NO. 13-12385-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/appellee,

v.

STANISLAV PAVLENKO,

Defendant/appellant.

INITIAL BRIEF OF APPELLANT STANISLAV PAVLENKO

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Stanislav Pavlenko
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.

Bergendahl, John

Brown, Hon. Stephen T.

Clay, William

DeFabio, Joel

Docobo, Richard Douglas

Feldman, Isaac

Ferrer, Wifredo A.

Fleischer, Bruce

Gregorie, Richard

Grove, Daren

Huynh, Joseph Hong

Klugh, Richard C.

Levin, Albert Zachary

Malman, Myles H.

Martinez, Hon. Jose E.

McAliley, Hon. Chris

Pavlenko, Stanislav

Salyer, Kathleen M.

Scola, Hon. Robert N.

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 defendant respectfully submits that oral argument is necessary to the just resolution of this appeal and will significantly enhance the decision making process. The appeal raises important trial and sentencing issues, including first impression issues concerning application of federal fraud statutes to the operation of a retail business serving alcoholic beverages. Oral argument will facilitate accurate analysis of the complex factual and procedural history of the case.

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STATEMENT REGARDING ADOPTION OF BRIEFS OF CO-APPELLANTS

Appellant Stanislav Pavlenko, pursuant to Fed. R. App. P. 28(i) (providing that in a case involving more than one appellant or appellee, appellants or may join in a brief, and any party may adopt by reference a part of another's brief) and 11th Cir. R. 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, IV, and V in the brief of co-appellant Isaac Feldman, and issues I, II, III, and IV in the brief of co-appellant Albert Takhalov, specifically all claims raised by the co-appellants premised on trial or sentencing error, due process violations in the presentation of ethnically prejudicial evidence and argument, denial of severance motions, erroneous evidentiary rulings and inadequate curative instructions, and claims of cumulative trial 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. NOTE: To avoid repitition, the complete procedural and factual recitation in the brief for Albert Takhalov is not included in this brief. However, as it contains the most comprehensive presentation of the procedural history of the entire

case and the statement of the facts in the light most favorable to the government, it is suggested that the Court may wish to review the Takhalov brief prior to considering the issues raised in this brief.

STATEMENT OF JURISDICTION

The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231 because the defendant 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. The district court entered judgment on August 28, 2013, disposing of all claims between the parties to this cause. The defendant filed a timely notice of appeal on September 11, 2013.

ISSUES

I. Instructional error—including denial of defense-theory instructions that the federal wire fraud statute does not prohibit promotion of a nightclub by employees who conceal their financial interest in sales of alcohol, that there is no fiduciary duty to reveal the club's employment relationship with such sales promoters, that sales of alcohol to voluntarily-intoxicated customers are not barred by federal fraud law, and that, absent false promises, using companionship by sales agents to stimulate customers' alcohol purchases does not constitute fraud, and denial of a multiple conspiracy instruction—substantially impaired presentation of a legal defense, undermined the exculpatory value of the defendants' testimony, allowed the government to constructively amend the indictment to expand the bases for conviction, and warrants reversal and a remand for a new trial.

II. The district court erred by denying the motion to dismiss the indictment for failure to state an offense and failure to invoke federal jurisdiction over the underlying conduct—operation of a bar regulated under local law—where the government was permitted to obtain a conviction on the legally defective theory that the object of the alleged scheme was to pay women to invite men to buy drinks and to sell alcoholic beverages to intoxicated men, conduct that is not covered by the fraud statute and that, even if potentially within the parameters of the statute, would

exceed constitutional limitations on regulating matters of purely local concern, such as morals regarding alcohol consumption or encouragement of such consumption.

III. The district court erred by denying motions for severance based on misjoinder of counts and defendants and compelling prejudice from evidence of charged and uncharged crimes by other persons, where: the magnitude of such uncharged offenses was disproportionate to the charged conduct; the likelihood of prejudice was increased due to ethnic references and associations falsely suggesting criminal disposition and livelihood and other factors; the government's presentation of evidence as being applicable to distinct sets of conspiracy allegations confused the jury as to business operations by unrelated nightclubs; and a limiting instruction could not prevent the jury from erroneously considering other offenses and conduct.

IV. The evidence was insufficient to sustain the defendant's convictions of: (a) wire fraud conspiracy, where the alleged object of the conspiracy did not violate the fraud statutes and undisputed evidence of multiple business agreements, disputes, and dissolutions of business relationships disproved the conspiracy theory, including the theory of a single conspiracy; (b) substantive wire fraud counts, where the business practices that formed the predicate of the government's case, including using employees to promote alcohol sales and contesting false claims by customers who

sought to void transactions, did not constitute fraud; and (c) conspiracy to conduct an international transfer of funds to promote an offense.

V. The district court erred at sentencing by:

(a) imposing a 12-level loss enhancement under U.S.S.G. § 2B1.1, for more than $200,000 in total revenue received by defendant's business, where only three customers asserted dissatisfaction with the nightclub; the jury rejected entirely claims by one of the three and largely discounted claims by the other two; the government offered no evidence that all sales by the nightclub were fraudulent or any charge disputes resolved inequitably; and no credit was given for the value of goods provided;

(b) applying the money laundering guideline and enhancements—rather than the fraud guideline found applicable in the presentence report—where the government did not timely object to the presentence report, violating the procedural guarantees of Fed. R. Crim. P. 32 and the Due Process Clause by changing the guidelines after resolving the defendant's timely-filed objections under the fraud guidelines and resulting in impermissible enhancements for role-in-the-offense and money laundering, where there were no laundered proceeds under the 18 U.S.C. § 1956(a)(2)(A) count of conviction;

(c) imposing a role-in-the-offense enhancement under U.S.S.G. § 3B1.1, where the defendant's undisputed role was providing financial contributions and financial services, he was not found to have supervised anyone in any money laundering conduct, and he did not supervise the work of any person in any unlawful activity;

(d) imposing an obstruction of justice enhancement under U.S.S.G. § 3C1.1, where the court failed to specify perjurious testimony;

(e) imposing a restitution order where there was no showing of actual loss or credit was given for goods provided to the single customer for whom the government sought restitution.

STATEMENT OF THE CASE

Course of Proceedings, Disposition, and Statement of Facts

Appellant Stanislav Pavlenko was the last defendant to be charged, in the September 22, 2011 superseding indictment, alleging that several defendants committed fraud in the operation of bars and nightclubs on Miami Beach. DE:953. Pavlenko was charged with conspiracy, under 18 U.S.C. § 1349, to commit wire fraud (Count 1); substantive wire fraud, under 18 U.S.C. § 1343 (Counts 2-21); conspiracy to defraud the government via false visa applications, in violation of 18 U.S.C. § 371 (Count 28); and, in Count 29, conspiracy, under 18 U.S.C. § 1956(h),

to commit two types of prohibited monetary transactions: payments intended to conceal fraud proceeds, under § 1956(a)(1)(B)(i), and international money transfers intended to promote a wire fraud conspiracy, under § 1956(a)(2)(A). DE:953. Pavlenko—who, in the pre-indictment phase of the case, DE:532, took and passed a polygraph examination, denying knowing of or approving any improper conduct by bar employees—proceeded to trial and was convicted of Counts 1, 6-8, 13, 18-21, and 29. He was acquitted of the visa conspiracy and the remaining wire fraud counts, and, as to Count 29, was convicted only as to the international transfer object, and not the concealment-of-proceeds object. DE:956. He was sentenced to 78 months' imprisonment and ordered to pay $6,419 in restitution. DE:1195.

Pavlenko filed a pretrial motion for severance of prejudicially-misjoined counts and defendants. DE:531. The severance motion was renewed at trial. *See* DE:1125:6. He also sought dismissal of the fraud-based charges for failure to state an offense and failure to properly invoke federal jurisdiction over the operation of a nightclub (Caviar Bar) in Miami Beach. DE:1009.

The indictment—using cooperating government witness Alec Simchuk as the hub of the Count 1 conspiracy, and defendant Albert Takhalov as the hub of the Count 30 conspiracy (in which Pavlenko was not charged)—divided up the operation of seven different Miami Beach bars from October 2009 to April 2011,

into two conspiracy charges and sought, in Count 1, to link Pavlenko's Caviar Bar to two bars run by Takhalov, Isaac Feldman, and others in different locations at different times. DE:953. The unifying element of these three bars was alleged to be the object of the bar owners to drive up sales by employing attractive women (whose immigration to the United States was facilitated by longtime bar operator Simchuk), on a commission basis, to invite men to purchase expensive drinks at the bars. DE:953. The women were described as "bar girls" or "B-girls." DE:1121:23, 48.

Despite the lack of any connection between Pavlenko and anything or other than Caviar Bar, the government offered substantial evidence against Pavlenko pertaining to the activities and attitudes of the people involved in the bars Pavlenko had nothing to do with—including video and audio recordings of the operations of the other bars and the testimony of an undercover agent who infiltrated those other bars. *See* DE:1154:77-78 (describing video evidence as to co-defendant). This video, audio, and undercover evidence was then offered to the jury as a template for how to view activities at Caviar Bar, as to which the testimony was otherwise vague and anecdotal. *See* DE:1138:39 (undercover officer claims employees of other, later bars related hearsay as to prior events at Caviar Bar). The government also relied on five days of testimony by Simchuk, DE:1125-29, who sought to

attribute to Pavlenko knowledge of Simchuk's Eastern European bar practices. The government also presented testimony by two so-called B-girls (four days of testimony by Marina Turcina, DE:1131-34, and five days of testimony by Julija Vinogradova, DE:1121-24, 1146) and three customers of Caviar Bar (John Bolaris, DE:1141, Ronald Michalak, DE:1144, and Michael Anderson, DE:1129). More than a week of testimony by undercover agent Luis King, who had no personal knowledge about Caviar Bar, was also presented by the government. DE:1134-40.

The facts relevant to Pavlenko's case relate principally to three men who patronized Caviar Bar from March 23-29, 2010. The indictment charged, and it was undisputed at trial, that at Caviar Bar engaged sexy women to drum up sales of expensive champagne. DE:953. The three customers of Caviar Bar who testified—Anderson, Bolaris, and Michalak—claimed either that they were too inebriated or intoxicated to know what they were doing or did not recall signing for drinks, DE:1129:136-37, DE:1141:51, and, in Michalak's case that the bar simply overcharged him and initially failed to properly resolve the charging dispute. DE:1144:10-18. Anderson acknowledged knowing that the B-girls had some relationship or connection to the bartender at Caviar Bar. DE:1129:127. None of these men had any interaction with or ever met Pavlenko. Bolaris pursued a complaint about his credit card chares in April 2010, and Pavlenko soon thereafter

dissolved his relationship with Simchuk, such that they did no further business together and parted on bad terms. DE:1125:195. Caviar Bar closed the next month, with Pavlenko closing down the credit card account and canceling the beverage license. DE:1147:6-24. Simchuk later went on to open up other bars after his business ties to Pavlenko were severed. DE:1125:196-97.

Most relevant to the issues on appeal is Pavlenko's testimony in his own behalf. He disputed knowing whether any improprieties occurred or that any such improprieties were approved by him. DE:1147:53, 82. Pavlenko explained that he did not get involved in Caviar Bar as a short-term fraud vehicle, but as a long-term operation designed to produce legal profits. DE:1147:46.

Pavlenko testified that he was a businessman and entrepreneur who came to this country from Russia in the 1990s and had made money legitimately in several businesses, including car sales, a filling station (with a beer and wine license), and financial services businesses (including merchant processing of credit card purchases). DE:1146:109-10. Pavlenko had no criminal history; he had two daughters in private college in New York (from a former marriage); and he is married to a Russian bobsledding champion (and former member of the Russian Olympic team) with whom he had a then 2-year-old daughter. PSI ¶¶ 104, 108.

Pavlenko, his wife (Alevtina) and their young daughter lived in Miami, Pavlenko having moved from New York several years earlier. DE;1147:109-10

Pavlenko explained that around the time that he acquired his interest in a gas station in Hollywood, Florida he was introduced to Alec Simchuk through local community businesspeople who vouched for Simchuk's bona fides and business acumen. DE:1147:110, 112. Pavlenko met with Simchuk and, after hearing Simchuk's version of how he had successfully operated night clubs in Europe, agreed to invest with Simchuk in a Miami Beach night club or bar. DE:1147:117-18. The intended design of the nightclub was to cater to a high-end market by having sexy women (paid on a commission basis) entice big spenders to come to the bar to purchase big-ticket brands of champagne and caviar. *Id.* Because certain types of champagne from certain brands—such as Roderer, Crystal, Dom Perignon, and others—have very high retail (and wholesale) prices (of $2,000 or more in South Beach clubs), there is a large potential profit margin per bottle of champagne sold. DE:1147:43. Pavlenko's understanding of the plan was simple: the big spenders would come to the bar and 'party like rock stars' in the company of the vivacious women who were selected and supervised by Simchuk. DE:1147:119.

Simchuk assured Pavlenko that this type of interaction with the big spender[1] this would produce great returns in Miami Beach. Pavlenko accepted the offer and invested in the club concept. DE:1147:118-19.

Pavlenko, upon forming Rose Entertainment LLC to conduct the bar's business, invested with Simchuk first in a bar-within-a-bar serving champagne inside Miami Beach's Club Dolce. DE:1147:43. After the Club Dolce-affiliated operation closed, Pavlenko found and set up the physical space for Caviar Bar at 643 Washington Avenue in the South Beach area of Miami Beach. DE:1147:42.

Pavlenko sought to end his involvement within two weeks of beginning the club in March 2010 and by May 28, 2010 had finally managed to extricate himself from Simchuk. Once again, however, Simchuk cheated Pavlenko, essentially stole the assets that Pavlenko had invested in as to Caviar Bar, while Simchuk opened other bars and, without the linkage to Pavlenko, raised prices exorbitantly, in a manner contrary to Pavlenko's effort to build a long-term self-sustaining club. *See*

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[1] The notion of a big spender impressing a woman in a bar is famously part of American culture, as seen in the lyrics of the song "Big Spender" from the musical *Sweet Charity*. *See* http://en.wikipedia.org/wiki/Big_Spender; *see also* http://www.lyricsmania.com/sweet_charity_-_hey_big_spender_lyrics_broadway_musicals.html ("The minute you walked in the joint, I could see you were a man of distinction, a real big spender, good looking, so refined. Say, wouldn't you like to know what's going on in my mind? So, let me get right to the point. I don't pop my cork for every guy I see. Hey, big spender, spend a little time with me!").

DE:1147:136. Pavlenko alone stood behind all Caviar Bar debts, including any credit card debts due to customers who sought chargebacks. DE:1147:24.[2]

Pavlenko testified (and government witnesses confirmed) that he had no interaction with customers. Similarly, B-girl Marina Turcina, who was involved in the transactions with Bolaris, Anderson, and Michalak, testified that she was unaware of any forgery of their signatures. As Turcina explained regarding Bolaris, he was over-excited about the prospect of a sexual encounter with two B-girls and signed for the expensive champagne he ordered without paying much attention to the details of the transactions. DE:1131:184, 189.

Pavlenko assumed that the B-girls did not reveal to customers the commission arrangement with Caviar Bar. DE:1147:186. He dealt with the credit card companies in the event of disputes and as to one customer, former TV weatherman John Bolaris, Pavlenko provided American Express with a photograph engaged in a happy interaction with Marina Turcina (one of the commissioned B-girls). Gov't Ex. 223. Pavlenko, in response to repeated questions by the

[2] There was an unresolved issue at sentencing as to whether one customer had or had not been reimbursed, because as of the time of the trial he had not requested reimbursement from the credit card company. Other than this one claim, made known at trial, there was no one else who claimed to have lost any money in dealing with Caviar Bar or Pavlenko. Pavlenko stands out in this case as a man who backed up and fulfilled his financial obligations, even as he was cheated and abused by Simchuk (who revealed at trial that he—Simchuk—had been part of the Russian Mafia).

government as to whether Pavlenko advised credit card companies about the B-girl commissions, stated that he did not and that he was unaware of any obligation to do so. *See* DE:147:206 ("Q. Finally, did you tell American Express at any time you were communicating with them that the girls were getting 20 percent of the bar bill? A. Again, it was not a subject discussed and therefore I didn't tell American Express.").

Pavlenko had nothing to do with any other club in this case. Nor did the government seek to attribute activity in any other club (than Caviar Bar and the unindicted Club Dolce) to Pavlenko. It was clear from the record that there was a total and avowed break by Pavlenko with Simchuk and anything to do with his bars upon Pavlenko's relinquishment of any interest in the bar. DE:1125:195 (Simchuk testifies that Pavlenko's abrupt break with Simchuk was so cold and unilateral that Smichuk wanted to "eat [his own] phone.").

At sentencing, the government sought to equate Caviar Bar with the Takhalov bars subjected to intense surveillance and investigation long after Pavlenko closed Caviar Bar. The government contended that because "fraud occurred at Caviar Bar" through employment of B-girls, parsing the evidence of intended losses as to individual customers was not necessary, even in the absense of a proffer of evidence as to why individual customers purchased drinks.

DE:1219:13. The government failed to object to the use of the money laundering guidelines in the presentence report. DE:1079. Hence, the final presentence report showed use of U.S.S.G. § 2B1.1 as the base offense guideline to be used. PSI ¶ 81. And the final addendum to the PSI showed no objection by the government.

The government conceded at sentencing that there should be no enhancement for vulnerable victim, but still maintained that Pavlenko should receive an enhancement for role in the fraud offense, not the money laundering offense, DE:1219:6, a position that is inconsistent with application of § 2S1.1, rather than U.S.S.G. § 2B1.1 as was called for in the PSI. In fact, the final PSI in this case, as revised following sentencing, still maintains that the base offense level was § 2B1.1, nor was the PSI ever ordered to be changed. PSI ¶ 81 ("Base Offense Level: The underlying offense is conspiracy to commit wire fraud, for which the applicable guideline is § 2B1.1."); *see also* PSI ¶ 80 (rejecting application of the money laundering guideline, § 2S1.1). The government asserted that only five customers had ever made reference to any actual loss, but that the defendant's intended loss calculation could be increased to include the total revenues of Caviar Bar despite the satisfaction of the customers with their drink orders. DE:1219:13; DE:1079:5 (government argues the "loss amount for Caviar Bar is ... the total

money received at Caviar Bar through the bank accounts). At the time of restitution, none of the customers claimed any actual loss. DE:1220:11.

Standards of Review

1. The denial of a requested theory of defense instructed supported by the law and facts is reversible error where the district court erroneously rejects the legal basis for defense theory and the failure to give the instruction seriously impairs the effective presentation of the defense. *See United States v. Ndiaye*, 434 F.3d 1270, 1293 (11th Cir. 2006). Review of the adequacy of jury instructions is *de novo* to determine whether they inaccurately or incompletely stated the law to the defendant's prejudice. *See United States v. Felts*, 579 F.3d 1341, 1342 (11th Cir. 2009). Instructional error that effects a constructive amendment of the indictment is per se reversible error. *United States v. Williams*, 537 F.3d 1235, 1246 (11th Cir. 2008).

2. The sufficiency of an indictment to properly state an offense and invoke federal criminal jurisdiction is reviewed *de novo*. *United States v. Izurieta*, 710 F.3d 1176, 1179-80 (11th Cir. 2013). A challenge to the constitutionality of a statute also is reviewed *de novo*. *United States v. Rozier*, 598 F.3d 768, 770 (2010).

3. The propriety of the joinder of charges and defendants under Fed. R. Crim. P. 8 is reviewed *de novo*. *United States v. Walser*, 3 F.3d 380, 385 (11th Cir. 1993) (Fed. R. Crim. P. 8(a), joinder of charges); *United States v. Wilson*, 894 F.3d 1245, 1253 (11th Cir. 1990). Denial of a motion for severance is reviewed under the abuse-of-discretion standard. *United States v. Pedrick*, 181 F.3d 1264, 1272 (11th Cir. 1999) (affirming grant of severance where compelling prejudice became clear during trial). Review of cumulative trial error considers all errors preserved and unpreserved in the context of the trial as a whole to determine whether the appellant was afforded a fair trial. *United States v. House*, 684 F.3d 1173, 1197 (11th Cir. 2012).

4. Review of the sufficiency of the evidence is *de novo*, and the conviction must be reversed absent substantial evidence that the defendant committed the offenses. *United States v. Lopez-Ramirez*, 68 F.3d 438, 440-441 (11th Cir. 1995).

5. The sentencing issues raised concerning the interpretation and application of the guidelines present legal questions reviewed *de novo*. *See United States v. Salgado*, 745 F.3d 1135, 1138 (11th Cir. 2014); *United States v. Barner*, 572 F.3d 1239, 1247-48 (11th Cir. 2009) (district court's interpretation of the guidelines is reviewed *de novo* and factual findings for clear error). Similarly, a

violation of the procedural requirements of Fed. R. Crim. P. 32 is reviewed *de novo*. *See United States v. Prouty*, 303 F.3d 1249, 1251 (11th Cir. 2002). Review of the reasonableness is a sentence requires application of an "abuse-of-discretion standard." *Peugh v. United States*, 133 S. Ct. 2072, 2080 (2013).

SUMMARY OF THE ARGUMENT

1. The district court erred in denying jury instruction requests that would have explained that there is no fiduciary duty between a bar and its customers; a bar that sells drinks at a set price to customers does not commit fraud by using promoters to encourage drinking; a bar's sale of alcohol to a voluntarily-intoxicated customer is not fraud; and capitalizing on a customer's misplaced hopes of sexual conquest is likewise not fraud. The district court also erred in denying a multiple conspiracy instruction where Pavlenko lacked any connection to the later bar operations.

2. The district court erred in denying the motion to dismiss. The indictment invoked state law – the Florida B-girl statute – and accused appellants of selling alcohol to intoxicated persons. These are not "crimes" under the federal fraud statues, so there was no federal jurisdiction at all.

3. Merging of multiple different charges, time frames, and courses of conduct into a joint indictment was highly prejudicial where the jury was exposed

to a barrage of other crimes evidence, FBI video and audio surveillance of entities having nothing to do with Pavlenko, and informant infiltration and sets of conspiratorial activities entirely foreign to Pavlenko. The contrived nature of the joinder, animated by notions of ethnic criminal disposition, warranted granting Pavlenko's motion for severance.

4. The evidence at trial was insufficient to convict. Beyond the defective fraud theories, the government also pursued a flawed money laundering theory: the necessary showings of international transfer and promotion were lacking. As to Takhalov, the government accused him of conspiring to defraud the United States without alleging, much less proving, that the government was deprived of any money or property – the so-called "*Klein* conspiracy" theory that has been subject to recent judicial critique.

5. The district court erred procedurally in permitting the government to make untimely objections to the PSR, which resulted in the application of the money laundering guideline cross-reference, further enhanced improperly by adjustments for role and obstruction – without finding perjury by Pavlenko. The court also miscalculated the "loss" by relying on "gross receipts," rather than undertaking an individualized analysis of transactions. The restitution amount was likewise miscalculated.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE COURT SHOULD GRANT A NEW TRIAL BASED ON FUNDAMENTAL INSTRUCTIONAL ERRORS.

The unique and unprecedented fraud theory on which the government founded its indictment, and the shifting nature of the prosecution's theories and arguments regarding the allegedly improper conduct and conspiratorial agreement, compelled that the district court grant defense-requested instructions as to the law applicable to the business about which Pavlenko and other defendants testified.

The district court also erred—in the context of a case dealing with multiple temporally separated business operations owned by different persons and entities, with different locations, business models, and histories—in denying the defense request for the pattern multiple conspiracies instruction.

And the district court erred in giving an instruction that served to call undue attention to a former co-defendant's resolution of her case via guilty plea, where the instruction was confusing and prejudicial, undermined the effect of a prior instruction as to the same co-defendant, and was given without prior explanation to the defense of the content of the instruction to allow the parties to modify the instruction. The instructional errors warrant granting a new trial.

A. Denial of defense-theory instructions as to the wire fraud statute's limits.

The district court erred in denying a series of defense-requested instructions

that related to theories of defense, including that the federal wire fraud statute does not prohibit promotion of a nightclub by employees who conceal their financial interest in sales of alcohol to customers; that there is no fiduciary duty to reveal to customers the club's employment relationship with such sales promoters; that sales of alcohol to voluntarily-intoxicated customers are not barred by federal fraud law; and that, absent false promises, using the companionship of sales agents to stimulate customers' purchases of alcohol does not constitute fraud.

The defense presented by Pavlenko at trial was not that he was unaware of the likelihood that the B-girls deceptively lured patrons to the bar, but instead that he never intended for the patrons to be deceived about matters pertinent to their purchases once they arrived at the bar and that he did not know of any such deception. Pavlenko admitted that the women involved did not disclose their profit-based connection to Caviar Bar:

> Q. You knew they weren't disclosing that they worked for Caviar Bar, didn't you?
>
> A. I didn't know specifically if they were disclosing or not. However, if you would ask me at any point then or now if they would disclose, I would probably say they would not disclose.

DE:1147:186 (cross-examination of defendant Pavlenko).[3]

Although the operation of Caviar Bar may have been in violation of the B-girl statute, that did not make the transactions engaged in by the bar customers fraudulent under federal law. Instead, the customers—to Pavlenko's knowledge—got what *exactly* they paid for: high-end champagne, at the listed price. Pavlenko sought instructional support for his theory of defense "asking that the Court consider each statement as a separate instruction so that it does not appear that it is just one continuous instruction." DE:1155:43:

> There is no duty to disclose the financial arrangement between the B-girls and the Bar.
>
> Failure to disclose the financial arrangement between the B-girls and the Bar, in and of itself, is not sufficient to convict a defendant of any offense.
>
> The financial arrangement between the B-girls and the Bar is immaterial to the transaction.
>
> So long as the Bar delivers to the patron the goods/beverages paid for there is no fraud even if no one disclosed the financial arrangement between the B-girls and the Bar.

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[3] Notably, Pavlenko had taken and passed a polygraph examination regarding his knowledge of any fraudulent activity at Caviar Bar and was found, by a former head of FBI polygraphy, to have truthfully denied any such knowledge. The district court, citing the broad exercise of discretion granted on evidentiary rulings, excluded the polygraph evidence. But that exclusion made it all the more important that the jury receive instruction on the defense theory and its legitimacy under federal law.

> A scheme to have attractive women induce patrons to purchase and consume alcoholic beverages under the illusion that the patron may later persuade the women to have sexual relations is NOT sufficient to convict of the federal crimes charged.
>
> The law does not recognize as reasonable or legal a patron's expectation that a woman will have sexual relations with him if he buys her alcoholic beverages, so such a patron is not a victim of fraud if the patron received from the establishment the beverages/goods that he paid for.
>
> The law does not excuse a patron from his obligation to pay for beverages/goods just because he became intoxicated voluntarily.
>
> Even if the establishment uses attractive women to encourage a patron to purchase and consume increasing amounts of alcoholic beverages, the patron is not a victim of a fraud when he becomes intoxicated voluntarily and later has buyer's remorse.
>
> Unless the establishment forces the patron to consume the beverage or adulterates the beverage, a patron remains responsible for his consumption of alcoholic beverages and is deemed to be intoxicated voluntarily, even if the establishment uses attractive women to encourage a patron to purchase and consume increasing amounts of alcoholic beverages.

DE:921. The court denied the proposed instructions.

The distinction between fraudulent transactions and fair transactions that the customer is induced to partake of because of paid promotional efforts of B-girls was the focus of the defense theory instructions. Where the women did not falsely *promise* sexual or other favors—other than the company that they provided—Pavlenko was correct in requesting an instruction that the customer's

hopes that they might bed the B-girls did not convert fair transactions into fraudulent ones. And Pavlenko was likewise correct in seeking a defense theory instruction that voluntary intoxication by the patrons—whether at the specific inducement of the bar employees or otherwise—did not render the fair-value transactions fraudulent, at least where the customer was not so drunk as to be deceived as to the nature of the transaction—a straightforward purchase of alcoholic beverages.

All of these premises are fundamental to the distinction between sharp practices and fraudulent ones. Although a salesman at a sports car dealership might imply to the customer that the buyer's sex appeal will be enhanced the driving of a hot-looking, sporty convertible—when the salesman actually believes nothing will do the trick for the buyer—there is no fraud in such puffery as long as there is no deception as to the price of the car, the warranty, and the other specifications of the purchase. Absent the defense theory instructions, the effect of the arguments and instruction was to allow jurors, some or all, to believe that Pavlenko had a fiduciary duty to tell customers that the girls worked on commissions and to convict Pavlenko on that theory.

The defense theories were correct: salesmen may conceal matters that are not material to the sale of a product; an employee can misleadingly say she likes a customer in order to induce the customer to buy at stated price. Seductive sales

pitches are the stuff of standard commercial advertising – ads portraying women falling at the feet of a man who uses a given brand of aftershave lotion. Appealing to a man's libido and revving up his imagination is not a fraud within the scope of the federal fraud statutes.

Thus in *United States v. Regent Office Supply Co.*, 421 F. 2d 1174 (2d Cir. 1970), the Second Circuit rejected the government's theory that every deception that motivates a "victim" to enter into a transaction is necessarily a fraud within the federal statutes. In *Regent Office Supply Co.,* the defendant's salesman falsely represented to customers that they were doctors or other professionals, had been referred by a mutual friend or were trying to dispose of supplies because of a death. The court held that such deceitful techniques were not federal fraud crimes because there were no misrepresentations about the quality or nature of the goods. Though by these knowingly false representations defendant deceived the customers and "secured sales," there was no scheme to "defraud" under 18 U.S.C. § 1341, because the representations were not calculated or intended to affect the customers' understanding of either the bargain or the value of the goods. *See id*. at 1181-82; *accord United States v. Starr*, 816 F.2d 94, 98-99 (2d Cir. 1987) (false statements that lure a customer into a transaction are not sufficient, in and of themselves, to support the charge of wire fraud if the customer obtains the benefit of his bargain).

The failure to grant a theory of defense instruction for which there is ***any*** foundation in the evidence, ***viewed in the light most favorable to the defendant***, is reversible. *United States v. Ruiz*, 59 F.3d 1151, 1,154 (11th Cir. 1995) (defendant entitled to jury instructions on theory of defense). The Court can exercise the same de novo review of the legal implications of the instructional requests as can the court of appeals. *See United States v. Stone*, 9 F.3d 934, 937 (11th Cir. 1993). Nor could the defendant's abiding defense of good faith be fairly evaluated absent the defense theory of the applicable legal components in his view of the events. *See United States v. Curry*, 681 F.2d 406, 417 (5th Cir. 1982) (reversing denial of good faith theory of defense instruction where the record contained some circumstantial evidence of the defendant's good faith). Divorced from the imprimatur of the Court, the argument of counsel was insufficient to assure the jury that the indicted theory of the case regarding B-girl promotion did not amount to fraud. Again, in this context, the jury's split and conflicting verdicts add to the likelihood that if given the defense theory instructions, a complete acquittal could have resulted.

The impermissible theories of prosecution as to allegations of wire fraud conspiracy and the tainting also of the money laundering theories due to fundamentally and jurisdictionally defective theories and allegations as to wire fraud,, warrant a new trial under *United States v. Range*, 94 F.3d 614, 620 (11th Cir.1996)

(general verdict cannot stand where one of the possible basis of conviction rest on a legally erroneous instruction unless the court is able to "determine with absolute certainly that the jury based its verdict on the ground on which it was properly instructed."), and *United States v. Shotts*, 145 F.3d 1289, 1293 n.3 (11th Cir. 1998) ("A general verdict which may rest on an insufficient legal theory must be reversed").

B. Denial of a multiple conspiracies instruction

Pavlenko was involved in Caviar Bar, but not the later bars. He presented evidence distinguishing his operation from the others. He was entitled to the pattern jury instruction regarding multiple conspiracies.

The business records and inventory purchase records showed that Pavlenko opened Caviar Bar with a business model that had a potential for success without any form or fraud or other misconduct. Pavlenko made a substantial investment in the bar, including for design, furnishings and high-cost champagnes (as advertised on the menus). Pavlenko stood behind Caviar Bar financially in a manner that lacked the traditional badges of fraud in relation to credit card companies. Pavlenko made sure that all of its obligations to credit card companies were fulfilled. Caviar Bar was not set up as a venue for Pavlenko to make a quick killing by fraud and run away to Europe.

In comparison, the participants in the other indicted bars did not make substantial investments or upgrades in the premises and lacked the commitment to

stand behind their bars' debts. The later bars shortchanged customers by substituting lesser quality drinks, in one case selling $5 sparkling wine as $600 champagne. Whereas Pavlenko obtained appropriate licenses for the sale of alcohol at Caviar Bar, the same was not true at the other bars.

The weighty evidence establishing that Pavlenko had a very different mindset about the bar business entitled him, at a minimum, to a multiple conspiracies instruction. *See infra* at 41 (discussing multiple conspiracy precedents and their application to Pavlenko's case).

C. Instruction Regarding Co-Defendant Kristina Takhalov

Takhalov's wife Kristina, who began the case as a co-defendant on trial, was in the courtroom to observe final instructions and closing arguments. She was on bond pending sentencing. The government asked the judge to exclude her from the courtroom. The judge refused because a trial is a public proceeding. DE:1154:4. Instead, over objection, DE:1154:5, the judge amended his final instructions, which he delivered before closing arguments, and told the jury:

> you may notice now or later that Ms. Kristina Takhalov, who was formerly before you in the trial, is here in the audience. ***I have allowed her to be here*** to support her husband in the case who is continuing in the trial. You should not speculate on what happened to her case because whether she pled guilty and ***I allowed her to remain on bond until her sentencing***, or whether her case was dismissed or whether there was some other resolution of her case is absolutely irrelevant as to whether the Government has proven or not proven the charges against these other defendants.

DE:1154:21 (emphasis added). Telling the jury that the judge "allowed her" to be in a public courtroom implied that the judge could have ***dis***allowed her. The only scenario consistent with the judge's power to ***dis***allow her from being in the courtroom that day was that "she pled guilty and [the judge] ***allowed her*** to remain on bond until her sentencing." Absent a pending sentencing, Kristina Takhalov would not need the judge's permission to be in that public courtroom. It was sophistry to suggest to the jury the possibility that "her case was dismissed" or that "there was some other resolution of her case."

Insofar as the instruction necessarily implied that Kristina had pled guilty to one or more of the charges for which she was previously on trial with appellants, it was prejudicial error to give it. *See United States v. Griffin*, 778 F.2d 707, 710 (11th Cir. 1985) (holding that courts and prosecutors are generally prohibited from mentioning to the jury that a codefendant has pled guilty or been convicted; there are only "two exceptions to this rule" and neither of them applies to an unindicted coconspirator or to use of the testimony apart from witness impeachment/credibility questioning. Evidence of a guilty plea was prejudicial because absent a limiting instruction it implied the guilt of the other defendants, and particularly Pavlenko, where the government had sought to link Kristina to Pavlenko at a early stage of the bar operations.

Even if the jury believed the counterintuitive alternative—that the charges against Kristina had been dismissed—that too was prejudicial but for the opposite reason: it implied that the court had found no merit to the prosecution against Kristina, but had found sufficient merit as to the prosecution against appellants.

II. THE DISTRICT COURT ERRED BY FAILING TO DISMISS THE INDICTMENT FOR FAILURE TO STATE AN OFFENSE OR INVOKE FEDERAL JURISDICTION.

The indictment is fundamentally deficient, failing to properly charge a violation of federal fraud statutes or a money laundering conspiracy and relying on theories extending beyond the jurisdictional scope of the relevant statutes, where the principal premise of the fraud component of the indictment was that the defendant had induced alcohol purchases through employee solicitation in violation of local business-operation laws and where the money laundering conspiracy charge relied on the defective fraud theory. DE953:3, 5-6, 21.

Failing to announce to patrons that B-Girls worked for Caviar Bar was obviously part of a technique to lure customers to Caviar Bar. But *Regent Office Supply* and *Starr* hold that even false statements that lure a customer into a transaction are not sufficient to support the charge of wire fraud if the customer obtained what he bargained for. *See Regent Office Supply*, 421 F.2d at 1181-82; *Starr*, 816 F.2d at 98-99.

As the court explained in *Starr*, the deceit must be coupled with a contemplated financial swindle of the victim. The harm contemplated must affect the very nature of the bargain itself. Such harm is apparent where there exists a discrepancy between benefits reasonably anticipated because of the misleading representations and the actual benefits which the defendant delivered, or intended to deliver. 816 F.2d at 98. These cases directly address the key issue in this case of whether concealment from patrons that the B-Girls worked for Caviar Bar constitutes wire fraud.

In the district court, the government relied on the theory that the case law, applicable to this case, is this Court's decision in *United States v. Svete*, 556 F.3d 1157 (11th Cir. 2009) (*en banc*), holding that the fraudulent misstatements at issue need not be objectively capable of deceiving a reasonably prudent buyer. In *Svete*, "the sales agents made false statements [to] and provided [investors in viatical life insurance policies] with literature that contained false statements about the life expectancies of viators, the status of the life insurance contracts, and the risks associated with the investments." *Id*. at 1159. *Svete* takes as a given that the misrepresentation must be material to the value of the item sold or offered for sale. The *en banc* Court's holding that deceiving victims as to matters material to the value of their investment falls within the scope of federal fraud prohibitions, regardless of the purchaser's intelligence, prudence or ability to comprehend, is in no way in conflict with the defense theory instruction requested in this champagne sales case.

Instead, the *Svete* decision offers support for the defense theory instructions in this case, because in *Svete*, the Court viewed materiality in the context of the value of the item (insurance policies) purchased, not on whether the lure given to buyers to hear the seller's sales pitch was premised on fact.

Trade practice issues that are otherwise capable of regulation or deregulation by the state or local government remain outside the scope of the fraud statutes where there is no false statement pertaining to the actual value of the item sold to the consumer and the customer receives the purchase that he bargained for. *See*, *e.g.*, *Marlborough Holding Co. v. Azimut–Benetti, Spa, Platinum Yacht Collection No. Two, Inc.* , 505 Fed.Appx. 899, 906 (11th Cir. 2013) (holding that plaintiff's attempt to treat unfair trade practice claim as one founded on fraud theory was unsupported by Eleventh Circuit precedent; merging statutory unfair trade practices limitations with fraud doctrine "would nullify the statutory distinction between actions founded on a statutory liability and legal or equitable actions founded on fraud").

The harm was particularly great in the present case where the instructions given to the jury, the government's arguments, and the indictment itself permitted the jury to rely on a regulatory violation having nothing to do with deceit. Thus, the B-girl statute, on which the government's indictment relied, bars both disclosed and undisclosed solicitation of beverage purchases by bar employees. It does not address fraud in any form. Absent the defense theory instructions, *see* DE914, the jury was

permitted to rely on just such an improper theory of the prosecution relating to non-fraud conduct. The jury was permitted to reach verdicts reflecting a mixture of theories, where there was no election of theories by the government and hence no unanimity instruction as to theories on which the jury relied.

Similarly, the jury was permitted to rely on a theory that selling alcohol to intoxicated customers or encouraging such customers to drink more is covered by the fraud statute. In that regard, the government's theory intruded on state law providing that such voluntary intoxication cannot be used as a defense to obligations incurred by the customer. Fla. Stat. § 786.36 (barring a finding of civil injury where drunkenness was the principal cause of the occurrence of the injury).

The government alleged that clubs were not "legitimate" because they used "illegally employed female[s]" to solicit purchases by tourists without disclosing their employment. DE953:5. Under the government's theory, however, the use of any illegally employed persons to serve or sell would be fraud; the sale of produce obtained through the use of illegal alien agricultural workers would be consumer fraud; and the operation of a business using illegal aliens in other subservient roles would also be fraudulent. But that is not the law and it would turn the fraud statute into a vehicle for imposing moral values onto the operation of all businesses.

The remainder of the indictment allegations, while novelistic and morally edifying, were ***not*** incorporated in the charged object of the conspiracy and fell below

the level necessary to assure that the fraud statutes are not extended to operate as a morals or business standards metric. Included among the descriptive allegations of overt acts was that the women accompanying customers would not drink the drinks ordered, but would pour them out. DE953:8. But again, such allegations do not amount to fraud where the women were not obligated to drink everything that was poured for them. Thus, even if such allegations had been included as part of the conspiratorial agreement and scheme, they were insufficient to meet the standard for application of federal fraud statutes—where the customer has received the exact item he paid for at the price listed.[4]

Just as it is the case that annoying unnecessarily high-pressure sales tactics do not constitute fraud if the customer buys an overpriced item—such as paying *thousands* more for a used car than the dealer paid for the car as trade-in, and even with the used car dealer falsely claiming that he likes the customer and wants to see

[4] The government included references to more traditionally proscribed activity such as extortion, forgery or exercising undue influence over an incapacitated customer as tactics employed. But that conduct, none of which pertained to Caviar Bar is, notably, not *fraud* conduct, but more akin to theft. Getting a customer drunk and then stealing from him may involve a scheme—and that analogy was used by the government in closing argument, along, prejudicially, with a comparison to date rape, DE:1155:76 ("Did she consent or is that rape?")—but it is not a fraud scheme; it is no different than distracting a store clerk to effect a shoplifting offense. Not every act of theft can be converted into a wire fraud offense , even if the theft involves placing a phone call or sending an email. The criminal conduct in that instance rests not on inducing reliance on a false statement, as required under federal fraud statutes, but on a separate criminal offense committed against an involuntary actor.

him get a good deal—so also false statements that lure a customer into a transaction are not sufficient, in and of themselves, to support the charge of wire fraud if the customer obtains the benefit of his bargain—the bargain in this case including more than just a sale of alcohol, but a private club atmosphere where the customer chose to enjoy time with a exciting companion; that it might—or might not—have been a bad bargain does not make it fraud, particularly absent false promises by the women. The "fraud" at the core of the government's case is nothing more than seeking advantage from the customer's hope that being with the exciting or sexy companion he or she has found will be worth a very expensive night on the town. This mix or dividing line in a business—specifically, businesses such as drinking establishments that are meant to offer social relations (a bar being, for many, an alternative to joining an athletic team or a common-interest club, or opting for a psychiatrist's couch)—is simply beyond the scope of federal law to prosecute. There is a reason why for centuries men who meet working 'girls' (or women who meet gigolos), only to find that they just were being played for the money or entertainment that they could provide, have simply chalked it up to experience. The federal fraud statutes are not meant to undo human nature, remake the moral fiber of socially- or sexually-tinged

interactions, or to protect people from their own bad (and morally questionable) decisions.[5] Unfair trade practice laws may do so, but not the fraud statutes.

In an analogous context, this Court recently explained that business regulations for public employees cannot be converted into standards for federal public integrity prosecutions under 18 U.S.C. § 666 merely on the basis that non-disclosure of personal interest in a transaction could have affected a decision-maker. In *United States v. Jimenez*, 705 F.3d 1305 (11th Cir. 2013), the Court vacated the defendant's conviction that was premised on his arranging for profitable transactions with the federally funded state agency for which he worked, holding that the government's effort to rely on a local statute to determine the scope of obligation for purposes of federal liability was insufficient to sustain the charge. *Id.* at 1311 ("Admittedly, Jimenez did not disclose his wife's financial stake in the transaction, ***but we are reluctant to metamorphose every municipal misstep into a federal crime***.") (emphasis added). This Court's recognition that the government cannot merely take

[5] An example of the costly nature of partaking in some exciting activities is that of the first-time gambler asking the casino employee if the house gives gambling lessons; the correct answer: 'Yes, but they're *very* expensive.' Some activities carry with them a very high risk of loss, but that does not make them impossible; and sometimes the pretty woman who finds a plain man attractive is actually cadging him, but that does not make his endeavor more impossible than the lottery or make the relation between the two fraudulent for federal law purposes. Varying state law regulations of business activities in this regard—such as the B-girl statute—simply cannot properly be federalized, and the government has failed to establish a valid precedent for this prosecution.

a local law penalizing businesses operating in a specific manner and use it to convert a local violation into a federal offense. That is exactly what the government's indictment and much of its trial presentation sought to do.

In this case particularly, reliance on local law standards premised on the B-girl statute (a non-fraud-based statute that is premised on inhibiting begging or solicitation of beverage purchases for the employee, and not for the patron), Fla. Stat. § 562.131, *see* DE953:3, is rendered more unreliable by countervailing Florida law of which the jury was not aware, including Fla. Stat. § 786.36, barring a finding of civil injury where drunkenness was the principal cause of the occurrence of the injury. For the defendant to contest in pre-litigation form a customer's attempt to avoid paying the bill in this circumstance is thus ***encouraged*** by Florida law, undermining the government's selective reliance on bar statutes that have no basis in fraud concepts. (The B-girl statute is simply not a disclosure-of-conflict-of-interest statute; it is a protective statute addressing alcohol's power to affect good judgment.) Particularly in relation to an allegation of fraud, reliance on a business standard having no connection to fraud or the fraudulent failure to disclose information renders the indictment and prosecution of Pavlenko defective.

In *Bond v. United States*, 134 S.Ct. 2077, 2983 (2014), the Supreme Court explained: "Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on

that responsibility, unless Congress has clearly indicated that the law should have such reach." *See id.* at 2088 (Federal criminal statutes "must be read consistent with principles of federalism inherent in our constitutional structure."; "The problem with [the government's] interpretation is that it would 'dramatically intrude[ ] upon traditional state criminal jurisdiction,' and we avoid reading statutes to have such reach in the absence of a clear indication that they do.") (quoting United States v. Bass, 404 U.S. 336, 350, 92 S.Ct. 515 (1971)). Thus, the Supreme Court's "precedents make clear that it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute." *Id.* at 2090. The *Bond* case shows limits of converting one prohibition into a federalization of matters of purely local interest, such as sex hustling.

Apart from the reference to funds from Europe—apparently to link to some form of bar solicitation activity in foreign countries—the money laundering conspiracy allegation included as a deficient premise that monies were transferred "to conceal payment to B-girls, who were employed illegally by co-conspirators." DE953:21. The reliance on this theory (although the jury acquitted on the charge of concealment) adds to the problematic nature of the money transmission component of the charge. For a source of funds, the jury was free to pick and choose among charged criminal conduct (18 U.S.C. § 1343) and uncharged conduct (18 U.S.C. § 1546). Regarding the uncharged § 1546 conduct, however, there was ***no other***

reference or explanation in the indictment or the jury instructions to such conduct, either by statute or otherwise. The jury could only speculate as to the elements of the § 1546 violation alleged. The untethered allegation regarding visa fraud proceeds under § 1546 rendered Count 29 of the indictment inadequate for purposes of imposing a money laundering conviction.

Similarly, because these allegations formed the core of the government's case at trial, and the conduct is not encompassed within the scope of the relevant criminal statutes, the evidence at trial was insufficient as a matter of law.

III. THE DISTRICT COURT ERRED BY DENYING MOTIONS FOR SEVERANCE.

Caviar Bar lacked the core badges of fraud that the government alleged as to the other bars. *See*, *ante*, Argument I-C. Its sin was violation of the B-girl statute. Pavlenko set up a luxury nightclub, briefly let Simchuk's employees operate it, quickly became disillusioned, and upon selling his interest was cheated by Simchuk who packed up and opened another bar elsewhere. While the defendants had connections to the South Florida Russian community and operated bars, that was not a proper basis for joining them in one charge of conspiracy or in one indictment. The misjoinder under Fed. R. Crim. P. 8 was followed by inordinate prejudice at trial due to the use of speculative evidence of violence to tar the defendants as if they had connections to, or were, some type of Russian organized crime figures. Left with

evidence that showed separate bars, with different ownership and operational structures, the government used ethnic association in an inherently prejudicial manner to prosecute Pavlenko together with the other defendants.

The district court committed reversible error in denying the defendant's pretrial severance motion and renewals of that motion at trial 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, 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 the defendant 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 could not be blunted by a curative instruction. Compounding the already incurable prejudice were repeated references suggesting the ethnicity of the defendant and his co-appellants Feldman and Takhalov and others involved in the trial was probative of their alleged membership in the charged conspiracies.

Beginning with the vastly more extensive set of bar operations and the evidentiary effect of transference—where the jury had a law enforcement insider view

(from Luis King) of non-Pavlenko operations and was induced to believe that Pavlenko would have responded the same way to interactions with King or shared knowledge with those who were actually on bar premises—and continuing to the even more overwhelming prejudice from introduction of evidence of violence, witness intimidation, obstruction of justice, perjury, and Homeland Security fraud, none of which involved Pavlenko, but from which he stood to be most highly prejudiced due to his Russian ethnicity, Pavlenko was subjected to an evidentiary onslaught that only the non-Russian co-defendant Zargari was able to overcome. Indeed, Zagari used the ethnic divide to his advantage. *See* Initial Briefs of Takhalov (pp. 51-60) and Feldman (pp. 22-40), which Pavlenko adopts.

Accordingly, a severance was required to protect Pavlenko's right to a fair trial. *See United States v. McClain*, 823 F.2d 1457 (11th Cir. 1987); *United States v. Cardascia*, 951 F.2d 474 (2nd Cir. 1991); *United States v. Engleman*, 648 F.2d 473 (8th Cir. 1981).

IV. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTIONS.

A. Wire fraud conspiracy and substantive counts

As to the fraud claims, the evidence was insufficient in two significant ways. First, as explained above the charged conspiratorial conduct of which Pavlenko was shown to be aware was insufficient to constitute a fraud scheme. The very brief

involvement of Pavlenko and the absence of any confirmation of improprieties known to him in that brief period at Caviar Bar renders the government's case insufficient. *See United States v. Chandler*, 586 F.2d 593, 602 (5th Cir. 1978) (government cannot prove case by speculative stacking of inferences). Ultimately, the charged conduct addressed by the testimony at trial did not satisfy the fraud scheme standard and compels reversal of the convictions.

As to Amex, the statement was not intended to defraud, but to influence Amex's decision to conclude that Bolaris was at the bar on the dates when purchases were voluntarily made; disguising the identity of the girl with him, even if that were the intention (and it was not according to the great weight of the evidence), was immaterial and Pavlenko had no duty to explain to Amex his business model or to identity his promoter "models." Despite the government's continuing reliance on Pavlenko's supposed misstatement about the Bolaris photograph with Marina Turcina, Gov't Ex. 223, the communications with the credit card companies lacked a fraud object covered by the statute, was a litigational argument, not a representation made for payment, and—as the district court concluded—were not unambiguously false. Nor does a coherent fraud theory apply as to Bolaris or Anderson transactions.

Second, there was no showing of a single conspiracy under Counts 1 or 29 and the failure to prove the charged conspiracy requires acquittal. The government's proof of multiple conspiracies was fatal to the prosecution. There was such a material

variance between the crime charged and the evidence offered at trial as to compel acquittal, because the evidence showed that if any of the business agreements constituted conspiracies, there were multiple conspiracies, rather than a single conspiracy. The evidence was directed to showing the kind of "rimless wheel" or "hub-and-spoke" conspiracy described in *Kotteakos v. United States*, 328 U.S. 750, 755, 66 S.Ct. 1239, 1243 (1946) and *United States v. Chandler*, 388 F.3d 796, 807 (11th Cir. 2004), where the convictions were reversed because that type of conspiracy constituted a material variance from the indictment. "A material variance between an indictment and the government's proof at trial occurs if the government proves multiple conspiracies under an indictment alleging only a single conspiracy." *United States v. Castro*, 89 F.3d F.3d 1443, 1450 (11th Cir. 1996). "We will uphold the conviction unless the variance (1) was material and (2) substantially prejudiced the defendant." *Id.* The material variance substantially prejudiced the defendants. *See United States v. Richardson*, 532 F.3d 1279, 1284 (11th Cir. 2008). The existence of separate transactions does not have to imply separate conspiracies if the co-conspirators acted "in concert to further a common goal." *Chandler*, 388 F.3d at 811 (emphasis omitted). If a defendant's actions facilitated the endeavors of other coconspirators, or facilitated the venture as a whole, then a single conspiracy is shown. *Chandler*, 388 F.3d at 811.

The government's conspiracy theory as to Count 1 was actually a "rimless wheel" conspiracy similar to those described in *Chandler* and *Kotteakos*. A "rimless wheel" conspiracy is a variation of the "hub-and-spoke" model, in which the individual at the "hub" of the conspiracy (supposedly Simchuk in regard to Count 1) interacts separately with those along the various "spokes" of the wheel. *See Chandler*, 388 F.3d at 807. Such a structure would constitute a single conspiracy when the various spokes are aware of each other and of their common aim. *See id.* at 808. However, "where the 'spokes' of a conspiracy have no knowledge of or connection with" the other "spokes" and "deal[ ] independently with the hub conspirator, there is not a single conspiracy, but rather as many conspiracies as there are spokes." *Id.* at 807. This type of multiple conspiracy is akin to "a 'rimless wheel' because there is no rim to connect the spokes in a single scheme." *Id.* In Chandler, this Court found that the evidence reflected the latter kind of arrangement because the central conspirator was the only individual who moved from spoke to spoke or who even knew about the other spokes or the overall scheme. *See id.* at 808.

B. Promotional Money Laundering Theory

There was no evidence that in 2009, when Pavlenko allegedly provided funds to Simchuk, Pavlenko knew or could have known of any of the misconduct that came to light months later in various bars. The necessary showings of international transfer

and promotion were lacking. Also, because there was no showing of Pavlenko's involvement in a fraud scheme at Caviar Bar, the promotional theory falls.

There also was no showing of a promotional money laundering violation in that the interstate transfer of money was not shown by use of credit cards; if credit card transactions could lead to money laundering prosecutions in this fashion, it would overextend the money laundering statute.

C. Conspiring to Defraud the United States

If the fraud and money laundering related counts are reversed, that would leave only Takhalov's conviction under Count 38.[6] The alleged "purpose" of that conspiracy under 18 U.S.C. § 371, was to "recruit B-girls to travel to the United States to work in the Takhalov Clubs by instructing the B-girls to falsely deny that the purpose of the entry into the United States was to seek or obtain employment or to engage in criminal or immoral activities. . . ." DE953:31. The B-girls thus gained entry into the United States under false pretenses. Because neither the indictment nor the proof established that the United States was defrauded of property, Takhalov submits that theory of prosecution is flawed, notwithstanding precedent to the contrary.

[6] Takhalov was sentenced to the statutory maximum 60 months imprisonment on Count 38, concurrent to the other counts, for which he was sentenced to 144 months imprisonment.

18 U.S.C. § 371 makes it a crime to conspire "to commit any offense against the United States, or to defraud the United States, or any agency thereof." The Supreme Court has stated that "it is not essential that such a conspiracy shall contemplate a financial loss or that one shall result . . . 'conspir[ing] to defraud the United States' ... is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government." *Haas v. Henkel*, 216 U.S. 462, 479 (1910) (arguably dicta because there was also evidence that the defendant's scheme resulted in a "real financial loss" to the government). The Court made a similar pronouncement in *Hammerschmidt v. United States,* 265 U.S. 182, 188 (1924) (also arguably dicta because the Court reversed the defendants' conspiracy convictions under § 371 and reiterated the *Haas* language as an aside).

Lower courts have seized upon the Court's language (dicta) to expand the scope of liability under § 371, culminating in the coining of the term *"Klein* conspiracy," based on *United States v. Klein*, 247 F.2d 908, 916 (2d Cir. 1957) (§ 371 covers "not only . . . the cheating of the government out of property or money, but 'also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest.'"). The "*Klein* conspiracy" doctrine, or some version thereof, has been adopted by every circuit.

The continuing viability of the *Klein* conspiracy doctrine is uncertain in light of *Skilling v. United States*, 130 S. Ct. 2896 (2010). As the Second Circuit recently acknowledged:

> At common law, the words "to defraud" meant to deprive another of property rights by dishonest means. . . Nonetheless, the word "defraud" in § 371 has been interpreted much more broadly.
>
> * * *
>
> The Government thus appears implicitly to concede that the *Klein* conspiracy is a common law crime, created by the courts rather than by Congress. That fact alone warrants considerable judicial skepticism.
>
> * * *
>
> Although the defendants argue forcefully on appeal that we should follow the example of *Skilling v. United States,* 130 S.Ct. 2896, 2928, and "pare" the body of § 371 precedent "down to its core," id., such arguments are properly directed to a higher authority. As an intermediate appellate court, we are bound to follow the dictates of Supreme Court precedents, no matter how persuasive we find the arguments for breaking loose from the moorings of established judicial norms by "paring" a statute.

United States v. Coplan, 703 F.3d 46, 61-62 (2d Cir. 2012), *cert. denied*, 134 S.Ct. 71 (2013).

If this court is compelled to sustain Count 38 in deference to precedent, *e.g., United States v. Elkins*, 885 F.2d 775, 781-82 (11th Cir. 1989), then Takhalov seeks to preserve the legal challenge for en banc or Supreme Court review.

V. THE SENTENCING COURT ERRED IN APPLYING THE GUIDELINES AND CALCULATING RESTITUTION

A. Loss calculation was legally and factually unfounded.

The district court erred at sentencing by 12-level loss enhancement under U.S.S.G. § 2B1.1, for more than $200,000 in total revenue received by the defendant's business, where only 3 out of 168 identified customers testified to any dissatisfaction with their patronage of the nightclub (with a total of only $6,491.60 in restitution ordered), the jury rejected entirely the claims of one of the three bar testifying patrons and largely discounted claims made by the other two, the government failed to offer any evidence to support the theory that all business done by the nightclub was fraudulent or that any charge disputes were resolved inequitably, and the defendant was given no credit for the value of the goods provided to customers, contrary to the intent of the guidelines.

In sentencing the defendants, the district court applied an intended loss theory that all business done by the defendants was fraudulent, apparently on the theory that if the B-girls failed to disclose their commissions, any sales effect were fraudulently induced, even if the customers received full or greater value for the items that they purchased and even if the customers were completely happy with their experiences and purchases. *See*, *e.g.*, DE:1161:14 (Takhalov sentencing) (district court states: "a

satisfied customer does not negate a fraud"; ruling that gross value of sale determines loss even if customer receives pecuniary value for transaction).

The district court thus computed loss as the gross receipts fraudulently obtained. But that is the wrong formula. To compute loss, the court should have subtracted from gross receipts the value conferred by the defendant upon the victim. Here is a simple example: If a defendant fraudulently induces a victim into trading a one-dollar-bill in exchange for nine dimes, the loss would be ten cents, not one dollar. In computing loss, it does not matter that the "victim" would have declined the transaction had he not been fraudulently induced. *See United States v. Martello*, 76 F.3d 1304, 1308, 1311 (3rd Cir. 1996) (rejecting government's argument that loss occurred because "no client would have paid any money" to the "attorney" if they had known he did not have a license).

"Loss" under the sentencing guideline is a specific offense characteristic intended to measure the actual, attempted or intended harm of the offense. *United States v. Orton*, 73 F.3d 331, 333 (11th Cir. 1996); *United States v. Bracciale*, 374 F.3d 998 (11th Cir. 2004). The measure of loss or harm generally focuses on the victim's direct loss. *United States v. Wilson*, 993 F.2d 214, 217 (11th Cir. 1993). The loss need not be determined with precision. The Court need only make a reasonable estimate of the loss, given the available information. *United States v. Renick*, 273 F.3d 1009, 1025 (11th Cir. 2001). At the same time the district court cannot merely

"speculate" as to the proper amount of loss. *United States v. Sepulveda*, 115 F.3d 882, 890 (11th Cir. 1997). Upon challenge, the government bears the burden of supporting its loss calculation with "reliable and specific evidence. *Renick*, 273 F.3d at 1025. (quoting *Sepulveda*, 115 F.3d at 890); *United States v. Cabrera*, 172 F.3d 1287, 1292 (11th Cir. 1999); *see also United States v. Guerra*, 293 F.3d 1279, 1293 (11th Cir. 2002) ("district court erred in not making findings during sentencing as to: (1) how close the defendants came to completing additional sales; [and] (2) whether there was a reasonable likelihood of generating revenue corresponding to the amounts assigned").

In this case, the near totality of sales by Caviar Bar were without complaint of any kind by the customers. The prices were not shown to be inconsistent with other retail establishments selling the same merchandise on South Beach. The jury rejected much of the claims of fraud by the three customers whose testimony was introduced by the government. To assign as an intended loss figure all sales by Caviar Bar in this context both overextends an unsupportable thesis, that the B-girls were required to identify themselves in financially interested in the alcohol sales, and speculates that every customer who ever went to Caviar Bar was cheated within the meaning of federal fraud statutes. Because the loss theory employed by the district court was legally overexpansive (and factually overinclusive, where jury acquitted on much of the few claims of fraud the government asserted as to Pavlenko and, notably, did not

convict Feldman of any substantive fraud counts), the Court should remand for resentencing under a more reliable actual-loss theory. Loss should be the difference between the amount paid by the patron and the value of the goods/services received in return. *See Martello*, 76 F.3d at 1308 (rejecting government's claim that clients of an attorney who concealed that he had been disbarred suffered any tangible "loss" where the legal services provided were not deficient"); *cf*. *Guerra*, 293 F.3d at 1291-92 (where counterfeit goods are sold, the valuation of the loss should be the difference between the value of the item sold and the value of the item promised).

Nor should the acquittal of this and other defendants on various counts be without effect in the determination of a loss figure, particularly where the government's loss theory would so directly conflict with the verdicts, including multiple acquittals of Pavlenko regarding transactions at Caviar Bar. Whatever theories may have once propped up prior rulings permitting guidelines ranges to be significantly enhanced by jury-rejected, judge-determined facts are no longer viable after two recent rulings by the Supreme Court. In *Peugh v. United States*, 133 S. Ct. 2072 (2013), the Court confirmed that guideline ranges, even though now only advisory, still have consequential "force as the framework for sentencing" and thus are subject to constitutional limitations on how they are calculated and applied. *Id.* at 2083-84. And in *Alleyne v. United States*, 133 S. Ct. 2151 (2013), the Court overturned a prior holding that had failed to recognize that the constitutional

protections of the Fifth and Sixth Amendments apply fully not only to facts raising maximum sentences, but whenever the law creates a "linkage of facts with particular sentencing ranges … regardless of what sentence the defendant might have received if a different range had been applicable." 133 S. Ct. at 2159-62. These recent rulings—especially when read with the Supreme Court's assertion that the "core concerns" of Sixth Amendment jurisprudence are "encroachment [at sentencing] by the judge upon facts historically found by the jury [and] any threat to the jury's domain as a bulwark at trial between the State and the accused," *Ice v. Oregon*, 555 U.S. 160, 169 (2009)—confirm that the sentencing courts should not disregard the constitutional problems inherent in aggravated sentences based on guideline ranges significantly enhanced by jury-rejected facts.

B. Erroneous application of money laundering guideline and enhancements—rather than fraud guideline as stated in presentence report,

The district court began the sentencing hearing by addressing objections filed by either party to the presentence report. The report had determined that the governing sentencing guideline for determining the base offense level and any enhancements was U.S.S.G. § 2B1.1, the fraud guideline. The government filed no objections. And the final addendum to the report, noting that the government had not objected, adhered to the fraud guideline, rejecting application of the money laundering guideline. At sentencing, after resolving all timely-filed objections and

reaching a tentative guideline range under the presentence report's use of the fraud guideline, U.S.S.G. § 2B1.1, the district court entertained the government's assertion that the court should not apply the fraud guideline and should impose two additional enhancements under the money laundering guideline. DE:1219:36. Overruling the defense objection that the government's untimely objection "is basically changing the PSI completely" and "changes the whole structure of the guidelines" in the case, after the Court had resolved all of the defendant's timely filed objections, DE:1219:37-38, the district court proceeded to consider the government's *ore tenus* request for additional enhancements applicable only to the money laundering guidelines, while leaving in place the enhancements that had been applied under the fraud guidelines. *See* DE:1219:38. In so doing the district court violated the defendant's fundamental rights under Fed. R. Crim. P. 32 that requires that parties state objections to allow the presentation of evidence and other litigation-strategy decisions to be effected without prejudice and to allow the defendant to adequately prepare for sentencing. *See*, *e.g.*, *United States v. Aguilar-Ibarra*, 740 F.3d 587, 591 (11th Cir. 2014) (holding that even where parties agreed to waive Rule 32, district court properly applied requirement that timely objections be filed; "And the manifest purpose of Rule 32 as a whole, of which the procedures and deadlines mandated by subsection (f) are an integral part, is not simply to resolve disputes between the parties; it is to ensure that the district court can meaningfully exercise its sentencing authority based on a

complete and accurate account of all relevant information. *See* Fed.R.Crim.P. 32(c)–(f) (mandating the preparation and submission of a PSR in advance of sentencing so that a district court can "meaningfully exercise its sentencing authority under 18 U.S.C. § 3553'); Fed.R.Crim.P. 32 advisory committee notes (1975) (explaining that because "presentence reports are important aids in sentencing,' it is "essential that the presentence report be completely accurate in every material respect'). The deadlines imposed by subsection (f) are meant to facilitate this process by ensuring that the probation officer has an adequate opportunity to investigate and resolve any potential inaccuracies in the PSR, regardless of whether those inaccuracies are perceived by one or both parties."); *see also* Fed. R. Crim. P. 32(i)(1)(A) (requiring that a sentencing court "verify that the defendant and the defendant's attorney have read and discussed the Presentence Investigation Report ***and any addendum to the report***') (emphasis added). The clear point of the procedural guarantees of Rule 32 is to make sure the parties are working from the same page at sentencing, so that the defendant is not forced to come up with new sets of arguments and positions at the last minute. Thus, just as a departure from the sentencing guidelines cannot be raised for the first time at sentencing without affording the defense an opportunity for a continuance, the switching of the guidelines after all defense objections have been resolved and the seeking of additional enhancements should not be permitted. *See*, *e.g.*, *Irizarry v. United States*,

553 U.S. 708, 715-716, 128 S. Ct. 2198 (2008) (creating an exception to the notice rule for variances only).

The procedural error was critical in this case, because it led to the erroneous imposition of a role-in-the-offense enhancement, in violation of *United States v. Salgado*, 745 F.3d 1135, 1138 (11th Cir. 2014) (holding that role in the money laundering, not the underlying offense, controls application of U.S.S.G. § 3B1.1 when a defendant is sentenced under § 2S1.1(a)(1); "When the district court calculated Salgado's offense level under § 2S1.1(a)(1), it could base a role enhancement on his conduct in the money laundering conspiracy but not on his conduct in the underlying drug conspiracy."), and to a hurried consideration, without briefing, of the fundamental question of whether a non-proceeds money laundering offense is covered by the ***proceeds***-based money-laundering guideline provision, § 2S1.1, advocated by the government and adopted by the district court over defense objection.

As a result, in addition to overruling the procedural objections to the government's last-minute guideline switch, the district court also overruled the defendant's substantive objection that because the defendant was not convicted of a "proceeds" money laundering offense, the U.S.S.G. § 2S1.1(a)(1) guideline—applicable to "proceeds" money laundering only—was inapplicable. The defendant was convicted of sending (untainted) funds to a foreign country to promote

a fraud offense in the United States. DE:956. Section 2S1.1(a)(1) applies only to offenses involving the laundering of fraud proceeds, setting the base offense level as "[t]he offense level for the underlying offense from which the ***laundered*** funds ***were derived***, if ... the defendant committed the underlying offense." U.S.S.G. § 2S1.1(a)(1). In this case, defendant Pavlenko was not convicted of an offense involving funds derived from any underlying offense. Instead, he was convicted for transporting funds in violation of 18 U.S.C. § 1956(a)(2)(A), which does not involve criminal proceeds. Thus, the defendant, in response to the government's *ore tenus* objection, argued the government's untimely objection was also unfounded. DE:1219:40-41 (defense counsel: "Usually, when you have a money laundering conviction and you say, well, we are going to base everything on the money laundering conviction it is because the money laundering conviction is intertwined with the fraud. You have the fraud ***proceeds*** that produce the money laundering. ... You can treat it as one unitary thing, but this is not that thing. You can't look at this and say the money laundering and the fraud proceeds involve the same thing so you merge them. ... This is not that kind of case and that is why [the United States Probation Officer] didn't put [the money laundering guideline] in there and I am delighted he didn't put it in there because it shouldn't have been in there.").

The plain language of the guideline, conditioning application of § 2S1.1 on a determination that the defendant's money laundering offense be scored under §

2S1.1(a)(1) only if the laundered funds "derived from" specified unlawful activity, establishes that application of the money laundering guideline was erroneous. The presentence report, that to date has not been changed, was accurate. And the defendant should have been sentenced under the fraud guideline. Hence, the money laundering enhancement under § 2S1.1(b) (a two-level enhancement for conviction under 18 U.S.C. § 1956) should be vacated. Further, the role-in-the-offense enhancement should be vacated in any event, as it was both factually unwarranted and violated the limitations of the *Salgado* decision and guideline commentary requiring that the role issue be judged on the basis of the money laundering conduct if the money laundering guideline is applied.

C. Erroneous role-in-the-offense enhancement under U.S.S.G. § 3B1.1.

For two reasons, the district court erroneously enhanced the defendant's sentence for role-in-the-offense. First, as noted above, the district court, in ultimately applying the money laundering guidelines, violated this Court's holding in *Salgado*, 745 F.3d at 1138, that a defendant sentenced under the money laundering guidelines is subject to a role enhancement only for role in relation to the money laundering offense, not an underlying offense producing proceeds.

Second, the defendant's role was not managerial in relation to the Simchuk-controlled B-girls and others involved at Caviar Bar. Although the government made reference to a statement Pavelenko allegedly made to B-girls, with Simchuk at his

side, that the bar should not take American Express cards because of the trouble it causes, the true basis for the enhancement argued for by the government was the defendant's financial stake in the bar. The defendant simply did not control, recruit, pay, or otherwise manage the bar personnel. He was an investor who handled financial services. Particularly with regard to the fraud conduct, there was no showing that the defendant managed any behavior. In fact, there was no showing he was even aware of it. A defendant's management of assets, standing alone, also is insufficient to support an enhancement under U.S.S.G. § 3B1.1. *United States v. Glover*, 179 F.3d 1300, 1302-03 (11th Cir. 1999); *United States v. Martinez*, 584 F.3d 1022, 1028 (11th Cir. 2009) (evidence that "Martinez 'orchestrated' drug shipments; Martinez was directly involved in the wire transfer of $343,729 of drug proceeds (there was a total of approximately $650,000 of drug proceeds involved in this case); and Martinez, along with his co-conspirators, 'utilized other individuals' to mail and receive drug shipments" was insufficient to warrant role enhancement).

D. Imposition of obstruction of justice enhancement under U.S.S.G. § 3C1.1, where the court failed to identify prejurious testimony.

The district court rejected all but one of the government's arguments as to possible false testimony by the defendant at trial. The court found that the defendant's testimony about an email that the court itself found to be ambiguous—DE:1219:25 ("I agree with you his statement to American Express could

be interpreted as being somewhat ambiguous and not a perjured statement to American Express.")—was a lie. DE:1219:30 ("He could have said the truth, okay, which was, yeah, I knew it was Marina Turcina and I made the email intentionally vague because I didn't want to lie to them, but I didn't want them to know she was an employee. Okay. He chose not to do that. He chose to lie about it."). The district court's finding does not express what falsity appears in the defendant's testimony regarding an ambiguous email referring to a photograph of a woman with John Bolaris at the Delano Hotel in Miami Beach.

Much less was there any testimony offered by the government refuting anything the defendant said about his recollection of the email or the photograph. Nor was the defendant's wire fraud conviction for sending the email in execution of the fraud in any sense a finding by the jury that the email was false: a wire transmission in execution of the scheme need not be false to come within the statute. The defendant fully admitted sending the email. The district court failed to specify any material falsity in the defendant's testimony, and a defendant's mere effort to present his testimony with a particular focus or lack of focus is not adequate to establish obstruction, where unaccompanied by any specific findings of willful, material and false statements. *See United States v. Alpert*, 28 F.3d 1104, 1107-08 (11th Cir. 1994) (*en banc*) (specific findings of fact required under § 3C1.1 to permit meaningful appellate review); *United States v. Mock*, 523 F.3d 1299, 1304 (11th Cir.

2008) (vacating sentence where premised on guideline enhancement not supported by explicit judicial findings); *United States v. Perez*, 350 Fed.Appx. 425, 430 (11 th Cir. 2009) (sentencing enhancement for perjury plainly erroneous absent requisite findings; district court must make an independent factual finding of obstruction of justice that encompasses all factual predicates of perjury) (citing United States v. Vallejo, 297 F.3d 1154, 1168 (11th Cir. 2002)). The obstruction enhancement regarding an ambiguous email relating to conduct that did not take place in the bar at all was unwarranted.

E. Unsupported restitution order.

The district court erred in imposing restitution where ***no one*** filed a restitution claim or responded to restitution inquiries, there was no determination of whether any loss was sustained or in what amount, and no credit was given for goods provided. At the time of the restitution hearing—held long after trial, and long after sentencing so as to enable the government and the probation office to communicate with any and all potential victims, including government witness, Michael Anderson, the sole customer for whom the government sought restitution—no one, not a single customer, claimed even one penny of loss as a result of their transactions with Caviar Bar. There was simply no evidence at the time of sentencing that anyone claimed any pecuniary harm. In the absence of any showing of loss or a claim of loss, the award of restitution was speculative and erroneous.

CONCLUSION

Based upon the foregoing argument and citations of authority, the Court should reverse the defendant's convictions and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7). According to the WordPerfect program on which it is written, the numbered pages of this brief contain 13,910 words.

s/Richard Docobo
Richard Docobo, P.A.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was served by mail this 26th day of September, 2014, upon Kathleen M. Salyer, Assistant United States Attorney, Chief of Appellate Division, 99 N.E. 4th Street, Miami, Florida 33132-2111.

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