addendum Page

Letter-Order (Mordue, U.S.D.J.) Granting Government's Motion <i>in Limine</i> (filed October 14, 2004)	SPA-1
Memorandum-Decision and Order (Mordue, J.) re: Restitution Issues (filed January 24, 2006)	SPA-3
Amended Judgment in a Criminal Case (filed and entered February 6, 2006)	SPA-5
U.S.S.G. § 2S1.1	SPA-13
18 U.S.C. § 3663A	SPA-15

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69-06 Grand Avenue
Maspeth, NY 11378

**Re: *United States v. Rafil Dhafir and Help the Needy Endowment, Inc.*
03-CR-64**

Counselors:

Jury selection is scheduled to begin in this case on October 18, 2004.¹ An additional 50 jurors have been summoned for that date. There are presently a number of issues before the Court.

First, the Government has made a motion *in limine* to preclude defendants from arguing at trial or offering any evidence concerning (1) the Government's alleged motives in investigating and prosecuting defendants or (2) the fact that defendant Dhafir was not charged with other crimes. In opposition, defendants' counsel states that he intends to address the integrity and/or credibility of the investigation, and he argues that evidence adduced at the Grand Jury is germane to this issue. Such evidence has no bearing on whether defendants are innocent or guilty of the charged crimes and thus presents an issue for the Court, not the jury.² *See, e.g., United States v. Regan*, 103 F.3d 1071, 1081-82 (2d Cir. 1997). Accordingly, the Government's motion is granted and defendants are precluded from arguing at trial or offering any evidence concerning the following: the Government's alleged motives in investigating and prosecuting defendants; the integrity and/or credibility of the Government's investigation and prosecution of defendants; the fact that defendant Dhafir was not charged with other crimes; and related issues.

1

The trial date was recently adjourned at the request of defense counsel, first from September 27, 2004 to October 4, 2004, and then from October 4, 2004 to October 18, 2004. The Court denied defense counsel's request (Dkt. No. 340) to stay jury selection pending a decision by the Second Circuit on defendant Dhafir's petition for rehearing and reconsideration of its order affirming this Court's detention order.

2

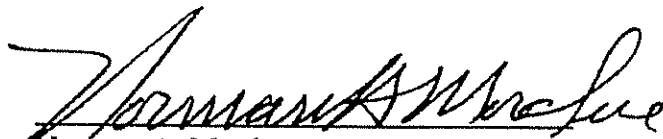
The Court has already rejected defendants' motion to dismiss the indictment based on selective prosecution. *See Memorandum-Decision and Order*, September 13, 2004 (Dkt. No. 314).

By letter dated October 11, 2004, defendants' counsel requests that the Court order the deposition of Maher Zagher under Fed. R. Crim. P. 15. Zagher, an indicted co-defendant, is believed to be in Jordan. Defendants' counsel in his letter asserts that Zagher's testimony "may tend to exculpate Dr. Dhafir" and that "[w]e believe that Mr. Zagher has material and exculpatory testimony to provide on behalf of Dr. Dhafir, and that he is prepared to waive his Fifth Amendment privilege." These bald conclusory assertions fall far short of demonstrating a basis for the Court to exercise its discretion to order a Rule 15 deposition of Zagher, particularly as the letter-request was made one week before the trial date, a date which has been set after a number of adjournments at defendants' request. Defendants have not demonstrated their entitlement to a Rule 15 order directing the deposition of Zagher; accordingly, the Court does not grant such an order.

In the event that defendant Dhafir refuses to travel to the courthouse for the commencement of his trial on October 18, 2004, the Court will be required to determine whether his refusal constitutes a knowing and voluntary waiver of his Sixth Amendment and Rule 43 rights. In order to make this determination, it may be necessary to hear testimony on the issues of whether defendant Dhafir's refusal to undergo strip searches arises from a sincerely held belief of a religious nature, whether the correctional authorities' practice regarding strip searches is reasonably related to legitimate penological interests and whether it is the least restrictive means of furthering those interests. The parties should prepare for this possibility.

The Court is also concerned about the status of the corporate defendant. The Court requests that the parties apprise it by letter of their progress in this regard. The Court also requests that the Government provide it with a copy of the corporation's by-laws. If a person or persons with authority to act for the corporation fail to take action to hire counsel, it may be necessary to procure their presence at the commencement of trial in order to obtain the corporation's waiver of its Rule 43 and Sixth Amendment rights. See *United States v. Pace*, 2000 WL 777936 (S.D.N.Y. 2000).

Very truly yours,



Norman A. Mordue
U.S. District Judge

the following ordering paragraphs; and it is further

ORDERED that restitution in the amount of \$316,262.61 shall be paid to the Centers for Medicare and Medicaid Services for losses to Medicare; of this amount, \$62,885.42 is ordered jointly and severally with Priscilla Dhafir, Docket Number 03-CR-270-001; and it is further

ORDERED that restitution shall be paid in the amount of \$45,366.75 to New York State Medicaid Restitution Fund for losses to Medicaid; and it is further

ORDERED that restitution in the amount of \$18,655.40 shall be paid to Excellus Blue Cross Blue Shield for losses to that entity; and it is further

ORDERED that restitution of charitable contributions in the amount of \$484,988.00 shall be paid to the State of New York Law Department, Restitution Account; and it is further

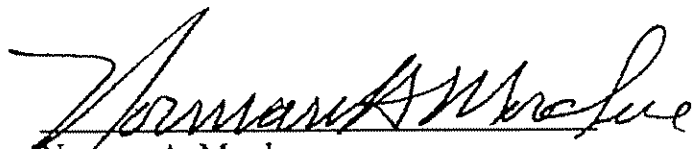
ORDERED that restitution is to be paid immediately; and it is further

ORDERED that payments shall be forwarded to the U.S. District Court Clerk; and it is further

ORDERED that, based on defendant's financial resources, projected earnings and other income, as well as his financial obligations, defendant is in a position to pay restitution but not a fine or interest on the restitution and therefore the Court waives both.

IT IS SO ORDERED.

January 24, 2006
Syracuse, New York


Norman A. Mordue
U.S. District Judge

UNITED STATES DISTRICT COURT

Northern

District of

New York

UNITED STATES OF AMERICA

AMENDED JUDGMENT IN A CRIMINAL CASE

V.

Rafil A. Dhafir

Case Number: 5:03CR00064-001

USM Number: 11921-052

Deveraux L. Cannick, Aiello & Cannick, 69-06 Grand Avenue, Maspeth, New York 11378 (718) 426-0444

Defendant's Attorney

Date of Original Judgment: 10/27/2005
(Or Date of Last Amended Judgment)

Reason for Amendment:

- Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

- Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- Direct Motion to District Court Pursuant 28 U.S.C. § 2255 or 18 U.S.C. § 3559(e)(7)
- X Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- pleaded guilty to count(s) _____
- pleaded nolo contendere to count(s) _____ which was accepted by the court.
- X was found guilty on count(s) 1, 2, and 4 through 60 of the Fourth Superseding Indictment on February 10, 2005. after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 371	Conspiracy to Evade the Iraqi Sanctions	2/03	1
18 U.S.C. § 1956(h)	Conspiracy to Launder Funds	2/03	2
18 U.S.C. § 1956(a)(2)(A) and 2	Money Laundering	11/7/99	4

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed in accordance with 18 U.S.C. § 3553 and the Sentencing Guidelines.

X The defendant has been found not guilty on count(s) 3 of the Fourth Superseding Indictment on February 10, 2005.

Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 24, 2006

Date of Imposition of Judgment

Date

DEFENDANT: Rafil A. Dhafir
 CASE NUMBER: 5:03CR00064-001

ADDITIONAL COUNTS OF CONVICTION

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 1956(a)(2)(A) and 2	Money Laundering	11/25/99	5
18 U.S.C. § 1956(a)(2)(A) and 2	Money Laundering	1/19/00	6
18 U.S.C. § 1956(a)(2)(A) and 2	Money Laundering	2/23/00	7
18 U.S.C. § 1956(a)(2)(A) and 2	Money Laundering	7/5/00	8
18 U.S.C. § 1956(a)(2)(A) and 2	Money Laundering	8/17/00	9
18 U.S.C. § 1956(a)(2)(A) and 2	Money Laundering	11/12/01	10
18 U.S.C. § 1956(a)(2)(A) and 2	Money Laundering	1/15/02	11
18 U.S.C. § 1956(a)(2)(A) and 2	Money Laundering	3/28/02	12
18 U.S.C. § 1956(a)(2)(A) and 2	Money Laundering	9/16/02	13
18 U.S.C. § 1956(a)(2)(A) and 2	Money Laundering	1/15/03	14
18 U.S.C. § 371	Conspiracy to Defraud the United States by Obstructing the Internal Revenue Service in Assessing and Collecting Income Taxes	2/03	15
26 U.S.C. § 7206(2)	Aiding in the Preparation and Presentation of a False Document to the Internal Revenue Service	8/2/02	16
26 U.S.C. § 7201	Tax Evasion	4/15/97	17
26 U.S.C. § 7201	Tax Evasion	4/15/98	18
26 U.S.C. § 7201	Tax Evasion	4/15/99	19
26 U.S.C. § 7201	Tax Evasion	4/15/00	20
26 U.S.C. § 7201	Tax Evasion	4/15/01	21
26 U.S.C. § 7201	Tax Evasion	4/15/02	22
18 U.S.C. § 1546(a) and 2	False Material Statement Presented in an Immigration and Naturalization Service Visa Application	8/17/01	23
18 U.S.C. § 1347 and 2	Health Care Fraud	2/22/99	24
18 U.S.C. § 1347 and 2	Health Care Fraud	2/22/99	25
18 U.S.C. § 1347 and 2	Health Care Fraud	12/16/99	26
18 U.S.C. § 1347 and 2	Health Care Fraud	12/27/99	27
18 U.S.C. § 1347 and 2	Health Care Fraud	3/16/00	28
18 U.S.C. § 1347 and 2	Health Care Fraud	5/11/00	29
18 U.S.C. § 1347 and 2	Health Care Fraud	12/14/00	30
18 U.S.C. § 1347 and 2	Health Care Fraud	3/27/01	31
18 U.S.C. § 1347 and 2	Health Care Fraud	11/27/01	32
18 U.S.C. § 1347 and 2	Health Care Fraud	2/12/02	33
18 U.S.C. § 1347 and 2	Health Care Fraud	2/15/02	34
18 U.S.C. § 1347 and 2	Health Care Fraud	2/15/02	35
18 U.S.C. § 1347 and 2	Health Care Fraud	4/11/02	36
18 U.S.C. § 1347 and 2	Health Care Fraud	6/7/02	37

DEFENDANT: Rafil A. Dhafir
CASE NUMBER: 5:03CR00064-001

ADDITIONAL COUNTS OF CONVICTION

18 U.S.C. § 1347 and 2	Health Care Fraud	6/7/02	38
18 U.S.C. § 1347 and 2	Health Care Fraud	6/7/02	39
18 U.S.C. § 1347 and 2	Health Care Fraud	6/7/02	40
18 U.S.C. § 1347 and 2	Health Care Fraud	6/12/02	41
18 U.S.C. § 1347 and 2	Health Care Fraud	6/12/02	42
18 U.S.C. § 1347 and 2	Health Care Fraud	6/12/02	43
18 U.S.C. § 1347 and 2	Health Care Fraud	9/27/02	44
18 U.S.C. § 1347 and 2	Health Care Fraud	1/28/03	45
18 U.S.C. § 1347 and 2	Health Care Fraud	9/20/02	46
18 U.S.C. § 1347 and 2	Health Care Fraud	9/20/02	47
18 U.S.C. § 1347 and 2	Health Care Fraud	9/27/02	48
18 U.S.C. § 1347 and 2	Health Care Fraud	9/30/02	49
18 U.S.C. § 1001(a)(2)	False Statement to a Benefit Integrity Specialist for a Medicare Carrier	9/16/02	50
18 U.S.C. § 1341	Mail Fraud	4/8/00	51
18 U.S.C. § 1341	Mail Fraud	2/15/01	52
18 U.S.C. § 1341	Mail Fraud	8/5/02	53
18 U.S.C. § 1341	Mail Fraud	8/19/02	54
18 U.S.C. § 1341	Mail Fraud	9/25/02	55
18 U.S.C. § 1341	Mail Fraud	10/2/02	56
18 U.S.C. § 1341	Mail Fraud	2/27/03	57
18 U.S.C. § 1343	Wire Fraud	10/30/02	58
18 U.S.C. § 1343	Wire Fraud	11/20/02	59
18 U.S.C. § 1343	Wire Fraud	1/3/03	60

DEFENDANT: Rafil A. Dhafir
CASE NUMBER: 5:03CR00064-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 264 months. This consists of terms of 240 months as to each of Counts 2, 4 through 14, and Counts 53 through 60; terms of 120 months as to each of Counts 24 through 49; terms of 60 months as to each of Counts 1, 15, 17 through 23, and Counts 50 through 52; and a term of 36 months as to Count 16. The terms on each of Counts 2, Counts 4 through 14, Counts 16 through 49, and Counts 51 through 60 shall be served concurrently with each other. The terms on each of Counts 1, 15, and 50 shall be served concurrently with each other and, on each of which, 24 months shall be served consecutively to the 20-year terms imposed on Count 2, Counts 4 through 14, and Counts 53 through 60, for a total term of imprisonment of 264 months.

The court makes the following recommendations to the Bureau of Prisons:

The Court recommends the defendant be designated to the Federal Correctional Facility at Otisville, New York.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____ .

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____ .

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Rafil A. Dhafir
CASE NUMBER: 5:03CR00064-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

3 years. This consists of a term of 3 years on Counts 1, 2, 4 through 15, and Counts 17 through 60; and a term of 1 year on Count 16, all such terms to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- X The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.
- X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Deselect, if inapplicable.)
- The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and
- 14) the defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

DEFENDANT: Rafil A. Dhafir
CASE NUMBER: 5:03CR00064-001

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall provide the probation officer with access to any requested financial information.

DEFENDANT’S ACKNOWLEDGMENT OF APPLICABLE CONDITIONS OF SUPERVISION

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

The conditions of supervision have been read to me. I fully understand the conditions and have been provided a copy of them.

Defendant

Date

U.S. Probation Officer/Designated Witness

Date

DEFENDANT: Rafil A. Dhafir
CASE NUMBER: 5:03CR00064-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A In full immediately; or
- B Lump sum payment of \$ _____ due immediately, balance due
 - not later than _____, or
 - in accordance with D, E, F, or G below; or
- C Payment to begin immediately (may be combined with D, E, or G below); or
- D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- E Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- F Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- G Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to **Lawrence K. Baerman, Clerk, U.S. District Court, Federal Bldg., P.O. Box 7367, 100 S. Clinton Street, Syracuse, N.Y. 13261-7367**, unless otherwise directed by the court, the probation officer, or the United States attorney. If a victim cannot be located, the restitution paid to the Clerk of the Court for that victim shall be sent to the Treasury, to be retrieved if and when the victim is located.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- X Joint and Several
 - X Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

* Of the total restitution owed to Centers for Medicare and Medicaid Services, \$62,885.42 shall be joint and several with Priscilla Dhafir (5:03CR00270-001).

- The Court gives notice that this case involves other defendants who may be held jointly and severally liable for payment of all or part of the restitution ordered herein and may order such payment in the future.
- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

§2S1.1 Laundrying of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

- (a) Base Offense Level
 - (1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense (or would be accountable for the underlying offense under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct); and (B) the offense level of the offense can be determined; or
 - (2) 8 plus the number of offense levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the laundered funds, otherwise.

- (b) Specific Offense Characteristics
 - (1) If (A) subsection (a)(2) applies; and (B) the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote (i) an offense involving the manufacture, importation, or distribution of a controlled substance or a listed chemical; (ii) a crime of violence; or (iii) an offense involving firearms, explosives, national security, terrorism, or the sexual exploitation of a minor, increase by 6 levels.
 - (2) (Apply to the Greatest):
 - (A) If the defendant was convicted under 18 U.S.C. §1957, increase by 1 level.
 - (B) If the defendant was convicted under 18 U.S.C. §1956, increase by 2 levels.
 - (C) If (i) subsection (a)(2) applies; and (ii) the defendant was in the business of laundering funds, increase by 4 levels.

Relevant Commentary

Application Notes:

* * *

2. Application of Subsection (a)(1).--

- (A) Multiple Underlying Offenses—In cases in which subsection (a)(1) applies and there is more than one underlying offense, the offense level for the underlying offense is to be determined under the procedures set forth in Application Note 3 of the Commentary to §1B1.5 (interpretation of References to Other Offense Guidelines).
- (B) Defendants Accountable for Underlying Offense.— In order for subsection (a)(1) to apply, the defendant must have committed the underlying offense or be accountable for the underlying offense under §1B1.3(a)(1)(A). The fact that the defendant was involved in laundering criminally derived funds after the commission of the underlying offense, without additional involvement in the underlying offense, does not establish that the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the underlying offense.

* * *

- 6. Grouping of Multiple Counts.—In a case in which the defendant is convicted of a count of laundering funds and a count for the underlying offense from which the laundered funds were derived, the counts shall be grouped pursuant to subsection (c) of §3D1.2 (Groups of Closely-Related Counts).

§ 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant--

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense--

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to--

(i) the greater of--

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim--

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense--

(A) that is--

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; or

(iii) an offense described in section 1365 (relating to tampering with consumer products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that--

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

CERTIFICATE OF SERVICE

On February 8, 2008, I served two copies of this Opening Brief on the attorneys for the government via First Class or Priority Mail, postage prepaid (and a PDF copy by e-mail) to:

Michael C. Olmsted, Esq.
Brenda K. Sannes, Esq.
Assistant U.S. Attorneys
P.O. Box 7198
Syracuse, NY 13261

I further certify pursuant to Fed.R.App.P. 25(d)(2) that ten copies of this brief were today placed in U.S. Priority Mail, postage prepaid, and properly addressed to the Clerk, United States Court of Appeals for the Second Circuit, thus filing the brief pursuant to Fed.R.App.P. 25(a)(2)(B).

/s/ Peter Goldberger