UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES	)	
	)	**No. 21 CR 345**
v.	)	
	)	**Judge John Kness**
TIMOTHY MAPES	)	
	)	

TIM MAPES' MOTION FOR ACQUITTAL OR, IN THE ALTERNATIVE, NEW TRIAL

Tim Mapes respectfully moves under Federal Rules of Criminal Procedure 29 and 33 for judgment of acquittal on both counts of the Indictment or, in the alternative, a new trial.

Mr. Mapes was found guilty of both counts of the Indictment for, in the jury's view, testifying falsely about entirely legal conduct that was not material to the grand jury's investigation. But neither through its arguments nor through its witnesses did the government identify *any* evidence that Mr. Mapes had knowledge of or participation in any bribery scheme involving Michael Madigan, Michael McClain, or ComEd. Instead, what the government presented at trial were claims that Mr. Mapes lied and obstructed when he testified about "tasks" and "assignments" allegedly given McClain by Madigan dealing with i) Madigan's request that McClain ask Representative Lang to give up his seat, *see* Trial tr. at 45 (government opening statement); ii) "who to appoint in the leadership positions in the Illinois House because there was going to be a new legislative session starting in January of 2019," *id.* (same); iii) "how to save Michael Madigan when bombshell allegations about sexual harassment started to arise in Springfield," *id.* (same); and iv) "fundraising efforts in 2018 for a really important election year." *id.* (same). All of that conduct was perfectly legal. None of it was investigated by the grand jury; rather, as the government argued at the very beginning of (and throughout) the case, the grand jury was investigating bribery and ComEd. *See id.* at 40; 1716-1717. The government never argued or

put on any evidence that the grand jury was investigating Lou Lang's departure from the Legislature, committee assignments in 2019, "bombshell" sexual harassment allegations, or fundraising in the 2018 election cycle. Indeed, its agents denied investigations into any of those topics.

What the government did in this case was to provide evidence that Mr. Mapes talked about "tasks" and "assignments" concerning wholly legal matters with Mr. McClain approximately three years before his grand jury appearance. Had Mr. Mapes testified in a way satisfactory to the government, that testimony still would not have gotten the grand jury any further in its investigation of whether McClain sought out bribes for Madigan or whether Madigan accepted them. And the government never offered evidence to explain how such testimony could have furthered or "substantially affected" the grand jury's investigation. Such testimony would only have provided the grand jury propensity evidence of the Madigan / McClain relationship (*i.e.* because McClain did a "task" for Madigan regarding *legal* conduct, it presumably follows that McClain necessarily did "tasks" for Madigan that were criminal in nature)—but this Court repeatedly rejected propensity arguments at trial.

The government never offered evidence to establish the materiality of Mr. Mapes' alleged lies, but instead invited the jury to speculate that Mr. Mapes' alleged lies were somehow relevant to the question of whether McClain and Madigan were conspiring together to commit crimes. Speculation cannot replace evidence, *see, e.g., United States v. Jones,* 713 F.3d 336, 340 (7th Cir. 2013), and the government offered no evidence that Mr. Mapes knew anything about criminality between McClain and Madigan. Just because Mr. Mapes expertly kept the "trains running on time" in the Illinois legislature for many years does not even tend to prove that he knew of or was read into criminal schemes involving McClain or Madigan. The government never offered any evidence

to connect the legal "tasks" and "assignments" that McClain discussed with Mr. Mapes to the bribery allegations concerning Madigan and McClain that were investigated by the grand jury. In the absence of evidence to make those connections, the government invited the jury to speculate. The guilty verdicts, then, must not stand.

Alternatively, for the reasons discussed below, individually and cumulatively errors in decisions about evidence, witnesses, and argument require a new trial.[1][2]

MOTION FOR JUDGMENT OF ACQUITTAL

A. Standard

This Court may set aside the jury's verdict and enter an acquittal pursuant to Federal Rule of Criminal Procedure 29. Where the evidence does not sustain the conviction, Rule 29 requires the entry of a judgment of acquittal when, even after viewing the evidence in the light most favorable to the government, the Court finds no rational trier of fact could proof of the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *United States v. Garcia,* 919 F.3d 489, 496 (7th Cir. 2019); *United States v. Murphy,* 406 F.3d 857, 861-62 (7th Cir. 2005) (affirming judgment of acquittal under Rule 29 because "a vital link between the evidence and the charge in the indictment [was] missing"). In considering a Rule 29 motion, this Court must "distinguish between reasonable inferences and speculation." *United States v. Jones*, 713 F.3d 336, 340 (7th Cir. 2013) (affirming acquittal where jury verdict "relied on several such speculative inferences"). A Court must grant a Rule 29 motion if the evidence gives "equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence," because in such a case "a reasonable jury must necessarily entertain reasonable doubt." *United*

[1] Mr. Mapes moves *instanter* for leave to file a motion in excess of 15 pages.
[2] In addition, Mr. Mapes incorporates by reference all of his pre-trial motions and arguments at trial concerning the issues raised in this motion.

States v. Cassese, 428 F.3d 92, 98-99 (2d Cir. 2005); *United States v. Johnson*, 592 F.3d 749, 755 (7th Cir. 2010) (where "the plausibility of each inference is about the same . . . the jury necessarily would have to entertain a reasonable doubt.").

B. Mr. Mapes' alleged lies were not material to the grand jury's bribery and ComEd investigations.

The law is clear that perjury requires proof that the witness's false or obstructive testimony concerned a *material* matter "designed to substantially affect the outcome of the case...." *United States v. Parker,* 25 F.3d 442, 448 (7th Cir. 1994) (quoting *United States v. Dunnigan*, 507 U.S. 87, 95 (1993)). The Seventh Circuit explained further that a "material" statement is one which, "if believed, would tend to influence or affect the issue under determination." *Parker,* 25 F.3d at 448. Mr. Mapes' alleged lies had nothing to do with the alleged focus of the grand jury's investigation—bribes paid by ComEd and bribes accepted by Michael Madigan. Therefore, Mr. Mapes' alleged lies could not have "substantially affected" the grand jury's investigation. In fact, the government's own witnesses acknowledged that Lou Lang's departure from the Legislature, 2019 committee assignments, Springfield's 2018 sexual harassment investigations, and fundraising for the 2018 election were not part of the investigation and did not lead to any charges of anyone.

The government presented evidence and argument that the grand jury was investigating bribes offered to and accepted by Madigan. That is it. Its arguments and the testimony of its witnesses were confined to those points:

- The grand jury was investigating "Madigan and whether people were paying bribes to Madigan and whether Madigan was accepting bribes from them." *See* Trial tr. at 40;
- "The government was conducting a wide-ranging bribery investigation involving Michael Madigan and Michael McClain" *id.* at 1716;

- Arguing that Mr. Mapes lied "in an attempt to derail an ongoing federal bribery investigation into the corrupt activities of Michael Madigan and Michael McClain." *Id.* at 1717;

- Mr. O'Leary testified that the investigation involved "an examination of whether people were paying bribes to Michael Madigan and whether Michael Madigan was accepting bribes from certain individuals;" an "examination of other people in connection with bribery-related activity;" and "the possible bribery-related activities of Michael McClain in relation to Madigan." *Id.* at 409.

- Mr. O'Leary also explained that "[w]hat we were looking into was whether Michael Madigan and whether Mr. McClain on behalf of Michael Madigan were trying to obtain things of value, including jobs, contracts, and payments, in excha – from ComEd in exchange for ComEd getting favorable legislation." *Id.* at 416.

- Mr. O'Leary continued that the government was "concerned about, again, bribery allegations dealing with Commonwealth Edison, whether it was jobs being exchanged, whether there was contracts being exchanged for monetary payments." *Id.* at 422.

- Mr. McDonald testified that after the indictment of Mr. McClain and other ComEd executives, the grand jury's investigation continued. He affirmed that the continuing grand jury investigation concerned ComEd, "amongst others." He also affirmed that the grand jury investigation concerned "bribery allegations." *Id.* at 587.

There was hardly any testimony or argument about Commonwealth Edison or bribery at Mr. Mapes' trial. That is because Mr. Mapes had no connection to that activity, and the government offered no evidence to the contrary. Indeed, the government witnesses acknowledged that Mr. Mapes was not implicated in ComEd's alleged bribery or Mr. Madigan's acceptance of such bribes. *See, e.g., id.* at 649-650 (testimony of Mr. McDonald confirming that no evidence existed of calls between Mapes and McClain about ComEd bribery allegations). Instead, the government presented hours and hours of evidence and argument concerning Lou Lang, Bob Rita, Illinois House committee assignments, Illinois House leadership appointments, sexual harassment allegations in Springfield and the 2018 MeToo movement, fundraising in advance of the 2018 election, a signpost request from a constituent, conversations by McClain with Sam Yingling, the

appointment of the Illinois Legislative Inspector General, and other perfectly legal conduct. The government's own witnesses acknowledged that the grand jury was not investigating any of that activity:

- *Lou Lang*:

  Q: The FBI was not investigating Lou Lang; is that correct?

  A: That is correct.

  Q: And so it's also correct, I take it, that the FBI was not investigating Mr. Lang based on the fact that Mr. McClain had a conversation with Mr. Lang in the fall of 2018 encouraging Mr. Lang to leave the Illinois General Assembly, correct?

  A: Could you repeat that again, please?

  Q: The FBI was not investigating Lou Lang based on the fact that Mr. McClain had a conversation with Mr. Lang in the fall of 2018 encouraging Mr. Lang to leave the Illinois General Assembly?

  A: I think the conversations between Mr. Lang and Mr. McClain were of interest to us. I don't think Mr. Lang was ever a target of our investigation, but it was of interest.

  Q: And Mr. Lang was never charged in this case

  A: That's correct.

  Q: And as you just testified, he wasn't investigated,

  A: I believe so, correct.

  Q: Likewise, there were no charges filed concerning Mr. McClain's interactions with Mr. Lang in the fall of 2018 about possibly stepping down, correct?

  A. That is correct, there was no charges filed based on that.

  Trial Tr. at 490-91 (O'Leary)

- *Bob Rita*:

  Q: The FBI was not investigating Mr. Rita based on the fact that Mr. McClain helped him with gaming legislation, correct?

A: I don't believe so.

Q: You don't believe that the FBI was investigating Mr. Rita concerning that, correct?

A: Correct. I mean, we knew it went on. I don't – right. Correct.

Trial Tr. at 466-67 (O'Leary)

- *Illinois House committee assignments*:

Q: Now, the FBI was not investigating Speaker Madigan's committee assignments in January of 2019, correct?

A: I mean, I think that was part of a bigger issue of the conversations between his inner circle, kind of show that what was going on between Mr. Mapes and Mr. McClain and Mr. Madigan. I think it was important.

Q: There's nothing per se illegal with selecting people for committee assignments, is there?

A: If there's nothing else to them, no. If they're just talking about committee assignments, that's correct.

Q: And you're not aware of any charges that have resulted from Mr. Madigan's committee assignments in January of 2019 as part of this investigation, are you?

A: That's correct.

Id. at 464-465 (O'Leary).

- *Illinois House leadership appointments*:

Q: And the FBI also was not investigating Speaker Madigan's choice of house leadership in January of 2019, correct?

A: That's correct.

Id. at 465. (O'Leary)

- *Sexual harassment allegations / MeToo movement*:

Q: And the FBI also was not investigating the "Me Too" movement sexual harassment allegations that bubbled up in Springfield in the spring of 2018, correct?

A: That's correct.

Id. (O'Leary)

- *2018 fundraising*:

Q. And the FBI was also not investigating the fundraising activities of Tim Mapes while he was the executive director of the Democratic Party of Illinois, right?

A. The fund- -- legitimate fundraising activities, no.

Id. (O'Leary)

- *Constituent signpost and exhibit 294 (Defense exhibit 3)*

Q: You don't recall the FBI ever investigating an individual who had made an inquiry about a pole sign on I-90 in the Chicagoland area, do you?

A: I do not.

Q: And as far as you know, no charges were filed, that you're aware of, concerning anything related to a pole sign along I-90 in the Chicagoland area, correct?

A: That's correct.

Id. at 489 (O'Leary)

- *Sam Yingling:*

Q: The FBI was not investigating whether Mike McClain, in fact, had a conversation with Lowell Jaffe or Sam Yingling in 2018 about whether Mr. Yingling was going to support Mr. Madigan for Speaker, correct?

A: Who are those individuals again? Mr. Yingling?

Q: Lowell Jaffe and Sam Yingling.

A: Those names aren't familiar to me as I'm sitting here today.

Q: And you recall, I take it, that the FBI was not investigating whether Mr. McCLain, in fact, had a conversation with Sam Yingling or his friend Lowell Jafffe about whether Mr. Yingling was going to vote for Mike Madigan for Speaker, correct?

A: Correct, that conversation – right. Yes, correct.

Q: Likewise, you're not aware of any charges being filed in this investigation as a result of any conversations Mr. McClain might have had with Mr. Yingling or Mr. Jaffe about whether Mr. Yingling was going to support Mr. Madigan for Speaker; is that correct?

A: That's correct.

Id. at 492-493 (O'Leary)

- *Appointment of Illinois Legislative Inspector General:*

Q: And you all were not investigating how that individual came to be the legislative inspector general, correct?

A: That's correct.

Q: That wasn't part of your investigation, was it?

A: No.

Id. at 485 (O'Leary)

As the government's own witnesses testified, the grand jury was investigating whether Com Ed (and others) were attempting to bribe Madigan and whether Madigan favored legislation as a result of those bribes. None of Mr. Mapes' testimony in the grand jury was about bribes paid by Com Ed or acts done by Michael Madigan in exchange for bribes. And none of the evidence at trial dealt with those two topics either. Therefore, no rational jury could conclude that the government proved beyond a reasonable doubt that Mr. Mapes lied or obstructed in the grand jury concerning the two topics material to the grand jury's investigation: bribes paid, and legislation passed in exchange for bribes. Instead, the government invited the jury to "fill the evidentiary void with guesswork and speculation." *See Garcia,* 919 F.3d at 500. Here, the government asked the jury to speculate that because Mr. Mapes testified that he did not recall communications with McClain about "tasks" and "assignments" about wholly legal topics that its own agents agreed

were not being investigated, it followed that he would also lie if asked about allegations concerning bribes made by McClain or ComEd and accepted by Madigan. But, of course, speculation is not evidence. *Id.* at 503 ("[A] judge must take special care to guard against the possibility that a defendant might be found guilty by either speculation or mere association."); *see also United States v. Jones*, 713 F.3d 336, 340 (7th Cir. 2013).[3] Because no rational jury could have found beyond a reasonable doubt that Mr. Mapes lied and obstructed regarding a material matter, he must be acquitted.

C. Fundamentally Ambiguous Questions

Mr. Mapes renews his pre-trial motion that episodes 3, 4, 5, and 6 of the question and answer contained within Count One should have been stricken as a matter of law. The Supreme Court has made clear that "precise questioning is the predicate for the offense of perjury." *Bronston v. United States*, 409 U.S. 352, 362 (1973). Where ambiguity exists—either in the witness's answers or the examiner's questions—it should be remedied "through the questioner's acuity and not by a federal perjury prosecution." *Id.* Those principles still hold true today. Where, as here, certain questions posed by the examiner were fundamentally ambiguous, those questions and the resulting answers cannot form the basis of a perjury charge. Likewise, a perjury charge cannot stand where the testimony is literally true, even if considered evasive by the examiner. *Bronston* teaches that, "if a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark." *Id.* at 358-59. So long as the witness speaks the literal truth, "[t]he burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." *Id.* at 360. Sequences 3 through 6 highlighted in Count One are, as a matter of law, either

[3] It is no answer to say that Mr. Mapes associated with Madigan and McClain. As the Seventh Circuit made clear in *Garcia*, "evidence that calls for inferences that are motivated or made possible by speculation—especially inferences focused on a defendant's presence or association with criminals or their criminal activity—will fail to carry the government's burden." *Garcia,* 919 F.3d at 503.

fundamentally ambiguous or literally true, and—when coupled with the ambiguity of the questions—should therefore also be stricken from Count One of the indictment.

As a matter of law, where "fundamental ambiguity" exists in a question forming the basis of a perjury indictment, the issue must be "taken from the jury." *United States v. Martellano*, 675 F.2d 940, 942 (7th Cir. 1982) (reversing perjury conviction resulting from ambiguous question in the grand jury); *see also United States v. Serafini,* 167 F.3d 812, 820-24 (3d Cir. 1999) (affirming pre-trial dismissal of portions of § 1623 perjury charge because "an 'excessively vague or fundamentally ambiguous' question may not form the predicate to a perjury or false statement prosecution"); *United States v. Farmer*, 137 F.3d 1265, 1270 (10th Cir. 1998) (reversing perjury conviction because grand jury questioning forming the basis of perjury charge was both "fundamentally ambiguous" and "arguably ambiguous"); *United States v. Markiewicz,* 978 F.2d 786, 808-09 (2d Cir. 1992) (reversing perjury conviction as a matter of law); *United States v. Manapat,* 928 F.2d 1097, 1099-1101 (11th Cir. 1991) (affirming dismissal of perjury indictment); *United States v. Lighte,* 782 F.2d 367, 375-76 (2d Cir. 1986) (answer to fundamentally ambiguous question cannot be perjurious); *United States v. Eddy,* 737 F.2d 564, 565-71 (6th Cir. 1984) (reversing perjury conviction based on ambiguous and imprecise questioning). While citing to the Supreme Court's *Bronston* ruling, the Court explained in *Farmer* that the "purpose of the rule of fundamental ambiguity is three-fold, namely, to (1) preclude convictions grounded on surmise or conjecture; (2) prevent witnesses from unfairly bearing the risks of inadequate examination; and (3) encourage witnesses to testify (or at least not discourage them from doing so)." *Farmer*, 137 F.3d at 1269 (citing *Bronston*, 409 U.S. at 359). Applying those principles to the examination of Tim Mapes, episodes 4 and 6 cited in Count One are "fundamentally ambiguous" and should have been stricken from the indictment. *See, e.g., United States v. Serafini*, 7 F.Supp.2d 529 (M.D.Pa.

1998) (dismissing portions of perjury charge pre-trial because of fundamentally ambiguous questions), *aff'd*, 167 F.3d 812 (3d Cir. 1999).

1. Episode 4 in the Perjury Charge is Fundamentally Ambiguous.

Question 4 asked, "Do you have any reason to think Mr. McClain was acting as an agent for Mr. Madigan after he retired in 2016, that is, doing work for him or carrying out assignments for him?" Mr. Mapes answered: "I'm not aware of any. I'm not aware of that activity. Let's put it that way." That question is vague, compound, grammatically awkward, and results in an answer non-responsive to the form of the question.

First, the question is vague. The terms "agent" and "assignments" are ambiguous, and the prosecutor does not clarify their meaning during the multi-hour questioning. Indeed, the Merriam-Webster definition of "agent" has multiple meanings, and the witness in other passages not cited in Count One did provide instances during his grand jury testimony of his factual observations about Mr. McClain and Mr. Madigan's dealings with each other. Mr. Mapes did not, however, use the terms "agent" or "assignments" in characterizing Mr. McClain's dealings with Mr. Madigan. Further, the phrase "do you have any reason to think" is vague in that it is asking specifically about the witness's mental processes rather than asking straightforwardly about specific examples of what Mr. Mapes saw, heard, or otherwise observed in Mr. Madigan and Mr. McClain's dealings with each other.

Second, the question is indisputably compound. Had the question been asked in the presence of counsel, an objection would have been lodged to the form of the question. Were a witness to attempt an answer to the compound question, a fact finder would need to assume the witness was answering one or another part of the compound question. But "especially in perjury cases, defendants may not be assumed into the penitentiary." *United States v. Tonelli*, 577 F.2d

194, 200 (3d Cir. 1978) (vacating perjury conviction where questioning was ambiguous, and sustaining conviction would have required assumption as to how witness interpreted the question) (citing *United States v. Brumley*, 560 F.2d 1268 (5th Cir. 1977) (vacating perjury conviction)).

Third, Mr. Mapes' answer to the question in episode 4 makes clear that he did not understand the question asked. The prosecutor's question began, "Do you have any reason to think . . . " Mr. Mapes answered, "I'm not aware of any." The answer is facially non-responsive to the prosecutor's question—further demonstrating its fundamental ambiguity. Thus, using this episode to support a perjury charge is not supported in law, because even if this answer were viewed as false by the government, the prosecution cannot as a matter of law establish that this answer was anything more than an honest mistake. An allegedly false answer given because of "inadvertence, honest mistake, carelessness, neglect, or misunderstanding does not constitute a crime." *Martellano*, 675 F.2d at 942.

2. Episode 6 in the Perjury Charge is Fundamentally Ambiguous.

Likewise in episode 6, the question posed by the prosecutor is fundamentally ambiguous:

> So one of the things we were trying to figure out, Mr. Mapes, is whether or not—kind of a key issue for us is whether or not Mr. McClain acted as an agent for Mr. Madigan in any respect, including that timeframe. We're talking about the 2017, 2018, 2019 timeframe. Are you aware of any facts that would help us understand whether or not, in fact, Mr. McClain acted as an agent or performed work for Mr. Madigan or took direction from Mr. Madigan in that timeframe?

The question is again rife with the vague term "agent." The phrase "took direction from" is also vague. The question is also compound, and would have prompted an objection to form had the question been asked in the presence of counsel. And, again, Mr. Mapes' answer is not responsive to the compound question posed by the prosecutor: "I don't know who you would go to other than Mr. Madigan and Mr. McClain. Mr. Madigan, if he had people do things for him like I did things for him, was—didn't distribute information freely." The prosecutor did not ask the obvious follow-

up—what did Mr. Mapes mean when he said that he "did things for [Madigan]." Instead, the prosecutor asked a series of questions about Mr. Madigan's desire to keep a "close circle of information" with confidants. Mr. Mapes confirmed his understanding of how Mr. Madigan shared information with others, including Mr. McClain: "Any discussions about private—private discussions with Mr. Madigan were always private between him and the other person in the room." The answers Mr. Mapes provides in the follow-up to that question in episode 6 are not found in the perjury charge, and the grand jury therefore must not have considered them false. It is in those follow up questions and answers that Mr. Mapes provides the context for his understanding of the prosecutor's questions—which was that in Mr. Mapes' understanding, Mr. Madigan kept a tight grip on information that he shared with other people in private discussions. *Cf. Tonelli*, 577 F.2d at 197-98 (vacating perjury conviction where follow-up questioning, that was not included in indictment, provided context for witness's allegedly perjurious answer).

Because the questions in episodes 4 and 6 are fundamentally ambiguous, they should be stricken from Count One of the Indictment.

3. Episodes 3 and 5 are both fundamentally ambiguous and the answers are literally true.

Episode 3 asked: "Do you have any knowledge about whether or not Mr. McClain performed any sort of tasks or assignments for Mr. Madigan in 2017 to 2018 timeframe at all?" Mr. Mapes answered, "I don't recall any." Episode 5 had the following back and forth:

Q: . . . All of these questions are going to be for the 2017 through 2019 timeframe. Do you recall anyone ever describing any work—anyone at all describing any work or assignments Mr. McClain was performing on Mr. Madigan's behalf?

A: I don't recall that—that I would have been part of any of that dialogue. I don't know why I would be.

Q: The answer is yes or no to that question. Do you recall?

A: No, I don't recall any of that.

These questions have the same hallmarks of fundamental ambiguity as the episodes above. They are ambiguous in their use of the terms "tasks," "work," and "assignments." They are compound. And, as demonstrated by the sequence of questions and answers both before and after those questions (none of which the grand jury found perjurious), Mr. Mapes' answers are literally true. For instance, before the allegedly perjurious answer to the question in episode 3, Mr. Mapes testified that he did not "recall anything at the moment" but "something could come up as subject matter if you bring it and it pops my memory." In his testimony, Mr. Mapes also gave high-level examples of Mr. McClain passing "along pieces of information" in the 2017 and 2018 timeframe and before, and Mr. McClain providing his "perspective" to Mr. Madigan on various matters. The prosecutor did not follow up on any of these matters—nor did the prosecutor attempt to refresh Mr. Mapes' recollection on any specific subject matters that could "pop[]" Mr. Mapes' memory.

While the examiner can ask whatever questions they choose and decide not to ask direct questions (*e.g.* did you have a telephone conversation with Mr. McClain on May 19, 2019 in which you and he discussed subject *x*), "Congress [did not] intend the drastic sanction of a perjury prosecution to cure a testimonial mishap that could readily have been reached with a single additional question by counsel." *Bronston*, 409 U.S. at 358. The Supreme Court added:

> Under the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it. . . . It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.

Id. at 358-59. What *Bronston* means is that the government has the burden of asking precise, clear questions. The consequences for failure to do so should fall on the government—not on the witness

who is unrepresented in the grand jury and is all alone in that setting. When the government does not ask precise, clear questions, the Court must step in and not allow such questions to provide the basis for a perjury prosecution.

The trial was littered with examples of witnesses who repeatedly did not recall information and answered "I don't recall" when asked questions. Indeed, witnesses Lang, Cousineau, Baugher, Cullen, Shapiro, Rita, O'Leary, and McDonald all testified that they did not recall in response to examination. Former US Attorney Shapiro went further, agreeing that if a witness did not recall something in the grand jury, they should say "I don't recall" and wait for the next question posed by the examiner. Trial tr. at 368. Despite all of this testimony in which witnesses acknowledged that recall is tricky, the government has persisted in its claims that only Mr. Mapes' "I don't recall" testimony was perjurious. But, as the Supreme Court instructed in *Bronstein*, such testimony must be literally true—and not the basis of a perjury prosecution—unless and until the prosecutor asks the clarifying question. That did not happen here.

One other example at trial pointed out the fundamental ambiguity of the terms "task" or "assignment." Mr. O'Leary was asked about types of "assignments", and he unintentionally makes the point clearly that those terms are ambiguous—and subject to interpretation. When asked about a conversation on a wiretap in which an "assignment" is given to get a chicken sandwich, Mr. O'Leary rejected the term: "I don't know if I call it assignment. I mean, more of a favor to go out and do something. But, yes, I guess you could—parsing words." Trial tr. at 463. That is exactly what the government did in charging Mr. Mapes; it parsed words. The government's witness can think of an "assignment" as a favor, proving the point that the term is ambiguous. Mr. Mapes' was not afforded the same latitude.

For all of those reasons, episodes 3-6 of Count One should have been dismissed before trial as a matter of law.

MOTION FOR NEW TRIAL

A. Standard

Federal Rule of Criminal Procedure 33(a) makes clear that this Court "may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). This Court should grant a new trial if "a reasonable possibility [exists] that a trial error had a prejudicial effect upon the jury's verdict." *United States v. Van Eyl*, 468 F.3d 428, 436, 438 (7th Cir. 2006) (affirming district court's grant of new trial). The Court's discretion is broad because it "heard all the evidence, watched both the witnesses and the jury," and is in the best position to determine whether any improper evidence "tipped the scale against" a defendant. *Id.* at 438. Additionally, if the Court "believes there is a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted—[it] has the power to set the verdict aside, even if he does not think that he made any erroneous rulings at the trial." *United States v. Morales*, 902 F.2d 604, 606 (7th Cir. 1990) (citation omitted).

A motion for new trial does not require the Court to view the evidence "in the light most favorable to the prosecution." *United States v. Washington*, 184 F.3d 653, 657 (7th Cir. 1999). Instead, "the court may reweigh the evidence, taking into account the credibility of the witnesses." *Id.* at 658. After reweighing the evidence, the Court should "grant a new trial if the verdict is so contrary to the weight of the evidence that a new trial is required in the interest of justice." *Id.* at 657; *see also United States v. Reed*, 875 F.2d 107, 113 (7th Cir. 1989) (the Court must grant a new trial if that evidence "preponderate[s] heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand"). As the Seventh Circuit explained, "[i]f the complete

record, testimonial and physical, leaves a strong doubt as to the defendant's guilt, even though not so strong a doubt as to require a judgment of acquittal," a new trial is required. *Morales*, 902 F.2d 604, as modified by *United States v. Morales*, 910 F.2d 467, 468 (7th Cir. 1990).

In the alternative to judgment of acquittal, Mr. Mapes is entitled to a new trial because errors described had a prejudicial effect on the jury's verdict. *See Van Eyl*, 468 F.3d at 436–38. In addition to these errors, a new trial is required because the verdict was contrary to the weight of the evidence, as described in the Motion for Judgment of Acquittal, *supra*. *See Washington*, 184 F.3d at 657.

B. The Court erred in admitting evidence of Mapes' immunity.

The jury should not have heard anything about the fact that Mr. Mapes was immunized. It has nothing to do with the elements of the offense and is therefore inadmissible under the Federal Rules of Evidence. The caselaw also strongly disfavors the introduction of such evidence, Mr. Mapes did not open the door to its introduction, and the Court's ruling admitting that evidence allowed the government to comment, subtly but impermissibly, on Mr. Mapes' invocation of his Fifth Amendment rights.

Evidence that Mr. Mapes was immunized is inadmissible under Federal Rule of Evidence 401, which bars the admission of evidence unless it has the tendency to make the existence of any fact "more or less probable than it would without the evidence." Relevance "is a threshold inquiry," and irrelevant evidence is inadmissible. *Dowling v. United States*, 493 U.S. 342, 350-51 n.3 (1990). That Mr. Mapes testified subject to immunity was not relevant—it did not have "any tendency to make [] more or less probable" nor "is of consequence," Fed. R. Evid. 401—to the allegations that he made a false statement under oath in his Grand Jury testimony. Nor did it make more or less probable any of the elements of perjury that the jury considered in this case. That is because lying

is lying. Whether it comes from an immunized witness, a cooperating witness, a government agent, or a witness who walks in off the street, lying under oath is a crime. That is why none of the elements of perjury mention immunity at all.

The government offered no cases, studies, data, or other support for the introducing such prejudicial evidence (and the Court cited to none in allowing the government to introduce Mr. Mapes' immunity agreement). That is because the caselaw consistently seeks to protect the interests of criminal defendants who invoke their Fifth Amendment rights. It is a bedrock principle of the law that the government cannot comment on a defendant's invocation of his Fifth Amendment right to silence. *See Griffin v. California*, 380 U.S. 609, 613-14 (1965). Nor can the jury be allowed to infer guilt from a defendant's silence. *United States v. Carswell*, 996 F.3d 785, 797 (7th Cir. 2021). But the evidence the government entered over Mr. Mapes' objection allowed the jury to do just that.

The only case directly on point on this issue, *United States v. Seltzer*, 794 F.2d 1114 (6th Cir. 1986), prohibited the introduction of the very evidence that the government was allowed to offer in this case. In *Seltzer,* the Sixth Circuit considered whether the district court abused its discretion when it allowed cross-examination and prosecutorial comment of the defendant's invocation of his Fifth Amendment rights and subsequent immunization before the grand jury. The Court first noted with approval that the trial judge, at a side bar at the beginning of trial, "stated that he did not expect the government to get into the proposition that [defendant] was immunized. Judge Dowd stated he believed it would be inappropriate for the jury to know [defendant] testified only with a grant of immunity." *Id.* at 1121. Only after the defendant in *Seltzer* opened the door by claiming that he was a willing and cooperative witness did the *Seltzer* court allow the introduction of evidence regarding defendant's immunity. *Id.* No such door opening occurred here.

The government introduced evidence in multiple places about Mr. Mapes' immunity. The government entered into evidence the order itself, the colloquy between Chief Judge Pallmeyer and Mr. Mapes about the immunity order, and the grand jury appearance of Mr. Mapes in which the AUSA lectured Mr. Mapes about the fact that he had been immunized. The government continued in closing by reminding the jurors that his testimony was compelled and that Mr. Mapes could not remain silent. *See* Trial at 1753 ("He had that immunity order, remember. So he had to answer. He had to say something."). All of that evidence and argument allowed the jury to speculate, impermissibly, about—why was he given immunity? what crime must he have committed to be given immunity? why did Mr. Mapes think his testimony could have incriminated him? This invitation to the jury to speculate as to uncharged wrongful conduct unfairly prejudiced Mr. Mapes—given that immunity had nothing to do with the core question for the jury: did Mr. Mapes commit perjury and obstruct when he testified in the grand jury? *See United States v. Brighton Bldg. & Maint. Co.,* 435 F. Supp. 222, 230 (N.D. Ill. 1977) (striking references in indictment that allow jury to speculate about "crimes not charged in the indictment").

The Court's decision to allow the government to put in evidence of Mr. Mapes' immunity constituted error, and requires a new trial.

C. The Court erred in admitting testimony of former United States Attorney Gary Shapiro.

Mr. Mapes had grave concerns about the testimony of Mr. Shapiro, a well-respected, capable, career public servant who previously served as United States Attorney in this district (a fact that the government needlessly elicited in Mr. Shapiro's direct examination). For all of the reasons the defense articulated in its pre-trial motions, Mr. Shapiro's testimony should have been excluded because it offered no facts, provided no useful evidence concerning whether Mr. Mapes committed perjury or obstruction, and was instead a thinly disguised effort to introduce "expert"

testimony through the guise of an accomplished lawyer and prosecutor who was clearly not a neutral. Indeed, Mr. Shapiro multiple times lapsed into the pronoun "we" when describing how the grand jury process worked, *see, e.g.,* Tr. at 334, 335, 344, further illustrating the prejudicial and bolstering nature of his testimony. Indeed, Mr. Shapiro's testimony allowed the jury to presume the regularity of the grand jury process as it related to Mr. Mapes, but did not allow Mr. Mapes to point out the significant differences in Mr. Mapes' grand jury experience from the experiences of other grand jury witnesses.

Allowing Mr. Shapiro to testify was improper. Neither the government nor the Court cited to any caselaw that would allow such testimony from a retired federal prosecutor who had no *facts* to offer about the evidence in this case. Instead, Mr. Shapiro's testimony was therefore based on his specialized training as a lawyer and a prosecutor and his years of experience. That is quintessentially the kind of testimony governed by and frowned upon by Rule 701 and Rule 602 when a witness is not identified as an expert. *See United States v. Conn,* 297 F.3d 548 (7th Cir. 2002). In *Conn*, the Court determined that a law enforcement witness's opinion that, based on his training and experience, certain guns were not collector's items was expert testimony under FRE 702. *Id.* at 553-54. The Seventh Circuit noted that lay opinion testimony under FRE 701 "most often takes the form of a summary of first-hand sensory observations." *Id.* at 554. It added, "Lay opinion testimony is admissible only to help the jury or the court to understand the *facts* about which the witness is testifying and not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events." *Id.* (emphasis added) (citation omitted). By contrast, "Expert opinion . . . need not be based on first-hand knowledge of the facts of the case. It brings to an appraisal of those facts a scientific, technological or *other specialized knowledge that the lay person cannot be expected to possess." Id.* (emphasis added).

Mr. Shapiro offered no first-hand observations or facts. Instead, like the law enforcement witness in *Conn* who was deemed an expert under FRE 702, Mr. Shapiro testified about specialized knowledge that he gained over the years as a lawyer and prosecutor that the lay person (*i.e.* the jury) did not possess. Just as Mr. Mapes predicted, Mr. Shapiro's testimony constituted opinion about the grand jury process as it existed in 2021. He did not have first-hand knowledge about that process—he has been removed from it for almost 10 years. And his knowledge was completely "specialized"—both from his training as a lawyer and his unique experience as a federal prosecutor for decades. *See also United States v. Christian,* 673 F.3d 702, 709 (7th Cir. 2012) (law enforcement witness's testimony "is a lay opinion if it is limited to what he observed . . . or to other facts derived exclusively from [a] particular investigation," but "an officer testifies as an expert when he brings the wealth of his experience . . . to bear on those observations and makes connections for the jury based on that specialized knowledge.").

Mr. Shapiro's entire testimony should have been barred—not just his impermissible discussion of the burden of proof. *See* Trial tr. at 338-342. He simply bolstered the regularity of the grand jury process, which had nothing to do with the issues the jury had to decide. It was error to admit that testimony at trial.

D. The Court erred in admitting evidence of Mapes' proffer.

The Court allowed significant testimony concerning Mr. Mapes' proffer interview with the government in February 2021, and the government spent considerable time discussing the proffer in its addresses to the jury. Allowing evidence of Mapes' proffer constitutes error. The introduction of this evidence in the government's case-in-chief was completely outside the usual practice in the Northern District of Illinois of seeking permission to introduce evidence of the defendant's proffer-protected statements only when those statements contradict that defendant's

testimony or a position he has taken at trial or at sentencing. The introduction of this evidence was also not supported by caselaw, violated the terms of the proffer agreement, constituted inadmissible hearsay, and trampled Mr. Mapes' rights that flowed from his immunity.

The government's introduction of the questions posed at the proffer violated Mr. Mapes' right to fundamental fairness under the Due Process Clause. The government entered into an agreement with Mr. Mapes when it entered into the proffer agreement with him. The government violated that promise when it introduced evidence in its case in chief about the proffer without the condition precedent that the evidence was introduced only in response to a position that Mr. Mapes had taken at trial. *See, e.g., Mabry v. Johnson,* 467 U.S. 504, 509 (1984) (broken government promise that induced guilty plea implicates due process clause); *United States v. Bowler,* 585 F.2d 851, 854 (7th Cir. 1978) ("plea agreements . . . are [viewed as] unique contracts and the ordinary contract principles are supplemented with a concern that the bargaining process not violate the defendant's right to fundamental fairness under the Due Process Clause."). In its agreements, the government must follow "the most meticulous standards of both promise and performance." *Id.; see also United States v. Ingram*, 979 F.2d 1179, 1184) (7th Cir. 1992) (even if plea agreement is unambiguous on its face, courts may refuse to enforce it if the government is found guilty of overreaching).

As the Seventh Circuit has made clear, "Such concerns are also appropriate, of course, in the context of proffer agreements." *United States v. $87,118.00 in U.S. Currency,* 95 F.3d 511, 516 (7th Cir. 1996); *see also United States v. Pielago,* 135 F.3d 703, 709 (11th Cir. 1998) ("Any ambiguities in the terms of a proffer agreement should be resolved in favor of the criminal defendant."). The government's efforts here did not live up to that "meticulous standard of both promise and performance". The proffer agreement it entered into makes clear that the government

cannot elicit the evidence it introduced in its case-in-chief. But, even if the agreement were ambiguous on that question, that ambiguity should have been resolved against the government. The Court erred in failing to do so.

The government's introduction of the proffered information—including the questions asked but not the answers given—was also inadmissible hearsay. Hearsay is "a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801. "Hearsay is not admissible" unless subject to an exception pursuant to Federal Rule of Evidence 802. The questions asked were quintessential out-of-court statements that the government introduced for the truth. That is, the government attempted to prove that the statements and questions they allege were posed to Mr. Mapes actually occurred. That is hearsay, and no exception to the rules permits introduction of such statements.

The government basis for admission of the evidence was also faulty. The government claimed pre-trial (and then argued in addresses to the jury) that introducing the questions posed to Mr. Mapes at his proffer was relevant to show that he "was asked about the same topics during the proffer [on February 11, 2021] as he was in his grand jury testimony [on March 31, 2021]." But the testimony did not bear that out. Mr. Mapes was not asked anything about Lou Lang, Bob Rita, Joe Dominguez, or Com Ed (all individuals and entities listed in the obstruction count against him). Nor were any of the following questions asked of Mr. Mapes:

> Q: Okay. Did [Mr. McClain], after he retired, kind of give you any insight into what his interactions with [Mr. Madigan] were that you weren't privy to personally?
>
> *****
>
> Q: Okay. And [Mr. McClain] didn't—wouldn't tell you what he was discussing with [Mr. Madigan] or anything that he was doing on behalf of [Mr. Madigan] in that '17, '18, and '19 timeframe?

*****

Q: Do you have any knowledge about whether or not [Mr. McClain] performed any sort of tasks or assignments for [Mr. Madigan] in 2017 to 2018 timeframe at all?

*****

Q: …Do you have any reason to think [Mr. McClain] was acting as an agent for [Mr. Madigan] after he retired in 2016, that is, doing work for him or carrying out assignments for him?

*****

Q: . . . All of these questions are going to be for the 2017 through 2019 timeframe. Do you recall anyone ever describing any work—anyone at all describing any work or assignments [Mr. McClain] was performing on [Mr. Madigan]'s behalf?

*****

Q: . . . So one of the things we were trying to figure out, Mr. Mapes, is whether or not—kind of a key issue for us is whether or not [Mr. McClain] acted as an agent for [Mr. Madigan] in any respect, including that timeframe. We're talking about the 2017, 2018, 2019 timeframe. Are you aware of any facts that would help us understand whether or not, in fact, [Mr. McClain] acted as an agent or performed work for [Mr. Madigan] or took direction from [Mr. Madigan] in that timeframe?

*****

Q: Let's talk about 2017/2018 to the present, do you know [Mr. McClain] to have acted in any capacity as a messenger for [Mr. Madigan] to convey messages to and from him?

As Mr. McDonald made clear in his testimony, the interview covered topics like Mr. Mapes' background, his duties as Chief of Staff, the structure of the Speaker's staff, how legislation moves in the Illinois House of Representatives, the veto session, and Mapes' daily interactions with Madigan. A bit of discussion at the end of the interview involved very high-level questions about

McClain. What was not discussed is whether McClain did "tasks" or "assignments" for Madigan from 2017 to 2019. Indeed, neither of those words even appeared once in the FBI 302. The government's stated purpose for introducing the questions themselves, then, was not supported by the government's own evidence. The jury, then, was left with an incomplete picture, and one that was entirely prejudicial to Mr. Mapes as it continued to allow the jury to infer that there was regularity to this process with Mr. Mapes—without Mr. Mapes being able to point out how *irregular* the process was to him compared to every other witness the government encountered in this case.

Another problem befell the government's evidence. If Mr. Mapes' *answers* in the February proffer were consistent regarding Mr. McClain, then the government's introduction of only the questions was wholly unfair. Imagine the government asked Mr. Mapes on February 11, 2021 whether he had any knowledge about whether McClain performed any tasks or assignments for Madigan in the 2017 to 2018 timeframe at all—*i.e.* the exact question it asked in the grand jury. And then imagine Mr. Mapes responded in the proffer, "I don't know," or "I don't recall." Even under the government's theory of relevance, knowing that the government asked the same exact question on February 11, 2021 and March 31, 2021 would not have helped Mr. Mapes to prepare for the grand jury (as the government argued to the jury). His answer would have been the same—"I don't know" or "I don't recall." Mr. Mapes' answers in the proffer were a necessary part of this exercise, then, but even the government agreed that it could not elicit evidence of Mr. Mapes' statements in the February 2021 proffer. This, again, put Mr. Mapes in an impermissible trick box at trial.

A final problem exists with the government's use of portions of Mr. Mapes' proffer interview. Subsequent to that proffer, the government chose to immunize Mr. Mapes prior to his

testimony in the grand jury. The only question for the jury was whether Mr. Mapes perjured himself or obstructed *after* he was immunized. His previous pre-immunized statements to the government (whether through a proffer or otherwise) were not relevant to that question. Said differently, his conduct, including his statements, were immunized, and the government's use of immunized evidence at trial violated the teachings of *Kastigar* and its progeny. *See, e.g., United States v. Pielago*, 135 F.3d 703, 707-08 (11th Cir. 1998) (reaching, on plain-error appellate review, defendant's denied motion to dismiss on ground that government had used immunized statements against her in violation of proffer agreement); *see also Kastigar v. United States*, 406 U.S. 441 (1972). Mr. Mapes argued this point pre-trial, but his argument was rejected.

For all of these reasons, it was error to permit the government to introduce evidence and argue to the jury that Mr. Mapes proffered.

E. The Court erred in admitting evidence of the "Chinatown" property.

For multiple reasons, all of which Mr. Mapes raised pre-trial, the government's admission of evidence concerning the "Chinatown" property was erroneous.

First, the "Chinatown" episode was not a basis for the indictment against Mr. Mapes. There was no reference to it in Count One, the perjury charge. Nevertheless, the government argued at trial impermissibly that Mr. Mapes lied in the grand jury when he responded to questions about the "Chinatown" property. *See, e.g.,* Tr. at 1772 (closing argument discussing Mr. Mapes' testimony regarding "Chinatown" as "lies, ladies and gentlemen."). That might have been the government's theory—the problem is that the grand jury did not charge Mr. Mapes with lying about "Chinatown." The question-and-answer sequence between the prosecutor and Mr. Mapes concerning the "Chinatown" property is not among the seven question and answer sequences listed in Count 1, paragraph 8. Nor is the "Chinatown" property referenced in any way in the obstruction

count. That Count Public Officials A, B, and C, and Individual A and Individual B. None are Representative Theresa Mah—the state legislator whose district contains the "Chinatown" property. Nor does Count 2 reference the "Chinatown" legislation in any way. Instead, the only additional facts discussed in Count 2 deal with Commonwealth Edison:

> The Special January 2019 Grand Jury was investigating allegations Public Official A and Individual B sought to obtain for others private jobs, contracts, and monetary payments from ComEd, in order to influence and reward Public Official A in connection with Public Official A's role as Speaker of the Illinois House of Representatives.

The government acknowledged that the "Chinatown" legislation had nothing to do with seeking to obtain "jobs, contracts, and monetary payments from ComEd." The "Chinatown" property legislation had nothing to do with this Indictment and evidence of it should have been excluded. Therefore, the government's attempt to constructively amend the Indictment should have been denied. *See, e.g. United States v. Sakoc*, 115 F.Supp.3d 475 (D.Vt. 2015) (new trial where government's reference to alleged false statements not referred to in indictment constituted prejudicial variance), *see also United States v. Stirone*, 361 U.S. 212 (1960) (finding constructive amendment of indictment at trial).

Second, the only reference to "Chinatown" presented to the jury was a one-line sentence uttered by McClain on tape that constitutes hearsay and should have been excluded. Mr. Mapes moved *in limine* prior to trial to exclude the recording, but that motion was denied. In the recording, entered into evidence as government exhibit 17, McClain stated as follows: "In my case, it's an assignment, as you probably know, I'm trying to get some legal um . . . property um . . . transferred from the CDOT." Mapes said, "mm-hmm". When McClain said he had "an assignment," Mapes did not respond or adopt the statement. He simply said, "Mm-hmm." That is insufficient to constitute an admission that would cure the hearsay of McClain's out-of-court statement. It was therefore error to admit this recording over Mr. Mapes' hearsay objection. Indeed, in its pre-trial

response to Mr. Mapes' motion, the government did not even challenge Mr. Mapes' argument that he did not adopt Mr. McClain's statements about the "Chinatown" parcel when he said "mmm-hmmm". In doing so, the government waived any objection to the exclusion of this call on hearsay grounds, *see, e.g., United States v. Wynn,* 845 F.2d 1439, 1442 (7th Cir. 1988) (discussing waiver by a party), and the call should have been excluded for that reason as well.

For all of those reasons, separately or together, the introduction of evidence and argument concerning the "Chinatown" property was error.

F. The Court erred in admitting evidence of documents outside the charged period of conduct.

Mr. Mapes was asked a series of questions in the grand jury about the 2017 to 2019 timeframe and his relationship with Mr. Madigan and Mr. McClain during that period of time. Nevertheless, the government introduced multiple documents from outside that time frame over objection. Specifically, exhibits 203 207, 209, 214, 219, 228, and 245 were introduced over objection. It was error to do so.

Mr. Mapes argued before trial that the relevance of such evidence was quite low concerning documents before 2017, but the threat of undue prejudice to Mr. Mapes was real in introducing exhibits that deal with inflammatory topics such as political fundraising, sexual harassment, and political patronage—particularly when such topics did not form the basis of the perjury or obstruction charges against Mr. Mapes. Those concerns were well-founded, given that the government argued repeatedly and introduced significant evidence about those very topics (which are disconnected from the focus of the grand jury's investigation – bribery and ComEd).

Mr. Mapes was not questioned about these documents or shown them during his grand jury appearance. More, they were from a time period that was well before the 2017-2019 time period that Mr. Mapes was asked about in the grand jury and allegedly lied about. Documents from 2010

are irrelevant to the inquiry into whether Mr. McClain was doing "tasks" and "assignments" for Mr. Madigan in the 2017-2019 time period. Indeed, the Government's theory of admissibility for these documents was that they showed that Mr. McClain was doing tasks and assignments for Mr. Madigan in 2010 (and that Mr. Mapes knew that Mr. McClain was doing so in 2010), such evidence was improper propensity evidence and should therefore have been excluded.

G. The Court erred in admitting certain wiretaps that constitute hearsay.

In its case, the government introduced multiple wiretap recordings to which Mr. Mapes was not a party. Contrary to the government's assertions to the contrary, these wiretaps *were* hearsay, offered as substantive evidence of the content of the calls.

Government exhibit 12 consisted of a call between Michael McClain and Bob Rita, discussing among other things Rita's work on gaming legislation. The call included the following exchange:

> Rita: What's our next move.
>
> MM: I sent a message to Joe but haven't heard from him.
>
> Rita: nor have I
>
> Rita: I know we talked about unveiling this, I talked to Ryan, is there a plan?
>
> MM: I think what we ought to do is have a hearing on it Monday and if you have the votes vote it out of sub committee
>
> Rita: I know we were doing that, I just wanted to know if you thought we should give the language to folks
>
> MM: I think you give it to Mapes first, isn't that the protocol
>
> Minimize
>
> MM: let me check with Mapes but if so, if Mapes lets it go up on the website people can pull it up. Last time I had a communication with Joe I found a couple of mistakes that's the last communication I had.

Rita: he's an amendment

MM: Link does?

Rita: yeah, that he wants to give me

MM: it never ends Bob, does it?

The only mention of Mr. Mapes in the recording is McClain's suggestion to Representative Rita that he provide the legislation to Mr. Mapes, as Clerk of the House, because of McClain's understanding that is "the protocol" for legislation. Mr. Mapes was not asked about this recording in the grand jury, nor was he played the wiretap in the grand jury. Mr. Mapes was not asked in the grand jury specifically about his handling of gaming legislation or whether Representative Rita provided a copy of the legislation to him in May 2018 before he departed his job as Chief of Staff and Clerk on June 6, 2018. Mr. Mapes was asked generally in the Grand Jury about his duties; but the government never contended in the charges against Mr. Mapes that his answers to questions about his duties were either false or obstructive.

The government argued that exhibit 12 was not being offered for the truth of the matter asserted, but rather was offered only for its effect on the listener. Yet, in questioning Representative Rita, the government clearly sought to establish that Mr. McClain's reference to Mr. Mapes was evidence that Mr. Mapes was in fact aware of the matter:

> Q: If you turn and go to line 51. Mr. McClain tells you: I'd give it to Mapes first, right? Isn't that protocol? What did you understand him to be advising you to do in that portion of the call?
>
> A: Make sure Tim Mapes had the language and – so he was aware of it.

Whatever Bob Rita's understanding regarding the protocol for calling bills, it was of absolutely no relevance to the matter at issue in this case. Similarly, the effect on Bob Rita of McClain's reference to Mr. Mapes could have no bearing on the matters at issue here. Rather, the inference

the government clearly made through introduction of this call was that Mr. Mapes *was* in fact aware of the gaming bill amendment, contrary to his testimony in the Grand Jury. That is unquestionably an out of court statement—in this case by Mr. McClain and Representative Rita—offered to prove the truth of the matter asserted; that is, that Mr. Mapes was aware of Rita's work on the gaming bill and McClain's involvement with it. This was hearsay testimony, and it should not have been admitted in the government's case against Mr. Mapes.

Similarly, Government Exhibit 63 was a wiretap recording of a phone call between Mr. McClain and Lou Lang for which Mr. Mapes was not present. On the call, McClain tells Lang that it is time for him to move on from his time as an elected official. Here again, the government submitted that it was offering the call to show its effect on the listener, not for the truth of the matter asserted. But here again, Mr. Lang's impression of Mr. McClain's statements is of literally no relevance to the perjury and obstruction charges against Mr. Mapes. And the government argued in closing that "McClain delivered the news to Lang on a call you heard, Exhibit 63, saying you've got to resign; you've got to step down." Trial tr. at 1741, The Government specifically argued that Call 63 was evidence of McClain passing messages for the Speaker—not because of its impact on Representative Lang, but as part of "the sheer number and detail of all those calls you heard" that established that Mr. Mapes must have known that McClain was acting as Madigan's agent on particular matters. *Id*. at 1742.

The government argued that Exhibits 12 and 63 were among the "sheer number and detail of calls" should tell the jury that its "common sense" would tell them that Mr. Mapes could not have been "the only person in all of Springfield who didn't know that McClain played this critical role for Speaker Madigan?" *Id*. Those calls are part of the evidence that the government indicated established as a matter of fact that these other people, including Rita and Lang, knew that McClain

was passing messages for Madigan. The government makes the leap they insisted they would not; that is, not that the hearers of these statements had impressions about what McClain was doing, but that those statements are evidence McClain was actually doing those things. This is hearsay impermissibly admitted for the truth of the matter asserted, and improper evidence against Mr. Mapes.

The government was also permitted to introduce improper hearsay evidence in Exhibit 74, a wiretap recording from December 2018 of a conference call in which McClain, Madigan, and several others—but not Mr. Mapes—were discussing committee assignments. Again, McClain's involvement in discussions about committee assignments is both innocuous and completely legal, and was not among the topics Mr. Mapes was asked about in the Grand Jury (or charged with after his testimony). But even setting that aside, this call was impermissible hearsay offered for the truth of the matter asserted. The government played a subsequent call between McClain and Mapes, Exhibit 75, and then in its closing argument told the jury that "McClain is describing to the defendant what Speaker Madigan did in a meeting for all his requests." That is: the government played the recording of the meeting, which Mr. Mapes did not participate in, and then played a subsequent call where Mr. McClain relays some of the content of that call to Mr. Mapes, and uses those two things together to argue:

> Now, is this a man who thinks Mike McClain is a big blowhard who's lying about his connection to Speaker Madigan? No. The defendant knows that Mr. McClain is actively involved in the Speaker's world.

Trial tr. at 1742. By this argument, the government used the hearsay content of Exhibit 74, the call with McClain and others that Mapes did not participate in, to bolster McClain's credibility with respect to what he relayed to Mapes later. They're using the *content* of that call in Exhibit 74, not

its impact on any particular listener. That is improper hearsay evidence, and Mr. Mapes' pre-trial motion should have been granted

H. The Court erred in allowing certain evidence concerning Mapes' meeting with FBI agents in January 2019.

Mr. Mapes was not charged with perjury concerning his testimony about (a) his 2019 meeting with the FBI; (b) the memo he prepared about that meeting; or (c) his discussions with others (including Michael McClain and various lawyers) about that meeting. Nor was Mr. Mapes charged with obstruction concerning the meeting, the memo, or his discussions with others. Accordingly, introduction of evidence that Mr. Mapes had discussions with others in 2019 about his meeting or the memo he prepared was irrelevant to anything the jury decided in this case. It is not a crime for someone approached by the FBI to consult with friends or lawyers. Indeed, it is entirely appropriate to consult with others after such an event has occurred. The Constitution protects such activity—just as it protects citizens' decisions to remain silent and elect not to become government informants. The Court knows deeply the importance of legal counsel in interactions with the government, all the more reason why, as a gatekeeper for the admission of evidence, the Court should rejected the government's introduction of evidence concerning the conversations of non-lawyer Mr. Mapes with others (most all of whom were lawyers) concerning the FBI's approach to him. The government leaned hard on this evidence—asserting repeatedly that Mr. Mapes lied in the grand jury about his meetings with the FBI in January 2019. *See, e.g.,* Trial tr. at 1732 ("when Mr. Mapes described this interaction in the grand jury, he lied about it"). This was impermissible, given that the grand jury itself had not indicted Mr. Mapes for lying about this episode or for obstructing concerning this episode.

This Court erred, then, in allowing the introduction of evidence that Mr. Mapes had discussions with others in 2019 about his FBI meeting or the memo he prepared was irrelevant to anything the jury decided in this case.

I. The Court erred in denying the admission of evidence and argument concerning witness' refreshing recollection.

Both in his cross-examination of witnesses and in his argument, Mr. Mapes was foreclosed from pointing out that (a) almost every other witness in the investigation (but Mr. Mapes) listened to recordings and/or reviewed documents to refresh their recollections; and (b) it is common sense and human nature to refresh one's memory in that way. In closing, Mr. Mapes attempted to make the point that witnesses throughout the trial often did not recall things and needed to see documents to refresh memory—a common occurrence that is within the province of the jury to observe (and for counsel to point out). That attempt in closing drew a strong rebuke, and Mr. Mapes was precluded from making those obvious, common sense points to the jury. That unfair limitation on counsel's ability to examine witnesses and argue to the jury prejudiced Mr. Mapes.

While the Court expressed concern about "propensity" arguments, that was never Mr. Mapes' aim. Instead, Mr. Mapes simply wanted to make common sense observations about human memory as it played out in court through cross-examination and argument. Indeed, pattern jury instructions used in this case called for the jury to use its common sense, but the Court's rulings constrained Mr. Mapes from pointing out the common sense of memory through witnesses and argument.

The government's arguments also required Mr. Mapes the latitude to examine witnesses and argue these points. In fact, the government argued in closing that it was impossible for Mr. Mapes to have forgotten conversations he had with McClain three years' before—and that was the thrust of the government's entire case. As part of that argument, the government specifically

referred to the testimony of several of its witnesses, who all testified about their knowledge of McClain's work on behalf of the speaker, which the government painted in sharp contrast to Mr. Mapes' lack of memory. The government was making an argument about how memory works, and specifically painting Mr. Mapes in contrast to its witnesses who it argued knew full well what Mr. McClain had been doing for the Speaker years before. And Mr. Mapes was precluded from rebutting that argument through examining witnesses about memory and argue in closing about how memory worked in this case, and in particular from eliciting the simple, and unremarkable, fact that many of the memories the government's witnesses had about that topic were assisted by refreshing their recollection with documents and recordings.

Precluding Mr. Mapes from taking those steps was error, and a significant one at that, because Mr. Mapes was not permitted to rebut head-on the entirely inference-laden case the government presented in a very significant way.

For all of the foregoing reasons, Mr. Mapes respectfully requests that his motion for acquittal on Counts One and Two be granted. Alternatively, Mr. Mapes respectfully requests a new trial.

Dated: November 10, 2023

Respectfully submitted,

/s/ *Andrew C. Porter*

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2023, I caused copies of the foregoing to be served on all counsel of record by filing electronic copies with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered CM/ECF users.

*/s/*_____
One of the Attorneys for Timothy Mapes