NO. 13-12385-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

ALBERT TAKHALOV,

Defendant/Appellant.

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

REPLY BRIEF OF APPELLANT ALBERT TAKHALOV

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REPLY

Takhalov's Initial Brief focused on the trial court's error in admitting highly prejudicial "other crimes" evidence, Rule 404(b), Fed.R.Evid., that was irrelevant, not timely disclosed, or both. Tak.Br.36-51. The inflammatory evidence portraying him as a leg-breaking, tax-cheating, traffic-ticket-fixing, man of bad character undermined Takhalov's presumption of innocence in a case built on a novel theory of fraud that alleged no violent crimes.

Making matter worse, Takhalov was tried together with a co-defendant, Zargari, whose defense at trial was that Takhalov was an "unscrupulous business partner" whose business model was "not legal," actually a "rip-off," according to Zargari's testimony. Key to Zargari's defense was an overt strategy to distinguish himself from Takhalov and the other co-defendants based on ethnicity and national origin – particularly because allusions to the "Russian Mafia" had permeated the trial. With Zargari in the courtroom, the government had a "second prosecutor" seated at the defense table. The denial of a severance was devastatingly prejudicial and compromised the fairness of the trial. Tak.Br.51-61.

In response, the Brief of the United States ("Gov.Br.") largely sidesteps the issues. It altogether ignores the leading Supreme Court and Eleventh Circuit cases regarding Rule 404(b). *See Huddleston v. United States*, 485 U.S. 681, 689 (1988);

United States v. Beechum, 582 F.2d 912 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979); *United States v. Veltmann,* 6 F.3d 1483, 1499 (11th Cir. 1993); *United States v. Utter*, 97 F.3d 509, 514-15 (11th Cir. 1996). Whereas in the district court the government implored the admission of the "other crimes" evidence for its significance in establishing the defendant's guilt, in this court the government makes a 180-degree turn and downplays the significance of the inflammatory testimony. Because the erroneous admission of evidence and the denial of severance resulted in specific and compelling prejudice rendering Takhalov's trial fundamentally unfair, this court should reverse all counts of conviction.

I.

THE DISTRICT COURT SHOULD HAVE REJECTED THE PROSECUTION THEORY REGARDING THE ALLEGED SCHEME TO DEFRAUD OR, AT A MINIMUM, INSTRUCTED THE JURY ON THE THEORY OF DEFENSE

Co-appellant Pavlenko's Reply Brief addresses the government's arguments regarding the flawed theory of prosecution and the inadequacy of the jury instructions affecting all of the counts in the indictment, except Count 38. Takhalov adopts those arguments.

As to Count 38, which charges only Takhalov with a conspiracy under 18 U.S.C. § 371 to defraud the United States (a so-called "*Klein* conspiracy"),

Pavlenko's Initial Brief stated: "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." Pav.Br.43 (emphasis added). Takhalov's Initial Brief expressly adopted the arguments in Pavlenko's Initial Brief that were applicable to Takhalov. Tak.Br.i.

The government complains that this challenge to Count 38 was included in Pavlenko's Initial Brief, not Takhalov's Initial Brief. Admittedly, Takhalov's challenge to the theory of conviction on Count 38 could have been placed in Takhalov's Initial Brief. The argument appears in Pavlenko's Initial Brief instead because counsel for appellants believed that all of the challenges to the theory of prosecution and sufficiency of the evidence that flowed together should appear together in a single brief (Pavlenko's). This should have come as no surprise to the government, given Appellants' August 27, 2014 *Unopposed Joint Motion to Extend Time to File Initial Briefs and Government Answer Brief*, which notified the government and the court that counsel had "coordinated briefing" and were working "jointly in regard to the appeal in order to avoid duplication of briefed material and to facilitate the appellate review process . . . to make the appeal manageable in length and organization."

In any event, this is much ado about little, given that Pavlenko's Initial Brief cited the adverse precedent, *e.g.*, *United States v. Elkins*, 885 F.2d 775, 781-82 (11th Cir. 1989), leaving nothing for the government to brief in response. In the end, Takhalov seeks to "preserve the legal challenge for en banc or Supreme Court review." Pav.Br.45. The legal issue was squarely presented. There was no mistaking that the argument pertained to Takhalov, as the government acknowledges. Enough said.

II.

THE ADMISSION OF "OTHER CRIMES" EVIDENCE VIOLATED DUE PROCESS AND FEDERAL RULES OF EVIDENCE 402, 403 AND 404(b)

A. The Uncharged Violent Crime

Simchuk: Come on, guys. I mean, ***I give you my leg for this***.

Counsel: Objection. Move to strike, Judge.

The Court: Overruled.

DE 1125:197 (emphasis added).

AUSA: Now, you mentioned that your leg was broken on April 2nd of this year?

Simchuk: Yes, I did.

AUSA: What is the condition of your leg today?

Simchuk: It is usable.

AUSA: Do you need anything to walk currently?

Simchuk: Yes, crutch.

AUSA: Do you have that crutch with you in court today?

Simchuk: Yes, I do.

AUSA: If you'd stand up and show the jury?

Counsel: Objection, Your Honor. Relevance.

The Court: Overruled.

Simchuk: This is my crutch.

AUSA: Okay. You may have a seat.

DE1126:62-63.

Counsel: [W]hy are you testifying as a witness in the case if you don't expect anything?

Simchuk: First of all, I want everybody to share responsibility and I want everybody to take actions for what they did. I am here – like ***these people want me to die in Russia***.

Counsel: What people want you to die in Russia?

Simchuk: ***These people want me to die in Russia***.

Counsel: Who wants you to die in Russia?

Simchuk: ***These people want me to die in Russia*** and like they don't want to take any responsibility. They want to put all blame on me like

> I am the bad guy. Yes, I am the bad guy, but like, you know, I am not the one who did this crime, so I want them also take part of responsibility for their actions.

DE:1126:282 (emphasis added).

With no pretrial notice whatsoever, the court permitted Simchuk, a cooperating government witness with a prior felony conviction, to testify that his leg had been broken by two strangers in Russia six months before trial. Although "Simchuk did not testify that Takhalov broke his leg, or even speculate about Takhalov's role in the assault," Gov.Br.62, the implication was obvious and intended to suggest that Takhalov had directed this act of violence to dissuade Simchuk from cooperating.

Simchuk could hardly have been more dramatic. His theatrics were over-the-top, particularly for a federal fraud trial in which no acts of violence were alleged in the indictment or committed by any of the defendants, at any time.

The purported evidentiary link between the violence and Takhalov was an alleged telephone call, a couple of days before the leg-breaking, in which Takhalov warned Simchuk about coming to Miami, where charges were already pending against all of them. According to Simchuk, Takhalov said something to the effect:

> Are you planning to go over here [Miami]? . . . Don't go there. Don't go to Miami ***or you're gonna have a lot of problems*** . . . Don't even think go back ***or you're gonna have lots of problems.***"

DE1125 at 114-15. Simchuk noted that Takhalov "didn't scream. [Takhalov] was like very polite but it was said." *Id*.

Neither the telephone call nor the leg-breaking was corroborated by any other evidence. In fact, Simchuk "had initially told prosecutors that he broke his leg slipping on ice." Gov.Br.62. And despite the last-minute notice of what the district court described as "such a devastating piece of evidence," DE1124:173, the district court declined to continue the trial to allow Takhalov's attorney to investigate and prepare to meet the accusation.

Rather than acknowledge the evidence for what it clearly is – extrinsic evidence of "Crimes, Wrongs or Other Acts" as defined by Rule 404(b), Fed.R.Evid., the government defends this evidentiary ambush by mislabeling the alleged "threat" as evidence "inextricably intertwined" with the charged offenses. Thus, the government eschews any analysis under Rule 404(b), including the requirement that the defendant be given "reasonable notice . . . before trial." Rule 404(b)(2)(A&B).

But contrary to the government's characterization, Gov.Br.64, an alleged post-indictment threat is not "inextricably intertwined" evidence, because its admission is not necessary to the jury's understanding of the charged offenses. *United States v. Chilcote*, 724 F.2d 1498 (11th Cir. 1984) ("[A]ppellant's involvement in the crime charged would have been completely comprehensible without the testimony regarding

appellant's claimed flight to Colombia. The evidence regarding the flight was entirely unrelated to the transaction at issue here and constitutes extrinsic act evidence subject to Rule 404(b)."); *United States v. Cross*, 638 F.2d 1375, 1381 (5th Cir. 1981) (holding that although other pending charges against the defendant were "part of the factual circumstances of the case, they were not so closely integrated with the crime of making false material declarations before a grand jury that proof of perjury, without reference to them, would be impossible or even difficult").

Rather, as this court has explicitly held, a post-indictment threat is "other acts evidence" falling within the rubric of Fed.R.Evid. 404(b). *United States v. Gonzales*, 703 F.2d 1222, 1223 (11th Cir. 1983); *accord United States v. Baker*, 432 F.3d 1189, 1221 (11th Cir. 2005); *cf. United States v. Corbin*, 734 F.2d 643, 656 (11th Cir. 1984) (admissibility of a post-arrest attempt to bribe a police officer, offered to prove knowledge and intent, analyzed under Rules 403 and 404 of the Federal Rules of Evidence).

The government, in turn, ignores (does not cite) the leading Rule 404(b) cases from the Supreme Court and this Circuit, cited in Takhalov's Initial Brief. Tak.Br.44-47. *See, e.g., Huddleston v. United States*, 485 U.S. 681, 689 (1988);*United States v. Beechum*, 582 F.2d 912 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979); *United States v. Veltmann,* 6 F.3d 1483, 1499 (11th Cir. 1993); *United States v. Utter*,

97 F.3d 509, 514-15 (11th Cir. 1996). Nor does the government explain how the telephone call, much less the leg-breaking, can meet the 3-part test for admissibility, as set forth by this court:

> First, the evidence must be ***relevant*** to an issue other than the defendant's character. Second, as part of the relevance analysis, there must be ***sufficient proof*** so that a jury could find that the defendant committed the extrinsic act. Third, the evidence must possess ***probative value that is not substantially outweighed by its undue prejudice***, and the evidence must meet the other requirements of Federal Rule of Evidence 403.

United States v. Utter, 97 F.3d 509, 513 (11th Cir. 1996) (emphasis added).

1. *Relevant* ?

The government quotes a passage from *Gonzales*, 703 F.2d at 1223: "Courts may consider evidence of threats to witnesses as relevant in showing consciousness of guilt." Gov.Br.63. Takhalov does not quarrel with that proposition. However, in *Gonzales* the threat was direct and unequivocal: "The government informant testified that he had received a death threat, two weeks before trial, from Arguello. The threat consisted of words spoken several times over the phone, 'Roger, you will soon die.'" *Gonzales,* 703 F.2d at 1223. The words unambiguously conveyed a threat by defendant Gonzales against the government witness.

So too did the threats in *Baker* convey that the witnesses would be harmed if they testified for the government and against the defendants:

> Errol Sawyer, an acquaintance of many of the defendants, testified for the government that [co-defendants] Leonard Brown, Baptiste, Shaw, and Williams threatened him while he was in a holding cell waiting to testify. Sawyer said that Brown told him that "black grease-ass kid's mother is sitting over there [in the courtroom] with his kid" and to "be careful about your son "cause we're going to get him on the streets and [f---] him." He said that Shaw asked him why he let the "white people" make him start talking, that Williams made "sly remarks," and that both said, "You ain't going to get forty years off of me."

Baker, 432 F.3d at 1220. Even then, this court only reluctantly affirmed the admission of those explicit threats as against the four defendants who made them, candidly acknowledging that "whether admission of this testimony was proper remains a close call." *Id*.

In Takhalov's case, by contrast, the words allegedly uttered to Simchuk ("Don't go to Miami or you're gonna have a lot of problems") did not convey any threat at all. Nor did the words convey a warning *not to testify*, as the government asserts. Gov.Br.61-62. The words merely warned of "problems" that Simchuk would face were he to "go to Miami," at a time when Simchuk was a fugitive from justice living in Russia, with U.S. prosecutors threatening him with a lengthy prison sentence if convicted on the instant indictment. As another of Simchuk's associate warned Simchuk at the same time as the alleged telephone call:

> Simchuk: I told Andrejs Romanovs, "I'm going back to United States and I going to face charges against me and I am going to jail."
>
> * * *

> . . . Romanovs was like -- told me like, ***"Don't go. Why you want to go there, like it's gonna be like they gonna put you like in jail for long time.*** This is America. Don't believe them [the prosecutors]."

DE1125:109. Romanov's cautionary words to Simchuk ("Don't go . . . they gonna put you like in jail for long time.") were similar to those allegedly uttered by Takhalov in the telephone call ("Don't go to Miami or you're gonna have a lot of problems."). Romanov's words were not deemed to be a threat. Takhalov's words were not appreciably different to support the malicious inference that the government ascribed to them, particularly because there was no evidence that Takhalov had any inkling that Simchuk was thinking about testifying against anyone. The "problems" that Simchuk faced in Miami were those identified by Romanov (the same problems that Takhalov and his co-defendants were then experiencing): an indictment threatening years in a U.S. prison.

At best for the government, the words were ambiguous, diminishing their probative value as evidence of "Takhalov's consciousness of guilt." Gov.Br.63. *Compare United States v. Monahan*, 633 F.2d 984, 985 (1st Cir. 1980) ("Evidence of threats to witnesses can be relevant to show consciousness of guilt. See Fed.R.Evid. 404(b). Although some conduct regarded as obstruction of justice may not be probative because it demonstrates only a preference to avoid legal

involvement, the act here was not so innocuous. The offensiveness of threatening personal harm to a witness shows that Monahan was willing to take extreme measures to exclude pertinent evidence from the trial.").

2. *Sufficient Proof*?

The government does not address the insufficiency of the evidence to establish that Takhalov had anything to do with the alleged assault of Simchuk. The government concedes that there is nothing corroborating Simchuk's testimony regarding the phone call. Gov.Br.65. Even if the words attributed to Takhalov by Simchuk ("Don't go to Miami or you're gonna have a lot of problems") could be given the government's sinister spin (and therefore be relevant as evidence of Takhalov's consciousness of guilt), those words still would not support an inference that Takhalov thereafter directed the leg-breaking described (exclusively) by Simchuk. *See Veltmann*, 6 F.3d 1483, 1499 (11th Cir. 1993) ("Proof that defendants committed other relevant offenses . . . must be sufficient to permit a jury, acting reasonably, to find the preliminary facts by a preponderance of the evidence.").

The government emphasizes – in an attempt to downplay the prejudice – that "Simchuk did not testify that Takhalov broke his leg, or even speculate about Takhalov's role in the assault." Gov.Br.63. But that only highlights the insufficiency of the evidence from which the jury could reasonably infer that Takhalov had any

involvement in the leg-breaking. By admitting this bone-crushing testimony, the district court invited *the jury* (if not Simchuk) to "speculate about Takhalov's role in the assault," Gov.Br.63, precisely the "unsubstantiated innuendo" that the Supreme Court disapproved of in *Huddleston*, 485 U.S. at 689. *See also United States v. Utter*, 97 F.3d 509, 514 (11th Cir. 1996) ("[D]espite its assertions in the pretrial notice, the government failed to produce any evidence at trial which tended to prove that the Kentucky fire was an arson. In her testimony at trial, Jernigan indicated that she could not sufficiently recall Utter's statements concerning the fire. The government presented no other evidence concerning the cause of the fire. The government thus clearly failed the second part of the test for admissibility of Rule 404(b) evidence: No proof was presented that Utter committed the extrinsic act—arson in the Kentucky fire.")

3. *Probative Value that is Not Substantially Outweighed by its Undue Prejudice*?

Given the lack of direct or even circumstantial evidence that Takhalov directed the leg-breaking, it was error to admit what the district court itself characterized as "a devastating piece of evidence." DE1124:173. The chilling testimony served no legitimate purpose other than to instill fear. Under Rules 401, 403 and 404, the testimony's probative value was substantially outweighed by the danger of unfair

prejudice. *See United States v. McManaman*, 606 F.2d 919, 926 (10th Cir. 1979) (taped conversation of the defendant's "inflammatory talk" of plans to murder a government witness "clearly must have predominated in impact over the discussion of [the charged crimes]," such that "the probative value was far outweighed by the danger of unfair prejudice."); *United States v. Weir*, 575 F.2d 668, 671 (8th Cir. 1978) (reversing convictions because of "unfair prejudice resulting from the admission of the 'other crimes' evidence . . . The testimony suggested that appellants be convicted of bank robbery because they were bad men who had threatened to kill or attempted to kill law enforcement agents or informers."). It is worth noting that the government does not even suggest that the erroneous admission of this evidence could be deemed harmless.[1]

Although evidentiary rulings are typically accorded deference, the haste displayed by the district court in admitting this inflammatory testimony suggests that it abused its discretion, not adequately balancing the probative value against the

[1] The jury deliberated for many days, acquitting Takhalov of several counts. The jury requested read-backs of testimony, including Takhalov's and Simchuk's, which the district court denied. This case was a "he said, she said" contest, with all defendants taking the witness stand. The inflammatory testimony of threats and violence raised the temperature in the courtroom, colored the jury's view of Takhalov and most certainly could not be ignored by the jury during deliberations.

substantial prejudice. When the government first sprung the surprise on the defense, the prosecutor proffered that Simchuk would testify that Takhalov was "essentially threatening [Simchuk], warning him not to come here ***to testify***." DE1124:169 (emphasis added). Counsel for the co-defendants immediately objected and moved for a severance, which the district court denied without much ado. DE1124:172. Along the way, the district court declined the request for a more searching inquiry of Simchuk about the veracity of the belated disclosure and allow the defendants to address the issue outside the presence of the jury:

> Counsel: Judge, on behalf of Mr. Zargari, I join my brother counsel on that, and I assume that the Court is going to have to direct some inquiry to Mr. Simchuk tomorrow outside the presence of the jury.
>
> The Court: Direct some inquiry of what?
>
> Counsel: Well, as to if it really happened, the threats were made and by whom, and allow us to make further motions after that.
>
> The Court: Okay. I'm not going to do that.

A more searching inquiry would have revealed that the alleged "threat" by Takhalov did not make any reference to Simchuk testifying, calling further into doubt the evidentiary link between Takhalov and the acts of violence.

At a minimum, the district court should have granted Takhalov's request to recess the trial so he might investigate and prepare to defend against this mid-trial

ambush. Rule 404(b) required as much. *United States v. Carrasco*, 381 F.3d 1237 (11th Cir. 2004) (per curiam), *cert. denied*, 543 U.S. 1177 (2005). So did the Local Rule, S.D. Fla. L. R. 88.10(h), not to mention principles of basic fairness. *See Riggs v. United States*, 280 F.2d 750, 753 (5th Cir. 1960) ("[T]he defendant was deprived of a fair trial by the cloak and dagger manner of getting this surprise testimony [about uncharged criminal conduct] into evidence."); *United States v. Baum*, 482 F.2d 1325, 1331-32 (2d Cir. 1973) ("We hold a new trial is required to afford the defendant Baum a fair opportunity to meet the critical and damaging proof of an offense not presented against him in the indictment.").

Contrary to the government's last-ditch argument, Gov.Br.65, there is nothing "unclear [about] what 'investigation' defendants would have undertaken if advised earlier." To his post-trial motion, DE1069, Takhalov appended a report, DE1069-2, documenting that, after the trial, a defense investigator contacted emergency rooms and hospitals within the vicinity of the supposed leg-breaking and none had treated Simchuk during the relevant time period. The facts revealed in the post-trial investigation would have put the lie to Simchuk, who testified that his wife "called the ambulance" shortly after the two men supposedly broke his leg. DE1125:118.

To the extent that the admission of explicit, graphic threats against testifying witnesses were deemed a "close call" by this court in *Baker*, *see ante* at 9-10, then the

testimony about an ambiguous statement ("Don't go to Miami or you're gonna have a lot of problems") and an alleged assault unconnected to Takhalov was decidedly not admissible. The evidence was not disclosed timely. It was irrelevant and highly inflammatory. Its prejudice far outweighed its probative value and should have been excluded.

B. The Uncharged Tax Crime.

Over Takhalov's objection, the government introduced "other crimes" evidence that Takhalov did not file a 2009 income tax return. DE1130:169-171, 185-186. The government, while admitting that Takhalov did not join the alleged conspiracy until 2010, argues that "Takhalov's concealment of his income from 2009, and his failure to file a tax return for that year when it came due in 2010, at the height of the conspiracy, was relevant to proving his intent to deceive." Gov.Br.70.

Intent to deceive whom? And how?

The indictment alleges a scheme to defraud bar patrons, not the Internal Revenue Service. Whether Takhalov was guilty or not of this uncharged, unrelated tax crime of failing to report his 2009 income had no bearing on whether he had the "intent to deceive" bar patrons starting in 2010.

Moreover, failing to file a tax return is not an act of deception. *Cree v. Hatcher*, 969 F.2d 34, 38 (3d Cir. 1992) ("[W]e do not believe that being convicted of violating

[26 U.S.C.] section 7203 [("Willful failure to file return")] necessarily connotes dishonesty or a false statement . . .". And yet, a "willful" failure to file a tax return has been described by the Eleventh Circuit as a "reprehensible" crime. *United States v. Gellman*, 677 F.2d 65, 66 (11th Cir. 1982).

Takhalov was never charged with, much less convicted of, a willful failure to file his 2009 tax return. Still he was branded a tax cheat at trial because the government convinced the district court to erroneously admit evidence of Takhalov's so-called "reprehensible" conduct. *Gellman*, 677 F.2d at 66. *See also United States v. Cadet*, No. 08-CR-458(NGG), 2009 WL 2959606, at *2 (E.D.N.Y. Sept. 11, 2009) ("This is exactly the sort of evidence that Rule 404(b) prevents from being presented to the finder of fact. The minimal probative value of Defendant's tax history on the issue of intent is substantially outweighed by the risk that the jury will infer from it that Defendant is 'generally a cheater' when it comes to taxes. Thus, the evidence is inadmissible under Rule 403 in any event."), *aff'd*, 664 F.3d 27 (2d Cir. 2011).

To avoid reversal on appeal, the government downplays the significance of this trial error, describing the evidence of Takhalov's failure to file the 2009 tax return as "just a snippet of proof mentioned very briefly in a months-long trial." Gov.Br.70. What an about face: In seeking the admission of this evidence in the district court, the

government stressed that Takhalov's failure to file his 2009 tax return would "completely undermine[]" his defense:

> Counsel: The document is what they call a Certification of Lack of Record which basically says that after diligent search, we were not able to -- no such record pertaining to such record was found. I am objecting on relevance grounds. It seeks to relate to a 2009 personal income tax return which is arguably outside the time frame of the conspiracy and not relevant to the issues charged in this case.
>
> The Court: What is the relevance of the tax return, or the non tax return?
>
> AUSA: First off, it is within the conspiracy, Secondly, it goes to concealment, Judge. It goes to the money laundering counts and the concealing of money. The notion that somehow they were paying taxes and that everything was a legal operation is going to be ***completely undermined by the fact that they didn't file taxes***.
>
> The Court: 137G is a 2010 tax return.
>
> AUSA: Yes.
>
> The Court: The 2010 certificate is that there was nothing filed from the 2009 year?
>
> AUSA: Yes, Your Honor.
>
> The Court: All right. I will overrule the objection.

DE1130:170 (emphasis added). The government's duplicity should not be countenanced. This trial error was harmful, warranting reversal.

C. The Uncharged Bribery of An Undercover Police Officer to "Fix" Traffic Tickets

The government argues that evidence of Takhalov bribing King to "fix" traffic tickets for Takhalov's friends "was relevant to reinforce the relationship between the two and show why Takhalov trusted King enough, and in his mind thought King corrupt or complicit enough, that he could made incriminating admissions to King." Gov.Br.72. Nonsense. Takhalov never claimed in his trial testimony or otherwise that he did not trust King during the course of the conspiracy, so the evidence was not needed for that purpose.

The government argues, in the alternative, that "the court's cautionary instruction was so strict that, intentionally or not, it effectively told the jury to disregard the evidence completely." Gov.Br.72. Not so. In making that pitch to this court, the government describes only part of the "limiting" instruction:

> Takhalov "is not on trial for" ticket-fixing and thus "[w]hen you go look at each individual charge, you can't consider the evidence as to whether it proves those charges.

Gov.Br.72 (citing DE1135:85). But the court's instruction, read verbatim, explicitly invited the jury to consider the evidence to prove "state of mind."

> THE COURT: All right. Members of the jury, I am going to give you another limiting instruction relating to the testimony you just heard. Mr. Takhalov is not on trial for those specific offenses; however, ***that evidence is admissible and for your consideration for whatever value***

> ***you think it has to explain his state of mind*** and his relationship with Mr. King during the time period set forth in the Indictment.
>
> When you go to look at each individual charge, you can't consider the evidence as to whether it proves those charges, only ***for that limited purpose***.

DE1135:85 (emphasis added). Far from telling the jury to "disregard the evidence completely," Gov.Br.72, the instruction told the jury that the ticket-fixing scheme was "admissible" regarding Takhalov's "state of mind."

The government makes no effort on appeal to defend the admissibility of the ticket-fixing on the basis that it was relevant to prove "state of mind." It plainly was not. The evidence of this unrelated crime only served the improper purpose of inviting the jury to infer that Takhalov was a man of bad character. The evidence should have been excluded.

The prejudicial cumulative effect of this evidence, especially combined with the other inadmissible evidence, *see ante* Part II. A&B, deprived Takhalov of a fair trial.

III.

THE DISTRICT COURT'S REFUSAL TO SEVER TAKHALOV FROM THE ACQUITTED CO-DEFENDANT RENDERED THE TRIAL UNFAIR

In response to Takhalov's complaint about being tried with acquitted co-defendant Zargari, the government cites *United States v. Blankenship*, 382 F.3d 1110 (11th Cir. 2004), in which the court observed that "co-defendants do not suffer prejudice simply because one co-defendant's defense directly inculpates another." *Id*. at 1125. "The fact that a defendant or his attorney is "a de facto prosecutor who will shift blame from himself to [co-defendants] ... [does not] justif[y] severance." *Id.* at 1126.

The government argues that Takhalov's Initial Brief "never articulates the legally-recognized theory of severance that would entitle him to relief." Gov.Br.60. The government criticizes Takhalov's Initial Brief for "selectively" quoting trial testimony and claims that co-defendant Zargari did not actually testify that "Takhalov committed fraud in general or in any specific instance." Gov.Br.59-60 (citing DE1152:259-60).

If what the government means is that Zargari (as the proverbial "second prosecutor") did not specifically use the word "fraud" to describe Takhalov's business practices, then the government is correct. Zargari himself did not say

Takalov committed a "fraud." What he said was that Takhalov's business practice was "not legal" and a "rip-off."

> Counsel: And when you were at the club, even though you didn't tell the promoters what to do or the staff what to do, did you insist that they show the menus with the prices?
>
> Zargari: That I did because that violates my liquor license and that I cannot take. I always told them you have to show the menu, not just put it on the table, because these prices are high. . .
>
> ***I told Albert*** once -- one time there was some problem with one customer say I didn't see the menu. I told Albert what is going on. He said if we have the menu on the table, it is legal. Then I told him if it is normal price, it can be legal, but if it is higher price, ***it is not legal***. That is how I do my business, you know, so ***I told him that many, many times***, you know.
>
> Counsel: Did you tell the women how much alcohol to sell the men?
>
> Zargari: You know, even again, you know, I went to Anna once. They were going to sell a bottle. They sold a bottle. Then it was late and again very fast, you know, they want to go sell another bottle. The customer willing maybe to buy it. For some people it sells. For my way of doing business, ***it is like a rip-off*** so I didn't want these things to happen in my place. ***I don't say it is fraud.*** I say it is pushing customer and I don't like it.

DE1152:258-259 (emphasis added).

Zargari's lawyer, for his part, did use the word "fraud" in reference to Tangia Club, which Thakalov operated: "If you believe that there was wire fraud in this case, it was on the part of Tangia Club." DE1155:18 (closing statement). And the entire

theme of Zargari's defense was that Zargari got "tangled up in this web of so-called alleged deceit," that Takhalov and other club owners were "unscrupulous business partners" who "didn't do things the right way." DE1155:27, 37, 35, 40.

The testimony of Zargari and the arguments of his lawyer were improper "opinions" about the illegality of Takhalov's conduct. "Statements embodying legal conclusions exceed[] the permissible scope of opinion testimony under the Federal Rules of Evidence." *United States v. Scop*, 846 F.2d 135, 139 (2d Cir.) on reh'g, 856 F.2d 5 (2d Cir. 1988); *accord United States v. Gonzalez*, 414 F. App'x 189, 200 (11th Cir. 2011) ("[A] government witness may not offer an opinion as to whether the defendant committed the offenses with which he is charged.").

> The problem with testimony containing a legal conclusion is in conveying the witness' unexpressed, and perhaps erroneous, legal standards to the jury. This invades the province of the court to determine the applicable law and to instruct the jury as to that law.
>
> * * *
>
> Thus, when a witness was asked whether certain conduct was "unlawful," the trial court properly excluded the testimony since terms that demand an understanding of the nature and scope of the criminal law may be properly excluded.

Torres v. Cnty. of Oakland, 758 F.2d 147, 150-51 (6th Cir. 1985).

Insofar as Zargari referred to Takhalov's conduct as "not legal" and his lawyer described it as a "fraud," such comments were not admissible against Takhalov, even if essential to Zargari's defense. *See Scop*, 846 F.2d at 140 ("It is not for witnesses

to instruct the jury as to applicable principles of law, but for the judge. . . '[S]cheme to defraud'" and 'fraud' are not self-defining terms but rather have been the subject of diverse judicial interpretations."); *United States v. Long*, 300 F. App'x 804, 815 (11th Cir. 2008) (unpublished opinion) ("Kapina's statement that Cash Today was an artifice or scheme to defraud is more problematic, however, because it comes much closer to embodying an impermissible legal conclusion. *[T]his statement was plainly inadmissible* . . ."). A severance was necessary to avoid "specific and compelling prejudice." *United States v. Baker*, 432 F.3d 1189, 1236 (11th Cir. 2005).

Takhalov also suffered "specific and compelling prejudice" when Zargari's lawyer urged the jury to consider ethnicity and national origin in assessing the guilt of the defendants on trial. *Cf. Blankenship*, 382 F.3d at 1126 (cautioning against a lawyer in a joint trial "attempt[ing] to inflame the jury by unnecessarily injecting race even further into an already contentious trial."). Takhalov's Russian background became a focus of Zargari's defense, largely because the government raised the specter that the "Russian" Mafia had infiltrated the South Beach bar scene. Not surprisingly, Zargari's defense emphasized that he was Persian, not Russian, to distinguish himself from his Russian co-defendants. DE1139:176, DE1140:15-16. Intentional or not, there is a risk that Zargari's defense implied that because Takhalov was Russian, there was a greater likelihood that Takhalov – as opposed to Zargari –

was connected to the Russian Mafia. Even if "finger-pointing and blame-shifting among coconspirators" would not alone require severance, Gov.Br.61 (citing *United States v. Voigt*, 89 F.3d 1050, 1095 (3d Cir. 1996)), where, as here, Takhalov's ethnicity and national origin became a focal point of co-defendant Zargari's theory of defense, a severance should have been ordered. *Cf. Blankenship*, 382 F.3d at 1126 ("[A]ppeals [to race] . . . reduce the solemn deliberations of the courtroom to little more than the ravings of the mob").

For more about the unfairness of an ethnic-based character attack, Takhalov adopts the arguments made in the briefs of co-appellant Feldman.

IV.

THE DISTRICT COURT ERRED IN COMPUTING THE SENTENCING GUIDELINES AND IMPOSING RESTITUTION

A. Sophisticated Means

The most that the government can say about the sophistication of the scheme is that Takhalov wired money through a corporate account.

> Takhalov was involved with coordinating payments to the B-Girls through Ieva Marketing, the shell company set up to launder the proceeds of VIP and Stars, and later at his clubs through Valeria Matsova. However "primitive" the idea of preying on men's "prurient interests," (Tbr.:61), Takhalov's efforts to conceal the scheme were not, and they are in line with prior cases where this Court upheld the enhancement.

Gov.Br.86. The government cites three cases where the concealment was intricate, elaborate and deceptive – therefore, distinguishable. *See United States v. Barrington*, 648 F.3d 1178, 1199 (11th Cir. 2011) ("[T]he scheme as a whole used sophisticated means to obtain the unique usernames and passwords and access the Registrar's protected computer system. . . [I]t involved repetitive and coordinated activities by numerous individuals who used sophisticated technology to perpetrate and attempt to conceal the scheme."); *United States v. Ghertler*, 605 F.3d 1256, 1267-68 (11th Cir. 2010) ("Although it is a *close question*, we cannot say that the district court clearly erred in finding Mr. Ghertler used sophisticated means to perpetrate or conceal his fraudulent scheme. The district court found that Mr. Ghertler had to conduct extensive research on the victim companies to develop inside information which facilitated the scheme to defraud; used unwitting couriers to pick up and deliver some of the proceeds of his frauds in an effort to conceal the scheme; forged false company documents, on at least one occasion referencing a confidential internal account number to facilitate the execution of his scheme; and had funds transferred to the accounts of unwitting third parties, who in turn withdrew and transferred cash to him."); *United States v. Campbell*, 491 F.3d 1306, 1315 (11th Cir. 2007) ("Campbell utilized campaign accounts and credit cards issued to other people to conceal cash

expenditures in 'a deliberate attempt to impede the discovery of both the existence and extent of his tax fraud.'").

It is telling that the government declines to address the three cases cited in Takhalov's Initial Brief, Tak.Br.61-62, in which circuit courts reversed the imposition of a sophisticated means enhancement in cases indistinguishable from Takhalov's. *See United States v. Valdez*, 726 F.3d 684, 695 (5th Cir. 2013); *United States v. Hance*, 501 F.3d 900, 909 (8th Cir. 2007); *United States v. Rice*, 52 F.3d 843, 844-45, 848-49 (10th Cir. 1995).

B. Vulnerable Victim

Quoting *United States v. Malone*, 78 F.3d 518, 522 (11th Cir. 1996), the government asserts that "the vulnerable victim adjustment focuses chiefly on the conduct of the defendant and should be applied only where the defendant selects the victim due to the victim's perceived vulnerability to the offense." Gov.Br.87. Takhalov does not quarrel with that proposition. But the *Malone* court explained further:

> [I]t is appropriate only where the defendant targets the victim based on the latter's "unique characteristics" that make the victim ***more vulnerable or susceptible to the crime at issue than other potential victims of that crime***.

> In such a case, the defendant is deemed more culpable than he otherwise would be had he committed that same crime on another victim ***who did not share those vulnerable characteristics***.

Malone, 78 F.3d at 521 (emphasis added).

In Takhalov's case, the alleged victims were ordinary men out for a night on the town. The alleged scheme did not target its victims based on any "unique" or "vulnerable characteristics." *See United States v. Morrill*, 984 F.2d 1136, 1137 (11th Cir.1993) (en banc) (bank tellers as a class were not "automatically" "vulnerable victims" of bank robberies); *United States v. Long*, 935 F.2d 1207, 1210 (11th Cir.1991) (members of a black family were not, by their race alone, "automatically" "vulnerable victims" of cross-burning). The scheme did not select its mark based on any inherent or pre-existing characteristic that rendered the victim particularly vulnerable for targeting, *e.g.*, an especially low tolerance for alcohol (or beautiful women). Rather, the Superseding Indictment alleged a scheme to "ply" typical men with alcohol as the means of executing the alleged fraud. The men allegedly defrauded were not "more vulnerable or susceptible to the crime at issue than other potential victims of that crime." *Malone*, 78 F.3d at 521. The enhancement should not have applied.

For these reasons, and those set forth in the briefs of the other appellants, the sentencing guidelines computations were erroneous.

CONCLUSION

For these reasons and those advanced in the briefs of Pavlenko and Feldman, the convictions and sentence of Albert Takhalov should be reversed.

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 contains 6,545 words.

/s/ Howard Srebnick
Howard Srebnick

CERTIFICATE OF SERVICE

I HEREBY certify that on July 31, 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF; the ECF system will automatically serve counsel of record and Assistant U.S. Attorney John C. Shipley at john.shipley@usdoj.gov.

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