No. 13-12385-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee

v.

ISAAC FELDMAN,

Defendant/Appellant.

On Appeal from the United States District Court
For the Southern District of Florida

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

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THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL APPEAL)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Isaac Feldman
Case No. 13-12385-C

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir.R. 26.1.

JOHN E. BERGENDAHL

BROWN, HON. STEPHEN T.

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DEFABIO, JOEL

DOCOBO, RICHARD DOUGLAS

FELDMAN, ISAAC

FERRER, WILFREDO A.

FLEISCHER, BRUCE

GREGORIE, RICHARD

GROVE, DAREN

HUYNH, JOSEPH HONG

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LEVIN, ALBERT ZACHARY

MALMAN, MYLES, H.

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MCALILEY, HON. CHRIS

PAVLENKO, STANISLAV

SALYER, KATHLEEN M.

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SHIPLEY, JOHN C.

SILVERS, MARCIA

SREBNICK, HOWARD

TAKHALOV, ALBERT

THAKUR, MICHAEL ERIC

TORRES, HON. EDWIN G.

VEREEN, RODERICK DARRELL

ZARGARI, SIAVASH

STATEMENT REGARDING ORAL ARGUMENT

The Appellant, Isaac Feldman, respectfully submits that oral argument is necessary to the just resolution of this appeal and will significantly enhance the decision-making process.

STATEMENT REGARDING ADOPTION OF CO-APPELLANTS BRIEFS

Appellant, Isaac Feldman, pursuant to Federal Rules Appellant Procedure 28(i) (providing that in a case involving more than one appellant or appellee, appellants may join in a brief, and any party may adopt by reference a part of another's brief) and 11th Circuit Rule 28-1(f) (providing that a party who adopts by reference any part of the brief of another party pursuant to Rule 28(i) shall include a statement describing which briefs and which portions of those briefs are adopted), hereby adopts the statement of the issues, summary of argument, and argument in support of issues I, II, III, and IV in the brief of co-appellant Stanislav Pavlenko and issue I in the brief of co-appellant Albert Takhalov, specifically, all claims based on trial error, due process violations in the presentation of ethnically prejudicial evidence and argument, denial of severance motions, improper admission of evidence, and cumulative error. Appellant also adopts the statement

of case and facts presented by co-appellant Takhalov as a presentation of the case in the light most favorable to the government.

PLEASE NOTE: Appellants recommend that of the three initial briefs filed by appellants, this brief for Albert Takhalov be read first, as it contains the most comprehensive presentation of the procedural history and the statement of the facts, which co-appellants are adopting.

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STATEMENT OF JURISDICTION

The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231 because the Appellant was charged with an offense against the laws of the United States. The Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, which gives the Courts of Appeals jurisdiction over all final decisions of the district courts of the United States.

STATEMENT OF THE ISSUES

I.

WHETHER THE DISTRICT COURT'S DENIAL OF SEVERANCE MOTIONS, WHICH WERE PREMISED ON OVERWHELMING PREJUDICE FROM THE INTRODUCTION OF EVIDENCE OF ORGANIZED CRIMINAL VIOLENCE, OBSTRUCTION OF JUSTICE, AND OTHER OFFENSES PERTAINING ONLY TO A CO-DEFENDANT, VIOLATED THE DEFENDANT'S FUNDAMENTAL RIGHT TO A FAIR TRIAL.

II.

WHETHER THE PERSISTENT AND INDELIBLE PREJUDICE FROM THE PRESENTATION OF EVIDENCE AND ARGUMENT AS TO RUSSIAN ETHNICITY AND ITS ASSOCIATION WITH VIOLENT LAWLESSNESS FOREIGN TO AMERICAN VALUES VIOLATED THE DEFENDANT'S DUE PROCESS RIGHTS AND WARRANTS A NEW TRIAL.

III.

WHETHER, GIVEN THE GREAT DIFFICULTY FACED BY THE JURY IN CLEARLY UNDERSTANDING THE HEAVILY-ACCENTED TESTIMONY OF SEVERAL NATIVE RUSSIAN SPEAKERS, INCLUDING THE DEFENDANT, WHO TESTIFIED WITHOUT INTERPRETERS, THE DISTRICT COURT'S REVERSAL OF ITS INITIAL POSITION THAT IT WOULD PERMIT TESTIMONIAL READ-BACKS REQUESTED BY THE JURY UNDERMINED THE FAIRNESS AND RELIABILITY OF THE JURY VERDICT AND WARRANTS A NEW TRIAL.

IV.

WHETHER EVIDENTIARY RULINGS PERMITTING THE INTRODUCTION OF GUILT-OPINION EVIDENCE OFFERED BY GOVERNMENT WITNESSES AND PERMITTING THE GOVERNMENT'S KEY COOPERATING WITNESS TO BOLSTER HIS TESTIMONY WITH CREDIBILITY FINDINGS FROM PRIOR PROCEEDINGS, CONSIDERED IN LIGHT OF THE CUMULATIVE TRIAL ERRORS, WARRANTS A NEW TRIAL.

V.

WHETHER THE SENTENCING COURT ERRED IN IMPOSING UNFOUNDED GUIDELINE ENHANCEMENTS BASED ON SPECULATIVE LOSS CALCULATIONS, SOPHISTICATED LAUNDERING, APPLICATION OF THE MONEY LAUNDERING GUIDELINE WHERE THERE WERE NO CRIMINAL PROCEEDS INVOLVED IN THE UNDERLYING OFFENSE OF CONVICTION, AND OBSTRUCTION OF JUSTICE AND IN VARYING ABOVE THE GUIDELINES FOR THE SAME CONDUCT ADEQUATELY ADDRESSED BY THE GUIDELINES.

STATEMENT OF THE CASE

In the summer of 2010, Isaac Feldman became a minority investor in two Miami Beach nightclubs. As a result of that investment, he found himself indicted for fraud and money laundering offenses predicated on a novel, unprecedented interpretation of the federal wire fraud statutes. He went to trial prepared to defend against those charges. What he was forced to defend against was something quite different. The story of the alleged fraud quickly morphed into a sordid and twisted tale recounting how other individuals (but not Isaac Feldman, a fifty-three year old real estate broker with no criminal record and a long standing history of community service and charitable works) threatened witnesses, retaliated against witnesses, broke legs, providing glimpses into the inner workings of the Russian Mafia and Russian organized crime. In addition, the whole atmosphere of the trial became ethnically charged when numerous unnecessary and improper references and comments focusing on the Russian ethnicity of Mr. Feldman and his co-defendants were put before the jury.

Course of Proceedings and Disposition in the District Court

Mr. Feldman adopts the procedural history set forth in co-appellant's Albert Takhalov's initial brief.

STATEMENTS OF FACTS

Mr. Feldman adopts the Statements of Facts set forth in co-appellant's Albert Takhalov's initial brief.

ISAAC FELDMAN'S DEFENSE CASE

A.

Mr. Feldman's Testimony

Isaac Feldman was born in 1961 in Moldova, a part of the former Soviet Union. As a child, he was routinely subjected to bullying and discrimination because he and his family were Jews. To escape the discrimination, they migrated to Israel in 1972. Mr. Feldman completed his secondary education in Israel and fulfilled his three year mandatory service obligation in the Israeli military. DE:1149:41-52.

In 1984, Mr. Feldman immigrated to America. His parents followed in 1985-86. He obtained his real estate license in New York. DE:1149:54,57-58.

In 1992, Mr. Feldman and his family relocated to Florida. In 1994, he secured his Florida real estate license and one year later passed the broker's exam. He opened his own real estate office and ran a successful business. From the late 1990s through the day he was arrested, he immersed himself in local, political,

religious, and community affairs and was a prominent, well respected business and community figure in his home town of Sunny Isles. DE:1149:60-66.

By the end of 2008, the real estate business had slowed substantially due to the economic crash and he began exploring additional business opportunities to supplement his earnings. DE:1149:81. In late 2010, he and a friend, Max Ruchkin, began discussing the viability of becoming involved in the night club business in Miami. Ruchkin told Feldman that he had experience in that line of business, that he owned clubs overseas and was now looking for investors to open a bottle club in Miami. Ruchkin also told Feldman he would manage the club and utilize promoters to grow the club's business. Based on what Ruchkin told him, Mr. Feldman developed an interest in investing in a bottle club, but felt he needed to learn more about the business. DE:1149:81-84.

Before he made his final decision to invest in Ruchkin's proposal, Feldman and Ruchkin travelled to New York to consult with a mutual friend, Eli Kipperman, who was familiar with the club business. While in New York, Mr. Feldman visited some high end bottle clubs to see first-hand how these nightspots operated. DE:1149:82-88. During his visits to the New York clubs, he saw nothing wrong with the way they were operated and observed they charged

extraordinarily high prices for the champagne and liquor they sold.[1] During a discussion with the manager of one of the clubs he learned that the club used both female and male promoters to generate business, and in exchange for bringing in a customer, the promoter would receive an undisclosed payment equaling 10% of the customer's check. DE:1149:90-94.

After returning to Florida, Mr. Feldman decided to invest with Ruchkin. Ruchkin agreed to find a suitable location, open the club, handle the promoters and run the business. Their club, VIP Diamond Club, opened its doors in February 2010.

Mr. Feldman understood that VIP would operate as a bottle club and that the general public would have access as long as they bought a bottle. DE:1149-122. Mr. Feldman had no idea how to run a bottle club. He was a passive investor and relied on Ruchkin to manage the day to day operation of VIP. He did not even attend opening night and rarely went to the club. DE:1149:109,112. Ruchkin made all the business decisions, including menu and pricing decisions, and handled the hiring and supervision of VIP's employees and promoters. The first promoters

[1] In fact, on one of the New York club's menu, the most expensive bottle of champagne was priced at $35,000.00, and the menu also reflected that a 20% percent gratuity would be added to the bill. [Feldman Ex. 130B]; DE:1149: 90-94.

hired by Ruchkin were not from overseas. The credit card account for VIP was opened by Mr. Takhalov. DE:1149:100-105.

VIP was a financial disaster. Ruchkin never did his job, and, did not honor his commitment to invest some of his own money in the struggling venture. He delegated away many of his responsibilities and hired a manager to run the club instead of doing it himself as promised. VIP continued to lose money. Mr. Feldman did not become more personally involved because he did not know the business and did not have the time. The majority of his time was devoted to his real estate office, community affairs and his family. DE: 1149:123.

Within 2 to 3 months after VIP opened, Feldman realized the business would have to close down. He began searching for a way to minimize his losses. DE:1149-39.

In July 2010, Eli Kipperman introduced Mr. Feldman to Alec Simchuk over the phone.[2] During this phone conversation, Simchuk explained that he was in the process of opening a new club in Miami. According to Simchuk, he had already secured promoters to work for his club and was only waiting for the licensing

[2] Mr. Feldman remembered Simchuk from back in the days when Simchuk owned clubs and promoted events at clubs in Miami. He believed Simchuk had been a prominent, successful businessman.

process to be completed. In the meantime his promoters were left with no work and nothing to do. DE:1149:133-140.

Three days after their phone conversation, Feldman, Kipperman, and Simchuk met at Simchuk's South Florida condo. Simchuk reiterated that he already had promoters in Miami and New York. He did not want them sitting around without a job; and needed to have a place where they could start working right away. To further that objective, Simchuk offered to take over VIP, run the club, and repay Mr. Feldman $20,000 of $40,000 he had invested. Under Simchuk's repayment plan, Mr. Feldman would receive the first 50% of VIP's net revenue to defray his previous losses. The remaining 50% was to be split four ways between Feldman, Kipperman, Simchuk and Simchuk's partner. DE:1149:133-141.[3]

Simchuk took over the day to day operations of VIP on or about July 15, 2010, and brought in Ieva Koncilo to manage the club. DE:1149:149. Mr. Feldman understood that Koncilo's duties included marketing and promoting VIP. DE:1149:152-153.

Once Simchuk assumed control of VIP, the club began to turn a profit and remained open until September 2010. During the Simchuck regime, Mr. Feldman

remained a passive investor. All management and operational decisions were left to Simchuk. At the time VIP ceased operations, Mr. Feldman had recouped $11,000 of his initial investment under the Simchuk agreement. DE:1149:153-156.

While VIP was still open for business, Simchuk offered Mr. Feldman the opportunity to invest in his new club, Stars Lounge, that was about to open. In exchange for a $50,000.00 investment, Mr. Feldman would be able to acquire a 25% share in the new club. Mr. Feldman himself was not financially able to meet the terms of Simchuk's offer. Ultimately, he and Eli Kipperman jointly purchased a 25% share of Stars. To finance his end of the deal, Mr. Feldman contributed $5,000.00 of his own money and borrowed $10,000.00 from Mr. Takhalov and $10,000.00 from Michael Rasner. Kipperman invested $25,000.00 of his own money. DE:1149:157-168. The remaining 75% of Stars continued to be owned by Simchuk and his partner, Andejs Romanovs. DE:1149:157-165. As with VIP, Mr. Feldman was a minority investor who did not participate in the day to day operation of Stars. 1149:157-165].

At one point, Mr. Feldman allowed his charge card to be used to purchase airline tickets for some of the promoters travel to Florida from New York. He did

[3] Under the new agreement Ruchkin was to have no further involvement in the club.

this to earn extra travel miles on his American Express Card and was reimbursed for the charges out of the club's account. DE:1149:168.

Feldman insisted that Stars employ an off-duty police officer for security, to make sure the business would be properly run, and to protect his investment. He turned to an acquaintance, Peter Smolansky, a retired Miami Beach police sergeant, to find out who he would recommend for the job. DE:1149:181-184.

On August 20, 2010, Mr. Feldman met at a restaurant with Peter Smolansky and Luis King, an undercover Miami Beach detective to discuss the situation. King portrayed himself as a well-qualified Miami Beach police officer interested in obtaining off-duty employment. Following the meeting, King went to speak with Kipperman and was introduced to Simchuk. King was immediately hired and began working at Stars that evening. DE:1149:184-194.

Stars opened for business on August 20, 2010 and continued to operate through October 31, 2010, approximately 70 days. During that entire time, Mr. Feldman visited Stars only 6 to 8 times, usually just to drive Simchuck to the club, have a drink and leave. DE:1149:200. One of the visits was to attend Simchuk's birthday celebration on an evening when the club was not open for business. DE:1149:200-201.

The few occasions that Mr. Feldman went to Stars were almost always before any customers arrived. Feldman did not know how the promoters operated and never heard that the promoters were pouring vodka in the customers' beer. Likewise, he did not believe that the promoters were encouraging the customers to drink when they got to the club, or that the girls were pouring their drinks out. DE:1149:218. Nor was he present at the nightly gatherings at Stars when the girls would discuss amongst themselves what had happened with the men they had brought to the club the previous evening. DE:1149:203. Feldman always believed that when a customer would arrive with the girls, the customer would see the menu and order whatever he wanted. DE:1149-218.

Feldman's involvement in Stars was minimal. He did not have the authority to recruit, hire or fire personnel, set their pay, or discipline them. DE: 1149:196. He was not a signatory on the Stars' bank account at TD Bank and was unaware of the wire transfers between that account and Simchuk and Romanovs in Latvia. DE:1150-33. He had, however, previously known Svetlana Coghlan and recommended her for the position of day manager at Stars to handle the paperwork. His sister, Alex Burrlader, was hired by Simchuk as the bookkeeper for Stars and was paid by Simchuk. DE:1149:205-210.

As part of her duties, Ms. Coghlan brought the charge receipts and paperwork documenting the previous evening's sales at the club to Ms. Burrlader. Ms. Burrlader had her office in the same building that housed Mr. Feldman's real estate business. Mr. Feldman never reviewed or discussed that paperwork with his sister,[4] DE:1149:205 and he was not involved in handling chargebacks. He only knew that the chargebacks were related to customer complaints or billing disputes. DE:1149:247.

Mr. Feldman quickly became disenchanted with Simchuk's operation of Stars. Within 20 days after the club opened, he decided he wanted to sell his shares in Stars. However, Simchuk would not buy them back and would not let the shares be sold to another investor. DE:1150:16.

Simchuk returned to Latvia in mid-October, 2010. Mr. Feldman was upset, consulted with an attorney, and began making plans to sue Simchuk for fraud. DE:1150:30,4]. Feldman ended up suffering a net loss of $15,000.00 on his investment in Stars. DE:1149-243.

During the course of the investigation, Det. King routinely recorded conversations he had with Mr. Feldman on those few occasions when he actually

[4] According to Julija Vinogradova, when a dispute arose concerning the Stars' receipts and the amount of money owed to the girls, the matter was discussed with Ms. Burrlader rather than Mr. Feldman. DE:1122:68-71.

visited Stars. During his testimony, Mr. Feldman explained his understanding of what was being discussed during some of the conversations.

During one conversation, Mr. Feldman discussed the practice of Stars charging a one cent difference on multiple purchases the same menu item so that the credit card processor would not reject it as a duplicate charge. He testified that he had learned about the 1-cent charge difference procedure from Albert Takhalov and understood that it was an acceptable practice sanctioned by the credit card processors. DE:1150:34-35.

During that same conversation, Mr. Feldman told King "all my life I do it cleanly. This is promoters bring, you know people that is ready to spend money. This is maybe a red line, but it is not illegal." He explained at trial that his reference to a red line raised an ethics question concerning the propriety of a Stars promoter going to another business establishment and taking that establishment's customers away. DE:1150-43.

B.

The "B-Girls" Corroborate Feldman's Testimony

Two of the government's cooperating witnesses corroborated significant portions of Mr. Feldman's trial testimony about his limited involvement in, and knowledge of, the business operations of VIP and Stars.

After returning to Miami, following her earlier stint at Caviar Bar, Julija Vinogradova worked at VIP for several days prior to the opening of Stars. During her time at VIP, she never saw or met Isaac Feldman. Ms. Vinogradova first learned of him when Simchuk mentioned prior to the opening of Stars that he was going to have a new business partner. She subsequently met Mr. Feldman for the first time at the opening of Stars. DE:1122:34,41.

Once she began working at Stars, Ms. Vinogradova was employed by Simchuk in several different capacities, including "B-girl," bartender, and manager. DE:1122-53. She recalled that there was a menu on each table at Stars and that the girls were not supposed to do anything to conceal the menu from the customers although they did so occasionally. DE:1122-78.

Ms. Vinogradova explained that Mr. Feldman actually had little involvement with the operation of Stars, and did not address any operational questions. DE:1123-51. In fact, by the time Simchuk left the United States and returned to Europe in October 2010, Ms. Vinogradova did not know if Mr. Feldman was still a partner in the business. DE:1122-94.

Ms. Vinogradova also confirmed that during her tenure at Stars, Mr. Feldman did not supervise, hire or recruit the girls, and did not have the authority to fire employees. DE:1123:49-51. Nor was he involved in picking the girls up at

their residence and bringing them the club. DE:1123-57. She also confirmed that Feldman was not involved with the credit card transactions and did not manage the credit card terminal. DE:1123-49.

Ms. Vinogradova recalled Feldman never gave advice regarding the way the girls should work. Nor was he ever involved in discussions regarding that topic. DE:1123-49. Ms. Vinogradova herself had no discussions with Feldman regarding her duties or how to perform them. DE:1123-117. In fact, she recalled seeing Feldman at Stars only four or five times during the entire time she worked there. On those few occasions when she did see him, he would come in around 9:00 or 10:00 PM, stay for a couple of hours and leave. The real activity at Stars began when the girls would arrive back with the customers. This happened well after the time Feldman normally left. DE:1123-61.

During her post arrest interview, Ms. Vinogradova told the FBI that Mr. Feldman was suing Simchuk and she was not sure if Mr. Feldman ever knew the details of the Stars operation, i.e., the purported fraud. DE:1123-180.[5] She confirmed this belief during trial when she explained to the jury that although Mr.

[5] On the other hand, Ms. Vinogradova testified that Eli Kipperman, who co-owned a 25% share of Stars with Feldman, was fully aware of the fraud and what the girls were doing. In addition, she would constantly text message him information regarding the amount of revenue being generated at the club each day. She did not

Feldman was a partner of Simchuk and occasionally present at Stars, he may not have known everything that was going on. DE:1123-189.

When Marina Turcina returned to the United States in the summer of 2010, Simchuk put her to work at VIP as a "B-girl." [6] Although she saw Mr. Feldman at VIP, she never had any meetings with him. DE:1131-209.

Ms. Turcina was eventually fired from VIP for pouring a drink on the floor. That type of behavior was neither encouraged or tolerated in the club. DE:1132-195.

Marina confirmed that while she was at VIP and Stars, Mr. Feldman never recruited any of the girls. DE:1132-165. She described Svetlana Coghlan as the director of the Stars' operation DE:1133-16 and Simchuk as the one who controlled the purse strings. DE:1133:12. She recalled that at one point, Simchuk told the girls that Kipperman was his partner at Stars and the girls should listen to him. Later, after an incident that caused him to become angry with Kipperman, Simchuk told the girls to only listen to him. DE:1133:92-96.

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send that information to Feldman. DE:1123:63-67. Miraculously, Kipperman was not indicted in this case.

[6] Turcina told the jury that she was taught the word "B-girl" by the prosecutors. DE:1132-164. Apparently, the word "B-girl" and the B-girl statute itself, section 562.13, Florida Statutes, had long lay dormant. According to the records manager of the Miami Beach Police Department, there had not been even a single arrest in Miami Beach for a violation of the statute for at least 10 years. DE:1151:6-8.

C.

The Character Witnesses

Members of the political, business and religious community testified as character witnesses on Mr. Feldman's behalf. Louis Thaler, the vice mayor of Sunny Isles Beach, who had known Feldman for 12 years, confirmed Feldman's good reputation for truthfulness and honesty in the political and business community. DE:1151:11-12.

Rabbi Alexander Kaller, the rabbi and spiritual leader of the Jewish Russian Synogogue met Mr. Feldman when he came to South Florida to establish the synagogue several years ago. At the time, Mr. Feldman was already operating a non-profit organization to help the Russian community. The Rabbi testified that Feldman had a good reputation for truthfulness and honesty in the community and that the community was shocked upon hearing the news that he had been indicted. DE:1150:220-224.[7]

STANDARDS OF REVIEW

A district court's denial of a motion for severance is reviewed for an abuse of discretion. *United States v. Alvarez*, 755 F.2d 830 (11th Cir. 1985).

[7] Feldman's ex-wife, Rachel Feldman, also testified and confirmed his good reputation in the community for truthfulness and honesty. Moreover, having

Constitutional claims involving deprivations of due process and equal protection of law are reviewed *de novo*.

A district court decision whether to grant or deny a jury's request for a readback of a portion of the trial testimony is reviewed for an abuse of discrection. *United States v. Edwards*, 968 F.2d 1148, 1152, (11th Cir. 1992).

Evidentiary rulings are reviewed for abuse of discretion. *United States v. Brown*, 413 F3d. 1257, 1265 (11th Cir. 2005).

In evaluating a challenge to a sentencing enhancement, this Court reviews factual findings for clear error and application of the sentencing guidelines to those fact *de novo*. *United States v. Lewis*, 115 F.3d 1531, 1538 (11th Cir. 1997). *United States v. Barner*, 572 F.3d 1239, 1247-48(11th Cir. 2009). The substantive reasonableness of a sentence is reviewed by examining the totality of the circumstances, including an inquiry into whether the statutory factors in Section 3553(a) support the sentence in question. *United States v. Gonzalez*, 550 F.3d 1319, 1323-24 (11th Cir. 2008).

SUMMARY OF THE ARGUMENTS

The government's prosecution of Feldman quickly mutated from a fraud case based on a novel yet legally unsupportable application of the federal wire

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known him for 30 years, it was her opinion (despite the divorce) that Feldman is a

fraud statutes into a chilling expose´ of Russian organized crime that included evidence of threats against government witnesses, acts of retaliation, including pointing guns at a witness' head and breaking his leg, and repeated references to the Russian Mafia and Russian organized crime. This extraordinarily prejudicial evidence was not admissible against Feldman in this case and would not have been admissible against him in a joint trial. The magnitude of its prejudice was such that it could not be eliminated by a curative instruction. Severance pursuant to Federal Rules Criminal Procedure 14 was the only viable remedy to ensure that Feldman received a fair trial. Each of his motions requesting that relief was erroneously denied by the district court.

Once the case mutated into an expose of Russian organized crime, the focus of the case in many respects became the appellants' Russian ethnicity. Their ethnicity was then impermissibly exploited by both the government and the only non-Russian defendant who went to trial, thus denying Feldman and his co appellants their due process and equal protection rights guaranteed by the Fifth Amendment to the United States Constitution.

The trial of this case was not only lengthy and complex, but in addition, much of the testimony of critical witnesses was difficult for the jury to understand

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truthful and honest person. DE:1150:229-23].

because of language issues. For example, there were questions regarding the accuracy of the Russian-to-English translation of a witness who testified in Russian. The government's key cooperating witness Alec Simchuk and the appellant Isaac Feldman are both native born Russian speakers whose English testimony was very difficult for the jury to understand. On the second day of jury deliberations, the jury requested that they be provided with the testimony of, inter alia, Simchuk and Feldman. The trial court denied the defense request that the jury be provided with a read back or informed of their right to have a read back. Instead, the jury was simply informed that a read back would be too time consuming and that they should rely on their individual and collective recollections. Given the length and complexity of the case and the unintelligibility of key testimony, the "recollection" the jury was asked to rely on was necessarily inaccurate, incomplete, distorted or just plain wrong. Without a read back, the jury was forced to base its decision on guesswork or speculation, thus denying the appellants their Sixth Amendment right to trial by jury.

The evidentiary errors committed by the district court denied Feldman his right to a fair trial. Contrary to established Circuit precedent, the district court allowed the government's key witness, Alec Simchuk, to bolster his credibility by testifying that attorneys and the presiding judge in a prior proceeding in which he

had testified trusted and believed him and, in addition, by allowing Simchuk and a law enforcement officer to express opinions that Feldman and his co-appellants were guilty of the crimes with which they had been charged.

The 100-month sentence representing a 30-month upward variance from the low end of the guideline range calculated by the district court was both procedurally and substantively unreasonable. To begin with, the district court erred in sentencing Feldman under the money laundering guideline U.S.S.G. 251.1. The court also erred in its calculation of the loss amounts and in applying a two-level enhancement for sophisticated laundering and for obstruction of justice based on Feldman's trial testimony. Moreover, in failing to consider all the section 3553 factors and instead focusing on Feldman's purportedly false trial testimony the district court violated the fundamental statutory sentencing requirement that the court impose a sentence that is "sufficient but not greater than necessary to comply with the specific purposes" identified in Section 3553.

ARGUMENT AND CITATIONS OF AUTHORITY

ISSUE I

The district court committed reversible error in denying Feldman's repeated midtrial motions for severance made after the government's case evolved from what was essentially a fraud prosecution predicated on a novel yet legally unsupportable interpretation of the federal wire fraud statutes into an expose of the violent, dark underbelly of Russian organized crime and the Russian Mafia. The torrent of evidence depicting threats of retaliation against witnesses and violent acts of retaliation against a key government witness, coupled with repeated references to Russian organized crime and the Russian Mafia, was not admissible against Feldman in this trial under any legal theory, and most certainly could not have been introduced against him in a separate trial. Moreover, the evidence was so powerful, inflammatory, and prejudicial that its impact simply could not be blunted by giving a curative instruction.[8]

Compounding the already incurable prejudice were repeated references throughout the trial suggesting the Russian ethnicity of Feldman and his co-

[8] Justice Jackson in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 723 (1949), pointed out the virtual uselessness of curative instructions. "The naïve assumption that the prejudicial effects can be overcome by instructions to the jury, c.f. *Blumenthal v. United States*, 332 U.S.

appellants Pavlenko and Takhalov and others involved in the trial was probative of their alleged membership in the charged conspiracies.[9]

Aware of the incurable prejudice that would result from the government introducing evidence concerning the Russian Mafia or Russian organized crime, Feldman filed a pretrial motion in limine to preclude the government from introducing such evidence during the trial. DE:808. The district court granted the motion and ordered that the government make no reference to the Russian Mafia during its case in chief. DE:826; DE:1120:41. Unfortunately, the government violated the order at the first available opportunity.

During the course of his opening statement, the prosecutor told the jury,

> "But if they had a barman there, not a police officer, the way it was done in Europe was your head would get broken. So the FBI put an undercover man here. They had at least a way to identify the victims and a way to make sure that people's head were [sic] being broken."

539, 559, 68 S.Ct. 248, 257, all practicing lawyers know to be an unmitigated fiction. *See Skidmore v. Baltimore and Ohio R. Co.*, 167 F.2d 54 (2d Cir. 1948)."

[9] Feldman, Pavlenko and Takhalov are of Russian descent and were born in the former Soviet Union. Alec Simchuk, his European partner, Andrejs Romanovs, the government's female cooperating witnesses, Julia Vinogradova and Marina Turcina, and other individuals mentioned prominently in the case such as Eli Kipperman, Max Ruchkin and several of the so called "B-Girls" are also Russian or of Russian heritage. Significantly, the only non-Russian who went to trial in this case, Siavish Zargari, was acquitted by the jury. Zargari's lack of Russian ethnicity was repeatedly highlighted and brought to the jury's attention by Zargari's counsel at various points during the trial.

DE: 1121-47.

The clear inference as later developed by the evidence was that this was a Russian organized crime tactic now ready to be unleashed against unsuspecting Miami Beach club patrons. Feldman immediately objected and reserved a motion. DE: 1121-47. Following the conclusion of the government's opening statement, Feldman moved for a mistrial. DE:1121-53. That motion was denied, as was a request for a curative or limiting instruction. DE:1121:47,53.

Next, during its redirect of cooperating witness Julija Vinogradova, the government elicited testimony that she was afraid of having to return to her residence in Latvia given the near-certainty that she would suffer repercussions from having cooperated and testified in this case. She explained that Simchuk's partner, Andrejs Romanovs, who was indicted in this case but had not yet been apprehended given that he was living in Europe, had "big connections" there and had already threatened her. DE:1124-132. The clear inference that the government was seeking to establish was that the "big connections" equated to ties to the Russian mob. There was of course no evidence to even remotely suggest that Feldman was either involved in, or even knew of, these purported threats, or that he had even the remotest affiliation with any Russian organized crime group.

Within an hour of Ms. Vinogradova telling the jury how she had been threatened by the well-connected Andrejs Romanovs, the government sprung the ultimate surprise on the defense. Now, for the first time, during the middle of trial the government revealed their star witness, Alec Simchuk, who would be the next person to take witness stand, had not only been threatened, but also viciously attacked and retaliated against, for having made the decision to surrender to authorities, come to the United States, and cooperate in this case.

The government claimed they had just learned that in March 2012, Simchuk received a threatening telephone call from Albert Takhalov warning him not to come to Miami to cooperate and testify. A few days after having received the threatening phone call, Simchuk was outside of his mother-in-law's residence in Russia when he received an unexpected and unwelcomed visit from two unidentified men. The two thugs threw Simchuk to the ground, pointed a gun at his head and, in the course of the attack, broke his leg. According to Simchuk, the fracture was severe and required Simchuk to be hospitalized and have surgery to repair the damage. DE:1125-113. Simchuk testified that plates had to be surgically inserted in his leg, leaving him physically disabled to the point where he could not even stand on the leg for two months. DE:1125-113.

Feldman, joined by all other defendants, immediately moved to exclude all evidence concerning the threat and subsequent violent attack. They urged that this evidence, if admitted, was so prejudicial and devastating that a curative instruction would have no effect. The motion was denied, as were Feldman's and Pavlenko's contemporaneous motions to be severed from Takhalov. DE:1124:170-172;1125:6-7,114. Simchuk was then allowed to testify about the specifics of the threats and the vicious retaliatory attack he suffered at the hands of the thugs in Russia.[10] DE:1125-113.

During the remainder of his direct examination, Simchuk seized every opportunity emphasize he was victimized by a Russian mob orchestrated attack. For example, at one point, over objection, he was allowed to expand his answer to a question pertaining to Pavlenko after advocating to the court and jury: "Come on guys. I mean, I give you my leg for this." DE:1125-197. Moreover, at the conclusion of his testimony, he was allowed to describe in detail the then current condition of his leg and, over objection, stand up and wave his crutch around in the presence of the jury. DE: 1126-62.

[10] Simchuck explained that he did not disclose this information to the government until a few days before he was going to testify because he feared additional retaliation against his wife up until that time when she was finally able to relocate out of harm's way. DE:1125-113.

While under cross-examination by Pavlenko's counsel, Simchuk upped the ante. He was asked what he expected to receive as a result of his plea agreement with the government. Rather than directly answering the question, he launched a nonresponsive diatribe against Feldman and his codefendants claiming "These people want me to die in Russia and like they don't want to take any responsibility." DE:1126-232. In no uncertain terms, he made it clear to the jury that Feldman and the other Russian defendants acting in concert wanted him dead so they could avoid being held responsible for their alleged criminal wrongdoing.

During their respective cross examinations of Simchuk, counsel for Feldman and Pavlenko carefully avoided asking questions about the Russian mafia or Russian organized crime. Such was not the case with Takhalov's trial counsel.

In an apparent attempt to demonstrate that Simchuk had numerous other enemies who were responsible for the threats, attack and broken leg, Takhalov's counsel vigorously questioned Simchuk about his membership in the Russian mafia and longstanding affiliation with Russian organized crime. For example: (1) Simchuk was asked about and admitted his involvement as a leader of a Russian organized crime ring that had operated in the United States some years earlier DE:1128-132; (2) Simchuk was asked about and admitted his membership in the St. Petersburg (Russia) Mafia, DE:1128-139; and (3) Simchuk admitted that his

close friend and fellow St. Petersburg Mafia member, Sergei Otz, fearing retaliation, had sought refuge with Simchuk in the United States. Simchuk then conceded Otz was murdered in his grandmother's home after he had returned to Russia. DE:1128-140-145.

During the government's redirect, Simchuk again confirmed his Mafia ties. DE:1129-53. The government was also allowed to elicit testimony that it was common practice among *Russians* (empahis added) involved in criminal activity to put a family members name on business documents etc.[11] DE:1129-53.

The haunting specter of "Russian" organized crime and threats of retaliation again arose during the testimony of Marina Turcina, a cooperating witness who had formerly been one of Simchuk's Eastern European "B-Girls" and a graduate of his "school of fraud." During Turcina's direct examination, the government elicited testimony that she and her family had been threatened by both Simchuk and his well-connected partner, Andrejs Romanovs. DE:1131-225. On cross examination, she recalled that she was told that when she returned home she would be met at the airport by "people who would put her under the ground" and that was a scary threat. She also testified that Romanovs' girlfriend had died

[11] Feldman's sister, Alex Burrlader's name appeared on some of the relevant business documents introduced into evidence in this case as did the name of Simchuk's mother, Eleanora.

under suspicious circumstance and that Simchuk and Romanovs were responsible for sending men to Ms. Vinogradova's family residence as a threat. DE:1132:136-140. Ms. Turcina confirmed that she was afraid to testify against Simchuk and his partners because eventually she would have to return home. DE:1134:24-25.

The undercover officer, Det. Luis King, testified that he was not surprised that Simchuk was Russian Mafia after he saw how the Stars operation worked. DE:1138:129-130. Later during King's cross examination, Zargari's attorney, who had by this time assumed the role of a second prosecutor in the case, played the Russian card to demonstrate that his client, the only non-Russian on trial, was not involved in the charged fraud. Specifically, King was asked:

> Q. And you don't have any knowledge or evidence that Sammy Zargari is any part of any type of Russian organized crime group, do you?
>
> A. The only knowledge I have is that --
>
> Q. Yes or no, and then you can explain.
>
> A. Yes. The only group that I know that's a Russian group or eastern -- they speak Russian, eastern European group, is this group here. That is the only association I know with them.

Q. So you are saying because he is being prosecuted with some Russian citizens or Russian-American citizens --

MR. LEVIN: I object to the form of the question.

THE COURT: Sustained.

BY MR. FLEISHER:

Q. Do you have any evidence that he is involved with the Russian Mafia?

MR. GREGORIE: Objection. Asked and answered, Your Honor.

THE COURT: Sustained.

DE:1140:15-16.

And on redirect, the government elicited testimony suggesting that the retired Sgt. Smolinsky, who along with King, had met with Feldman early on in the investigation, was some sort of an expert on Russian organized crime. DE: 1140-8].

To further perpetuate the now underlying and recurring theme of the government's prosecution, one of the alleged victims was allowed to testify how he felt that he was going to be mugged or shot by mobsters when the girls brought

him back to an empty club. He provided a chilling, frightening and graphic explanation: “the hair on the back of your neck standing up and you are thinking not good...the girls were ordering drinks and I was walking around to see what else was in the location. Right. So there was like a back door ajar, were there people in the back wearing black turtlenecks and leather jackets who are going to jump out at us?” DE:1142:19-55.

Mr. Pavlenko called Ana Kilimatova as a defense witness. Ms. Kilimatova had pled guilty prior to trial pursuant to a plea and cooperation agreement with the government. On cross examination the government, for no good reason other than to continue to hammer home its Russian mafia/organized crime theme and further prejudice the defendants, elicited testimony that she would be deported to Latvia, that Simchuk's former partner, Andrejs Romanovs, was in Latvia and that she was scared for having testified at the trial. DE:1148-221.

Federal Rules Criminal Procedure 14(a)provides:

> "If the joinder of offenses or defendants in a indictment or information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.”

Even if Feldman was properly joined with his co-defendants under Federal Rules Criminal Procedure 8(b) - a point that he does not concede - the trial court

should nonetheless have ordered a severance under Rule 14, where, as here, there is a serious risk that a joint trial will compromise a specific trial right of the accused or prevent the jury from making a reliable judgment about guilt or innocence. *Zafiro v. United States*, 506 U.S. 534, 113 S.Ct. 933 (1993).

The Supreme Court has recognized that this risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a co-defendant. An example is where evidence of a codefendant's wrongdoing in some circumstances may erroneously lead a jury to conclude that the defendant was guilty. *Id.* at 534. The Supreme Court has also recognized that the risk of prejudice is heightened when the defendants are tried together in a complex case and have markedly different degrees of culpability. *Zafiro v. United States*, 506 at 534; *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239.[12]

The "serious risk of prejudice" increases when, in a joint trial, a conspiracy count is included in the indictment. *See e.g., Zafiro v. United States*, 506 U.S. 534, 113 S.Ct. 933 (1993) (Stevens, J concurring) ("[A]nd in all cases, the Court should be mindful of the serious risk of prejudice and overreaching that are

[12] Feldman's alleged involvement was significantly less than others charged in the case. He was an investor in only two of the eight clubs; and with respect to those

characteristic of joint trials, particularly when a conspiracy count is included in the indictment."); s*ee also, Krulewitch v. United States*, 336 U.S. 440, 446, 69 S.Ct. 716, 720 (1949) (Jackson, J., concurring). There is much more at stake than administrative convenience. *Krulewitch*, 336 U.S. at 446 ("A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together."); s*ee also United States v. Romanello*, 726 F.2d 173 (5th Cir. 1984).

The measure of protection provided by the district court granting Feldman's motion in limine was quickly stripped away once the government was erroneously allowed to introduce evidence of threats of violence and actual extreme acts of violence directed at Simchuk that, according to the government, (and stead fastedly denied Takhalov) were made by or directed only by Takhalov. Feldman's only available avenue of meaningful relief was to be severed from Takhalov. The district court denied Feldman's repeated motions made during the remainder of the trial.

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clubs, he had no control over nor did he participate in the day to day business operations. DE:1122:34,41,94;DE:1123:49,51,57,61,63-67,117,180,189.

Meanwhile, the jury was inundated with additional evidence of the Russian Mafia, Russian organized crime and additional threats of retaliation directed against other cooperating government witnesses. None of the threatened or actual acts of violence or retaliation were, or by any stretch of the imagination could be, attributed to Feldman. In denying severance, the district court eliminated Feldman's only opportunity to receive a fair trial and ultimately he was swept away by a virtual tsunami of simply irrelevant yet incurable prejudicial evidence that had no place in his trial. Subjecting Feldman to the onslaught of such compellingly prejudicial evidence is an abuse of discretion by the trial court mandating reversal of his convictions. *United States v. Padilla-Martinez*, 762 F.2d 942, 950 (11th Cir. 1985); *United States v. McLain*, 823 F.2d 1457 (11th Cir. 1987).

In *United States v. McClain*, 823 F.2d 1457 (11th Cir. 1987), this Court found specific compelling prejudice and reversed a defendant's conviction where the district court failed to grant severance in circumstances functionally akin to those in this case. In *McClain*, Seymour Sher, Dennis McClain and others were charged with racketeering in violation of 18 U.S.C. § 1962(c). The racketeering activity allegedly consisted of the collection of unlawful debts, collection of extensions of credit by extortionate means, interference with commerce,

bookmaking and conspiracy to import and distribute cocaine. Sher was not part of the drug conspiracy and for that reason contended he should have been severed from the trial of his codefendant, McLain, who was involved in the drug activity.

At trial, the jury heard drug evidence that solely pertained to McLain. Included as part of that evidence was testimony describing how one of McLain's associates used a cattle prod known as the "social workers kit" to force drug buyers to make timely and accurate payments. The jury also heard testimony how McLain and a cooperating witness had plotted to murder a drug dealer by flying him over the Gulf of Mexico, shooting him in the head and throwing the corpse out of the plane and into the ocean. This Court found that this evidence was overly prejudicial, opined that the jury could not ignore it in determining Sher's guilt, and held that the district court abused its discretion in failing to grant Sher's severance motions. *Id*. at 1457.

Well-reasoned decisional authority from other circuits has also recognized that the failure to grant a defendant severance when the jury has heard evidence of violent acts committed by a codefendant, that would be inadmissible against the defendant in a separate trial, is an abuse of discretion requiring reversal of the defendant's convictions. In *United States v. Engleman,* 648 F.2d 473 (8th Cir. 1981), two individuals, Handy and Engleman, were jointly indicted and tried on

charges of conspiracy to commit mail fraud and 15 counts of substantive mail fraud. The charges centered on allegations that Handy and Engleman defrauded insurance companies by insuring the life of a third individual and then killing him. At trial, the district judge allowed the government to present evidence under Federal Rules Criminal Procedure 404(b) that Engleman alone had been involved the murder of another individual (Frey) approximately 15 years earlier. Handy, who was in no way involved in the prior murder, not only objected to the introduction of that evidence but also timely moved for severance upon its introduction. Handy's severance motions were denied and he was convicted.

In reversing Handy's convictions, the Eighth Circuit observed, "[i]t is our view that in this case the evidence concerning Frey's murder and insurance fraud surrounding it was so prejudicial that a new trial must be ordered to defendant Handy. " *Id*. at 473. *See also, United States v. Cardascia*, 951 F.2d 474 (2nd Cir. 1991) (recognizing that when evidence is inadmissible against a defendant moving for severance involves activities of a violent nature, severance rather than a limiting instruction may be appropriate); *United States v. DiNome*, 954 F.2d 839 (2nd Cir. 1992); *United States v. Burke*, 789 F.Supp.2d 395 (E.D.N.Y. 2011) (granting defendant's pretrial motion for severance pursuant to Fed.R.Cr.P.14.).

Evidence of Takhalov's purported threats against Simchuk would not have been admissible against Feldman in a separate trial. Neither would the evidence of the violent attack on Simchuk, which left him with a severely fractured leg, or the evidence of threats against other witnesses, repeated references to the "Russian" mafia and "Russian" organized crime.[13] This evidence, inadmissible against Feldman, was so incurably prejudicial that a severance was the only means to assure Feldman got the fair trial to which he is constitutionally entitled. The district court's failure to grant the severance was a clear abuse of discretion mandating reversal of Feldman's convictions.

ISSUE II

The repeated references throughout the trial to the Russian Mafia, Russian organized crime and the appellants' Russian ethnicity violated their Fifth

[13] The evidence and references to the "Russian" Mafia and "Russian" organized crime is in many respects similar to gang evidence, which creates a similar danger of prejudice to the accused. As the Seventh Circuit Court of Appeals observed, "[g]angs generally arouse negative connotations and often invoke images of criminal activity and deviant behavior. There is therefore always the possibility that a jury will attach a propensity for committing crimes to defendants who are affiliated with gangs or that a jury's negative feelings toward gangs will influence its verdict. *See Irvin*, 87 F.3d at 865-66 (citing *United States v. Thomas*, 86 F.3d 647, 652-54 (7th Cir. 1996))(stating that "the danger of unfair prejudice from gang evidence stems from the potential inference that a defendant is guilty by association.")."

Amendment rights to due process and equal protection and ultimately deprived them of their right to a fair trial.

Discrimination on the basis of race is especially pernicious in the administration of justice. *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S.Ct. 2993 (1979). *See also, McMillan v. City of New York*, 253 F.R.D. 247 (E.D.N.Y. 2008) due process and equal protection require that inferences based on race, ethnicity, or nationality be excluded at trial), (*McClesky v. Kemp*, 481 U.S. 279, 310, 107 S.Ct. 1756 (1987)) citing *Batson v. Kentucky*, 476 U.S. 79, 85, 106 S.Ct. 1712, 1716 (1986).

Despite the above constitutional proscriptions, the term "Russian" Mafia was interjected into the trial no less than 53 times; the term "Russian" organized crime" was used on 17 occasions; needless yet prejudicial references to the appellants' Russian ethnicity were made numerous other times; and, sensing the hostility that had been engendered towards the appellants because of their Russian ethnicity, counsel for co-defendant Siavash Zargari, the only non-Russian who went to trial, went out of his way to drive home the fact that Zargari was not Russian, and, therefore, not a part of the "Russian" conspiracy. DE:1140:15-16 Simply put, as the trial progressed, it became increasingly clear that the evidentiary adhesive purporting to bind the appellants to the charged conspiracy

was their Russian ethnicity and heritage. This the Fifth Amendment does not permit.

A number of Circuit Courts of Appeal have not hesitated to reverse convictions where, as in this case, the accused's race or ethnicity has been inappropriately referred to or focused on. *See, e.g., United States v. Doe*, 903 F.2d 16, 24 (D.C. Cir. 1990) (reversing convictions of Jamaican defendants due to testimony and argument concerning Jamaican control over the drug trade in the District of Columbia). The *Doe* Court noted that although the evidence was arguably probative, discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. *Id*. (quoting *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S.Ct. 2993, 3000 (1979)); (because such evidence may well appeal to the jury's racial or ethnic bias, and impermissibly sway the jury's verdict and thus has no place in a criminal trial); *United States v. Cabrera*, 22 F.3d 590, 594-597 (9th Cir. 2000) (reversing defendants' drug convictions due to repeated testimony and reference to their Cuban ethnicity and recognizing that appeals to racial, ethnic or religious prejudice, including generalizations about racial and ethnic groups, *United States v. Vue*, 38 F.3d 973 (8th Cir. 1994) (reversing defendants' drug and firearm convictions based on trial testimony suggesting that persons of Hmong descent had a proclivity to engage in opium

smuggling, and holding that this species of error is of constitutional dimension because it injected ethnicity into the trial and invited the jury to put the defendants' racial and cultural background into the balance in determining their guilt); *United States v. Rodriguez Cortes*, 949 F.2d 532, 542 (1st Cir. 1991) (reversing the drug conviction of a Colombian national due to improperly highlighting his ethnicity thus inciting the jury to determine guilt based upon nationality).

Feldman and his co-appellants were attacked on two fronts, because of their Russian ethnicity. Both the government and the only non-Russian defendant seized each and every opportunity to buttress their respective positions by playing the Russian card. The result was a denial of Feldman's and his co-appellants Fifth Amendment right to due process and equal protection that can only be cured by a reversal of their convictions.

ISSUE III

The testimony in this case began on October 10, 2012 and concluded on December 11, 2012. Due to limited English language skills of several key witnesses, much of the testimony in this lengthy trial was difficult for the jury to understand. It could be charitably described, at best, as high gibberish. A Russian interpreter was required to translate the testimony of cooperating witness, Julija Vinogradova, and there were disputes about the accuracy of some of the

simultaneous translation being provided. Russian was the first language of Alec Simchuk and Isaac Feldman. Although both men testified in English, because of their accents, speech patterns and pace of speech both were difficult for the court and the jury to understand.

Beginning on December 11, 2012, the jury was charged and heard closing arguments before retiring to begin deliberations shortly after 11:30 A.M. on December 13, 2012. DE:1555-80.

On December 14, 2012, the jury sent two notes to the court asking for assistance with their deliberations. In its first note, the jury asked "[m]ay we please have the testimony of Luis King, Albert Takhalov, Alec Simchuk, and Isaac Feldman." DE:929. In its second note, the jury informed the court they "[n]eed testimony for Anastasia, Feldman's secretary." DE:931. That the jury made these requests was hardly surprising. Immediately after the jury was sworn, the court informed them they would have access to such tools during their deliberations.

> THE COURT: All right. Members of the jury, Jacob is handing out some notepads to each of you so that you can take notes during the trial. Remember, I told you that our court reporter, Mr. Millikan, takes down everything that is said by all of the participants, including now. He will take down the witnesses' testimony, but he does not prepare a transcript of the testimony as it is taking place.

> So that's why we want you to pay close attention to the testimony during the trial and if you want to take notes, if you think that will help you to remember the testimony, you can do that.
>
> So if it is absolutely necessary to reach a verdict, his notes of the testimony can be reread to you, but that is a very difficult and time-consuming process, so please do pay close attention to the testimony and take notes if you think that will help you do so.

DE:1121-16.

In response to the jury's notes, the defendants requested that the jury be given a copy of the transcript of the requested witnesses' testimonies, or, in the alternative, that the jury be advised that they were entitled to a read back of the witnesses' testimony and be given a read back of the testimony. The trial judge denied the defendants' request and instead sent the jury a note telling them there was no transcript that a read back would take 15 days, and to rely on their individual and collective recollections to make their decision. DE:1156-5. The note, in no uncertain terms, informed the jury that because of time constraints, no assistance would be forthcoming from the court and effectively negated what the jury had been told at the commencement of trial, i.e., that, if necessary, they could have a read back. The trial judge's failure to provide either a transcript or a read back or to advise the jury that they had the right to have a read back of the

requested portions of the testimony was an abuse of discretion that under the circumstances left the jury to guess or speculate what the most important witnesses in the trial had testified to.

The jury's need for either a transcript or a read back was compelling given the circumstances of this case, and, at a minimum, the jury should have been informed during deliberations of its right to a read back. The trial itself was lengthy and the testimony of all the witnesses called by both sides consumed 30 trial days. Moreover, language barriers made much of the testimony difficult for the jury to understand. One of the B-Girls, Julija Vinogradova, testified through a Russian interpreter. There were a number of disputes regarding the accuracy of the translation being provided and adlibbing on the part of the interpreter. DE:1121:190-191;1122-18;1122-56;1122-87;1122-123;1122-145;1123-38;1123-53.

Russian is Alec Simchuk and Isaac Feldman's first language. Although each testified in English, the court and the jury consistently had difficulty understanding their testimony either because of their accent, choice of words, sentence structure, speech patterns or pace of speech. Simchuk and Feldman, for example, were repeatedly asked to repeat or rephrase their testimony. In addition, Simchuk's testimony was often inconsistent and difficult to follow. Moreover, the

recorded conversations involving Det. Luis King and Simchuk, and Feldman were equally difficult to understand for the same reasons.

Difficulties understanding Feldman arose numerous times. DE:1149:4; 1149:51; 1149:56; 1149:63; 1149:65-66; 1149:68; 1149:75; 1149:79; 1149:81; 1149:92; 1149:94; 1149:101; 1149:119; 1149:124; 1149:135-136; 1149:138; 1149:141-142; 1149:143; 1149:150; 1149:158; 1149:171; 1149:181-182; 1149:190-191; 1149:206; 1149:218; 1149:228; 1149:235; 1149:237-238; 1149:247; 1150:8; 1150:16; 1150:34. Two exchanges between Feldman and his trial counsel early on in his testimony illustrate the difficulties.

> Q. How old are you, Mr. Feldman?
>
> A. I am 51.
>
> Q. Where were you born?
>
> A. To a woman will say I'm 40 plus.
>
> Q. I'm sorry. Where?
>
> A. I would say 40 plus to a woman, but I am 51.
>
> Q. All right. I am beyond that. Where were you born, sir?
>
> A. I was born in the former Soviet Union in Moldova.

DE: 1149:49.

> Q. And your parents, sir, did they work there in Moldova?

A. Yes, sir. My father was photographer and my mother was working in a store.

Q. Your father was a what?

A. A photographer.

Q. A photographer?

A. Yeah, photographer.

DE: 1149:49.

Simchuk was also difficult to understand. DE:1126:46; 1126:54; 1126:107. In fact, the difficulty was so profound that at the conclusion of Simchuk's first day of testimony, Takhalov's counsel asked the court for CJA funding for a transcript of Simchuk's testimony because it was so difficult to understand Simchuk. DE:1125:242-243.

The Sixth Amendment to the United States Constitution guarantees the accused in a criminal case the right to trial by jury. *Georgia v. McCollum*, 505 U.S. 42, 58 (1992). Implicit in the right is the assurance that the jury will base its decision on a careful, impartial and thoughtful consideration of the evidence presented and a comprehensive understanding of the evidence and testimony that was presented. The Sixth Amendment is violated when the circumstances are such that the jury is permitted to simply guess or speculate about the evidence and

testimony. *Krellenstein v. U.S.*, 1976 WL 1053 (charging the jury with the law); *United States v. Cantu*, 504 F.2d 387 (5th Cir. 1974) ("A jury must not be left to speculate and surmise in a criminal case, merely hoping that they are drawing the proper inference"). Moreover, a conviction based on guesswork or speculation, rather than a thoughtful intelligent consideration of the evidence, violates the Fifth Amendment guarantee of due process of law.

The trial court has a fundamental obligation to assist the jury in its role as the fact finder. As the Florida Supreme Court observed in *Sutton v. State*, 51 So.2d 725 (Fla. 1951),

> "in our system of jurisprudence the jury is of ancient and constitutional sanction...It performs an extremely important duty and neither its duty nor that performed by the court can be properly done in the absence of mutual aid and assistance.....The jury has a perfect right to return to the court room at any time and ask questions that are calculated to shed light on the controversy or that will in any way assist it or the court in developing the truth of the controversy."

To ensure that Feldman received a fair trial and to safeguard the integrity of the verdict ultimately reached by the jury in this case the district court, in responding to the jury's request, at a minimum, should have followed the procedure adopted by the Florida Supreme Court in *Hazuri v. State*, 91 So.3d 836 (Fla. 2012). In that case, the jury, after deliberating for a short time, sent a note to

the court requesting trial transcripts. Defense counsel requested that the jury be advised that they had the right to have testimony read back to them. The trial court denied that request, and instead informed the jury that no transcripts existed and that they must rely on their own collective recollection in deciding the case. The Florida Supreme Court held that the failure to tell the jury that they had the right to have a read back of the testimony required reversal of the defendants conviction and observed that:

> "[t]he guilt or innocence of a defendant hinges on the facts of any given case and a courtroom trial can be a long, drawn out, and complex process with conflicting witnesses and expert testimony. Thus, a jury's recollection of the testimony is crucial to its verdict. Simply put, a jury cannot properly fulfill its constitutionally mandated role if it cannot recall or is confused about the testimony presented in a case. Thus, in order to assist the jury in completing its fact finding mission, trial courts should apply a liberal construction to a jury's request for transcripts. In other words, a jury's request for transcripts should prompt a judge to inform the jury of the potential availability of a read back of testimony."

This Court has held that a district court has broad discretion in determining whether to grant or deny a jury's request to read a portion of the trial transcript. *United States v. Edwards*, 968 F.2d 1148 (11th Cir. 1992). Nonetheless, the discretion afforded to the district court is not unlimited, and in this case the district

court abused its discretion. Moreover, other courts of appeal have expressed the opinion that making read backs available to the jury is the preferred practice. *See* e.g., *United States v. Holmes*, 863 F.2d 4 (2d Cir. 1988); *United States v. Damsky*, 740 F.2d 134 (2d Cir. 1984); *United States v. Criollo*, 962 F.2d 241 (2d Cir. 1992) (reversing defendant's conviction where trial court told the jury before deliberations that there would be no read back of testimony).

In this case, the district court's response to the jury, telling them to rely on their recollection, eroded the fact finding process. Despite being told at the beginning of the trial they would be given access to testimony during their deliberations, they were ultimately told the contrary and the court's response failed to adequately apprise them that they could have a read back. By the nature of the jury's request, it is clear some of the jurors may have had no recollection of important testimony. Others may have had an incomplete, faulty or incorrect recollection. Others may have had their recollections distorted by inaccurate translations or difficulties understanding the English of the native Russian speakers. Without a read back, the jurors were forced to decide the appellants' fate based on a recollection (individual or collective) of the evidence, which may have been nonexistent, incomplete, faulty, distorted or just plain wrong.

In the last analysis, the right to trial by jury is too important to be compromised by concerns over the length of time it would take to provide the jury with the tools necessary to make a thoughtful, intelligent, and considered decision. Yet, that is what happened here. As a result, Feldman was effectively denied his constitutional right to trial by jury and due process of law. His convictions must be reversed.

ISSUE IV

The district court committed reversible error in permitting testimony that improperly bolstered the credibility of a key cooperating government witness, Alec Simchuk, and in allowing two government witnesses, Alec Simchuk and Det. Luis King, to give opinion testimony that the appellants were guilty of the crimes charged.

On various occasions during his extended time on the witness stand, Simchuk afforded himself the opportunity to improperly bolster his credibility. While being cross examined regarding his prior fraud case in Pennsylvania, Simchuk blurted out inadmissible hearsay and opinion testimony informing the jury that even the attorneys who represented the individuals he cooperated against in that case, including his wife and father-in-law, trusted him when he was testifying, and that when Simchuk appeared for sentencing in 2008 for that case

after violating his probation, the judge imposed a sentence of time served because the judge trusted Simchuk and realized that he didn't lie on the witness stand. DE:1127:90-91. A timely objection to this testimony was overruled and a motion to strike was denied. DE:1127:91.

The following day Simchuk again gratuitously vouched for and bolstered his credibility when, following a defense objection being sustained he stated, "[i]t's like in the movie. Can you handle the truth? I think you can't handle the truth." DE:1128:54. Although the trial court granted a defense motion to strike the message had already been sent---Simchuk was telling the truth. DE:1128:54.

Moments later, Simchuk told the jury, "[t]hat I knew Pavlenko is guilty...." That statement was met with an immediate objection and motion to strike. In response, the trial judge merely said, "[a]ll right. What is the next question," creating the impression that the court approved or believed Simchuk's comment. DE:1128:108. Earlier in the trial, Simchuk told the jury that he was testifying because in his opinion, Pavlenko and Feldman were guilty, they wanted him to die in Russia, and he wanted them to take responsibility for their actions. DE:1126:232.

On not less than three occasions, Det. Luis King expressed his opinion that the appellants were guilty of the charged offenses. First, he opined that, “the main

people who are responsible for this are the individuals sitting over there." A defense objection and motion to strike were immediately granted. DE:1140:13-14. A few minutes later when asked a specific question about Simchuck, he replied, in reference to Stars, "I was to the opinion that there was fraud was taking place there, that they were stealing from the customers, they were defrauding them." DE:1140-22. And shortly after expressing those opinions further opined that by December, 2012 he had determined fraud was being committed by the "participants"(other than Zargari whom he had not met yet). DE:1140:22-23.

The law is clear. A jury has an obligation to "exercise its untrammeled judgment upon the worth and weight of testimony" and to "bring in its verdict and not someone else's." *United States v. Johnson*, 319 U.S. 503, 519, 63 S.Ct. 1233, 1241 (1943). To ensure that a jury does not abrogate this responsibility, a trial judge must be sensitive to the jury's temptation to allow the judgment of another authority to substitute for its own. And in addition, a trial judge is required to avoid expressing or implying his or her own opinion on the merits of the case or the weight of particular evidence, lest the jury substitute the trial judge's opinion for its own. *United States v. Cox*, 664 F.2d 257, 259 (11th Cir. 1981).

Here, Simchuk was allowed to introduce inadmissible extrinsic source evidence that bolstered his credibility. Testimony of this nature has been held to

be reversible error in this and other circuits. In *United States v. Sorondo*, 845 F.2d 945 (11th Cir. 1988), this Court reversed the defendant's drug conviction where the government witness' testimony was improperly bolstered by the case agent informing the jury that the government witness had testified before a large number of other juries and those juries had never returned a verdict of not guilty. *Id. at* 949-950. The *Sorondo* court also held that it was plain error to allow the agent to testify about the result of other trials where the witness had testified because that testimony may have unfairly and strongly bolstered the witness's credibility in the eyes of the jury. *Id*. at 949-950.

Other courts of appeal have reversed convictions where similar instances of improper bolstering have occurred. In *United States v. Taylor*, 900 F.2d 779 (4th Cir. 1990), the Fourth Circuit reversed the defendant's conviction where, on redirect, a law enforcement officer told the jury that the informant, who had testified at trial, had given reliable information in a prior case that resulted in a drug seller's conviction. Likewise, the Third Circuit reversed a conviction on the grounds that a witness's testimony had been improperly bolstered in *United States v. Murray*, 103 F.3d 310 (3d Cir. 1996). The *Murray* court determined that it was reversible error to permit a law enforcement officer to inform the jury that the confidential informant, who testified at trial, was reliable, had successfully made

numerous other cases and that search warrants had been obtained on the basis of information he had provided. See also, *United States v. Napue*, 834 F.2d 1311, 1324-25 (7th Cir. 1987) (improper bolstering).

Simchuk was the single most important witness that the government called to prove its case against Feldman. The government relied on Simchuk's testimony to establish that Feldman had knowledge of the alleged fraudulent scheme executed at VIP and Stars through the utilization of the B-Girls, and that despite that knowledge, Feldman knowingly joined and participated in the scheme. Simchuk improperly bolstered his credibility by telling this jury that his co-defendants' attorneys and the presiding judge in the prior Pennsylvania case in which he had cooperated and testified, trusted him and found his cooperation and testimony, which led to convictions in that case, to be credible. The jury was thus invited to substitute the unimpeached judgment of Pennsylvania attorneys and a Pennsylvania judge in place of their own in determining Simchuk's credibility.

In addition, the district court's non-ruling in response to the objection to Simchuck opening that Pavlenko was guilty may well have given the jury the impression that the judge believed Simchuk's testimony. This, quite simply, was improper and mandates reversal of Feldman's convictions. *United States v.*

Sorondo, 845 at 945 (11th Cir. 1988); *United States v. Cox*, 664 F.2d 257, 259 (11th Cir. 1981).

It was also error for the district court to permit Simchuk and Det. King to express their opinions that Feldman and his co appellants were guilty of the crimes with which they had been charged. Courts have determined that neither a law enforcement witness, nor any other witness, is allowed to give testimony that, in their opinion, the accused is guilty of committing the crimes for which he is on trial.

In *United States v. Menefee*, 28 F.3d 109 (9th Cir. 1994), the court determined and government conceded that an FBI agent's testimony that he thought that the defendant rather than another individual was the bank robber was inadmissible by opinion testimony. Likewise, in *United States v. Garcia*, 413 F.3d 201 (2d Cir. 2005), an agent's testimony that the defendant was a partner in a drug deal was essentially telling the jury that he had concluded the defendant was guilty of the crimes charged and thus improper. The Second Circuit has also recognized that to allow law enforcement witnesses to express opinions as to the defendants culpability based on the totality of the information gathered during the investigation was inadmissible. *United States v. Grinage*, 390 F.3d 746 (2d Cir. 2004) and *United States v. Dukagjini*, 326 F.3d 45 (2d Cir. 2003).

Similarly, a lay witness expressing a naked opinion that the accused is guilty is also improper.

ISSUE V

The sentence of 100 months imprisonment imposed by the district court was both procedurally and substantively unreasonable and must be vacated.

A.

The district court erroneously sentenced Feldman under the wrong guideline. As a result, his adjusted offense level was at least two levels higher than it would have been had the court utilized the correct guideline i.e., U.S.S.G.§ 2B1.1. Feldman was convicted of two offenses: (1) Count 1 (conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349); (2) Count 29, (conspiracy to violate 18 U.S.C. 1956 § (a)(2)(A), prohibiting the transmission or transfer of funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States with the intent to promote the carrying on of specified unlawful activity. The unique feature of section 1956(a)(2)(A) is that unlike true laundering offenses, the funds involved in the transaction do not have to be the proceeds of unlawful activity. It is not, therefore, a "proceeds" offense.

The Presentence Investigation Report determined, and the court agreed, that Feldman should be sentenced under the money laundering guideline, U.S.S.G.§ 2S1.1(a)(1), which directs the court to use the offense level for the underlying offense "from which the laundered funds were derived" if the defendant committed the underlying offense. (emphasis added). DE:1181:23.

The plain language of the money laundering guideline confirms that it should not have been applied to Feldman. By its terms it applies only in those cases where the court of conviction is based on laundered funds derived from the underlying offense. Here, there were no laundered funds derived from an underlying offense as section 2S1.1(a)(1) requires. The premise for the conviction on Count 29 was that an international transfer of non-criminally derived funds was sufficient to establish a violation of 1956(a)(2))A); and the government's proof at trial focused on the international transfer of funds not derived from the underlying fraud.[14]

Given that it was error to sentence Feldman under section 2S1.1, it was also error to sentence him based on an offense level that include two level increases for

[14] Feldman was acquitted of the second object of the charged conspiracy, alleging concealment money laundering, which would have involved criminally derived proceeds.

that guideline's specific offense characteristics i.e., section (b)(2)(B) conviction under 18 U.S.C.§ 1956 and section (b)(3) sophisticated laundering.

B.

Even assuming that Feldman was properly sentenced under the money laundering guideline, it was nonetheless error for the district court to apply a two level enhancement for sophisticated laundering under U.S.S.G. section 2S1.1(3). Sophisticated laundering is defined as "complex or intricate offense conduct pertaining to the execution or concealment of the 18 U.S.C. § 1956 offense. U.S.S.G. § 251.1(n.5(A)).

Feldman and Pavlenko were both convicted on the identical single object of the dual object conspiracy charged in Count 29 (international transfers) and both were acquitted on the other object of the charged conspiracy (concealment money laundering). Despite their identical convictions, the district court applied the sophisticated laundering enhancement to Feldman, DE:1181:21-23, but when Pavlenko was sentenced several weeks later did not apply it to him. DE:1219:16. Just as it was inappropriate to apply the enhancement to Pavlenko, it was inappropriate to apply it to Feldman.

In any event there simply was no sophistication present in the transfer of funds involved in the count of conviction. [G.Ex.25]. Each transaction involved

the Stars Lounge LLC account at TD bank, an account on which Feldman was not a signatory and accounts held in the true and correct names of the transferors/transferees of the funds at Swed Bank and/or DNB Nord Banka in Riga, Latvia. There was no concealment involved in any aspect of the transaction, nor was there any layering, or the use of fictitious entities or shell corporations -- the indicia of sophistication listed in Application Note 5(A) Sophisticated Laundering under Subsection (b)(3).[15] The application of this enhancement was therefore erroneous.

C.

The district court also erred in determining the amount of loss attributable to Feldman under Section 2B1.1(b)(1). The primary argument on this issue, which Feldman has moved to adopt, is set forth in Pavlenko's initial brief. In addition, it is Feldman's position that the amount of loss in this case should equate to the amount of restitution determined by the court to be owed, i.e., $15,498.05. The court's determination of the loss was flawed for two other reasons. First, the district court assumed without making a specific factual finding that each customer who visited the VIP or Stars was a victim. DE:1181-18. Second, the

15 The other indicia listed in the application note, offshore financial accounts, are an essential component of any international banking transfer of funds and a

court failed to make the required specific factual findings of the amount that Feldman defrauded or intended to defraud each alleged victim, and the court failed to consider and deduct from the loss amount the reasonable value of the champagne purchased by each alleged victim.

D.

The district court also erred in assessing a two level increase in Feldman's offense level for obstructing or impeding the administration of justice pursuant to Section 3C1.1.

The two level obstruction enhancement under Section 3C1.1 cannot be applied in every case where the accused testifies at trial and is convicted. It may only be applied when he has willfully obstructed or impeded the administration of justice. An enhancement based on purportedly false trial testimony should not apply where the testimony at issue is the result of confusion, mistake or faulty memory. *United States v. Dunnigan*, 507 U.S. 87, 88, 113 S.Ct. 1111, 1115-1119 (1993). Rather, the testimony serving as the basis for the enhancement must equate to the generally accepted understanding of perjury defined by the federal criminal perjury statute, 18 U.S.C. §1621. A witness testifying under oath violates this statute only if he gives false testimony concerning a material matter with the

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necessary component of the transactions – the conviction on Count 29. The use of

willful intent to provide false testimony, rather than as a result of confusion mistake or faulty memory. *Id.* at 94, 1116.

Feldman's trial testimony fell far below meeting the accepted definition of perjury. Simply put, there is a paucity of record evidence suggesting that Feldman's testimony concerning any material matter was false. Rather, much of his testimony was corroborated by the testimony of one or more government witness.

The government contended that, as reflected in the Presentence Investigation Report, Feldman should have received a two level increase in his offense level for providing untruthful testimony at trial. In support of their position, the government identified six purported instances of untruthful testimony: (1) that he was not aware of any chargebacks at VIP and that is own sister, who was the bookkeeper at VIP, never told him that there were chargebacks; (2) that he was not involved in any of the operations of the clubs, despite being recorded discussing whether there should be a one cent difference in prices so as not to generate chargebacks; (3) that he had no idea what he was purchasing a ticket for when he paid for Marina Turcina's airline ticket with his own credit card; (4) that he had no idea if there were any promoters at VIP; (5)

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such accounts does not therefore, evidence any level of sophistication.

that he was not aware that the credit card terminals at Stars would be shut down because of excessive chargebacks even though there was an email from the credit card terminal processor forwarded to Feldman's sister; and (6) that he claimed it was Ieva Koncilo's idea to open up Ieva Marketing, LLC when Simchuk indicated it was Feldman who wanted it set up. DE:1079:15.

Over Feldman's objection, the district court found that Feldman "perjured himself on numerous occasions including the six specific occasions identified in the PSI," and assessed a two level increase for obstruction of justice. DE:1181-23.

The totality of Feldman's trial testimony, coupled with the testimony of other government witnesses, demonstrates that the district court's conclusion that Feldman perjured himself with respect to the above listed six specific portions of his testimony is clearly erroneous. To begin with, Feldman never claimed that he was unaware of chargebacks. Rather, he explained that he knew that there were chargebacks and believed that they were related to some type of billing or customer's dispute. DE:1149:247. His testimony about never discussing the chargebacks with his sister, who was the bookkeeper for VIP and Stars, was not contradicted by any credible record evidence. In fact, his testimony on this point was to some extent corroborated by Julija Vinogradova, who explained to the jury that when there were disputes concerning the revenues generated at Stars, they

were discussed with Feldman's sister rather than Feldman himself. DE:1122:68-71.

Feldman's testimony that he was not involved in the day to day operations of the clubs was substantially corroborated by the testimony of both Julija Vinogradova and Marina Turcina. Both women, especially Ms. Vinogradova, confirmed that Feldman was rarely present at the clubs, made no decisions and did not participate in the day to day operations. In addition, Ms. Vinogradova testified that Feldman may have had no knowledge of the alleged fraudulent activity. DE:1123:49-51,61-63,117,180-189. Feldman's comments about the one cent difference in prices so as to not generate chargebacks are not to the contrary. As he explained in trial, he learned this bit of information from Albert Takhalov and that credit card processors knew of and sanctioned this procedure. DE:1150: 34:35. His knowledge of this widely known fact does not demonstrate significant involvement in the operation of VIP or Stars.

Feldman never suggested that he had no idea that there were promoters at VIP. To the contrary, he testified that prior to investing in VIP, he visited the clubs in New York and learned that promoters were routinely in the club business and that it was the responsibility of his partner, Mr. Ruchkin, to secure the promoters at VIP. DE:1149:100-105. Moreover, Mr. Feldman confirmed that the

reason why Simchuk was interested in taking over VIP was to have a place for his promoters to work while awaiting the opening of Stars Lounge. DE:1149:133-140.

The record also supports Feldman's testimony that he was not usually present when customers were present at Stars. During the 70 days that the club operated, Feldman was present on only 6 to 8 occasions. Julija Vinogradova confirmed that not only was Feldman rarely present at Stars, but on the few occasions when he was there, he left before the girls returned back with the customers. DE:1123-6.

As explained above, Feldman never denied knowing that there were chargebacks, but rather testified that his knowledge was limited to the fact that the chargebacks involved customer or billing disputes. DE:149:247. His testimony regarding the lack of more detailed knowledge of the chargebacks is not substantially contradicted by the record.

Concerning Ieva Marketing, Koncilo herself was never called to contradict Feldman's testimony. Simchuk's testimony that it was Feldman who wanted the company set up is implausible given the fact that Simchuk himself utilized similar corporate entities for the same purported purpose when he was operating Club Dolce and Caviar Bar. Moreover, Simchuk testified that he directed Feldman to set up the company. DE:1125-214.

Where, as here, the defendant objects to a sentence enhancement based on his trial testimony, a district court is obligated to review the evidence and make independent findings necessary to establish an obstruction of justice under the definition of perjury. *United States v. Dunnigan*, 507 U.S. 87, 88, 113 S.Ct. 1111, 1115-1119 (1993). In that regard it is preferable for the district court to address each element of the alleged perjury in a separate and clear finding. *Id.*; *United States v. Dobbs*, 11 F3d 152, 155 (11th Cir. 1994). Here the district court failed to comply with that mandate. Instead, the court made only a generalized finding without separate or clear finding that the testimony concerned a material matter or did not result from a mistake or lapse of memory; and as we have demonstrated above, the court's generalized finding is clearly erroneous based on the totality of the record in this case. Thus, it was error for the district court to impose an obstruction of justice enhancement pursuant to U.S.S.G. § 3C1.1.

E.

The 100-month sentence of imprisonment imposed by the district court was substantively unreasonable. The touchstone of reasonableness is based on the mandate found in 18 U.S.C. § 3553(a) that the court impose a sentence that is "sufficient but not greater than necessary to comply with the specific purposes" of

sentencing set forth in § 3553(a)(2). Here, the district court failed to comply with that statutory mandate.

Feldman's guideline range (including the two level enhancement for obstruction of justice) based on a calculated adjusted offense level of 27, was 70-87 months. The government recommended a sentence at the bottom of the guideline range. DE:1181:24 Feldman suggested that a significant downward variance would be appropriate based on a myriad of Section 3553 factors including the nature and circumstance of the offense, his limited involvement in the offense, his life's history, community involvement, charitable work, and the need to prevent unwarranted sentencing disparity. [DE1075:14-20 DE1181:25-30].

The district court rejected both parties' recommendations and instead upwardly varied and imposed a sentence of 100 months--a more than 40% increase over the bottom of the calculated guideline range. In doing so, the district court disproportionately relied on its finding that Feldman had perjured himself at trial, a factor already used to enhance the sentence, DE:1181-35, and wholly failed to consider the other Section 3553 factors in fashioning the appropriate punishment. The end result is a sentence that far exceeds one that is "sufficient but not greater

than necessary" to comply with the statutory sentencing objectives found in Section 3553. That sentence must now be vacated.

CONCLUSION

Based upon the foregoing argument and authority, the Court should vacate the defendant's convictions and remand for the entry of a judgment of acquittal or, in the alternative, for a new trial or resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B), and that according to the program (WORD) on which it is prepared it contains 13,999 words.

Respectfully submitted,

/s/ *John E. Bergendahl*
JOHN E. BERGENDAHL

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was filed with the Clerk of Court via CM/ECF on this 19th day of September, 2014, and a copy thereof served upon Kathleen M. Salyer, Assistant United States Attorney, Chief of Appellate Division, 99 NE Fourth Street, Miami, Florida 33132-2111 via U.S. Mail.

Respectfully submitted,

/s/ *John E. Bergendahl*
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