

RECORD NO.

05-5965-cr-L

consolidated with 06-0949-cr

To be argued by Peter Goldberger

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In The  
United States Court of Appeals  
For The Second Circuit

UNITED STATES OF AMERICA,

*Appellee,*

v.

RAFIL DHAFIR,

*Defendant – Appellant.*

On Appeal from Judgment in a Criminal Case filed and entered  
October 27, 2005, as amended February 6, 2006, in the United States District  
Court for the Northern District of New York at Syracuse in  
No. 5:03-CR-0064-01 (Norman A. Mordue, U.S.D.J.)

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REPLY BRIEF OF APPELLANT DHAFIR

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## ARGUMENT IN REPLY

This appeal arises from a conviction and sentence in the Northern District of New York. The government's brief ("Gov't Br.") commences with a lengthy statement of facts which depends on a highly partisan reading of the record. The appellant's statement is more fair and balanced, while still giving the government the benefit of the verdicts.

In several instances, the appellee's brief claims that appellant's brief misstated certain points.<sup>1</sup> In most instances, the government is wrong.<sup>2</sup> For example, with regard to the critical defense theory that the investigation initially focused on Dr. Dhafir's support of terrorism, the government claims that the appellant failed to provide any supporting record citation. Gov't Br. 7 n. 6. The government simply ignores the record citations contained within our opening brief which establish this point. *See, e.g.*, A-259 (defense proffer regarding grand jury testimony); A-580, 586 (Colleen Williams's testimony about how the agents invoked 9-11 in trying to get her to cooperate).

Moreover, the government's brief is replete with misstatements regarding the record in this case, and particularly the strength of the evidence against Dr. Dhafir. While some of these errors are noted in relation to the specific arguments

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<sup>1</sup> The government is correct that appellant made some regrettable, although minor, mistakes in the opening brief (*e.g.*, the number of days the jury deliberated, the existence of named co-conspirators, and when Help the Needy Endowment first appeared in the series of indictments).

<sup>2</sup> In addition to the many examples discussed elsewhere in this Reply, the government incorrectly asserts that Help The Needy ("HTN") did not begin amassing funds until 1995 (in fact, funds were already in place from its predecessor charity, IANA), Gov't Br. 50 n.25, and inaccurately characterizes our argument regarding donor testimony, Gov't Br. 54.

addressed in this Reply, space limitations prevent appellant from responding to most of them.

For the reasons elaborated in this Reply and for the reasons originally presented, Dr. Dhafir is entitled to a judgment of acquittal on the mail and wire fraud counts, a new trial on the rest of the case, or at least to an order vacating the judgment and remanding for resentencing.

**1. CONTRARY TO THE GOVERNMENT’S ASSERTION, THE DEFENSE SOUGHT TO DEVELOP EVIDENCE OF BIAS, NOT SELECTIVE PROSECUTION, AND THE TRIAL COURT IMPROPERLY RESTRICTED DR. DHAFIR’S RIGHT TO PRESENT THIS DEFENSE.**

According to the government, the trial court did not restrict cross-examination or argument that would have demonstrated government agent bias, but rather only restricted examination and argument relating to a legally inappropriate selective prosecution defense. The appellee’s brief mischaracterizes Dr. Dhafir’s position on appeal (and at the trial court) and confuses concepts of impeachment, bias and selective prosecution.

The thrust of the government’s argument is that asking questions or making arguments about the “government’s bias” was tantamount to advancing a selective prosecution theory, and therefore constituted improper cross examination or argument, because selective prosecution is an issue for the court, not the jury. The appellee’s argument conflates and confuses distinct issues. As explained in our initial brief, while the government’s motivation is not a substantive defense, it is relevant to the extent that it caused the testifying government agents to be biased against Dr. Dhafir. Appellant’s Opening Brief (“AOB”) 28-29. This bias against Dr. Dhafir was two-fold in its origins: 1) the erroneous belief that Dr. Dhafir was a

supporter of terrorism and 2) the enormous amount of resources that had been dedicated to an ultimately fruitless terrorism investigation.

Significantly, the government never disputes the proposition that these issues were probative of bias on the part of the government's agents or that improperly limiting a defendant's ability to demonstrate bias violates the Sixth Amendment and requires vacating a defendant's convictions unless such a restriction was harmless beyond a reasonable doubt. *See United States v. Abel*, 469 U.S. 45, 50 (1984) (noting that the Confrontation Clause "requires a defendant to have some opportunity to show bias on the part of a prosecution witness"); *United States v. Sasson*, 62 F.3d 874, 883 (7<sup>th</sup> Cir. 1995) ("where the defense is completely foreclosed from exposing the witness' bias or motive to testify, the limitation may directly implicate the defendant's constitutionally protected right of cross examination").

Dr. Dhafir at trial did not attempt to examine witnesses or to make an argument designed to establish a selective prosecution defense.<sup>3</sup> It is the government that is "analytically imprecise" in suggesting otherwise. Selective prosecution arises when the government has unconstitutional motives in investigating and indicting a defendant. *See States v. Alameh*, 341 F.3d 167, 173 (2d Cir. 2003); *United States v. Abboud*, 438 F.3d 554, 579 (6<sup>th</sup> Cir. 2006). Thus, in selective prosecution cases, the exploration of motive is for purposes of determining whether the government's pursuit of the defendant violated constitutional principles. *See United States v. Armstrong*, 517 U.S. 456 (1996).

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<sup>3</sup> Appellant raised this issue unsuccessfully by pretrial motion. Even though it is true that groups founded on non-Muslim religious traditions also violated the sanctions openly and for similar humanitarian reasons without government reprisal, for lack of a sufficient record the selective prosecution issue has not been renewed on appeal.

Here, the defense never elicited evidence regarding the terrorism focus of the investigation to attempt to argue before the jury that Dr. Dhafir's prosecution was unconstitutional; rather, it sought to highlight that this original investigatory focus, and ultimately the fact that it was fruitless, rendered the government agents particularly venomous towards Dr. Dhafir, and that this "bias" colored the self-described "subjective" testimony of the government agents (A-620) and the arguments of the government prosecutors.

Thus, the cases relied upon by the government where the defense sought to establish a selective prosecution defense based the government's "motive" are completely inapposite. *See, e.g., United States v. Stewart*, 2004 WL 113506, at \*1 (S.D. N.Y. 2004) (defense wanted the jury to "question the Government's motives in investigating and indicting Ms. Stewart, as opposed to other individuals who may also have committed the crimes charged or similar crimes"); *Abboud*, 438 F.3d at 579 (defendant expressly stated that its goal in cross examining the witnesses was to establish selective prosecution defense, specifically that the prosecution was initiated "as a result of defendant's ethnicity"); *United States v. Regan*, 103 F.3d 1072, 1082 (2d Cir. 1997) (in a case charging perjury before the grand jury, the defendant's defense was that his lies were not material because the government called him before the grand jury solely to elicit perjured testimony—a defense that the court found analogous to selective prosecution). In none of the cases cited by the government was a defendant limited in his ability to examine a witness or to make arguments which attempted to demonstrate bias.

The only other argument by the government is that Dr. Dhafir was not in the end limited in his ability to cross examine or argue issues of bias. In addressing the numerous examples provided in our original brief which illustrated the restrictions on cross examination and closing argument, the government suggests that in each instance, the particular question or argument either was not designed to

impeach the witness, Gov't Br. 41, 45-46, or was relevant only to bias on the part of government actors and agents in general rather than bias on the part of the particular witness, Gov't Br. 46-48. But, in so casting its argument, the government completely misses the point: bias can be demonstrated in myriad ways, not merely via impeachment of the witness who is on the stand. *See United States v. Abel*, 469 U.S. at 51 (extrinsic evidence is permissible to prove bias). In addition, as previously noted, arguing bias on behalf of the government agents in general is completely permissible and does not become a selective prosecution defense unless the defendant contends that the government's motivation for the prosecution is unconstitutional. The government does not dispute that each example cited in the brief represented an occasion where the defense attempted to develop evidence or argument regarding the government's terrorism focus in the initial investigation of Dr. Dhafir.<sup>4</sup>

Under these circumstances, the trial court's pretrial order had the effect of completely foreclosing Dr. Dhafir from demonstrating bias on the part of the government agents due to the government's mistaken belief that Dr. Dhafir was a supporter of terrorism. The jury might have weighed that bias significantly against the credibility of the government's witnesses. As a result, Dr. Dhafir was deprived of his rights under the Sixth Amendment to confront witnesses and to present his defense theory of bias on the part of government agents. The resulting trial was unfair, and the convictions must be reversed.

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<sup>4</sup> It is true that on several occasions the defense argued that the door had been opened for this line of inquiry, but that does not change the fact that the line of inquiry or argument was independently relevant to bias.

**2. THE GOVERNMENT FAILED TO PROVE THAT FUNDS “MISSPENT” BY DR. DHAFIR WERE, IN FACT, THE FUNDS DONATED BY THE PURPORTED VICTIMS OF CHARITY FRAUD, AND FAILED TO PROVE THAT DR. DHAFIR MADE ANY MATERIALLY FALSE REPRESENTATIONS.**

a. Donor Funds Were Not Misspent. Although the government attempts to amend its theory of prosecution on appeal, the core focus of its mail-and-wire fraud prosecution was that Dr. Dhafir misspent money contributed by donors to his charity. A-678-79. The government’s own evidence clearly established that Dr. Dhafir himself contributed *more* money to Help the Needy than what was, according to the government, “misspent.” This defect alone undermines completely Dr. Dhafir’s conviction on counts 51-60. In addition, the government failed to prove that Dr. Dhafir made any materially false statements or promises to HTN’s donors. Together or separately, these points require reversal of the convictions on these counts for insufficient evidence

The government’s position on appeal rests on its claim that Dr. Dhafir “misspent more than he and the foreign contributors donated by over \$500,000,” therefore, the jury was “entitled to conclude Dhafir engaged in criminal wrongdoing.” Gov’t Br. 50 (*citing* Exhibit 1.900.107, A-1393a-93b). This government exhibit, labeled “Summary of Dhafir Contributions,” directly contradicts the government’s position and instead establishes that Dr. Dhafir himself contributed in excess of the amount that the government claims was “misspent.”

According to this exhibit, Dr. Dhafir’s own “Total Contributions” to HTN were \$1,450,134. The legitimate HTN expenses that were incidental to its direct charitable activities, such as cash expenses, expenses from bank records, money exchanger fees, and salaries, total \$592,606. The “Non-Charitable Money” – presumably the money that was “misspent” by Dr. Dhafir – totals \$1,183,493.

Thus, it is immediately apparent that Dr. Dhafir contributed is \$266,641 *more than* the “misspent” “Non-Charitable Money.”

The fourth section of the Exhibit characterizes an additional \$219,023 as “Preacher/Agent Salary/Expenses.” While it is not clear that expenditures for religious education activities are illegitimate even under the government’s view of the evidence, adding this total to the “misspent” “Non-Charitable Money” still does not exceed Dr. Dhafir’s personal contributions to the charity. Instead, Dr. Dhafir’s total contributions *exceed* the combined amount “misspent” by \$47,618 exclusive of money that was in hand before 1995 and of any foreign contributors. Apparently, the government in reaching its mistaken conclusion that Dr. Dhafir took out more than he donated by \$544,988 added the legitimate HTN operating expenses to the “misspent” money.

In its brief, the government accuses Dr. Dhafir of “neglect[ing] to address the ledger that Dhafir and Zagha had maintained to track Help the Needy’s money....” Gov’t Br. 51. The appellee asserts that the ledger and the testimony of agents Kelly and Kolbe “played an important role in demonstrating the misuse of money.”<sup>5</sup> *Id.* But, if the “misused” money is less than the amount of Dr. Dhafir’s personal contributions, then the ledger and the accompanying testimony is irrelevant. Dr. Dhafir does not dispute the existence of the ledger or where money was spent, rather, the government failed to prove *whose money* was used for each disbursement on the ledger. Similarly, the government’s description of specific

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<sup>5</sup> Although the government states that IRS Agent Kelly and Agent Kolbe were able “to track money from its specific source to its illicit purpose,” Agent Sweeney admits that the government was not able to trace funds that existed before 1995 due to the statute of limitations. AOB 36. Because of this, the government does not know the source of the funds that existed in the IANA account that predate 1995, which were later used to open an account for HTN in 1995.

instances of “misuse” of HTN’s money by Dr. Dhafir is irrelevant since these figures are incorporated in Exhibit 1.900.104.

Finally, the government’s own witnesses corroborated that the government’s case is completely undermined if Dr. Dhafir’s contributions exceed the total amount of money allegedly diverted to his personal interests. As Agent Sweeney testified, “money is money....once it gets in [an account], it loses its character.” A-456. Thus, “what I did was just use the technique that we use as IRS agents. I looked at the total amount of money that was deposited into the account and the total checks that were written on the account, and the deposits, I looked at the sources,” however, because disbursements aren’t always in round numbers, “you can’t say, well, this transaction [sic; “contribution”?] absolutely funded this transaction.” A-456-57. Instead, the critical question is how much in total came from Dr. Dhafir and how much came from donors. To the extent that the “misspent” money was less than the amount contributed by Dr. Dhafir himself, under Sweeney’s approach, there is no way to conclude that donor money was misused.

In light of this glaring proof deficit, the government, again, attempts to shift its theory of prosecution in an attempt to salvage the convictions. Specifically, the government now argues that it did not have to prove that any of the donors were actually defrauded (*i.e.*, had their money misspent) but “merely that the defendant knowingly entered into a scheme to defraud.” Gov’t Br. 50. But, the government does not explain the contours of this alternative “scheme to defraud,” conveniently overlooks the specific allegation in the indictment that the scheme to defraud was to divert solicited donations to his private use, A-212-13, ¶ 80, and forgets about its

closing argument that “the core of the mail fraud” is that Dr. Dhafir was using HTN’s “money as if it were his own.” A-678.<sup>6</sup>

Based on the scheme to defraud charged in the indictment and the theory presented at trial, in order to be guilty of mail and wire fraud, Dr. Dhafir had to have defrauded innocent donors; he could not “defraud” himself. Thus, the money “misspent” had to be other donors’ money, not his own. Because the government failed to prove that the “misspent” money was not Dr. Dhafir’s own personal contributions, there was insufficient evidence to convict him of these charges.

b. No Materially False Statements. Dr. Dhafir argued in his opening brief that the government failed to establish *he* misrepresented or actively concealed any material fact from HTN donors, or that money specifically pledged by donors was not, in fact, spent just as they requested. The government in its brief mischaracterizes the appellant’s argument as one based on the victim’s intent. Gov’t Br. 54. But, the argument is based on whether Dr. Dhafir himself made any false statement, regardless of what the donor subjectively perceived apart from his representations. The government recognizes the corroborative nature of the donor testimony in this regard, because it relies heavily on this testimony in an effort to prove that there were misrepresentations. Gov’t Br. 55-57.

At trial, none of the government’s donor witnesses testified that there was a specific representation by Dr. Dhafir that donations to HTN would be used exclusively for feeding starving children nor did they testify they had knowledge *their* donations did not go where they were supposed to. While the government is correct that it makes no difference whether a victim *knows* that his or her money has been fraudulently diverted, there can be no fraud if the donation was actually

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<sup>6</sup> Of course, the government cannot sustain a conviction based on a scheme to defraud other than the one set forth in the indictment. *See Stirone v. United States*, 361 U.S. 212, 217-19 (1960).

used in the manner intended by the donor. The significance of the donor testimony is that neither they nor anybody else established that the donations were not used by Dr. Dhafir in the manner promised and intended. Indeed, Waleed Smari, a government witness, testified that if donors specified a use for their money, then it was used for that purpose. A-331. Thus, the government failed to establish an essential element of wire/mail fraud because it did not prove Dr. Dhafir made any false statements nor did it prove that *donors' money* was used for non-charitable purposes, or if specified, was used for a different purpose. Accordingly, there was no proof of fraud. Finally, as set forth in the preceding subsection, since Dr. Dhafir did not mispend donor money, there were no material misrepresentations made to donors.

In addition, the government misstates the record in this section of its brief. For example, it states as fact that “there were never families identified in Iraq for support, and donor money never supported them.” Gov’t Br. 56. To support this assertion, the government cites the testimony of co-conspirator Jarwan. A-1355. This was not Jarwan’s testimony. Mr. Jarwan testified that *he* did not keep a database of the families that were supported. A-1355. As the government well-knows, Agent Kolbe testified that HTN records demonstrated that thousands in Iraq benefited from these donations. Trial Tr. 5014-16, 5038-39. Given the dangerous nature of HTN’s charitable mission (not so much because of its disregard of the U.S. embargo but because of its defiance of the Saddam Hussein dictatorship), it is not surprising that someone not directly involved with that aspect of the mission would be kept unaware of individual beneficiaries’ names. *See* Trial Tr. 1042 (Testimony of Dr. Smari). This is just one of many examples where the government distorts the trial record in an effort to salvage these convictions.

The government failed to prove that Dr. Dhafir used anyone else's money on what it characterizes as illegitimate expenses for the charity, or that Dr. Dhafir made any materially false representations. Accordingly, his convictions on counts 51-60 must be reversed.

### **3. THE GOVERNMENT'S THEORY OF FRAUD WAS DEPENDENT ON EVIDENCE ELICITED IN VIOLATION OF THE FIRST AMENDMENT FREEDOM OF RELIGION.**

The appellant's opening brief demonstrates that the government elicited from its cooperating witness, Walid Smari, opinion testimony about whether it was "proper or appropriate" for Help the Needy to use donated funds in certain ways. A course of conduct could only be judged "proper or appropriate" against some standard, which presumably would be legal, ethical, cultural or religious in nature. The defense objected unsuccessfully to this request for incompetent, irrelevant, and unfairly prejudicial testimony. A-332.<sup>7</sup> The witness then answered the question, as he had understood it, in terms of Islamic religious principles of charitable giving. Seeking a more favorable standard of review, the appellee hints that the objection may have been insufficient to avoid the plain error rule. Gov't Br. 62-63, 72; *cf.* Fed.R.Evid. 103(d) (plain error doctrine applies to evidence issues). The appellant's argument, however, is about the unfair prejudice that ensued from the overruling of a proper evidentiary objection.

The appellee does not deny that a prosecutorial stratagem of having the jury judge the defendant's conduct against a religious standard would be

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<sup>7</sup> The government now complains that defense counsel did not state grounds for the objection, Gov't Br. 66, but neither the prosecutor nor the judge expressed any question or doubt at the time what the basis for the objection might be. Any federal practitioner knows that "speaking objections" are generally disfavored unless the trial court requests them.

unconstitutional under the First Amendment; it simply denies that this was intended. But the prosecutor did not demur and try to get the witness to give some other answer to his objectionable question, thus suggesting that appellant's interpretation is correct – that an opinion about the conformity of HTN's practices with Islamic law is exactly what the government sought to elicit.<sup>8</sup> The government's brief, even now, does not suggest on what basis Dr. Smari's opinion in response to this question would have been material to any charge in the indictment or helpful to the jury.

The appellee suggests that evidence which this Court has held irrelevant and confusing when offered by the defense, *see United States v. Rahman*, 189 F.3d 88, 134-38 (2d Cir. 1999) (per curiam), somehow becomes proper when presented and then emphasized in argument by the government. Gov't Br. 63 n.30. But the rules of evidence do not generally work that way – unfair evidence is no more admissible at the government's behest than the other way around. The government's improper tactic, and the resultant error in the trial court's ruling, is confirmed by the prosecutor's emphatic exploitation of this testimony in his closing rebuttal speech "about zakat." A-705. The appellee's brief assiduously avoids discussing the main points that the appellant raises about the prosecution closing argument – presumably because the rebuttal in particular utterly belies the innocent explanations now offered in defense of the government's approach at trial, as endorsed by the trial judge. The appellee's brief does not effectively defend it

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<sup>8</sup> The fact that the defense asked further questions on cross-examination, Gov't Br. 67-70, in an attempt to turn this evidence (once admitted over objection) to the defendant's advantage, after the government had opened the door, hardly makes the admission of the evidence into "invited error," immune from challenge on appeal. *Compare* Gov't Br. 67-70.

against the arguments advanced by the appellant. The judgment of the court below should be reversed.

**4. THE HEALTH CARE FRAUD OFFENSES WERE MIS-JOINED WITH THE OTHER OFFENSES IN THE INDICTMENT AND THIS MISJOINER RESULTED IN ACTUAL PREJUDICE TO DR. DHAFIR.**

Under Point IV of the opening brief, appellant Rafil Dhafir shows that the health care fraud counts were improperly joined in this indictment with the IEEPA and tax violations. While the government makes a half-hearted attempt to argue that there is some connection between the Medicare counts and the other charges in this case, the real focus of its brief is on Dr. Dhafir's "waiver" of this argument and the lack of any prejudice. In fact, there was no waiver, and any forfeiture of the issue is not fatal. Rule 8 misjoinder is reviewable for plain error and there was substantial prejudice to Dr. Dhafir. The government used the health care fraud charges to solidify its core theory that Dr. Dhafir was a liar and cheat who only selectively followed the rules. In this way, the trial was rendered unfair, requiring reversal.

The government initially appears to suggest that Rule 8 misjoinder is never reviewable on appeal in the absence of a pretrial motion to sever. Gov't Br. 73-75. But, in so doing, the government mistakenly analyzes the issue as if this appeal presented a Rule 14 severance issue. While Rule 14 severance proceeds from the assumption that joinder is legally proper but prejudicial, Rule 8 misjoinder "raises a question of law and is subject to full appellate review." *United States v. Turoff*, 853 F.3d 1037, 1042 (2d Cir. 1988); *see, e.g., United States v. Joyner*, 201 F.3d 61, 74 (2d Cir. 2000) (reviewing Rule 8(b) misjoinder for plain error); *United States v. Brown*, 16 F.3d 423, 424, 428 (D.C. Cir. 1994) (finding misjoinder but holding it did not amount to plain error); *United States v. Balzano*, 916 F.2d 1273, 1280 (7<sup>th</sup>

Cir. 1990) (reviewing Rule 8(a) misjoinder for plain error); *see generally United States v. Thomas*, 274 F.3d 655, 666 (2d Cir. 2001) (en banc) (plain error review applies to a challenge to an indictment made for the first time on appeal).<sup>9</sup> In fact, this Court has suggested that even Rule 14 severance motions may be subjected to plain error review. *See United States v. Sweig*, 441 F.2d 114, 119 (2d Cir. 1971).

The government next suggests that there is a sufficient nexus between the health care fraud and the other charges to support Rule 8(a) joinder. The government first argues that the health care fraud charges “involve much of the precise activity that formed the basis of the IEEPA charges: Dhafir’s travel to raise money to send to Iraq.” Gov’t Br. 75-76. But the health care charges arose from his failure to be physically present in the office when chemotherapy treatments were administered and then alleged misrepresentations when asked about that. The government fails to offer a single record citation to support the proposition that on any particular occasion, the reason Dr. Dhafir was not physically present in the office was that he was committing IEEPA or any other offenses.

The government also contends that the health care fraud charges “are of the same or similar character as the mail and wire fraud charges.” Gov’t Br. 76. The government argues that the same evidence was used to prove both sets of offenses (*i.e.*, four trial witnesses – out of approximately 43 government witnesses – testified to some extent about both<sup>10</sup>); Dr. Dhafir’s lab technician was the nominal President of Help the Needy; and that both sets of charges were part of a common

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<sup>9</sup> The government unfairly paints the defense failure to move for relief pretrial trial as a strategic decision. Gov’t Br. 74. If it were a strategic decision (and the record is silent on this issue), it was based on the assumption that the trial court would have permitted the defense to develop the bias issue set forth in point one.

<sup>10</sup> The government does not delineate which witnesses testified about both or the extent to which their testimony truly overlapped both sets of offenses.

scheme to raise money to send to Iraq or to use for Dr. Dhafir's private benefit. Gov't Br. 76-77. Of course, any time a single defendant is accused of multiple crimes designed to enrich himself, there is going to be some overlap in the evidence and some similarity in motivation. For example, in such cases, it would not be surprising to find that a person is motivated by greed and deposits the proceeds in the same savings account. But, if this were sufficient to establish legal joinder under Rule 8, the limitation would be meaningless.

The government offers only two cases in support of its argument that there was a sufficient nexus between the health care fraud offenses and the other charges in the indictment to permit the challenged joinder. Gov't Br. 75-76. Analysis of these cases, *United States v. Blackney*, 941 F.2d 114, 116 (2d Cir. 1991), and *United States v. Tubol*, 191 F.3d 88, 95 (2d Cir. 1999), actually highlights the misjoinder of counts that existed here. In *Blackney*, joinder of gun and narcotics charges was deemed proper because the defendant sold "both commodities to the same customers" and on one occasion sought to pay for guns with cocaine. *Blackney*, 941 F.2d at 116. In *Tubol*, joinder of firearms possession with robbery charges was appropriate because "eyewitnesses testified that the perpetrator of both robberies carried a gun"; thus, the fact that the defendant had a gun when arrested demonstrated that he had "the means to commit the robberies." *Tubol*, 191 F.3d at 95.<sup>11</sup> Obviously, there was nothing close to this kind of connection between the health care fraud and charity fraud charges. The purported victim of any health care fraud was the government and the purported victims of the mail-and-wire fraud were the contributors to HTN. The offenses did not occur

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<sup>11</sup> *Tubol* actually provides stronger support for the appellant's position because the court held within that opinion that different robberies (one of a bank and one of a store) committed by the same defendant were misjoined notwithstanding that both involved a gun and "proximity in time and place." 191 F.3d at 95.

simultaneously and one offense was in no way a prerequisite for the other offense. Thus, there was no “direct” relationship between the charged health care offenses and the other counts in the indictment. Accordingly, the Medicare offenses were improperly joined in the indictment. *See United States v. Shellef*, 507 F.3d 82, 97 (2d Cir. 2007);<sup>12</sup> *United States v. Turoff*, 853 F.2d 1037, 1042-43 (2d Cir. 1988).

Finally, the government argues that even if these charges were mis-joined, there was no actual prejudice. Gov’t Br. 78-80. In so doing, the government fails to refute, and thus apparently concedes, that much of its case turned on Dr. Dhafir’s intent. The government also simply ignores the inflammatory language used by the two prosecutors in their closings with regard to the Medicare charges and the devastating impact that this had on Dr. Dhafir’s defense on the other charges.

The government attempts to demonstrate the strength of its case against Dr. Dhafir on the mail/wire fraud counts, and thus the lack of prejudice from the misjoinder of the Medicare offenses, by claiming that Dr. Dhafir “acknowledged” that Help the Needy’s charitable purposes “were a disguise for its real purpose.” Gov’t Br. 80 (citing A-1533). In fact, the government’s assertion is not supported by the appendix reference and its argument highlights the prejudice to Dr. Dhafir from the mis-joinder. The cited portion of the record is the script from Dr. Dhafir’s presentation at a board meeting that was captured on video-tape. There are dueling government and defense translations set forth in the appendix. But, even the government’s version merely highlights Dr. Dhafir’s overarching

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<sup>12</sup> The government’s distinguishes *Shellef* because it claims that there were two defendants and each demonstrated spill-over prejudice. Gov’t Br. 77. But, this mis-states the relevant holding from this case (which had nothing to do with an analysis of prejudice). Instead, the court clearly held that the misjoinder was based on the fact that there was not “an adequate link . . . to justify joinder of all the charges against *Shellef*.” 507 F.3d at 100.

objective to be on “the right path,” and contains a statement that “feeding and relief” are a part of, but not all of, this “right path.” A-1533. There is no basis for the government’s suggestion of a mutual exclusivity between feeding the hungry and being on “the right path.”

Moreover, the government’s argument to this effect highlights the prejudice which accrued from the joinder of the healthcare fraud offenses. The government used its “liar and cheater” theme to suggest to the jury (as it now suggests to this Court) that it interpret the record as demonstrating “above all” Dr. Dhafir’s intent to defraud his donors. Gov’t Br. 80. But, given its potentially benign meaning, the government’s reliance on this transcript puts the proverbial cart before the horse. There was an issue for the jury to decide about whether the fundraising presentation demonstrated Dr. Dhafir’s *mens rea* on the mail/wire fraud charges. The government’s depiction of Dr. Dhafir as a liar and cheater who did not follow applicable rules certainly prejudiced the jury’s determination of this issue. Given that the government now labels this the most significant evidence of Dr. Dhafir’s criminal intent, the actual prejudice from the misjoinder of the healthcare offenses is plainly apparent.

**5. THE TRIAL EVIDENCE FAILED TO ESTABLISH THAT THE CONSPIRACIES CHARGED IN COUNTS 1 AND 15 CONSTITUTED SEPARATE AGREEMENTS. IN ANY EVENT, THE SENTENCES ON THOSE COUNTS AND COUNT 50 ARE ILLEGAL.**

a. Multiplicity. The appellant's brief shows under Point V that Dr. Dhafir was convicted and sentenced on Counts 1 and 15 for what were, in fact and law, a single conspiratorial agreement at most, and thus no more than one offense. The appellee concedes, Gov't Br. 85, that its case as presented at trial was that Dr. Dhafir agreed with Arman Jarwan to raise and transmit funds from the United States for relief of civilian suffering in Iraq in violation of the sanctions law, by

operating Help the Needy as a charity in violation of the Internal Revenue Code. The two aspects of the plan were inseparable. That some others aided in the charitable contributions violations but not in the defiance of the IEEPA, while different individuals participated in transmitting funds without committing tax violations, does not prove that Dr. Dhafir committed more than one violation of 18 U.S.C. § 371. The government's brief ignores almost all the pertinent authority cited and applied by the appellant, *e.g.*, *United States v. Nersesian*, 824 F.2d 1294, 1303 (2d Cir. 1987),<sup>13</sup> including the precedent discussing multiplicity violations as plain error. *E.g.*, *United States v. Ansaldo*, 372 F.3d 118, 124 (2d Cir. 2004). Merely to assert that an error is not "plain" – as the appellee does here, Gov't Br. 81-82 – cannot make it so. This Court's case law shows otherwise.

The evidence at trial did not demonstrate the existence of two overlapping but legally and factually separate conspiratorial agreements, but rather the existence of one agreement, to achieve a single end: delivery of humanitarian relief to Iraqi civilians notwithstanding the embargo. True, this unitary objective required multiple steps to be accomplished, and had the included effect of violating more than one law. But an agreement to violate more than one law does not

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<sup>13</sup> Instead, the appellee claims that Dr. Dhafir's case is "somewhat similar" to *United States v. Bilzerian*, 926 F.2d 1285, 1301 (2d Cir. 1991). Gov't Br. 82-83. Of course, the only similarity that would be pertinent would be if *Bilzerian* included any discussion of a legal issue raised in this appeal. But appellant Bilzerian did not argue that the evidence at his trial proved no more than a single agreement, so the holdings in that case are not applicable. (Bilzerian's erroneous contention was that an indictment could not properly charge a conspiracy to defraud based on conduct which *could* have been charged as a conspiracy to commit a specific offense.) Consistent with Dr. Dhafir's contention here, however, this Court in *Bilzerian* did comment that "it is recognized that the government may not obtain two convictions or punish the defendant twice for the same conduct by alleging violations of both the defraud and offense clauses of the conspiracy statute ...." 926 F.2d at 1301.

establish two separate conspiracies. The conviction and sentence on Count 15 should be vacated and the case remanded for resentencing.

b. Illegal "Partially Consecutive" Sentences. A federal sentence that does not commence and does not run as specified in 18 U.S.C. § 3585 (see AOB 63), such as the sentences imposed on Dr. Dhafir on Counts 1, 15 and 50, is illegal. Yet the government's brief does not even cite that governing statute, much less attempt to show any defect in appellant's statutory argument. Instead the appellee relies on case law interpreting the Sentencing Guidelines as requiring such sentences in some instances. This Circuit's prior case law was premised on a misreading of USSG § 5G1.2(d), which the Court then deemed obligatory because compliance with the Guidelines was believed to be mandatory. Under that regime, the duty to follow the Guidelines (18 U.S.C. § 3553(b)) might have been understood to authorize judicial disregard of conflicting statutes (such as § 3584 or § 3585).<sup>14</sup> But now that *United States v. Booker*, 543 U.S. 220 (2005), has held § 3553(b) unconstitutional under the Sixth Amendment, striking and severing it from the statute, there is no longer any basis for accepting a judicial obligation to follow invalid Guidelines (such as § 5G1.2(d) as formerly construed by this Court).

Appellant does not suggest that some of the individual sentences comprising a multi-count sentencing package cannot run concurrently with one another, while other, presumably shorter terms run consecutively (thus constituting a judgment of sentence which is "partially consecutive"), but the sentence imposed on any given count cannot *itself* be "partially consecutive" in the sense formerly allowed under *United States v. McLeod*, 251 F.3d 78, 83-84 (2d Cir. 2001). For the reasons

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<sup>14</sup> Of course the most important statutory command that was deemed overridden by the pre-Booker mandatory Guidelines command of § 3553(b) was the mandate in § 3553(a) to impose a sentence in every case that was "no greater than necessary."

discussed under Point V of appellant's brief, appellant Dhafir is entitled to resentencing.

**6. THE TRIAL COURT ERRED IN FAILING TO FOLLOW THE PLAIN LANGUAGE OF U.S.S.G. § 2S1.1(a)(1) BECAUSE, CONTRARY TO THE GOVERNMENT’S ARGUMENT ON APPEAL (BUT CONSISTENT WITH ITS ARGUMENT IN THE DISTRICT COURT), THE MONEY SENT TO IRAQ WAS DERIVED FROM THE PROCEEDS OF UNDERLYING ALLEGED TAX AND FRAUD OFFENSES.**

In its brief, the government distorts the record to build its argument that the funds used in the laundered transactions did not represent the proceeds from the underlying tax and fraud violations. The government’s revisionist theory is necessary in order to attempt to justify the district court’s failure to follow the plain language of U.S.S.G. § 2S1.1(a)(1), which requires calculating the base offense level based on the offense that generates the funds used in the money laundering financial transactions, where the defendant committed that offense and where the offense level can be determined.<sup>15</sup> The government does not dispute that where the district court fails to calculate the advisory Guideline range properly, the resulting sentence is procedurally defective and must be vacated. *See United States v. Williams*, \_\_F.3d\_\_, 2008 WL 1836371 (2d Cir. Apr. 25, 2008) (“improperly calculating” the Guidelines range renders sentence procedurally unreasonable).

To circumvent this clear and unambiguous Guideline language, the appellee argues that only one of the charged offenses “contributed at all to the ‘laundered’ money sent overseas, and that this offense (health care fraud) generated only a “minor portion of the laundered amount.” Gov’t Br. 90. That suggestion plays fast and loose with the factual record. Contrary to its current assertion (for which it

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<sup>15</sup> Significantly, the Guideline does not even require that the defendant be “convicted” of the underlying offense, merely that he “committed” it.

provides no record citations), the government conceded in its sentencing memorandum that “there is **overwhelming** evidence that the laundered funds are, indeed, the proceeds of the tax and fraud charges . . . .” A-1122 (emphasis added). Given this concession, it is not surprising that the government failed to object to the finding in the presentence report that “the source of the money which was laundered to promote the violation of the Iraqi Sanctions was largely from the tax offenses perpetrated by Dhafir and a much smaller amount was proceeds from mail and wire fraud.” PSR ¶ 64. Indeed, in responding to the government’s initial objection regarding the Guideline calculation and grouping (which was eventually sustained by the district court), the probation officer expressly noted the absence of any “dispute [that] the defendant committed the underlying offenses from which the laundered funds were derived and that the offense for those offenses can be determined.” First Addendum to PSR at 2 (referring to government’s objection to paragraph 61 regarding grouping). Given its position at the time of sentencing, the government is foreclosed from making any argument that the source of the laundered funds came from somewhere other than the tax and fraud charges. *See United States v. Caba*, 955 F.2d 182, 187 (2d Cir. 1992) (where appellants failed to object to factual findings in PSR at sentencing, “they waived the issue for appeal”); *United States v. Borst*, 62 F.3d 43, 47 (2d Cir. 1995) (“To the extent that [a party] now wishes to challenge factual findings he did not challenge below, he has waived that right.”).<sup>16</sup>

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<sup>16</sup> The government notes that approximately \$2.4 million was sent to Iraq, and suggests that this is far in excess of the money that could have been generated from the underlying crimes. Gov’t Br. 94 n.41. However, the PSR determined that the total donations during the relevant time frame were \$3,035,347 – this sum being the “proceeds” of the Count 15 tax conspiracy – and the government did not object to this finding. PSR ¶ 28. In addition, the proceeds from the health care fraud were allegedly in excess of \$300,000. Gov’t Br. 92. Thus, without even resorting to the alleged proceeds from the mail and wire fraud, there was more than enough

The government suggests that following the plain language of the Guideline would produce an absurd result because it could result in someone being sentenced more harshly where he or she did **not** commit any underlying criminal offense. Gov't Br. 91. In other words, under the government's hypothetical, a person who did not commit the crimes of mail and wire fraud, would actually be punished more harshly than the person who committed those crimes and also laundered money. However, the language and structure of the advisory Guidelines makes such a result inevitable in a wide variety of money laundering cases; and as noted in our main brief, while this result might provide an argument in favor of a statutory "variance" in the sentencing of a defendant who is not a professional money-lauderer, it does not provide a justification for ignoring the plain language of the Guideline.

The government, relying on two cases, suggests that the Commission "sought to associate the money laundering penalty with the offense to which the laundering most related." Gov't Br. 93 (citing *United States v. Descent*, 292 F.3d 703, 708 (11<sup>th</sup> Cir. 2002), and *United States v. Sabbeth*, 277 F.3d 94, 97 (2d Cir. 2002)). However, neither cases support this proposition. Rather, both cases address the issue whether the 2001 amendment was a substantive or clarifying amendment for retroactivity purposes. Indeed, both cases confirm that the amended Guideline redefines the way the offense level is calculated "so that the offense level for money-laundering may now be **dependent upon the offense level assigned to the underlying offense.**" *Descent*, 292 F.3d at 708 (emphasis added), quoting *Sabbeth*, 277 F.3d at 97. Moreover, neither case suggests that the sentencing court in calculating the offense level can look beyond the underlying

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money generated from the underlying offenses to commit the money laundering offenses.

offense to the offense to which the laundering is most related and, in fact, the express terms of the Guideline are to the contrary. Where there is no underlying offense or where the offense level for the underlying offense cannot be determined, the court is not instructed to look for the guideline calculation for the most closely related offense; rather, the sentencing court must follow the dictates of § 2S1.1(a)(2) regardless of how disproportionate, in the prosecutor's view, that may cause the sentence to be.

In short, the appellee's brief totally fails to demonstrate that the Guideline calculation underlying appellant Dhafir's sentence was correct. Its effort to do so is based on an impermissible attempt to change factual positions on appeal. The judgment must be reversed and remanded for resentencing.

## **7. THE RESTITUTION TO MEDICAID AND TO THE NEW YORK STATE LAW DEPARTMENT WAS UNLAWFUL.**

The governing statute, as construed by the Supreme Court and by this Court, allows a judge to order restitution only to a "victim of the offense." 18 U.S.C. § 3663A(a)(1). Nevertheless, the district court ordered appellant Rafil Dhafir at sentencing to make more than \$530,000 in restitution to two entities neither of which was a "victim" of any offense which was the subject of a conviction in this case, even as that term is more expansively defined in subsection (a)(2). The arguments to the contrary in the government's brief are unpersuasive.

a. Medicaid. With respect to the New York Medicaid restitution, the government does not appear to disagree with appellant's argument that the applicable statutory question is whether the New York State Medicaid Restitution Fund was a "victim" of "the offense" and suffered \$45,366.75 in losses caused "by the defendant's criminal conduct in the course of the scheme" for which he was convicted. *Id.*(a)(2). "[T]he scheme," as used in this statute is limited to the

offense of conviction. *See Hughey v. United States*, 495 U.S. 411 (1990). That scheme, in turn, is necessarily defined by the indictment, which describes quite specifically a particular scheme to defraud the federal Medicare program. The indictment did not charge any broader scheme to defraud insurance companies and health benefit programs, of which Medicare was just one example of a victimized party. A-205-06. There is simply no basis in the record of this case for any conclusion that Medicaid was defrauded, if it was, as part of that same “scheme.” It may have been the same “course of conduct,” but the claims against New York's Medicaid program were not within the “scheme” as defined in this indictment.

In the court below, the government took the erroneous position that this component of the restitution was justifiable on the basis of a "relevant conduct" analysis under the U.S. Sentencing Guidelines. A-1146. But that contention was directly contrary to this Court's controlling case law (which the prosecutors failed to cite). In *United States v. Germosen*, 139 F.3d 120, 131 (2d Cir. 1998), the Court held that restitution cannot be awarded to a recipient who has suffered a loss due to conduct which is merely "relevant" (as defined in USSG § 1B1.3) to the offense of conviction. Restitution can only be ordered to a "victim" (as defined) of the offense itself. In this Court, the government presses the same position without mentioning the term "relevant conduct." But in truth that is still its theory, and it cannot prevail.

b. Charity Fraud. The appellee's brief recites the history of what the district court did and said to justify the payment of \$484,988 in restitution to the New York Law Department, Gov't Br. 100-02, but does not offer any legal response to the argument advanced by the appellant. As already quoted, only a "victim" of "the offense" can receive restitution. 18 U.S.C. § 3663A(a)(1). Again, as with the Medicaid issue, the government's argument in this Court is based on a rewriting of the indictment. The Introduction to Counts 51-56 plainly alleges that Dr. Dhafir

schemed "to defraud donors to [Help the Needy] and to obtain their money ...." A-212 (emphasis added). To effectuate this "scheme," according to the indictment, Dr. Dhafir used HTN as his instrumentality. Now, to justify the restitution, the government attempts to cast HTN as a "victim" of the scheme whose money was taken for unauthorized purposes. But under the law of vicarious corporate criminal liability, HTN was plainly a guilty party if Dr. Dhafir was, and a co-conspirator cannot be a "victim." *United States v. Reifler*, 446 F.3d 65, 124-32 (2d Cir. 2006). The government's revisionist theory must be rejected, and the order of restitution reversed.

c. Factfinding and Burden. As for appellant's final point, *see* AOB 76, the government predicates its argument on a falsehood: that appellant "wholly ignores an Order of the district court confirming precisely the opposite." Gov't Br. 103. To the contrary, appellant placed that same Order in the Special Appendix (SPA-3), summarizing and citing it on the very page of the brief at issue.

For these reasons, more than \$530,000 of the restitution that appellant was ordered to pay in this case must be stricken from the judgment. The defendant is entitled to resentencing.

## CONCLUSION

The convictions for mail and wire fraud must be reversed, and a new trial granted on the remaining counts. At least, appellant Dhafir is entitled to resentencing.

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Respectfully submitted,

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CERTIFICATE OF TYPE-VOLUME COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), I certify, based on the word-counting function of my word processing system, that this brief is in a 14-point, proportionally-spaced format using MS Word's Times New Roman font. This brief exceeds the ordinary type-volume limitation for a Reply, in that it contains 7,866 words. However, on February 7, 2008, this Court (per Hall, J.) granted leave to the appellant to file an opening brief with up to 24,000 words. The instant Reply contains substantially less than one-half that number of words. Fed.R.App.P. 32(a)(7)(B)(ii).

*/s/ Peter Goldberger*\_\_\_\_\_

CERTIFICATE OF VIRUS COMPLIANCE

Pursuant to Local Rule 32(a)(1)(E), I certify that the PDF version of the Brief for the Appellant that was submitted in this case as an email attachment to [briefs@ca2.uscourts.gov](mailto:briefs@ca2.uscourts.gov) was scanned for viruses, using Command Antivirus for Windows Enterprise, and Avast! Antivirus (ver. 4.7, with current updates) for Windows XP, and no viruses were detected.

/s/ Peter Goldberger

CERTIFICATE OF SERVICE

On May 14, 2008, I caused two copies of this Reply Brief to be served on the attorneys for the government via UPS Second Day Air, postage prepaid (and a PDF copy by e-mail) to:

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I further certify pursuant to Fed.R.App.P. 25(d)(2) that ten copies of this Reply Brief were today placed with UPS for delivery via Second Day Air, postage prepaid, and properly addressed to the Clerk, United States Court of Appeals for the Second Circuit, thus filing the reply pursuant to Fed.R.App.P. 25(a)(2)(B).

*/s/ Peter Goldberger*\_\_\_\_\_