

05-5965

To be Argued by:
MICHAEL OLMSTED

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 05-5965-cr

UNITED STATES OF AMERICA
Appellee,

v.

RAFIL DHAFIR, also known as
Sealed Deft # 1

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

UNITED STATES OF AMERICA

GLENN T. SUDDABY
United States Attorney for the
Northern District of New York,
100 South Clinton Street
Syracuse, N. Y. 13261-7198
Tel.: 315-448-0672

MICHAEL C. OLMSTED
BRENDA K. SANNES
STEPHEN C. GREEN
Assistant United States Attorneys
Of Counsel

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE ISSUES PRESENTED.....	1
STATEMENT OF THE CASE.....	3
STATEMENT OF FACTS.....	6
I. The Investigation.	6
A. Case Initiation.....	6
B. Following the Money.....	10
C. The Investigation Expands To Other Crimes.....	12
1. Tax Offenses.	12
2. Health Care Offenses... ..	15
D. Tracing The Money From Jordan To Iraq And Elsewhere.....	17
II. The Arrests, and Indictments and Pretrial Litigation.	20

III.	The Trial.	23
	A. The Iraq-Based Charges.	23
	B. The Tax Charges.	24
	C. The Visa Fraud Charge.	26
	D. The Mail and Wire Fraud Charges.	27
	E. The Health Care Fraud Charges.	29
IV.	The Jury Charge.	29
V.	The Sentencing.	30
	SUMMARY OF ARGUMENT.	36

ARGUMENT:

POINT I: The Trial Court Properly Exercised Its Discretion In Granting And Enforcing The Government’s Motion In Limine To Prohibit Inquiry Or Arguments At Trial About the Government’s Alleged Motive In Investigating Dhafir. 38

1. Standard of Review.. . . . 38

2. Discussion.. . . . 38

A. The District Court Properly Granted The Motion In Limine.. . . . 39

B. The District Court Properly Prohibited Dhafir From Cross-Examining On Selective Prosecution. 41

POINT II: There Was Ample Evidence To Prove Dhafir Engaged In A Scheme To Defraud, In Violation of the Mail and Wire Fraud Statutes. 49

1. Standard of Review. 49

2. Discussion. 49

POINT III: The District Court Did Not Commit Plain Error When One Donor And Co-Founder of Help The Needy Was Permitted To Testify About His Understanding Of the Proper Use of Donations. 62

1. Standard of Review. 62

2. Discussion. 63

POINT IV:	Dhafir Cannot Assert Misjoinder On Appeal When He Elected Against Severance In the Lower Court, And In Any Event, There Was Neither Error Nor Prejudice In Joining The Charges In This Case.....	73
1.	Standard of Review.....	73
2.	Discussion.....	73
POINT V:	Charging Two Separate Conspiracies Under 18 U.S.C. § 371 – A Conspiracy to Violate IEEPA (Count One) and A Conspiracy to Defraud the IRS (Count Fifteen) Was Not Plain Error.	80
1.	Standard of Review.....	80
2.	Discussion.....	80
A.	The Charges Were Not Multiplicitous.....	80

	B.	There Was No Error In Imposing Partially Consecutive Sentences.....	86
POINT VI:		The Court Properly Concluded That The Applicable Money Laundering Guideline Was §2S1.1(a)(2) Rather Than §2S1.1(a)(1).....	89
	1.	Standard of Review.....	89
	2.	Discussion.....	89
POINT VII:		The District Court’s Restitution Order Is Proper Under Governing Statutory Authority.....	95
	1.	Standard of Review.....	95
	2.	Discussion.....	95
	A.	New York State Medicaid Restitution Fund.....	96
	B.	State of New York Department Of Law, Restitution Fund. . . .	100

C. Dhafir’s Objections To The
Restitution Amount Were Fully
Submitted To and Resolved By
The District Court..... 103

CONCLUSION. 105

TABLE OF AUTHORITIES

CASES:

Blakely v. Washington,
542 U.S. 296 (2004). 5, 94

Herring v. Meachum,
11 F.3d 374 (2d Cir. 1993). 78

Hughey v. United States,
495 U.S. 411 (1990). 99

Jackson v. Virginia,
443 U.S. 307 (1979). 49

*Illinois, ex rel. Madigan v. Telemarketing
Associates, Inc.*,
538 U.S. 600 (2003). 58

Pinkerton v. United States,
328 U.S. 640 (1946). 97

<i>Smith by Smith v. Board of Education, North Babylon Union Free School District, 844 F.2d 90 (2d Cir. 1988).</i>	63
<i>Taylor v. Illinois, 484 U.S. 400 (1988).</i>	40
<i>United State v. Rahman, 189 F.3d 88 (2d Cir. 1999).</i>	63, 64
<i>United States ex rel. Tarallo v. LaVallee, 433 F.2d 4 (2d Cir. 1970).</i>	75
<i>United States v. Abboud, 438 F.3d 554 (6th Cir.), cert. denied, ___ U.S. ___, 227 S. Ct. 446 (2006).</i>	40, 48
<i>United States v. Alessi, 638 F.2d 466 (2d Cir.1980).</i>	82
<i>United States v. Allen, 491 F.3d 178 (4th Cir. 2007).</i>	88
<i>United States v. Andreadis, 366 F.2d 423 (2d Cir. 1966).</i>	50
<i>United States v. Angelica, 859 F.2d 1390 (9th Cir. 1988).</i>	98
<i>United States v. Armstrong, 517 U.S. 456 (1996).</i>	40

<i>United States v. Ballard</i> , 322 U.S. 78 (1944).	63
<i>United States v. Beltempo</i> , 675 F.2d 472 (2d Cir. 1982).	74, 75
<i>United States v. Berrigan</i> , 482 F.2d 171 (3d Cir. 1973).	40
<i>United States v. Betts</i> , 509 F.3d 441 (8th Cir. 2007).	88
<i>United States v. Biedeski</i> , 933 F.2d 539 (7th Cir. 1991).	54
<i>United States v. Bilzerian</i> , 926 F.2d 1285 (2d Cir.1991)..	83
<i>United States v. Blakney</i> , 941 F.2d 114 (2d Cir. 1991).	76, 77
<i>United States v. Blount</i> , 291 F.3d 201 (2d Cir. 2002).	74
<i>United States v. Bontkowski</i> , 865 F.2d 129 (7th Cir. 1999).	40
<i>United States v. Booker</i> , 543 U.S. 220 (2005).	5, 87, 88

<i>United States v. Boyd</i> , 222 F.3d 47 (2d Cir. 2000).	96, 97, 98
<i>United States v. Broce</i> , 488 U.S. 563 (1989).	82
<i>United States v. Brock-Davis</i> , 504 F.3d 991 (9th Cir. 2007).	98
<i>United States v. Casamento</i> , 887 F.2d 1141 (2d Cir. 1989).	77
<i>United States v. Ciccone</i> , 219 F.3d 1078 (9th Cir. 2000).	54
<i>United States v. Crowley</i> , 318 F.3d 401 (2d Cir. 2003).	38
<i>United States v. Cummings</i> , 189 F. Supp. 2d 67 (S.D.N.Y. 2002).	98
<i>United States v. D'Amato</i> , 39 F.3d 1249 (2d Cir. 1994).	50, 55
<i>United States v. Descent</i> , 292 F.3d 703 (11th Cir. 2002).	93
<i>United States v. Dhafir</i> , 461 F.3d 211 (2d Cir. 2004).	6

<i>United States v. Diamond</i> , 430 F.2d 688 (5th Cir. 1970).	54
<i>United States v. Dickerson</i> , 370 F.3d 1330 (11th Cir. 2004).	98
<i>United States v. Elliott</i> , 62 F.3d 1304 (11th Cir. 1995).	54
<i>United States v. Estrada</i> , 320 F.3d 173 (2d Cir. 2003).	82
<i>United States v. Evangelista</i> , 122 F.3d 112 (2d Cir. 1997).	72
<i>United States v. Eversole</i> , 487 F.3d 1024 (6th Cir.), <i>cert. denied</i> , __ U.S. __, 128 S. Ct. 649 (2007).	88
<i>United States v. Feliciano</i> , 223 F.3d 102 (2d Cir. 2000).	44, 72
<i>United States v. Gelzer</i> , 50 F.3d 1133 (2d Cir. 1995).	73, 74, 75
<i>United States v. Gore</i> , 154 F.3d 34 (2d Cir. 1998).	80, 81
<i>United States v. Gotti</i> , 487 F.3d 1024 (6th Cir.), <i>cert. denied</i> , __ U.S. __, 128 S. Ct. 649 (2007).	89

<i>United States v. Grundhoefer</i> , 916 F.2d 788 (2d Cir. 1990).	98
<i>United States v. Haddad</i> , 462 F.3d 783 (7th Cir. 2006).	50
<i>United States v. Handakas</i> , 286 F.3d 92 (2d Cir. 2002).	85
<i>United States v. Rybicki</i> , 354 F.3d 124 (2d Cir. 2003).	85
<i>United States v. Hawkey</i> , 148 F.3d 920 (8th Cir. 1998).	58, 59, 60
<i>United States v. Hensley</i> , 91 F.3d 274 (1st Cir. 1996).	98
<i>United States v. Hudson</i> , 53 F.3d 744 (6th Cir.1995).	75
<i>United States v. Jones</i> , 52 F.3d 924 (11th Cir. 1995).	40, 82
<i>United States v. Jones</i> , 482 F.3d 60 (2d Cir. 2006), <i>cert. denied</i> , ___U.S.___, 127 S. Ct. 1306 (2007).	85
<i>United States v. Jones</i> , 455 F.3d 134, 146 (2d Cir. 2006).	82

<i>United States v. Kinney</i> , 211 F.3d 13 (2d Cir. 2000).	49, 61
<i>United States v. Lane</i> , 474 U.S. 438 (1986).	73, 78, 79
<i>United States v. Lucien</i> , 347 F.3d 45 (2d Cir. 2003).	95
<i>United States v. Lyons</i> , 453 F.3d 1222 (9th Cir. 2006), <i>amended and superseded</i> , 472 F.3d 1055 (9th Cir. 2007), <i>cert.</i> <i>denied</i> , __ U.S. __, 127 S. Ct. 2285 (2007).	58
<i>United States v. Macchia</i> , 35 F.3d 662 (2d Cir. 1994).	82
<i>United States v. Mascuch</i> , 111 F.2d 602 (2d Cir. 1940).	81
<i>United States v. Matera</i> , 489 F.3d 115 (2d Cir), <i>cert. denied</i> , __ U.S. __, 128 S. Ct. 424 (2007).	87
<i>United States v. McLeod</i> , 251 F.3d 78 (2d Cir. 2001).	86, 87

<i>United States v. Mizrachi</i> , 48 F.3d 651 (2d Cir. 1995).	86, 87
<i>United States v. Mosley</i> , 965 F.2d 906 (10th Cir. 1992).	40
<i>United States v. Nakashian</i> , 820 F.2d 549 (2d Cir. 1987).	82
<i>United States v. Oaks</i> , 508 F.2d 1403 (9th Cir. 1974).	40
<i>United States v. Olano</i> , 507 U.S. 725 (1993).	43, 81
<i>United States v. Orozco-Prada</i> , 732 F.2d 1076 (2d Cir. 1984).	82
<i>United States v. Quintanilla</i> , 2 F.3d 1469 (7th Cir. 1993).	62
<i>United States v. Regan</i> , 103 F.3d 1072 (2d Cir. 1997).	40, 48
<i>United States v. Reifler</i> , 446 F.3d 65 (2d Cir. 2006).	50, 54, 87, 95
<i>United States v. Rice</i> , 38 F.3d 1536 (9th Cir. 1994).	98

United States v. Ronquillo,
508 F.3d 744 (5th Cir. 2007). 88

United States v. Roshko,
969 F.2d 9 (2d Cir.1992).. 82

United States v. Sabbeth,
277 F.3d 94 (2d Cir. 2002). 93

United States v. Salameh,
152 F.3d 88 (2d Cir. 1998). 62

United States v. Seymour,
468 F.3d 378 (6th Cir. 2006). 43

United States v. Shellef,
507 F.3d 82 (2d Cir. 2007). 77

United States v. Smith,
133 F.3d 737 (10th Cir. 1997). 59

United States v. Spano,
476 F.3d 476 (7th Cir.), *cert.*
denied, 127 S. Ct. 2153
(2007). 88

United States v. Stewart,
433 F.3d 273 (2d Cir. 2006). 39, 40

United States v. Stewart,
2004 WL 113506 (S.D.N.Y.
January 26, 2004). 39, 48

United States v. Tubol,
191 F.3d 88 (2d Cir. 1999). 76

United States v. Vasquez,
389 F.3d 65 (2d Cir. 2004). 89

United States v. Washington,
705 F.2d 489 (D.C. Cir. 1983). 40

United States v. Young,
470 U.S. 1 (1985). 81

United States v. Yousef,
327 F.3d 56 (2d Cir. 2003). 62, 78, 79

FEDERAL STATUTES, RULES AND OTHER
AUTHORITIES

31 C.F.R. Part 575. 3

50 U.S.C. §§ 1701 *et seq.*, IEEPA. 3

18 U.S.C. § 371. 2, 3, 4, 80, 81

18 U.S.C. § 1001. 16

18 U.S.C. § 1347. 99

	PAGE
18 U.S.C. § 1956(a)(1).	93
18 U.S.C. § 1956(a)(2)(A)..	2, 3, 33, 90, 93
18 U.S.C. § 1956(a)(2)(B)..	93
18 U.S.C. § 3553(a)..	35, 88
18 U.S.C. § 3584.	86
18 U.S.C. § 3663, Victim Witness Protection Act ("VWPA").	97
18 U.S.C. § 3663A, Mandatory Victim Restitution Act, (the "MVRA").	95, 96
18 U.S.C. §3663A(c)(1)(A)(ii).	96
18 U.S.C. § 3771(d)(2).	30, 102
Fed. R. Crim. P. 8.	75, 78
Fed. R. Crim. P. 12(b)(3)(D)..	74
Fed. R. Crim. P. 14.	74
Fed. R. Crim P. 52..	77
Fed R. Crim. P. 52(b).	81
Fed. R. Evid. 103..	43

Fed. R. Evid. 103(a)(1).	66
U.S.S.G. § 2S1.1(a)(1).	<i>passim</i>
U.S.S.G. § 2S1.1(a)(2).	<i>passim</i>
U.S.S.G. § 3D1.4	32, 33
U.S.S.G. § 5G1.2(d).	87, 88
U.S.S.G. § 5G1.3	87

**United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 05-5965-cr**

UNITED STATES OF AMERICA,
Appellee,

– v. –

RAFIL DHAFIR,
Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Statement Of The Issues Presented

1. Whether the trial court abused its discretion by prohibiting cross examination on “the Government’s” motive in seeking the indictment in this case, while allowing cross examination on the motive, bias and credibility of individual witnesses?
2. Whether the evidence proving that defendant-appellant Rafil Dhafir falsely represented the purposes of a charity that he controlled, Help the Needy, and then used donations to that charity for personal purposes, was sufficient to convict him of mail and wire fraud?
3. Whether the court committed plain error when it allowed testimony from one witness, who co-founded

Help the Needy and donated to it, concerning his understanding of Dhafir's use of donations?

4. Whether Dhafir waived the right to contest joinder and, even if not, whether constitutional error was committed where health care fraud counts were joined with other charges, including other fraud counts that were committed at the same time as the health care fraud charges involving proof of the same overseas travel, and whether any prejudice flowed from the alleged misjoinder?

5. Whether Count One, which charges Dhafir with conspiring to send money into Iraq is multiplicitous with Count Fifteen, which charges him with conspiring to defraud the IRS of tax revenue and of its oversight of tax-exempt organizations, simply because both are violations of 18 U.S.C. § 371, and whether it was plain error not to dismiss Count Fifteen as a result?

6. Whether the district court correctly calculated Dhafir's sentence for "promotional" money laundering (18 U.S.C. § 1956(a)(2)(A)) under U.S.S.G. § 2S1.1(a)(2), linking the offense level to the promoted offense, rather than under U.S.S.G. § 2S1.1(a)(1), linking the offense level to a predicate offense, where the laundered money was not substantially derived from any underlying offense for which Dhafir was responsible?

7. Whether restitution was ordered appropriately to the victims of Dhafir's health care offenses, and

whether New York State's Department of Law, Restitution Fund, as successor in interest to the defrauded charity, was the appropriate restitution payee for restitution on the mail and wire fraud offenses.

Statement Of The Case

On February 19, 2003, Rafil Dhafir and others were charged by Indictment with conspiring to violate the International Economic Emergency Powers Act (IEEPA), in violation of 18 U.S.C. § 371, and with promotional money laundering, in violation of 18 U.S.C. § 1956(a)(2)(A). (A37)¹ Specifically, because Dhafir arranged to transfer money into Iraq, he was charged with conspiring to violate regulations and orders known as the Iraqi Sanctions Regulations, 31 C.F.R. Part 575, which were issued pursuant to IEEPA, 50 U.S.C. §§ 1701 *et seq.* The essence of the charges was that Dhafir operated a "charity" that collected donations within the United States, sent

¹ References to the Joint Appendix will be designated "A_". The government has submitted Volumes IV and V to augment the Appellant's "Joint Appendix." References to the Presentence Report (with its three addenda), which is filed with the court under seal will be designated "PSR_".

money to Jordan, and then directed some of the donated money to be taken into Iraq from Jordan.²

Following his arrest, Dhafir was detained as a flight risk pending trial. The detention order was appealed to this Court, and was affirmed under docket number 03-1441.

In April 2003, the Grand Jury issued a Superseding Indictment, adding tax evasion charges. In July 2003, the Grand Jury issued a Second Superseding Indictment, adding a second, tax-related, conspiracy charge,³ a false tax document charge, a visa fraud charge, 24 health care fraud charges, a false statement charge, and forfeiture allegations.⁴ In April

² In his recitation of the case, Dhafir asserts he was charged with conspiring only with unnamed coconspirators. (Brief at 6-7, 23, 57) In fact, the Indictment charges five other named coconspirators in two conspiracies.(A37-52)

³ The conspiracy charge accused Dhafir and others of conspiring to defraud the IRS of its ability to assess and collect taxes from donors who had contributed to an unauthorized charity, in violation of 18 U.S.C. § 371.

⁴ Dhafir claims twice in his brief that Help the Needy Endowment, Inc. was added as a defendant for the first time in this second superseding indictment. (Brief at 1, 5) In fact, Help the Needy Endowment,

2004, the Grand Jury issued a Third Superseding Indictment, adding ten mail and wire fraud charges.

In June 2004, the Supreme Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), which generated substantial uncertainty about whether sentencing enhancements needed to be pled in the indictment and proved beyond a reasonable doubt to a jury. In response, the government sought and obtained a Fourth Superseding Indictment (hereinafter, “the Indictment”), which listed the sentencing enhancements that the government expected to be pertinent to sentencing.⁵

Prior to trial, Dhafir filed a motion to dismiss the Indictment. Dhafir claimed (a) the IEEPA was unconstitutional, (b) the Indictment violated his First Amendment rights, and (c) selective prosecution. Dhafir’s unsuccessful constitutional challenge to IEEPA joined in the motion of a co-defendant, Osameh al Wahaidy, and this Court affirmed the district court’s

Inc. was a named coconspirator and co-defendant in the first and every later Indictment (A37, 47, 49) and was severed shortly before trial, together with Help the Needy, on motion of the government.

⁵ Because the Supreme Court decided *United States v. Booker*, 543 U.S. 220 (2005) before the case was submitted to the jury, the sentencing enhancements were simply redacted from the Indictment as surplusage.

denial of al Wahaidy's motion in *United States v. Dhafir*, 461 F.3d 211 (2d Cir. 2004).

Jury selection commenced on October 18, 2004. The trial continued until February 10, 2005, when the jury returned a verdict of guilty on Counts 1 and 2 and Counts 4 - 60 of the Indictment, and a verdict of not guilty on Count 3, which was a money laundering charge.

On October 27, 2005, the district court (Mordue, J) imposed a below-Guidelines sentence of 264 months incarceration, and a term of three years supervised release. The parties then litigated restitution issues, which were resolved in an Amended Judgment of January 24, 2006, requiring payment of \$865,272.96 to various victims. This appeal followed.

Statement Of Facts

I. The Investigation

A. Case Initiation

The investigation of this case began in April, 1999, when a Syracuse police officer received information from Fleet Bank concerning an account in the name of Maher Zagma, with an address in Jordan.

(A1229)⁶ Bank records provided to the officer disclosed that over 100 checks had been deposited into the Zagha Account from an account at the Oneida Savings Bank in the name of “Help The Needy,” each check in an amount just less than \$10,000. (A1449-53) To Fleet Bank and to the officer, the activity was suspicious because it appeared that the checks were structured to avoid an inapplicable cash transaction reporting requirement. (A1230)⁷ Fleet also disclosed that the Social Security number used to open the account was not valid. The Syracuse police also discerned that some of the money had been transferred from Zagha’s Fleet account to “M Zagha Trading Establishment” and deposited in the Jordan Islamic Bank in Amman, Jordan. (A1231, 1454-55). A bank surveillance photograph showed that transactions in Zagha’s Fleet account were actually conducted by

⁶ Dhafir begins his recitation of the facts with the erroneous assertion that the case was begun due to a suspicion of terrorist financing (Brief at 12), which he maintains as a theme in his appeal without any record citation. In fact, as described below, the police officer initiating the investigation testified that he had no such suspicion (A1237).

⁷ In a meeting in August 2002, which was surreptitiously videotaped pursuant to court authorization, Dhafir and the other trustees of Help the Needy confirmed that avoiding bank scrutiny was, in fact, the reason for keeping the checks under \$10,000. (A1533)

Dhafir, a resident of Fayetteville, New York and a physician with an oncology practice in Rome, New York. (A1235, 1469)

The Syracuse police soon learned that all transactions in the Help the Needy account at Oneida Savings Bank were also conducted by Dhafir, even though he was not one of its signatories. The police then found that the identifying information for the account's signatories – Osameh al Wahaidy and Mo Harairi – was false. (A1232-34) Recognizing the complexity and geographic breadth of the suspicious activity, the Syracuse police officer responsible for the case referred the matter to the multi-agency Central New York Financial Crimes Task Force and ceased his own independent investigation. (A1236)

Agents on the Financial Crimes Task Force discovered that Help The Needy claimed to be a licensed, tax-exempt organization that raised money for the needy in Iraq (A1258-60, 1521-23). Records obtained from Oneida Savings Bank and Fleet Bank showed deposits totaling over \$1 million into the account since it was opened in 1995. The account maintained an average balance of over \$200,000, and when Dhafir transferred any money, he wrote sub-\$10,000 checks to Zagma's Fleet account. (e.g. A1449-52)⁸ From Zagma's Fleet account, the money was used

⁸ At trial, al Wahaidy testified that Dhafir signed al Wahaidy's name on each of the "structured" checks, and that he did not know how Help the Needy's money

to purchase electronic equipment and textiles. (A1248-49, 1466-68) Other money was sent from Zagma's Fleet account to M Zagma Trading Establishment, which was a commercial business in Amman specializing in textile sales. (A1249-50)

In fact, Help The Needy was not a tax-exempt organization and did not have a license to send aid to Iraq.⁹ Indeed, the tax-exempt number used by Help The Needy had been assigned to a small charity in Troy, New York (the Somali Relief Network), the authorized purpose of which was to alleviate the harsh conditions in Somalia. (A1567-68) Bank records and interviews also showed that, before Dhafir had opened Help the Needy's bank account in September 1995, he had opened an account at Fleet Bank in the name of the IANA Relief Fund, using the same nominee signatories and the tax identification number of yet another organization. (A1470) The IANA Relief account at Fleet was the source of an earlier series of sub-\$10,000 checks into Zagma's Fleet account. (A1241-47, 1456)

was spent. (A1313)

⁹ A license was necessary to send humanitarian assistance to Iraq. Licenses were not given to send money into Iraq, due to the lack of control over fungible currency once it was taken into Iraq. (A1299-1303)

Thus, at an early stage of the investigation, the government had determined that Dhafir controlled three bank accounts using nominees, false Social Security numbers, and tax exempt numbers issued to other entities. Dhafir was using contributions that were solicited from the public and making transfers into the Zagha account, from which he purchased commercial products here in the United States or sent money to a commercial account in Amman, Jordan.¹⁰ Those conclusions, once proven at trial, formed the basis of the convictions on the mail and wire fraud counts (Counts 51 - 60) of the Indictment.

B. Following the Money

In addition to the apparently commercial expenditures from the Zagha Fleet account, \$200,000 had been transferred into an account at M&T Bank owned by Osameh al Wahaidy. Al Wahaidy was the signatory on the Help The Needy account that was, itself, the source of the funds in the Zagha account. (A1251, 1615) Records obtained from M&T Bank revealed that al Wahaidy's account was opened with a \$100,000 check drawn on the Jordan Islamic Bank, where Help The Needy's funds had been sent. (A1252, 1624) Bank records showed that the \$300,000 had

¹⁰ Investigators later found a fourth account in Help the Needy's name at Key Bank that had been established to collect donations that were made through automatic electronic deposits. (See A781)

been paid from the account to "M.C.M.C.", "Alberr LLC", and "Mahir Majid." (A1616-18)¹¹

Business records and tax returns disclosed that (1) M.C.M.C. was Dhafir's medical practice (A1596), (2) Alberr LLC was a partnership belonging to Rafil Dhafir that owned commercial real estate in Syracuse, New York (A1593), and (3) Mahir Majid was a substantial contributor to Help The Needy and a personal creditor of Dhafir. (A1291, 1613-14)

Trash recovered from Help the Needy's dumpsters included fliers stating that the money raised

¹¹ Dhafir's brief erroneously refers to the M&T account as an account "Al Wahaidy opened in HTN's name..." (Brief at 34). In fact, al Wahaidy opened it in his own name as a convenience to Dhafir. (A1315-24, 1615) As his trial testimony made clear, al Wahaidy agreed to deposit what he was told was Dhafir's own money from Zagha in Jordan, and then he gave Dhafir a book of pre-signed blank checks, so that Dhafir could dispose of the money as he saw fit. (A1315-20) Several of those checks were completed in Dhafir's handwriting and made payable to Dhafir's businesses, as described above (A1321-25), and the remaining signed, blank checks were found in a search of Dhafir's residence in February 2003. (A1619-22) Bank records introduced at trial showed that the money that al Wahaidy believed was Dhafir's own money was, in fact, donated Help the Needy funds. (e.g. A821, 840, 1560)

for Help The Needy would be sent to Iraq. (A1521-23) In addition to Help The Needy publicity, the trash searches uncovered a copy of the Office of Foreign Assets Control regulations entitled "What You Need To Know About the U.S. Embargo," which explained the licensing requirements for humanitarian assistance in Iraq. (A1254, 1517-19) Also found in the discarded trash was an e-mail from Dhafir to Maher Zagha telling him to direct "Iyad" to distribute money in Iraq. (A1255)

Search warrants were executed on Zagha's email account, which contained communications with Dhafir concerning the delivery of Help The Needy's funds, both into Iraq and elsewhere. (A1472-92) For example, Dhafir wrote to Zagha saying: "Can you please send one hundred thousand from the relief to Dr. Najim [Dhafir's brother in Baghdad]. Arrange it with him and let me know." (A1474)

C. The Investigation Expands to Other Crimes

1. Tax Offenses

In November 2001, Rafil Dhafir arranged to incorporate an organization called Help The Needy Endowment, Inc. (A1563-66) He asked Ayman Jarwan, the Executive Director of Help the Needy Endowment, Inc., to assist him in obtaining tax-exempt status for the organization. On November 15, 2001, at Dhafir's request, Jarwan contacted a tax return

preparer, Colleen Williams, to prepare an Application for Recognition of Exemption (IRS Form 1023) on behalf of Help The Needy Endowment, Inc. (A1345)

The tax return preparer questioned Jarwan specifically on the way in which Help The Needy's money was distributed. When his answers were vague and inconsistent, and disagreed with answers Dhafir later gave her, she withdrew from the project and at Dhafir's request sent the draft forms to G. William Hatfield, Dhafir's accountant. In her letter to Hatfield she noted:

The information necessary to properly prepare all required forms has been inconsistent between volunteers I have consulted with. (A1569)

During the time Williams was working with Jarwan, government investigators and an Assistant U.S. Attorney contacted her and asked her to assist their investigation by wearing a wire and writing scripted letters to Jarwan. In each instance she declined to assist, except to provide documents pursuant to subpoena. (A1366-67, 588)¹²

¹² In his brief, Dhafir claims that the agents' request that Williams assist the investigation, coupled with their telling her that 9/11 might not have happened if more citizens had gotten involved, implied to her that Dhafir "was thought to be planning deadly terrorist attacks." (Brief at 13) At trial, however, when asked by Dhafir's counsel: "What was it that they said

Hatfield completed the IRS Form 1023 and sent it to the IRS on or about August 8, 2002. That form (1) falsely described Help The Needy's activities as having recently concentrated on feeding the needy in the United States and omitted any reference to its unlicensed transmission of money into Iraq; (2) falsely asserted that Help the Needy Endowment, Inc. did not have a predecessor organization; and (3) falsely stated that Help the Needy Endowment, Inc. did not have any income or assets.(A1570-77)¹³ Jarwan's email showed that Dhafir himself had drafted the false information. (A1350-52)

Dhafir's personal tax returns revealed that he deducted over \$1 million for his own contributions to Help The Needy, even though he was well aware that it did not have tax-exempt status, and that its mission involved a violation of federal law, so that tax-exempt status was unobtainable. (e.g. A1587-95) Those fraudulent deductions formed the basis for the tax evasion convictions on Counts 17 - 22.

to you in relationship to this organization and 9/11" Williams testified that: "They didn't compare the two." (A1368)

¹³ The false IRS Form 1023 was the basis of Count 16, and its filing was one of the overt acts set out in the tax-related conspiracy charged in Count 15.

2. Health Care Offenses

In conducting physical surveillance of Dhafir's house during May, 2002, investigators noted that he seldom went to his medical practice. (A1261, 1287) He spent several hours at his office on Monday, Tuesday and Wednesday, but did not go to the office on Thursdays or on Fridays. (A1287)

Investigators wrote to Dhafir's Medicare carrier ("HNNY") and requested billing information for Dhafir's medical practice during two designated times when they knew that Dhafir had been out of the country raising money for Help the Needy. (A1423) HNNY reported that there were substantial billings during both periods that were associated with codes requiring physician presence in the office. As a result, the investigation widened, and further information about Dhafir's billing practices while he was overseas was sought and obtained.

A representative from HNNY, Nina Carosella arranged to meet with Dhafir on September 13, 2002, to ask about his Medicare billing practices. When she arrived at the medical practice, however, Dhafir was absent. (A1425) Instead, Carosella met Priscilla Dhafir, Dhafir's wife and billing assistant. Carosella asked Priscilla Dhafir about the billing practice for chemotherapy, for which Dhafir had claimed to have been present. Priscilla Dhafir assured Carosella that

Dhafir was present whenever chemotherapy was administered.(A1419-21)¹⁴

On the following Monday, Carosella spoke on the telephone to Dhafir. She asked him to confirm Priscilla Dhafir's assertion that he was always present during chemotherapy. He stated that, during that year (2002) he had not used a back-up physician on any occasion because he had not been out of the office when chemotherapy was being administered during that year. (A1426-27) In fact, he had been out of the office as recently as two weeks before, when chemotherapy had been administered and billed as if he were present. (A1611)

On October 8, 2002, Carosella wrote to Dhafir that Medicare was unable to determine who performed the services for ten beneficiaries whose records had been reviewed in the on-site review on September 13, 2002, and who investigators knew had been treated for chemotherapy in Dhafir's absence. (A1599-1601) Carosella asked Dhafir to complete a certification form certifying the identity of the provider. On October 24, 2002, Dhafir wrote to Carosella stating that his long-standing practice was to directly provide and directly supervise the care and treatment of each of his patients, even though his nurse practitioner may be able to perform certain services without his direct supervision. Dhafir wrote "In the few times when I am unable to be

¹⁴ That statement formed the basis of Priscilla Dhafir's guilty plea for violating 18 U.S.C. § 1001.

present, I make arrangements so that there is physician coverage during absence.” Dhafir then certified in writing that the services provided to these ten beneficiaries were “provided directly by me or under my direct supervision, or by another physician under arrangement with me.” (A1598)

D. Tracing the Money from Jordan to Iraq and Elsewhere

The investigation continued to focus on the use of Help The Needy's money after it was sent to Jordan. On August 27, 2002, law enforcement officers found Help the Needy documents in a dumpster outside Help The Needy's office. (A1252a) The documents tracked deposits and transfers of Help the Needy's monies from February 1995 to December 1999, including numerous transfers to “Iyad.” Some of the transfers to Iyad were reflected on a Jordan Islamic Bank statement in the name of Iyad Abdel Latif Ibrahim and Mostafa Qahtan Mostafa, which was also found in the trash. (A1505-16) Documents found in the trash and later in Dhafir's house revealed that Iyad was involved in the distribution of food, funds, and other activities inside Iraq on behalf of Help The Needy. (e.g. A1520-23)

In addition to these transfers to Iyad, the documents reflected other large transfers of Help the Needy money, including \$100,000 to Rafil Dhafir on January 15, 1998, and \$100,000 to Rafil Dhafir and “Nijm” on September 1, 1997. Those \$100,000 transfers corresponded with money diverted from Help

The Needy's account through Zagher's Fleet Bank account into Osama al Wahaidy's M&T Bank account, as described above.

On August 31, 2002, Rafil Dhafir met with the Trustees of Help the Needy in a hotel room in Washington, D.C. That meeting was audio and videotaped pursuant to a court order. In the meeting, Rafil Dhafir acknowledged that he had been using another organization's tax identification number, that Help The Needy sent money into Iraq, and that Help The Needy had not been complying with the law. Dhafir explained that the money that had been donated by automatic electronic transfers from donors into a Help the Needy account at Key Bank to assist families was not being spent at all, rather it was kept by Dhafir for emergencies. Dhafir also discussed the organization's goals, saying:

. . . the issue of feeding and rescue. It is a good idea. But, that's not the major goal. Our major goal is the issue of "Al-Dawa" [Islamic mission work] . . . To us that's the most important. . . Even if it was under aid disguise, that's the most important question (A1533)

At that meeting, one of the Trustees told Dhafir that the money in Jordan (approximately \$700,000) should be split up into several different accounts to protect against government seizure. (A1532) Dhafir told the others that, while they could disclose to people like

Ayman Jarwan how they raised money, they should not tell anyone how it was used in Iraq.¹⁵ (A1535-36)

On October 3, 2002, the government executed a search warrant on a package that Rafil Dhafir had mailed to himself from Egypt. Inside was a ledger of Help The Needy's credits and debits. (A767-79) The ledger updated a ledger that investigators had previously found in the trash.

During the following two months, Dhafir continued to send e-mails to Zaghera in Jordan. In November, he directed Zaghera to give \$19,200 of Help the Needy's money to Haifal Abdallah, who worked for a pharmaceutical company in Montreal, Canada. (A1627) E-mail correspondence further revealed that Dhafir was planning to go to Saudi Arabia in February, 2003. According to his e-mails and his visa application, he was planning to finalize an investment company with Syed Badawi, a former Syracuse resident who worked for Al-Khair Trading Association, a group specializing in "industrial, electronic and laundry equipment." (A1625-26) Other e-mails revealed that Dhafir had directed Zaghera to

¹⁵ At trial, Jarwan, who was the Executive Director of Help the Needy, testified that he had no control over the money, and was unaware how the money was used in Iraq (A1354-55). He said he once asked how the money was being used, and Dhafir answered, "[D]on't you trust me?" (A1344)

transfer \$213,000 of Help the Needy's money into accounts owned by Badawi in anticipation of his trip. (A1628-32)

II. The Arrests, Indictments and Pretrial Litigation

On February 26, 2003, Dhafir, Jarwan and al Wahaidy were arrested, and 15 search warrants were executed. Materials taken during the searches were translated and reviewed. Witnesses were interviewed and put before the Grand Jury. Tax fraud, visa fraud, health care fraud, and mail and wire fraud charges followed.

After his first motion to dismiss was denied, Dhafir moved to dismiss the indictment a second time in July 2004. He claimed that he had been the victim of selective prosecution, first simply because he was a Moslem, and second because the government had originally believed that he was a terrorist, and the variety of offenses charged by the Grand Jury were simply ornaments on the barren tree of its hopes for a terrorism trial. (Docket 298)

The government responded in two ways. First, it pointed out that Dhafir was unable to point to any similarly situated individual who had not been charged with an offense, which is the essence of a selective prosecution charge. Second, the government vigorously denied the underlying accusation that it was improperly motivated. Noting first that the case had

begun in 1999, the government pointed to its many filings (including drafts from May 2001) in which the predication for each of its investigative steps (e.g. search warrants, wiretaps, letters rogatory) was based on Dhafir's misuse of Help the Needy's funds, and was described in each case first as a mail or wire fraud and secondarily as an IEEPA violation, and a conspiracy. (Docket 300)

The Court denied the motion to dismiss and found that there was no support in the record for any inference that the investigation or arrests were based upon an impermissible motive or purpose. (Docket 314)

Because Dhafir had repeatedly argued in court and in the press that he was the victim of frustrated terrorism investigators, the government anticipated that he intended to raise that issue at trial. The government filed a motion *in limine* to prohibit such an argument before the jury. The government argued that its motivation was irrelevant to the proof or the defense of the charges set out in the Indictment. (A227-38)

The Court concurred. It found that the government's motivation went to the issue of selective prosecution, which is an issue of law solely for the court to determine. Accordingly, while Dhafir was permitted to challenge the credibility of witnesses, he was precluded from seeking jury nullification by arguing that the entire case was an act of retaliation by

the government for its alleged inability to find evidence of terrorism. (A256)

In a pretrial conference, Dhafir sought clarification of the Court's order, asking if he would be permitted to challenge the bias or credibility of witnesses, particularly of the government agents.

[DEFENSE COUNSEL]: I'm trying to understand whether by your Honor's ruling, you're indicating that you don't want us to cross-examine agents or other witnesses or make arguments with respect to the professionalism, the credibility of the agents who investigated the case.

After the government noted that the court's order does not restrict attacks on "the credibility of the agents," the Court responded:

THE COURT: I will handle things like that when we're out in the courtroom, but I'm just talking about the credibility of the investigation and things. I don't know what you're talking about. You certainly have a right to impeach every witness that they bring out here.

[DEFENSE COUNSEL]: I was just trying to make sure Judge, that you're not precluding us, I understand we're not in a position --

THE COURT: Credibility is an issue with every witness.

[DEFENSE COUNSEL]: Fine, I just wanted to make sure I wasn't misreading this. I always thought that to be the case, but I just didn't want to run afoul so early in the game. (A261-63)

III. The Trial

The trial began on October 18, 2004. The evidence was introduced, generally, in the order of the counts, which paralleled the chronology of the investigation.

A. The Iraq-Based Charges

With respect to the Iraq-based charges (Counts 1 - 23 and 51 - 60), documents written by Dhafir and circulated to the public, a videotape of Dhafir addressing donors, as well as the direct testimony of the participants all showed that Dhafir raised money, with others, in the United States and sent it into Iraq, in knowing violation of the sanctions (Count 1).

Walid Smari testified that he traveled to Iraq at Dhafir's request to oversee the distribution of money from Help the Needy. (A344) He also acknowledged that for several years he was the intermediary between Dhafir and the money couriers (Iyad and Mustafa) who took the money from Jordan into Iraq. (A1268-81) He also described how he and Dhafir consulted about the use of money in Iraq. (A1269, A1279) Mahir Majid testified that he had donated money to Help the Needy,

and had arranged with Dhafir to use Help the Needy to send money to his family in Iraq. (A1292-94)

The government called four donors to Help the Needy. Muhammed Naim, Khalid Qazi, Ahmed Elantably, and Maqsood Ahmad each testified that he had intended to provide assistance to needy people, especially children, in Iraq.

Diana Wellmon testified that she was completely unaware of the actual operation of Help the Needy and that she was its President in name only. (A1412-14) She said that she signed documents given to her by Dhafir without reading them. (A1415-16) She further admitted that she found out she was President only after the fact, and that there had never been meetings of the officers and directors of Help the Needy, despite the fact that her name appears on the minutes of several such meetings (A1412).

Agents introduced bank records and emails showing that Dhafir sent the money to Jordan in order to promote the IEEPA offense (Counts 2 through 14). (A1306-11, 781-83)

B. The Tax Charges

Emails and the testimony of Ayman Jarwan, G. William Hatfield and Colleen Williams showed that Dhafir was the author of false information on the application for tax exempt status (A1346-47) and that he knew that the false information was designed to

mislead the IRS concerning the activity of Help the Needy. (e.g A1351)

Hatfield, for example, testified that all of the answers that he put on the application, including the false ones, were obtained from Dhafir, (A1369a, 1369b) that Dhafir told him that Help the Needy Endowment Inc. would not be involved with Iraq (A1372) and that it was a completely different organization than Help the Needy had been (A1370).¹⁶

An IRS employee testified concerning the materiality of the information that appeared on the application for tax exempt status. (A1331-39).

¹⁶ In his brief, Dhafir states that Hatfield “admitted he never discussed this question [the relationship of Help the Needy Endowment Inc. with Help the Needy] with Dr. Dhafir.” (Brief at p 17 - 18) In fact, Hatfield testified as follows:

Q: Did you talk with him about whether there was any connection between Help the Needy Endowment, Inc. and Help the Needy?

A: In our first meeting, I said is this organization a separate corporation, does it have a separate board of directors, [It] is a separate corporation, was his answer, formed in November of 2001, has a separate board of directors from Help the Needy ... (A1370)

The founder of a charity in Troy, New York, Ahmed Ali, described how, at Dhafir's request, he had allowed Help the Needy to use the tax-exempt number of his charity, the Somali Relief Network (A1356-57), and how he had included Help the Needy's financial information in each of his own charity's subsequent tax returns. (A561) He also described how, when he was formally requested to provide Help the Needy's records to the New York State Charities Bureau, Dhafir told him instead to close the Somali Relief Network. (A1359)

Tax returns and the testimony of G. William Hatfield showed that Dhafir deducted his contributions to Help the Needy, knowing it was not a registered charity. (Counts 17 - 22) The government played the videotaped meeting in which Dhafir admitted to the trustees of Help the Needy that this was illegal. (A1530)

An IRS agent established the tax loss that resulted from the deductions taken by Dhafir for his contributions to Help the Needy. (A1376-77) She further established that bank records directly contradicted information that Dhafir had provided on the application for tax exempt status. (A1375)

C. The Visa Fraud Charge

The testimony of Ahmed Ali, Ayman Jarwan and Jonathan Micale all related that Dhafir told them

to put a false salary down on Jarwan's visa application in order to qualify him for an H-1B1 visa (Count 23).

D. The Mail and Wire Fraud Charges

The testimony of al Wahaidy, Hadian and Abdallah, supported by bank records and documents taken from Dhafir's home, showed that Dhafir had taken money raised by Help the Needy and sent (a) \$300,000 through al Wahaidy's account (A1315-20), some of which was used to purchase real estate in Syracuse, which was later sold and the proceeds deposited into Dhafir's medical practice accounts, and some of which paid back a personal loan (A1291); (b) \$10,000 to a grocery store owner in Buffalo who later moved to Yemen without repaying Help the Needy (A1399-1400); (c) \$12,000 to a car repairman who repaid Dhafir by fixing his cars;¹⁷ (d) \$213,000 to a friend in Saudi Arabia with whom Dhafir was planning to open an investment company(A1628-32, A1505a); (e) \$65, 200 to a Canadian businessman who intended to pay the money for a contract in Iraq, but decided instead to live off it in Montreal;¹⁸ and (f) close to \$1

¹⁷ Abdalla Hadian testified that he had received \$12,000 from Rafil Dhafir, believing the loan was from Dhafir's personal funds. Hadian testified that he had repaid Dhafir, principally in kind by servicing Dhafir's cars at no cost. (A1374)

¹⁸ Haifal Abdallah recounted how Dhafir had arranged two loans, using Zagha, so that Abdallah

million to pay for proselytizing efforts when Dhafir and others communicating on behalf of Dhafir had told donors that the money would aid the sick and starving in Iraq. An analysis of the bank records demonstrated that the funds given to each of these undisclosed purposes were from public donations to Help the Needy. (A784ff)

During Jarwan's testimony, the government played a videotape of a fund-raising event in which Dhafir showed a PowerPoint presentation to potential donors depicting children suffering from devastating injuries and birth defects in Iraq. Dhafir then asked for donations to help the needy children in Iraq. Jarwan acknowledged that Help the Needy received donations as a result of the presentation (A1354) but that they had no records concerning the distribution of money to any of the families or children who were described in the promotional materials and on the PowerPoint presentation. (A1355) Bank records demonstrated that the money was eventually delivered to Syed Badawi in Saudi Arabia in advance of Dhafir's

could pay money to an Iraqi official in Baghdad to expedite a contract under the Oil-for-Food program. (A1388-93) Those two payments were corroborated by Zagher's bank records. (A1505-05a) Abdallah testified that when he got to Iraq, he realized that the payments would not be useful, so he gave some of it to his family in Iraq and brought the rest back to Canada, where he used it for his own business expenses. (A1390-91)

visit there to set up an investment company (A 1625, A1628-32), which was the basis of Counts 57 and 60.

Dhafir was intercepted talking with the trustees of Help the Needy saying that the charity was a “disguise” and that the real purpose of Help the Needy – proselytizing – could not be disclosed. (A1533-34) He further said that, while others could know how Help the Needy’s money was raised, no one other than the trustees could be told how the money was spent. (A1535-36)

E. The Health Care Fraud Charges

With respect to the health care fraud counts, six employee-witnesses testified that they billed for services “incident to” Dhafir’s direct supervision, even when he had been out of the country when the services had been provided.¹⁹ Dhafir’s wife (and biller) testified that she had told Dhafir that he was overcharging for those services, and that he told her to do it anyway. (A1418; A1422) Nina Carosella testified

¹⁹ The witness testimony appears at in the Trial Transcript at pp. 4631, 4649, 5488, 5594, 5726. Diana Wellmon, in particular, testified that she administered chemotherapy alone, with Dhafir’s approval, although she was not licensed to do so. (A1403-06). She admitted that she signed his name to the progress notes, which (unintentionally from her perspective) made it appear that he had done the procedure himself. (A1417)

that when she asked Dhafir how he handled patients when he was out of the office, he lied – both in a telephone call to her (A1427) and in a written certification the next month (A1598). Billing records corroborated their testimony and established a loss in excess of \$300,000. (e.g. A1153-63; *see* PSR ¶ 37)

IV. The Jury Charge

The Court gave its instructions, which both parties had agreed to in advance. The case was submitted to the jury for deliberation. The jury deliberated for five days,²⁰ sending in four questions, and on February 10, 2005, the Jury returned a verdict of guilty on counts 1, 2 and 4 through 60, and a not guilty verdict on Count 3. (A1113-21) The parties agreed to resolve the amount of restitution on the papers before the court, and the jury was dismissed.

V. The Sentencing

Sentencing was complex due to two issues: victims' rights, and "grouping" issues under the Guidelines. With respect to the victims' rights to restitution, the government filed a motion pursuant to 18 U.S.C. § 3771(d)(2) to fashion an order that recognized the uniquely complex position of the

²⁰ Dhafir's brief mistakenly states that the jury deliberated for two days. (Brief at 9)

donor-victims of the mail and wire fraud counts.²¹ The government noted that locating donors from as long ago as a decade before the trial, some of whom gave as little as \$29, would be daunting. Coupled with the fact that restitution would only provide about 10 cents on the dollar, and would have to be recognized as income (requiring the donors to eliminate any prior charitable deductions that they might have taken), the government proposed, instead, to “restore” the money to the intended beneficiaries (who were fairly seen as victims of the fraud as well), thereby fulfilling the purpose that the donors had intended the money to serve (and “restoring” the donors their deductions). (Docket 495) The record discloses no opposition to the request, which the Court granted conditionally on July 7, 2005, stating:

[S]hould the Court find the defendant is responsible for any restitution to the donors regarding the mail and wire fraud charges, as an alternative to restitution to the individual donors, all funds shall be transferred to the New York State Charities Bureau, as successor to Help the Needy and Help the Needy Endowment Inc., with the direction that funds be distributed in a manner substantially similar to the original

²¹ This litigation before the district court regarding restitution to the New York State Charities Bureau is never mentioned in Dhafir’s Brief, despite that the payment to the New York State Charities Bureau is one of the seven issues he raises on appeal.

intent of the donors, specifically through a recognized charity to aid needy people in Iraq. (Docket 496)

At the time of sentencing, that is precisely what the Court ordered. (A1195)

The grouping issue was more controversial. The first version of the Presentence Report calculated the total offense level under the Guidelines to be 37. That calculation is summarized in the following chart:²²

Group	Score	Unit	Combined Offense Level
IEEPA	30	1/2	
Money Laundering/Tax/Fraud	36	1	
Visa Fraud	8	0	
Total Pursuant to § 3D1.4		1 ½	37

²² With the exception of an abuse of trust enhancement sought by the government, which was never resolved due to a change in the method of calculation, there is no dispute regarding the Guideline score derived from each of the constituent offenses, which are set out at PSR ¶¶ 49 - 72.

The government objected, arguing first that an abuse of a position of trust enhancement was appropriate (which would raise the total offense level to 39), and second that the base offense level and the grouping of the money laundering counts should be calculated with the offense being promoted, under § 2S1.1(a)(2), rather than with predicate offenses under § 2S1.1(a)(1), given that the Indictment charged promotional money laundering under 18 U.S.C. § 1956(a)(2)(A), and did not allege that the laundered funds were “proceeds” of a separate specified unlawful activity or derived from an underlying offense. The government proposed that the Guidelines be calculated, after grouping, as follows:

Group	Score	Unit	Combined Offense Level
IEEPA/Money Laundering	40	1	
Tax Offenses	32	1/2	
Visa Fraud	8	0	
Medicare/Mail/Wire Fraud	34	1/2	
Total Pursuant to § 3D1.4		2	42

The Court agreed with the government’s position that the money laundering charges should be calculated and grouped pursuant to § 2S1.1(a)(2), rather than with

predicate offenses under § 2S1.1(a)(1), and requested an amended Presentence Report to provide the alternative calculation. (A1125-29) The Amended Presentence Report conformed to that request, but did not adopt the government's suggestion that the tax offenses should be separately grouped from the fraud offenses, and so came to the following total offense level:²³

Group	Score	Unit	Combined Offense Level
IEEPA/Money Laundering	40	1	
Tax/Fraud Offenses	34	1/2	
Visa Fraud	8	0	
Total Pursuant to § 3D1.4		1 ½	41

On the day of sentencing, neither party submitted evidence. After hearing counsel for the government and the Defendant, and after hearing from Dhafir himself, the Court imposed sentence, stating:

Now the Court finds the total offense level to be 41, the criminal history category is I, and the

²³ PSR Second Addendum, 9/14/05, at p. 6

guideline imprisonment range is 324 to 405 months. The Court has considered the relevant factors in Section 5K2.0 of the Sentencing Guidelines, and finds that this case is not outside the heartland of cases. The Court denies defendant's motion for a downward departure.(A1131Y - 1132)

The Court then specifically considered the factors in 18 U.S.C. § 3553(a) to determine “a sentence sufficient, but not greater than necessary, to comply with the above stated purposes of § 3553(a).” The Court concluded:

As such, it is the opinion of this court that a term of imprisonment of 27 to 30 -- nearly 34 years is not necessary to carry out the purposes of 3553(a). Taking into account all the required factors, the Court finds that the purposes of 3553(a) are satisfied by a sentence below that recommended by the Guidelines. Accordingly, upon your conviction by jury trial of Counts 1, 2, and 4 through 60 of the fourth superseding indictment, it is the judgment of this court that you are hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 264 months. (A1132 - 33)

Because the government had revised its request for restitution concerning the health care fraud counts downward shortly before sentencing, the court decided to postpone the restitution portion of the judgment for

90 days. (A1131S) Following submissions by the parties, the Court ordered restitution in the amount of \$865,272.76. (SPA11) This appeal followed.

Summary Of Argument

Having properly allowed all questions concerning the possible bias or credibility of individual witnesses, the trial court did not abuse its discretion by foreclosing questions as to the motive of the government, as a whole, for investigating Dhafir. Such questions would have elicited testimony that was irrelevant to Dhafir's guilt or innocence and possibly confusing to the jury.

The evidence was more than sufficient to support Dhafir's mail and wire fraud convictions. Dhafir's claim to the contrary overlooks some of the government's key evidence. It also fails to acknowledge that the government need not prove that all of the fraudulently solicited funds were used for an improper purpose, that the law does not excuse fraud based on the victims' acquiescence, and that the victims in this case did not acquiesce in any event.

The district court did not commit plain error by allowing the government to introduce the testimony from a co-founder of Help the Needy as to what he understood was the proper use of donor money. Nor did the court commit plain error when it allowed the

government to introduce evidence and argue to the jury that Dhafir failed to abide by the counsel he himself had sought concerning the proper use of donor money. The fact that the counsel was given by religious elders was immaterial, since the evidence was introduced only to show Dhafir's fraudulent intent and lack of good faith. Rather, it was Dhafir who elicited testimony expounding on religious doctrine and who improperly sought to use that doctrine as a legal defense.

The fact that the indictment charged, and the jury found, two separate conspiracies each with a different object and a different set of members, forecloses Dhafir's argument that the charges were multiplicitous, especially on plain error review. As for Dhafir's claim of improper joinder, he waived it when he deliberately chose not to move for severance below.

At sentencing the district court correctly used, for Dhafir's promotional money laundering convictions, the money laundering guideline that calibrates the offense level to the promoted offense. Dhafir's argument that the court should have used the money laundering guideline that calibrates the offense level to the "underlying offense" would have made no sense on these facts, and would have reduced Dhafir's offense level by virtue of the fact that he was convicted of additional crimes.

Finally, the court properly ordered that restitution be made to Medicaid, because it was a

victim of the health care fraud counts, and to the New York State Charities Bureau (as successor in interest to Help the Needy and Help the Needy Endowment, Inc.), so that the original intention of the victim-donors would be fulfilled by supporting the victim-beneficiaries.

ARGUMENT

POINT I

The Trial Court Properly Exercised Its Discretion In Granting And Enforcing The Government's Motion In Limine To Prohibit Inquiry Or Arguments At Trial About The Government's Alleged Motive In Investigating Dhafir

1. The Standard of Review

The trial court's limitations on cross-examination concerning motive or bias are reviewed for abuse of discretion. *United States v. Crowley*, 318 F.3d 401, 417 (2d Cir. 2003).

2. Discussion

During pretrial litigation, the district court first denied Dhafir's motion to dismiss for selective prosecution, and later granted the government's motion *in limine* to prevent Dhafir from raising that same legal

issue before the jury. The district court precluded argument or evidence concerning: the government's alleged motives in investigating and prosecuting Dhafir, the integrity and or credibility of the government's investigation and prosecution of defendants, and the fact that Dhafir was not charged with other crimes. (A256) Dhafir conceded at trial that this restriction was proper in light of Second Circuit precedent. (A258) Yet his brief is analytically imprecise on this point, continuing to assert that the district court improperly restricted "argument relevant to the government's bias." (Brief at 30). In his brief, Dhafir characterizes his numerous attempts to get in testimony on "the government's" bias as attempts to impeach witnesses by calling into question that witness' bias. The record, however, does not support Dhafir's characterization.

A. The District Court Properly Granted the Motion *in Limine*

In granting the motion *in limine*, the district court properly followed the lower court opinion in the Martha Stewart case, which has since been affirmed by this Court in *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006). The district court in *Stewart* found that "any evidence that raises questions of prosecutorial bias against [the defendant] has no bearing on the issues properly before the jury, *including the credibility of co-operating witnesses.*" See *United States v. Stewart*, 2004 WL 113506, *1 (S.D.N.Y., 2004) (emphasis added). On appeal, this Court found

that the district court had not abused its discretion in implementing this rule. *See Stewart*, 433 F.3d at 310-13.

The view that selective prosecution is an issue for the court, not the jury, is shared by the Court's sister circuits. *See United States v. Abboud*, 438 F.3d 554, 579-580 (6th Cir.), *cert. denied*, ___ U.S. ___, 227 S. Ct. 446 (2006); *United States v. Jones*, 52 F.3d 924, 927 (11th Cir. 1995); *United States v. Washington*, 705 F.2d 489, 495 (D.C. Cir. 1983); *United States v. Oaks*, 508 F.2d 1403, 1404-05 (9th Cir. 1974); *United States v. Berrigan*, 482 F.2d 171, 175 (3d Cir. 1973); *see also United States v. Bontkowski*, 865 F.2d 129, 131 (7th Cir. 1999) (finding the same for accusations of outrageous prosecutorial conduct); *United States v. Mosley*, 965 F.2d 906, 909 n.3 (10th Cir. 1992).

A claim of selective prosecution is not a defense on the merits. *See United States v. Armstrong*, 517 U.S. 456, 463 (1996). Consequently, it has no relevance to deciding the innocence or guilt of the defendant. *See United States v. Regan*, 103 F.3d 1072, 1082 (2d Cir. 1997). The Confrontation Clause does not grant the accused "an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible . . ." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988). The trial court does not violate the right to confrontation by excluding cross-examination on irrelevant matters. *Stewart*, 433 F.3d at 311. The district court in the case at bar did not violate Dhafir's rights in granting the motion *in limine* to restrict the

defense from raising at trial issues bearing on selective prosecution.

B. The District Court Properly Prohibited Dhafir From Cross-examining On Selective Prosecution.

The government never contested Dhafir's right to impeach witnesses, nor did anyone think that impeachment was restricted. In explaining its ruling on the motion *in limine*, the district court explicitly told defense counsel that they were allowed to impeach *any* witness by questioning his or her bias. (A261-63) Dhafir's arguments at trial demonstrate that he well understood the ambit of the court's restriction.

Dhafir now claims on appeal that he was improperly prohibited from cross-examining witnesses on their motives. (Brief at 26) But the record fails to provide any such instance. The record clearly demonstrates that Dhafir sought to attack "the government's" bias as a whole, not any witness' bias in his cross-examination. The Court properly held that the former was out of bounds, and allowed confrontation on the latter whenever the issue was raised.

Dhafir first cites limitations on his cross-examination of Chad Munroe as an example of error. Yet Monroe was allowed to answer every question put to him, except one that was phrased specifically to elicit his "motive" in pursuing the case. Defense

counsel twice asked Munroe whether the fact that the people under investigation had “Arabic sounding names” affected his decision to send the case to the task force. (A275, 280) He said no. (A1238, 1240) Munroe was repeatedly asked whether the fact that the money was being sent to Jordan aroused his suspicions. (A268-281) He said he was suspicious of money going out of the country generally, but “At that point in time the Middle East did not mean a whole lot to us here in Syracuse.”(A271, 1240) Counsel asked if he had referred the matter to a terrorism task force. Munroe said that he had not. (A1237) Munroe was asked if any of the agents to whom he had referred the case were members of a terrorism task force. Munroe said he did not know anything about a terrorism task force. (A1237)

Only when Dhafir proposed asking if Munroe had been “motivated” by concerns of terrorism did the district court sustain an objection. At the lengthy sidebar, Dhafir did not suggest that he was trying to establish the witness’ bias or to attack his credibility. Rather, he said that the question went to the government’s motive, and claimed that the “door” to that line of inquiry had been opened by the government. (A276-79) The district court ruled that the door had not been opened concerning terrorism or the government’s motive, and sustained the objection. (A279)

The fact that all the parties, as well as the district court, saw the inquiry as focused on the government’s

motive, rather than the credibility of the witness, is confirmed by the judge's lengthy discussion a few days later. (A399-402) At that time, and at Dhafir's request, the district court "thoroughly reviewed the trial testimony," including Munroe's, to determine if the government had "opened the door" to the issue of terrorism and the motive of the government in investigating Dhafir. Referring at length to Munroe's testimony, the district court specifically found that nothing had opened the door to testimony about the government's motive. (A400)

Although Dhafir now tries to cast this issue as a question about Munroe's bias, he did not make that suggestion at trial, nor was his question framed in that context. Rule 103 of the Fed. R. Evid. requires the proponent of questioned evidence to make known its substance and relevance, so that the court can properly assess its admissibility. Dhafir specifically said that he wanted to prove motive, which he claimed was fair game, as the door had been opened. The court reviewed the testimony both at that time and later, and concluded that the government had not put its motive in issue, and sustained the objection. (A279, A402) Having suggested only one ground for admission at trial, Dhafir must demonstrate plain error in advocating reversal for this evidence ruling on other grounds. *United States v. Seymour*, 468 F.3d 378, 387 (6th Cir. 2006).

Under a plain error standard, there must be (1) error, (2) that is plain under current law and (3) that

must affect the substantial rights of the defendant to a fair trial. *United States v. Olano*, 507 U.S. 725, 731-37 (1993); *United States v. Feliciano*, 223 F.3d 102 (2d Cir. 2000). Here, there is no error, let alone plain error. Dhafir wanted to ask Munroe if a fear of terrorism motivated him in 1999 to refer the matter to the multi-agency task force. Munroe had already testified that the Arabic sounding names meant nothing to him, that he was not especially anxious about the Middle East, and that he was unaware of a terrorism task force or anyone working on terrorism investigations. The further question whether he had been “motivated” by a concern for terrorism was both superfluous and objectionable. The minute degree to which it could theoretically be tied in hindsight to a question of Munroe’s bias had already been fully explored. The question was, as Dhafir argued at the time, directed solely to elicit “motive” evidence, and as such was not admissible. It was not plain error to sustain the government’s objection, indeed it was not error at all. With respect to Munroe’s bias, Dhafir was not prohibited from asking pertinent questions; Dhafir was simply unable to establish the bias that he had assumed Munroe held.

Dhafir’s brief provides a string citation of supposed restrictions on his cross examination without any discussion. Each citation is inapt. The first citation (Brief at 26, referencing A615-17) relates to an attempt to cross examine FBI SA Kolbe about an email that Diana Wellmon had sent to Dhafir about the government’s seizure of other charities’ funds in

connection with terrorism investigations. When asked to explain the relevance of his question, defense counsel did not even suggest it had anything to do with bias or credibility. Rather, he said that it was relevant “to refute the government’s claim that Wellmon was strictly a straw figurehead.” (A1401) The court then stated that the exhibit could be offered in relation to Wellmon, but was not pertinent to Kolbe.

Dhafir’s next citation refers to the cross-examination of Nina Carosella. (Brief at 26; A656-58) Dhafir sought to confront Carosella with one sentence in a memorandum that someone in her organization, HNNY, wrote to another person there. The essence of the sentence was that Dhafir was being investigated by the FBI for over-billing Medicare and using the excess money to support terrorism. (A1424) The government objected because the letter could not shed any light on Carosella’s bias or credibility, because she did not read, write, review, adopt, or approve the letter in any way. (A658). Having never seen it, she could not have been influenced by its content. The Court agreed that the witness could not be cross examined on another person’s use of the word “terrorism” in a document she had never seen, and sustained the government’s objection. (A1429)

Dhafir’s final citation relates to the cross-examination of Mahir Majid. (Brief at 26, A418-25) There, defense counsel sought to cross examine Majid on what the FBI agents had told him about how the money donated to Help the Needy had been used.

Dhafir's counsel did not argue that the question went to Majid's credibility, and it is unclear how the defense expected to use this to impeach Majid.²⁴ The court did not abuse its discretion in sustaining an objection to this question.

With respect to the objections sustained during closing arguments, Dhafir persists in his failure to distinguish between (a) bias on the part of a particular witness and (b) bias on the part of government actors and agents in general. For example, during closing arguments the defense began talking about unnamed witnesses, who had been visited by unnamed agents in an operation that "was carried out with almost military precision," and suggested to the jury that this was the type of operation the government would undertake if it was "going after people that [it] believe[d] were dangerous human beings." (A691) Such a statement has no bearing whatsoever on the credibility of any witness. Rather, it asks the jury to speculate on the motives of the government in conducting its

²⁴ As it happens, Majid testified freely about his bias. On direct examination, he said that Dhafir was his benefactor and counselor. (A1289-90). He said he loaned Dhafir \$90,000 without asking him a question. (A1291) On cross examination, he elaborated on the many things for which he was grateful to Dhafir. (A1295-98) Majid's bias in favor of Dhafir was well developed at trial; there was no error in connection with his testimony.

investigation – the precise issue prohibited by the court’s *in limine* ruling, and the government’s objection was properly sustained.

Where the defense’s statements could plausibly be considered to reflect on a particular witness, however, the court allowed them. Immediately following the sustained objection mentioned above, the defense began exploring the same themes by focusing on Colleen Williams’s testimony about what FBI SA Kolbe had told her. The court *overruled* an objection by the government at this point. (A694)

The defense then attempted to cite Colleen Williams’ testimony to allege that there was a bias motivating the government: “[W]hat they were interested in was a lot more than health care fraud and visa fraud and tax evasion. And that’s the reason—.” (A694-95) Because the defense had again moved into the motivation of the government as a whole rather than that of particular witnesses, it again raised the issue of selective prosecution, and again the court sustained an objection. (A694-95) Counsel defended his statements by claiming they called attention to the fact that Williams had been requested by the government to wear wires and “spy for them.” (A695) The court properly allowed statements about wearing wires, saying that they could bear on the credibility of Williams as a witness. (*See* A698). The suggestion that the government was interested in more than white collar crimes, however, had no logical connection to the idea that wearing wires for the government

(actually, refusing to wear wires for the government, as her testimony made clear) made Williams a less credible witness. There was no error in the court's ruling.

Dhafir asserts that "the court's order in this trial completely restricted Dr. Dhafir's opportunity to confront the witnesses on the critical issue of bias." (Brief at 28) The district court specifically said that it would handle issues as to the professionalism and credibility of investigating agents as they arose in the courtroom. (A263) As the above discussion has demonstrated, the court only restricted the defense's ability to use cross-examination as a back door to make selective prosecution arguments about the government's alleged motives.

Witness bias cannot be conflated with allegations that a defendant has been improperly targeted for prosecution. *See Abboud*, 438 F.3d at 579-580. Because such arguments are irrelevant to whether or not Dhafir committed the crimes with which he was charged, they were properly excluded from trial. *See Regan*, 103 F.3d at 1082; *Stewart*, 2004 WL 113506, at *1. Where the defense was probing the alleged bias of the witness on the stand, the court allowed it. In a transcript of over 7,000 pages, Dhafir cannot point to a single instance where the court precluded the defense from questioning a witness about his or her bias. The district court properly granted the motion *in limine* and properly enforced it during trial.

POINT II

There Was Ample Evidence To Prove Dhafir Engaged In A Scheme To Defraud, In Violation of the Mail and Wire Fraud Statutes

1. The Standard of Review

In challenging the sufficiency of the evidence for his mail and wire fraud convictions, all the evidence must be construed in favor of the prosecution, and the conviction must be upheld “if *any* rational trier of fact could have found the essential elements” of the offense beyond a reasonable doubt. *See United States v. Kinney*, 211 F.3d 13, 16-17 (2d Cir. 2000); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

2. Discussion

Dhafir next asserts that the government failed to prove that the money diverted from Help the Needy’s accounts was not Dhafir’s own donated money, and therefore – the argument goes – there is no proof that Dhafir defrauded donors as charged in Counts 51 - 60. Principally, he argues that IRS Special Agent Mark Sweeney failed to distinguish between Dhafir’s

commingled donations and other donors' money in testifying about the money flow charts. (A780-83)²⁵

Dhafir's argument fails for two reasons. First, as a matter of fact, the government proved that donors were defrauded, and second, the government is not required to prove that anyone was defrauded, merely that the defendant knowingly entered into a scheme to defraud and that he used the mails or the wires in furtherance of that fraud. *See United States v. Andreadis*, 366 F.2d 423, 431 (2d Cir. 1966); *United States v. Reifler*, 446 F.3d 65, 95-96 (2d Cir. 2006) (construing § 1343) and *United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994)(construing § 1341).

Dhafir's execution of a scheme to defraud was proved in the "macro" sense, and in the "micro" sense. The evidence demonstrated that Dhafir mis-spent more than he and the foreign contributors donated by over \$500,000. (A1393a-93b) Thus, donors' money was misspent. Simply on this "macro" approach alone a jury would be entitled to conclude Dhafir engaged in criminal wrongdoing. *See United States v. Haddad*, 462 F.3d 783, 791-92 (7th Cir. 2006).

²⁵For example, Dhafir says that Sweeney did not account for money in Help the Needy's accounts before 1995 (Brief at 36). But there were no Help the Needy accounts before 1995. (A1284, 1288) Help the Needy began in 1995, and virtually every contribution to it is recorded in the ledger. (A769).

In describing the supposed shortcomings of Special Agent Sweeney's testimony, Dhafir neglects to address the ledger that Dhafir and Zaghera had maintained to track Help the Needy's money (A770-79). The ledger played an important role in demonstrating the misuse of money because it allowed the jury to track money from its specific source to its illicit purpose.²⁶ IRS Revenue Agent Deborah Kelley testified for two days corroborating each credit in the ledger (including the source of the funds) with domestic bank records (A1383, assembled in Exhibit 1.900.28). Her testimony tied each credit entry in the ledger to a specific item of deposit, showing that the ledger was an accurate accounting of the money donated to Help the Needy (and its predecessor IANA Relief Fund) since their inception in 1995, and making the link that allowed the jury to discern which money paid to Help the Needy was from Dhafir and which money had come from other donor sources. (A1384)

SA Kolbe testified corroborating most of the debits in the ledger (including the misused money). (A1386a-86b) In doing so, he linked the entries on the ledger to the various bank records, emails and reports maintained by Dhafir, and assembled them in a single exhibit. (*See* A1396-97, 785-1067) Those records showed that Dhafir had withdrawn from Help the Needy's accounts far more than he had donated,

²⁶ Dhafir's brief also fails to mention the days of testimony by Deborah Kelly and James Kolbe in corroborating the ledger entries.

defeating Dhafir's argument that he had simply been spending his own money.²⁷ He also calculated the amount of money that Dhafir diverted to purposes other than those identified on Help the Needy's promotional material.

The testimony of Osamah al Wahaidy and IRS Special Agent Leslie Bascom Rubel, described above, showed how the M&T account that al Wahaidy had established as a favor to Dhafir was the conduit Dhafir used to get public contributions to Help the Needy into his own private business interests. (A1315-20) Hadian, for example, testified that he received money from this account and paid Dhafir back by maintaining his car for free. (A1374)

SA Kolbe also reviewed documents that tracked an occasion when Dhafir gave \$10,000 of Help the

²⁷ Money that Dhafir specifically claimed was his own money was shown through an analysis of the deposit items to have come from other sources. For example, in a 1995 letter from Dhafir to Zagher, Dhafir says that certain deposits, identified by amounts and dates, was his family's money, not relief money. Looking at those deposit items, which like the letter were assembled in a single exhibit (A785-91), however, SA Kolbe showed that the deposited checks came from an account of a mosque in Buffalo, and in the memo field designated the IANA Relief (Help the Needy's precursor) as the recipient. (A1396-97, 791, 1402)

Needy's money directly from Help the Needy's account to a grocery store owner in Lackawanna New York to expand his store, money which was not paid back when the owner left the country for Yemen. That transaction was the basis for Count 54 in the Indictment. (A1398-1400)

The government provided other examples of misuse. A witness named Maetham Alazawi testified about a receipt that Dhafir had maintained at Help the Needy. (A1341) The receipt stated that Alazawi had received \$1,000 from Maher Zagha in Jordan, and that the money was to be used to purchase food for the needy in Iraq. Alazawi said that, notwithstanding his signature on that receipt, Dhafir had given him a \$1,000 check from the Help the Needy account (A1340a, A1469a), and had him sign the receipt. He further testified that Dhafir gave him the money for his personal expenses incurred in the Binghamton area. (A1342-43, A1504)

In another instance in 2002, money donated at a fund-raising meeting was deposited into Help the Needy's account, mailed by bank check to Zagha in Jordan, deposited into his Jordan Islamic Bank account, and wire transferred by Zagha to Syed Badawi in Saudi Arabia, at Dhafir's direction. The evidence showed a \$213,000 transfer in January 2003; and yet Dhafir had only contributed \$52,040 in 2002 and nothing in 2003. The running balance on the ledger was calculated by Deborah Kelley and could not

support any conclusion other than the diversion of charitable donations to private gain. (*See* A1560)

Dhafir next argues that none of the donors stated that they objected to the uses to which Dhafir spent the money. (Brief at 37) As an initial matter, such evidence was unnecessary. It also simply misstates the record.

As a matter of law, the intent of the victims of the alleged fraud is irrelevant; rather, the proper inquiry is focused on whether or not the defendant had the requisite fraudulent intent. *See United States v. Biedeski*, 933 F.2d 539, 544 (7th Cir. 1991) (finding that testimony by customers who did not feel defrauded would have “improperly shifted the jury’s attention away from the knowledge and intent of [the defendant] and focused instead on the beliefs of the victims of the alleged scheme to defraud.”). This rule has led the Fifth, Ninth, and Eleventh Circuits to hold that a trial court may properly exercise its discretion in refusing to admit the testimony of satisfied donors to a “charitable” organization where the ultimate use of the money is at issue. *See United States v. Ciccone*, 219 F.3d 1078, 1082-83 (9th Cir. 2000); *United States v. Elliott*, 62 F.3d 1304, 1308 (11th Cir. 1995); *United States v. Diamond*, 430 F.2d 688, 693 (5th Cir. 1970).

Focusing on the intent of the defendant and not of the victims is consistent with the rule that the government is not required to prove any actual injury in order to convict a defendant of mail or wire fraud.

See United States v. Reifler, 446 F.3d 65, 95-96 (2d Cir. 2006) (construing § 1343); *United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994) (construing § 1341). Therefore the government was under no obligation to prove that the money of these particular donors went to a purpose other than that which they intended. To allow the jury to make an inference that there was a scheme to defraud, the government needed to demonstrate only that Dhafir had made misrepresentations.

The donors' testimony tended to prove that Dhafir made misrepresentations regarding how Help the Needy's money would be spent. Maqsood Ahmed testified that he had arranged for a monthly automatic donation specifically to sponsor a family in Iraq. (A1327) He said that he did not want his money to go to any other purpose, and that it was to go to Iraq exclusively. (A 1326, 1328) Ahmed Elantably testified that he too arranged for a monthly automatic deduction, which he described as being intended for suffering Iraqis.

Elantably: Basically to help poor people in Iraq through the sanctions and the poor, destitute conditions of the government and the poor conditions after the war, very poor conditions and the schools in particular and for the poor people in Iraq.

[GOVERNMENT COUNSEL]: Did you have any further understanding of what your money would be used for?

Elantably: Just for all of these conditions, this was part of the religious duties, to help the poor and needy.

[GOVERNMENT COUNSEL]: And what was your understanding of how these donations would be used based on?

Elantably: Basically to people who are poor and destitute in Iraq.

[GOVERNMENT COUNSEL]: But what led you to believe that's how your money would be spent in Iraq?

Elantably: That's what they say in the brochures.(A1340)

Bank records showed that automatic transactions like Ahmed's and Elantably's were deposited into the Key Bank account, where they accumulated for years without being spent. For his part, Dhafir described the money in Key Bank as being kept by him because it was not needed. (A1527) In short, there were never families identified in Iraq for support, and donor money never supported them. (A1355) Rather, reports from Iyad and Mustafa, which described the distribution of money in Iraq, showed payments for such purposes as rent for preachers and videotapes for

proselytizing.(e.g. A908-25) The jury was entitled to conclude that there was a scheme to defraud.

Dhafir says that one contributor, Dr. Naim, was not shown to have been defrauded (Brief at 38). The evidence shows otherwise. Naim was asked:

[GOVERNMENT COUNSEL] Doctor, what did you understand that your \$1,000 contribution would be used for?

Naim: For food, medicine, and health care of the children and women, all the people affected by the sanctions.

* * *

[GOVERNMENT COUNSEL] And would you have made the same donation if you'd been told that Help the Needy did not have a license to provide humanitarian aid in Iraq?

Naim: No.

(A1312a-12b)

The record was clear that Help the Needy did not have a license to provide humanitarian aid in Iraq. The evidence also showed that Naim's \$1,000 donation (A1471) was deposited into the Oneida Savings Bank in December 2002. Bank records showed that it was then transferred (with other donations) by official bank check to Zaghera at the

Jordan Islamic bank in the first week of January 2003, at which time it was wire transferred to Saudi Arabia to start up an investment business with Syed Badawi. Abdullah testified he received \$46,000 from Zagha, (A1389) which bank records showed came from the same account in January 2003. (A1505-05b)

Dhafir also argues that the donors were not told that the money would be used *exclusively* to provide medicine, food and other basic necessities to the needy of Iraq. (Brief at 37-40) Yet it was not necessary for the government to prove that Dhafir represented to potential donors that *all* their money would go to helping the poor and needy in Iraq.²⁸ See *United States v. Hawkey*, 148 F.3d 920, 924 (8th Cir. 1998).

No case requires proof that every penny of donor money was misspent to support a mail fraud or wire fraud conviction of the charity's operators. In *Illinois, ex. rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 606 (2003), the Supreme Court upheld a fraud prosecution under Illinois law where only a small amount of the money raised by the charity was used for charitable purposes, and the bulk was used for undisclosed expenses. The state was not required to prove that every penny was stolen, or that specific donors' money had been diverted. In *United States v. Lyons*, 453 F.3d 1222 (9th Cir. 2006), *amended and*

²⁸ As it happens, Help the Needy's posters stated "All funds will be used to feed the Iraqi people." (A1562)

superseded, 472 F.3d 1055 (9th Cir.), *cert. denied*, ___ U.S. ___, 127 S. Ct. 2285 (2007) the court upheld the conviction of two charity operators where the government argued that almost none of the money made it to the stated charitable purposes, but the evidence showed that some of it was for what the defendant had argued were appropriate fund-raising expenses. In *United States v. Smith*, 133 F.3d 737, 742 (10th Cir. 1997), the court upheld a conviction where the evidence showed: “Mr. Smith represented Say No Now as a charity and told donors money sent to Say No Now would be used on behalf of children. In fact, the evidence presented at trial showed Say No Now gave only a pittance to charity.” In each case, the jury must simply conclude that the defendant engaged in a scheme to defraud by telling the donors about the use of their donations when he knew otherwise.

In *United States v. Hawkey*, the defendant was convicted of mail fraud for diverting to his personal use some of the proceeds from charity benefit concerts. The defendant argued that the evidence was insufficient because the government had not proved that the telemarketers soliciting for the concerts had represented to consumers that *all* of the concert proceeds would go to charity. The court found this argument “unavailing,” saying that the record indicated that “the concerts were designed to raise money for charitable purposes” and therefore the jury was allowed to conclude Hawkey had engaged in a scheme to defraud contributors and ticket purchasers. *Hawkey*, 148 F.3d at 924

Here the main thrust of Dhafir's presentations and solicitations were that Help the Needy would help the poor, the hungry, and the sick in Iraq. The jury observed one of Dhafir's presentations on videotape (introduced at trial as Exhibit 1.211.90B) and could compare Dhafir's statements there to the reports from Iyad and Mustafa describing how the money was spent in Iraq, and to the bank records that showed that much of the money never got to Iraq. The jury was entitled to conclude that because the actual uses of the money differed significantly from the stated purpose of the organization, the defendant intended to execute a scheme to defraud. They could draw this same conclusion from the videotape of the intercepted trustees' meeting, in which Dhafir himself referred to the charitable purposes of Help the Needy as a disguise for its other purposes. (A1533) In fact, the present case is stronger than that of *Hawkey*. The *Hawkey* court relied entirely on the representations made or caused to be made by the defendant and the reasonable inferences to be drawn therefrom. *Hawkey*, 148 F.3d at 924. In contrast, here the evidence included not only Dhafir's representations, but also donors' testimony as to their understanding of those representations.

On appeal, as he did at trial, Dhafir argues that the other purposes to which he diverted money were also charitable purposes and therefore using the money for business investments and religious education did

not defraud donors.²⁹ (Brief at 40). Even so, deceptions about how contributions to a charitable organization will be used constitute fraud when they are intended to influence donors to contribute, even when the both the actual use and the represented use are charitable. *See Kinney*, 211 F.3d at 18-19. In *Kinney*, agents of the defendant had misrepresented to potential donors that their contributions would be used to fund drug education, when in fact they were soliciting donations for a different charitable purpose. 211 F.3d at 18-19. This Court rejected the defendant's argument that those representations did not defraud donors because the donors had only been misled as to particular charitable use of the money. This Court's decision in *Kinney* shows that Dhafir's use of the Help the Needy funds for "charitable" purposes other than helping the poor, hungry, and sick in Iraq was still fraudulent because these other uses were not consistent with the representations made to donors to induce them to give to Help the Needy.

Dhafir extends this flawed argument by contending that his consultation with shaikhs "defeats any claim that the funds were simply 'diverted' to a private purpose rather than used within a broader context of advancing the charitable cause." (Brief at

²⁹ Of course, the jury was well justified in finding that a \$12,000 loan to Abdalla Hadian, which was repaid to Dhafir by free auto maintenance was not "charitable." (A1374) This Court should respect that finding.

40) In proposing this argument, Dhafir fails to acknowledge that the evidence established conclusively that he ignored the shaikhs' advice. (A1440)

Each of Dhafir's arguments on appeal were factual themes at trial and he had ample opportunity to prove them there. They were arguments appropriate for the jury to weigh – and to dismiss. *See United States v. Quintanilla*, 2 F.3d 1469, 1478 (7th Cir. 1993) The jury was well justified in rejecting Dhafir's claims – based upon donor testimony as well as upon Dhafir's own words – and finding him guilty of mail and wire fraud. That factual conclusion is entitled to deference on appeal.

POINT III

The District Court Did Not Commit Plain Error When One Donor And Co-Founder Of Help The Needy Was Permitted To Testify About His Understanding Of The Proper Use Of Donations

1. The Standard of Review

The trial judge's evidentiary rulings are reviewed for abuse of discretion, asking whether the court acted irrationally or arbitrarily, because the district court was in the best position to determine whether the information would be unfairly prejudicial. *See United States v. Salameh*, 152 F.3d 88, 110 (2d Cir. 1998). Where no objection was made, a "plain

error” standard applies. *United States v. Yousef*, 327 F.3d 56, 121 (2d Cir. 2003)

2. Discussion

Dhafir next argues that the government elicited testimony concerning Dhafir’s failure to comply with his own religious rules, and that the government invited the jury to conflate that failure with a criminal intent to defraud donors (Brief at 46). From that premise, Dhafir cites a series of cases that he claims hold a conviction for fraud should not be predicated on a violation of religious doctrine.³⁰ This simply did not

³⁰ For instance, *United States v. Ballard*, 322 U.S. 78, 86-87 (1944) simply holds that the First Amendment precludes a jury from considering “the truth or verity of [a defendant’s] religious doctrines or beliefs,” reasoning that “[i]f one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom”). See *Smith by Smith v. Board of Educ., North Babylon Union Free School Dist.*, 844 F.2d 90, 93 (2d Cir. 1988) (same). The case of *United States v. Rahman*, 189 F.3d 88, 134-38 (2d Cir. 1999), which Dhafir cites for the proposition that the government should not be permitted to ask the jury “to second guess” decisions made by Dhafir on religious grounds, actually held that the defendant could not call religious experts in order to bolster his argument that his conduct should not be considered criminal because it complied with the Sharia.

happen; rather it was Dhafir who introduced religion as an issue at trial. The district court never permitted “religious” testimony over Dhafir’s objection; indeed, Dhafir sponsored the testimony concerning religious standards, sometimes over the government’s objection. The government simply elicited testimony concerning what Help the Needy represented it would do with donor money.

The defense strategy throughout the trial was summed up by defense counsel in the following comments made at side-bar: “it's the government's position that Dr. Dhafir took moneys from Help the Needy and invested in projects to, and they're going to say for whatever reason. . . It's -- our contention is that if he did, he did it because he had the authority of the Sharia to do so . . .” (A1286)³¹

The government stated its view on Dhafir’s religious compliance directly to the jury in closing argument, saying “*it doesn’t matter what’s appropriate under the Sharia and what’s not*” (A1440) The legal instructions to the jury were faultless in this regard, and Dhafir points to nothing that would support his argument that the jury was invited into confusion or

³¹ Dhafir’s explanation for his attempts to introduce testimony about the Sharia is the same line of argument held inadmissible by this Court in a case cited by Dhafir. *See United States v. Rahman*, 189 F.3d at 134-38. The “Sharia” is a short-hand term to describe the body of Islamic law.

that they were confused. Nor does Dhafir point to an instance where the district court abused its discretion by overruling an objection on this subject.

Dhafir's argument conflates different parts of the trial and suggests that the government elicited testimony that actually came out on cross, or that the prosecutors sought to equate a violation of religious strictures with a violation of federal law. A review of the full testimony is useful to dispel any concern that the government sought to confuse the jury in its deliberations concerning criminal intent, or that the court permitted objectionable testimony.

The concept of zakat – an Arabic term for a category of annual alms – was first used, but not discussed, during the FBI case agent's testimony when he read from Help the Needy advertisements that described the obligations that could be fulfilled by donations to Help the Needy. (A1253, 1562) During the government's examination of its next witness, Walid Smari, Smari briefly gave an English explanation of the term, and explained that some of the donations to Help the Needy were zakat, and some were not (because there are several other categories of almsgiving). (A1262) There was no objection to this testimony.

Dhafir claims that the ensuing colloquy with Smari was designed to elicit "religious" opinions, and that his answers purported to recite "religious" law. To the contrary, the government asked Smari, without

objection, about the representations that he and Dhafir made to donors to Help the Needy. The questions were as follows:

“Can you tell us in sum and substance what Help the Needy representatives told respective [sic] donors when they held these fund-raising events;”

“Did the presentations make reference to the children of Iraq?;”

“Did Help the Needy make any representations to the prospective donors about what their money would be used for if they chose to make a contribution?;”

“Well, did Help the Needy’s advertisements continue to focus on the need to provide people with food throughout the entire period that you were involved with the organization?;”

“So the donors could specify the use to which the money would be put if they wanted to, is that correct?;”

(A329 - 336)

The government also asked: “Well, if someone made a contribution to help starving children, would it be proper or appropriate for that money to be used, invest in a business for example, even if that business might generate money in its own regard that could be also used for charitable purposes?” Dhafir objected to this question, but did not specify any grounds for the objection, as required by Fed. R. Evid. 103(a)(1).

Smari's view of the "proper" use of the money was relevant because he was donating to, and helping to run Help the Needy, and his testimony showed what he thought Help the Needy's solicitations promised, and what he and Dhafir understood the donors to have authorized. It did not ask for a religious response. The judge allowed Smari to answer as to "his understanding." (A332)

Smari's response began by referencing several Arabic terms for religious charity, but before he gave an answer, the government rephrased the question. The government asked if it would be proper for Help the Needy to use money for something other than what the donors intended, to which there was no objection by Dhafir. (A334) The court properly allowed Smari to answer. Smari he testified as to his understanding of what he thought that he and Dhafir were actually doing. He said "No, if that's all, you said we will use this money to feed the children and the poor and the needy, that's all that you can use it for, you can't use it for other things .. I cannot use it for anything else." (A335-36). This testimony was evidence of Dhafir's scheme to defraud – that he was using the donated money for purposes not authorized by Smari or by the other donors -- and neither referenced the Sharia nor embroiled the jury in an evaluation of Islamic jurisprudence, as Dhafir now suggests.

Contrary to the claim Dhafir makes in his Brief (Brief at 48) it was the defense that sought to measure the use of the money against the religious limitations

of zakat. On cross-examination, defense counsel asked Smari to define zakat, reviewed the eight “authorized” purposes of zakat, and then cited a specific expenditure of money in Iraq and asked: “Moneys were used or aid was given to this person based on the eight purposes of the use of zakat. Was this a legitimate expenditure?” (A1283) Smari declined to answer, stating:

I'm really not a person who specialized in how to spend zakat. I cannot make these decisions. I think what you told me is the verse in the Qur'an and the way that the zakat should be spent in the eight ways, jurisprudence is a very big field, scholars have different opinions, you read pages and pages on what each one of these words that you just mentioned may mean. There are scholars who are specialized in zakat and those are usually the ones who issue the order to spend, not to spend in a given situation, if there was any question about it. . . . I am in no position to make a judgment.

(A1283)

Counsel for Dhafir then went on to ask about Dhafir’s efforts to comply with religious requirements, which he now argues should have been out of bounds. Regarding letters that Smari had written to religious scholars, defense counsel asked:

[DEFENSE COUNSEL]: And what you were trying to adhere to is, and again forgive me if I'm mispronouncing, Sharia laws, Sharia?

SMARI: Sharia.

[DEFENSE COUNSEL]: Sharia, you were trying to be in compliance with the Sharia?

SMARI: Yes.

[DEFENSE COUNSEL]: And that's why you had these questions go out, so that you would make sure you were doing things the right way?

SMARI: Correct.

(A1285)

Smari's testimony on cross examination essentially reiterated the gist of testimony that Smari had first given on direct examination, without objection, that he and Dhafir would occasionally seek advice from "shaikhs" – a term for scholars – in the operation of Help the Needy. (A349-57) As defense counsel plainly stated at the time, Dhafir was trying to demonstrate that his conduct was permitted by the religion that he shared with many of his donors. (A1286)

This testimony, to which Dhafir did not object, and upon which he elaborated in trying to establish his

defense, ultimately hurt Dhafir, because Dhafir's bank records and correspondence, which are described above, showed that Dhafir did not comply with the advice he received. As the government pointed out, Dhafir was told first that he should not make investments with donations, and later that any investments purchased with donated funds should be owned by the beneficiaries. (A1440) Dhafir bought properties in Syracuse New York and kept them in the names of his businesses, and when he sold them, he kept the proceeds. The government made this point precisely, and without objection, in its closing:

So that even when they seek advice and they get told "don't do it, don't do it," they keep seeking it until you find someone who says, "yeah, you can but you can only if you put it in the name of the beneficiaries," and they don't even follow that advice."

(A1440)

Dhafir asserts that in the government's closing, the prosecutor "proceeded to argue against the wisdom of the shaikh's interpretation" (Brief at 49) and substituted his own view of the purposes of zakat. In fact, the prosecutor said the following, without objection:

And then as the case went along with the testimony of other witnesses, there was a -- wasn't there also a letter to this Ali Al Saloos

asking if he could, looking for yet another opinion, can we use this money for investments. I would encourage you to infer that that was shopping for a new opinion, but the fact is they sent a third letter out saying, can we do this, to Ali Al Saloos and he writes back saying, well, you can as long as the project is owned by the needy. And that makes perfect sense because, for example, if Rafil Dhafir is run over by a train or something like that, who owns that property, you know, is that now Priscilla Dhafir's, and she may not even know it, is that somebody else's? The point is that to protect against the vagaries of life, if you were going to use charitable money as an investment, according to Al Saloos, then it should be in the name of the people who are the beneficiaries so that if something happens, they end up owning the investment.

Now that's not -- I mean, as you may recall, we objected to this testimony because it doesn't matter what's appropriate under the Sharia and what's not, but the point is that's the advice he got.

(A1439-40)

The government then pointed to two examples where Dhafir immediately ignored the shaikh's interpretation, and instead had invested Help the Needy's money in his own name (A1440), including one instance where the evidence showed that Dhafir kept the money when the investment was sold.

(A1441) Dhafir did not object to the argument at the time.

The line of questioning and argument that Dhafir now challenges on appeal was introduced by both parties without objection, and was a recurrent theme in Dhafir's defense.³² Having not objected, indeed having invited and expanded upon the testimony, Dhafir may not argue for a reversal now that the defense has proved ineffective. Where evidence is admitted without objection, it can only be reviewed under the plain error standard. Even if plain error is found, a reversal is not appropriate unless the admitted evidence taints the proceeding such that the prosecutor and the judge were derelict in permitting it, despite the defendant's failure to object. *Feliciano*, 223 F.3d at 115.

It was not error, and certainly not plain error, to allow the donor and co-founder of Help the Needy to testify as to his understanding of how donor money was spent. Smari did not try to interpret the Sharia, and neither did the government, as Dhafir now suggests. Rather, Smari explained how he assisted

³² This argument parallels the situation where a defendant seeks to raise an advice of counsel defense. The government is entitled to show that the defendant did not follow the advice he was given. *See United States v. Evangelista*, 122 F.3d 112, 117 (2d Cir. 1997) In neither instance is the propriety of the advice at issue; rather the compliance with it.

Dhafir in running Help the Needy, and how he thought Help the Needy's money would be distributed. Dhafir's own counsel sought to justify Dhafir's use of Help the Needy's money by suggesting Dhafir complied with the advice he obtained about the use of donations, but the facts simply did not support it.

POINT IV

Dhafir Cannot Assert Misjoinder On Appeal When He Elected Against Severance In The Lower Court, And In Any Event, There Was Neither Error Nor Prejudice In Joining The Charges In This Case

1. The Standard of Review

Because the defendant elected not to make a motion to sever prior to trial, this issue is waived, and unreviewable. *United States v. Gelzer*, 50 F.3d 1133, 1139 (2d Cir. 1995). Even if the court were to consider the propriety of the joinder and finds it was improper, the error is only reversible if it caused actual prejudice. *United States v. Lane*, 474 U.S. 438, 449 (1986).

2. Discussion

Dhafir argues that the health care fraud charges should have been severed from the remaining charges. Dhafir candidly admits that the decision not to seek severance was a trial tactic (Brief at 52). His trial

counsel believed that the multitude of charges would demonstrate an unseemly hunger on the government's part for conviction. Indeed, such an argument was at the heart of Dhafir's defense, and was the focus of his opening and closing arguments.³³ Now that the tactic has failed, Dhafir complains that the multitude of charges was unfair, and his convictions should be reversed. Having decided against seeking severance, this issue was waived and is unreviewable.

The Federal Rules of Criminal Procedure require that a motion under Rule 14, to sever charges due to prejudice, be made prior to trial. Fed. R. Crim. Proc. 12(b)(3)(D). Under the rules, a failure to make such a motion by the deadline set by the court means that issue has been waived. Fed. R. Crim. Proc. 12(e); *See United States v. Blount*, 291 F.3d 201, 208 (2d Cir. 2002); *United States v. Beltempo*, 675 F.2d 472, 481 (2d Cir. 1982). This Court has flatly stated: "The failure to raise a claim of improper joinder before trial results in a waiver of that issue on appeal." *United States v. Gelzer* 50 F.3d 1133, 1139 (2d Cir. 1995),

³³ In opening statement, counsel argued, inaccurately: So what they did on February 26th . . . they had over 80 law enforcement officers, over 80, helicopter buzzing around, at his home on an IEEPA violation, on a Medicare violation. . .85 law enforcement officers from every facet of the federal government that you can imagine. Every facet. What did they do? Well, they watch him drive away, but then they rush to the house.(A1228) *See also* (A1442)

citing United States v. Graves, 736 F.2d 850, 854 (2d Cir. 1984) (issue waived if motion not made before or during trial). A post-trial motion alleging improper joinder is untimely; therefore it is properly denied and the issue considered waived and unappealable. *See Gelzer*, 50 F.3d at 1139; *Beltempo*, 675 F.2d at 481. This position is justified by the “[e]xigencies of trial and a need for orderly procedure.” *See United States ex rel. Tarallo v. LaVallee*, 433 F.2d 4, 6 (2d Cir. 1970).

Requiring a defendant to raise the issue of misjoinder or prejudicial joinder “allows the trial court to assess whether the joinder was in fact prejudicial, and prevents a defendant from deliberately failing to make a meritorious motion to wait and see what verdict the jury returns.” *United States v. Hudson*, 53 F.3d 744, 747 (6th Cir.1995) (citations omitted). Having deliberately waited to see what verdict the jury returned, Dhafir cannot seek relief on appeal asserting an objection to joinder.

Even if Dhafir had made a motion to sever the charges, the Court would have been within its discretion to deny severance. Rule 8 of the Federal Rules of Criminal Procedure permits the joinder of charges against a single defendant where they i) are of the same or similar character, ii) are based on the same act or transaction, or iii) are connected with or constitute parts of a common scheme or plan. In this case, 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. The evidence showed that Dhafir was committing a crime by being away (and billing as if he were in his office) and that his travel was in aid of a second crime. The crimes, though different offenses, are two sides of the same coin, and are part of the same, though multi-faceted, transaction.³⁴

In addition, the health care fraud charges are of the same or similar character as the mail and wire fraud charges. Four trial witnesses testified concerning both the Help-the-Needy-related offenses and the health care offenses. Dhafir intertwined the offenses by enlisting Diana Wellmon, his lab technician, to act as the President of Help the Needy.³⁵ Consequently, the district court would have been well justified in

³⁴Ironically, Dhafir's argument that the money laundering guideline calculation was improper (Issue VI, below) depends entirely on the fact that a small portion of the laundered funds were derived from the health care offense, the reverse of his argument here that the offenses were unrelated.

³⁵Joinder of charges is permitted when the same evidence will be used to prove the joined charges. *See United States v. Tubol*, 191 F.3d 88, 95 (2d Cir. 1999); *United States v. Blakney*, 941 F.2d 114, 116 (2d Cir. 1991). For example, sufficient overlap to justify joinder can be established where the defendant involves the same people in the different transactions. *See id.*

determining that the health care fraud charges were of the same or similar character as the mail and wire fraud charges, that they were different aspects of the same transactions, and that they connected to a common scheme – to raise money (both from the public and from the taxpayer) by trickery, and to send that money both to Iraq and to a series of his own private enterprises.

The government does not suggest that a district court would have abused its discretion had it granted a motion for severance (had Dhafir chosen to make it); the fact is, the decision is not without doubt.³⁶ Whether the acts underlying the charges are sufficiently connected to be part of a common scheme or plan depends on the facts of each case. *See Blakney*, 941 F.2d at 116. The mere fact that joinder makes a trial long or complicated does not automatically support an inference of jury confusion. *See United States v. Casamento* 887 F.2d 1141, 1150 (2d Cir. 1989). Indeed, the government was prepared to try one large case or two smaller cases; the defendant chose to put his eggs in one basket.

³⁶ Dhafir's reliance on *United States v. Shellef*, 507 F.3d 82 (2d Cir. 2007) is misplaced. In that case, there were two defendants both of whom made motions to sever, and each of whom was able to show prejudice from spill-over. This Court found that, given the prejudice, the district court abused its discretion in not granting the requested severance.

If Dhafir had not waived his right to severance, but had made a motion that the district court denied, he still would not be entitled to reversal on appeal. Pursuant to Rule 52 of the Federal Rules of Criminal Procedure, even if the reviewing court finds charges or defendants were improperly joined, reversal is only appropriate if the misjoinder caused actual prejudice. *See United States v. Lane*, 474 U.S. 438, 449 (1986). The joinder standards of Rule 8 are not constitutional mandates; therefore, the harmless error analysis is appropriate. *See Lane* 474 U.S. at 446

Where the jury has been instructed on each separate offense and is told to reach a verdict on each offense, using only the evidence relevant to that charge – as occurred here – (A1266-67) there must be an “overwhelming probability of jury confusion” to satisfy this actual prejudice requirement. *Herring v. Meachum*, 11 F.3d 374, 377 (2d Cir. 1993); *see United States v. Yousef*, 327 F.3d 56, 150-51 (2d Cir. 2003). The acquittal on Count 3 demonstrates that the jury was careful in considering each count separately. Evidence that is “distinct and easily compartmentalized” supports an inference against jury confusion. In this case, the false pretenses that formed the basis of the health care fraud charges were easily compartmentalized from the other acts that proved the remaining charges. *See Lane* 474 U.S. at 450.

Finally, the clearest demonstration that any error from theoretically misjoined counts is harmless comes from an analysis of the strength of the respective

counts. *See Lane* 474 U.S. at 450 n.13. When the evidence is so strong that it is a certainty that the defendant would still have been convicted even absent the improper joinder, there can be no substantial prejudice. *See Yousef*, 327 F.3d at 151. Unless there is actual prejudice that substantially affected the outcome, the conviction must not be reversed. *Lane* 474 U.S. at 449. The evidence in this case was overwhelming and therefore the alleged misjoinder did not cause the defendant any actual prejudice.

As described above, the evidence of guilt on Counts 1 - 50 was virtually uncontested. Dhafir's own statements, including his intercepted statements, showed that he sent money to Iraq in violation of the sanctions, and that he caused money to be delivered to Jordan to promote that offense. (Counts 1 - 14) In the meeting with Help the Needy's trustees, he acknowledged that his management of Help the Needy was not legal from the IRS's point of view (Count 15). Dhafir's wife, his accountant, his Executive Director, his best friend, and the manager of a third party charity each testified that he or she pled guilty to a felony that he or she had committed at Dhafir's urging.³⁷ Those felonies track Dhafir's convictions (Priscilla Dhafir/Counts 24 - 50, G. William Hatfield/Counts 16-22, Ayman Jarwan Counts 1, 15 and 23, Osameh al

³⁷ Their testimony is described above in the Statement of Facts concerning the trial. The corroborating documents are described in the Statement of Facts concerning the investigation.

Wahaidy/Counts 1-14 and Ahmed Ali/Count 16). Bank records, emails and tax records corroborated their testimony. Although Dhafir vigorously contested the mail and wire fraud charges (Counts 51 - 60), the evidence described above demonstrates the strength of that case. Above all, Dhafir himself acknowledged that Help the Needy's charitable purposes were a disguise for its real purpose. (A1533) Even if Dhafir had not waived this issue, and even if the joinder was too broad, there is simply no prejudice from the alleged misjoinder.

POINT V

Charging Two Separate Conspiracies Under 18 U.S.C. § 371 – A Conspiracy To Violate IEEPA (Count One) And A Conspiracy To Defraud The IRS (Count Fifteen) – Was Not Plain Error

1. The Standard of Review

Because Dhafir did not raise the issue of multiplicity before or during trial, the issue is forfeited, and can be reviewed only for plain error. *See United States v. Gore*, 154 F.3d 34, 41 (2d Cir. 1998).

2. Discussion

A. The Charges Were Not Multiplicitous

Dhafir's next claimed error is that Count 1, which charged a conspiracy to violate IEEPA, is

multiplicitous with Count 15, which charged a conspiracy to defraud the IRS. Put simply, Dhafir claims they are multiplicitous because the same statute is violated (18 U.S.C. § 371) and they both relate to the operation of Help the Needy. Like the joinder issue, this was never raised in the district court. It is less clear that this was a conscious trial tactic, so that unlike the issue of joinder, which was consciously waived, this issue appears to have been missed, and thus subject to a plain error analysis. *See United States v. Gore*, 154 F.3d 34, 41-42 (2d Cir. 1998) (holding that by not raising an issue, the defendant forfeited his right to appeal, so that a claim of multiplicity should be considered under a plain error standard); *see also United States v. Mascuch*, 111 F.2d 602, 603 (2d Cir. 1940).

Fed R. Crim. P. 52(b) allows a court to review plain errors that affect a defendant's "substantial rights." First, there must be an error, and it must be clear or obvious under current law. *Gore*, 154 F.3d at 42 (citations omitted). Second, a defendant must prove that an error affected his substantial rights, "meaning [that] the error must have been prejudicial and it must have affected the outcome of the district court proceedings." *United States v. Olano*, 507 U.S. 725, 734-35 (1993). Moreover, a court should not correct a plain error that affected the defendant's substantial rights unless the error is "particularly egregious" and will "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Young*, 470 U.S. 1, 15 (1985). In this case, the fact that

two conspiracies were charged is not error, much less plain error. Moreover, it did not have any affect on Dhafir's substantial rights.

In *United States v. Jones*, the court held “An indictment ‘is multiplicitous when a single offense is alleged in more than one count.’ ” 455 F.3d 134, 146 (2d Cir. 2006); *United States v. Roshko*, 969 F.2d 9, 12 (2d Cir.1992) (quoting *United States v. Nakashian*, 820 F.2d 549, 552 (2d Cir. 1987)). A claim of multiplicity cannot succeed, however, “unless the charged offenses are the same in fact and in law.” *United States v. Estrada*, 320 F.3d 173, 180 (2d Cir. 2003)

“[M]ultiple agreements to commit separate crimes constitute multiple conspiracies” *United States v. Broce*, 488 U.S. 563, 571 (1989). The question of whether one, or more than one, conspiracy has been proven is a question of fact for a properly instructed jury. *See, e.g., United States v. Orozco-Prada*, 732 F.2d 1076, 1086 (2d Cir. 1984); *United States v. Alessi*, 638 F.2d 466, 472 (2d Cir.1980); *see generally United States v. Macchia*, 35 F.3d 662, 672-73 (2d Cir. 1994)(Newman, C.J., concurring).

Where, as here, separate counts of a single indictment allege that the defendant participated in more than one conspiracy, and allege that the conspiracies had different groups of coconspirators in each alleged conspiracy, it is appropriate to charge two separate conspiracies, rather than a single dual-purpose conspiracy. This case is somewhat similar to *United*

States v. Bilzerian, 926 F.2d 1285, 1301 (2d Cir.1991), in which the defendant was charged in two counts with different prongs of the conspiracy statute: a conspiracy to violate a different statute, and a conspiracy to defraud the United States. *Bilzerian* held that the different prongs of the conspiracy statute are simply not the same at law; and this Court should make the same conclusion with the case at bar. Further, the two charges against Dhafir have different conspirators, different overt acts and different methods and means, which the court in *Bilzerian* considered relevant in holding that the charges were not multiplicitous. 926 F.2d at 1301-02. Counts 1 and 15 are simply not the same “in fact.”

Count One alleges that Dhafir arranged with others to violate the Iraqi Sanctions. Al Wahaidy, Jarwan and Zagha were named conspirators (A58); Smari’s and Majid’s testimony demonstrated that they were two of the unnamed conspirators. Al Wahaidy, Smari and Majid each admitted to participating in the agreement to violate the Iraqi sanctions, but each had nothing to do with the tax offense; indeed, each testified that he believed Dhafir when Dhafir told him that the charity was tax-exempt, and Smari and Majid deducted their contributions as a result. Zagha, too, had nothing to do with the IRS offense, which occurred uniquely in the United States. Zagha’s activity was limited to Jordan, where he assisted Dhafir in smuggling money into Iraq.

The IRS-related conspiracy alleged in Count 15 of the Second Superseding Indictment relied on a different prong of the conspiracy statute – setting out a conspiracy to defraud a department of the United States. (A143) There were no named conspirators, in part because Jarwan had already pled guilty to conspiring with Dhafir both to violate the IEEPA and to defraud the IRS, and Ahmed Ali and G. William Hatfield had agreed to plead guilty to their part in the IRS-related offense. But neither Ali nor Hatfield had any participation in the Iraqi Sanctions offense. Ali simply allowed Dhafir to use his charity’s tax identification number; he never contributed to Help the Needy, and he thought that Dhafir had obtained all the necessary licenses. Hatfield, who pled guilty to submitting the false application for tax exempt status for Help the Needy Endowment, Inc. was unaware of IEEPA offense. Indeed, Dhafir specifically told him that Help the Needy Endowment Inc. was not involved at all with Iraq. (A1372)

Turning to the overt acts listed in the indictment, the IEEPA conspiracy allegations are almost entirely of monetary transactions – Dhafir (together with others) is alleged to have transferred money from the United States, through Jordan, to Iraq. (A175-84) The tax conspiracy, on the other hand, lists overt acts that describe the various false statements that Dhafir (together with others) made to donors and to the IRS, through falsifying bank ownership documents, Form 990's (employer tax returns), a Form 1023 (the application for tax-exempt status), and by deducting his

own contributions when he knew they were not deductible. (A191-94)

A jury may find multiple conspiracies if an indictment alleges that each conspiracy “existed for different—albeit overlapping—periods of time, and that the defendant, in each alleged conspiracy, had different groups of coconspirators.” *United States v. Jones*, 482 F.3d 60, 72 (2d Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 1306 (2007). In this case, one conspiracy begins when Dhafir decides to send money to Iraq, the other begins when he later disguises what he is doing from the IRS. One conspiracy is international, the other is entirely domestic. Jarwan is the only conspirator who joins Dhafir in both conspiracies, otherwise there are two entirely separate sets of conspirators. It was not error, much less plain error, to charge the offenses in two counts, and it was not “plain” error to try them and to sentence them as two separate conspiracies.³⁸

³⁸ The government notes that the sentences for Counts 1 and 15 were to be served concurrently to each other, but recognizes that *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002) overruled on other grounds by *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003), holds that the imposition of concurrent sentences does not cure multiplicity.

B. There Was No Error In Imposing Partially Consecutive Sentences

In arguing that the concurrence of the sentences for Counts One and Fifteen do not make multiplicity “harmless,” Dhafir objects to the way the sentence was articulated in the judgment (Brief at 61). Because the final term of imprisonment exceeded the highest statutory maximum for any single count, the 60 month sentences for counts 1, 15 and 50 were imposed to be “partially consecutive” to the 240 month sentences for Counts 2, 4- 14 and 53 - 60, leading to a total sentence of 264 months. (A1131) Dhafir appears to concede that the court followed U.S.S.G. § 5G1.2(d) and Second Circuit precedent for adding partially consecutive terms where the statutory maximum of any one of the individual counts is less than the final term of imprisonment, but he argues that the “overlapping” quality of the consecutive/concurrent sentences offends 18 U.S.C. § 3584, which allows the court to decide whether sentences are served consecutively or concurrently. (Brief at 63).

There is no dispute that the district court correctly followed the procedure described in *United States v. McLeod*, 251 F.3d 78, 83-84 (2d Cir. 2001) (imposing only a portion of the sentence on one count to run consecutively to the sentence imposed on the other counts, to achieve the total sentence of incarceration, and ordering that the “remaining” portion of that count “would then be imposed to run concurrently”). This Court in *United States v.*

Mizrachi, 48 F.3d 651, 654 (2d Cir. 1995) specifically held that: “The Guidelines' multi-count analysis interposed a sensible middle ground between completely concurrent and completely consecutive sentences that uses a combination of concurrent and partially consecutive sentences” and that a district court is free to choose to apply a partially consecutive, partially concurrent sentence. The Court noted that “[t]he latter technique of partial consecutiveness avoids the risk of leaving in place a sentence less than what the sentencing judge intended in the event that the sentence on the most serious count is subsequently vacated.” *Mizrachi* 48 F.3d at 655.

Dhafir suggests that *United States v. Booker*, 543 U.S. 220 (2005) invalidates the legal authority of those cases, which were decided in reference to Sentencing Guidelines § 5G1.2(d) (“the sentence imposed on one or more other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment”). Dhafir fails to cite any case to support that view, however, and can point to no language in *Booker* or in any case since that purports to invalidate § 5G1.2(d) or to overrule *McLeod*.

Dhafir argues that this Court has not followed the *McLeod* procedure that permits partially consecutive sentences since *Booker* was decided (Brief at 62 n.34). Yet in *United States v. Reifler*, 446 F.3d 65, 113 (2d Cir. 2006) this Court cited U.S.S.G. § 5G1.2(d) and said: “[T]he court should impose no more than the statutory maximum on any one count but

should impose the sentences consecutively to the extent necessary to reach the recommended Guidelines range.” In *United States v. Matera*, 489 F.3d 115, 124 (2d Cir.), *cert. denied*, ___ U.S. ___, 128 S. Ct. 424 (2007) this Court specifically held, in the context of § 5G1.3: “[t]he district court had discretion to impose a concurrent, partially concurrent, or consecutive sentence.” *See also United States v. Betts*, 509 F.3d 441, 447 (8th Cir. 2007) (“Section 3584(a), (b) of Title 18, United States Code, mandates consideration of the § 3553(a) factors in determining whether to impose a concurrent, partially concurrent, or consecutive sentence” which is then reviewed for reasonableness). For its part, the Fourth Circuit has specifically approved post-*Booker* stacking for partially consecutive sentences as contemplated in § 5G1.2(d). *See United States v. Allen*, 491 F.3d 178, 195 (4th Cir. 2007), and cases cited therein. The Sixth Circuit has done the same in *United States v. Eversole*, 487 F.3d 1024, 1033 (6th Cir.), *cert. denied*, ___ U.S. ___, 128 S. Ct. 649 (2007) declaring that the effect of *Booker* is to render cases “stacked” properly under 5G1.2(d) to “carry a badge of reasonableness.” The Seventh Circuit is also in accord. *See United States v. Spano*, 476 F.3d 476, 478 (7th Cir.), *cert. denied*, ___ U.S. ___, 127 S. Ct. 2153 (2007). In *United States v. Ronquillo*, 508 F.3d 744, 750-51 (5th Cir. 2007), the Fifth Circuit observed that *Booker* had increased, rather than eliminated, the discretion of the district court in deciding whether to impose concurrent, consecutive or partially concurrent sentences. There is simply no support in the logic of *Booker* or in the language of any

statute to suggest that § 5G1.2(d), which the District Court followed in this case, has been nullified by case law or contravenes any statute.

POINT VI

The Court Properly Concluded That The Applicable Money Laundering Guideline Was § 2S1.1(a)(2) Rather Than § 2S1.1(a)(1)

1. The Standard of Review

In determining the appropriate standard of review for a district court's application of the Guidelines to the specific facts of a case, “this Court has followed an either/or approach,” adopting a *de novo* standard of review when the district court's application determination was primarily legal in nature, and adopting a “clear error” approach when the determination was primarily factual. *United States v. Gotti*, 459 F.3d 296, 349 (2d Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 3001 (2007); *See United States v. Vasquez*, 389 F.3d 65, 75 (2d Cir.2004).

2. Discussion

Dhafir asserts that the sentence for the money laundering counts should have been calculated under § 2S1.1(a)(1) and grouped with the fraud and tax offenses, because Dhafir was not a “third party” money launderer, but was himself convicted of all the predicate offenses. (Brief at 64) The government argues, and the district court found, that the money

laundering base level offense should be calculated under § 2S1.1(a)(2) and grouped with the IEEPA offense, because the money laundering charge was a promotional money laundering offense, and there was no “underlying offense from which the laundered funds were derived.” (A1125-29) The approach adopted by the district court resulted in a total offense level of 41, where the approach Dhafir advocated would have resulted in a level 39.

The district court properly found that promotional money laundering under 18 U.S.C. § 1956(a)(2)(A), for which – in this case – there is no “underlying offense,” should be grouped with the promoted offense, and the base level offense should be calculated under § 2S1.1(a)(2), which associates the money laundering with the promoted offense. Dhafir argues that because he was convicted of other offenses, only one of which contributed at all to the “laundered” money sent overseas, the court should have applied § 2S1.1(a)(1), which enhances the offense level for the crime that generated a minor portion of the laundered amount.³⁹ This approach would not reflect the amount of money sent to promote the overseas offense.

³⁹As noted above, the only offense that contributes at all to the laundered funds is the health care fraud (because it increases Dhafir’s wealth, and Dhafir contributes to Help the Needy), which he asserts should have been severed from the money laundering counts because they are completely unrelated.

The following example shows the absurdity of the result that would derive from Dhafir's proposed method of calculation under §2S1.1(a)(1). If a defendant takes \$1 million that is *not* the proceeds of a crime, and sends it out of the country to promote a specified unlawful activity, such as child pornography or nuclear weapons proliferation, the Guideline calculation would be 32. If, however, following Dhafir's analysis, the same defendant added \$10,000 of fraud proceeds to the same \$1 million, his Guideline score would drop to 12. Indeed, Dhafir's method of calculation would lead to a lower Guidelines score based upon Dhafir's conviction on all the counts than would have been applied had he been convicted of only the first two counts.

There are no reported cases that address this situation. There are no application notes that compel either result. Dhafir argues that the district court's decision flies in the face of the clear language of the Guideline. To the contrary, the language of the Guideline supports the district court's interpretation. Specifically, § 2S1.1(a)(1) refers to cases where the money that was laundered was derived from an underlying offense, and where a Guidelines score can be determined concerning that underlying offense. Where there is no underlying offense from which the laundered funds were derived, or where an appropriate offense level for that offense cannot be determined, § 2S1.1(a)(2) applies.

In this case, the district court determined that there was no underlying offense from which the laundered money was derived, a conclusion that is literally underlined in the Court's decision (A1128). The facts support that conclusion. The mail and wire fraud offenses did not generate the laundered funds. Indeed, the money that violates the IEEPA offense (the laundered funds) was often not part of the mail fraud (for example, the money Mahir Majid sent to his family through Help the Needy was not obtained by fraud or the proceeds of any crime, but violated IEEPA when it was sent into Iraq, and comprised some of the laundered funds). In the government's view, and as the court calculated, contributions that never made it to Iraq *were* the proceeds of the mail and wire frauds, but they *were not* laundered funds, because they did not promote an IEEPA offense. Neither was the health care fraud a major source of the laundered funds (although it was one of the indirect sources). The evidence established a loss in excess of \$300,000 from the health care fraud, some of which was paid to Dhafir personally. Some of Dhafir's income was contributed to Help the Needy, and some of that contribution was used to violate IEEPA. But the Guideline does not refer to the underlying offense from which "any portion" of the laundered funds was derived. Because the amount of health care fraud money actually contributed to Help the Needy is uncertain, and in any case would only be a minor portion of the laundered funds, the district court properly decided that there was not a measurable connection between the two such that

it could conclude that the health care fraud offense met the criteria of § 2S1.1(a)(1).

It is clear from both the earlier version of the Guideline and its amended version that the Commission sought to associate the money laundering penalty with the offense to which the laundering most related. *See United States v. Descent*, 292 F.3d 703, 708 (11th Cir. 2002) The purpose of the 2001 amendment to the Guideline was to eliminate the situation where a money laundering conviction established a penalty that bore no relation to the predicate offense. *See United States v. Sabbeth*, 277 F3d 94, 97 (2d Cir. 2002). And so, where the laundered funds are derived from an offense, the money laundering penalty relates to that offense. But where the laundered funds cannot truly be characterized as being derived from an underlying offense, or where the amount to which any underlying offense generated the laundered funds is beyond discernment, the court is directed to look to the promoted offense, and to calculate the Guideline score based upon the amount of the laundered funds and

enhanced by the character of the promoted offense.⁴⁰

Finally, the government notes that the jury found that the money laundering offense *promoted* the IEEPA offense. That finding was an essential element of the crimes charged in Counts 2 and 4 – 14. Although *Blakely v. Washington*, 542 U. S. at 301-08, does not require a jury determination of each sentencing factor, the values embraced in *Blakely* certainly support adopting the Sentencing Guidelines calculation that most closely tracks the necessary findings of the jury. In this case, calculating the money laundering Guideline under § 2S1.1(a)(2), rather than under § 2S1.1(a)(1), more closely tracks the necessary jury determinations.⁴¹ It also relates the money laundering

⁴⁰ In most money laundering cases, including most promotional money laundering cases, the laundered funds are proceeds of a specified offense, leading to a charge under 18 U.S.C. § 1956(a)(1), 18 U.S.C. § 1956(a)(2)(B), or 18 U.S.C. § 1956(a)(3). Where, as here, the charge is under 18 U.S.C. § 1956(a)(2)(A), the funds do not have to be "dirty" funds, and need not be derived from any offense whatsoever.

⁴¹ The government notes that, in order to convict the defendant on substantive money laundering charges, Counts 4 - 14, the jury must have found that Dhafir laundered at least \$2,380,000, far in excess of the money that could have been derived from the health care fraud offense, which is the sole offense that could

penalty to the crime with which the money laundering charge relates in the Indictment. The district court correctly calculated the offense level for Dhafir's money laundering offense.

POINT VII

The District Court's Restitution Order Is Proper under Governing Statutory Authority

1. The Standard of Review

A district court's order of restitution is reviewed "generally for abuse of discretion." *United States v. Lucien*, 347 F.3d 45, 52-53 (2d Cir. 2003) "Where there are challenges to the court's findings of fact, we review for clear error; insofar as the order rests on interpretations of law, we review those interpretations *de novo*." *United States v. Reifler*, 446 F.3d 65, 120 (2d Cir. 2006)

2. Discussion

Dhafir's last argument is that two payees to whom the district court ordered him to pay restitution were not "victims" of an offense of which he was convicted, within the meaning of the Mandatory Victim Restitution Act, 18 U.S.C. § 3663A (the "MVRA"), and thus "the restitution to those entities was entirely

be considered "underlying."

unlawful.” (Brief at 71-72) He further asserts that his arguments urging certain offsets to the amount of restitution to be ordered were ignored by the government and left unresolved by the district court. The first two complaints are wrong as a matter of law, the third complaint is wrong as a matter of fact.

A. New York State Medicaid Restitution Fund

Pursuant to 18 U.S.C. § 3663A, a court sentencing a defendant convicted of an offense against property under Title 18, specifically including an offense committed “by fraud or deceit”, 18 U.S.C. § 3663A(c)(1)(A)(ii), “shall order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense.” 18 U.S.C. § 3663A(a)(1).

“Victim” is defined as “a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered *including, in the case of an offense that involves as an element a scheme, conspiracy or pattern of criminal activity, any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy or pattern.*” 18 U.S.C. § 3663A(a)(2) (emphasis added); *United States v. Boyd*, 222 F.3d 47, 50 (2d Cir. 2000).⁴²

⁴² Dhafir concedes, as he must, that every mail fraud, wire fraud and health care fraud count in the Indictment involved as an element a “scheme” to

This Court has noted that the broad statutory definition of “victim” may result in restitution for a defendant’s conduct “even on uncharged or acquitted counts.” *Id.*, at 51. In *Boyd*, the defendant had been acquitted on a conspiracy count but nonetheless was ordered to pay restitution for losses sustained by the victims of the conspiracy. The Court found that the jury’s guilty verdict on *Pinkerton* charges⁴³ necessarily meant that the jury had found that the defendant participated in the conspiracy. The Court concluded the district court’s restitution order encompassing victims on “uncharged or acquitted counts” was proper and consistent with the MVRA, stating:

With [amendments to the VWPA⁴⁴], Congress broadened the scope of restitution from losses

defraud. (Brief at 72). Accordingly, this broadest portion of §3663A’s definition of who is a “victim” of his criminal conduct applies here.

⁴³ *Pinkerton v. United States*, 328 U.S. 640 (1946)

⁴⁴ This Court and many other courts have recognized that the MVRA definition of “victim” tracks verbatim the amended language of the Victim Witness Protection Act (“VWPA”), 18 U.S.C. § 3663, and therefore that case law under the VWPA may help to interpret the corresponding portions of the MVRA. *See Boyd*, 222 F.3d at 50.

attributable solely to the offense of conviction to all losses caused in the course of a defendant's criminal conduct, *whether the defendant is convicted of each of those offenses or not.*

Boyd, 222 F.3d at 50 (citations omitted) (emphasis in original).

Indeed, this Court has found that “[a] sentencing court is authorized to provide restitution to ‘any’ victim of the *offense*, even those not named in the criminal indictment.” *United States v. Grundhoefer*, 916 F.2d 788, 794 (2d Cir. 1990). *See also United States v. Cummings*, 189 F. Supp. 2d 67, 75 (S.D.N.Y. 2002); *United States v. Brock-Davis*, 504 F.3d 991, 999 (9th Cir. 2007); *United States v. Dickerson*, 370 F.3d 1330, 1339 (11th Cir. 2004) (“the courts have held that restitution may be ordered to a victim not named in the indictment”) (collecting cases); *United States v. Hensley*, 91 F.3d 274, 277 (1st Cir. 1996) (finding restitution statutorily authorized and proper when a scheme is involved “without regard to whether the *particular criminal conduct* of the defendant which directly harmed the victim was alleged in a count to which the defendant pled guilty, or was even charged in the indictment”); *United States v. Rice*, 38 F.3d 1536, 1545 (9th Cir. 1994) (declining to find “a per se rule that restitution is limited to victims specifically named in the indictment”); *United States v. Angelica*, 859 F.2d 1390, 1395 (9th Cir. 1988) (“The trial court did not err in basing the restitution order on victims not identified in the indictment.”)

Here, counts 24 through 49 of the Indictment outline with specificity Dhafir's scheme to defraud a health care benefit program by claiming he (i) treated or directly supervised his patients' treatment when, in fact, a nurse practitioner or laboratory technician provided the treatment with neither the defendant nor any other physician present, and (ii) caused claims to be submitted under his provider number when he had neither performed nor supervised those services, in violation of 18 U.S.C. § 1347. (A203-11). The indictment adequately specifies the time period of the scheme and sets forth the precise course of the defendant's conduct in carrying it out. There is no claim in this appeal that the jury lacked a basis for convicting Dhafir on those counts.

Post-trial proof submitted by the government to the district court, which identified the New York State Medicaid Restitution Fund as a "victim" of the "conduct that is the basis of the offense of conviction," *Hughey v. United States*, 495 U.S. 411, 413 (1990), sufficiently described losses to Medicaid that were directly caused by Dhafir's fraudulent scheme within the time period set forth in the indictment. (A1148-1163, A1145-1147). Accordingly, the district court properly ordered that restitution be paid to the New York State Medicaid Restitution Fund in the amount of its loss.

**B. State of New York Law Department,
Restitution Account**

Dhafir next challenges the district court's restitution order with respect to the payment to the Charities Bureau (the New York Law Department, Restitution Account), claiming that "[a]ccording to the indictment, HTN and HTNE were co-conspirators, co-schemers and co-defendants of Dr. Dhafir" with regard to the mail and wire fraud counts upon which the restitution is based (Brief at 74). Dhafir then asserts that donor money obtained by his fraud, some of which he converted to his own use, thus actually represents "ill-gotten *gains*" and "not *losses*" to Help the Needy. (emphasis in original). No reasonable reading of the mail and wire fraud counts of the Indictment (Counts 51-60) permits such a conclusion.

Counts 51-60 of the Indictment clearly allege a scheme by Dhafir to defraud donors to Help the Needy and to defraud the charity of funds provided by those donors, utilizing the mail and wires. (A212-17). The jury returned guilty verdicts on each of these counts. Perhaps because Dhafir treated Help the Needy as an alter-ego, its role as a victim is less obvious on appeal than it would be had the charity been more like the United Way. Nevertheless, Help the Needy, a conspirator in the counts relating to the delivery of money to Iraq, was the victim of Dhafir's later fraudulent conversion of its donations to his own purposes. Help the Needy and Help the Needy

Endowment, Inc. were appropriately owed restitution.

By the time restitution was ordered, however, Help the Needy and Help the Needy Endowment, Inc. had been judicially dissolved; the New York State Charities Bureau had been appointed their successor. Where and how to pay restitution in that situation was meticulously litigated and resolved before the district court.⁴⁵

Over seven months *before* the district court ordered him to pay restitution in its Amended Judgment (A1189-1196), the Supreme Court of the State of New York – on motion of New York’s Attorney General – had issued an order judicially dissolving Help The Needy Endowment, Inc. (Docket 488). Following its review of the NY Supreme Court’s order, the district court issued its own Order, dated June 22, 2005, finding that Help the Needy and Help the Needy Endowment Inc. had been dissolved and that the Attorney General of the State of New York had been judicially authorized to “receive the assets of HTN.” (Docket 489).⁴⁶

⁴⁵ As noted above, Dhafir fails to reference the Court’s June 22, 2005 or July 5, 2005 Orders, or the government’s submissions that directly address and support the district court’s restitution order.

⁴⁶ Consistent with these findings, the district court then ordered that Help the Needy’s bank

As described above, the government then filed a motion pursuant to 18 U.S.C. § 3771(d)(2) suggesting that the right to receive restitution would be an asset of Help the Needy. The district court agreed, saying that because the State of New York stood in the shoes of the prior Help the Needy entities at the time of the restitution order, it would be the proper receiver for any restitution otherwise payable to the charity, its donors or its beneficiaries. The district court directed the Charities Bureau “as successor to Help The Needy and Help The Needy Endowment, Inc.,” to distribute the funds “in a manner substantially similar to the original intent of the donors, specifically through a recognized charity to aid needy people in Iraq.” (Docket 496)

These orders make manifest that the district court adequately considered and properly determined that the New York State Law Department, Restitution Account was the appropriate restitution payee for that portion of Dhafir’s restitution obligation that was based on his defrauding of Help the Needy, its donors and its beneficiaries.

accounts, which had been restrained pursuant to a prior Order of the court, dated February 25, 2003, “be transferred to the control of the New York Attorney General’s Office in an instrument payable to ‘New York State Law Department, Restitution Account.’” (Docket 489)

C. Dhafir's Objections To The Restitution Amount Were Fully Submitted To And Resolved By The District Court

Finally, Dhafir argues that the government never responded to, and the district court never addressed, his objections to certain calculations of the amount of restitution he was ordered to pay. Once again, he wholly ignores an Order of the district court confirming precisely the opposite. In its Memorandum-Decision and Order setting restitution, dated January 24, 2006, the district court stated:

By letter dated December 23, 2005, the Court determined that the Government had provided all documents initially requested by the defense with respect to the amount of restitution. The Court stated that it would accept further submissions on the issue of restitution no later than January 9, 2006. Defendant's counsel submitted a letter brief on the issue on January 9, 2006. The matter is thus fully submitted to the Court. (Docket 558)

Dhafir's substantive restitution argument called for offsets for "the cost of certain items (medicine , for example)." (Brief at 76) Dhafir's request for offsets was contested by the government's post-trial sentencing submissions addressing that very point. The affidavit filed on behalf of Medicaid clearly says that those offsets were inappropriate, explaining that

offsets are not allowed where (a) Dhafir submitted claims for physician services provided by members of his staff who were not enrolled as a provider at the time the services were provided, and/or (b) the staff member who provided the services was unlicensed to do so (citing as an example Diana Wellmon, who had administered chemotherapy drugs to patients when she was not licensed to do so) (A1150-51). Excellus's affidavit in support of its restitution claim makes the same point. (A1165-66)

Based upon these submissions, the district court did not *accept* Dhafir's restitution arguments. Dhafir is simply wrong to suggest that the government did not respond to and the court did not address his objections concerning restitution. The district court did not abuse its discretion in rejecting Dhafir's submission because that submission was factually unsound.

Dhafir's various objections regarding restitution are unavailing and offer no basis to overturn the district court's proper and appropriate restitution order.

CONCLUSION

The conviction and the sentence were correct,
and the judgment should be affirmed.

Dated: Syracuse, New York
April 8, 2008

Respectfully submitted,
GLENN T. SUDDABY
*United States Attorney for the
Northern District of New York
Attorney for Appellee*

By: /s/
MICHAEL C. OLMSTED
Assistant United States Attorney

BRENDA K. SANNES
STEPHEN C. GREEN
GREGORY A. WEST
*Assistant United States Attorneys
Of Counsel*

CERTIFICATE RE: COMPLIANCE

The undersigned counsel for the United States hereby certifies that this brief does not comply with the Federal Rules of Appellate Procedure concerning the type-volume limitation set forth in Rule 32(a)(7)(B). As measured by the word-processing system used to prepare this brief, there are 22,979 words in the brief.

GLENN T. SUDDABY,
*United States Attorney for the
Northern District of New York*

/s/

Michael C. Olmsted

By: Assistant U.S. Attorney

**CERTIFICATE OF SERVICE BY
E-MAIL**

USA
v.
DHAFIR

Docket No. 05-5965-cr(L); 06-0949-cr

The undersigned hereby certifies that she is an employee of the Office of the United States Attorney for the Northern District of New York, and is a person of such age and discretion as to be competent to serve papers.

She further certifies that on April 9, 2008, she served a copy of the Appellee's Brief on the United States District Court of Appeals for the Second Circuit, by forwarding a Portable Document Format (PDF) version of the Brief to:

briefs@ca2.uscourts.gov, and to the attorneys for the Defendant Appellant, L. Barrett Boss, Esq. at BBoss@cozen.com and Peter Goldberger, Esq. at Peter.Goldberger@verizon.net.

/s/
Kathleen A. Barry

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: USA v. DHAFIR

DOCKET NUMBER: 05-5065-cr(L); 05-0949-cr

I, Kathleen A. Barry certify that I have scanned for viruses the PDF version of the

_____ Appellant's Brief

 x Appellee's Brief

_____ Reply Brief

_____ Amicus Brief

that was submitted in this case as an email attachment to <briefs@ca2.uscourts.gov> and that no viruses were detected.

Please print the **name** and **version** of the anti-virus detector that you used: Trend Micro Office Scan 7.3.

If you know, please print the version of revision and/or the anti-virus signature files 5.207.

/s/

Kathleen A. Barry

April 9, 2008