IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	
v.	**Crim. No. 08-231 (EGS)**
THEODORE F. STEVENS,	
Defendant.	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S
MOTION FOR A NEW TRIAL

WILLIAM M. WELCH II
Chief, Public Integrity Section

BRENDA K. MORRIS
Principal Deputy Chief

NICHOLAS A. MARSH
EDWARD P. SULLIVAN
Trial Attorneys

JOSEPH W. BOTTINI
JAMES A. GOEKE
Assistant United States Attorneys
for the District of Alaska

DATED: January 16, 2009

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INTRODUCTION

Defendant contends that he is entitled to a new trial based on numerous claims of error in his indictment and trial. Under Fed. R. Crim. P. 33(a), a defendant may be granted a new trial only "if the interest of justice so requires." The burden of demonstrating that a new trial is justified rests with the defendant. United States v. Reese, 561 F.2d 894, 902 (D.C. Cir. 1977); United States v. Quattlebaum, 540 F.Supp.2d 1, 7 (D.D.C. 2008). This burden is a "heavy" one, requiring that the defendant show that it would be a "miscarriage of justice to let the verdict stand." Ibid. In other words, the defendant "must overcome a strong presumption * * * in favor of upholding the jury verdict." United States v. Rogers, 918 F.2d 207, 213 (D.C. Cir. 1990); see also Quattlebaum, 540 F.Supp.2d at 7 (power to grant a new trial "should be exercised with caution"). As we show below, defendant's claims of error, either individually or in combination, do not entitle him to a new trial.

ARGUMENT

I. NO PREJUDICIAL HEARSAY WAS ADMITTED AT TRIAL.

Defendant contends (Mem. 1-10) that this Court misapplied the hearsay rules. See Fed. R. Evid. 801-807. As we demonstrate below, these claims are incorrect. Moreover, even if any inadmissible hearsay was introduced at trial, defendant cannot show that this evidence had a "'substantial and injurious effect or influence in determining the jury's verdict.'" United States v. Evans, 216 F.3d 80, 90 (D.C. Cir. 2000) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).[1]

A. Persons's Statement that Defendant was "Just Covering His Ass." Defendant first challenges (Mem. 2) the admission, through the testimony of Bill Allen, of Bob Persons's

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[1] Kotteakos does not apply if the error violated the Confrontation Clause. See ibid. The hearsay portion of defendant's brief does not allege any such violation. See Mem. 1-11.

statement that, in requesting that Allen send him a bill, defendant was "just covering his ass." 10/1/08 A.M. Tr. 52. The Court properly admitted this statement: (1) to show Allen's "state of mind," id. at 53; and (2) as a joint-venturer statement under Fed. R. Evid. 801(d)(2)(e). Id. at 53-59; see United States v. Gewin, 471 F.3d 197, 200-02 (D.C. Cir. 2006).

Defendant argues (Mem. 2) that since Persons was the *declarant*, this statement could not be admitted under the hearsay exception in Fed. R. Evid. 803(3) as proof of Allen's own state of mind. This claim is irrelevant because a statement admitted to show its effect on the *hearer* is not hearsay at all. Fed. R. Evid. 801(c) (hearsay must be offered "to prove the truth of the matter asserted"); see United States v. Thompson, 279 F.3d 1043, 1047 (D.C. Cir. 2002). Persons's statement was therefore admissible to explain why Allen failed to send defendant a bill. See, e.g., Miller v. Holzmann, 563 F.Supp.2d 54, 86 (D.D.C. 2008) (statement offered for "its effect on the hearer" was not hearsay under Fed. R. Evid. 801(c)).

Persons's statement was also admissible as proof that defendant was, in fact, "just covering his ass." Fed. R. Evid. 801(d)(2)(E) provides that a statement is not hearsay if it is made by a party's co-conspirator "during the course and in furtherance of the conspiracy." Under Gewin, this exception applies to statements made by lawful joint venturers as well. 471 F.3d at 201-02. Here, the trial evidence demonstrated that defendant, Allen and Persons collaborated closely and over a long period of time on renovating defendant's chalet. E.g., 10/1/08 A.M. Tr. 14-15, 26; 10/16/08 A.M. Tr. 21-29.[2] Moreover, the record contains ample evidence (independent of Persons's statement) that one of this joint venture's goals was to ensure that defendant did not foot the entire

[2] See also, e.g., GX 172, 428, 449, 452, 456, 488-89, 491-92, 494, 495, 497, 504, 509, 604, 677-78, 699, 1023, 1026-27, 1031, 1033-36.

bill for this project himself. E.g., 10/6/08 A.M. Tr. 13-16, GX 203-205; GX 660. Persons's remark, which furthered this goal, was therefore admissible under Fed. R. Evid. 802(d)(2)(E).[3]

B. Persons's Statement that "Ted gets Hysterical When He Has to Spend His Own Money." Next, defendant contends (Mem. 5) that the district court erred in admitting a recorded conversation between Allen and Persons, in which Persons noted:

> Ah, as, as, ah, Catherine says, ah Ted gets hysterical when he has to spend his own money (laughs). So, so, I wanna, wanna keep it down cause, and, and, you know, the other flip side of that is he gets hysterical cause he can't really afford to pay, ah, a bunch of money I don't think.

GX 662, 10/7/08 P.M. Tr. 68. This remark was made while Persons and Allen were discussing expenses relating to a joint venture with defendant to breed race horses, and just after Persons emphasized the need to minimize such expenses for defendant's sake. GX 662 ("So, ah I gotta hold this thing a little bit tight mainly because of Ted, you know.").

Defendant does not dispute that he participated in this business venture with Persons and Allen. Instead, citing to a Third Circuit decision, he contends that the statement was inadmissible because the horse breeding venture was not "factually intertwined" with the renovation of the chalet. Mem. 5 (citing United States v. Ellis, 156 F.3d 493, 497 (3d Cir. 1998)). These two projects were "factually intertwined" because they were both ventures that the three close friends pursued simultaneously. Indeed, Allen and Persons also discussed repairs to defendant's chalet in the same conversation in which they discussed the horse venture. GX 662.

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[3] Because Persons was undoubtedly acting as defendant's agent throughout the renovation, his remark was also admissible under Fed. R. Evid. 801(d)(2)(D) as "a statement by the party's agent * * * concerning a matter within the scope of the agency * * * made during the existence of the relationship." See GX 495 (defendant's note requesting a bill states "I asked Bob P to talk to you about this * * *").

More importantly, the D.C. Circuit has never held that statements may only be admitted under Fed. R. Evid. 801(d)(2)(E) if the underlying conspiracy or joint venture is "factually intertwined" with the charged offense. Nor is there any obvious reason to adopt such a limitation. Instead, because the "coconspirator" exception is "based on concepts of agency and partnership law," Gewin, 471 F.3d at 201, what matters is whether the defendant and the declarant were "acting in concert towards a common goal" when the statement was made, see United States v. Weis, 718 F.2d 413, 433 (D.C. Cir. 1983). If the declarant and the defendant are pursuing a common goal, and the statement is relevant, then it should be admissible under Fed. R. Evid. 801(d)(2)(E). Cf. United States v. Saimiento-Rozo, 676 F.2d 146, 149 (5th Cir. 1982) ("[I]t is not necessary that the conspiracy upon which admissibility of these statements is predicated be the conspiracy charged.").

Ellis does not clearly establish any different rule. After stating that "some courts" require "the conspiracy during which the statement were made" to be "'factually intertwined' with the offenses being tried," Ellis characterized this "additional requirement" as "essentially a restatement of ordinary relevancy principles." 156 F.3d at 497. Ellis then found the statements at issue there admissible because "[they] are relevant to the crimes charged." This standard was easily met here because defendant's aversion, in his various undertakings with Allen and Persons, to "spend[ing] his own money" was at the heart of the government's indictment.[4]

Defendant also contends (Mem. 6) that Persons's reference to Mrs. Stevens constituted "double hearsay" that should have rendered the entire statement inadmissible. Assuming *arguendo*

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[4] Defendant also contends (Mem. 5) that Persons's statement was "merely casual chatter," and thus not "in furtherance" of the horse venture. In fact, as we noted above, the statement was offered to explain why Persons was attempting to limit expenses, and was therefore directly tied to the management of the venture.

that Persons's claim that Mrs. Stevens shared his opinion constituted an independent hearsay statement by her, the introduction of this statement was harmless. Because the jury properly heard Persons's own statement that "Ted gets hysterical when he has to spend his own money," there could be little prejudice from it also hearing that Mrs. Stevens held the same view. Moreover, assuming arguendo that this remark prejudiced the defense at all, that prejudice was minimal because Catherine Stevens testified at trial, and was able to explain her comment to the jury. 10/16/08 A.M. Tr. 109.

C. The Allen/Persons Conversation Regarding the Chugach Bill. Defendant also challenges (Mem. 6-7) the introduction of a conversation between Allen and Persons prompted by defendant's receipt of a bill from Chugach Sewer and Drain. GX 203-05. The Chugach bill documented Allen's payment of the labor costs for a boiler repair at defendant's chalet. In the recorded conversation, Allen and Persons react with horror to the existence of this document, and then scheme about how to destroy it or to create false evidence to explain it in the future. GX 660.

The government has already addressed defendant's claim (Mem. 6) that this conversation was inadmissible because he was not a party to any joint venture to make improvements to the chalet that he did not pay for himself. See supra at 2-3. Moreover, contrary to defendant's claim, the conversation does not reveal that defendant wanted to pay the plumbing bill himself. In fact, Allen and Persons ultimately concluded that defendant should write a phony check to Allen, ostensibly covering Allen's prior payment, that Allen would then never cash. Such a scheme would have little chance of success without defendant's knowledge and cooperation, because it would leave an uncleared check permanently on his records, something that defendant would presumably notice and attempt to correct, if he actually wanted to pay the bill.

D. The VECO Accounting Records. Finally, defendant argues (Mem. 7-9) that the Court erred in admitting a redacted version of VECO's accounting records regarding the chalet renovation. Defendant also contends that the government "impermissibly altered" these records (Mem. 9-11). Neither claim warrants a new trial.

The parties have already thoroughly briefed the admissibility of the redacted accounting records, Dkt. 171; Dkt. 178; Dkt. 185, and defendant's present arguments fail to show that this Court abused its discretion in resolving this issue. United States v. Evans, 216 F.3d 80, 85 (D.C. Cir. 2000) (abuse of discretion standard applies to claim that hearsay was inadmissible). Defendant's principal claim is that "the source of information [in the records] or the method or circumstances of [their] preparation indicate lack of trustworthiness." Fed. R. Evid. 803(6). Notwithstanding claims to the contrary, defendant's argument merely raises concerns about the weight that should be accorded the records, not their admissibility. There is no evidence that the Williams and Anderson time records and the remaining accounting records originated from a single "source." Indeed, many of the underlying records are not even time records at all, but rather consist of invoices for materials used at the Girdwood project. Moreover, trial testimony established the prerequisites for admission pursuant to Rule 803(6), demonstrating that the process of submitting invoices and time records from VECO subsidiaries was standard protocol for VECO Corporation, independent of the Girdwood spreadsheet. See 9/26/08 A.M. Tr. 8, 12.

Nor is there anything about the "method or circumstances" of the records preparation that shows that they are untrustworthy. Defendant notes (Mem. 8-9) that Bill Allen testified that he had never seen "all the figures" on the Girdwood project, and specifically, did not see the hours spent by Williams and Anderson. 10/06/08 A.M. Tr. 92-93. Allen's testimony about Williams and

Anderson is irrelevant since the records relating to these two employees were stricken. As to the remaining records, there is no requirement that the CEO of a company with hundreds of millions of dollars of annual revenue review its accounting records, time sheets or invoices in order for these documents to be considered business records of the company.

Allen's conclusion that some of VECO's costs on the Girdwood remodel were "excessive" also does not prove that the records should have been excluded. 10/6/08 A.M. Tr. 91. That a business has determined that its underlying costs on a particular project were too high does not render its accounting documents unreliable.[5] The government established at trial that the VECO accounting records were generated and kept in the normal course of business, and bears no burden to establish their complete accuracy prior to admission. Defendant had every opportunity to challenge the reliability of the accounting records during the testimony of Allen, Cheryl Boomershine, and David Anderson. The jury was instructed as to why Anderson and Williams's information was stricken from the records, and it also heard Allen's testimony concerning his oversight of the process -- the same testimony upon which defendant relies heavily in his motion. As a result, the jury had sufficient testimony with which to weight the value of the records.

In any event, any error in admitting the VECO accounting records was harmless. Even assuming *arguendo* that the inaccuracies relating to Williams and Anderson rendered *all* employee time records suspect, the government called numerous VECO employees (including Anderson) at

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[5] See, e.g., White v. Godinez, 301 F.3d 796, 801 (7th Cir. 2002) (upholding admissibility of incomplete jail records under Rule 803(6) because "the state's arguments about incompleteness implicate the weight, and not the admissibility of the records"); United States v. Scholl, 166 F.3d 964, 978-79 (9th Cir. 1999) ("[A] party need not prove that business records are accurate before they are admitted."). "Generally, objections that an exhibit may contain inaccuracies, ambiguities, or omissions go to the weight and not the admissibility of the evidence." United States v. Keplinger, 776 F.2d 678, 694 (7th Cir. 1985). See also Dkt. 178 at 7 (citing cases).

trial, and these employees gave detailed testimony about the amount of time they spent working on the defendant's chalet. E.g., 9/26/08 P.M. Tr. 40-42; 9/26/08 P.M. Tr. 68; 9/29/08 P.M. Tr. 34-35; 9/29/08 P.M. Tr. 64-65; 9/29/08 P.M. Tr. 99-106; 9/30/08 A.M. Tr. 12; 10/9/08 A.M. Tr. 42. This testimony demonstrated that defendant accepted thousands of hours of free labor on his house, and there can be no question that the value of this labor far exceeded the applicable threshold for reporting gifts (or liabilities). In light of this testimony, VECO's time records ultimately proved to be cumulative. The admission of these records therefore could not have had a "'substantial and injurious effect or influence" on the jury's verdict. See also 10/21/08 P.M. Tr. 55 (after noting that "defendant can try to argue that there is something wrong with the VECO spreadsheet," government notes in rebuttal closing "it's not about the final number of how much VECO paid, Bill Allen paid, for this renovation and the gifts that the defendant received, it's the fact that he knew he got it.")

Finally, defendant contends (Mem. 9-11) that this Court erred in permitting the government to indicate, on the redacted version of the VECO spreadsheet, the new totals for the underlying invoices, once the redacted items were subtracted. At trial, this Court observed that this procedure was "only fair," and "certainly consistent with what [it] had in mind when it struck the information regarding Anderson and Williams." 10/21/08 A.M. Tr. 4. The Court did not abuse its discretion in permitting the government to supply these notations.

Defendant acknowledged at trial that the notations were "the least intrusive option" for dealing with the effect of the redactions, id. at 3, but nonetheless maintains that adding them to the spreadsheet somehow "compounded the unreliability of the exhibits." Mem. 10. This is incorrect. The handwritten totals reflected nothing more than simple arithmetic, and providing them spared the jury the task of adding up the numbers on the underlying invoices itself. Because defendant does

not dispute the government's arithmetic, he cannot show that these notations affected the reliability of VECO's accounting records.

Nor did the notations add any inadmissible "evidence" to the case. See Mem. 10 ("Counsel's handwritten alterations to a document is not admissible evidence."). Simple mathematical calculations are not "evidence," but rather are undisputed facts of which the district court can properly take judicial notice. Miller v. Federal Land Bank of Spokane, 587 F.2d 415, 422 (9th Cir. 1978). Accordingly, once a business record has been admitted at trial, it does not become inadmissible if annotated to show the results of such calculations.

II. THERE WAS NO JUROR MISCONDUCT THAT WARRANTS A NEW TRIAL.

Defendant contends that "multiple instances of juror misconduct" require the Court to order a new trial in this case, Mem. 11, but he falls far short of clearing the "very high hurdle" that must be surmounted by any defendant seeking a new trial on the basis of alleged juror misconduct. United States v. Stewart, 317 F.Supp.2d 432, 436 (S.D.N.Y. 2004). In the alternative, defendant seeks an evidentiary hearing to further explore the alleged juror misconduct. Because defendant has failed to present "clear, strong, substantial and incontrovertible evidence that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial," United States v. Moon, 718 F.2d 1210, 1234 (2d Cir. 1983), no such hearing is required. See United States v. Boney, 977 F.2d 624, 634 (D.C. Cir. 1992) ("We do not now hold that any false statement or deliberate concealment by a juror necessitates an evidentiary hearing.").

A. Allegedly False Statements on Juror Questionnaires

Defendant first identifies a handful of responses made by two jurors on the Court-ordered juror questionnaire-- out of literally hundreds of answers provided by the potential jurors--that

"counsel now believe to be false." Mem. 12. While defendant cites the appropriate test for assessing the alleged false statements of a juror during voir dire--which is set forth in the Supreme Court's decision in McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984)--defendant never actually applies that test to the alleged false statements at issue here. The application of the appropriate legal test to the alleged false statements compels the conclusion that neither a new trial nor an evidentiary hearing is warranted.

As an initial matter, it is well established that "[p]ost-trial jury scrutiny is disfavored because of its potential to undermine 'full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople.'" United States v. Stewart, 433 F.3d 273, 302 (2d Cir. 2006) (quoting Tanner v. United States, 483 U.S. 107, 120-21 (1987)). "Courts should be reluctant to 'haul jurors in after they have reached a verdict in order to probe for instances of bias, misconduct or extraneous influences.'" United States v. Sattar, 395 F.Supp.2d 66, 73 (S.D.N.Y. 2005) (quoting United States v. Moon, 718 F.2d 1210, 1234 (2d Cir. 1983)). Therefore, a defendant should be permitted to probe jurors for potential bias "'only when reasonable grounds for investigation exists,' in other words, where there is 'clear, strong, substantial and incontrovertible evidence that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial.'" Stewart, 433 F.3d at 302-3 (quoting Moon, 718 F.2d at 1234). Moreover, "[t]he inquiry should end whenever it becomes apparent to the trial judge that 'reasonable grounds to suspect prejudicial jury impropriety do not exist.'" Id. at 303 (quoting Moon, 718 F.2d at 1234). In light of the extreme caution with which courts approach post-trial scrutiny of juror conduct, defendant has not made the requisite showing that, first, "a juror failed to answer honestly a material question on voir dire," and, second, that "a correct response would

have provided a valid basis for a challenge for cause." McDonough, 464 U.S. at 556.[6]

Defendant does not mention United States v. Stewart, supra. In Stewart, as here, a high-profile defendant was charged with knowingly making materially false statements in violation of 18 U.S.C. 1001. There, as here, jurors were required to fill out a lengthy questionnaire that

> probed prospective jurors' prior involvement with the justice system by asking about court appearances and whether the individual or someone close to him or her had filed criminal charges, had been the victim of a crime, had been sued, accused of wrongdoing on a job, or questioned by law enforcement or accused of, charged with, or convicted of any crime.

433 F.3d at 303. There, as here, jurors spoke to the press and made statements about the trial and about the defendant.[7] The defense in Stewart also received information that one of these jurors had failed to disclose information on his questionnaire information about prior arrests, civil suits, and being fired from a job. Id. at 304. The trial court rejected defendant's motions for a hearing and a new trial, finding that the defense had failed to satisfy the first prong of the McDonough test because the allegations of juror misconduct rested on "little more than hearsay, speculation, and in one instance, vague allegations made by a person who refused to identify himself." Stewart, 317 F.Supp.2d at 438. The trial court further found that the defense had not shown that the juror's responses deliberately concealed the truth. Finally, the trial court held that, even if the omissions identified by the defense were deliberate, the defendants had failed to satisfy the second prong of the

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[6] Because defendant submitted the statements that he believes to be false in a sealed filing, the government's discussion of the particular reasons why the identified statements either are not false or, even if false, would not have served as a valid basis for a challenge for cause is also submitted under seal. See Appendix A (Under Seal).

[7] The statements this particular juror made to the press included a characterization of the verdict as a "victory for the little guy who loses money in the markets because of" actions like those taken by the defendant, and as "a message to bigwigs that they have to abide by the law and no one's above the law." Stewart, 317 F.Supp.2d at 439 n.4.

McDonough test because they had not shown that the omitted facts would have provided a sufficient basis to challenge the juror for cause. Id. at 439. The Second Circuit affirmed the trial court's rulings.

While the Second Circuit in Stewart did note that an evidentiary hearing "generally should be held" in cases where "any significant doubt as to a juror's impartiality remains in the wake of objective evidence of false *voir dire* responses," 433 F.3d at 306, the allegations of concealment and bias in Stewart were far more specific and serious than anything alleged here. Nevertheless, the Second Circuit affirmed, indicating that it believed that no significant doubt remained as to the juror's impartiality. As the government's appendix points out, the same is true in the present case.

The cases relied upon by the defendant in support of his motion for an evidentiary hearing do not compel a different result. In United States v. Boney, 977 F.2d 624 (D.C. Cir. 1992), the D.C. Circuit ordered an evidentiary hearing after a juror failed to disclose his felon status during voir dire. The court took pains to note, however, that "[w]e do not now hold that any false statement or deliberate concealment by a juror necessitates an evidentiary hearing." Id. at 634. And it bears emphasis that the defendant has offered no objective evidence--despite an apparently thorough search--that any juror in the present case lied about his or her felon status.

In United States v. Colombo, 869 F.2d 149 (2d Cir. 1989), the defendant produced an affidavit from an alternate juror stating that another juror had (1) deliberately refrained from disclosing that her brother-in-law was a government attorney in order to remain on the jury panel and (2) told the affiant that a location mentioned at trial was a "hang out for gangsters." Id. at 150. The Second Circuit found that the allegation--supported as it was by an affidavit from a second juror--warranted an evidentiary hearing to determine the truth or falsity of the allegation. Importantly,

however, the court's holding hinged on the fact that "the juror's motive in lying on the *voir dire* was precisely to prevent defense counsel or the magistrate from acting on information the juror believed might lead to her dismissal from the case." Id. at 151. In other words, the particular nature of the allegedly concealed information "exhibited a personal interest in this particular case that was so powerful as to cause the juror to commit a serious crime." Ibid. In the present case, the defense has offered no evidence that any juror has concealed information of a sort that exhibits a personal interest in this case or "suggests a view on the merits and/or knowledge of evidentiary facts." Ibid.

Finally, defendant's reliance (Mem. 14) on United States v. Robinson, 475 F.2d 376 (D.C. Cir. 1973), in support of the proposition that "false statements [about jurors' involvement with the criminal justice system] may suggest an attempt to serve on the jury in order to vindicate prejudice toward government, politicians or political parties" is wildly misplaced. That case concerned the defendants' attempt to voir dire potential jurors about their attitudes toward the use of lethal force in self-defense. The court held that the defendants were not harmed by the trial court's refusal to allow voir dire on this subject because they had made no showing that there was "any material tending to show that prejudice against a claim of self-defense was likely to be encountered in the community from which the veniremen were drawn." Id. at 381. In so holding, however, the court noted that such targeted inquiries on voir dire would be appropriate in situations where the case "involves other matters concerning which either the local community or the population at large is commonly known to harbor strong feelings * * * ." Id. at 381. It is this portion of the court's holding that defendant relies on, but he omits a footnote in which the court spelled out some examples of "matters"--other than race, which the court cited as the most obvious example--"concerning which the local community is commonly known to harbor strong feelings." That

footnote includes such things as "prejudice against: wagering; the use of intoxicants; one who intends to testify that he had lied to another; a member of a religious minority." Robinson, 475 F.2d at 381 n.9. Far from supporting defendant's case, Robinson actually undermines it. First, if a juror's involvement with the criminal justice system is likely to inspire any bias at all, as defendant appears to contend, it is far more likely that the bias will inure to the detriment of those government officials most nearly responsible for bringing about the juror's "involvement" with the criminal justice system-- which is to say members of law enforcement and prosecutors--than it will to a criminal defendant. Second, Robinson stands for the proposition that, where a defendant seeks to voir dire on a potential source of bias in the community from which the veniremen are drawn, "it is incumbent upon the proponent to lay a foundation for his question by showing that it is reasonably calculated to discover an actual and likely source of prejudice, rather than pursue a speculative will-o-the-wisp." Id. at 381. In the present case, defendant has made no showing that an evidentiary hearing into the juror responses during voir dire is "reasonably calculated to discover an actual and likely source of prejudice." Like the defendants in the case he cites, defendant here has failed to present any material tending to show that prejudice against a politician as a result of jurors' experience with the criminal justice system was likely to be encountered in the community from which the veniremen were drawn. His claim of juror misconduct is therefore nothing more than "a speculative will-o-the-wisp." Accordingly, neither a new trial nor an evidentiary hearing is warranted.

B. Juror No. 4's Statements to the Media

Defendant next contends that two statements made to the news media by an excused juror who played no part in voting to convict defendant nevertheless "demonstrate that voir dire failed and the jury was tainted by bias." Mem.15. Defendant offers no evidence to support this sweeping

conclusion, other than the statements of the excused juror themselves--statements which say absolutely nothing about the views of the jurors who ultimately deliberated and voted to convict defendant, let alone the truth or falsity of the answers those jurors provided in voir dire.

Even assuming there were some truth to defendant's claim that Juror No. 4 had predisposed views about politicians' guilt-- and, to be clear, there is no such evidence--those views were excised, and their effect on the jury obviated, when Juror No. 4 was replaced by an alternate and the panel was instructed by the Court to begin its deliberations anew. Accordingly, his assertion that Juror No. 4's views "almost certainly tainted other members of the jury" is pure speculation, and any remedy that the Court could have provided to cure such a taint has already been provided through the replacement of Juror No. 4 and an instruction that the jury begin its deliberations anew.[8]

C. Juror Flight and Substitution

Defendant next contends that the Court's replacement of Juror No. 4 with an alternate "clearly prejudiced" him. Mem. 17. In support of this assertion, defendant cites the following items of "evidence": (1) the jury reached its verdict several hours after the alternate juror, Juror No. 11, was seated to replace Juror No. 4; (2) Juror No. 11 made statements on an internet blog that "suggest" that she was "predisposed" to find defendant guilty and that "surely" she "must have reached" a view regarding his guilt before she was substituted; and (3) Juror No. 11 "paused" before answering the Court's inquiry into whether there was any reason she could not be impartial.

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[8] Public statements made by Juror No. 11 clearly support this conclusion. See "Senior Barbie Leaves Trial to Bet on Horses," available at http://juror11.blogspot.com/2008/11/senior-barbie-bets-leaves-trial-to-bet.html (downloaded on January 8, 2008) ("Whatever happens next in this little side drama, I hope [defendant's] lawyers don't use this as an excuse to get our verdict thrown out. She [i.e., Juror No. 4] had nothing to do with our deliberation. We had to start over when I [i.e., Juror No. 11] stepped in to cover for her.").

Mem.16-17. According to defendant, these circumstances "strongly suggest that the [alternate] Juror made material false statements to the Court relating to her views of the proper outcome of the trial." Mem. 17. Defendant does not identify a single specific statement by Juror No. 11 on voir dire that he claims was false or which concealed material information from either the Court or defendant. Indeed, defendant cannot even identify a single statement from Juror No. 11's post-trial writings that he claims was false, let alone one that indicates that she made a false statement or concealed material information during voir dire that would give rise to an inference of prejudice. Instead he relies on circumstantial evidence--and decidedly weak circumstantial evidence at that--to pile innuendo on top of innuendo.[9] Thus, he cannot even satisfy the first prong of the McDonough test, and his request for a new trial and an evidentiary hearing on this ground should be dismissed out of hand.

D. Cumulative Effect

Because none of the alleged specific instances of juror bias in fact constitute juror bias, defendant's contention that the "cumulative effect" of these non-prejudicial events entitles him to a new trial also must fail.

III. THE COURT'S INSTRUCTION UPON SUBSTITUTING THE ALTERNATE JUROR WAS NOT ERRONEOUS.

Defendant next contends that the Court committed plain error when, after replacing Juror No. 4 with Juror No. 11, it instructed the jury that "because one of the jurors is no longer present and you have a new juror who was not present when you started deliberations, you have to start your

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[9] Tellingly, although defendant makes conclusory allegations that Juror No. 11's statements on her internet blog "suggest that she was predisposed to find Senator Stevens guilty," Mem. 16, he neglects to point out that statements on the same blog specifically refute his claim that the jury did not, in fact, begin its deliberations anew when Juror No. 11 was seated. See footnote 4, supra.

deliberations, and I leave it up to you to define what that means, you have to start your deliberations anew." 10/27/08 A.M. Tr. 5-6. Defendant argues that this instruction was plain error because it "invited the jurors, eleven of whom had already deliberated for two days, to short-cut the process by updating the newly substituted juror on prior deliberations." Mem. 18. According to defendant, it is "apparent" that the jury accepted the Court's "invitation" because of the "speed with which it rendered a verdict." Ibid.

The Supreme Court has held that there is a general presumption that juries follow their instructions. See, e.g., Penry v. Johnson, 532 U.S. 782, 799 (2001), citing Richardson v. Marsh, 481 U.S. 200, 211 (1987). This presumption is only overcome if there is an "overwhelming probability" that the jury was unable to follow the instructions. Greer v. Miller, 483 U.S. 756, 767 n.8 (1987). There is no evidence indicating that this jury was faced with such an "overwhelming probability" here. In fact, all evidence points to the contrary conclusion: that the jury carefully listened to the Court's instruction, began their deliberations anew, and, after weighing the evidence and reaching a unanimous verdict, voted to convict on all seven counts.

Defendant inaccurately contends that the jury deliberated for "only a few hours" after the substitution of the alternate before rendering its verdict, Mem.18, as opposed to the "two days" of deliberations before the substitution of the alternate. In fact, the record reflects that the jury received its instruction to begin deliberating anew with the alternate juror no later than 9:23 a.m. on October 27, 2008. 10/27/08 A.M. Tr. 6. The Court received a note revealing that the jury had reached a verdict a few minutes before 4:00 p.m. that same day. Id. at 19. In short, the reconstituted jury deliberated for almost a full day before reaching its verdict--a fact which defendant's characterization of "a few hours" conveniently elides. Similarly, while it might be technically correct to say that the

pre-alternate jury deliberated for "two days," several hours of one of those "two days" of deliberations were given over to the court's instructions to the jury. So framed, it becomes clear that the jury's pre-substitution deliberations were not significantly longer than its post-substitution deliberations--and the latter certainly were not so short as to give rise to an inference that the jury failed to follow the Court's instructions.

Second, there is every indication from the record that the jury took the Court's instruction to begin anew seriously. The post-substitution jury, for example, asked a very pointed question about Count Two of the indictment that the pre-substitution jury did not ask. Jury Note (Oct. 27, 2008), Dkt. 236. This constitutes significant evidence that the jury abided by the Court's instructions and was fully engaged in its deliberations. See United States v. Warner, 498 F.3d 666, 690 (7th Cir. 2007) (citing, as proof that reconstituted jury followed instructions to begin anew, the fact that jury had "requested additional instructions from the court on specific counts in the indictment during its deliberations that the original jury had not sought").[10] Given the strength of the presumption that juries follow their instructions and the evidence that the jury in this case did just that, defendant's motion for a new trial on this ground must fail.

IV. THE DISCREPANCY BETWEEN THE PROOF AND AN ALLEGATION IN COUNT TWO DID NOT GIVE RISE TO A CONSTRUCTIVE AMENDMENT OF THE INDICTMENT.

Count Two charged defendant with failing to report certain reportable items–-the

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[10] As noted above, public statements made by Juror No. 11--which defendant elsewhere relies upon as evidence of juror misconduct--clearly support the conclusion that the jury began its deliberations anew in accord with the Court's instruction. See "Senior Barbie Leaves Trial to Bet on Horses," available at http://juror11.blogspot.com/2008/11/senior-barbie-bets-leaves-trial-to-bet.html (downloaded on January 8, 2008) ("She [i.e., Juror No. 4] had nothing to do with our deliberation. We had to start over when I [i.e., Juror No. 11] stepped in to cover for her."

improvements to the Girdwood residence, the Brookstone massage chair, the stained glass artwork--on his 2001 financial disclosure form, in violation of 18 U.S.C. 1001(a)(2). During its deliberations, the jury discovered that, contrary to an allegation in Count Two, see Indict., Ct. 2 ¶ 50, defendant had actually checked "YES" rather than "NO" in answer to the question whether he had received reportable gifts in 2001. 10/27/08 A.M. Tr. 7. When the jury brought this discrepancy between the evidence and the indictment to the Court's attention, the Court instructed the jury that the indictment is "not evidence" and that the jury "must consider all of the evidence and my instructions to determine whether the government has proven each element of an offense in the indictment beyond a reasonable doubt." The jury thereafter returned a guilty verdict on Count Two. Defendant contends (Mem. 19-22) that, in light of the jury's finding that he had checked "YES" rather than "NO," it could not have convicted him on Count Two under a theory charged in that Count, and that it thereby constructively amended the indictment.

Because the Fifth Amendment guarantees a defendant the right to be tried for only those offenses presented in an indictment, indictments may not be substantively amended without reconvening the grand jury. See Stirone v. United States, 361 U.S. 212, 217-219 (1960). A constructive amendment occurs when the trial evidence proves a crime different from that charged in the indictment, or the court's instructions permit conviction for an uncharged offense. Ibid.

A. Defendant Forfeited His Claim. As an initial matter, defendant neglected to preserve this claim. If defendant believed that, in light of the discrepancy between the evidence and the indictment, there was no valid basis in Count Two upon which the jury could convict him, then he should have moved to dismiss the Count or for a judgment of acquittal. Instead of doing so, he requested an instruction that "the indictment is merely a charge, that it is not evidence, and that if

the jury finds that the evidence does not support a charge in the indictment beyond a reasonable doubt, then the jury must find the defendant not guilty." 10/27/08 A.M. Tr. 8. That requested instruction did not preserve his constructive-amendment claim. An unpreserved constructive-amendment claim is subject to plain-error review. See United States v. Lawton, 995 F.2d 290, 294 (D.C. Cir. 1993); United States v. Brandao, 539 F.3d 44, 58-59 (1st Cir. 2008) (collecting cases). To satisfy the plain-error standard, a defendant must show, among other things, that the error was "clear" or "obvious," and that it "seriously affect[ed] the fairness, integrity or public reputation" of the proceedings. United States v. Olano, 507 U.S. 725, 732-733 (1993).

B. Count Two Encompassed Theories on Which the Jury Was Entitled to Convict.

Contrary to defendant, the jury did not have to find that he answered "NO" to the question on the financial disclosure form regarding gifts in order to return a valid guilty verdict on Count Two. The jury could properly have relied on either of two other theories encompassed by that Count and supported by the evidence.

First, under a "common-sense reading" of Count Two, United States v. Hitt, 249 F.3d 1010, 1025 (D.C. Cir. 2001), the jury was entitled to convict defendant for failing to report the items at issue on the PART V attachment to the financial disclosure form. Count Two stated that the Form required defendant to "disclose gifts" with an aggregate value of greater than $260 from any single source. Indict., Ct. 2 ¶ 14; see also id. at Ct. 2 ¶ 49 (stating requirement that such gifts be "identif[ied] and report[ed]." The Count further stated that, if he answered "YES" to the question whether he had received any such gifts, he was required to complete PART V of the Form, which required him to itemize the reportable gifts he received. Id. at Ct. 2 § 50. Finally, the Count alleged that defendant had made false statements on the "Form *and attachments thereto*" regarding his

receipt of things of value from Allen, Veco, Person A, and Person B. Id. at Ct. 2 § 50 (emphasis added).

In light of the above-cited language in Count Two, defendant's failure to disclose the items in question on the PART V attachment was part and parcel of the charged offense. Accordingly, under that Count, the jury did not have to find that defendant answered "NO" to the question regarding his receipt of reportable gifts in order to convict him for failing to disclose the gifts; it was entitled to rely also on his failure to report the gifts on the attachment. There can be no question that the grand jury found that defendant had not listed the gifts on the attachment, for otherwise it could not have charged him with failing to disclose them (even if it incorrectly believed that he had checked the "NO" box). See United States v. Fern, 155 F.3d 1318, 1325 (11th Cir. 1998) ("if the facts alleged in the indictment warrant an inference that the jury found probable cause to support all the elements of the charge, the indictment is not fatally deficient * * * "). At the very least, there was no plain error, for it is far from "obvious" that Count Two did not adequately charge defendant with failing to report the items on the attachment. See United States v. Ramsey, 406 F.3d 426, 430 (7th Cir. 2005) ("[N]ot explicitly including all the elements of the offense in an indictment is not fatal so long as the absent elements can be deduced from the language that is actually included in the charging document").

This reading of Count Two is perfectly consistent with the Court's jury instructions on that Count. In pertinent part, the Court instructed the jury as follows:

> The government alleges that Senator Stevens made or caused a false, fictitious or fraudulent statement or representation on May 15, 2002 concerning gifts from Bill Allen, VECO, Robert Persons, and Robert Penney. To establish that the defendant made or caused such a statement or representation, the government must first prove beyond a reasonable doubt that, in response to the following question on the 2001 financial disclosure form, and I'll read the

question:

> Did you, your spouse, or dependent child receive any reportable gift in the reporting period, i.e. aggregating more than $260 and not otherwise exempt)? If "Yes," complete and attach Part V.
>
> In response to that question, the government alleges that Senator Stevens made or caused an untrue statement or representation and knew on May 15, 2002 that this statement or representation was untrue and was made or caused with the intent to deceive the Senate Select Committee on Ethics.

10/22/08 A.M. Tr. 35-36. That instruction allowed the jury to find that defendant made false representations in violation of Section 1001(a)(2) by failing to list the items in question on the PART V attachment.

Defendant argues (Mem. 20 n. 6) that omissions, such as the failure to list the items on the attachment, are not actionable as false statements. The courts of appeals have repeatedly held, however, that the omission to disclose a material fact required to be reported on a government form constitutes a false statement, especially if the form contains a certification that the information provided is "true" or "complete." See, e.g., United States v. Boskic, 545 F.3d 69, 85-87 (1st Cir. 2008); United States v. Failing, 96 Fed. Appx. 649, 651-652 (10th Cir. 2004); United States v. Goodson, 155 F.3d 963, 965, 967 (8th Cir. 1998); United States v. Mattox, 689 F.2d 531, 532 (5th Cir. 1982); United States v. Irwin, 654 F.2d 671, 675-676 (10th Cir. 1981); United States v. McCarthy, 422 F.2d 160, 162 (2d Cir. 1970). As the court explained in Irwin, "[i]f there are facts that should be reported, leaving a blank belies the certification * * * ." 654 F.2d at 676. Here, defendant signed the certification on the 2001 financial disclosure form that the information provided on the form and attached schedules was "true, complete and correct." See GX 884.

United States v. Crop Growers Corporation, 954 F.Supp. 335 (D.D.C. 1997), on which

defendant relies, is not to the contrary. In that case, the court held that false statement charges for failing to disclose uncharged criminal conduct on certain SEC filings were invalid because the defendants had no clear duty to disclose the information. Id. at 348-349. The court explicitly distinguished Mattox and Irwin because in those cases, as here, there was "a duty to speak." Id. at 349. In the context of 18 U.S.C. 152(3), which makes it a crime to make a false statement in a bankruptcy proceeding, the D.C. Circuit has stated that "false statements are not limited to affirmative misrepresentations but include knowing omissions as well." United States v. Sobin, 56 F.3d 1423, 1428 (D.C. Cir. 1995). More to the point, in United States v. Hansen, 772 F.2d 940, 943 (D.C. Cir. 1985) (Scalia, C.J.), the D.C. Circuit upheld convictions for omitting to disclose material information on congressional financial disclosure forms under a former version of Section 1001 that proscribed "mak[ing] or us[ing] any false writing or document knowing the same to contain any *false, fictitious or fraudulent statement* or entry * * * " (emphasis added). The emphasized language is identical to that in the current version of Section 1001(a)(2) under which defendant was convicted. The Hansen court stated that the statute "clearly embrace[d] the omissions." Id. at 943.

In finding defendant guilty on Count Two, the jury could also properly have relied on defendant's statement on the financial disclosure form that he had no liabilities in 2001 exceeding $10,000. Count Two explicitly alleged that that statement was false, ¶¶ 49, 51, 52, and this Court explicitly submitted the Count Two charges to the jury on both a "gifts" and "liabilities" theory, 10/22/08 A.M. Tr. 34, 36, 37. Although the massage chair and the stained glass artwork did not qualify as reportable liabilities because their value did not exceed $10,000, the items defendant received from Allen and VECO did so qualify. Indeed, the government in its closing argument specifically argued in the alternative that those items constituted either reportable gifts or reportable

liabilities. 10/21/08 A.M. Tr. Tr. 10, 58; 10/21/08 P.M. Tr. 71-72. As we show in our response to defendant's motion for judgment of acquittal, the evidence was sufficient to permit an inference that defendant intended to pay for the items and therefore that they qualified as liabilities.

C. In Any Event, There Was No Plain Error. Even assuming arguendo that Count Two did not adequately charge defendant with failing to report the items in question on the PART V attachment, that the error was obvious, and that the jury must have relied on the failure to itemize the gifts on the attachment in reaching a guilty verdict, the resulting constructive amendment of the indictment still would not amount to reversible plain error. That is so because defendant manifestly did not disclose the items on the attachment; that fact was uncontroverted at trial; the grand jury necessarily found that defendant did not disclose the items on the attachment; and there was no lack of notice to the defense, which knew that the alleged crime involved nondisclosure of the items. In these circumstances, any omission in the indictment to allege adequately defendant's failure to disclose the items on the attachment did not "seriously affect the fairness, integrity or public reputation" of the trial. See, e.g., United States v. Cotton, 535 U.S. 625, 632-633 (2002); United States v. Sinks, 473 F.3d 1315, 1321 (10th Cir. 2007); United States v. Mojica-Baez, 229 F.3d 292, 310-312 (1st Cir. 2000); cf. Johnson v. United States, 520 U.S. 461, 469-470 (1997) (failure to submit element of offense to jury does not "seriously affect[] the fairness, integrity or public reputation" of a trial when proof of the element is "overwhelming" and "essentially uncontroverted").

V. THE GOVERNMENT DID NOT APPEAL TO CLASS PREJUDICE IN CROSS-EXAMINING DEFENSE WITNESSES.

Petitioner contends (Mem. 22-26) that, in cross-examining certain defense witnesses, the

government deliberately appealed to "class prejudice" by portraying the Stevens family as wealthy and privileged.

A. Cross Examination of Mrs. Stevens. Petitioner focuses primarily on a portion of the government's cross-examination of Mrs. Stevens, in which it asked her whether members of defendant's Senate staff walked her dogs; fed her cats; paid her bills from Saks Fifth Avenue, Neiman Marcus, and Nordstrom; cut her grass; paid her parking tickets; wrote checks for her to Blockbuster Videos; and wrapped her Christmas gifts. 10/16/08 P.M. Tr. 27-29. Defendant objected only to the questions about dog-walking, grass-cutting, and gift-wrapping. Ibid. Accordingly, with respect to the other questions, the applicable standard of review is plain error.

The government had a valid basis for pursuing this line of questioning. The burden of Mrs. Stevens's direct testimony was that she was in charge of the couple's home and finances, including the Girdwood remodeling. See, e.g., 10/16/08 A.M. 56 ("[I] was the one that was going to be in charge of the renovation. Ted was too busy."); id. at 99 (defendant had "[no] involvement" with the stained glass); 10/16/08 P.M. Tr. 19 (Mrs. Stevens "responsible" for paying for Girdwood renovations).[11] The implication of this testimony was that defendant was uninformed about the details of the remodeling, especially its financial aspect. By the challenged questions, the government properly sought to establish the extent to which defendant's household affairs, financial and otherwise, were handled through his Senate office by his staff, suggesting that he would have had knowledge of them.

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[11] Defendant's direct testimony was to the same effect. See, e.g., 10/17/08 A.M. Tr. 24 ("what goes on in the house is Catherine's business. What goes on outside is my business . . ."); id. at 47 (Mrs. Stevens obtained the line of credit on the house, had charge of the checkbook for paying for the renovation, and "got all the bills and paid all the bills"); id. at 89 ("I really wasn't involved [with the stained glass], and I didn't want to get involved in it").

In any event, the challenged cross-examination did not cause unfair prejudice. For one thing, Mrs. Stevens denied knowledge of whether her husband's staff performed any of the tasks in question, except paying the bills, which she acknowledged they "could have" done. 10/16/08 P.M. Tr. 27-29. This Court instructed the jury that only a witness's answers, not the lawyer's questions, are evidence, 10/22/08 A.M. Tr. 19, an instruction the jury is presumed to have followed, see Richardson v. Marsh, 481 U.S. 200, 211 (1987). Moreover, the jury knew from the start that, as a United States Senator, defendant belonged to one of the most exclusive and privileged clubs in the world. In this light, the fact that his wife, herself a successful lawyer, shopped (like thousands of other Washingtonians) at certain upscale department stores could not have fazed the jury.

B. Cross Examination of Defendant Regarding the Value of his House. Defendant also claims that the government sought to appeal to class prejudice by asking him whether he purchased his Washington townhouse for $1.4 million and inquiring about the publicly assessed valuation of the house. See 10/20/08 A.M. Tr. 97-98. Again, the government had a substantial reason, having nothing to do with exploiting class prejudice, for asking these questions. One of defendant's defenses was that he believed the Girdwood renovations were above board because the public assessment reports for the house rose by approximately the same amount as his wife paid for the renovations. See 10/17/08 A.M. Tr. 26, 51. The government sought to counter this evidence in part by getting defendant to acknowledge, using his Washington townhouse (2005 purchase price: $1.4 million; 2005 public assessment: approximately $800,000) as an example, that the valuation of a house for tax purposes may bear at best a tenuous relationship to the property's market value.

In any event, because the Court sustained defense objections to the questions concerning the value of the Washington property, defendant did not answer them, so the information never became

evidence. Moreover, the Court specifically instructed the jury in its final charge to disregard questions to which an objection had been sustained. 10/22/08 A.M. Tr. 19.

C. Cross-Examination of Donna De Varona and Defendant Concerning Ben Stevens. Donna de Varona testified, as a defense character witness, about defendant's political and charitable work on behalf of the Special Olympics. 10/15/08 A.M. Tr. 56-58. To counter this testimony, the government sought to establish, through its cross-examinations of de Varona and then defendant, that defendant's relationship with the Special Olympics may not have been entirely disinterested in light of the fact that his son received more than $750,000 in consulting fees from the organization. Id. at 60-61; 10/20/08 A.M. Tr. 18. As the Court recognized by overruling the defense objection,[12] 10/15/08 A.M. Tr. 60, this was a legitimate line of inquiry that had nothing to do with exploiting class prejudice. Moreover, both de Varona and defendant testified that they had no knowledge of the amount of money the Special Olympics paid defendant's son, id. at 61; 10/20/08 A.M. Tr. 18, so that information did not become evidence.

D. The Cases on Which Defendant Relies are Unavailing. The cases on which defendant relies (Mem. 25) underscore the weakness of his claim. In United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), for example, the prosecutor made blatant and direct appeals to class prejudice unlike anything that occurred in this case, referring to "malefactors of great wealth," "eager, grasping men," and corporations that lack "any consideration for the underdog or the poor man." Id. at 238. Stating that such class-based appeals are "highly improper," the Court nonetheless concluded that they were *not* prejudicial. Id. at 239. The Court explained, "it is hard

[12] The defense objected to the question only when it was asked of de Verona. It did not object when it was asked of defendant.

for us to imagine that the minds of the jurors would be so influenced by such incidental statements during this long trial that they would not appraise the evidence objectively and dispassionately." Ibid. Similarly, in United States v. Stahl, 616 F.2d 30 (1980), where the court reversed convictions because of the prosecution's "persistent appeals" to class prejudice, id. at 33, the conduct at issue--including the prosecutor's reference to the defendant as "a multi-millionaire businessman in real estate, who his whole life is geared to buy property, buy property," and whose "office, his suite office, has just dollar signs, dollar signs all over. That's all he cares about," id. at 32–-was far more objectionable than that challenged here. Indeed, the prosecutor in Stahl specifically acknowledged that his trial strategy was to equate affluence and success in business with greed and corruption. Id. at 31.

In short, the record in this case is devoid of the kind of explicit appeals to class prejudice at issue in Socony-Vacuum, Stahl, and some of the other cases cited by defendant. The government had valid grounds for asking the questions at issue, but even assuming it did not, the questions and the responses they elicited were not of a sort, especially given the strength of the government's case, that could "so poison the minds of jurors * * * that an accused may be deprived of a fair trial." Socony-Vacuum, 310 U.S. at 240.

VI. DEFENDANT WAS NOT PREJUDICED BY THE PROSECUTOR'S REFERENCES TO HER "FRIENDS" DURING REBUTTAL ARGUMENT.

Defendant contends (Mem. 26-28) that the government made improper comments during its rebuttal argument to the jury. The two comments with which he takes issue were as follows:

> Now, I was thinking about this for a while because I really do believe you just got to break this stuff down to its common denominator. Break it down to what is just–-on its common sensical (Phonetic) terms. And I was talking to a friend, and he was telling me that this reminds him of his little six-year-old son. He likes to play hide-and-go-seek, but what he

> likes to do is he likes to cover his eyes and then keep one eye open, you know, looking through his fingers, and then when you say, hey, hey, I see you, he goes, no, no, no, I don't see you. I'm not looking. You know, you tell him he's cheating and then he starts laughing.

10/21/08 P.M. Tr. 51.

> I spoke to another friend of mine who heard the defendant's testimony on Friday, and what he told me about the defendant's testimony was that * * * is that the gifts from Bill Allen that appeared at the defendant's chalet without the defendant's knowledge–-he said, well, you know, Brenda, maybe since the defendant lives so close to the North Pole, that maybe Santa and his elves came down and did this work and completed it, and it was–-you know, he had no idea. He had been very, very good.

Id. at 52-53.[13]

In order for a defendant to obtain a new trial based on improper closing argument by the government, it is "'not enough that the prosecutors' remarks were undesirable or even universally condemned,'" Darden v. Wainwright, 477 U.S. 168, 181 (1986); rather, "[t]he relevant question is whether [the remarks] 'so infected the trial with unfairness as to make the resulting conviction a denial of due process,'" Id. at 181 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)); see United States v. Monaghan, 741 F.2d 1434, 1443 (D.C. Cir. 1984) ("The fact that a prosecutor oversteps the bounds of proper advocacy * * * does not necessarily mean that he thereby violates the due process rights of the accused"). Absent other "compelling factors," "'[i]solated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence,'" are not significantly prejudicial. United States v. North, 910 F.2d 843, 897 (D.C. Cir. 1990) (quoting DeChristoforo, 416 U.S. at 646). The D.C. Circuit has "traditionally been wary of reversing convictions solely on the grounds of a misstatement in a closing argument," North, 910 F.2d at 897, and will do so "only in the rarest and most prejudicial circumstances," id. at 898.

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[13] Defendant objected at trial only to the second remark.

Defendant argues that the prosecutor's statements were improper because they were "intended" to convince the jurors that others in their position believed defendant to be guilty and discredited his testimony. But nowhere did the prosecutor suggest that the jury should disbelieve defendant's testimony because her "friends" did. She invoked her friends as a rhetorical device for introducing the metaphors concerning the hide-and-go-seek-playing child and Santa and his elves; the point was the metaphors, not the friends. Nor could the jurors have reasonably regarded the friends as being in a position to comment knowledgeably about the case, let alone as being in the same position as the jurors themselves. The prosecutor did not suggest that friend #1 had observed any part of the trial or had even followed news reports about it. With respect to friend #2, the prosecutor stated only that he or she had been present in court during a single day of the trial. In these circumstances, it is implausible to think that the jurors would be influenced by the views of the prosecutor's friends. As the D.C. Circuit has stated, in assessing the effect of a prosecutor's remarks on a jury, courts should accord "'due respect'" to "'the jurors' common sense and discrimination.'" North, 910 F.2d at 895 (quoting Monaghan, 741 F.2d at 1440).

Moreover, as the court of appeals observed in North, 910 F.2d at 897, its "unwillingness to reverse a conviction [for improper closing argument] has been particularly pronounced when the trial judge issues curative instructions"—to wit, that "the statements, opinions, and arguments of counsel are not evidence." See also United States v. Perholtz, 842 F.2d 343, 362 (D.C. Cir. 1988) ("any possible prejudice was cured by the trial judge's instructions that arguments of counsel are not evidence"). In this case, the Court gave such an instruction just prior to closing arguments, 10/21/08 A.M. Tr. 8, and then repeated the instruction in its general jury charge, 10/22/08 A.M. Tr. 26. In addition, the Court instructed the jurors that they were "the sole judge of the credibility of

witnesses." Id. at 21. Especially in light of these instructions, as well as the strength of the government's case against defendant, the prosecutor's comments could not have affected the outcome of the trial. See, e.g., North, 910 F.2d at 897; Perholtz, 842 F.2d at 361; Monaghan, 741 F.2d at 1443.

Defendant relies (Mem. 27) on two cases involving third-party juror contacts. In United States v. Greer, 620 F.2d 1383, 1385 (10th Cir. 1980), the court reversed the defendant's conviction because a marshal had suggested to the jury the possibility that the defendant might receive a light sentence. In Stockton v. Virginia, 852 F.2d 740, 743-746 (4th Cir. 1988), the court vacated the defendant's death sentence because a third party who was "a barometer of local sentiment" told jurors that they ought "to fry the son of a bitch" and engaged in other conversation with the jurors. The prosecutor's comments here were not remotely as prejudicial as those made by the third parties in Greer and Stockton. Moreover, comments made in the controlled setting of a courtroom where the court can make a firsthand determination of their impact on the jury are different in kind from third-party contacts, which occur outside the earshot of the court and the parties and which therefore present a heightened danger of jury taint. For those reasons, such contacts, unlike improper remarks during closing argument, are ordinarily *presumed* to be prejudicial. See Remmer v. United States, 347 U.S. 227, 229 (1954); Stockton, 852 F.2d at 743-44; Greer, 620 F.2d at 1385.

VII. THERE WAS NO GOVERNMENT MISCONDUCT THAT WARRANTS A NEW TRIAL.

Defendant contends (Mem. 28) that the government engaged in "multiple instances" of "severe and intentional" misconduct. One of his claims, i.e., that the government knowingly suborned perjury from Bill Allen, is baseless conjecture. The other three claims aim to reargue

discovery issues that were effectively resolved during trial. Although the government admittedly made errors in discovery, they were not intentional. More importantly, when these problems surfaced at trial, this Court forcefully rectified them, providing the defense with all government interview memoranda and grand jury transcripts, striking prosecution evidence, and instructing the jury that the government had not fulfilled its obligations. Because these actions cured any prejudice to the defense, defendant's misconduct claims supply no basis for granting a new trial. United States v. Gartmon, 146 F.3d 1015, 1029 (D.C. Cir. 1998).

A. The VECO Accounting Records.

1. The Defendant's Allegations. Defendant contends (1) that certain VECO accounting records introduced at trial were false; (2) that the prosecution team knew these records were false; and (3) that "the government took affirmative steps to conceal this information by denying the defense access to Mr. Williams and Mr. Anderson, [two VECO employees]." Mem. 31.

The first part of this argument is partially true: grand jury testimony from Dave Anderson places him outside Alaska at times when VECO's accounting records have him working on the Girdwood chalet. In addition, Rocky Williams estimated to the grand jury that he worked fewer hours on the Girdwood project than the accounting records reflect, raising questions about whether the records were accurate as to him.[14] These discrepancies did not mislead the jury because, when defense counsel raised the issue during trial, this Court struck the suspect portions of the accounting records, eliminating any possible prejudice to the defense. In particular, the Court removed all time

[14] Williams clearly performed significant work on the Girdwood Residence for a lengthy period of time, and it is at least possible that it was his memory of the hours he worked, and not VECO's records, that was faulty.

records for Anderson and Williams (even though Williams undoubtedly worked at Girdwood during the relevant period), and then instructed the jury not to consider this evidence in the case. 10/9/08 P.M. Tr. 62-63.

Defendant's claim that the government knowingly presented false evidence is untrue. No member of the prosecution team realized that the VECO accounting records covered a time period when Anderson was not in Alaska, or that Williams' grand jury testimony was inconsistent with his time sheets. To be sure, the government had the grand jury transcripts and members of the team had reviewed the testimony of Anderson and Williams in preparation for trial. Thus, the prosecution team may be charged with constructive knowledge of what the testimony entailed. 10/8/08 P.M. Tr. 52. But no one actually noticed any discrepancy between the witnesses' testimony and the accounting records before those records were introduced at trial.[15]

Defendant's final claim, i.e., that the government attempted to secrete Anderson and Williams to conceal the inaccuracy of VECO's records, is just a reckless shot in the dark. Williams returned to Alaska on September 26, 2008, a few months before his recent death, because he was gravely ill and had been missing appointments with his doctors. Before he left, the government reminded Williams to call defense counsel from Alaska, and thereafter defense counsel discussed the case with him by phone.[16] As for Anderson, the government merely noted that it had no authority to accept service of the subpoena on his behalf or to provide his address. Later, when Anderson was

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[15] This is not as surprising as it may seem at first. Williams and Anderson were two among more than 40 VECO employees who testified before the grand jury about working on the Girdwood residence, and they testified before the government had obtained either the VECO accounting spreadsheet or the underlying backup documentation.

[16] Even prior to his departure from Washington, D.C., Williams called defense counsel and provided them with his cell phone and hotel contact information while in D.C.

in Washington, D.C. for trial preparation, the government offered to facilitate service of the defendant's trial subpoena. When Anderson ultimately testified at trial, defendant elected not to cross-examine him at all. None of these events suggests an attempt to coverup known problems relating to the VECO accounting records.

2. The Jury Was Not Misled. Defendant suggests (Mem. 29) that he is entitled to a new trial under Napue v. Illinois, 360 U.S. 264 (1959). Napue held that a criminal conviction must be overturned if the government's knowing use of perjured testimony might have had affected the verdict at trial. Napue has no bearing here because this jury's verdict does not rest on any false testimony or evidence. Instead, because the Court struck all portions of the VECO records relating to Anderson and Williams, the jury here was indisputably not misled.

Defendant nonetheless attempts to manufacture some prejudice from this event by claiming that the Court's instructions striking this evidence improperly "took away the jury's ability to evaluate the trustworthiness of GX 177 [VECO's accounting spreadsheet] or any other evidence presented by the government, on the basis that portions of that exhibit were demonstrably false and the government knew it." Mem. 41 (citing 10/9/08 Tr. P.M. 62-63). By instructing the jury that the government had failed to live up to its discovery obligation, the Court (as defendant acknowledges) dealt the government a serious "blow."[17] Mem. 41. The Court was not required to also instruct the jury that the government knowingly presented false testimony, especially when the government denied this charge. See 10/8/08 P.M. Tr. 76-77. Moreover, nothing prevented defendant from developing evidence that Anderson's time records were false, and then arguing from this evidence

[17] Defendant complains (Mem. 41) that the Court allowed the government to "soften the blow of the stricken evidence" by reopening its case to call David Anderson * * * ." The Court's decision to permit this testimony was entirely within its discretion.

that the remaining records were inaccurate. Indeed, Anderson testified at trial and defendant could have cross-examined him about the time records (or even called him as a defense witness) but failed to do either.

Nor did the Court "hamstr[ing] the defense's ability to argue the unreliability of the time records to the jury." Mem. 41-42. Instead, counsel argued without objection that (1) the redacted records refuted the claim -- made in the government's opening -- that VECO's costs totaled more than $188,000; (2) the redacted document was "worthless," and "trash;" and (3) the unredacted portions were inaccurate because they inflated the hours worked by Dan McBirney, another VECO employee. 10/21/08 A.M. Tr. 96-98. The Court corrected defense counsel only when he further suggested that "the exhibit that's all blacked out" was "phony," thereby inviting the jury to ignore this document simply because portions of it had been redacted. Id. at 98. By reminding the jury that the document had been redacted pursuant to its own order, the Court merely ensured that the jury was not misled by this argument, and did not restrict defense counsel's ability to otherwise argue that VECO's records were inaccurate.

B. Bill Allen's Views About Whether Defendant Would Pay A Bill. Defendant contends (Mem. 32-34) that the government both "manufactured" evidence and "concealed highly material, exculpatory information" regarding Bill Allen's opinion as to whether defendant would have paid a bill, if given one. Neither claim is true. Moreover, although the government did produce two statements made by Bill Allen after they should have been disclosed, these statements were not "materially" exculpatory, and the defense obtained them in time to use them effectively at trial. Accordingly, the delayed disclosure of these documents does not warrant a new trial under Brady v. Maryland, 373 U.S. 83 (1963) (requiring the government to produce materially exculpatory

evidence to the defense). See also Giglio v. United States, 405 U.S. 150 (1972) (applying Brady doctrine to impeachment evidence).

The critical facts regarding this incident are as follows. As one part of its overall discovery effort, the prosecution team sent the defense a letter on September 9, 2008, identifying potentially exculpatory or impeaching information in its files. One of the topics addressed was Bill Allen's view about whether defendant would have been willing to pay a bill for the Girdwood renovations.[18] Although Allen had discussed this matter in prior interviews, when preparing the letter the prosecution team was still unsure of Allen's exact position, and therefore decided to re-interview him. When asked, Allen responded that (1) VECO's costs were higher than they needed to be; (2) defendant would not have paid VECO's "actual costs" because he would not have wanted to pay "that high of a bill;" and (3) defendant probably would have paid a reduced invoice if he had received one. 9/16/08 FBI 302. The government produced this statement as the most comprehensive and accurate summary of Allen's state of mind concerning what, if any, types of invoices Allen believed defendant would have been willing to pay. 9/9/08 Letter from Brenda Morris at ¶ 17(c).

Contrary to defendant's claim (Mem. 33), the net effect of these disclosures was not "inculpatory." Instead, these statements allowed defendant to argue that Allen believed he probably would have paid any fair bill VECO produced. Indeed, this is precisely what Allen testified to at trial. 10/6/08 P.M. Tr. 70 ("[I]f it had been an invoice that was fair, I think Ted would have paid it."). Moreover, in calling Allen to discuss this issue, the government did not "manufacture" his opinions, unless by this defendant means that it acquired them through proper means.

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[18] It is undisputed, of course, that Allen never submitted a bill and defendant never paid one.

The problem arises from the government's failure also to produce in the September 9, 2008 letter Allen's other statements on the same topic, including (1) a statement that Allen believed Stevens would have paid the architect, if billed, 2/28/07 FBI 302 at 2; (2) a statement that if Anderson or Williams had billed Ted and Catherine Stevens, Allen believed they would have paid the bill, 12/11-12/06 MOI at 9; and (3) a statement that Allen recalled that Stevens wanted to pay for everything he got. 8/30/06 FBI 302 at 4. These statements were not disclosed because either (1) they were not identified as potentially exculpatory in the document review; or (2) the government believed that the September 9, 2008 letter accurately described whatever exculpatory information Allen had to offer on the subject.

We acknowledge that, to avoid unnecessary disputes over discovery, the better practice would have been to disclose all of Allen's various statements. This is especially true here because, the day after the letter was produced, this Court agreed with United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005), that the government is required to produce any evidence "favorable" to the accused, regardless of whether it would affect the outcome at trial. 10/10/08 Tr. 67. But see Boyd v. United States, 908 A.2d 39, 60-61 & n.32 (D.C. 2006) (concluding that Safavian "cannot be reconciled" with three separate Supreme Court cases).

The effect of not disclosing these statements was magnified when, at the September 16, 2008 afternoon conference, the Court "direct[ed] that the government produce the redacted 302s and do it by tomorrow." 9/16/08 A.M. Tr. 30. (This order was made in response to the defense complaint that the disclosure letters did not provide the exculpatory information in a "useable format." Dkt. 65 at 1; 9/16/08 Tr. 26). Because the government believed that it had already provided any Brady information in its disclosure letters (and prior productions), it attempted to comply with this order

by locating in the 302s the information already disclosed, and then producing that same information in a redacted version of the 302. See 9/16/08 Tr. 27 (prosecution informs the Court that "[g]iving them redacted 302s will give them nothing further.").

On the night of September 16, 2008, FBI SA Mary Beth Kepner performed this task with respect to Bill Allen's 302s. Kepner made sure that every statement previously disclosed was produced in a redacted 302. Kepner worked into the night on this task, while others on the team prepared a hard copy of the government's exhibits, also due the next day. Kepner was not asked to, and did not attempt to, perform an independent review of the 302s for additional Brady or Giglio material. Accordingly, two of the additional statements by Allen regarding whether Stevens would have paid a bill were not produced. Kepner did, however, discover and disclose Bill Allen's August 30, 2006 statement that "ALLEN recalled that TED STEVENS wanted to pay for everything he got."

Although the government should have performed a thorough re-review of its interview memoranda before turning over the redacted 302s on September 17, it did undertake such a review two weeks later. As a result, the government discovered and disclosed Allen's additional statements before his cross-examination began.[19] The delay in disclosing these statements prompted this Court to order the government to disclose unredacted versions of all of its 302s and other interview memoranda as well as all grand jury transcripts. 10/02/08 A.M. Tr. 19; 10/02/08 P.M. Tr. 51, 52-53.

Defendant appears to contend (Mem. 29-30) that the delayed disclosure of Allen's statements

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[19] On October 1, 2008, Trial Attorney Nicholas Marsh began a search for any FBI 302s prepared by FBI SA Michelle Pluta in anticipation of her upcoming testimony. When Marsh reviewed the February 28, 2007 FBI 302, which had been prepared by Pluta, he recognized that this document arguably contained exculpatory information not previously disclosed, prompting an internal review of all the relevant memoranda. Redacted versions of Pluta's 302 and the 12/11-12/06 MOI were produced late that night.

requires a new trial under Brady and Giglio. This is incorrect. First, the timing of the disclosure did not prejudice the defense. A Brady error occurs only when the government fails to produce materially exculpatory evidence in time for its effective use at trial. United States v. Wilson, 160 F.3d 732, 742 (D.C. Cir. 1998). The defendant bears the burden of showing that "'had the statement been disclosed earlier, there is a probability sufficient to undermine [ ] confidence in the actual outcome that the jury would have acquitted.'" Id. (quoting United States v. Tarantino, 846 F.2d 1384, 1417 (D.C. Cir. 1988)). Here, defendant received all of Allen's interview memoranda in unredacted form five days before his cross-examination began. He therefore had ample time to determine how to use Allen's previously undisclosed statements (and a wealth of other information not normally available to the defense at trial). United States v. Andrews, 532 F.3d 900, 906-07 (D.C. Cir. 2008).

Second, there was no error under Brady or Giglio because the statements produced during trial were not "materially" exculpatory or impeaching. In analyzing whether undisclosed evidence creates a "reasonable probability" of a different result at trial, the missing evidence must be considered in light of the evidence the government did produce. Andrews, 532 F.3d at 906-07. Here, the statements produced after trial began were substantially similar to statements produced before trial. Indeed, one of the statements produced before trial began, i.e., that Allen "recalled that TED STEVENS wanted to pay for everything he got," was considerably more helpful to the defense than the two statements produced later because it suggested not only that defendant would have paid a bill if asked, but that he wanted to do so. As for Giglio, the minor discrepancies between Allen's various statements were not the kind of impeachment that was "material" to the case, especially given the wealth of other impeachment material relating to Allen available at trial. United States v.

Brodie, 524 F.3d 259, 268-69 (D.C. Cir. 2008). Thus, even if the government had never produced Allen's additional statements, there would have been no constitutional error under Brady and Giglio.

Defendant also contends (Mem. 42) that the disclosure of Allen's statements "interrupt[ed] the proceedings for days while the government's most powerful piece of evidence lingered in the jurors' minds." But the proceedings were delayed at defendant's own request, 10/2/08 P.M. Tr. 51, and Allen's lengthy cross-examination provided the defense ample opportunity to address any "lingering" issues. United States v. Marshall, 132 F.3d 63, 70 (D.C. Cir. 1998) ("Ordinarily, a continuance is the preferred sanction for discovery delay because it gives the defense time to alleviate any prejudice it may have suffered from the late disclosure.").

Defendant also suggests (Mem. 42-43) that "a string of frivolous objections" interposed by government counsel prevented him from making effective use of Allen's prior statements at trial. This argument is beside the point because whatever objections the government interposed at trial would presumably have been made regardless of when Allen's statements were produced to the defense.[20]

C. The $44,000 Check. Next, defendant contends (Mem. 34-35) that the prosecution "withh[eld] critical evidence and spr[ung] it on the defense at trial." The facts relating to this claim are undisputed. The government had in its possession a $44,339.51 check written by Bill Allen to pay for a 1999 Land Rover, which Allen subsequently traded to defendant for $5,000 and a 1964 1/2 Mustang. The check was not produced in discovery. This was error. Fed. R. Crim. P.

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[20] In fact, the transcript makes clear that (1) the government made no "frivolous" objections; (2) defendant was allowed to question Allen about his prior remarks; and (3) Allen repeatedly agreed that defendant would have paid a fair bill, thereby ensuring that the jury heard the "highly material [and] exculpatory" evidence underlying this misconduct claim. Mem. 32; see 10/06/08 P.M. Tr. at 70-78.

16(a)(1)(E)(i), see United States v. Marshall, 132 F.3d 63, 69-70 (D.C. Cir. 1998).

The government did not, however, attempt to sandbag the defense by withholding the check and then springing it on the defense at trial. In fact, the government was surprised that the defense contested the price of the Land Rover, believing that it would instead focus on the much-harder-to-value 1964 1/2 Mustang. After the government introduced the check in Allen's redirect to counter the defense's suggestion that the Land Rover did not cost $44,000, defense counsel protested that the check had not been produced. At this point, the Court struck all evidence relating to the Land Rover swap, and then informed the jury that the government had not met its discovery obligations. 10/8/08 P.M. Tr. at 90; 10/9/08 P.M. Tr. 62-63.

As this discussion makes clear, the government paid a heavy price for its mistake. The Court's sanction eliminated from trial significant proof of the defendant's intent, and damaged the government's credibility in the eyes of the jury. Accordingly, the check incident, like the two other incidents addressed above, proved to be a boon to the defense. Defendant nonetheless contends that this event warrants a new trial because, by introducing the check, the government "bolstered the credibility" of Allen, leaving the jury "with a more favorable impression of Mr. Allen's testimony across the board * * *." Mem. 35. This argument makes no sense. Had the government produced the check, it presumably would also have used it at trial, and thus, Allen's credibility on this point would have been "bolstered" in any event.[21] Moreover, even if we assume that the government would have produced the check and not used it, defendant cites no authority suggesting that a new trial is required when, as a result of a discovery error, a witness is proven to have testified truthfully,

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[21] The prosecutor did not use the check in Allen's direct examination because he had forgotten that it existed.

especially as regards a collateral matter.

D. The Testimony of Bill Allen. Defendant contends (Mem. 36-39) that the government elicited "demonstrably false" testimony from Allen, and that "the prosecution team must have known" this testimony was false. The argument focuses on Allen's statement that, when he discussed with Persons defendant's October 6, 2002 request for a bill, Persons told Allen not worry about this request as "Ted is just covering his ass * * * ." 10/1/08 A.M. Tr. 51-52. In arguing that this testimony was false, defendant offers the Court the same combination of conjecture and wishful thinking that he previously presented to the jury. Tr. 10/21/08 P.M. 7 ("I'm going to prove to you that it is a lie."); see id. at 7-15. The jury was unconvinced, and the present motion provides no basis for questioning its conclusion (let alone finding government misconduct).

To begin with, Allen's testimony was not "demonstrably false." Indeed, the explanation that Persons provided Allen about defendant's letter makes good sense. After accepting free labor and materials from Allen and VECO for many months, defendant sent this note just six days after Senator Torricelli formally withdrew from his Senate race as a result of similar conduct. 10/6/08 A.M. Tr. 34. Defendant's note even references this event. Moreover, when Allen failed to send defendant a bill notwithstanding this note, defendant sent one more "cover" note and then let the matter drop, a decision which strongly suggests that his written requests for a bill were not sincere. Allen's testimony about Persons remark is also consistent with other evidence that defendant, Allen and Persons attempted to "cover" the defendant so that he could accept valuable gifts without disclosing them. See, e.g., GX 660, GX 462.

In claiming that Allen's testimony was false, defendant relies first on the fact that Persons's comment was not recorded in the government's memoranda of its interviews with Allen. This fact

proves nothing, however, because the government was not even aware of the October 6, 2002 note until defendant produced it in early 2008, long after most of the memoranda were prepared. Moreover, it was not until shortly before trial that the government questioned Allen about defendant's statement that he had asked Persons to speak to Allen about a bill, and thereby learned about Persons's remark. Allen's recollection on this point was not recorded in an FBI 302 because it was disclosed during a trial preparation session.

Defendant also contends (Mem. 37-38) that the statement must be false because Allen had elsewhere identified other reasons why he did not want to send defendant a bill. But this argument confuses two separate issues, namely, (1) whether Allen wanted to send defendant a bill, and (2) whether, Allen felt obligated to send a bill based on defendant's request. That Allen had his own reasons for not sending defendant a bill is not inconsistent with his claim that, when he asked Persons about defendant's October 6, 2002 letter, Persons stated that defendant's request for a bill was simply intended for "cover."

Next, defendant contends (Mem. 38) that Allen's testimony about Persons's remark must have been false because Allen did not immediately recall this conversation when asked about a subsequent letter the defendant sent, also requesting a bill. This argument makes little sense. Had Allen actually perjured himself by testifying about Persons's remark, this fact would have been front and center in his mind, making it more likely (not less likely) that he would immediately recall Persons's remark when asked about the second letter. Accordingly the idea Allen would perjure himself and then promptly "forg[e]t the lie" is hardly compelling. 10/21/08 P.M. Tr. 9.

Finally, defendant contends that the government must have known that Allen's remark was false because it did not question Persons about this conversation before trial. But by the time the

government learned of Persons's remark, it had concluded that he was a hostile witness closely aligned with the defense. The government did not check Allen's recollection against Persons's because it thought it highly unlikely that this particular witness would willingly recall any conversation detrimental to the defense.

VIII. THE INDICTMENT WAS NOT IMPERMISSIBLY VAGUE.

Defendant contends (Mem. 44-47) that the indictment was impermissibly vague. In particular, he argues that Counts Two and Three did not identify sufficiently certain things of value–-the massage chair, the stained glass artwork, the bronze fish statute--that he was charged with failing to report on his financial disclosure forms. He also argues that the indictment improperly failed to specify whether the unreported items constituted gifts or liabilities. In the alternative, he contends that the Court should have required the government to itemize the unreported items in a bill of particulars. The Court correctly rejected these claims when defendant raised them pretrial, 9/10/08 Tr. 78, and there is no basis for a different result now.

A. Counts Two and Three More Than Adequately Set Forth the Charges. Fed. R. Crim. P. 7(c)(1) requires that an indictment be a "plain, concise, and definite written statement of the essential facts constituting the offense charged." An indictment need only contain those facts and elements of the alleged offense necessary to inform the accused of the charge so that he may prepare a defense and plead double jeopardy where appropriate. See Hamling v. United States, 418 U.S. 87, 117 (1974). An indictment that tracks the statutory language defining an offense is sufficient so long as it states all the offense elements. See ibid.; United States v. Haldeman, 559 F.2d 31, 124 n. 262 (D.C. Cir. 1976). As this Court has recognized, a "bare bones" indictment as regards statutory language "is the norm and fully permissible." United States v. Crosby, No. 91-0559-08, 1992 WL

35124, at *1 (D.D.C. Feb. 5, 1992); see also United States v. Palfrey, 499 F.Supp.2d 34, 47 (D.D.C. 2007).

Counts Two and Three were anything but "bare bones" and more than sufficient. Section 1001(a)(2) makes it a crime, "in any matter within the jurisdiction of the * * * legislative branch * * * , knowingly and willfully * * * [to] make[] any materially false * * * statement or representation." Tracking that language, Counts Two and Three alleged that, "in a matter within the jurisdiction of the legislative branch," defendant, "knowingly and willfully made "material false * * * statements and representations" on his 2001 and 2002 financial disclosure forms and attachments thereto in that he represented that he had received no reportable gifts and had no reportable liabilities during those years when in fact he knew that that was not true. Indict., Ct. 2 ¶ 52; Ct. 3 ¶ 58.[22] The indictment then proceeded to relate the government's grounds for believing that defendant's statements were false by describing the reportable items that defendant failed to disclose on the forms. The indictment described the unreported items, in the case of Count Two, as having been received from "Allen, VECO, Person A and Person B," id. at Ct. 2 ¶ 52, and, in the case of Count Three, as having been received from "Allen, VECO, Person B, and others," id. at Ct. 3 ¶ 58. In addition, the indictment identified "Person A" (Bob Persons) as "the owner of a retail business in the State of Alaska" who was "a personal friend of Stevens," who had monitored the work being done at the Girdwood residence, and who had provided defendant with periodic email updates on the progress of the renovation. Id. at Ct. 1 ¶ 5, 39, 40 (incorporated by reference in Ct. 2 ¶ 47 and Ct. 3 ¶ 53). And it identified "Person B" (Bob Penney) as "the owner of a real estate business in the

[22] In both Counts Two and Three, the indictment also, among other things, set forth the requirements of the Financial Disclosure Forms, the filing requirement, and the specific dates that defendant filed the forms. See Indict., Ct. 2 ¶¶ 48-52; Ct. 3 ¶¶ 54-58.

State of Alaska" who was "a personal friend of Stevens." Id. at Ct. 1 ¶ 6 (incorporated by reference as indicated above).

In a false statement or perjury case, "an indictment need not allege in detail the factual proof that will be relied upon to support the charges." United States v. Oberski, 734 F.2d 1034, 1035 (5th Cir. 1984). Some courts take the view that "an indictment for perjury is sufficient if it alleges the falsity of the defendant's oath without alleging what the truth was." United States v. Marchisio, 344 F.2d 653, 662 (2d Cir. 1965); see also United States v. Serola, 767 F.2d 364, 370 (7th Cir. 1985); United States v. Lattimore, 215 F.2d 847, 861 n.7 (D.C. Cir. 1954) (Stephens, C.J., concurring in part and dissenting in part) (it is sufficient for perjury indictment to plead the charged falsity without also "plead[ing] the truth"). Indeed, this Court has stated that, under the law of the D.C. Circuit, an indictment need not even "include the precise 'materially false, fictitious, or fraudulent statement or representation,' attributed to a particular defendant." United States v. Brown, No. 07-75, 2007 WL 2007513, at *14 (D.D.C. July 9, 2007). In the instant case, to the degree that some description of the unreported gifts and/or liabilities may have been necessary, the indictment more than adequately provided it.

Nor was the indictment required to specify whether the unreported items constituted gifts or liabilities. In United States v. Blackley, 167 F.3d 543 (D.C. Cir. 1999), the defendant, a former chief-of-staff to the Secretary of Agriculture, contended that an indictment charging him with making false statements on a financial disclosure form impermissibly listed the various categories of disclosure required-- "assets and income," "gifts, reimbursement and travel expenses," " liabilities," and "agreements or arrangements"–-without connecting the money he received to any particular category. The D.C. Circuit rejected his claim, explaining that, "[w]here the indictment alleges only

one offense, it is proper to charge the different means for committing that offense in the conjunctive," and that "proof of any one of th[e] [categories] could sustain a conviction." Id. at 549. Blackley defeats defendant's claim.

B. Defendant Was Not Entitled to a Bill of Particulars. The Court correctly denied defendant's pretrial motion for a bill of particulars. A bill of particulars is not required where the indictment provides sufficient notice of the charges. See, e.g., United States v. Eiland, No. CRIM-04-379 (RCL), 2006 WL 516743, at *7 (D.D.C. Mar. 2, 2006); United States v. Brodie, 326 F.Supp.2d 83, 91-92 (D.D.C. 2004); United States v. Edelin, 128 F.Supp.2d 23, 36 (D.D.C. 2001). Moreover, the availability "in some other form" of the information sought by a defendant obviates the need for a bill of particulars. United States v. Butler, 822 F.2d 1191, 1193 (D.C. Cir. 1987). On that basis, courts in the D.C. Circuit have repeatedly denied motions for bills of particular where the requested information had already been provided through pretrial discovery. See United States v. Mejia, 448 F.3d 436, 446 (D.C. Cir. 2006); Eiland, 2006 WL 516743, at *7; Brodie, 326 F.Supp.2d at 92; Edelin, 128 F.Supp.2d at 36; United States v. Cooper, 91 F.Supp.2d 79, 84 (D.D.C. 2000); United States v. Coleman, 940 F.Supp. 15, 19 (D.D.C. 1996). Moreover, the record shows that, as a result of pretrial discovery or by other means, defendant had clear notice of the identity of the unreported items on which the government was relying. Thus, with respect to the massage chair, (1) the government explicitly identified the chair as a reportable benefit in its proposed statement of the case filed several weeks before trial, see Dkt. 58, at 2; (2) the government specifically requested from defendant, as part of discovery, "all electronic mail relating to a chair provided by [Bob] Persons in or around 2001," see Exh. 1 at 2; (3) the defense produced a number of emails concerning the chair, see, e.g., GX 451, 445, 447; (4) the government produced documents from Brookstone relating to

the chair; (5) defendant and Persons discussed the chair prior to Persons's grand jury testimony; (6) the government provided defendant with a copy of Persons's grand jury testimony, which covered the chair in detail; (7) the government provided defendant with a copy of the search warrant for his house, which set forth the relevance of the chair, see 7/27/07 Search Warrant Affidavit ¶ 143; (8) the government's exhibit list set forth documents relating to the chair; and (9) the parties, before trial, discussed a stipulation regarding the authenticity and admissibility of Brookstone records pertaining to the chair.

With respect to the stained glass artwork, (1) the government explicitly identified the artwork as a reportable benefit in its proposed statement of the case, Dkt. 58 at 2; (2) the defendant, in response to a government discovery request for documents concerning the artwork, produced emails relating to the artwork's provenance and his receipt of the artwork from the Penneys, see GX 452, 454; and (3) the government, in the course of discovery, produced numerous documents regarding the artwork, including detailed invoices provided by Bob Penney and his company concerning the purchase of the artwork, a paper template used by the artist to create the design, a photograph of the artwork taken by the artist, and photographs of the artwork taken by the government during the execution of the search warrant, see, e.g., GX 207, 209. And as to the fish sculpture, (1) the search warrant affidavit disclosed the existence of the sculpture, its location, and how it was purchased, see 7/27/07 Search Warrant Affidavit ¶¶ 62, 80; (2) the parties, as part of discovery, exchanged numerous photographs and documents relating to the provenance of the sculpture, the date it was auctioned off, the identity of the individuals who purchased it, and the checks used to pay for it, see, e.g., GX 239, 1021; (3) the parties sparred over whether the sculpture was a reportable gift during a pretrial hearing, see 9/18/08 Tr. 53; and (4) defendant included on his

exhibit list evidence pertaining to the issue of whether the sculpture was intended for a memorial library allegedly planned for Senator Stevens. Thus, defendant's claim to have been surprised by the government's reliance on the massage chair, stained glass artwork, and fish sculpture is disingenuous, to say the least. Because defendant had abundant notice of those items well before trial, he was not unfairly prejudiced by the denial of his request for a bill of particulars.[23]

IX. THE COURT DID NOT ERR IN ADMITTING EVIDENCE OF UNCHARGED ACTS

Defendant contends that the government's case "prominently featured uncharged conduct," and that the Court's decision to admit this evidence was unfairly prejudicial. Mem. 47. Defendant is mistaken, and the Court's evidentiary rulings were not an abuse of discretion.

A. The Generator Evidence

Defendant first claims that the Court erred when it refused to strike evidence relating to the generator provided to him by Allen and VECO in 1999. Mem. 48-49. After full briefing by the parties (see Dkt. 20, 33, 45, 49), the Court initially admitted the proof concerning the generator as intrinsic evidence or as other-acts evidence under Fed. R. Evid. 404(b). 9/26/08 A.M. Tr. 5; 9/19/08 Minute Order. Near the end of trial, defendant moved to strike the generator evidence (see Dkt. 182, 187, 189) and, on October 19, 2008, the Court issued a minute order granting in part and denying in part the motion "in view of the government's concession that the generator may be considered pursuant to Federal Rule of Evidence 404(b) but is not intrinsic to the indictment." The Court's

[23] Defendant also takes issue (Mem. 45) with the evidence of his receipt of certain extraneous gifts--guns, gift bags, and a boxing bag. Defendant did not object contemporaneously to any of this evidence, see 9/30/08 P.M. Tr. 15-17, 18-19; 10/6/08 A.M. Tr. 26, 30, and the Court subsequently struck the evidence, instructing the jury that it had "no relevance" and to disregard it, 10/22/08 A.M. Tr. 20; 10/19/08 Minute Order Granting Defendant's Motion to Strike Evidence Of Uncharged alleged Gifts. Moreover, the government did not make use of any of the evidence in its closing argument. In these circumstances, the evidence could not have prejudiced defendant.

decision to admit this evidence was correct.

At trial, defendant disputed that he harbored the requisite knowledge and intent for a violation of 18 U.S.C. 1001, contending that he was unaware of the benefits that Allen and VECO had provided him in connection with the Girdwood remodeling. As another valuable benefit, worth approximately $6,300, see GX 1096, 1107, that defendant received from Allen and VECO and did not pay them for, the evidence relating to the generator was highly probative of defendant's knowledge and intent regarding the unpaid-for renovations to the Girdwood residence. The government was therefore entitled to introduce the evidence under Fed. R. Evid. 404(b) and 403. See United States v. Bowie, 232 F.3d 923, 930 (D.C. Cir. 2000); United States v. Gartmon, 146 F.3d 1015, 1021 (D.C. Cir. 1998). Dkt. 45 at 3-4, 7-11; Dkt. 187 at 5.

B. Evidence Relating To Walter Stevens And John Covich

The parties also fully briefed the admissibility of evidence relating to the VECO-related benefits that Allen and VECO provided to defendant's son (Walter Stevens) and grandson (John Covich) at defendant's request. See Dkt. 20, 33, 45, 49. Defendant now claims that the Court's decision to admit this evidence as either intrinsic or Rule 404(b) evidence was erroneous. Mem. 49-50. Defendant makes no arguments in this connection that have not already been presented to and rejected by the Court.

The evidence that defendant asked Allen to provide financial benefits to defendant's family tended to prove defendant's knowledge, which he denied, that Allen and VECO had provided and would provide him with financial benefits when he asked for them. See Dkt. 45 at 1-4. Accordingly, the evidence was admissible as direct proof of facts intrinsic to the conduct charged in the indictment. See United States v. Alexander, 331 F.3d 116, 125-26 (D.C. Cir. 2003); Bowie, 232

F.3d at 929. This evidence also was admissible pursuant to Rule 404(b) for the purpose of proving defendant's knowledge, intent, motive, opportunity, and absence of mistake in connection with the crimes charged. See Dkt. 45 at 10.

C. Evidence Relating To Ben Stevens

Defendant complains that the Court improperly allowed the government to ask both defense character witness Donna de Varona and defendant himself whether defendant's son, Ben Stevens, had received substantial compensation while he was Executive Director of the 2000 Winter Special Olympics and while he served that organization in a consulting role. Mem. 50-51 (citing 10/15/08 A.M. Tr. 60-61).[24] Defendant maintains that these questions were irrelevant "and designed "to impugn [defendant] by suggesting that he somehow provided his son with these positions." Id. at 51. As we have already shown, the government asked the questions of defendant and de Varona with the object of rebutting de Varona's character testimony concerning defendant's work in behalf of the Special Olympics by showing that defendant's motive in doing the work may not have been entirely disinterested in light of his son's relationship with the organization. Hence, the questions were designed to elicit not Rule 404(b) testimony, but testimony rebutting a "trait of character offered by [the] accused," as specifically authorized by Rule 404(b)(1). Significantly, neither de Varona nor defendant could testify how much Ben Stevens received from the Special Olympics in

[24] Defendant's assertion that the government "dropped a series of clues" that Ben Stevens was one of the state legislators whom Bill Allen had pled guilty to bribing is based on nothing more than speculation and innuendo. The citations referenced by defendant (Mem. 52) do not indicate that Allen was bribing Ben Stevens. Instead, evidence introduced during Allen's testimony indicated that *defendant* was actively involved in communicating with Allen regarding the state gas pipeline. That certain of these communications also involved defendant's son does not mean the government was "flout[ing]" the Court's prior ruling. Rather, it merely shows that defendant's son, a state legislator, was supportive of and involved with the state gas pipeline project--not that he was receiving alleged illegal benefits from Allen.

employee or consulting fees. See 10/15/08 A.M. Tr. 60; 10/20/08 A.M. Tr. 18.

X. THE ADMISSION OF "OFFICIAL ACTS" EVIDENCE DID NOT VIOLATE THE SPEECH OR DEBATE CLAUSE OR CAUSE DEFENDANT UNFAIR PREJUDICE

Defendant contends that the admission of evidence concerning official actions taken by him--as well as evidence of solicitations of him made by VECO and its executives--violated the Speech or Debate Clause and caused him unfair prejudice. Mem. 52-59. Neither claim withstands scrutiny.

A. Speech or Debate Clause. Defendant contends that the government violated the Speech or Debate Clause by (1) introducing testimony by Bill Allen about purportedly legislative acts performed by defendant; (2) cross-examining defense witnesses about legislative acts performed by defendant; and (3) requiring defendant to defend himself through further introduction of protected legislative activities. The Court should reject each of defendant's asserted violations of the Speech or Debate Clause because (1) none of the actions described by Allen in his direct testimony constituted legislative acts within the ambit of the Speech or Debate Clause; (2) the government elicited no testimony from defense witnesses on cross-examination regarding legislative acts performed by defendant, and in any event, defendant opened the door to the very questioning to which he now objects; and (3) defendant's own decision to introduce evidence of legislative acts does not violate the Speech or Debate Clause.

1. The Direct Examination of Bill Allen. The defense identifies five aspects of Allen's testimony that it asserts "concerned * * * overtly legislative acts," Mem. 54. Specifically, defendant points to testimony and documentary evidence regarding (1) Allen and VECO's solicitation of defendant for assistance in securing unpaid dividends owed VECO by the government of Pakistan; (2) Allen and VECO's solicitation of defendant for assistance in gaining the passage of

legislation pending within the Alaska State Legislature; (3) defendant's meeting with the State Department and the Agency for International Development to discuss a public-private partnership between the U.S. Government, the Alaska State Government, VECO, and other oil companies regarding a training program for Sakhalin Island residents; (4) Allen's solicitation of defendant to contact the mayor of an Alaska town who was opposing the planned construction by VECO of a nearby prison; and (5) VECO's solicitation of defendant for assistance in securing a contract with the National Science Foundation.

Defendant cites no precedent supporting his assertion that the Speech or Debate Clause protects the five areas of testimony described above, because there is no legal support for such an assertion of the privilege. Indeed, even the most cursory examination of Allen's testimony reveals that much of the evidence described above constitutes attempts by VECO to obtain assistance from defendant or his legislative staff on matters affecting VECO's business interests. See 10/1/08 A.M. Tr. 75, 79, 80, 81, 88. These types of solicitations, standing alone, do not give rise to speech or debate concerns because they involve no action--official, political, or otherwise--on the part of defendant or his staff.

Moreover, even when the evidence in question extended to actions taken by defendant, the actions involved assistance in securing government contracts or federal grants or otherwise influencing the conduct of the executive branch, intergovernmental agencies, or the Alaska State Government--actions that courts have repeatedly held to be unprotected by the Speech or Debate Clause. See United States v. Brewster, 408 U.S. 501, 512 (1972); Gravel v. United States, 408 U.S. 606, 625 (1972). Indeed, with respect to two of the five examples of purportedly speech-or-debate-protected material offered by the defendant--VECO's requests for assistance with the construction

of a prison in Alaska and with a National Science Foundation grant--Allen clearly stated either that defendant took no action at all in response to a solicitation or that he had no knowledge of whether defendant took any action. 10/1/08 Tr. A.M. 79, 81.

With respect to the remaining three areas of Allen's testimony that defendant identifies as intruding upon the Speech or Debate privilege--writing a letter to the World Bank, working to support the passage of state legislation regarding a natural gas pipeline, and meeting with the State Department and the U.S. Agency for International Development to discuss a public-private partnership for training Sakhalin Island workers--the activities in question are "in no wise related to the due functioning of the legislative process." United States v. Johnson, 383 U.S. 169, 172 (1966). Rather, Allen's testimony concerned actions that fall within the "wide range of legitimate 'errands' performed for constituents," United States v. Brewster, 408 U.S. 501, 512 (1972), actions the Supreme Court has held are "political in nature rather than legislative." Ibid. Indeed, courts have uniformly rejected the assertion of Speech or Debate privilege over the types of actions described in Allen's testimony. The first allegedly privileged action, defendant's assistance in securing unpaid dividends owed to VECO by writing a letter to the World Bank, is not protected because efforts to "cajole" or "exhort" Executive Branch officials--and by extension, officials of intergovernmental agencies such as the World Bank--do not qualify as "protected legislative activity." Gravel, 408 U.S. at 625; see also Johnson, 383 U.S. at 172 (suggesting that the Clause did not cover a Member's attempt to influence the Department of Justice).

The second allegedly privileged action covered by Allen's testimony, defendant's assistance in reaching out to *state* legislators to ask for their support on legislation related to a natural gas pipeline, is similarly outside the protections of the Speech or Debate Clause. Defendant contends

that the actions discussed in Allen's testimony were "pursuant to federal legislation," Mem. 55, but the government's questioning--and Allen's testimony--never mentioned any federal legislation, and instead covered only the efforts to convince *state* legislators to pass *state* legislation. The Speech or Debate Clause "prohibits only proof that a member actually performed a legislative act," United States v. McDade, 28 F.3d 283, 293 (3d Cir. 1994) (Alito, J.), and there was no such proof offered here. Furthermore, even if defendant's efforts to convince the state legislators to pass pipeline legislation was "pursuant to" a statute that Congress had passed--and, to repeat, there was no testimony or evidence indicating that it was-- those actions are more akin to the kind of "cajol[ing] and exhort[ing] with respect to the administration of a federal statute" that the Supreme Court has held is "not protected legislative activity." Gravel, 408 U.S. at 625.

The third allegedly speech-or-debate-protected activity identified by defendant in Allen's testimony is defendant's meeting with the State Department, the U.S. Agency for International Development, and others regarding a public-private partnership to train workers on Sakhalin Island. Mem. 54. To the extent that defendant's actions were aimed at securing a government contract or funding for the Sakhalin public-private partnership, it is clear that the boundaries of the Speech or Debate Clause do not include attempts by a Member to secure government contracts on behalf of a constituent. See Brewster v. United States, 408 U.S. 501, 512 (1972); Fields v. Office of Eddie Bernice Johnson, 459 F.3d 1, 24 (D.C. Cir. 2006) (en banc); Rose, 28 F.3d at 188 ("[T]he Court has found that many activities routinely engaged in by lawmakers, such as constituent services, communications with government agencies, assistance in securing government contracts, and speeches delivered outside of Congress, do not qualify for immunity.") (citations omitted); McDade, 28 F.3d at 295-96 ("the Clause does not shield * * * assistance in securing Government contracts").

The Supreme Court also has repeatedly held that attempts by a Member of Congress to communicate with and influence the conduct of executive agencies--like the State Department and USAID--are not immunized by the Speech or Debate Clause. See, e.g., Hutchinson v. Proxmire, 443 U.S. 111, 121 n.10 (1979); Gravel, 408 U.S. at 625; Johnson, 383 U.S. at 172; Doe v. McMillan, 412 U.S. 306, 313 (1973); see also Chastain v. Sundquist, 833 F.2d 311, 314-15 (D.C. Cir. 1987). Accordingly, none of the five portions of Bill Allen's testimony singled out by the defendant--nor any of the evidence admitted in the course of that testimony–was protected by the Speech or Debate Clause.

2. Cross-Examination of Defense Witnesses. Out of an extensive trial record spanning hundreds of pages of testimony by their own witnesses, the defendant manages to identify only two examples of government cross-examination that allegedly violate the Speech or Debate Clause. First, the defense cites an exchange from the cross-examination of Helvi Sanvik, President of the NANA Development Corporation, during which Sanvik professes not to know whether or not the Native corporation she heads received special 8(a) rights with respect to federal contracts "due to a law enacted in 1986 by defendant." 10/14/08 A.M. Tr. 55. When government counsel attempted a follow-up question, defense counsel objected on Speech or Debate grounds and the Court sustained the objection. Second, defendant points to the government's cross-examination of Russell Howell, Director of the America-Russian Center, during which Howell testified that he did not know whether or not his Center's funding was the result of an earmark defendant inserted into an appropriations bill. Again, when government counsel attempted a clarifying follow-up question, defense counsel objected on Speech or Debate grounds and the Court sustained the objection.

As an initial matter, it is clear that neither exchange cited by defendant resulted in the admission of Speech-or-Debate-protected material. In both cases, the witnesses, when asked a

question that allegedly concerned legislative acts, responded that they had no knowledge of any legislative acts by defendant.[25] Furthermore, in both cases, when government counsel attempted to ask a follow-up or clarifying question, defense counsel objected on speech or debate grounds, and the Court sustained the objection. The timely assertion of objections to evidence at trial, and the ruling on those objections by the Court, is precisely the process contemplated by the D.C. Circuit for sorting out the assertion of the Speech or Debate privilege. See Rostenkowski, 59 F.3d at 1300 (defendant can vindicate privilege "by objecting to the introduction of Speech or Debate material at such point(s) in the trial as the Government may propose to put protected material into evidence.")[26]

Even assuming, however, that the excerpts in question did result in the admission of speech-or-debate-protected material, defendant opened the door to such questioning through his own direct examination of these two witnesses. As courts in this and other circuits have held, "the constitutional protection against [a Member of Congress] being 'questioned' for his legislative acts 'does not prevent [the Member] from offering such acts in his own defense, even though he thereby subjects himself to cross examination." Rostenkowski, 59 F.3d at 1303 (quoting United States v. McDade, 28 F.3d 283, 295 (3d Cir. 1994) (Alito, J.); citing United States v. Myers, 635 F.2d 932, 942 (2d Cir. 1980)). With respect to Sandvik's testimony, defendant's brief neglects to mention the

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[25] In neither case did defense counsel interpose a speech or debate objection to the initial question.

[26] Defendant relies on United States v. Helstoski, 442 U.S. 477 (1979), for the proposition that "mere 'mention' of "a [legislative] act that has already been performed" is a violation of the Speech or Debate Clause." Mem. 56. This is, at best, an overly literal reading of Helstoski--one that is greatly aided by the defendant's appending of the word "mere" to the language of the Court--and it cannot be squared with controlling precedent in this circuit. Helstoski stands for the proposition that "references to past legislative acts of a Member *cannot be admitted* without undermining the values protected by the Clause." Helstoski, 442 U.S. at 489 (emphasis added).

extensive questioning on direct examination of the same witness regarding the very same "8(a) rights" contained in the question now complained of. See 10/14/08 A.M. Tr. 47-48. By eliciting extensive testimony about assistance defendant provided to Sanvik's organization with respect to the 8(a) program, defendant effectively opened the door to questioning about Speech or Debate protected actions regarding that program. Indeed, the "part of the program that the Senator was helpful with," as Sanvik described it in her direct examination, is precisely the same thing that she was asked about on cross-examination, as the passage excerpted by defendant clearly reveals. Having elicited testimony from Sanvik about his own legislative acts, defendant cannot now complain that the government's cross-examination of the same witness regarding the same activity violates the Speech or Debate Clause.[27]

Similarly, defendant opened the door to the cross-examination testimony of Howell to which he now objects. Defendant's direct examination of Howell was given over, in large part, to a recitation of detailed discussions Howell had with defendant's office regarding the Sakhalin Islands public-private partnership, 10/10/08 P.M. Tr. 101-103, thereby opening the door to questions on cross-examination about defendant's efforts to secure funding for the program. More importantly, because the Court sustained a speech-or-debate objection by defense counsel, no testimony about speech-or-debate-protected activity was ever elicited.

3. Defendant's Rebuttal Evidence. Finally, defendant contends that the admission of official acts evidence violated the Speech or Debate Clause by "forc[ing] him to introduce evidence of his legislative activities in rebuttal." Mem. 56. This claim need not detain the Court

[27] It bears noting, moreover, that even though defendant opened the door to cross-examination on this subject, the government chose not to pursue the questioning once counsel interposed a speech-or-debate objection.

long because it is specifically addressed and foreclosed by controlling precedent in this circuit which defendant labors in vain to distinguish. In Rostenkowski, the D.C. Circuit held that a defendant Congressman is not "questioned" under the clause when he offers otherwise privileged evidence:

> Moreover, to the extent that Rostenkowski himself chooses to present evidence of his status or activities as a legislator, we agree with the Second and Third Circuits that the constitutional protection against his being "questioned" for his legislative acts "does not prevent [a Member of Congress] from offering such acts in his own defense, even though he thereby subjects himself to cross-examination."

59 F.3d at 1303 (quoting United States v. McDade, 28 F.3d at 295, citing United States v. Myers, 635 F.2d 932, 942 (2d Cir. 1980)). Defendant contends that this case is distinguishable from Rostenkowski because "[t]here [i.e., Rostenkowski], the court evaluated the indictment" and concluded that the defendant had failed to identify anything on the face of the indictment to show that his legislative acts would ever be at issue at trial," whereas in the present case, "it is now clear such acts *were* at issue in this trial--at the government's initiation." Mem. 58 (quoting Rostenkowski). But as the government has repeatedly argued-- both in the present filing and in multiple pretrial filings--neither the allegations contained in the indictment nor the evidence the government offered at trial included any reference to speech or debate-protected material. Thus it simply cannot be said that the defendant was "forced" to introduce evidence of protected legislative activities in rebuttal. Like Rostenkowski, there is nothing on the face of the indictment here that required the government to introduce legislative acts protected by the Clause, and the government did not introduce any such evidence. 59 F.3d at 1303. Defendant's decision to offer Speech or Debate evidence for tactical or other reasons was his and his alone, and he made it voluntarily and without compulsion.

B. Defendant Was Not Unfairly Prejudiced by Admission of Evidence of His Official Acts.

Defendant next contends that evidence at trial "suggested" that the government was charging him with bribery, and that the evidence of official acts performed and gifts received by him were "highly prejudicial to Senator Stevens." Mem. 58. There was no unfair prejudice.

The evidence of defendant's performance of official or political acts is of course prejudicial because the evidence tended to prove his guilt by establishing the expressly charged manner, means, and motive for his concealment scheme and false statements. Defendant, however, confuses prejudice caused by evidence of his guilt, which is admissible under Fed. R. Evid. 401 and 403, with the sort of "*unfair* prejudice" barred by Rule 403 (emphasis added). When balancing the probative value and need for evidence versus its possible prejudicial effect, the question is always "one of 'unfair' prejudice--not of prejudice." United States v. Moreno Morales, 815 F.2d 725, 740 (1st Cir. 1987). Rule 403 "focuses on the 'danger of *unfair* prejudice,' and gives the court discretion to exclude evidence only if that danger '*substantially* outweigh[s]' the evidence's probative value." United States v. Gartmon, 146 F.3d 1015, 1021 (D.C. Cir. 1998) (emphasis in original). There was nothing unfair about introducing evidence of defendant's official acts. In fact, it was quite necessary.

Paragraph 17 of the government's indictment charged that defendant received and accepted solicitations for multiple official and political acts from VECO and Allen during the same time period that he filed false U.S. Senate financial disclosure forms concealing his receipt and acceptance of over $250,000 in things of value from VECO and Allen. As is plain from the indictment itself–and from the evidence introduced at trial--this allegation relates to defendant's motive and intent to conceal the benefits received from VECO and Allen. Thus, contrary to defendant's

argument, by introducing evidence of official acts, the government was not "attempting to smuggle in a bribery case," Mem.59, but was instead offering crucial evidence in support of Paragraph 17--evidence that is highly relevant to the essential elements of the charged crimes, including intent and materiality. This evidence also helped to prove motive, explaining why defendant did not report his receipt and acceptance of things of value from VECO and Allen on his financial disclosure forms.

The government took great care to state that defendant was not being charged with bribery. See, e.g., 10/21/08 P.M. Tr. 56 ("Now, ladies and gentlemen, regarding the official act that we talked about during the government's direct case * * * the government has not charged the defendant with bribery."). Furthermore, the Court read the jury a lengthy limiting instruction making clear, among other things, that

> [t]he defendant is not charged with a crime for performing official or political acts. As I've instructed you elsewhere, the defendant is charged with concealing material facts and submitting false statements. Evidence of any official action by the defendant or his office, may be considered by you only to determine the motive, and intent, if any, to commit the crimes charged in the indictment.

10/1/08 A.M. Tr. 73. The Supreme Court has held that we ought to "presume[ ] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985). And the presumption that jurors understand and follow the instructions given to them "is only overcome if there is an 'overwhelming probability' that the jury was unable to follow the instruction as given." Doe v. Johnson, 52 F.3d 1448, 1458 (7th Cir. 1995). Defendant points to nothing in the trial record that indicates in any way that the jury was unable to follow the instruction as given--let alone a "overwhelming probability" that they failed to do so.

The two cases cited by the defendant are entirely inapposite. In Carter v. District of Columbia, 795 F.2d 116 (D.C. Cir. 1986), a civil rights action, the court concluded that the trial judge erred by allowing defense counsel to read a series of inflammatory newspaper articles detailing allegations of police abuse and misconduct. In so doing, the court specifically found that "[t]he specific accounts of allegations contained in newspaper articles were themselves of *no probative value* * * * ." Id. at 128 (emphasis added). Here, however, the evidence of defendant's official acts is highly probative of essential elements of the charged crimes, including intent and materiality. Similarly, in United States v. Fuller, 387 F.3d 643 (7th Cir. 2004), the court of appeals held that the trial court had correctly barred testimony from a medical expert about the defendant's stated reasons for committing the crime because "[i]n light of the objective standard [governing the criminal statute in question] * * * [the defendant's] subjective intent * * * is not relevant" and the excluded evidence "would merely have been confusing to the jury." Id. at 648. By contrast, the official acts evidence the defendant here claims was wrongfully admitted is highly probative of key elements of the charged crimes. No new trial is warranted.

XI. THE GOVERNMENT'S REFERENCES AT TRIAL TO THE PUBLIC'S INTEREST IN HONEST FINANCIAL DISCLOSURE WERE PROPER AND DID NOT GIVE RISE TO UNFAIR PREJUDICE.

Defendant claims (Mem. 59-61) that the government unfairly emphasized throughout the trial that the public has a general interest in the information that defendant was required to disclose on his statutorily-mandated and publicly-filed annual financial disclosure forms.

This issue was fully litigated by the parties. On October 12, 2008, defendant moved for an order precluding the government from any future references through witness testimony or closing argument to the public's "right to know" the information required to be disclosed on the forms. See

Dkt. 167 & 181; 10/18/08 Tr. 102. The government, in response, explained that

> [t]he public interest in the information contained in defendant's public financial disclosure forms is directly relevant to the defendant's motive and intent, and to the element of materiality, and there is no danger of prejudice to the defendant. The government has made no improper appeal to the jury to consider themselves victims of the offense, and no such argument will be made.

Dkt. 175 at 1. The Court correctly denied defendant's motion "essentially for the reasons stated by the government and in view of the government's representation that it will not 'emphasize that the jury members or any specific sector of the population was victimized' by the alleged nondisclosures." 10/19/08 Minute Order. The government complied with this Order.[28]

The Court, in addition, stated that it would "give a modified version of the defendant's proposed jury instruction regarding public interest in disclosure." Ibid. The Court subsequently instructed the jury that "Senator Stevens is charged with making false statements to the government, not the public, and public disclosure is not an element of the charges in this case." Instruction No. 65. Defendant's claim (Mem. 60-61) that this instruction did not go far enough to remove the "taint of unfair prejudice" from prior references to the public's right to know is without merit. Indeed, the jury must be presumed to have followed the instruction. See Richardson v. Marsh, 481 U.S. at 211.

Defendant's remaining arguments simply rehash arguments previously rejected by the Court. Defendant claims that the government's opening statement improperly referred to the public's right to know about information contained in defendant's financial disclosure forms; that the government

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[28] Defendant nonetheless suggests that the government, during closing arguments, "again referred to the public's interest in the financial disclosure forms." Mem. 60 (citing 10/21/08 A.M. Tr. 23). The defense did not object to this portion of the government's closing, and with good reason--the government did not suggest that the jury or any specific sector of the population was victimized by the alleged nondisclosures. Instead, the government merely noted that the Secretary of the Senate and the Senate Select Committee on Ethics serve a public function of enforcing the mandatory disclosure requirements.

thereafter elicited testimony from certain witnesses in support of these statements made during opening argument; and that such references "were irrelevant to the charges in this case," since "Section 1001 punishes false statements to the government, not the public at large."[29] Mem. 59-61. Defendant's argument is erroneous.

The government was required to prove that defendant acted knowingly and willfully, that the inaccuracies were not the result of simple mistake, and that the omissions were material-- i.e., capable of influencing a decision maker. United States v. Cisneros, 169 F.3d 763, 766 (D.C. Cir. 1999); United States v. Hansen, 772 F.2d 940, 949 (D.C. Cir. 1985). The facts that defendant was receiving benefits far in excess of the reporting thresholds established by the Senate and was laboring under a conflict of interest that could be detected by either Senate Ethics officials *or the public* if the benefits were disclosed go to the heart of the materiality inquiry, because disclosure to the public would have made it more likely that "an investigation might commence." Ibid. The government was entitled to introduce evidence and make reasonable arguments to the effect that defendant had an interest in concealing from the public (as well as the Senate) his receipt of the things of value from VECO and Allen. Especially in light of the Court's instruction, the government's conduct was not unfairly prejudicial and certainly did not "inflame the jury," Mem. 61.

XII. THE COURT DID NOT ERRONEOUSLY EXCLUDE EVIDENCE CONCERNING BILL ALLEN OR ERRONEOUSLY REJECT A PROPOSED JURY INSTRUCTION BEARING ON HIS CREDIBILITY.

A. Other Investigations Of Bill Allen

Defendant contends that the Court improperly interfered with his ability to cross-examine

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[29] Defendant forfeited his challenge to the government's opening argument by failing to raise an objection.

Allen about misconduct Allen allegedly committed that had been the subject of two previous state criminal investigations. Mem. 62-65. The government sought to prevent all cross-examination on this topic, claiming, *inter alia*, that the defense merely intended to harass, annoy or humiliate Allen; improperly inflame the jury; and unfairly prejudice the government's case. Dkt. 94.

The Court ruled for the defense, holding that evidence of the investigations went to Allen's "bias," and more specifically, "what [Allen] would like the government to do in an effort to curry favor." Tr. 9/30/08 P.M. 47. At the same time, the Court limited cross-examination by instructing defense counsel not to refer to the "nature of the charges," concluding that this information "might tend to inflame the prejudices or bias of [the jury]." Id. at 46. Armed with this favorable ruling, defense counsel cross-examined Allen over the course of two days, without asking him a single question about the state investigations. By failing to pursue the matter, the defense made clear that it did not view the investigations as significant proof of bias, and that it wanted to explore them (if at all), only if the underlying allegations could be used to prejudice the jury against Allen.[30]

In light of his decision not to use this information in Allen's cross-examination, defendant's present claim (Mem. 62) that the Court "deprived [him] of the ability to fully and fairly cast doubt on Mr. Allen" does not merit serious attention. Moreover, given the potential for unfair prejudice that this alleged misconduct posed, the Court acted well within its discretion by permitting reference to the existence of the investigation, but not the nature of the allegations. Fed. R. Evid. 403; see United States v. Washington, 969 F.2d 1073, 1081 (D.C. Cir. 1992) (trial court is "in the best

[30] In fact, there were solid strategic reasons not to address the matter at all. The underlying allegations concerned Allen's activities in the mid to late 1990s, a period when defendant and Allen were close personal friends. Any suggestion that Allen was engaged in criminal activities during this period would not helped defendant portray himself as one who lived "honorably, truthfully, abiding by the law and serving people." Tr. 10/21/008 P.M. 41.

position to perform [the] subjective balancing" under Rule 403 and its decision is "reviewed only for 'grave abuse.'").

Indeed, defendant fails to show that the nature of the allegations was relevant at all, let alone so relevant that the Court was compelled to admit it. The best defendant can do is to argue that "the investigations of Mr. Allen -- past and present -- involve allegations of very serious offenses that may bear very serious consequences." Mem. 63-64. But the Court did not preclude defendant from asking Allen whether the allegations against him were "serious" or even "very serious," and thus defendant could presumably have established this fact without revealing the specifics of the underlying claims at trial.[31]

The Court gave significant consideration to defendant's requested instruction, but ultimately concluded that the instruction was inappropriate.

[31] Defendant's effort to buttress this claim by referring to the Confrontation Clause also fails as this clause "does not bar a judge from imposing reasonable limits on a defense counsel's inquiries." United States v. Lin, 101 F.3d 760, 767 (D.C. Cir. 1996).

This decision rested within the discretion of the Court.

B. Proposed Expert Testimony Of Billy Martin

Defendant contends (Mem. 65-66) that a new trial is warranted because the Court erroneously excluded the belated, proffered "expert" testimony of Billy Martin. Defendant sought to have Martin opine on two issues. After full briefing (see Dkt. 160, 165, 166 & 179), the Court excluded the proposed testimony, noting that expert testimony was unnecessary for either issue. 10/15/08 A.M. Tr. 88-90, 97-98. Defendant has failed to demonstrate any abuse of discretion.

According to defendant, Martin should have been allowed to explain to the jury certain transactional terms of the 2007 Stock Purchase Agreement by and between VECO, its shareholders, and CH2M HILL for the purpose of showing that Allen had a financial incentive to curry favor with the government. Mem. 66. Such opinion testimony, if admitted, would have been improper for several reasons. First, defendant thoroughly examined Allen on the terms of the Stock Purchase Agreement.[32] Apparently unsatisfied with his efforts to impeach Allen directly, defendant sought to impeach him indirectly or collaterally by introducing testimony from Martin–a complete stranger to the case as well as to the CH2M HILL acquisition--"interpreting" or "contradicting" a contract provision that speaks for itself. Second, Martin was tendered by the defense to provide improper

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[32] Defendant introduced through Allen the Stock Purchase Agreement (DX 3491), and then drew the jury's attention to a $70 million “holdback provision” (DX 3491 at 2, 4), as well as to other provisions in the agreement in an attempt to suggest that the Allen family's right to the holdback funds is conditioned on Allen's cooperation and VECO’s avoiding prosecution. 10/7/08 A.M Tr. 49-62. As Allen testified on cross-examination, the holdback provision speaks for itself--it covers not just potential damages flowing from a breach of Allen's cooperation agreement or an indictment of VECO, but from other undisclosed liabilities, such as environmental remediation, taxes, and repairs and damages associated with acquired buildings. Id. at 53-61. Allen further explained that the first installment of the $70 million has been greatly reduced and delayed in any event because of disputes concerning environmental remediation, taxes, and other matters. Id. at 57.

legal opinions that would have supplanted the Court's role in instructing the jury on the applicable law.[33] Third, unlike lawyers for VECO, Allen, or CH2M HILL, Martin had no first-hand knowledge of the Stock Purchase Agreement and, thus, was not qualified to make "legal interpretations" of its contents. Fourth, Martin is not an expert in corporate transactional matters.

Defendant also argues that Martin should have been permitted to explain a portion of a recorded conversation between defendant and Allen (introduced during the government's case-in-chief) wherein defendant made reference to Martha Stewart. See GX 650. According to defendant, Martin would have testified that, "when criminal defense attorneys make reference to the conviction of Martha Stewart, they are referring to the principle that those involved in investigations need to take care to tell the truth and not to obstruct justice." Mem. 65. Such “expert” testimony was altogether unnecessary. First, in the recorded conversation, defendant, a former prosecutor, made clear to Allen what he meant by the term “Martha Stewart,” explaining that they should avoid giving the appearance that they were obstructing justice. GX 650; Dkt. 165 at 8-9. Especially in light of defendant’s explanation, expert testimony was not needed to explain this basic concept, which was well within the ken of the jurors. See Fed. R. Evid. 702. Further, the straightforward nature of the concept was reflected at trial by the fact that (1) defendant did not feel the need to ask Allen on cross-examination what the term "Martha Stewart" meant (or what Allen understood defendant to be telling him); or (2) to address the point during his own testimony.[34]

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[33] E.g., Burkhart v. Washington Metropolitan Area Transit Authority, 112 F.3d 1207, 1212-13 (D.C. Cir. 1997); Weston v. WMATA, 78 F.3d 682, 684 n. 4 (D.C. Cir. 1996); Halcomb v. WMATA, 526 F.Supp.2d 24, 27 (D.D.C. 2007).

[34] Defendant's reliance on United States v. Safavian, 528 F.3d 957 (D.C. Cir. 2008), is misplaced. The appellate court in Safavian determined that a specific term of art had some ambiguity requiring explication from an expert. No such ambiguity existed here. See Dkt. 179;

C. Jury Instruction Concerning Signaling by Allen's Attorney

At one point in Allen's cross-examination, the court observed Allen's attorney make a gesture that the court thought might have been a signal to the witness. 10/6/08 P.M. Tr. 76. In the presence of the jury, the court directed the attorney to refrain from such conduct. Ibid. During recess, the court reprimanded the attorney for his behavior. Id. at 82. The defense did not request a hearing to determine the purpose of the gesture or whether it was an isolated incident. Later, the defense asked the court to instruct the jury in its general charge that the jury could consider the gesture in weighing Allen's credibility. 10/18/08 P.M. Tr. 87. Defendant contends (Mem. 67) that the court erred in rejecting the proposed instruction.

There was no need for the requested instruction. As the court explained in rejecting the instruction, it had observed only "one instance" of possible signaling and had "immediately stopped it." 10/18/08 P.M. Tr. 89. Nor was the court certain that the gesture was intended as a signal; indeed, the court acknowledged that it may have been "completely wrong" in initially construing it as such. Id. at 88, 91. Moreover, because the court had raised the issue in the presence of the jury, the jury was aware of what had occurred and that any signaling was improper. Any further need for jury guidance was satisfied by the court's instruction, in its general charge, that the jury could "consider any matter that may have a bearing" on a witness's credibility. 10/22/08 A.M. Tr. 21.

XIII THE EXCLUSION OF TESTIMONY ABOUT THE RESALE VALUE OF THE HUSKY WAS CORRECT AND NONPREJUDICIAL.

Defendant contends that the Court erred by excluding David Monson's testimony regarding the price for which he sold the Husky and its brother after defendant placed the dogs in his care.

10/15/08 A.M. Tr. 88 (Court:"This case is totally unlike Safavian.").

Mem. 67-69. Although defendant asserts that this testimony was "highly probative of the dog's original value," id. at 69, the sale price had insignificant bearing on the Husky's value at the time defendant received it given the amount of time that had passed and the circumstances that had changed.[35] The Court did not abuse its discretion in excluding the testimony.

Monson's sale of the Husky did not occur close in time to the defendant's receipt of the dog–rather, it occurred over one year later. Furthermore, while defendant suggests that the Husky was more valuable at the time it was sold than at the time he received it because in the interim it had been "trained as a sled dog by a well known dog trainer," Mem. 69, this is far from obvious. In fact, it is more likely that the dog was less valuable when Monson sold it than when it was given to defendant. When defendant received the Husky as a puppy, there was at least the possibility that it might be able to serve as a sled dog. See 10/9/08 P.M. Tr. 89. Monson testified, however, that by the time he sold the dog it was evident that the Husky was worthless in that capacity. Id. at 107-108.

Moreover, defendant cannot demonstrate that prejudice resulted from the exclusion of the testimony given the extensive evidence that defendant did introduce about the Husky's alleged value (or lack thereof). See United States v. Coumaris, 399 F.3d 343, 349 (D.C. Cir. 2005). Dean Osmar, the Husky's breeder, testified that the dog had a number of traits that detracted from its value, including that it was a runt, that it was female, and that it had blue eyes. 10/9/08 P.M. Tr. 83-85. In fact, Osmar testified that he believed he could have only gotten "50 or a hundred bucks for" the dog and that he sold the dog's more valuable brother to defendant for $200. Id. at 85, 86-87. In addition, Monson testified that the Husky would not make an effective sled dog, see id. at 107-108,

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[35] The testimony had no bearing on the issue of defendant's state of mind at the time he completed his 2003 financial disclosure form. The resale did not occur until late 2004, and, in any event, there was no evidence that defendant was aware of the sale price.

and Jim Varsos informed the jury that things at auction are sometimes purchased for far more than they might otherwise be worth, id. at 93-94.

Finally, the defense is incorrect that "the dog was the only potential basis in the evidence for conviction" on Count Four, which related to defendant's 2003 financial disclosure form. Mem. 69. The evidence was sufficient to permit the jury to conclude that defendant had an accumulated debt exceeding $10,000 to Bill Allen or VECO as a result of the renovations to the Girdwood residence in preceding years and that defendant failed to report this liability, which carried over into 2003, on his financial disclosure form. Accordingly, even had the jury concluded that the Husky was worth no more than $285, it could still have returned a verdict of guilty on Count Four.

XIV. THE COURT PROPERLY DENIED THE MOTION FOR TRANSFER OF VENUE.

This Court acted well within its discretion in denying defendant's motion to transfer the trial. Under Fed. R. Crim. P. 21(b), the defendant "bears the burden of proving that 'all things considered, the case would be better off transferred to another district.'" United States v. Quinn, 401 F.Supp.2d 80, 85 (D.D.C. 2005). In recent years, courts have viewed skeptically motions to transfer premised on the argument that holding the trial in the original district would result in financial, emotional, or practical difficulties. Id. at 85-86. Consideration of a motion to transfer is governed by the factors enumerated in Platt v. Minnesota Mining and Manufacturing Co., 376 U.S. 240, 243-244 (1964). As this Court recognized in denying the motion for transfer, in the instant case those factors weighed in favor of holding the trial in the District of Columbia, especially given the "general presumption that 'a criminal prosecution should be retained in the original district.'" United States v. The Spy Factory, Inc., 951 F.Supp. 450, 464 (S.D.N.Y. 1997) (quoting United States v. Posner, 549 F.Supp. 475, 477 (S.D.N.Y. 1982); see also United States v. Jones, 43 F.R.D. 511, 514 (D.D.C. 1967).

Although defendant maintains a home in Alaska, for all practical purposes he lived and worked in the District. In addition, the crimes for which defendant was tried and convicted-- namely, the creation, signing, and submission of false financial disclosure forms--all occurred in the District, and some related conduct (such as the receipt of the Brookstone chair and correspondence about the Girdwood renovations) was connected to the District. See Jones, 43 F.R.D. at 516 (denying transfer of venue, even though defendant resided elsewhere, when "the offense charged was committed in the District of Columbia"). While the majority of witnesses resided in Alaska, others resided in or near the District, and defendant made no allegation that the location of the trial would prevent him from calling any witness. See Spy Factory, 951 F.Supp. at 456-457 (defendant seeking transfer on the basis of inconvenience to witnesses "must offer specific examples of witnesses' testimony and their inability to testify because of the location of the trial"); see also United States v. Baltimore and Ohio R.R., 538 F.Supp. 200, 205 (D.D.C. 1982) (The "assertion that a large number of witnesses (from another jurisdiction) will be needed at trial is not sufficient to demonstrate the preponderance of inconvenience necessary to warrant a transfer.") Furthermore, moving the case to Alaska would have required counsel for both sides--as well as possibly this Court and its staff-- to travel to Alaska for an extended period of time. See Platt, 376 U.S. at 244; Jones, 43 F.R.D. at 516.

Even assuming arguendo that Alaska would have provided a more suitable venue for trial, defendant has failed to carry his "heavy" burden of demonstrating that the denial of his transfer motion so prejudiced him as to require a new trial. United States v. Quattlebaum, 540 F.Supp. 2d 1, 7 (D.D.C. 2008). For example, defendant argues that holding the trial in the District required him to use a "bland stipulation," as opposed to recalling four witnesses, to demonstrate that those witnesses (John Hess, Roy Dettmer, Mike Luther, and Daniel McBirney) did not know how many

hours Rocky Williams worked. Mem. 71. As an initial matter, defendant appears to concede that holding the trial in the District did not, in fact, prevent him from recalling these witnesses if he had felt it necessary to do so; he certainly does not argue that it was impossible to recall them. See ibid.; 9/29/08 Tr. 12 (explaining that defense counsel agreed to stipulation for purposes of convenience); see also Spy Factory, 951 F.Supp. at 456 (defendant must demonstrate that a witness would be unable to testify as a result of the trial's location in order to support a motion to transfer). Furthermore, the stipulation more than adequately addressed the issue, given the extremely limited testimony these witnesses gave about Williams. 9/25/08 P.M. Tr. 12, 9/26/08 A.M. Tr. 31, 58-59.

Also without merit are defendant's assertions of prejudice arising from his inability to investigate "newly disclosed facts," such as inaccuracies in the VECO accounting records, and to take the jury to the Girdwood residence to enable it to gain "insight about the value of the renovations." Mem. 72. The government did not have to prove that the VECO records were accurate or that $188,000 worth of work was done on the Girdwood residence to meet its burden, and the government adduced enough evidence to satisfy the burden it did bear. Defendant's arguments are premised wholly on speculation that (1) an investigation or a visit to the residence would actually have provided additional material information for the jurors to consider, and (2) this information would have affected the outcome of the trial. Such "[b]aseless conjecture * * * [is] not sufficient to warrant a new trial." United States v. Morrow, 412 F.Supp.2d 146, 174 n.15 (D.D.C. 2006).

Defendant's remaining claims that the denial of his transfer motion unfairly prejudiced him consist of nothing more than conclusory assertions. For example, defendant argues that venue in the District "unduly prevented from campaigning for reelection," Mem. 72. But "interference with one's routine occupational and personal activities * * * which normally follow when one is called

upon to resist a serious charge do not ipso facto make the necessary showing that a transfer is required in the interest of justice." Baltimore and Ohio R.R., 538 F.Supp. at 205. Moreover, defendant fails to specify how any interference with his ability to campaign affected his ability to defend himself at trial.

Similarly, while defendant asserts that he was prejudiced because the defense was required to attend to the transportation of witnesses to the District "rather than focusing on the defense case-in-chief," Mem. 71, he fails to explain (or provide facts that permit the court to discern) how that is true.[36] He does not identify a single way in which the defense's trial preparation, strategy, or presentation were harmed or anything that defense counsel would have done differently if witness travel had not been an issue. The fact that defense counsel may have been required to spend time arranging witness travel does not, without more, constitute prejudice warranting a new trial. See Quattlebaum, 540 F.Supp.2d at 7; United States v. Gray, 292 F.Supp.2d 71, 77 (D.D.C. 2003); United States v. Walker, 899 F.Supp. 14, 15 (D.D.C. 1995).

Defendant also argues that holding the trial in the District "impaired the orderly presentation of the government's case" because the first full day of testimony on September 26 ended early due to witness unavailability. Mem. 71. Defendant again rests completely on a bald assertion of prejudice, as he does not even hint at how concluding the proceedings a mere one hour early had any effect on his defense. In short, none of the allegations of prejudice advanced by defendant

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[36] Defendant also argues that transporting witnesses to Washington caused him inconvenience and expense. Mem. 71. Simple inconvenience and expense do not constitute prejudice sufficient to justify a new trial. Instead, the defendant to show his substantial rights were adversely affected and that it would be a miscarriage of justice to sustain the verdict.

withstands scrutiny. Defendant's motion for a new trial on venue grounds should be denied.[37]

CONCLUSION

Defendant's motion for a new trial should be denied.

Respectfully submitted,

WILLIAM M. WELCH II
Chief, Public Integrity Section

/s/ Brenda K. Morris
BRENDA K. MORRIS
Principal Deputy Chief

NICHOLAS A. MARSH
EDWARD P. SULLIVAN
Trial Attorneys

JOSEPH W. BOTTINI
JAMES A. GOEKE
Assistant United States Attorneys
for the District of Alaska

DATED: January 16, 2009

[37] Defendant contends (Mem. 72) that the jury's verdict was contrary to the weight of the evidence. As explained in the government's response to his motion for a judgment of acquittal, the evidence amply supported defendant's convictions. Defendant also seeks to "incorporate" his prior objections (Mem. 73); to the extent any response is required, the government reasserts its prior responses to defendant's claims.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2009, a true and correct copy of the foregoing Government's Opposition to Defendant's Motion for a New Trial was filed by ECF and served on counsel as set forth below:

Brendan V. Sullivan, Jr.
Robert M. Cary
Craig D. Singer
Alex G. Romain
Joseph M. Terry
Beth A. Stewart
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Attorneys for Defendant Theodore F. Stevens

/s/ Brenda K. Morris