EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

JASIEL F. CORREIA, II

No. 18-cr-10364-DPW

REPLY IN SUPPORT OF
DEFENDANT JASIEL F. CORREIA, II'S RENEWED MOTION
FOR JUDGMENT OF ACQUITTAL OR, ALTERNATIVELY, A NEW TRIAL

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INTRODUCTION

A judgment of acquittal is required because the prosecution has failed to fill the numerous gaps in the evidence for its sprawling, two-part case against Mr. Correia.

For example, rather than cite sufficient evidence to sustain the wire fraud convictions, the Opposition completely disregards the actual use of wire communications and makes the legally and factually unsupported assertion that the foreseeability of such communications was a matter of "common sense." It also emphasizes the legally irrelevant claim that SnoOwl investors purportedly relied on Mr. Correia's alleged misstatements, while ignoring the critical issue of Mr. Correia's specific intent in evaluating whether there was any nexus between his alleged misrepresentations and the charged SnoOwl investments.

Likewise, the Opposition fails to identify sufficient evidence to sustain the tax fraud convictions, because there was no testimony, documentation, or other proof that Mr. Correia "willfully" violated any "known legal duty" under the tax laws.

With regard to the corruption charges, the Opposition distorts Supreme Court precedent to argue marijuana vendors, the alleged "victims" in this case, conspired to "shakedown" themselves, and it hangs the entire case against Mr. Correia on a handful of ambiguous words ("we're good" and "you're family now").

Accordingly, under Rule 29, the challenged counts "must" be dismissed.

In the alternative, under Rule 33(a), a new trial is required, because the fraud and corruption cases should never have been joined in the first place, and Mr. Correia suffered prejudice by facing those two distinct cases in a single trial. Mr. Correia did not waive that issue, and this Court retains broad discretionary authority to order a new trial in "the interest of justice."

ARGUMENT[1]

I. This Court should enter a judgment of acquittal.

Because the evidence at trial was insufficient to prove beyond a reasonable doubt that Mr. Correia committed wire fraud or tax fraud or that he violated the Hobbs Act, the challenged counts "must" be dismissed. Fed. R. Crim. P. 29.

A. The evidence was insufficient to prove Mr. Correia committed wire fraud.

1. The prosecution failed to prove wire communications were actually used and also reasonably foreseeable to Mr. Correia.

The "check processing" charges (Counts A, D, E, G, H, and I) must be dismissed, because the prosecution failed to prove "wire communications" were (i) actually used in furtherance of the alleged scheme and also (ii) reasonably foreseeable to Mr. Correia. The Opposition incorrectly asserts that the first problem is "not implicated by Correia's motion," and it parries the second by making a patently insufficient appeal to "common sense." D.E. #293 ("Opp.") at 4.

a. No evidence proved wire communications were actually used.

To prove wire fraud, the prosecution must establish wire communications were actually used by someone in furtherance of the charged fraud and reasonably foreseeable to the defendant. *See United States v. Sawyer*, 85 F.3d 713, 723 (1st Cir. 1996); *see United States v. Dray*, 901 F.2d 1132, 1137-38 (1st Cir. 1990) ("[T]here is a chasmal gulf between what is 'actual' versus what is 'intended' or 'reasonably foreseeable.' That the evidence needed to prove these separate elements [of wire fraud] may often overlap . . . cannot eradicate this important distinction.").

At trial, the prosecution did not prove that anyone actually used wire communications to process the charged checks. In his motion, Mr. Correia repeatedly highlighted the prosecution's

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[1] Because this Court has already received ample submissions, this reply focuses on those issues that warrant further briefing, but it does not concede any points raised in the initial memorandum.

failure: "the evidence failed to establish that . . . wire communications . . . *actually occurred*." D.E. #281 ("Mem.") at 2 (emphasis added); *see id.* at 4 ("No evidence proved the [Cabeceiras] checks were processed by wires."); *see id.* at 4-5 (same for Eisenberg, Martinez, and Miller checks); *see id.* at 6 ("the prosecution improperly invited the jury to speculate, without evidence, that wires . . . actually occurred"). Yet the Opposition focuses only on the separate issue of reasonable foreseeability, Opp. at 3-5 (arguing "[i]t was reasonably foreseeable to Correia that his crimes would involve wire transactions"), without identifying evidence that wire communications were actually used. Thus, even if wire communications were reasonably foreseeable to Mr. Correia (as discussed below, they were not), the "check processing" counts must be dismissed.

Falling back on the stipulation about *interstate* communications, the prosecution confuses "the interstate-nexus requirement," the jurisdictional element of wire fraud, with "topic five," referring to this Court's five-part instructions on wire fraud. Opp. at 4. The narrow stipulation, which the parties reached before this Court instructed the jury, did not refer to "topic five," and it merely provided, *if wire communications were used*, they crossed state lines. As Mr. Correia has explained, the stipulation did not establish wire communications were actually used. Mem. at 8-9.

b. "Common sense" cannot prove wire communications were reasonably foreseeable to Mr. Correia.

Regarding reasonable foreseeability, the Opposition baldly asserts, "[i]t *is* common knowledge that most bank transactions are made almost instantaneously in the electronic age . . ." Opp. at 5 (emphasis in original). The prosecution made the same unsupported claim in its closing. Tr. 14/33 (arguing wire communications were "clearly foreseeable").

At trial, no evidence proved that sweeping contention, and if accepted, it would re-write and expand the wire fraud statute. All frauds involving financial transactions would be, *ipso facto*, federal wire fraud, because according to the prosecution, it would be reasonably foreseeable that

even cash deposits at local banks would involve wire communications. This Court should reject the prosecution's invitation to "stretch the long arms of the fraud statutes" that far. *United States v. Weimert*, 819 F.3d 351, 356 (7th Cir. 2016) ("The mail and wire fraud statutes have 'been invoked to impose criminal penalties upon a staggeringly broad swath of behavior,' creating uncertainty in business negotiations and challenges to due process and federalism.'") (quoting *Sorich v. United States*, 555 U.S. 1204, 1205 (2009) (Scalia, J., dissenting from denial of cert.)).

In arguing the reasonable foreseeability of wire communications can be assumed in all cases involving any checks, the prosecution relies on an unremarkable comment from *United States v. Muni*, 668 F.2d 87 (2d Cir. 1981), that "[t]he content of reasonable foreseeability must inevitably keep pace with advances in technology and general awareness of such advances." *Id.* at 90. No court has cited that 30-year-old decision, which specifically addressed the interstate element rather than the wire element, to hold that all modern banking, including simple local transactions such as cashing personal checks, involves wire communications.

At most, courts have recognized, "given the ubiquity of electronic communications in our day and age, one might posit that use of the wire is always foreseeable *when conducting . . . large and complex transactions.*" *United States v. Mullins*, 613 F.3d 1273, 1281 (10th Cir. 2010) (citing *Muni*) (emphasis added). And at least one court has refused to extend *Muni* to every instance in which a person or business cuts a check. In *United States v. Bentz*, 21 F.3d 37 (3d Cir. 1994), the Third Circuit vacated wire fraud convictions arising from a scam in which the defendant delivered cheap metal that he claimed to be stainless steel and, in return, received check payments issued by the scrap yard. Distinguishing *Muni* and rejecting the purportedly "common sense" claim that wire communications were reasonably foreseeable, the appeals court held:

> Although "the content of reasonable foreseeability must inevitably keep pace with advances in technology and general awareness of

> such advances," *Muni*, 668 F.2d at 90, the use of a wire by a scrap metal storage facility in Pennsylvania which issues checks drawn on a Pennsylvania bank is not self-evident. Nor is there sufficient evidence for us to conclude that [the defendant] should reasonably have anticipated that [the scrap metal yard] made wire transmissions when preparing his checks.

Id. at 41. The same is true here. In fact, the prosecution's anachronistic assertion that, since the early 1980s, all banking has been electronic, \is wrong. For decades after *Muni* was decided, check clearance depended primarily on physical delivery of paper checks, often by overnight flights. *See* Jerry Knight, "The Check Is in the Airmail," THE WASHINGTON POST (Jan. 17, 1996).

Further, given the charged transactions in this case, the prosecution's "common sense" claim about banking "in the electronic age" rings hollow. SnoOwl investors gave Mr. Correia handwritten, personal checks, and Mr. Correia allegedly cashed those checks in person at local banks. No one would expect such straightforward, smalltown transactions in Fall River to yield "the predictable consequences of international finance." *United States v. Castillo*, 829 F.2d 1194, 1198 (1st Cir. 1987) (affirming wire fraud convictions, because "telexes" were reasonably foreseeable to Castillo, who ran international scam with complicated cross-border transactions).

At trial, no evidence proved Mr. Correia, or a person in his position, would have reasonably foreseen that wire communications would be used to process the charged checks. In *United States v. Tum*, 707 F.3d 68 (1st Cir. 2013), the critical fact was that Tum expressly asked his insurer to make electronic deposits in his bank account.

> *So having asked that benefit payments be deposited electronically into his account*, a sensible person in Tum's position should have anticipated that wire transmissions involving Unum and others would follow—at least a reasonable fact finder using "common sense" could so conclude, which is all that is required.

Id. at 74 (emphasis added). Here, however, Mr. Correia neither requested electronic transactions nor used online banking. Moreover, in *Tum*, a witness testified wire communications were used to

process the fraudulent payments. But, in this case, no witness from the banks where the charged checks were drawn or cashed testified that processing them involved wire communications.

2. No evidence established the Cabeceiras and Miller checks in 2014 and 2015 were in furtherance of an alleged fraud scheme from 2013.

Unlike civil fraud, which turns on the alleged victim's reliance, criminal fraud requires proof of the defendant's intent. *See United States v. Arif*, 879 F.3d 1, 9 (1st Cir. 2018). The prosecution must prove that, at the time of the charged wires, the defendant specifically intended to obtain money based on the charged misrepresentations. *See* Tr. 10/216 (Court: "the misrepresentation must remain outstanding"). In other words, the focus is on what the defendant was thinking, not what the victim may have had in mind.

Nevertheless, at trial, the prosecution failed to prove that, when Mr. Correia obtained funds from Cabeceiras and Miller in 2014 and 2015, he specifically intended to obtain *those funds* based on his alleged misstatements in 2013. To the contrary, the evidence revealed Mr. Correia solicited those later investments based on unrelated representations, which the prosecution has never alleged were false. Cabeceiras invested funds in May 2014, because Mr. Correia said a potential investor had "backed out." Tr. 4/216. Miller made his second investment in January 2015, after Mr. Correia told him about SnoOwl's valuation and its expectation of new venture funding. Tr. 5/99-102.

Neither Cabeceiras nor Miller testified that, in 2014 or 2015, Mr. Correia repeated or referred to his alleged prior statements about selling FindIt, taking no salary from SnoOwl, or using investor funds only to develop the app. Thus, viewing the evidence in the light most favorable to the verdict, and even assuming Mr. Correia obtained the initial investments from Cabeceiras and Miller in 2013 based on his alleged misstatements around that same time, Opp. at 10 (citing testimony that, if Cabeceiras "had known the 'truth,'" he "'absolutely' would not have made the *initial* $50,000 investment in SnoOwl") (emphasis added), the prosecution failed to prove

that the charged scheme remained "alive" at the time of the *later* charged wires in 2014 and 2015. Tr. 10/223 (Court: "scheme" must be "alive" at time of wires).

The Opposition fails to fill this gap in the evidence. Instead, it shifts the focus from Mr. Correia's intent to the investors' purported reliance, by recounting testimony that the investors relied on Mr. Correia's alleged misstatements and would not have invested in SnoOwl if Mr. Correia had not made them. Opp. at 9-13 ("Both men were adamant that they would not have invested in SnoOwl"). But that is not the point, because "reliance is not an element of wire fraud," *Arif*, 897 F.3d at 11 (citing *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 642 (2008)), and proof of an alleged victim's reliance, however strong, cannot establish the defendant's intent.

Absent evidence that, when Mr. Correia obtained the charged investments from Cabeceiras and Miller in 2014 and 2015, he specifically intended to obtain money from them based on the charged misrepresentations that he supposedly made in 2013 (about selling FindIt, taking no salary, and using investor funds), those counts of wire fraud fail. Nor can the prosecution's rhetoric, *see, e.g.*, Opp. at 9 (describing Mr. Correia's statements as "foundational lies that pervaded the scheme from the beginning to the end") replace proof beyond a reasonable doubt that the alleged scheme remained "alive" when the charged wire communications were completed.

B. The evidence was insufficient to prove Mr. Correia committed tax fraud.

Viewing the evidence in the light most favorable to the verdict, the jury could have found that (i) under federal tax law, Mr. Correia was obligated to report as business income on his personal returns any SnoOwl funds that he spent on personal expenses; (ii) Mr. Correia used SnoOwl funds for personal expenses; and (iii) he did not report any resulting business income. But the evidence did not prove Mr. Correia *knew* the first point—the critical principle of tax law underlying the tax charges—and, thus, *willfully* violated any "known legal duty."

For Counts J and K, the Opposition cites only limited testimony from Stacia Vieria. Opp.

at 18. In preparing Mr. Correia's 2013 and 2014 returns, Vieria went over the Return Income Verification forms and "asked [Mr. Correia] if he had any additional income" beyond his W2s from Providence College and Fall River. Vieria did *not* specifically ask about additional *business* income; after Mr. Correia provided his W2s, she "just g[a]ve a general, 'do you have anything else?'" Tr. 8/19-20. (There is no dispute that Mr. Correia did not have any other W2s.) Vieria neither explained the term "business income" nor told Mr. Correia that spending SnoOwl funds on personal expenses could constitute "business income," even though SnoOwl did not pay him a salary, issue him a W2, or generate any profits.

Regarding Counts L and M, the Opposition cites no testimony from Terry Charest. It merely repeats the list of allegedly false items in Mr. Correia's amended returns, without citing evidence that Mr. Correia understood any of the relevant tax issues. Opp. at 19. For example, even assuming the returns mischaracterized SnoOwl's corporate form (as a proprietorship rather than a partnership), no evidence proved Mr. Correia knew the legal difference. Charest did not explain any aspect of tax law to Mr. Correia, Tr. 7/180-81 (admitting that he never had "that conversation" with Mr. Correia), nor did any other witness. The evidence about SnoOwl's form revealed that everyone, including Mr. Correia, was confused about it, so Mr. Correia could not have knowingly misrepresented the company and, in doing so, violated any known legal duty.

Given the testimony at trial (or lack thereof) about Mr. Correia's *mens rea*, this case contrasts sharply with *United States v. Boulerice*, 325 F.3d 75 (1st Cir. 2003), where Boulerice admitted that her accountant advised her not to claim "wages" on her personal returns, that she felt "unease" about doing so, but that despite her "concerns," she "decided" to file her false returns. *Id.* at 81. Similarly, in *United States v. Monteiro*, 871 F.2d 204 (1st Cir. 1989) (affirming § 7206(2) conspiracy conviction), the defendant was caught running a classic tax scam—"ten percenting"—

at the dog track; in summarizing the "willfulness" evidence, the First Circuit cited evidence that the "defendant explained the relevant tax law to [undercover agents]." *Id.* at 210. Finally, in *United States v. Drape*, 668 F.2d 22 (1st Cir. 1982) (affirming tax fraud convictions arising from illegal shelter scheme), Drape "knew what he was doing"; with the help of a crooked accountant who was paid $30,000 in cash, Drape signed backdated, phony documents in 1977, claiming losses from a partnership that he supposedly joined in 1976 and avoiding all tax liability for the year. *Id.*

The Opposition also cites *United States v. Burr*, No. 13-cv-12710-DPW, 12-cr-10352-DPW, 2013 U.S. Dist. LEXIS 180646 (D. Mass. Dec. 27, 2013). But there was no question about Burr's *mens rea*, as this Court knows, because it accepted Burr's plea, sentenced him, and denied his § 2255 motion. At the Rule 11 hearing, Burr admitted he knowingly filed a false tax return:

> I then verified with Mr. Burr that *he knew he was submitting a false tax return*, to which he replied, "Yes, sir," and that *he had not made a mistake when he filed the return*, to which he replied, "No, sir."

Id. at *8 (emphasis added). In contrast, Mr. Correia has denied that he knowingly submitted any false return, and the prosecution failed to prove that he willfully violated any known legal duty.[2]

[2] To the extent the prosecution now contends that Mr. Correia's signature on his returns, without more, suffices to sustain his convictions, it is incorrect. Opp. at 19. That contention would turn every mistake on a signed tax return into a federal crime. It ignores decades of jurisprudence since *Cheek v. United States*, 498 U.S. 192 (1991), holding tax fraud is different and the *mens rea* requirement of specific intent is more demanding than for other fraud offenses. The "signature" cases, going back to *United States v. Romanow*, 505 F.2d 813 (1st Cir. 1974), addressed a different issue. There, the defendants admitted filing tax records with false information, but they claimed not to have "examined the contents of the returns (which were prepared by a bookkeeper)." *Id.* at 815. The First Circuit "reject[ed]" the argument that "the jury must have something more than [defendant's] signature to infer that *he read the returns*." *Id.* at 815; *see also United States v. Romanow*, 509 F.2d 26, 27 (1st Cir. 1975). Here, Mr. Correia does not deny signing his returns, and the jury could infer that he read them. But his signature does not prove that he willfully violated the tax law by knowingly failing to report business income from SnoOwl on his personal returns.

C. The evidence was insufficient to prove Mr. Correia violated the Hobbs Act.

1. Pichette and Saliby merely "consented" to the alleged "shakedowns" as the victims, not Mr. Correia's co-conspirators.

In discussing the challenged Hobbs Act counts, the Opposition mistakenly focuses on the distinction between "coercive extortion" and "extortion under color of official right," noting that Mr. Correia was charged with the latter. Opp. at 20-22. That distinction, which Mr. Correia does not dispute, is irrelevant. All agree that the Second Superseding Indictment ("SSI"), D.E. #69, charged extortion under color of official right, and *Ocasio v. United States*, 136 S. Ct. 1423 (2016), involved the very same offense.

In *Ocasio*, the Supreme Court held that not "every bribe of [or by] a public official" amounts to "a conspiracy to commit extortion" under color of official right. *Id.* at 1435.

> The "consent" required to pay a bribe does not necessarily create a conspiratorial agreement. In cases where the bribe payor is merely complying with an official demand, the payor lacks the *mens rea* necessary for a conspiracy. . . For example, imagine that a health inspector demands a bribe from a restaurant owner, threatening to close down the restaurant if the owner does not pay. If the owner reluctantly pays the bribe in order to keep the business open, the owner has "consented" to the inspector's demand, but this mere acquiescence in the demand does not form a conspiracy.

Id. at 1435-36. Both the kickback scheme run by crooked cops in *Ocasio* and the health inspector hypothetical involved extortion under color of official right, not coercive extortion based on violence, threats, or fear. This case, as the prosecution charged and tried it, was the same.

According to the prosecution, Pichette and Saliby reluctantly paid bribes to Mr. Correia to open their marijuana shops, and their "consent" to "the [mayor]'s demand" was "merely acquiescence," not active participation in any conspiracy. That is why the "shakedown" theme is so important. Calling the alleged bribes in this case "shakedowns" did not implicate any "coercive extortion" theory, rather it demonstrated the "store owner[s]" gave only their "grudging consent"

to extortion under color of official right. No evidence proved these "victims" intentionally joined any criminal agreements. As a result, the evidence was insufficient to convict Mr. Correia of conspiring with Pichette and Saliby to extort Pichette and Saliby themselves.

In addition, the prosecution concedes that the SSI expressly alleged Mr. Correia conspired with Hebert and Andrade, as his "co-conspirators," to extort Pichette and Saliby, as the "victims." As the Opposition notes, a person *can* be both a conspirator and a victim in a Hobbes Act case. Opp. at 22 (citing *Ocasio*). But that is not how this case was charged or presented the jury.[3]

2. Hebert and Andrade did not conspire with Mr. Correia to demand bribes from would-be marijuana vendors.

Each of the conspiracy charges regarding Pichette and Saliby turns on a single, isolated statement. Pichette testified, after the official meeting in City Hall, Mr. Correia commented to him, "You talked to Dave [Hebert] and we're good." Tr. 11/80-81. Meanwhile, Saliby testified that, after Mr. Correia privately demanded a bribe, Andrade briefly met him in the hall and said, "You're family now." Tr. 11/151. The Opposition contends those ambiguous statements are sufficient to prove that Mr. Correia conspired with Hebert and Andrade.

The crux of a conspiracy is the agreement among the conspirators. But in this case, the prosecution decided not to call Hebert, and it could not call Andrade (who exercised her right to

[3] Comparing the superseding indictment against Ocasio with the SSI here demonstrates how this case was different and why the Opposition is incorrect. In *Ocasio*, the indictment charged that Ocasio conspired with other Baltimore Police Department Officers "and with Moreno and Mejia," the auto-body shop owners, "to unlawfully obtain under color of official right, money and other property from Moreno, Mejia and Majestic," the auto-body shop, "with their consent, not due to the defendants or their official position" in violation of § 1951(a). *United States v. Manrich and Ocasio*, No. CGB-11-0122 (D. Md. filed Oct. 19, 2011) [D.E. #138], attached as Exhibit A. In contrast, the SSI here charged that Mr. Correia conspired to "obtain[] property not due to CORREIA and his co-conspirators, from the victims, with the victims' consent, under color of official right." D.E. #69 ¶ 120; *see also id.* ¶ 122. It further identified the "MJ Vendors" as the "Victim[s]," including Pichette and Saliby. *See id.* ¶¶ 120, 122. Thus, while the charges in *Ocasio* expressly stated that the victims (Moreno and Mejia) were also co-conspirators, the charges against Mr. Correia distinguished between those two groups.

remain silent). As a result, the jury heard no direct evidence that either Hebert or Andrade agreed with Mr. Correia to demand bribes from marijuana vendors.

Rather Pichette, who testified with an immunity agreement, interpreted Mr. Correia's comment ("we're good") to refer to Hebert's earlier demand for a contribution to Mr. Correia's legal defense fund. Pichette did not say why he "felt" that way, and he could not testify that Hebert and Mr. Correia agreed to extort him. Nor could Pichette refute the reasonable possibility that Herbert, a relentless self-dealer, was freelancing. Saliby, who also had immunity, did not even guess what Andrade meant by "family" or testify that he ever heard Andrade, Mr. Correia, or anyone else use the word.

"[I]f the evidence, viewed in the light most favorable to the verdict, gives equal or nearly equal circumstantial support to a theory of guilty and a theory of innocence of the crime charged . . . . a reasonable jury must necessarily entertain a reasonable doubt." *United States v. Flores-Rivera*, 56 F.3d 319, 323 (1st Cir. 1995); *see Linton v. Saba*, 812 F.3d 112, 123 (1st Cir. 2016) (holding "equipoise is tantamount to reasonable doubt" and requires reversal). That principle is important here, because the Opposition ignores competing interpretations of these stray comments that are equally compelling, if not more so.

Regarding Pichette, the evidence established that, after talking to Mr. Correia, Hebert told Pichette about "the rules," the official legal requirements that marijuana vendors pay fees to their host communities and share revenues. Tr. 11/73-74, 120; Ex. 177. When Mr. Correia later met with Pichette, mentioned Hebert, and said, "we're good," he merely confirmed that Pichette understood "the rules" and would comply with them. The prosecution "identifies no evidence that would tip the scales in favor of [the alternate] possibility" of a criminal conspiracy between Hebert and Mr. Correia. *United States v. Guzman-Ortiz*, 961 F.3d 1169, 1173 (1st Cir. 2020).

For Saliby, the evidence was similarly insufficient. When Mr. Correia supposedly extorted Saliby, Andrade left the room. Tr. 11/148-49 She never discussed money with Saliby or shared proceeds with Mr. Correia from any "shakedown." Her comment, "You're family now," was ambiguous, as the prosecution implicitly conceded in its closing by putting additional words in Andrade's mouth: "You're family now, *now that you've agreed to pay us off*." Tr. 14/50. Andrade did not say those italicized words, and they would have made no sense, because Saliby never agreed to pay Andrade ("us") anything. Indeed, the prosecution alleged that Mr. Correia also extorted Andrade, which makes it more likely that she was telling Saliby that she, too, had to pay tribute to the mayor. Whatever Andrade may have meant, "speculation between [these] possibilities cannot suffice to make up for gaps in the evidence." *Guzman-Ortiz*, 961 F.2d at 1173.

II. This Court should order a new trial in "the interest of justice" and sever the two distinct cases against Mr. Correia.

The consolidation of the fraud and corruption cases raises two distinct issues. First, given how the prosecution presented those cases, new trials are needed, because spillover prejudice tainted the verdicts. Second, the two cases should have been severed, because they were misjoined as a matter of law, and their joinder prejudiced both the jury's evaluation of the evidence and Mr. Correia's right to testify. Mr. Correia did not "waive" his claims, and under Fed. R. Crim. P. 33, this Court has broad discretion to order a new trial in "the interest of justice."

A. Mr. Correia did not waive his challenge to misjoinder or request for severance.

In arguing waiver, the Opposition disregards the context for trial counsel's statement that "[he]'d rather do it once rather than have consecutive trials." Opp. at 33 (quoting 6/25/19 Sealed Tr. at 5-6). That comment was made during a pretrial conference on June 25, 2019, more than two months *before* the prosecution obtained its First Superseding Indictment ("FSI") on September 5, 2019, D.E. #53, which added the new corruption charges to the original fraud charges.

The prosecution does not contend that, *after* being confronted with the FSI, Mr. Correia or his trial counsel "explicitly withdrew" any request for relief from misjoinder under Fed. R. Crim. P. 8(a) or severance under Fed. R. Crim. P. 14. It only states that, after Andrade submitted her proposed guilty plea on December 14, 2020, D.E. #149-51, and this Court "indicated during a status/scheduling [conference] on December 15, 2020, that the case would proceed to trial against Correia 'on all counts,'" Mr. Correia did "not object." Opp. at 33 (quoting D.E. #154). Because misjoinder and severance were not even raised at that point, they could not possibly have been raised and withdrawn—and, thus, waived.

"Waivers of constitutional rights," such as the due process right to a fair criminal trial, "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970); *United States v. Frechette*, 456 F.3d 1, 12 (1st Cir. 2006). For that reason, waiver will not be "lightly inferred." *United States v. Harty*, 476 F. Supp. 2d 17, 27 (D. Mass. 2007). Here, Mr. Correia could not have knowingly and intentionally waived his right to challenge an indictment under Fed. R. Crim. 8(a) before that indictment existed. Until the FSI was returned and Mr. Correia was charged with Hobbs Act violations, it was impossible to meaningfully assess the misjoinder of those new corruption charges with the original fraud charges.

Although failing to object may have constituted a forfeiture, it would not preclude this Court from considering misjoinder, *see United States v. Rodriguez*, 311 F.3d 435, 437 (1st Cir. 2002) (distinguishing waiver from forfeiture and stating "[t]he difference is critical"), especially on a post-trial motion, which broadly authorizes this Court to order a new trial in "the interest of justice." Fed. R. Crim. P. 33(a). "The rules do not define 'interests of justice,'" *United States v. Wheeler*, 753 F.3d 200, 208 (D.C. Cir. 2014), and "[a] judge's handling of a Rule 33 motion is

'ordinarily a judgment call.'" *United States v. Baptiste*, __ F.4th __, 2021 U.S. App. LEXIS 23578, at *21-22 (1st Cir. Aug. 9, 2021) (quoting *United States v. Connolly*, 504 F.3d 206, 211 (1st Cir. 2007)), one that "rests within the discretion of the trial judge," *United States v. Rodriguez*, 738 F.2d 13, 17 (1st Cir. 1984).

Critically, the interest-of-justice standard encompasses more than what might constitute reversible error on appeal. *See United States v. Cabrera*, 734 F. Supp. 2d 66, 87-88 (D.D.C. 2010). Thus, the prosecution's plain-error arguments are inapposite. Opp. at 37-43. This Court need not find plain error, and Mr. Correia did not "waive" any misjoinder challenge or severance claim by failing to discuss that appellate standard in his motion. The cases cited by the Opposition hold only that, if an *appellant* does not argue plain error, any unpreserved claim will be deemed waived *on appeal*. That is a doctrine of appellate practice, *see Puckett v. United States*, 556 U.S. 129, 134 (2009) (under plain-error doctrine, "[i]f an error is not properly preserved, appellate-court authority to remedy the error . . . is strictly circumscribed"); *United States v. Padilla*, 415 F.3d 211, 218 (1st Cir. 2005) ("the plain error test constitutes a mandatory limitation on a federal appellate court's remedial authority"), not a rigid constraint on a trial court's discretionary power to order a new trial in "the interest of justice."

Regardless, the prejudicial misjoinder of unrelated charges against Mr. Correia based on the slight overlap of immaterial evidence was plain error. *See United States v. Perez-Rodriguez*, __ F.4th __, 2021 U.S. App. LEXIS 26548, at *18-19 (1st Cir. Sept. 2, 2021) (vacating convictions and remanding for new trial) (summarizing four criteria for finding plain error) (citing *United States v. Olano*, 507 U.S. 725 (1993)). As explained below, misjoinder was error under Fed. R. Crim. P. 8(a), and that error was clear, because the fraud and corruption cases did not satisfy any of the criteria for joinder. That error also affected Mr. Correia's substantial rights, including his

due process right to a fair trial. Indeed, the First Circuit has recognized that "Rule 8(a) sets the limits of tolerance beyond which the danger of prejudice outweighs the benefit" of joining multiple charges in a single trial. *United States v. Turkette*, 632 F.2d 896, 906-07 (1st Cir. 1980). Finally, in this high-profile prosecution of a public figure, the combination of unrelated criminal cases "impaired the fairness, integrity, [and] public reputation of [these] judicial proceeding," *Perez-Rodriguez*, 2021 U.S. App. LEXIS 26548, at *19, because it invited the jury to convict Mr. Correia for having a criminal disposition (not based on proof beyond a reasonable doubt that he committed the charged offenses) and also infringed on his fundamental right to testify in his own defense (and to deny that he ever demanded or accepted any bribe from anyone).

B. The charges were misjoined as a matter of law.

The Opposition correctly states that, when assessing joinder, courts look to "whether the charges are laid under the same statute, whether they involve similar victims, locations, or modes of operations, and the time frame in which the charged conduct occurred," Opp. at 44 (quoting *United States v. Taylor*, 54 F.3d 967, 973 (1st Cir. 1995)), but the prosecution fails to analyze any of those factors, and as Mr. Correia has noted, all of them indicate that the fraud and corruption charges were misjoined in this case. Mem. at 41-46. The two sets of charges involved different statutes, victims, and modes of operation, and with a limited exception (*i.e.*, the tax charges related to Mr. Correia's amended returns), the alleged conduct occurred over different timeframes.

Disregarding the relevant factors, the Opposition pivots to another point, claiming joinder was justified by the purported "overlap" of evidence. Opp. at 44. That argument ignores *United States v. Randazzo*, 80 F.3d 623 (1st Cir. 1996), in which the First Circuit held that only an overlap of "the important evidence" is relevant to joinder. *Id.* at 628. And even "important" overlap is still not sufficient, because Fed. R. Crim. P. 8(a) "forbid[s] joinder unless the counts meet one of the conditions," which do not include the mere existence of common evidence. *Id.* at 627.

Here, the prosecution overstates the purported overlap; it certainly was not "significant." Opp. at 34-35. Although Costa and Camara both invested in SnoOwl, their testimony to that effect consisted of a few minutes of inconsequential evidence in a nearly four-week trial. Opp. at 5 (citing 5 pages from 2,200-page transcript). The fraud case included no charges concerning Costa or Camara, and their status as SnoOwl investors was not material to the corruption case. Although the prosecution now claims the evidence went to motive, as proof of Mr. Correia's need to raise money for legal bills as well as Costa's and Camara's desire to recoup their SnoOwl investments, the supposed motives of Mr. Correia, Costa, or Camara did not prove any element of any charged offense. Although their limited testimony may have added narrative color, the prosecution's desire to tell a good story does not take precedence over Mr. Correia's constitutional right to a fair trial.

In addition, the prosecution's closing belies any post-trial claim that "important evidence" was common to the fraud and corruption cases. The closing distinguished the "evidence [the jury] heard regarding the SnoOwl and tax portion of the case" from "evidence from the corruption part of the case," without suggesting any overlap between the two. Tr. 14/9. In summarizing the fraud evidence, the prosecution never mentioned Costa or Camara. Tr. 14/8-30. When the prosecution turned to the corruption part, it talked at length about Costa and Camara but only briefly noted Mr. Correia "took" $50,000 from each man as SnoOwl investments. Tr. 14/39, 47. The closing did not highlight that evidence or suggest it was significant. Thus, the prosecution's creative effort to re-cast Costa and Camara as "critical witnesses" for "both parts of the case" falls flat. Opp. at 35.

C. The charges should have been severed to avoid unfair prejudice.

In addition to rehashing its waiver and overlap claims, the prosecution makes two additional arguments about the prejudice to Mr. Correia from facing two separate cases in a single trial. First, the Opposition contends that this Court prevented any prejudice by instructing the jury to separately consider each count. Opp. at 35-36. Second, it asserts that, because the jury returned

three not guilty verdicts (along with 21 guilty verdicts), it could not have been prejudiced against Mr. Correia. Opp. at 36. Those arguments overstate the general legal principles at issue and, at the same time, ignore the specific facts of this case.

It is true that a trial court should always instruct the jury in a multi-count case to consider separately the evidence on each count—or in a multi-defendant case, to consider individually the culpability of each defendant. Such instructions help to inoculate against potential prejudice, but no vaccine is perfect. If generic instructions could effectively eliminate any possible risk of unfair prejudice, as the prosecution contends, it would never be necessary to consider issues of misjoinder or severance after verdicts have come back. That, however, is not the law. None of the cases cited in the Opposition support the prosecution's position, and most discuss instructions about evaluating evidence "as to each defendant," not among many charges against a single defendant. *See United States v. Simon*, __ F.4th __, 2021 U.S. App. LEXIS 25591, at *25-26 (1st Cir. Aug. 25, 2021) (quoting *United States v. Casas*, 425 F.3d 23, 50 (1st Cir. 2005)).

Moreover, the Opposition mischaracterizes this Court's instructions. Three times, this Court "instructed the jury that it must consider each of these counts in this case 'on the facts and circumstances of the evidence regarding them separately.'" Opp. at 35 (quoting Tr. 14/122, 130-31, 134). But in each instance, this Court delivered that message within the section of its instructions that defined wire fraud, tax fraud, and public corruption, respectively. For example, after explaining Counts A through I, the wire fraud charges, this Court remarked: "You must consider each of *these counts*, they're separate counts [of wire fraud]." Tr. 14/122. Then, after Counts J to M, it repeated: "you must consider each of *these counts*," referring to the tax fraud counts, "and the facts and circumstances in the evidence regarding each separately." Tr. 14/131-32. Finally, after Counts N to W, it said: "Again, you must consider each of these counts," referring

to the corruption charges, "separately." Tr. 14/134.

The instructions omitted any more general statement that the jury must independently assess the fraud and corruption cases or that it must not infer from one case or the other than Mr. Correia had a criminal disposition and convict him on that improper basis. Indeed, the jury could have taken the instruction "to consider *the evidence in total*," Tr. 14/112; *see* Tr. 14/141 (instructing jury to consider "all of the evidence"), as this Court's direction or, at least, permission to do just that. The risk of prejudice cannot be ignored, because the prosecution invited the jury to draw inferences about Mr. Correia's propensity to break the law. *See* Mem. at 38-40 (explaining how spillover prejudice flowed in both directions, tainting the jury's decision about Mr. Correia's *mens rea*, its evaluation of Costa's credibility, and other issues).

The three not guilty verdicts on Counts V, W, and X do not demonstrate that "the jury was able to follow this Court's instructions and differentiate between the charges." Opp. at 36. Count V and W concerned the alleged "Batman Rolex" scheme, a supposed conspiracy between Mr. Correia and Camara to extort Costa for activating a water line at 379 Kilburn Street and one that bore no resemblance to the alleged "shakedowns" of marijuana vendors. The evidence about that scheme was exceedingly weak, and at most, it showed Costa gifted Mr. Correia a watch as an unsolicited, after-the-fact gratuity. Tr. 9/126-27. Similarly, Count X charged that Mr. Correia committed federal program bribery by demanding Andrade "kickback" a portion of her salary. It involved a different statute, alleged victim, and mode of operation. But without testimony from Mr. Correia or Andrade, the jury had little, if anything, to go on.

The three counts on which Mr. Correia was acquitted lay at the margins of the case. While the verdicts suggest the jury was paying attention, they do not dispel the concern that Mr. Correia suffered prejudice. After all, he was convicted of *all* wire fraud charges, *all* tax fraud changes, and

all corruption charges concerning alleged demands that marijuana vendors pay cash bribes for non-opposition letters and host community agreements. This was not a case like *United States v. Natanel*, 938 F.2d 302 (1st Cir. 1991), a 14-defendant drug prosecution in which Natanel was acquitted of three charges and convicted of only one. *Id.* at 308 ("Since Natanel was acquitted on all counts save count 18, it is hard to envision how the joinder of counts might have prejudiced him."). Nothing about the 21 guilty verdicts against Mr. Correia indicates the jury separately considered the three distinct groups of charges—or within those groups, the individual charges. The jury likely decided Mr. Correia was "the type of person" who would commit all those crimes, just as the prosecution improperly argued in its closing. Tr. 14/15, 30; *see also* Tr. 14/17, 26, 29.

Finally, the prosecution's argument about Mr. Correia's right to testify in his own defense, which was infringed upon by the misjoinder of fraud and corruption charges, conflates the issues of waiver (whether Mr. Correia previously told this Court that he wanted to testify regarding the corruption counts) and prejudice (whether Mr. Correia had "important testimony to give"). Opp. at 41-42 (quoting *United States v. Richardson*, 515 F.3d 74, 81 (1st Cir. 2008)). As the Opposition acknowledges, Mr. Correia "initially indicated his intent to take the stand and testify." *Id.* at 42 (citing Tr. 12/84-86). Later, however, trial counsel reported Mr. Correia had decided not to testify, without giving any reason or making any offer of proof. *Id.* Nevertheless, there can be no question that if Mr. Correia had testified that he never demanded or accepted any bribes from any marijuana vendors, that evidence would have been "important" and worthy of the jury's consideration.

CONCLUSION

For the foregoing reasons, Defendant Jasiel F. Correia, II, respectfully requests that, pursuant to Fed. R. Crim. P. 29, this Court enter a judgment of acquittal or, alternatively, pursuant to Fed. R. Crim. P. 33, order a new trial.

Respectfully submitted,

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