21-1920-cr

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA,

Appellee,

– v. –

ARI TEMAN, AKA Sealed Defendant 1,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT

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JURISDICTIONAL STATEMENT

On January 28, 2021, Appellant Ari Teman ("Teman") was convicted of two counts of bank fraud and two counts of wire fraud. Following the filing of motions pursuant to Rule 29 and Rule 33, Teman was sentenced on July 28, 2021 by Judge Paul Englemayer to the payment of restitution and forfeiture, in the amounts of $259,988.17 and $330,000, respectively, and to a term of one year and one day's imprisonment, to be followed by three years of supervised release. Notice of this appeal was timely filed on August 3, 2021. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

(1) Whether Teman's convictions must be vacated when his alleged fraudulent conduct, from beginning to end, occurred entirely outside New York and there was no competent evidence that any conduct *in furtherance of* those charges took place in the Southern District of New York.

(2) Whether the indictment, which specifically alleged that the alleged frauds were committed by the creation and depositing of "counterfeit" checks, was constructively amended by the Court's instructions permitting conviction on proof the checks were merely unauthorized.

(3) Whether Teman was deprived effective assistance of counsel by trial counsel's decision to call Teman's corporate counsel as a witness knowing that otherwise inadmissible "toxic" text messages would be published to the jury.

(4) Whether Teman was deprived of due process of law by (i) Judge Englemeyer's failure to disclose in a timely and complete manner his multi-million dollar interest in Bank of America ("BOA") and to recuse himself from the case, (ii) Judge Englemayer's bias against Teman, as revealed notably in his false attribution of admissions to Teman and his *ex parte* contacts with the prosecutor's office, (iii) prosecutorial misconduct, including by inflaming the jury on religious grounds and failing to disclose a conflict of interest requiring a *Curcio* hearing, and (iv) flawed jury instructions that failed to ascertain which of three sharply different customer narratives was the basis for a jury finding of guilt.

STATEMENT OF THE CASE

This case is about a civil dispute improperly dressed up as a criminal matter and tried in violation of fundamental fairness. Defendant-Appellant Ari Teman – the founder of JCorps, a non-denominational social volunteering force of young Jewish adults, and GateGuard, Inc., a cutting-edge artificial intelligence-enabled "smart" intercom system – was wrongly indicted, unfairly tried, incorrectly charged, and improperly convicted and sentenced.

The indictment was based on a fundamentally flawed theory of venue in which the government sought an improper tactical advantage in trying its case in the Southern District of New York when all the established elements of the alleged crime were committed and completed in Florida. The indictment was then constructively amended to write out of the indictment the key legal "counterfeiting" language the government knew it could not sustain and tried on an entirely different "authorization" theory.

Teman was tried before a conflicted judge who failed to disclose a multi-million-dollar interest in the only alleged economic victim in the case, BOA, until after the conclusion of the trial, and even then failed to disclose the extent of his financial interest. The trial itself, marred by ineffective assistance of counsel, unfolded in a manner that gave the government procedural advantages denied to defendant. Worse, in its closing argument, the prosecution was allowed to confuse

the jury with references to "fake" checks and inflame their passions with false statements impugning the appellant's religion.

At the close of the trial on two counts of bank fraud and two counts of wire fraud for the alleged "unauthorized" deposit of 29 RCC's, Judge Englemayer incorrectly charged the jury, resulting in a conviction that could have been based – consistently with the court's instructions – on a *single* $18,000 RCC "chargeback." The jury's verdict on what could have been this *one* chargeback resulted in the imposition of restitution of $259,000, forfeiture of $330,000, and a year's jail time—a result so grossly disproportionate it leaves no doubt that Teman's conviction must be reversed and the case remanded to a new judge in the Southern District of Florida.

I. FACTS

Appellant is the founder of JCorps and GateGuard, Inc. ("GateGuard"). JCorps is a seven-city international volunteer organization that has led thousands of young Jewish adults to volunteer in children's hospitals, senior centers, soup kitchens, animal shelters, parks, and more. A-2319. GateGuard, for its part, is a "cutting edge" technology company that provides intercom devices for multi-tenant properties and related services to both the tenants that live in those apartment buildings and the landlords and owners of the properties. A-716:24; A-870:8-11. The GateGuard system includes a face-recognition entry panel, an intercom, and an artificial intelligence "virtual doorman" + camera system. A-1856. The GateGuard

intercom is connected to a website panel that enables visual tracking of entrances into a customer's building, permitting the customer to see time-stamped logs and photographs of who was entering the building at a given time, thus providing value to the company far beyond a standard intercom. A-511:2-9. The website homepage contains a form through which the customer provides its contact information and information regarding its properties and also, as is customary for on-line businesses, contains a link to GateGuard's Terms and Conditions the customer must check to signify its agreement with the terms and place an order for desired products and services. A-872:21-25, A-873:1-9. Teman includes a link to this web landing page, Gateguard.xyz, on official correspondence with clients. A-1856. The Terms and Conditions expressly provide that the customer agrees to updates to the terms and other documents incorporated by reference without any requirement for express agreement to these updates. A-1809. The Terms and Conditions also contain a link to payment terms authorizing the use of "remotely created checks" – or RCC's – in the event of customer defaults or to secure payment of a device removal fee. A-1884 (Permission to Make Bank Draws and Other Account Draws). *Id.*

Teman's conviction and the present appeal revolve around three distinct RCC narratives involving three different customers: Elie Gabay ("Gabay"), Bonnie Soon-Osberger ("Soon-Osberger") and Joseph Soleimani ("Soleimani"). The different narratives were incoherently combined in single counts based not on any similarity

in the relationships but the timing of Teman's deposit of RCC's to collect what he believed were contractually enforceable customer debts. Thus, Counts I and III involved the deposit of 27 checks on April 19, 2019 against the accounts of entities related to Gabay and Soleimani and Counts II and IV involved the deposit of two checks against the accounts of entities related to Gabay and Soon-Osberger in March 18, 2019. Thus, the Gabay relationship was included in each count.

A. Elie Gabay

In 2016 or 2017, Gabay, managing director of a property management company, Coney Management ("Coney"), met Teman at a trade show. A-446:2, A-445:25, A-449:4-6. Coney manages a Manhattan property located at 518 West 204, owned by an LLC identified by the building's address, 518 West 204 LLC. A-447:16-19, A-447:25-A-448:1-3. Teman first marketed to Gabay a product called SubletSpy that helped property owners and managers detect illegal uses of their properties. A-449:11-14. Gabay then subscribed for the GateGuard intercom system, with the idea that Coney would use GateGuard's existing intercom suite at a single location and roll out an upgraded 2.0 version out across the company's property portfolio. A-451:21-25, A-452:1-5.

On January 19, 2018, Teman sent Gabay an email indicating that Coney would be invoiced $3,600 for the initial invoice installation, to be credited against monthly fees from the 2.0 roll-out, together with a security deposit of $849. A-1789. Gabay

took issue with the $849 and requested a copy of the invoice, which had not been attached to the initial email. A-1788.

Teman clarified in response that the $849 would be reflected as "0" (*i.e.*, not charged) and attached the requested invoice. *Id.* The cover email expressly requested payment through GateGuard's website portal and the invoice reminded Coney that the order was subject to GateGuard's Terms and Conditions, a link for which was provided to the left of the amount due. A-1790. The Terms and Conditions expressly reference GateGuard's Payment Terms, which provide for the use of RCC's to recover unpaid debts. A-1884.

The invoice also expressly noted the limitations of the initial version of the Intercom suite and the buyer's acceptance of the online Terms and Conditions.[1] Gabay testified that he did not recall whether he clicked on the Terms and Conditions link as requested in connection with the initial invoice. A-456:17-18. On January 28, 2018, Michael Haas ("Haas"), one of the other owners of the 518 W. 204 LLC, paid in full the $3,600 invoice stating that "Buyer accepts the Terms and Conditions at

[1] The invoice contained, on the bottom left, opposite the price, the following language:

> We are installing Version 1.0 ahead of 2.0 being available (~90 days). Client understands 1.0 device does not have 4G, IR, battery, etc. https://gateguard.xyz.
> **Terms**
> Buyer accepts terms & conditions at https://gateguard.xyz.

A-1790.

gateguard.xyz." A-549: 19-20, A-1725, A-1790.[2] In addition, the introductory paragraph to Section 5 of the Terms and Conditions contained the link to specific payment terms, including the use of RCC's, to which neither Gabay nor Haas objeted, and immediately below which Gabay had requested the addition of the word "reasonably." A-1801.

Despite the initial promise of Teman's relationship with Coney, the Version 1.0 of the Gateguard Intercom encountered connection problems. A-471:11-16. Gabay relayed his concerns to Teman over the next six weeks and many of the problems were resolved. A-477: 2-9. Indeed, as of March 13, 2018, Coney was considering an investment into GateGuard. A-1795. On this date, Teman emailed Gabay and stated he was providing a template for an order of twenty intercom panels, a proposed convertible note for a $40,000 investment into GateGuard, and his banking details for payment of the note. *Id.*[3] In response, on March 25, 2018, Gabay provided comments on the GateGuard Terms and Conditions, but not on the Payment Terms. A-1797-A1814. Teman responded that these changes appeared "mostly workable," but explained the reasoning behind certain provisions that were

[2] The Government did not obtain Haas' testimony at trial, but rather produced an affidavit in which Haas swore he was not familiar with GateGuard. A- 1727, A-327, A-1157-58.

[3] The government did not offer the attachments to the email into evidence and there was no questioning from the Court as to the status of the attachments.

important to GateGuard, including the need for a 10-year contract. A-1816. Teman followed up with an email stating "Updated with tracking. Most changes made as requested." A-1822. Gabay did not respond to Teman's explanation or updated Terms and Conditions but shared "the general feedback he was getting" that the entire GateGuard project should be placed on hold. A-473:8-9, A-1815. Teman countered that there was an unpaid invoice relating to an intercom panel that had been installed on January 19, 2018, stating he would "place a lien on your building on Pesach [Passover]." A-1820 at 1. GateGuard's unpaid invoice referenced the "full price" of the installed intercom panel, installation fees, and one year of service fees. A1828. The total amount invoiced for the initial panel, again with a reference to GateGuard's Terms and Conditions, was $18,286. A-1828.

The Government presented the foregoing facts in a manner that made logical narrative flow extremely difficult. The prosecution sought to elicit testimony that Gabay had not "signed" the online Terms and Conditions (which were not designed to be signed); that he believed he did not have an "agreement" about the Terms and Conditions (where assent was provided by a click-through mechanism customary in on-line contracts); that Teman had not sent him a copy of the "website" with the Payment Terms (when the link to the Payment Terms was immediately above a line on which he had commented); and that he "never saw" the device removal language in the Payment Terms and Conditions. A-465:12-13, A-478:12-15, A-469:15-16.

However, despite the Government's leading questions, Gabay testified that he did not "recall" whether he clicked on the Payment Terms. A-469:2-5.

For the remainder of 2018, relations between Teman and Coney deteriorated. A-493:14. Teman repeatedly warned customers, including Coney, that if they removed the GateGuard device, they would be subject to a device removal fee, which even the government conceded. A-497:13-18, A-865:4-5.

On March 28, 2019 Teman deposited a check for $18,000 drawn on Coney's account at Signature Bank ("Signature") for the property in question, identified as 518 W. 205 LLC,[4] A-1728, together with a separate check, A-1729, drawn on the account of 18 Mercer Equity, Inc., a different customer described below, *via* mobile deposit to his BOA account. A-335:21-24. Some days later, Gabay was contacted by Signature and asked whether he had authorized the $18,000 check deposited by Teman. A-494:12-4. Gabay responded that he had not. A-495:3-4. Haas, as noted, submitted a false affidavit stating he did not even know who GateGuard was. *See supra* at 8 and Note 2. At that point, Signature initiated a "chargeback," leaving Teman's account with a negative balance. A-345:16-22, A-347:10-11, A-348:5-9. According to Karen Finocchiaro, a BOA vice-president and senior fraud investigator

[4] The check contained a typo because the property was actually located at 518 W. 204, held by 518 W. 204 LLC. *See supra* at 6. The government made much of this typo, highlighting the check in red next to a "good" check for maximum visual effectiveness. A-1726.

("Finocchiaro"), the Internet Protocol (or IP) address associated with a mobile device corresponding to Teman's deposit, 74.203.64.198, was linked to a physical address in New York, New York. A-338:11-16, 20-21, A-339:7-12. However, no expert testimony was provided connecting this IP address to the physical location of Teman's phone and publicly available information shows that the IP address was monitored by a company called Level 3 that exclusively monitors fixed line devices. *See infra* at 29-30.

Approximately a month after the chargeback of the $18,000 check, Teman attempted to cash three additional checks drawn on 518 W. 205 LLC for a total amount of $33,000,[5] but the account had been closed and the checks were returned uncashed. A-504:13-16. Neither Gabay, Signature nor BOA suffered any loss from the attempted deposit of the three returned checks.

B. Bonnie Soon-Osberger

Like Gabay, Soon-Osberger met Teman at a trade show. A-556:19-24. Soon-Osberger was a member of the Board of Directors and Treasurer of a condominium cooperative corporation, 18 Mercer Equity. Inc. ("Mercer") that owned a cooperative condominium located at 18 Mercer St. ("18 Mercer") in Manhattan. A-552:21-25, A-553:1-8, A-554:9-13. Among her duties, Soon-Osberger was responsible for soliciting bids and obtaining devices for 18 Mercer. A-554:21-23. In

[5] These checks contained the same typo noted above. *See supra* at 10 and Note 4.

October, 2017, Soon-Osberger attended a condominium trade show at which she was looking for vendors to supply a new intercom system for 18 Mercer. A-556:21-24, A-557:1-5. GateGuard had a booth at the trade show and Soon-Osberger, attending the trade show with her husband and the President of Mercer, was attracted to the GateGuard Intercom panel because of its "smart" features. TR A-557:6-8, 14-16, 19-21.

According to Soon-Osberger, Teman discussed a "price point" for the GateGuard panel of $2,500. A-558:1-2. After the trade show, Soon-Osberger contacted Teman, indicated she was interested in the GateGuard intercom, and requested information on the product. A-561:8-10. Teman directed Soon-Osberger to the GateGuard website, where he told her she could sign up and order the product. A-561:10-15. Soon-Osberger testified that she "went through all" of GateGuard's Terms and Conditions. A-559:5. Teman expressly told her that the contract for the GateGuard Intercom panel was created through the company's on-line Terms and Conditions. A-561:20-24. Soon-Osberger testified she likely downloaded the Terms and Conditions on March 23, 2018. A-561:1-5. However, Soon-Osberger testified that she did not click on the Payment Terms in Section 5. A-565:1-5.

Notwithstanding the Terms and Conditions, which expressly state that the customer is simply paying for rights to use the panel and its associated intellectual property, Soon-Osberger testified that her "recollection" was that she would

purchase the panel outright because Teman gave her a "price." A-562:21-25.[6] Soon-Osberger testified that she had previously only executed agreements with a physical signature, implying that she was unfamiliar with customary online terms and conditions. A:563:19-24.[7]

Soon-Osberger also provided the Terms and Conditions to the members of the 18 Mercer Board and to Stephanie Phillips, the President of 18 Mercer, who, according to Soon-Osberger "looked at" the document. A-684:24-25, A-585:1-11. Soon-Osberger emailed Teman with specific questions on the GateGuard Terms and Conditions. A-1860. She did not, however, provide any comments on the Payment Terms, despite the prominent placement of the link to the terms in Section 5 of the Terms and Conditions. In response, Teman agreed to limit price increases, but otherwise explained the reasoning behind the clauses without modifying the language. A-1859. After receiving Teman's response, Soon-Osberger stated that Teman had addressed 18 Mercer's concerns. A-1858. Appellant provided an invoice for a total of $3,947 that included a "cooperator show price" for the GateGuard intercom panel, installation and one-year's prepaid services. A-1833. The invoice

[6] This does not explain why Soon-Ostberger would go through and then download the entire Terms and Conditions, but not read the Payment Terms.

[7] The Court can take judicial notice that online "clickwrap" and "browsewrap" agreements are customary. *See, e.g.*, *Meyer v. Uber Techs., Inc.*, 868 F.3d 66 (2d Cir. 2017).

expressly stated that "Buyer accepts terms and conditions at gateguard.xyz." The Terms and Conditions notice was on the same line as the amount to be paid and clearly visible. The invoice, with its express limitation to the Terms and Conditions on GateGuard's website, was reviewed by 18 Mercer's management and, on April 4, 2018, sent to 18 Mercer's property management company, Crystal Real Estate Management, Inc. ("Crystal"), who paid the invoice in full. TR A-572:23-25, 573:1-7, A-1831-32, A-1838. Following payment, GateGuard installed the panel at the Mercer St. condominium. A-573:10-12.

According to Soon-Osterberger, 18 Mercer encountered difficulties with the GateGuard intercom, which Teman explained resulted from the building's poor Internet connection. A-574:2-10. For the remainder of the year, 18 Mercer and GateGuard attempted to resolve the connectivity issues. A-574:11-22. In January 2019, 18 Mercer decided to "move on" from GateGuard. A-574:23-25. In early January, 2019, Soon-Osterberger sent an email informing Teman that 18 Mercer intended to remove the GateGuard intercom, to which Teman responded that GateGuard would enforce its rights to a removal fee. A-1866. Soon-Osberger recalled several additional emails in which Teman threatened to enforce GateGuard's rights. A-577:24-25, A-578:1.[8]

[8] The Government did not seek to introduce any of these emails despite their relevance to Soon-Osberger's knowledge of the applicable contractual provisions on which Teman was relying.

In light of Teman's position, Soon-Osberger provided the GateGuard Terms and Conditions, referred to as the "contract," to Jacqueline Monzon ("Monzon") at Crystal, who in turn forwarded the contract to the entity that would replace GateGuard, Academy Intercom, Inc. ("Academy"). A-1862-A-1865. Academy reviewed the Terms and Conditions and refused to proceed with removing the intercom because of legal liability. A-1863-A1864. After receiving the contract, Crystal requested indemnification for itself and Academy if the removal work were to be authorized. A-1862. The Government did not produce evidence of any indemnification agreement and did not produce evidence as to when or under what circumstances the GateGuard device was removed.

However, after GateGuard had put 18 Mercer on notice that it intended to enforce its right to an $18,000 device removal fee; after Academy had refused to effect the removal; and after Crystal had demanded indemnification if the device were removed, on or about January 10, 2019, 18 Mercer removed the device. A-602:12, A-603:21.

On March 28, 2019, Teman deposited an RCC for the device removal fee in the amount of $18,000, which Soon-Osberger testified was "unauthorized." A-578:4-11. Meanwhile, Crystal had terminated its management contract with 18 Mercer on or about March 15, 2019. A-612:1-3. At the end of the month, Gina Hom ("Hom"), who, together with Monzon, was one of the two authorized signatories for

Crystal, noticed the GateGuard RCC, which she claimed not to recognize, and called Signature to place a hold on the check. A-611:18-19, A-612:13. Hom testified she did not ask anyone on the 18 Mercer Board whether the check was authorized. A-612:22-25.

Signature then processed a "chargeback" to BOA, leaving Teman's account with a negative balance. A-345:16-22, A-347:10-11, A-348: 5-11. The "chargeback" was combined with the chargeback for the $18,000 check drawn on Coney's account. A-348:6-9. BOA honored both chargebacks, leaving Teman's BOA account overdrawn by a total of $29,036.56. A-348:15. This negative balance was subsumed by the RCC deposits involving the last customer discussed below. As a result, neither Signature nor BOA suffered any independent loss in connection with the Soon-Osberger or Gabay checks.

C. Joseph Soleimani

In late 2016, Soleimani, one of the owners of ABJ Properties ("ABJ"), a property management company that managed two real estate companies, ABJ Lennox, LLC ("ABJ Lennox") and ABJ Milano LLC ("ABJ Milano"), reached out to Teman to discuss his SubletSpy product. A-624:8-14, 21-22; A-626:3-8. Shortly after meeting Teman, ABJ subscribed for Teman's SubletSpy service. A-626: 9-12. Soleimani then asked Teman to give him a "demo" of the GateGuard Intercom system at Soleimani's office. A-723:6-9, 724:13-23.

At the office "demo," Soleimani had an opportunity to review not only the physical Intercom system but also GateGuard's "online interface." A-725:5. GateGuard's only interface includes a landing page with references to its Terms and Conditions. *See supra* at 5. After the office demo, Soleimani agreed to have seven GateGuard intercoms installed at ABJ properties. A-726:15-20. Soleimani testified that he "did not recall" whether he signed up for the GateGuard products and services through GateGuard's online platform. A-726:8-13. However, he acknowledged using the online platform, which requires acceptance of the online terms to sign in. A-727:5-6.

After Soleimani signed up for the seven GateGuard intercoms, ABJ used the system for "quite some time," during which ABJ had continuous access to the GateGuard online interface. A-726:21, A-727:2-6. In March, 2017, Soleimani received invoices for the seven intercoms and related services. A-728:2-9; A-1777-A-1784. The invoices contemplated delivery of the intercoms for a heavily discounted up-front cost of $499,[9] an installation fee of $650, a six-month service charge of $594 and a three-year contractual commitment. A-1777-A1784. As with

[9] *See supra* at 6-7 (referencing a discounted up-front initial price for a temporary device of $3,600) and 12 (referencing a discounted up-front price of $2,500 for installation of an initial device). The particularly heavy discounting for Soleimani must be seen in the context of the parties' negotiation of a separate, much larger, order covering 60 buildings. *See infra* at 19.

the invoices for Gabay and Soon-Osberger, all seven invoices expressly stated that they were subject to the GateGuard online Terms and Conditions available at https://gateguard.xyz/legal/terms/php. *Id.* However, Soleimani stated that "he did not see" the reference to the online Terms and Conditions. A-728:12.

After the system went live, there were several problems with the GateGuard system, which Teman attributed to connectivity issues, and, apparently, an unwillingness of ABJ to pay certain invoices. A-733:4-17, A-1928. In frustration, on March 9, 2018, Appellant sent ABJ an email stating that in light of client's non-payment, he "was done" and GateGuard would be "shutting down" in part because of ABJ's dangling of "fake orders" and "fake investments." A-1928-A-1929. Benjamin Soleimani, Soleimani's brother and the other owner of ABJ, responded by entreating GateGuard not to shut down and imploring GateGuard to work together with ABJ to resolve any issues they were having. A-1928, A-715:2-3. Specifically, Benjamin Soleimani pleaded with Appellant to come to dinner and discuss matters, stating: "Please don't do anything yet with the system. Let's keep it going how it was before the update. And let's discuss next week what we can do together to improve it." A-739:3-6.

For much of the rest of the year, relations between Soleimani and Teman oscillated between mutual recriminations and an attempt to patch things up and seek common ground for the installation of the GateGuard 2.0 devices. On the one hand,

billing disputes continued to plague the parties' relationship. On September 6, 2018, Ariel Reinitz ("Reinitz"), Teman's corporate attorney, contacted Soleimani to obtain payment of outstanding fees. A-1887. In response, ABJ requested that GateGuard discontinue service. *Id*. Reinitz responded by reminding Soleimani of the GateGuard Terms and Conditions, referenced in the initial GateGuard invoices and attached to Reinitz's email. *Id.* However, during the Soleimani cross-examination, the defense did not have a copy of the invoice and the Court did not permit cross-examination of Soleimani on the email, which drew Soleimani's attention to the specific online terms, identified in Reinitz' email with the hyperlinks "here" and "here." A-745:6-25. These specific online terms expressly referenced both the Terms and Conditions and the Payment Terms that authorized the use of remotely created checks for payment of outstanding fees. *See supra* at 5.

On the other hand, at the same time, ABJ was considering installing an upgraded, second generation, version of the GateGuard system across 60 buildings in the ABJ portfolio. A-748:14-24, A-750:12-14. As part of its purchase, ABJ sought a general release as to fees claimed by GateGuard up to that time, which it discussed with Reinitz. A-1889. Soleimani also testified that he continued to receive multiple emails from Teman during this time period, but these were not produced by the Government. A-751:4-10.

The negative aspect of the Soleimani/Teman relationship eventually came to dominate. In early January, 2019 Teman began discussions with Reinitz about using RCC's to recover amounts owed from ABJ. A-1872. At that time, Reinitz discouraged Teman from using RCC's to recover debts from ABJ without warning, saying he thought this would be a "bad idea." *Id.* After an extended back and forth over several months, Reinitz concluded, "ok invoicing and then collections is fine." A-1876. Following this exchange with Reinitz, Teman sent ABJ an invoice for, among other things, the device removal fee for seven devices, past due fees for the seven devices under the terms of the initial invoices, an attorney collections fee, and a device reinstallation fee. A-1775. The invoice also included amounts allegedly owed for 60 devices, apparently relating to the additional intercom panels the parties had been negotiating since October 2018.[10] The prosecution did not introduce any evidence of Soleimani disputing this invoice.

Two weeks later on April 19, 2019, the day before Passover began,[11] at the BOA Lincoln Rd. Branch in Miami Beach, Florida, Teman deposited a total of 24 checks drawn on ABJ's bank, JP Morgan Chase ("JP Morgan"), against amounts

[10] Given the Government's incomplete production of Solemani material, it is not possible to determine whether there had been a meeting of the minds with respect to the 60-building order.

[11] The importance of this detail is discussed *infra* at 64-69.

invoiced for a total of $264,000. A-1733-A-1756. Teman also deposited three additional checks drawn on Coney's 518 W. 205 LLC account with Signature, A-1730, A-1731, A-1732,[12] but the account had been closed and these checks were not processed for payment. *See supra* at11. With these three checks, the total amount deposited on April 19, 2019 was $297,000, A-357:19-20, and the ending balance on that date in the GateGuard account was $271,803.12. A-358: 9-10.[13]

On April 16, 2019, once the seven-day hold was lifted, Teman transferred $225,000 to GateGuard's parent company, Friend or Fraud, Inc. A-361:4-8. Friend or Fraud then transferred $4,500 to Teman's personal account. A-363:6-13. $180,000 was transferred to an account ending in 1046, identified as the account for Touchless Labs, LLC. A-363:18-20, A-344:4-7. On April 29, 2019, $125,000 was transferred back to the Friend or Fraud account. A-363:23-25. Two wire transfers were then made to suppliers in China. A-364:12-18. On May 8, 2019, Teman withdrew $4,000 in cash from BOA at 1 Penn Plaza in Manhattan. A-365:3-7. The Government did not provide testimony as to how this $4,000 related to any of the

[12] The actual name of the entity was 518 W. 204 LLC.

[13] The account had a negative balance as of April 2, 2019 of $29,036.56. Teman also deposited a non-RCC for $4,096 on April 19. Combining this check with the negative balance, and a few other small deposits and withdrawals after April 2, reconciles the $297,000 deposit with the $271,803.12 closing balance. *See infra* at 22.

RCC's at issue. Teman had deposited a check for $4,096 unrelated to the RCC's on April 19, 2022. *See* GX113, A-1657.1, at 483067038085.[14]

According to Finocchiaro, all of the $297,000 checks were subject to a chargeback. A-367:17-20. However, this was not quite correct. Finnocchiaro separately testified that only the ABJ (Soleimani) checks totaling $264,000 were subject to a chargeback. A-368:3-4. Gabay's 514 W 208 LLC account had been closed and the checks could not be credited to this account. *See supra* at 11. The testimony was exceedingly confusing because Finnochiario testified that the $264,000 chargebacks covered all 27 checks (with a total value of $297,000), which

[14] The virtually incomprehensible testimony relating to these fund movements was accompanied by the presentation of an Excel spreadsheet identified as GX 113 (referenced in Teman's Appendix as A-1657.1 and submitted to the Court in CD-Rom form). The jury requested delivery of the spreadsheet during deliberation, but the prosecution did not have the spreadsheet available in a paper form that could be provided to the jury. A-1245; A-1248:22-25. Rather, the prosecution had prepared a laptop containing the information on GX 113, but the laptop contained other information not germane to the case, such as mp3 files, and could not be provided to the jury. A-1247:19-23. The Court brought the jury back into the courtroom to review the spreadsheet on the courtroom screens, but then realized it was a "long document" that was illegible on the screen and sent the jury back to the jury room, while it conferred with the parties on a mechanism for providing a laptop to the jury. A-1250-A-1252. As the Court was conferring, the jury sent back a lapidary note, "No laptop." A-1254:22-23. The Court responded that this was "good news" and did not enquire as to whether the jury wanted the spreadsheet in some other form. A-1254:25. The jury may well have determined it could get to a verdict without GX 113 by concluding the check drawn on 518 West 205 LLC was "counterfeit" and that, as a result, there was "fraud" in the Gabay customer relationship, which, given the judge's instruction that the jury only had to agree as to a single customer in each count, and Gabay's presence in each count, obviated the need to scrutinize the detail on GX 113. *See supra* at 6*; see infra* at 78-84.

only works arithmetically if the three Gabay/West 205 checks totally $33,000 were not subject to a chargeback. Teman's GateGuard account was then closed, with a negative balance of $260,319.81. A-368:18. The Friend or Fraud account, which had a positive balance of $8,386, and the Touchless account, which had a positive balance of $86,558.18, were also closed. A-370:4-19. An additional account with a positive balance of $13,447.37 was not discussed at trial but was disclosed on the eve of sentencing, when it appeared that, instead of using these funds, which were available for offset to reduce the amount of its loss, BOA returned the funds to Teman in February 2021. A-2261. The Friend or Fraud and Touchless balances were sent to Appellant who returned them to BOA. A371:20-21. Once returned to BOA, the positive balances were sent to a BOA "hold harmless" account. A-370:22-25. Finocchario then testified that BOA was unable to offset the Friend or Fraud and Touchless positive balances against the GateGuard negative balances because the corporate entities all had different tax identification numbers. A-372:21-25, A-373:1-4. The Government did not provide any correspondence between BOA and Teman relating to the various positive balances.

Ultimately, because only BOA suffered any losses in connection with the three customer relationships involved in the Government's prosecution of Teman, *USA v. Teman* resolves into *Bank of America v. Teman*, a case that should have been brought in a civil proceeding based on the application of *Meyer v. Uber*, *supra* at 13

and Note 7, with full discovery and depositions, and from which Judge Englemayer would have been subject to *mandatory* recusal.[15]

II. PROCEDURAL HISTORY

On June 20, 2019, Magistrate Judge Sarah Netburn issued an arrest warrant based on a complaint charging bank fraud. *See United States v. Teman*, Case No. 19-MAG-5858. A- 46.2. On July 3, 2019, Teman was arrested pursuant to the warrant. *See United States v. Teman*, Case No. 1:19-mj-03082-JJO-1 (S.D. Fl.) On September 26, 2019, a grand jury returned a one-count indictment for bank fraud. A-49-A-52. On November 12, 2019, a grand jury returned a superseding indictment against Teman charging two counts of bank fraud and two counts of aggravated identity theft. A-96.1. Count 1 of the superseding indictment was dismissed by the trial court on December 20, 2019. A-97-A-120. On January 3, 2020, the United States Attorney for the Southern District filed a six-count superseding indictment charging two counts of bank fraud, two counts of wire fraud, and two counts of aggravated identity theft. A-121-A-128. On January 10, 2020, the Court held a pre-trial hearing at which various motions *in limine* were addressed. A-137.1-137.95. On January 14, 2020, the Government informed the trial court that it would not pursue counts 5 and 6 at trial. A-136.96. Following a five-day trial, on January 29, 2020 Teman was

[15] Recusal is discussed *infra* at 52-60.

convicted on all counts. A-1298.1-1298.2. The court granted bail pending appeal. A-1287-1294.

On February 26, 2020 Teman moved for an acquittal or, in the alternative, a new trial under Rule 29 and Rule 33. A-1437-1472. While the motion was pending, Teman filed a motion for a new trial on the basis of undisclosed *Brady* and *Jencks Act* material. A-1473-1497.

On June 5, 2020, the Court entered an order denying all of Appellant's post-trial motions and setting the case for sentencing. A-1937-2043. Sentencing was deferred on multiple occasions. A-2044, A-2107-2108, A-2111-2112.

On November 30, in anticipation of sentencing, Appellant informed the court that he had gathered the funds to pay the restitution amount calculated by the Probation Department of $259,988.17 but opposed the payment of forfeiture in addition to restitution. A-2113. At the same time, still encountering difficulties in calculating the precise amount of the BOA loss, the government notified the court that it intended to seek forfeiture for BOA in addition to the amount of restitution to be finally calculated. A-2114-2115.

On January 28, 2021, the Court entered an order seeking submissions on bail pending appeal and whether an award of forfeiture in addition to restitution was warranted. A-2170-2172. On April 23, 2021, the government filed its motion seeking restitution and forfeiture. A-2173-2180. In its motion, the government sought restitution

in the amount of $259,340.32 and forfeiture in the amount of $330,000. A-2179. At the same time, Teman informed the court that he would be seeking dismissal or vacatur of his conviction based on expert testimony to be provided by Professor Richard M. Fraher ("Fraher"). A-2195.1. On April 28, 2021, Teman then filed a Motion to Dismiss and a Motion for Vacatur and Bail Pending Appeal. A-2196-A-2222.

On May 5, 2020, ostensibly in response to Appellant's recent filings, the trial court disclosed for the first time its indirect interest in BOA through its ownership of stock of Berkshire Hathaway, approximately 11% of whose holdings are in BOA. A-2223-2224.[16] The court indicated that it believed recusal was not necessary in this circumstance under *United States v. Ravitch*, 421 F.2d 1196, 1205 (2d Cir. 1970). However, the Court did not disclose the extent of its interest in BOA, which appears to be close to $2,000,000.[17]

On May 12, 2021, Teman filed the Declaration of Richard M. Fraher (the "Fraher Dec'l"). A-2226-2235. Fraher opined that, contrary to Finnocchiaro's sworn testimony at trial, BOA had remedies that would enable it to reach the funds in Teman's personal, Friend or Fraud, or Touchless accounts. A-2232. Teman also moved for Judge Englemayer's recusal. Dkt. 230. On July 9, 2021, the Court denied Teman's motions and set sentencing for July 28, 2021. A-2247-2315. At sentencing,

[16] *See infra* at 52 and Note 30.

[17] *See infra* at 53.

Teman was ordered to pay restitution to BOA of $259,340.32, incur a forfeiture penalty of $330,000, and serve a year and a day in prison. A-2425-2430.

Recently, Teman filed an emergency motion with Judge Englemayer for the unsealing of certain portions of the January 10, 2020 hearing. A-2476-2478. This motion was granted on April 21, 2022. A-2483

POINT I
VENUE WAS IMPROPER IN THE SOUTHERN DISTRICT OF NEW YORK

The Constitution restricts criminal prosecutions to the judicial district(s) in which the charged crimes were allegedly committed. Thus, the Sixth Amendment guarantees a criminal defendant the right to be tried in the "district wherein the crime shall have been committed." Likewise, Article III, § 2, cl. 3 provides that "Trial of all Crimes … shall be held in the State where the said Crimes shall have been committed." *See United States v. Cabrales*, 524 U.S. 1, 6 (1998) ("the Constitution twice safeguards the defendant's venue right."). Accordingly, a defendant may only be tried in a district where the alleged crime "was begun, continued, or completed." 18 U.S.C. § 3237(a). Applying these principles here, Teman's convictions must be vacated as his alleged fraudulent conduct with respect to Counts I and III, from beginning to end, occurred entirely within Florida, and there was no competent evidence that any conduct relating to Counts II and IV, or *in furtherance of* any of

the charges on any count, took place outside of Florida, much less in the Southern District of New York.

I. FACTS

Counts One and Three charged Teman with committing bank fraud and wire fraud "from at least in or about April 2019 up to and including at least in or about June 2019, in the Southern District of New York and elsewhere." At Teman's arraignment, Judge Engelmayer raised the apparent lack of a sufficient nexus with the Southern District of New York, warning the government, "you should make sure that legally you're on sound footing contending that the New York activity, after the deposit of the fraudulent checks, is a necessary component or a component of the bank fraud here." A-70.

For the April checks, it was undisputed that Teman deposited them in person at a bank in Miami Beach, Florida. *See, e.g.* A-407, A-409. The only evidence connecting these checks to New York was the testimony of a Signature employee, John Motto. As Motto explained, the Manhattan-based third-party team of six used by Signature reviews checks which come in for payment does so only *after* the money has left its customer's account. *See* A-789, A-804-805, A-807. Occasionally, the review team routes a check to the branch where the customer's account is located for further review. A-814, A-816. Signature has 30 locations, so a check could be sent to any of these locations. A-816. If the branch determines that the check should

be rejected, it informs the central review team in Manhattan. A-818. There was no direct testimony as to any fraud review relating to the 24 ABJ checks totaling $264,000 drawn on ABJ's JP Morgan account.[18]

For the March checks, it was undisputed that the checks were deposited via a mobile telephone application. A-335-336. However, the only evidence connecting the checks to the Southern District of New York was the testimony of Finocchiaro that BOA had recorded an Internet protocol (IP) number or address associated with the mobile deposits. A-338. Finnochiaro did not describe BOA's internal network routing protocol or otherwise provide competent testimony that an IP address in BOA's network logs proves a defendant's physical location. Every communication over the Internet has two IP addresses, the address of the sender and the address of the recipient. *See, e.g., White Buffalo Ventures, LLC v. Univ. of Texas at Austin*, 420 F.3d 366, 369 and Note 6 (5th Cir. 2005).

But Finocchiaro did not provide the IP address of the sender and recipient of the mobile deposits. She only provided a single IP address, which could have been *either* the network address associated with Teman's mobile phone *or* the network

[18] Despite the Government's reliance on Motto's testimony, none of the April checks was actually reviewed by Motto's team, which only reviewed checks *after* they had been paid. A-790:18-19. The three Gabay checks deposited on April 19 were never paid because the account had been closed. The ABJ checks were apparently reviewed in Texas. *See* A-1678. The affidavit of loss form was to be sent to a JP Morgan Ohio branch. *See* A-1902-1903.

address associated with a BOA computer to which his mobile communication was routed. Moreover, the Court can take judicial notice of the fact that IP address Finocchiaro did provide, 74.203.64.198, is administered by an entity known as "Level 3."[19] Level 3, in turn, provides wireline (*i.e.*, fixed, not mobile) telecom services.[20] Thus, the IP address given by Finnochario appears to be the IP address of a *bank* computer to which certain communications are routed, not the physical address of Teman's mobile phone. No expert testimony was provided that the logging of a customer device in Manhattan – which could have been routed from other boroughs or even from outside New York State – means the customer was physically in Manhattan.

II. STANDARD OF REVIEW

This Court reviews *de novo* a trial court's determination that venue was proper. *United States v. Kirk Tang Yuk*, 885 F.3d 57, 71 (2d Cir. 2018). A federal prosecution may be brought "in any district in which [an] offense was begun, continued, or completed." 18 U.S.C. § 3237(a). In *United States v. Svoboda*, 347 F.3d 471 (2d Cir. 2003), this Court held that venue is proper where "(1) the defendant intentionally or knowingly causes an act in furtherance of the charged offense to occur in the district of venue or (2) it is foreseeable that such an act would occur in

[19] https://search.arin.net/rdap/?query=74.203.64.198

[20] https://www.bloomberg.com/profile/company/1552993D:US

the district of venue." *Id.* at 483. Thus, under either of these alternatives, there must first be an act, in the district of prosecution, that *furthers* the offense. Judge Englemeyer found that venue was proper in denying Teman's motion to dismiss for improper venue at the close of the Government's case and his post-trial Rule 29 motion. A-859-864 and A-1984-2003.

III. ARGUMENT

A. The Government Failed to Prove that Teman Began, Continued, Completed, or Took Action in Furtherance of, Any Alleged Fraud in the Southern District.

The evidence was insufficient to establish venue in the Southern District of New York because the government failed to prove that Teman began, continued, or completed a fraud in the Southern District. To the contrary, the alleged frauds were completed when Teman deposited the checks at the BOA branch in Florida or made his mobile deposits from an undisclosed location.

"The crime of bank fraud is complete when the defendant places the bank at a risk of financial loss, and not necessarily when the loss itself occurs." *United States v. Anderson*, 188 F.3d 886, 888 (7th Cir. 1999). Thus, as Judge Engelmayer correctly observed, bank fraud is complete *at the time of the deposit*. *See* A-1966; *see also United States v. Greenidge*, 495 F.3d 85, 101 (3d Cir. 2007) ("[W]e conclude that the conspiracy to commit bank fraud was 'executed' when the check was deposited."); *United States v. Thomas*, 315 F. App'x 828, 838 (11th Cir. 2009)

("[B]ank fraud was complete at the time that checks were deposited into the bank accounts.").

To apply these principles here is to recognize that the bank fraud was complete when Teman deposited the checks, because that is when the banks involved (Signature, JP Morgan and BOA) incurred the "risk of financial loss." *See Anderson*, 188 F.3d at 888.

Judge Englemayer held, however, that the alleged fraud was complete only when the checks *cleared*—a conclusion for which the court cited no authority. *See* A-1998.[21] In the court's view, in order for Teman "[t]o obtain the money he sought, it was necessary for Teman to deceive both [sic] banks." *Id.*[22] However, this ignores the authority cited above (and by Judge Engelmayer) which clearly holds that bank fraud is complete upon the making of a fraudulent *deposit*. Indeed, Motto from Signature testified that prior to the bank conducting its fraud review, the *funds had already left the depositing customer's account*. A-807. Thus, the creation of a risk of loss—the essence of the alleged crime—had already occurred by then. The district court not only failed to heed this authority and evidence, but illogically made the *completion* of the alleged crime dependent on acts *not* perpetrated by the alleged

[21] Contrary to Judge Englemayer's statement, there was no fraud review during the pendency of the 7-day hold. *See supra* at 29 and Note 18. The 518 W. 204 LLC account had been closed and the three checks drawn on this account were returned uncashed. *See supra* at 11.

[22] There were three banks involved, Signature, JP Morgan and BOA.

defendant, and instead on the subsequent acts of *victims* over which those charged have no authority or control.

Even assuming, *arguendo*, that the bank fraud was not complete until the checks *cleared* as opposed to when they were deposited, Signature's fraud review can still not be treated as an act in furtherance of the fraud. Judge Englemayer correctly recognized that Signature's internal wiring of the checks to itself in New York could not supply a basis for venue unless that conduct was "in furtherance of the charged offense." A-1998. However, he failed to explain how actions taken solely by the bank, designed to *prevent* unauthorized checks from being paid, was "in furtherance" of any alleged criminal acts by Teman. Although the district court claimed that the fraud review was part of the alleged crime because Teman needed the checks to pass the review for the funds to be released, *id.*, any acts that were designed to pass that review and were thus in "furtherance" of the alleged crime took place in Florida or outside Manhattan when Teman <u>*created*</u> the checks. In contrast, Signature's wiring of check images to itself and its examination of them did not *further* Teman's purportedly fraudulent conduct, and instead was for the opposite purpose. [23]

[23] As to JP Morgan, any fraud review would have occurred in Texas or Ohio. *See supra* at 29 and Note 18.

The conclusion that this conduct does not "further" criminal activity is reinforced by the cases that interpret the co-conspirator hearsay exception, where such statements must have been "in furtherance" of the conspiracy to be admissible. In those cases, courts have held that only statements which help *achieve* the conspiracy's goals should be treated as furthering the alleged crime, and those that are made for another purpose are not admissible. *See, e.g. United States v. Diaz*, 176 F.3d 52, 85 (2d Cir. 1999); *accord United States v. Saneaux*, 365 F. Supp. 2d 493, 501 (S.D.N.Y. 2005).

The "in furtherance" requirement has this common meaning in the venue context. For example, in *United States v. Davis*, 689 F.3d 179 (2nd Cir. 2012), this Court found venue proper based on acts "in furtherance" of a robbery where the defendant called someone in the district and that person continued to make calls from the district to find others willing to assist with the robbery. *Id.* at 190. The Court reasoned that the defendant had "entered" the venue by telephone to seek assistance accomplishing his crime. *Id.* Here, by contrast, Signature's review of the checks did not further any fraud, but rather, furthered an effort *to detect and prevent fraud*. Accordingly, Signature's review cannot provide a basis for venue.

For similar reasons, there was no venue for the wire fraud counts. The images were not wired to Signature "for *the purpose of executing*" the scheme, 18 U.S.C. § 1343, but to prevent theft. Moreover, with respect to the mobile deposits, no

evidence was given that the alleged fraud made use of *interstate* means of communication. The Government did not provide *any* competent evidence on the location of the mobile deposits.

` B. Teman Could Not Have Foreseen That the Bank Review Would Take Place in the Southern District

Even if Signature's fraud review in the Southern District was in furtherance of Teman's alleged criminal conduct, it was not *foreseeable to Teman* that the review would happen in the Southern District. Judge Engelmayer posited that Teman foresaw Signature's fraud review in New York because there had been a chargeback on the checks Teman had deposited the prior month. A-1999. However, even if the prior chargeback made it foreseeable to Teman that a review would occur, the venue issue was whether he should have foreseen that such a review would occur in the Southern District. *See, e.g United States v. Lange*, 834 F.3d 58, 70 (2d Cir. 2016) (to establish venue it must be "foreseeable [to the defendant] that such an act would occur *in the district*"); *Davis*, 689 F.3d at 186 (government must prove that the act's occurrence in the district of venue would have been reasonably foreseeable to the defendant).

But there was no such evidence. That the checks bore a Manhattan address for Signature or JP Morgan does not change this conclusion. Signature has branches throughout multiple states and districts – and thus its checks bear addresses throughout those states. Moreover, the executive account manager for fraud review

operations has offices in both Manhattan and New Jersey A-664, A-665:1-2, 18-19. Even the location of its central operations in Manhattan has nothing to do with its maintenance of branches in multiple districts and states. In other words, the location of a particular branch in Manhattan does not make it foreseeable that Signature conducts fraud review operations in the same state or district as that branch. In addition, the Government provided no testimony that Teman had any knowledge that Signature centralizes fraud review through a Manhattan-based third-party called "Oasis". A-788-A-789. There was no reason that Teman should or would have known that any fraud review would be outsourced to a team located in the Southern District, just because the check bore the address of a Manhattan branch. Signature could have just as easily contracted with a fraud review team located in a different district or even a different country.[24] In addition, the location of the third-party fraud review team for Signature was irrelevant to the venue issue relating to JP Morgan—the bank on whom the ABJ checks were drawn.

In sum, venue in the Southern District for these counts was improperly based on conduct by the victim whose purpose was not to further the offense but instead

[24] JP Morgan appears to operate its fraud review in Ohio and Texas. *See supra* at 29 and Note 18. The Court can take judicial notice that other large banks New York banks outsource fraud review to jurisdictions such as India. *See* Outsourced-service-providers.pdf (citibank.co.in).

to try to prevent it—and which review process in the Southern District was not foreseeable to Teman.

POINT II
THE INDICTMENT, WHICH SPECIFICALLY ALLEGED THAT THE ALLEGED FRAUDS WERE COMMITTED BY THE CREATION AND DEPOSITING OF "COUNTERFEIT" CHECKS, WAS CONSTRUCTIVELY AMENDED BY THE COURT'S INSTRUCTIONS PERMITTING CONVICTION ON PROOF THE CHECKS WERE MERELY UNAUTHORIZED.

The Fifth Amendment provides that no person may be tried for a felony "unless on a presentment or indictment of a grand jury." That fundamental precept was violated here. Ari Teman was charged by indictment with committing fraud by knowingly depositing *counterfeit* checks. He was tried and convicted for committing fraud by knowingly depositing *unauthorized* checks – without any proof of a true act of counterfeiting. For this reason, the conviction must be vacated.

I. FACTS

The trial proceeded consistent with the government and the court's position that "counterfeiting" means in the "vernacular" sense, that "the defendant created these checks and that they were unauthorized by the account holder." A-1023. To that end, the government primarily relied on customer testimony that they had not authorized Teman to use RCCs, and photographs of the checks themselves, which, the government claimed, contained errors such as misspellings of the customers'

names, incorrect addresses, and out-of-sequence checks. The government presented no evidence that the RCCs purported to be anything other than what they were – checks created by Teman on his customers' accounts.

Although not necessary to a finding of constructive amendment, the defense offered significant evidence that the checks were exactly what they purported to be – RCCs – and were treated as such by the banks. Among other things, the instruments forthrightly revealed that they (i) were remotely created, (ii) drawn on customer accounts, (iii) based on contracts between GateGuard and the customers (and the checks expressly stating "DRAW PER CONTRACT. NO SIGNATURE REQUIRED"). The Government's central bank witness at trial confirmed that the checks were remotely created checks. A-384. They were not created to look like the customers' own checks, or to create a false impression that the customers had signed them.

Although the Indictment accused Teman of committing fraud by depositing "counterfeit" checks drawn on his customers' accounts, the court simply instructed the jury that Teman was charged with "creating, and then making the false pretense and representation to the bank that [Teman] had the account holders' authority to deposit [the] checks," A-1358-1359; A-1367; A-1210. And the jury convicted on that basis.

After the verdict, Teman made a Rule 29 motion to vacate the conviction on the basis that the Indictment was constructively amended at trial. Judge Engelmayer denied the motion. A-1937. He recognized that a constructive amendment occurs when "the trial evidence or jury instructions 'so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment.'" A-1956-1957 (quoting *United States v. Bastian*, 770 F.3d 212, 220 (2d Cir. 2014) (additional quotation omitted). However, he concluded that there was no constructive amendment because "the evidence at trial supported the core allegations in the Indictment (and later particulars) as to the dates, amounts, and payees of the checks, and that they had been drawn without customer authorization." A-1965.

II. STANDARD OF REVIEW

To establish a constructive amendment, a defendant must show that the trial evidence or jury instructions "so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." *United States v. Rigas*, 490 F.3d 208, 227 (2d Cir.2007) (internal quotation marks omitted). Even if an indictment might have been drawn in more general terms to encompass the ultimate conviction, where "only one particular kind of [criminal conduct] is charged . . . a conviction must rest on that charge and not another." *United States v. Zingaro*, 858 F.2d 94, 99 (2d

Cir.1988) (internal quotation marks omitted). Ultimately, whether an indictment has been constructively amended comes down to whether "the deviation between the facts alleged in the indictment and the proof [underlying the conviction] undercuts the constitutional requirements" of the Grand Jury Clause: allowing a defendant to prepare his defense and to avoid double jeopardy. *Rigas*, 490 F.3d at 228. *See United States v. Bastian*, 770 F.3d 212, 220–21 (2d Cir. 2014). The constructive amendment of an indictment is structural error and thus subject to *de novo* review. *See United States v. Dupre*, 462 F.3d 131, 140 (2d Cir. 2006) ("A constructive amendment of an indictment constitutes a *per se* violation of the Grand Jury Clause of the Fifth Amendment.").

III. LEGAL ARGUMENT

A. By Conflating Counterfeit Checks and Unauthorized Checks, The Court Constructively Amended the Indictment.

Here, Teman was charged with committing fraud through the use of "counterfeit checks." In holding that no constructive amendment had occurred, the district court relied on cases such as *United States v. Bastian*, 770 F.3d 212 92d Cir. 2014) and *United States v. D'Amelio*, 683 F.3d 412 (2d Cir. 2012) for the proposition that no constructive amendment occurs so long as a defendant "has notice of the core of criminality alleged by the Government, is not taken by surprise at trial, and is not prosecuted later for the same offense," and that the government is not restricted to the "specific means" charged in the indictment. A-1963-1964.[25]

What the court ignored is that here, as preceded by a "to wit" clause, the allegation that Teman committed fraud by depositing counterfeit checks was the *only detail* alleged in the Indictment. That is, without the "to wit" clause, all Teman would

[25] The allegation regarding the counterfeit checks was contained in "to wit" clauses in the indictment. *See* Indictment. A-121-122. Some unreported decisions from this Circuit have held that "to wit" clauses are not binding and are not a "per se" bar on a conviction based on other details. *See, e.g. United States v. Klein*, 216 F. App'x 84, 87 (2d Cir. 2007); *accord United States v. Little*, 828 F. App'x 34, 38 (2d Cir. 2020). However, those cases do not hold that a "to wit" clause which contains *the only details* of an offense may be ignored, and, significantly, other circuits have held that "to wit" clauses *do become an essential part of the indictment which must be proven*. *See, e.g., United States v. Leichtnam*, 948 F.2d 370, 379 (7th Cir. 1991); *United States v. Weissman*, 899 F.2d 1111, 1112 (11th Cir. 1990); *United States v. Bishop*, 469 F.3d 896, 903(10th Cir. 2006); *United States v. Chambers*, 408 F.3d 237, 241 (5th Cir. 2005).

have had notice of is that he was charged with committing bank fraud and wire fraud "in or about March 2019" and "in or about April 2019 up to and including at least in or about June 2019." *See* Indictment. A-121-122. Thus, the "to wit" clause which contains the charge that Teman obtained funds from his customers by depositing counterfeit checks is the *entire* "core of criminality" with which Teman was charged.

Similarly, the court ignored that once an indictment *does* specify the means by which the alleged crime was committed, a conviction may rest only upon those means and not any others. *See*, *e.g. United States v. Zingaro*, 858 F.2d 94, 99 (2d Cir. 1988); *accord United States v. Leichtnam*, 948 F.2d 370, 379 (7th Cir. 1991); *United States v. Farr*, 536 F.3d 1174, 1181 (10th Cir. 2008).

All charges upon which Teman was convicted rested on the indictment's allegations that he "deposited *counterfeit* checks." Whether the checks were counterfeit was not a peripheral issue but went to the essence of the charges. Counterfeit and unauthorized are distinct legal concepts. "Counterfeit, when used as an adjective - as it was in the indictment - has a clear and unambiguous meaning. Something is properly described as "counterfeit" when it is "made *in imitation of something else* with intent to deceive", that is "forged." Merriam Webster. Counterfeit and unauthorized are not synonymous. Indeed 18 U.S.C. § 1029 prescribes both the use of an "unauthorized" access device and the use of a "counterfeit" access device. This Court has held that these provisions are not

multiplicitous because "criminal use of a counterfeit device requires the forgery of a signature, while criminal use of an unauthorized device requires that the device be obtained in an improper manner." *See United States v. Gugino*, 860 F.2d 546, 550 (2d Cir. 1988). Thus, Teman proceeded with a defense that was premised on showing that the financial instruments he deposited were exactly what they purported to be—RCCs.

Although the government might not have been obligated to specify the type of instrument used to commit the alleged frauds, once it did so with its allegation of "counterfeit checks" it was bound to prove that type of instrument was in fact used—or amend the indictment. *See, e.g.*, *United States v. Stirone*, 361 U.S. 212, 218 (1960); *Zingaro*, 858 F.2d at 102-03 (reversing due to constructive amendment where defendant was convicted based on debt collection regarding loan not charged in indictment). By instead allowing the government to proceed against Teman and obtain a conviction on evidence that he deposited financial instruments which were exactly what they purported to be – RCCs – but were allegedly unauthorized, Judge Englemayer constructively amended the indictment and infringed Teman's Fifth Amendment rights. Accordingly, the convictions must be reversed.

POINT III
TEMAN DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL

Trial's counsel decision to call Ariel Reinitz as a defense witness was catastrophic and virtually guaranteed a conviction in a case where the jury could easily have voted to acquit. Reinitz was the only defense witness.[26]

I. FACTS

On direct examination, Reinitz testified that he had expressly advised Teman orally that his use of RCC's to collect payments due from Coney, 18 Mercer and ABJ was legal. A-1058:2-5. However, contemporaneously with his oral advice, Reinitz authored a series of inflammatory text messages. On April 2, Reinitz wrote that "hitting" ABJ's account "out of the blue" would create "50/50" risk ABJ would "call the cops." A-1876.[27] Reinitz warned Teman in a text message, "you will be arrested." A-1872.

Any reasonably competent attorney would have known that Reinitz' text messages – none of which would have been available to the government but for counsel's decision to advance the advice of counsel defense and which were not

[26] By calling Reinitz, counsel waived attorney-client privilege with respect to Teman's oral and written communications at issue, including the text messages discussed below.

[27] As noted above, Teman in fact invoiced ABJ for amounts due well in advance of his deposit of the RCC's. *See supra* at 20.

necessary to establish Teman's good faith – would deal a death blow to the defense. The text messages placed Reinitz' explosive and unforgettable language front and center of an otherwise weak prosecution case, in which the Government did not present any evidence of contract terms that would have prohibited the use of RCC's to collect customer debts and key witnesses did not know or could not recall whether they had reviewed payment terms authorizing the use of RCC's of which they were on at the very least constructive notice.

Calling Reinitz completely undermined Teman's defense. Whatever arguments Teman had intended to make were destroyed by Reinitiz' text messages, in an inevitable cross-examination slaughter. The prosecution had to do no more than put up on the screen for the jury the simple exchanges between Teman and Reinitz – language that stood in stark contrast to the Government's confusing and in spots incomprehensible case, such as its use of the BOA account spreadsheet – and get Reinitz to confirm the words he used.

> MR. BHATIA: I would like to go back to the Elmo device.
> Q. This is Government Exhibit 704 up here.
> You wrote that: "If you are hitting their accounts Out of the blue, ***I expect this will become a criminal matter*** sooner or later." That's what you told Mr. Teman, right?
> A. That's what I wrote, yes.

A-963:15-22; A-1875 (emphasis added).

And again:

> MR. BHATTIA: He's referencing a contract when he's talking to you?
> A: Yes.
> Q: Any you say, a few lines down***, because they are likely to call the police***.
> Those are your words, right?
> A: Yup.
> Q: You told him you thought customers were likely to call the police?
> A: Yes.
> Q: ***And you said: And you will be arrested***. Right?
> A: Mm-hmm. Yes.

A-1032:13-24; A-1872 (emphasis added).

Even on a cold, appellate record, the "bombshell" nature of the text messages and the electric effect they produced on the jury can be felt. The case was effectively over. Teman was relying on someone who told him he would likely be arrested and face criminal charges. A first-year law student could have seen that the defense would not be able to overcome the toxic effect of the text messages.

II. STANDARD OF REVIEW

The Court reviews ineffective assistance claims *de novo*. *United States v. Kaid*, 502 F.3d 43, 45 (2d Cir. 2007). As a rule, "To succeed on an ineffective assistance claim, a defendant must demonstrate, first, that in light of all the circumstances, the acts or omissions of trial counsel were outside the wide range of professionally competent assistance and, second, that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *United States v. Nolan*, 956 F.3d 71, 79 (2d Cir. 2020) (citing *Strickland v. Washington*, 466 U.S. 668, 690, 694 (1984) (internal quotation

marks omitted). Moreover, even a single error by counsel can result in a finding of ineffectiveness. *See Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986).

III. LEGAL ARGUMENT

It is hard to imagine how counsel could have called Reinitz without recognizing that the jury would view the texts as proof-positive of criminal intent. Reinitz's testimony largely relied on oral advice he stated he had given Teman and there was no clear written legal opinion the defense could walk through Reinitz. To the contrary, disaster was inevitable, as the documents sounded a shrill alarm that the police would likely come and arrest Teman for depositing the RCC's. Counsel could have done no worse had he introduced his client's confessional.

A. Trial Counsel's Decisions Were Outside the Range of Professionally Competent Assistance.

Counsel's unjustifiable decision to call Reinitz as a defense witness, and thereby cause the introduction of harmful evidence that would otherwise been shielded from the jury, is a classic form of ineffectiveness that has led courts to overturn convictions. *See Wilson v. Mazzuca*, 570 F.3d 490, 505 (2d Cir. 2009) (finding counsel ineffective for calling witness that opened the door to the inevitable introduction of devastating evidence); *Rickman v. Bell*, 131 F.3d 1150, 1159 (6th Cir. 1997) (granting habeas where "the most damaging images of Rickman came from his own attorney," who effectively functioned as a "second prosecutor"); *Swaby v.*

People, No. 06-CV-3845 ENV, 2014 WL 1347204, at *13 (E.D.N.Y. Mar. 31, 2014) (counsel's "inquiry of [his own witness] cannot be seen as anything other than a significant blunder" where it opened the door to damning evidence); *State v. Saunders*, 958 P.2d 364, 367 (Wash. Ct. App. 1998) (finding ineffectiveness on direct appeal where counsel elicited otherwise inadmissible and damaging testimony).[28]

In sum, the trial record firmly established that "the acts . . . of trial counsel were outside the wide range of professionally competent assistance," *Nolan*, 956 F.3d at 79, and thus counsel here denied Teman his constitutional right to effective representation.[29]

[28] Moreover, Judge Englemayer knew that Teman was suffering from a grave mental illness, which prevented a meaningful allocution as to whether Teman understood the consequences of calling Reinitz as a witness. *See* A137.2-137.4.

[29] In granting bail pending appeal, Judge Engelmayer necessarily found that Teman had raised a substantial question on *Strickland*'s performance prong. Although he signaled that *he* might be disinclined to vacate the conviction, he recognized that "*another judge* could look at the decision to call a lawyer, knowing that those text messages would sail in, as beneath a standard of professional competence and producing error." A-2449 (emphasis added).

B. Counsel's Ineffectiveness Prejudiced Teman

1. Reinitz' testimony was toxic evidence virtually assuring a conviction.

Given the evidence of Teman's good faith that counsel had established in cross-examining the government's witnesses, the fundamentally commercial and civil nature of the dispute between Teman and his customers, the Government's reliance on witnesses who "could not recall" or deliberately chose not to review payment terms that expressly authorized the RCC's at issue, and the government's confused, meandering case that was virtually impossible to follow in key spots, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Nolan*, 956 F.3d 71 at 79.

Until counsel called Reinitz to testify, the jury could have found reasonable doubt that Teman was guilty of fraud based on, among other things, evidence (i) Teman was transparent in his dealings with BOA, using his regular branch and accounts; (ii) the RCC's provided sufficient information to allow both the depository and payor banks to confirm that they were authorized; (iii) Teman repeatedly directed his clients to review GateGuard's Terms and Conditions, which, in fact, they commented on and even negotiated by red-lining; (iv) Teman attempted to resolve fee disputes before he deposited the RCC's; (v) the customers had a strong incentive to deny authorization so they could claw back the funds from their banks; (vi) relatedly, one of the customers who paid a GateGuard invoice failed to appear

at trial and provided a false affidavit stating he was unfamiliar with GateGuard; (vii) the customers' credibility was sharply contested at trial; (viii) Teman invoiced his clients for amounts due before using RCCs; (ix) Teman repeatedly warned his customers about their liability for fees; and (x) the Government produced no evidence that contradicted Teman's right to use RCC's to collect customer debts.

Reinitz's testimony gutted the defense case. As Judge Engelmayer aptly noted, Reinitz was "an extremely important witness." A-969. Not surprisingly, the government was on-board with that characterization, and exploited Reinitz's testimony to its full advantage. In his initial summation, the prosecutor referenced Reinitz 24 times—on eight of the 34 transcript pages, hammering away at Reinitz' damaging text messages. *See, e.g.*, A-1137-1143. To sear the Reinitz text messages into the jury's minds, the PowerPoint presentation that accompanied the summation concluded with six consecutive slides displaying Reinitz's explosive text messages blown up on the screen for dramatic effect. A-1429-A1434.

On his rebuttal summation, the prosecutor went all-in. He referred to Reinitz on *every page* of the transcript. *And he did not mention any other witness*. The prosecutor also told the jury that Reinitz was "by far[] the least credible witness you heard from during this trial"; a witness who "got paid from the defendant's fraud scheme" and who was "essentially a member of the defense" team. Finally, the jury requested a readback of Reinitz's entire testimony (it only asked for a readback of

one other witness's testimony and, as noted, it decided not to review BOA's more complicated numbers). Evidently, it, too, viewed Reinitz's testimony as critical, if not dispositive.

Counsel's decision to call Reinitz as a defense witness transcended unsound strategy—it was inexplicably misconceived and disastrously executed. Had the defense stopped when the government rested, the jury may well have acquitted. By calling Reinitz, however, counsel all but assured a conviction. For that reason, counsel was ineffective, and the conviction should be set aside.

POINT IV
TEMAN'S CONVICTIONS MUST BE REVERSED BECAUSE OF REPEATED, FUNDAMENTAL VIOLATIONS OF HIS DUE PROCESS RIGHTS.

Under the Constitution, a criminal defendant has a right to fundamental guarantees of due process that include the right to trial by an impartial tribunal, free of prosecutorial misconduct, with jury instructions that permit conviction or acquittal based on the actual conduct of defendant. Error in any one of these areas provides a basis for reversal, but where, as here, there was error on all these fronts, Teman's conviction must be reversed.

I. JUDGE ENGLEMAYER HAD A DUTY TO RECUSE HIMSELF BECAUSE OF HIS SUBSTANTIAL INTEREST IN BOA.

A. Facts

On May 5, 2020, ostensibly in response to Teman's post-trial filings, the trial court disclosed for the first time its indirect interest in BOA stock through its ownership of stock of Berkshire Hathaway, over 10% of whose holdings are in BOA. *See supra* at 26. Judge Englemayer did not disclose at this time, or any other time during the proceedings, the extent of his interest in BOA, which is very substantial.[30] This Court can take judicial notice that in connection with his confirmation to the Southern District of New York in 2011, Judge Englemayer disclosed beneficial family ownership of $5.2 million in Berkshire Hathaway stock.[31] Berkshire Hathaway's value has increased substantially since 2011 and the Court's most recent available financial disclosure lists Berkshire Hathaway holdings in a range of $5-

[30] The relative weight of BOA in the Berkshire Hathaway portfolio appears to have remained constant. In recusing himself from *In re Interest Swaps Antitrust Litigation*, 16-MD-2704, *Dkt. 884, see infra* at 58, Judge Englemayer stated that his decision was triggered by BOA crossing a 10% threshold in the Berkshire Hathaway portfolio. The most recently available public information indicates that BOA constitutes approximately 11% of the Berkshire Hathaway portfolio. https://www.cnbc.com/berkshire-hathaway-portfolio/.

[31] https://legaltimes.typepad.com/blt/2011/02/new-york-judicial-nominees-report-income.html.

$25 million.[32] From 2011, Berkshire Hathaway stock had increased by nearly 300% by trial and nearly 400% by sentencing.[33] BOA stock during this period followed a similar trajectory. *See* https://finance.yahoo.com/quote/BAC/. Judge Englemayer's interest thus had a value during the relevant period in excess of $1.5 million and likely in excess of $2 million. In absolute terms, these are very substantial numbers.

After the trial was over, Teman's new counsel filed a motion for dismissal based on proposed expert testimony countering Finnochiaro's conclusions that BOA could not reach the accounts of GateGuard affiliates to limit its losses. A-2208. In response, Judge Englemayer finally disclosed that he had an interest in BOA. A-2223. Judge Englemayer asserted that this belated disclosure was made "in an excess of caution" because the defense had put at issue whether BOA would be entitled to restitution. *Id.* In finding that he was not subject to a conflict of interest that would require recusal, Judge Englemayer cited to *United States v. Ravitch*, 421 F.2d 1196, 1205 (2d Cir. 1970), a case involving a *de minimis* stock holding, but failed to reference *Chase Manhattan Bank v. Affiliated FM Ins. Co.*, 343 F.3d 120, 127 (2d Cir. 2003), a case in which the trial judge had a substantial interest in a subject bank involving an amount far less than Judge Englemayer's multi-million dollar interest.

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[32] https://www.courtlistener.com/person/997/disclosure/29788/paul-adam-engelmayer/.

[33] https://finance.yahoo.com/quote/BRK-A?p=BRK-A&.tsrc=fin-srch

Judge Englemayer also failed to specify that he knew the government would likely be seeking restitution for BOA before the trial began, *see* A-96.20, A-157, or that the government formally declared BOA the victim on the second day of trial. A-662:18 (the "victim here is Bank of America"). Of course, Judge Englemayer knew that restitution for BOA in the event of a conviction was mandatory. *See United States v. Gushlak*, 728 F.3d 184, 190 (2d Cir. 2013)

B. Standard of Review

The Second Circuit reviews a district court's decision to deny a recusal motion for abuse of discretion, *LoCascio v. United States*, 473 F.3d 493, 495 (2d Cir. 2007). However, when a judge has a substantial interest in an alleged victim of a crime, recusal is required.

The Due Process Clause of the Fourteenth Amendment "establishes a constitutional floor, not a uniform standard . . . But the floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v. Gramley*, 520 U.S. 899, 904–05 (1997).

The Committee on Codes of Conduct of the Judicial Conference of the United States [the "Judicial Code of Conduct"], Advisory Opinion No. 57 (December 2017) (the "Advisory Opinion") states:

> Canon 3C(1) of the Code of Conduct for United States Judges provides that: (1) A judge ***shall disqualify*** *himself* [if] (c) *the judge* knows that the judge,

> individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, *has a financial interest in the subject matter in controversy* or in a party to the proceeding, *or any other interest that could be affected substantially by the outcome* of the proceeding (emphasis added).

Under Canon 3C(3)(c), Judge Englemayer has a "financial interest" in BOA, as he recognized in recusing himself from *In re Interest Swaps Antitrust Litigation*, 16-MD-2704.[34]

The Second Circuit has elaborated on the principles that govern the recusal of a judge who has a financial interest in the victim of a crime:

> Thus, in assessing whether a judge's interest in a victim calls for recusal, there are three critical analytical factors: (1) the substantiality of the judge's interest; (2) the amount of restitution to be awarded; and (3) any other facts that would bear on the substantiality of the interest, such as the effect of a guilty verdict on the interests of the victim. The core inquiry is whether the judge's "impartiality might reasonably be questioned." *28 U.S.C. § 455(a)10.*

United States v. Lovaglia, 954 F.2d 811, 815 (2d Cir.1992).

Here, there is no doubt that Judge Englemayer's undisclosed multi-million-dollar interest in BOA requires reversal for a new trial before an impartial judge.[35]

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[34] Discussed *infra* at 58.

[35] Another SDNY Judge, Andrew Carter, recently recused himself from *U.S. v. Hwang*, 22-cr-240 because of his ownership of stock in JP Morgan, one of the victims in the case. *See* https://www.law360.com/articles/1495230/archegos-judge-backs-out-over-jpmorgan-stock-holdings (quoting Judge Carter as saying, "It's seems to me I need to recuse. I own JP Morgan stock.").

C. Argument

1. BOA was the only alleged economic victim in the case, and, in a substantive sense, the real party in interest.

By the first day of trial, when the Court had heard testimony about the chargebacks to BOA and the loss suffered by BOA, Judge Englemayer was plainly aware that BOA was the alleged bank fraud victim to whom restitution would need to be paid in the event of a guilty verdict. A-662, A-663. Moreover, it was clear BOA *was the only party* that had suffered a loss. *See supra* at 23. *All* the other parties had been made whole, Teman's customers through their banks, Signature and JP Morgan through BOA. Only BOA was left with any out-of-pocket loss and only these losses were considered in assessing restitution, forfeiture, and jail time. Thus, in a fundamental economic sense, the trial was conducted and penalties assessed *for the benefit of BOA*, and BOA alone. In the event of a conviction, BOA would not only obtain restitution of funds it would otherwise need to expend its own resources to recover in civil court; it would also establish the principle of using the resources of the Department of Justice to externalize chargeback collection costs, with potentially enormous savings.[36] The substantiality of Judge

[36] The Court can take judicial notice that in a recent year, chargebacks cost banks approximately $31 billion. https://www.finextra.com/pressarticle/73874/consumer-disputes-and-chargebacks-created-31-billion-in-financial-losses-in-2017

Englemayer's interest needs to be weighed *qualitatively* against the importance of the trial to the portfolio company in which he owned an interest.

2. The size of Judge Englemayer's interest in BOA is substantial.

Judge Englemayer's interest in BOA was substantial for a separate, *quantitative reason*. Judge Englemayer's interest in BOA *is over 100 times as large* as the interest at issue in *Ravitch*, making the reference to *Ravitch* misleading and unpersuasive. In *Ravitch*, the Second Circuit upheld a trial judge's refusal to recuse himself where his ownership of $10,000-$15,000 worth of shares representing .0072% of the bank's shares did not amount to a "substantial interest" 28 U.S.C. § 455. The facts could not be more different here.

In fact, Judge Englemayer's interest in BOA is almost *10 times the size* of Judge Pollack's bank stock ownership in *Chase Manhattan*, where this Court rightly expressed concern about the appearance of partiality. As the Court stated, "we are equally confident that Congress was right in apprehending that a headline (accurately) stating that the judge had entered a $92 million judgment to be shared by a corporation in which he owned $250,000 of stock would damage public confidence in the judiciary." *Chase Manhattan*, 343 F.3d at 129. Here a headline stating that the judge had entered a *quarter of a million-dollar* restitution judgment to benefit a bank in which he held an interest worth nearly *ten times* the amount of the bank's loss would equally damage public confidence in the judiciary.

The key question in all recusal cases is whether a reasonable person fully aware of all relevant facts would believe there was bias or the appearance of bias. Defendants – and the judicial system as a whole – need a trial free from even the appearance of partiality. *Chase Manhattan Bank v. Affiliated FM Ins. Co.*, 343 F.3d 120, 127 (2d Cir. 2003) (appearance of partiality requires "objective" evaluation and disqualification of judge and reversal of all decisions taken after conflict became apparent).

3. Judge Englemayer's disclosure was untimely and inadequate.

Perhaps the most troubling aspect of Judge Englemayer's approach was the timing and nature of his disclosures. It was evident from well before the trial began that BOA was the real economic victim alleged in the case. A-96.20. Moreover, Judge Englemayer's had just recused himself in another case involving BOA. In that case, *In re Interest Swaps Antitrust Litigation*, 16-MD-2704, Dkt. 844, Judge Englemayer stated that he had consulted with the Committee on Codes of Conduct of the Judicial Conference of the United States and had concluded that because BOA had crossed the 10% threshold in the Berkshire Hathaway portfolio, his "impartiality in supervising the case could otherwise reasonably be questioned." As a result, it was with "great regret" that Judge Englemayer recused himself from the case.

Yet in the Teman matter, coming shortly after his "careful consideration" of the conflict posed by his interest in BOA, he was presiding over a criminal case in which BOA was not simply one party among many, but the *only* economic victim—and yet he did not even raise the issue with the defense until *17 months after* the trial had concluded. Judge Englemayer claimed to have waited this long on the grounds that Teman was only then challenging BOA's right to restitution. A-2223. But it is obvious that Judge Englemayer had the exact same duty to disclose his interest in BOA at the beginning of the trial as he did 17 months later. Potential conflicts with respect to BOA were of clear concern to the defense, as evidenced in their proposed questions for jury *voir dire*, notably the following question: "Does any member of the panel have any ownership (for example, stock) in any bank or financial institution such as Bank of America?" A-135. It defies logic and common sense to believe that a potential juror with a financial interest in BOA would be unable to fairly sit in judgment over Teman, while the presiding judge could hold a multi-million-dollar interest in the same bank without conflict.

Moreover, failing to provide a defendant with an opportunity to object to a judge's potential conflict constitutes a violation of defendant's due process rights that requires reversal. *Evitts v. Lucey*, 469 U.S. 387, 402 (1985) (failure to provide adequate opportunity to present claims violates due process); *see also Church v. Sullivan*, 942 F.2d 1501, 1512 (10th Cir. 1991) (failure to apprise defendant of

conflict before trial requires remand). And when Judge Englemayer did finally disclose his interest, he failed to provide any indication of the magnitude of the interest, instead suggesting misleadingly that the interest was *de minimis* when it was in fact amounted to several millions of dollars. The substantiality of Judge Englemayer's interest and his failure to provide the defense with a timely and meaningful opportunity to object to his potential conflict require reversal.

II. JUDGE ENGLEMAYER DISPLAYED IMPERMISSIBLE BIAS AGAINST TEMAN.

A. Facts.

Throughout the trial, Judge Englemayer made numerous adverse decisions that were devastating to Teman's fundamental rights. *First*, As discussed, Judge Englemayer failed to raise a conflict of interest with BOA until well over a year after the trial had concluded, depriving Teman of the opportunity to be tried before an impartial tribunal.

Second, Judge Englemayer did not apply the law equally to the prosecution and the defense. Judge Englemayer intervened *sua sponte* during the defense cross-examination of Soleimani to prohibit the defense from introducing an email establishing that Soleimani had been explicitly directed to the Terms and Conditions and Payment Terms authorizing the use of RCC's to cover a device removal fee because the defense did not have the invoice referred to in the email. A-743. Yet Judge Englemayer permitted the Government to introduce the GateGuard Terms and

Conditions without introducing the explicitly referenced Payment Terms going to the heart of the case and that the Government should have been required to produce as part of its affirmative case—Teman's right to use RCC's to cover an $18,000 device removal fee. During the Reinitz cross-examination, Judge Englemayer repeatedly intervened to "control" the witness for the prosecution, demanding the Reinitz give yes/no answers. *See, e.g.*, A-930 ("it's a yes or no question"). Yet when a government witness rambled evasively on cross-examination and the defense attempted to limit her answers, Judge Englemayer sharply intervened "let the witness finish," leaving no doubt in the jury's mind that the judge had picked a side in the trial. A-587:20. When the defense sought to introduce expert testimony on the validity of RCC's, Judge Englemayer dismissed the request on the grounds expert testimony would "confuse the jury." A-173.39. But when the Government expanded Finnochiaro's testimony far beyond the fact testimony for which she was called as a witness, to present a legal conclusion as to the bank's rights of "set-off" and the network routing protocol of mobile devices connecting to the BOA servers, Judge Englemayer overruled all objections. A-137.35, A-2303. At the conclusion of the trial, Judge Englemayer listened silently as the prosecution in summation repeated over and over that the checks at issue were "fake" after refusing to allow the defense to introduce expert testimony as to genuineness of Teman's RCC's. A-137.39; A-137.41.

Third, Judge Englemayer failed to conduct a *Curcio* hearing affecting Teman's constitutional rights in a timely manner. On November 1, 2020, Noam Biale and Justine Harris of the Sher Tremonte firm entered an appearance and immediately filed a motion for additional discovery. A-2108.1, A-2108.2. The motion referenced communications between the Government and Sher Tremonte that had been ongoing for some time. A-2108.4. Yet Judge Englemayer did not raise any issue with Teman's representation by Biale in considering and then *ruling against* Teman on the motion. A-2109. However, *after* he had decided the motion, on December 1, 2020, during a remote sentencing conference, Judge Englemayer disclosed that he knew well both Mr. Biale, and Mr. Biale's wife, Ms. Graham, who worked in the United States Attorney's office for the Southern District. A-2132-2133. Judge Englemayer stated on the record that ensuring a defendant had non-conflicted counsel *before* any decisions were taken against him was "pivotally important" under *United States v. Curcio*, 680 F.2d 881, 888-890 (2d Cir. 1982). A-2138. The Court appeared to ignore the fact it had *already* ruled on a motion by conflicted counsel. A-2109. Moreover, Teman's thoughts, suggestions and knowledge of the case had *already* been shared with conflicted counsel and had already been placed at unacceptable risk of passing to counsel's spouse – with whom counsel was working together at home during the height of the Covid pandemic – and her colleagues seeking to put Teman in prison. The bell that had been rung could

not be un-rung. The Court's failure to allocute Teman in a timely manner infected all the subsequent post-trial proceedings during which Teman repeatedly attempted to demonstrate the need for a new trial based on theories and strategies that may well have passed to the Government improperly before Teman knew his own lawyer was, quite literally, married to the prosecution.

Fourth, Judge Englemayer communicated *ex parte* with the Chief of the General Crimes Unit at U.S. Attorney's office for the Southern District, a position Judge Englemayer had held from 1996-2000. A-137.5.[37] At some point before trial began, Judge Englemayer asked his contact at the U.S. Attorney's office to review the transcripts from the previous conferences to make sure there was "adequate supervision," a practice Judge Englemayer stated he followed "from time to time" when he had concerns about the Government's lawyers. *Id.* But this type of intervention is *never* permissible. *See United States v. Barnwell*, 477 F.3d 844, 850 (6th Cir. 2007) (*ex parte* communication between the prosecution and the trial judge can only be justified and allowed by *compelling* state interest). Even Judge Englemayer appeared uneasy, because he sealed the portion of the transcript relating to the *ex parte* transaction. A-137.5

[37] The Court can take judicial notice of Judge Englemayer's publicly available biography. https://en.wikipedia.org/wiki/Paul_A._Engelmayer.

Courts have found that matters of national security, *see, e.g.*, *United States v. Yunis*, 867 F.2d 617, 620 (D.C. Cir. 1989), or the safety of witnesses or jurors, *see United States v. Napue*, 834 F.2d 1311, 1316–18 (7th Cir. 1987), may constitute a "compelling state interest." But intervening to ensure the government has the committed the resources, whether in numbers of lawyers or level of experience, necessary to convict a defendant or protect a financial institution is *never* a compelling state interest to be invoked by a judge meant to stand above the fray. Judge Englemayer's subsequent disclosure of the *ex parte* call in his robing room where defense counsel were caught off guard does not remedy Judge Englemayer impermissibly putting his thumb on the scales of justice.

As troubling as all the above examples are, there was also something more, something deeper, a personal animus against Teman himself that colored the Judge's thinking and turned the proceedings into a show trial or a morality play, rather than a forum for a sober, unbiased assessment of guilt or innocence. This something more has to do with Teman's Jewish faith, a theme to which the court returned again and again throughout the proceedings, both during the trial and afterwards. As noted above, Teman had stated in frustration to Gabay that he would put a lien on one of Coney's properties on Pesach (Passover). *See supra* at 9. Teman also deposited 27 of the checks at issue on the eve of Passover. *See supra* at 20. These actions appear to have shocked Judge Englemayer even though they were irrelevant to the charges

against Teman. As to the Pesach comment, there was no evidence that Teman carried out the threat and, even if he had, the incident long pre-dated the indictment and had no bearing on the bank fraud charges against Teman. As to the Depositing of checks on the eve of Passover, this was a business day like any other Friday and a seven-day hold was placed on the checks in any event. Moreover, the first two days of Passover that year – when Orthodox Jews do not use electronic devices – were weekend days when banks were closed, so *there could not possibly* have been any special hardship imposed on observant Jews. In fact, Soleimani testified that he did not notice the debits to his account until well into the week *after the last day* of Passover, on May 2 (the last day of Passover that year being April 26, 2019). A-754:4. Gabay never even saw the checks in question, because the relevant bank account had been closed by then, and he stated he never discussed religious matters with Teman. *See* A-505:1-6. And yet Judge Englemayer refers to the Passover incident over and over, citing it *specifically as evidence of fraud* and justification for the imposition of a harsh sentence. Judge Englemayer even suggests to the prosecution a line of argument that would feature prominently in the prosecution's summation:

> But is there some way that Mr. Teman's
> dealing with the customers here facilitates the fraud?
> understand that he makes a decision to time this for Pesach
> [Passover]; *and that he says, basically**, **at various points**, I'm going to do X, Y, Z on Pesach*.

A-855:14-18 (emphasis added).

However, there was no evidence that Teman says, "*at various points,*" that he was "going to do" "x,y,z" on Pesach.[38] He made this comment *once,* in a context *unrelated* to the bank fraud allegations. Having suggested a false line of attack on Teman, Judge Englemayer then allowed the prosecution to inflame the jury with an appeal to religious passion (and prejudice), suggesting the timing of Teman's check deposit on the eve of Passover was proof of fraudulent intent. *See infra* at 76-78. Judge Englemayer even expands upon and further distorts Teman's actions, taking as a fact that Teman had intentionally used the eve of Passover to harm his clients:

> In addition, as noted, Teman acted to delay the bank in contacting the Customers and learning they disavowed the checks and the debts that they purported to cover. He did so by depositing the large checks on the Friday of Passover, when the representatives of 518 West 204 LLC and ABJ—on whose accounts the checks were drawn—would not be reachable.

A-1979.

Judge Englemayer deliberately distorts the facts by stating that Teman's Jewish clients "would not be reachable on the Friday of Passover." This was false, as the "Friday of Passover" would have been the following Friday and the Friday *before* Passover was a business day like any other until sundown when Passover began. Judge Englemayer then states the checks were deliberately deposited "over

[38] Contrast the loose inferences from an isolated instance of prior conduct with no bearing on fraud, *supra* at 9, to the Judge's extreme solicitousness towards the prosecution in keeping out potentially damning character evidence from Soleimani's conduct as a landlord. A-164-A-167, A-2109.

the Passover weekend." A-1977. In fact, as just noted, the checks were deposited on the Friday *before the Passover weekend* began when all Jews, however observant, are free to consult electronic devices and transact business.

At sentencing, Judge Englemeyer adopted an even more extreme and counterfactual Passover narrative:

> Mr. Teman, after all, had effectively announced to one of his religiously observant customers that he intended to move quickly to foil any attempt to block the deposits. *Mr. Teman stated that he would deposit checks on the eve of Passover when the customer would be disabled from learning about the deposits* and acting to promptly stop them. *Particularly, in light of this evidence,* it was fair comment to argue that Mr. Teman's decision to move funds quickly out of the GateGuard account after they had cleared was strategic and canny and that *it bespoke an intention on his part to assure that he got away with the deposits that he knew were improper*.

A-2302:21-25, A:2303:1-7 (emphasis added).

Unfortunately, this is a complete fabrication. Teman <u>*never stated*</u>, nor was there any testimony or evidence as to any such statement, that he would deposit checks on the eve of Passover. Yet Judge Englemayer doubles down and repeats the same falsehood at Teman's sentencing hearing (in front of family and friends participating by audio conference link).

> *As you yourself admitted, you timed the deposit of certain checks for when you knew* that your religiously observant customer would be observing Passover and thus not reachable. *You were explicit about that in your e-mails*. You took advantage of other people's religious faith, their devotion to Judaism and timed your scheme around it.

A-2404:4-9.

It is utterly false that Teman "admitted" that he timed the deposits of RCCs to interfere with religious Jews' Passover practices and that he was "explicit about this in his emails." There is *no evidence whatsoever for these comments*, which served to justify a finding that Teman intended to defraud his Jewish customers, that he was a criminal. Only a judge with an extreme and inexcusable animus against a defendant could have permitted himself to fabricate, over and over, incriminating statements out of whole cloth.

B. Standard of Review

Judicial bias constitutes "structural error." S*ee Arizona v. Fulminante*, 499 U.S. 279, 309 (1991); *Sullivan v. Louisiana*, 508 U.S. 275, 283 (1993). With structural error, prejudice is presumed and review is *de novo*. *Holland v. Irvin*, 45 F. App'x 17, 19 (2d Cir. 2002).

C. Legal Argument

Judge Englemayer's Passover comments – through which the district court mischaracterizes the record and fabricates statements in support of a false, religiously-based theory of criminality – are so far removed from the impartiality demanded of a judge that they cast doubt on the fairness of the entire trial and require reversal and remand for a new trial before a new judge. As the Supreme Court has put it:

> Thus, judicial remarks during the course of a trial . . .ordinarily do not support a bias or partiality challenge. [But] . . . *they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.*

Liteky v. United States, 510 U.S. 540, 555–56 (1994) (emphasis added).

Ex parte communications by the judge are also *per se* grounds for reversal. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 462 (1978) (*ex parte* colloquy with jury foreman justifies reversal). Courts have found that *ex parte* communications between judges and prosecutors constitute grounds for reversal. *U.S. v. Barnwell*, 477 F.3d 844, 2007 FED App. 0081P (6th Cir. 2007) (*ex parte* communications between prosecutor and trial judge during jury's deliberation violated defendant's right to due process, effective assistance of counsel, and trial by an impartial judge and jury); *Yohn v. Love*, 76 F.3d 508 (3d Cir. 1996) (habeas writ granted for mid-trial *ex parte* conversation between prosecutor and Chief Justice of State Supreme Court concerning admissibility of evidence); *U.S. v. Martinez*, 667 F.2d 886 (10th Cir. 1981) (private meeting between prosecutor and judge to devise strategy to force a mistrial condemned, and retrial barred by double jeopardy). Here, the judge was concerned about the adequacy of the prosecution team and called the U.S. attorney's office to make sure there was "adequate supervision." A-137.5. Judge Englemayer was effectively picking sides and acting impermissibly to bring in "reinforcements" to convict Teman.

Further, the Court's failure to conduct a *Curcio* hearing in a timely manner, *Cuyler v. Sullivan*, 446 U.S. 335 (1980) "*mandates* a reversal when the trial court has failed to make an inquiry even though it knows or reasonably should know that a particular conflict exists." *Wood v. Georgia*, 450 U.S. 261, 273 and Note 18 (1981) (internal quotations omitted).

Finally, while adverse rulings generally cannot serve as a basis for a finding of judicial bias, their cumulative effect can show that "the defense cannot obtain a fair trial and reversal is required," *Liteky*, 510 U.S. at 555, particularly when combined with the court's failure to raise conflicts of interest fully and fairly in a timely fashion, its reliance on *ex parte* communications to advance the interests of the prosecution, and the demonstration of a "high degree of favoritism or antagonism" in the fabrication of admissions falsely attributed to the defendant in service of a theory of moral culpability rooted not in the law, but in flawed assumptions about religious faith and practice.

III. THE GOVERNMENT'S TACTICS REPEATEDLY CROSSED THE LINE INTO PROSECUTORIAL MISCONDUCT

A. Standard of Review

Prosecutorial misconduct as to which no objection is made at trial is subject to plain error review. *United States v. Young*, 470 U.S. 1, 14-20, (1985); *United States v. Torres*, 845 F.2d 1165, 1172 (2d Cir.1988); Fed. R. Crim. Pro. Rule 52(b).

B. Legal Argument

1. The prosecution sought to sandbag the defense and score a "win" by gamesmanship.

From the beginning, the prosecution operated by "trial by ambush," using gamesmanship to secure tactical advantages, treating the judicial process as a combat to be "won," rather than a way for justice to be served, seizing Teman's RCC check stock to signal a classic "counterfeiting" and identity theft case, then dropping the identity theft charges and changing theories of liability without amending the indictment. On the eve of trial, the prosecution buried the out-of-town defense team with nearly 5,000 pages of documents, making it virtually impossible for the defense to prepare adequately. A-146. The Government then relied on a materially false affidavit of an unavailable declarant to bolster its case with respect to 508 W. 214 LLC, the focus of its summation.[39] The Government then deliberately withheld the

[39] Having prepared Gabay for trial as one its witnesses, the Government knew the Hass affidavit was materially false. *See supra* at 8 and Note 2, 49-50. Introducing this affidavit, which gave the jury additional ammunition for a finding of unanimity with respect to the Coney/518 W. 204 relationship, constituted a fundamental violation of due process. *Napue v. People of State of Ill.*, 360 U.S. 264, 269 (1959); *U. S. ex rel. Washington v. Vincent*, 525 F.2d 262, 267 (2d Cir. 1975); *Drake v. Portuondo*, 553 F.3d 230, 241 (2d Cir. 2009) (conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury).

existence of a personal reserve account that would have further reduced BOA's alleged losses until the eve of sentencing. A-2432.[40]

But even with this sandbagging approach, the Government produced reams of materials that were incomprehensible to the jury, *see* GX113, and failed to produce highly relevant evidence apparent from the face of the government's production, including (1) correspondence about Crystal and Academy's request for an indemnification if the GateGuard devices were removed in violation of the Terms and Conditions and Payment Terms, *supra* at 15; (2) Soleimani's and Teman's communications about the order for 60-additional second generation intercoms, *supra* at 20 and Note 10; (3) Soon-Osberger's relevant email exchanges with Teman on the issue of notice of GateGuard's contractual rights, *see supra* at 14 and Note 8; (4) BOA's communications with Teman about access to the funds in his personal, Friend or Fraud and Touchless accounts, *supra* at 23; or (5) correspondence with BOA relating to GateGuard's negative balance following the March chargebacks, and whether these chargebacks were treated as ordinary overdrafts or potential criminal violations.

[40] Judge Englemayer characterized the issue as one involving whether Finnochiaro has wrongly testified about the bank's ability to reach these personal funds. *Id.* In fact, however, the Government did not elicit *any* information from Finnochiaro as to the personal account, other than the false statement that BOA could not reach *any* of Teman's funds to reduce its loss.

Then, for its first witness, the prosecution presented Finocchiaro as a mere records custodian, but used her to present expert testimony on the bank's legal rights and on the technical inferences to be drawn from the IP address associated with a mobile deposit. *See supra* at 29-30. As if this were not enough, after the arrival of Teman's second set of post-trial counsel, who intended to offer the testimony of a banking expert, Professor Richard Fraher, to testify that Finocchiaro had provided improper and false expert testimony, requiring dismissal of the case against Teman, the prosecution violated its duty of candor to the tribunal. Fraher tendered an affidavit in which he affirmed that, although a "set off" was not technically available to mitigate the bank's loss:

> *The bank could have simply seized and kept the funds* [in Teman's other accounts] and risked that the negatively impacted accountholders might take legal action to recover the funds from the bank. *The bank's actions in these situations would not be limited by the principle of mutuality* of obligation *that limits the scope of the bank's right to set off*.

A-2231-A-2232 (emphasis added).

Rather than attempt to reconcile this analysis with the testimony of Finnochiaro that BOA was categorically *not* able to recover funds from the three accounts in question by *any* means, A-373:2-4, the Government simply omitted the relevant analysis and falsely claimed that Fraher's opinion was limited to the statement that set-off was not available. Judge Englemayer followed the prosecution's argument almost to the letter, ignoring Fraher's conclusions that the

bank had remedies that were not limited by its set-off rights. A-2298. Thus, the prosecution cut corners, knowingly introduced false evidence, engaged in gamesmanship, and deceived the court, rather than carrying out its duty to do justice. *Berger v. United States*, 295 U.S. 78, 88 (1935).

2. The prosecution failed to disclose to the Court that Teman's post-trial counsel was married to an assistant U.S. Attorney in the U.S. Attorney's Office for the Southern District of New York.

As discussed above, the court's failure to allocute Teman in a timely manner as to whether he wanted to proceed with conflicted counsel whose wife was an Assistant United States Attorney in the very office prosecuting him was prejudicial. *See supra* at 62-63. But while Judge Englemayer stated he had simply missed the issue, the prosecution admitted it knew of the issue from the beginning but made the unilateral decision not to inform the court. A-2138:19-23, A-2141:20-25. Failure to disclose a known conflict of interest constitutes prosecutorial misconduct. *See, e.g.*, *United States v. Ziegenhagen*, 890 F.2d 937, 941 (7th Cir. 1989) (remanding case where prosecutor could have informed the trial court of conflict, but did not); *United States v. McKeighan*, 685 F.3d 956, 967–68 (10th Cir. 2012) (prosecution has duty to inform courts of defense counsel's potential and actual conflicts of interest).

3. The prosecution misled the jury with false statements and inflamed it with antisemitic statements

The most egregious example of prosecutorial misconduct occurred during the prosecution's summation. *First*, it was false and highly prejudicial to refer to the checks deposited by Teman as "fake." The uncontroverted evidence established that the checks were valid RCC's. *See supra* at 38, 43. Moreover, the Court had denied Teman's motion for expert testimony on the validity of the RCC's on the grounds that this issue was irrelevant and likely to confuse the jury. A-137.37-41. Having prevented Teman from presenting testimony that the RCC's were valid, the court should not have allowed the prosecution to represent to the jury that the checks were "fake." The only issue was whether the checks were "authorized." *See* A-137.37. By confusing the jury on this point, the prosecution was able to fix in the mind of the jury that certain checks, notably the $18,000 check drawn on Gabay's account with an incorrect identification of the payor, could be viewed as "fake," rather than "unauthorized," notwithstanding the judge's instructions that "fakeness" was not at issue. The jury could well have concluded that Teman was authorized to deposit RCC's as to Soleimani, but that the Gabay check was "fake" because it was accidentally drawn on the account of 518 W 205 LLC rather than 518 W 204 LLC, a facial error the prosecution exploited to maximum effect by highlighting this check

in red and enlarging it for the jury. A-1726.[41] Moreover, the jury only had to agree unanimously on a *single* customer to convict Teman on all four counts with respect to all customers. *See supra* at 6*; see infra* at 78-84. By wrongfully stressing the "fake" nature of the checks, the prosecution deflected from what the court had described as the real issue and made it easier for the jury to convict improperly and on the basis of a single customer relationship.

Most egregiously, the prosecution was permitted to inflame the passion of the jury on religious grounds with argument that was clearly out of bounds. The prosecution argued:

> So, there is another reason you know the defendant acted with criminal intent: ***Look at when he timed his deposits***. You heard Mr. Gabay and Mr. Soleimani testify that they observed the Passover holiday. That's the holiday that started on the very day after the April 2019 checks which were drawn on their accounts. And they told you that as part of their observance of that holiday they don't use electronic devices for two days. ***When did Mr. Teman deposit these checks?*** The day before. ***That's fraudulent intent, ladies and gentlemen.*** That shows you the defendant knew he didn't have permission. It shows you the defendant wanted a lead time to get these checks cleared. ***Why did he deposit that day of all days? Because he knew it was a fraud.*** **So** ***there is another way you know the defendant had criminal intent***.

A-1129-1130.

[41] In the Government's summation PowerPoint, the ***only*** checks it included were the 518 W. 205 LLC checks, including the one already highlighted for the jury as "fake" rather than "unauthorized." A-1399, A-1420, A-1421.

This argument impermissibly uses religion to inflame the jury and paint Teman as a criminal because he deposited checks subject to a seven-day hold the day before Passover. A moment's reflection shows how profoundly offensive and prejudicial the "argument from Passover" is. Teman knew the checks were subject to a seven-day hold and that the first two days of Passover were non-banking days so there could not have been any "religious lead time" in depositing the checks on Friday, which was itself a normal business day, for Jews and non-Jews alike. And neither the timing of Teman's deposit nor Soleimani's religious practices had any effect on Soleimani's ability to contest the checks and secure a chargeback. In fact, the evidence was that Soleimani did not even notice the checks until days after Passover had ended, and he faced no difficulty challenging the deposits and having his account credited. *See supra* at 65. Gabay never discussed religion with Teman and never even saw the checks in question. For there to be *criminal intent*, the jury has to make stereotyping assumptions about what it means to observe Passover and what it means to be Jewish, that there is some special prohibition on doing business on the day before Passover, that Jews who do not conform to these stereotypes are *criminal*. The jury has to disregard the actual testimony, it has to ignore actual banking practice, it has to close its eyes to what actually happened. In a not-so subtle way, with no evidence in the record, the prosecution was attempting to activate anti-semitic bias against Teman by painting him as a "bad Jew." The prejudicial effect of

this portrayal of Teman cannot be overstated. No trial can be fair if the prosecution is allowed to pander to potential ethnic bias and inflame passions along religious lines.

IV. JUDGE ENGLEMAYERS INSTRUCTIONS FAILED TO CHARGE THE JURY TO SPECIFY WHICH ENTITY OR ENTITIES WERE ALLEGEDLY DEFRAUDED.

A. Standard of Review

The Due Process Clause of the Fourteenth Amendment denies the State:

> the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. Jury instructions relieving the government of this burden violate a defendant's due process rights. Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases.

Carella v. California, 491 U.S. 263, 265 (1989) (internal citations and quotations omitted).

The Court reviews jury instructions *de novo*, considering the challenged instruction in light of the charge as a whole. *Warren v. Pataki*, 823 F.3d 125, 137 (2d Cir. 2016). However, the failure to use a special verdict form

is generally reviewed for harmless error. *United States v. Farnsworth*, 302 F. App'x 110, 114–15 (3d Cir. 2008).

B. Facts

Judge Englemayer instructed the jury that it would have to agree unanimously on at least *one* customer narrative per count to convict on the count. A-1371. However, the verdict form itself simply asked “guilty/not guilty” on each of the four

counts, without any requirement that the jury specify which customer relationship, in the event of a guilty verdict, was deemed to have been used to commit bank fraud. A-1394. And the jury returned a verdict of guilty on each count of the indictment. A-1298.1-A1298.2.

C. Legal Argument

1. Completely different customer narratives cannot be coherently combined into a single count consistently with due process.

Judge Englemayer sensed from his earliest interaction with the government that the proposed approach of lumping together different customer "narratives" into a single count would create a substantial legal problem. *See* A-65-66 (questioning why different victim accounts are "clustered" in a single count); A-220:1-3 ("there is a narrative that exists with each of these customer relationships"); A-543:2-10 ("it seems clear to me each customer has its own narrative"); A662:2-4 ("it's clear to me each customer narrative is its own story and they don't necessarily travel up or down together"); A-974:18-21 ("each of the three customer relationships is its own narrative"); A-975:13-16 ("where I am left is, in effect, with, for example, a bank fraud count that has three different customers embedded in it and three different narratives relating to authorization in fact or perceived authorization"); A-976:6-11 ("what is decisive here is that we have three very different narratives"); A-981:6-11 ("the three different narratives that come out from each customer group . . [e]ach has its own story to tell").

Judge Englemayer's solution to this problem was to require unanimity as to any *one* entity within the multiplicity of relationships embedded in a given count. A-1371. But this charge does *not* solve the problem of individual narratives that so concerned Judge Englemayer. Because 518 West 204 LLC (Gabay) was included in each count, the jury could have unanimously decided that Teman defrauded BOA through 518 West 204 LLC, *and no-one else*, and still returned a guilty verdict on all four counts. This was also the account that corresponded to the one check the prosecution highlighted *in red* for the jury as looking "fake" on its face, the only account whose checks the prosecution highlighted in its summation PowerPoint slides, and the account for which the Government introduced the false Haas affidavit. *See supra* at 71 and Note 39; *see also supra* at 76 and Note 41. Even though the judge had told the jury that that "fakeness" was not the issue, the government's insistence on stressing the "fake" nature of the checks in summation meant that the jury necessarily had its attention drawn to indicia of "fakeness" in the 518 W. 205 LLC check. A-1726. Given the focus on that particular check, much easier to understand that the convoluted spreadsheet relating to the Soleimani checks, the jury may have concluded that the entire relationship with Gabay was tainted by fraud. And the Gabay relationship involved no independent loss for anyone, not Gabay, not Signature, not JP Morgan, not BOA, who suffered no separate loss beyond the $264,000 from the ABJ checks.

Thus, if the jury unanimously agreed on Teman's guilt *only* with respect to 508 West 204 LLC – for which there was *no economic* loss at all – the full weight of the law still bore down on Teman and he was ordered to pay $259,000 in restitution, $330,000 in forfeiture and serve a year in jail. This is a potential result so completely unjust, so totally disproportionate to any possible aim of the criminal law, that the conviction must be reversed.[42]

2. <u>A special verdict form was necessary to ensure that any punishment fit any actual findings of the jury.</u>

Judge Englemayer was very conscious that the multiple different narratives that "did not travel up or down together" could not be coherently combined into a single count without some mechanism to understand what precisely the jury would agree on in the incoherently bundled counts of the indictment:

> *It seems to me there's a substantial argument here that the verdict form ought to inquire more specifically of the jury with respect to particular entities*.

A-149:12-21 (emphasis added).

[42] The problem was compounded by the Government's constructive amendment of the indictment. If the Government had truly been proceeding on a "counterfeiting" theory – despite the absence of evidence – it could have at least made the argument that checks deposited on the same day were part of the same counterfeit "batch." But since the government was proceeding on an authorization theory, there is simply <u>*nothing*</u> that can be inferred as to authority or lack thereof based solely on the date of deposit of the checks relating to different customers. Indeed, Teman also deposited a non-RCC on the same day he deposited the 24 Soleimani RCCs and the three Gabay RCCs. *See supra* at 21 and Note 13.

Despite this prophetic insight, Judge Englemayer ultimately let the verdict form remain with the simple up/down choice on each count. Even on the most stringent possible appellate review, the failure to include a special verdict form or special interrogatories to ensure that Teman could only be convicted of a crime on which the jury *actually agreed* constitutes reversible error. *See United States v. Perez*, 129 F.3d 1340, 1342 (9th Cir. 1997) (the district court's failure to submit a special verdict form that related to the type of weapon used by one defendant was not harmless and required new trial). As in *Perez*, because of the "immense consequences" that follow from finding bank fraud with respect to Gabay as opposed to Soleimani, "a jury finding on that issue is required."

Although special verdicts are generally not favored in criminal cases, this Court has upheld special verdicts when the information sought is relevant to the sentence to be imposed. *United States v. Orozco-Prada*, 732 F.2d 1076, 1084 (2d Cir. 1984); *see also United States v. Murray*, 618 F.2d 892, 895 n. 3 (2d Cir.1980); *United States v. Stassi*, 544 F.2d 579, 583–84 (2d Cir.1976), cert. denied, 430 U.S. 907, 97 S.Ct. 1176, 51 L.Ed.2d 582 (1977).[43]

[43] The resistance to special verdicts stems from a common law desire to protect the right of the jury to acquit defendants subject to politically motivated trials without having to answer detailed questions explaining their reasoning. *See United States v. Wilson*, 629 F.2d 439, 443 (6th Cir. 1980). Thus, the traditional hostility to special verdicts aimed to protect the rights of "criminal defendants by preventing the court from pressuring the jury to convict." *United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir.1998); *United States v. Blackwell*, 459 F.3d 739, 766 (6th Cir. 2006). Here,

In *Orozco-Prada*, the defendant was convicted under Count 1 of a money laundering conspiracy that could have involved the proceeds of cocaine or marijuana sales and sentenced to a prison term applicable to cocaine sales. *Orozco-Prada*, 732 F.2d at 1083. This Court reversed on the grounds that the only proof at trial was of underlying marijuana sales, which, as a non-narcotic, carried a lower sentence than that applicable to cocaine. *Id*. The case was remanded for resentencing under the lower penalty or, if no resentencing occurred within 30 days, for a new trial. *Id*. at 1084.

Here, Counts I and III against Teman include the equivalent of marijuana (attempted bank and wire fraud with no loss as to Gabay) and cocaine (bank and wire fraud with $260,000 loss as to Soleimani), with the added complexity that this Court has no way of knowing whether the jury found Teman guilty with respect to Gabay or Soleimani. If Counts I and III (containing these two radically different fact patterns) are thrown out, the Court is left with the grossly disproportionate punishment resulting from one of two $18,000 checks in Counts II and IV, neither of which could support anything like the punishment meted out.

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however, the absence of a special verdict operates in the exact opposite fashion and permits the imposition of a punishment unrelated to the conduct on which it is ostensibly based.

Thus, the problem is not just a sentencing issue, but the more fundamental one that Teman may have been punished for a crime the jury did not agree he had committed. On the record before the Court, there is no resentencing that could be ordered because there is no rational basis to choose between *any* possible punishment. Simply throwing the book at Teman if the jury only thought he had committed fraud in the Gabay relationship, with a single $18,000 cashed check, cannot be reconciled with foundational notions of fairness. The only way to cure this problem is to remand for a new trial either with separate counts for each customer relationship or a special verdict form to ensure that any punishment fits any crime that is found.

In the end, Judge Englemayer's limited unanimity instruction did not, and with the three unique customer narratives, could not, resolve the radical flaw at the heart of the government's entire, ill-considered criminal prosecution of Ari Teman.

Respectfully submitted,

New York, New York
May 25, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to the decision of the Court of Appeals permitting the filing of an oversize brief, dated April 22, 2022 (the "Decision"), I, Eden P. Quainton, an attorney duly admitted to practice before this Court, hereby certify that the foregoing memorandum of law contains 19,926 words, in compliance with the Decision and that this memorandum complies with the Court's applicable formatting rules. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum.

This brief complies with the word count limitations of Fed. R. App. P. 32(a)(7)(B)(ii), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it was prepared in a proportionally spaced 14-point Times New Roman typeface font using Microsoft Word.

Dated: May 25, 2022
New York, New York

/s/ Eden P. Quainton
Eden P. Quainton

SPECIAL APPENDIX

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SPA-1

AO 245B (Rev. 09/19) Judgment in a Criminal Case Sheet 1 (form modified within District on Sept. 30, 2019)

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
ARI TEMAN

JUDGMENT IN A CRIMINAL CASE

Case Number: S2 19-CR-696 (PAE)

USM Number: 18244-104

Susan Kellman
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) after a plea of not guilty. 1ss, 2ss, 3ss & 4ss of the S2 Indictment

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1344	Bank Fraud	7/3/2019	1ss
18 U.S.C. § 1344	Bank Fraud	7/3/2019	2ss
18 U.S.C. § 1343	Wire Fraud	7/3/2019	3ss

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Count(s) All open counts ☐ is ☑ are dismissed on the motion of the United States.

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

7/28/2021
Date of Imposition of Judgment

Paul A. Engelmayer
Signature of Judge

Paul A. Engelmayer, United States District Judge
Name and Title of Judge

7/29/2021
Date

SPA-2

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1A

DEFENDANT: ARI TEMAN
CASE NUMBER: S2 19-CR-696 (PAE)

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1343	Wire Fraud	7/3/2019	4ss

SPA-3

DEFENDANT: ARI TEMAN
CASE NUMBER: S2 19-CR-696 (PAE)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
One (1) year and one (1) day on each count, the terms to run concurrently. The Court granted bail pending appeal, pursuant to 18 U.S.C. § 3143(B)(1)(b), with the defendant released on the same bail conditions as have applied to date.

☑ The court makes the following recommendations to the Bureau of Prisons:
The Court recommends that the defendant be placed in any mental health and anger management programs for which he is eligible.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SPA-4

DEFENDANT: ARI TEMAN
CASE NUMBER: S2 19-CR-696 (PAE)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Three (3) years on each count, the terms to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

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

SPA-5

DEFENDANT: ARI TEMAN
CASE NUMBER: S2 19-CR-696 (PAE)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

SPA-6

DEFENDANT: ARI TEMAN
CASE NUMBER: S2 19-CR-696 (PAE)

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant shall provide the probation officer with access to any requested financial information unless the defendant has satisfied his financial obligations.

2. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

3. The defendant shall participate in an outpatient mental health and anger management program approved by the U.S. Probation Office. The defendant shall continue to take any prescribed medications unless otherwise instructed by the health care provider. The defendant shall contribute to the costs of services rendered not covered by third-party payment, if the defendant has the ability to pay. The Court authorizes the release of available psychological and psychiatric evaluations and reports to the health care provider.

4. The defendant shall complete three hundred (300) hours of community service under the direction of the Probation Department.

5. The defendant shall be supervised in the district of residence.

SPA-7

DEFENDANT: ARI TEMAN
CASE NUMBER: S2 19-CR-696 (PAE)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 400.00	$	$	$	$

☑ The determination of restitution is deferred until 8/11/2021 . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SPA-8

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: ARI TEMAN
CASE NUMBER: S2 19-CR-696 (PAE)

SCHEDULE OF PAYMENTS

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

A ☑ Lump sum payment of $ 400.00 due immediately, balance due

☐ not later than _____, or
☑ in accordance with ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:
See Order of Forfeiture filed separately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.