IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-13765

UNITED STATES OF AMERICA,
Plaintiff-Appellee, -Cross-Appellant,

v.

PHILIP FLORES,
ALAN CARSON,
Defendants-Appellants, -Cross-Appellees.

No. 23-14222

UNITED STATES OF AMERICA,
Plaintiff-Appellant, -Cross-Appellee,

v.

VALERIE HAYES
Defendant-Appellee, -Cross-Appellant.

No. 24-10524

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ENVISTACOM, LLC,
Defendant-Appellee.

On appeal from the United States District Court
for the Northern District of Georgia
No. 1:22-CR-00197-VMC-RGV

BRIEF OF THE UNITED STATES OF AMERICA

(cover page continued)

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In addition to those listed in Defendants' briefs, the following people and entities have an interest in the outcome of this appeal:

Bly, Honorable Christopher C., United States Magistrate Judge

Cannon, Honorable Regina D., United States Magistrate Judge

Erskine, Kurt R., former United States Attorney

Fredricks, James, former Chief, Washington Criminal II Section of the Antitrust Division

Kanter, Jonathan S., Assistant Attorney General for the Antitrust Division

Kumar, Manish, Deputy Assistant Attorney General for Criminal Enforcement for the Antitrust Division

Lawrence, David B., Policy Director for the Antitrust Division

Lewis, Megan, former Assistant Chief, Washington Criminal Section of the Antitrust Division

Mekki, Doha G., Principal Deputy Assistant Attorney General for the Antitrust Division

Pak, Byung J., former United States Attorney

Salinas, Honorable Catherine M., United States Magistrate Judge

Wang, Alice A., Counsel to the Assistant Attorney General

STATEMENT REGARDING ORAL ARGUMENT

The government respectfully requests oral argument. While the issues and positions of the parties, as presented in the record and briefs, are sufficient to enable the Court to reach a just determination of Defendants' appeals, the government's appeals present substantial issues regarding sentencing for fraud convictions.

In particular, how to calculate loss where defendants commit fraud to obtain public set-aside contracts is a recurring question of importance to the government—especially as it allocates its limited resources to determine how much to invest in such investigations—and to criminal defendants as well. The government believes that oral argument would aid the Court's resolution of that question.

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UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ENVISTACOM, LLC,
Defendant-Appellee.

STATEMENT OF JURISDICTION

(A) The district court had subject-matter jurisdiction over the underlying criminal case under 18 U.S.C. § 3231.

(B) The court of appeals has jurisdiction over this direct appeal from the judgment of the district court under 18 U.S.C. § 3742(b) and 28 U.S.C. § 1291.

(C) While not jurisdictional, the notices of appeal were timely filed under Fed. R. App. P. 4(b)(1)(A) and 4(b)(1)(B).

(D) This appeal is from a final judgment that disposes of all the parties' claims in this criminal case.

STATEMENT OF THE ISSUES

DEFENDANTS' APPEALS

1. Whether the district court abused its discretion by giving this Circuit's approved modified *Allen* charge. (Carson II; Hayes I; Flores I)

2. Whether sufficient evidence supported the convictions. (Carson III; Hayes II, IV; Flores II, IV)

3. Whether the district court abused its discretion by declining to dismiss the indictment based on a document production at the start of trial before opening statements. (Carson I; Hayes III; Flores III)

4. Whether the district court abused its discretion by declining to sanction the government for failing to disclose evidence that the prosecution team never possessed. (Carson IV; Hayes V; Flores V)

5. Whether the district court abused its discretion by declining to grant a mistrial based on a brief statement during rebuttal closing argument that was consistent with Eleventh Circuit authority. (Hayes VI; Flores VI)

6. Whether the district court correctly denied motions to dismiss by holding that tolling agreements rendered the conspiracy count timely. (Hayes VII; Flores VII)

7. Whether Defendant Flores has shown that his sentence was substantively unreasonable. (Flores VIII)

GOVERNMENT'S APPEALS

1. Whether the court erred in interpreting Sentencing Guideline § 3B1.1(a), which imposes a four-level enhancement for any defendant who "was an organizer or a leader of a criminal activity that involved five or more participants or was otherwise extensive," to cover only defendants who personally organized or led five others.

2. Whether the court erred in determining that Defendants' fraudulently obtaining $7.8 million of small-business set-aside contracts must be offset by the full value of the contracts under Eleventh Circuit law, resulting in no loss and minimal sentences, because the fraud was not detected until after the contracts were performed.

3. Whether the district court erred in ordering no restitution for Defendants' fraud based on the court's zero-loss determination.

INTRODUCTION

Defendants Envistacom, LLC, Alan Carson, Valerie Hayes, and Philip Flores defrauded the government into awarding three small-business set-aside contracts worth $7.8 million to Flores's firm, with Envistacom as its subcontractor. Based on the powerful evidence of guilt, a jury convicted Carson, Hayes, and Flores of conspiracy and two counts of major fraud. Envistacom pleaded guilty to the same counts. Despite the severity of the conduct and the amount of public funds involved, the district court ordered only minimal incarceration and no restitution. The court did so based on the belief that this Court's precedent required fully offsetting the loss by the value of the fraudulently obtained contracts. That was error. The court also declined to add a four-level organizer-or-leadership enhancement to Carson's and Hayes's offense levels because they had not personally organized or led five participants in the criminal activity. But the Sentencing Guidelines require that a defendant organize or lead only one criminal participant to qualify for this enhancement, so this was error, too.

Having escaped just punishment, Carson, Hayes, and Flores now seek to overturn their convictions on spurious grounds. Among other things, they misstate the facts and misconstrue the law in arguing against the district court's modified *Allen* charge, misapply the legal

standard for sufficiency-of-the-evidence challenges, assert meritless *Brady/Giglio* claims, and make demonstrably false accusations of prosecutorial misconduct. The government thus urges this Court, after rejecting those arguments and affirming the convictions, to remand for resentencing.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

A grand jury charged Carson, Hayes, and Flores ("Defendants"), as well as Envistacom, with conspiracy to defraud the United States and commit major fraud against the United States under 18 U.S.C. § 371 (Count One); and two counts of major fraud against the United States under 18 U.S.C. §§ 1031, 2 (Counts Two and Three). (Doc. 1).[1] Over the government's objection, Envistacom pleaded guilty to all counts under *North Carolina v. Alford*, 400 U.S. 25 (1970). (Doc. 171-9, 25). A jury convicted each Defendant of all counts. (Doc. 200).

The district court sentenced Carson to six months' imprisonment, two years of supervised release, and a $250,000 fine (Doc. 269); Flores to four months' imprisonment, two years of supervised release, and a

[1] "Doc." signifies district-court docket entries; "Ex." signifies government trial exhibits (unless otherwise noted); "App." is the government's appendix. For district-court docket entries, page numbers are the CM/ECF-generated numbers.

$50,000 fine (Doc. 247); Hayes to three years' probation (Doc. 273); and Envistacom to 12 months' probation (Doc. 312). The court granted Carson and Flores bond pending appeal and declined to stay Carson's fine. (Docs. 350; 351).

B. Statement of the Facts

1. The Set-Aside Program

The Small Business Administration ("SBA") administers a program, the 8(a) program, that assists small businesses owned by "socially and economically disadvantaged individuals." (Doc. 327-66-67). Certified 8(a) firms have opportunities to perform federal government contracts "set aside" for 8(a) participants. (Doc. 327-67-68, 77-78). The contracts are either "competed" (awarded through bidding among 8(a) firms) or "sole-source" (awarded without bidding to an 8(a) firm meeting specified criteria). (Doc. 327-67).

Program participants must abide by "[l]imitations on subcontracting." 15 U.S.C. § 657s. During the relevant time, if a contract was for services, the contractor had to expend at least 50% of personnel costs on its workers rather than on subcontractors. 15 U.S.C. § 657s(a)(1); 79 Fed. Reg. 31,848-02, 31,849 (June 3, 2014); (Doc. 327-69). For certain contracts covering both goods and services, the 8(a) firm had to satisfy the 50% rule only for the contract's service component. 15 U.S.C. § 657s(a)(3); (Doc. 327-69-70).

2. The Procurement Process

When the federal government awards contracts (including 8(a) contracts), officials called "contracting officers" have authority to enter the contracts on the United States's behalf. (Doc. 328-118-120); *see* 48 C.F.R. § 1.602-1(a). Contracting officers appoint "contracting officer's representative[s]," who serve as "technical expert[s]" but cannot themselves award contracts. (Doc. 328-119-120, 224).

When an agency, such as the Department of Defense, decides to acquire something from a contractor through the 8(a) program or otherwise, the agency prepares "pre-acquisition paperwork," including a performance work statement ("PWS") that describes the needed goods or services. (Doc. 328-120-122). PWSs are "inherently governmental" and are created by the government rather than outside contractors. (Doc. 327-94-97). Next, the agency prepares a request for proposal ("RFP"), which—for sole-source contracts—solicits the relevant contractor's offer. (Doc. 328-120-122, 127-128). If the contracting officer determines that the proposed price is fair and reasonable, he can award the contract to the offeror. 48 C.F.R. § 13.106-3(a); (Doc. 328-120-123).

A document called an independent government cost estimate ("IGCE") is "paramount" in the procurement process. (Doc. 328-234). The IGCE is a government-generated estimate of how much the

desired goods or services will cost. (Doc. 328-122-124). To prepare IGCEs, government employees sometimes perform "market research," which can involve asking industry participants how much they would charge for goods or services. (Doc. 328-124-125). Contracting officers can use IGCEs as "the basis" for assessing whether contractors' proposed prices are "fair and reasonable." (Doc. 328-129).

Like PWSs, IGCEs are "supposed to be created by the government." (Doc. 328-144). Because the government wants "the best possible deal" and "do[es]n't want the seller to know how much [it is] willing to pay," it is impermissible for potential contractors or subcontractors to create a contract's IGCE. (Doc. 328-128-129, 136-137).

3. The Conspiracy

In 2015, Flores was owner, president, and CEO of IntelliPeak Solutions, Inc., a certified 8(a) firm. (Docs. 328-158, 232; 329-72, 92-93). Carson was co-founder and vice president of Envistacom, a government contractor, and served as Envistacom's final decisionmaker on government contracts. (Docs. 326-110; 327-172; 329-92). Hayes was an Envistacom vice president. (Doc. 327-75-76). Envistacom was not a certified 8(a) firm and thus had to subcontract work from 8(a) firms, such as IntelliPeak, to work on 8(a) contracts. (Exs. 90; 97; Doc. 327-85-86).

As detailed below, from approximately 2014 to 2016, Defendants and others conspired to obtain by fraud three 8(a) sole-source set-aside contracts, totaling $7.8 million, for IntelliPeak with Envistacom as the subcontractor. Defendants, along with various co-conspirators, wrote the contracts' PWSs and IGCEs even though these documents should have been prepared by the government. Defendants—again with co-conspirators—used the sham IGCEs to support IntelliPeak's proposed prices as fair and reasonable, fabricated "competitor" quotes to buttress that impression, and prepared memos recommending that IntelliPeak receive the contracts. Defendants and co-conspirators then falsely conveyed that the government had independently prepared the IGCEs and evaluation memos and that competitors had independently prepared the quotes. The conspiracy succeeded: IntelliPeak received the contracts, and Envistacom performed most of the work and received the vast majority of the $7.8-million proceeds.

a. Contract #1 (HHS029A)

On February 23, 2015, Edward Dove—a contracting officer's representative and Navy employee—emailed contracting officer Micah Kauzlarich and asked about an existing 8(a) contract with IntelliPeak. (Ex. 15-2; Docs. 326-142-144; 328-133). Under the contract, IntelliPeak provided "specialized management and technical contractor personnel" to assist a Navy division, which in turn

supported the Army and other military agencies. (Ex. 15-5). Dove needed to "modif[y]" the contract to cover "some material/equipment purchases" and "increase" the "services" provided. (Ex. 15-2; Doc. 328-133).

Kauzlarich asked Dove to "make any necessary adjustments" to the existing PWS and provide "an IGCE to support the changes." (Ex. 15-1). Kauzlarich made this request because he knew that he would have to determine whether the modified contract's price was "fair and reasonable," and he needed the IGCE to do so. (Doc. 328-134). The request triggered a multi-phased effort by Defendants and their co-conspirators to prepare procurement documents aimed at ensuring that IntelliPeak would receive the new work (with Envistacom as subcontractor).

1) Creation of Procurement Documents

Two days after Kauzlarich asked Dove for "support," Flores and Hayes collaborated to manufacture that support. They developed a cost estimate—a list of estimated prices—for the goods and services that would be provided under the modified contract. (Ex. 11; Doc. 327-91). In an email to her subordinate, Kathryn Gannon, Hayes said she would "make a[n] IGCE out of" the estimate. (Ex. 12-1). Hayes sent this email from her Yahoo! account—as she did for nearly all emails in the conspiracy—and addressed the email to Gannon's personal Gmail

account. (*Id.*; Doc. 327-89). Gannon testified that Hayes used Yahoo! when discussing things that Envistacom "should not be doing." (Doc. 327-94-95).

Hayes and Gannon, with input from Carson, then prepared the documents that Kauzlarich requested. (Doc. 327-97). Those documents were a modified PWS and an IGCE that purportedly provided support for the prices of the new goods and services. (Ex. 13; *see* Ex. 15-1; Doc. 327-97). The IGCE contained the same line items and prices as the cost estimate that Hayes developed with Flores. (Ex. 13-27; *see* Ex. 11-4).

Hayes sent Dove the PWS and IGCE. (Ex. 13). She blind-copied Carson's Gmail address (Ex. 13-1)—the same address that she used for all correspondence with Carson involving the conspiracy (unless otherwise noted). Hayes instructed Dove "to save over the files before sending." (*Id.*). She made this request because the PWS and IGCE were "inherently governmental," and, by "sav[ing] over," Dove would remove "any traces" that someone "besides [himself]" had prepared

the materials. (Doc. 327-97). When Hayes later re-sent the files to Dove, she reiterated that he should "please RESAVE."[2] (Ex. 14-1).[3]

Dove sent the PWS and IGCE to Kauzlarich, changing only the file names. (Ex. 15). As with all the IGCEs he received from Dove, Kauzlarich thought that "Dove or someone in [Dove's] office" had drafted the document. (Doc. 328-136; *see* Doc. 328-143-144, 147).

2) Quote Compilation

Kauzlarich asked Dove to explain how the estimated costs of supplies listed in the IGCE had been generated. (Ex. 20-1; Doc. 328-138). Kauzlarich needed this information because, before "issu[ing] an award," he would need to determine whether the contractor's prices were "fair and reasonable"—and additional "price information"

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[2] When emailing Dove about a contract not in the indictment, Hayes wrote: "PLEASE SAVE THE FILE OVER SO NONE OF MY PROPERTIES SHOW on the document." (Ex. 8-1). In another instance, she said, "Please save over so my properties go away." (Ex. 7-1). In another, she stated, "PLEASE SAVE OVER ALL FILES SO PROPERTIES doesn't show my name." (Ex. 9-1). And, after Hayes sent a document that "ha[d] [her] last name," Carson reminded her to "always check properties of the doc." (Ex. 6-1). Hayes replied: "Crap – thanks. I am usually good with that too." (*Id.*).

[3] Underscoring the personal emails' covertness, Envistacom responded to a grand-jury subpoena by producing emails from Carson's and Hayes's Envistacom accounts, but not emails from their personal accounts. (Doc. 329-91-92). The government obtained the latter through search warrants. (Doc. 329-160).

would help make that determination. (Ex. 20-1). Dove forwarded Kauzlarich's email to Hayes, who sent it to Carson and asked for "quotes." (Ex. 16-1).

The same day, Carson began compiling sham quotes—fake estimates of the prices that other industry participants purportedly would charge for the supplies listed in the IGCE. Carson emailed Paul Frese, a friend and former subordinate who ran a defense-contracting firm, and asked for a quote with several "items—slightly higher in price but not the same percentages for each[.] Need it for price reasonableness." (Ex. 18-2; Doc. 326-107-109). Carson then listed the five sets of materials that had been included in the IGCE, along with prices close to those in the IGCE. (Ex. 18-2). He later reiterated that Frese's quote should be "[j]ust a couple points higher" than the listed prices. (Ex. 28-1). Carson also asked that the quote be addressed to Dove—whom Frese did not know—and "date[d] 2 weeks ago." (Exs. 18-1; 28-1; Doc. 326-114). Carson made the same request of another friend and business associate, Michael Geist, who also did not know Dove. (Ex. 30-2-3; Doc. 326-54-59, 63).

Frese and Geist prepared sham quotes that were addressed to Dove, backdated to before the date that Dove had sent the IGCE to Kauzlarich, and contained prices exceeding those in Carson's email. (Exs. 21; 28-1, 3-4). Both Frese and Geist based their pricing solely on

information provided by Carson and did not do research or independent analysis. (Doc. 326-90-91, 121-122, 130). Frese did not have "detailed specs" for the items he quoted; Geist did not even know what some of the items were and could not say whether the benchmark prices Carson listed were fair. (Doc. 326-94, 102-103, 106, 122).

Over the following months, Carson repeatedly requested revised quotes, variously stating (without explanation) that he "need[ed]" the prices "changed" or had to "take" a "line item off." (Ex. 30-1-2). Carson always made clear that he wanted inflated prices—stating at different times that the quotes should "be slightly higher in price 3-5%," that they should be "approx[imately] 3-4% above" the prices Carson listed, that Geist was correct to propose "add[ing] a small percentage to the prices," and that the quotes should "bump up [the] pricing." (Exs. 30-2; 31-1; 50-1-2; 57-1). Frese and Geist complied, always quoting prices slightly above those Carson listed, even when the prices changed drastically from prior emails. (Exs. 26-2; 27-2; 30-1-2; 31-1, 4; 32-2, 7; 39-1, 5; 50-4; 57-2; 58-2). Some of Geist's quotes stated that they were "[b]ased upon" a "discussion today" between Geist and Dove, even though no discussion had occurred. (Exs. 32-7; 50-4; Doc. 326-76, 80).

3) IGCE Revisions

As Carson was obtaining the quotes, the SBA stated it would not approve modifications to IntelliPeak's contract and wanted to use a new, standalone set-aside contract. (Ex. 20-1). That contract eventually received the contract number HHSP233201550029A ("HHS029A"). (Ex. 1-1).

To ensure that IntelliPeak would receive HHS029A, Defendants repeated the process they used when they thought IntelliPeak's existing contract would be modified. Hayes and Flores developed an IntelliPeak estimate for the goods and services subject to HHS029A, which differed slightly from those that had been contemplated under the modified contract. (Ex. 24-1, 6; *see* Ex. 11). Hayes told Flores to "add[]" IntelliPeak's 8% mark-up to the costs, and Flores did. (Ex. 24-1, 6). Hayes then sent three documents to Carson and Gannon for review: (1) a cost estimate purporting to reflect Envistacom's prices; (2) a cost estimate purporting to reflect IntelliPeak's prices, which were 8% higher than Envistacom's prices for all listed supplies; and (3) an IGCE, which included estimates for the same supplies but priced them 10% higher than Envistacom's estimate. (Ex. 25). Defendants made the IGCE's estimates higher than IntelliPeak's prices to ensure "there wouldn't be any issues, from a cost

perspective," to prevent IntelliPeak's "get[ting] the contract." (Doc. 327-103).

The next week, Hayes told Flores that she "had to change the material line" items in the estimates and asked for a new IntelliPeak estimate, including the 8% mark-up. (Ex. 34-1). After Flores provided one, Hayes sent Dove an IGCE for HHS029A. (Ex. 34). The IGCE had the words "Ed Dove" in the file name and contained seven of the same line items as the IntelliPeak estimate—with higher prices for each. (Exs. 34; 36-1, 6). As Hayes explained to Dove, "Your government estimate has a 10% fee on it, Intelli[P]eak will only have a[n] 8% passthrough"—i.e., mark-up—built into its costs. (Ex. 36-1). Hayes also provided draft text for Dove's email to Kauzlarich, including the phrase "I"—i.e., Dove—"had to update the IGCE." (*Id.*). Hayes forwarded Carson her email to keep him in the loop. (Ex. 37).

One day later, Dove sent Kauzlarich the IGCE (with the same file name), using Hayes's draft email text. (Ex. 38-1, 5).

4) Responses to Follow-up Questions

Defendants continued drafting materials for Dove to pass off as his own. When Kauzlarich asked Dove a question, Dove forwarded the query to Hayes; after running her proposed response by Carson, Hayes suggested that Dove answer by sending Kauzlarich the PWS and IGCE for HHS029A. (Exs. 41-1; 42-1, 9-38). Hayes attached the

PWS and IGCE (with "Ed Dove" in the file name), along with quotes from Frese and Geist. (Ex. 42-1, 9-38). She described the latter as "backup cost data" and stated that Dove could send these materials if Kauzlarich "ask[ed] for" them. (Ex. 42-1).

Hayes also reminded Dove that "your cost"—the IGCE's estimates—"will be higher than" IntelliPeak's prices, told him to "save as over the files," and included draft text stating that "I" (Dove) "have provided" the PWS and IGCE. (Ex. 42-1; Doc. 327-114). Concealing Envistacom's part in drafting the documents was necessary because, had the company's role been exposed, it would have become obvious that Envistacom would "profit off" the contract by performing most of the work despite not being an 8(a) firm. (Doc. 328-116; Exs. 90; 97). Dove used Hayes's text nearly verbatim and sent Kauzlarich the PWS and IGCE (retaining "Ed Dove" in the file name). (Ex. 43-1, 10-35).

A few weeks later, Hayes texted Carson, asking for "info that Micah"—Kauzlarich's first name—"requested of Ed." (Ex. 204-16; Doc. 328-114). Carson said he would have to "make it up." (Ex. 204-16).

The week after, Hayes needed to change the IGCE because one set of supplies "became a priority." (Ex. 10-1). She sent the updated IGCE to Dove. (Ex. 10-14). She also attached three quotes (one from Envistacom, along with the sham Frese and Geist quotes she had sent

Dove previously), suggesting that Dove pass these quotes along to Kauzlarich in response to a question that Kauzlarich had raised. (Ex. 10-1, 13-16). Dove provided the documents to Kauzlarich but with a different file name for the IGCE—indicating that Dove had "saved over" the document. (Ex. 45-1, 10-13; Doc. 329-117-118).

Upon receiving the email, Kauzlarich believed that Dove had solicited Frese's and Geist's quotes and that those quotes had been prepared independently without Envistacom's participation. (Doc. 328-149-151). As a result, Kauzlarich thought the quotes were "great information" because they "show[ed] that even though this contract is a direct 8a, we are able to determine the price . . . fair and reasonable through vendor competition." (Ex. 46-1).

About three weeks later, Dove told Hayes that Kauzlarich could award a contract covering only a subset of items from the latest IGCE. (Ex. 53-1). Hayes sent Dove an updated IGCE that removed the non-coverable items, along with an RFP to solicit IntelliPeak's bid, and wrote: "Please don't forget to save over my files." (Ex. 53). After changing the file names—including removing "Valerie" from one—Dove passed the IGCE (without altering the listed costs) and the RFP (with minimal edits) to Kauzlarich. (Ex. 54-1, 11-49).

5) Bid Submission and Evaluation

The next week, Kauzlarich sent Flores an RFP for HHS029A and requested IntelliPeak's offer. (Ex. 56-1-2). Flores forwarded the email to Hayes, who replied—copying Carson—with a "suggested cost work up." (Ex. 56). The work-up listed IntelliPeak's price as $829,618.20—below the latest IGCE's estimate of $832,260. (Exs. 54-50; 56-9).

Flores signed and submitted IntelliPeak's offer, bidding $829,618.50. (Ex. 2-47, 49). Kauzlarich determined the price "fair and reasonable." (Ex. 2-92). He rested that determination in part on advice from Dove, who declared IntelliPeak's "Cost Proposal acceptable" and suggested making the award to IntelliPeak. (Ex. 2-93; Doc. 328-165-166). Kauzlarich also relied on the fact that IntelliPeak's prices for supplies were "in line with market rates"—i.e., Frese's and Geist's quotes—"and less than the government cost estimate." (Ex. 2-92; Doc. 328-161-162).

6) Contract Award

Kauzlarich awarded the contract to IntelliPeak for $829,618.50, and Flores signed for IntelliPeak. (Ex. 1-1). Had Kauzlarich known of Defendants' role in preparing the quotes and IGCE, he would not have awarded the contract to IntelliPeak. (Doc. 328-219-220).

IntelliPeak paid $735,000 to Envistacom as its subcontractor, of which Hayes received a 1% commission. (Exs. 151; 156).

b. Contract #2 (HHS313A)

A few months after IntelliPeak received HHS029A, Carson used his Gmail account to send Hayes and Gannon a government report. (Ex. 60). Summarizing the report, Carson wrote that the "majority of KO" (contracting officers) "don't check for compliance" with the 8(a) program's limitations on subcontracting. (Ex. 60-1).

Around the time Carson sent this email, Defendants were passing off documents through Dove to secure HHSP233201500313A ("HHS313A"), a second sole-source set-aside contract, for IntelliPeak with Envistacom as subcontractor. (Ex. 3-1). The contract covered "highly specialized management and technical contractor personnel" to support a Navy division, including by "[d]evelop[ing] research findings reports"; the Navy division, in turn, supported the Army and other military agencies. (Ex. 3-4-6, 9).

1) Creation of Procurement Documents

On August 9, 2015, Hayes asked Gannon (copying Carson) to "provide" procurement documents, including a PWS, for HHS313A. (Ex. 61-1). Hayes stated that she would "brief Phil" Flores about "how we desire to proceed." (Ex. 61-1; Doc. 327-127). Gannon replied to Hayes and Carson from her Gmail account, sending a PWS and cost estimates for the contract. (Ex. 62). Hayes had "taught" Gannon to send "these types of" emails—which Gannon did not think were

"legal"—from a personal account; indeed, Gannon generally used that account when "th[e] business that [she] was participating in was not legal." (Docs. 327-128-129, 132-133; 328-113). Later that night, Hayes sent an IGCE, RFP, and revised PWS for HHS313A to Carson and Gannon for "review." (Ex. 64-1-6, 11-52).

The same day, Carson, Hayes, and Flores created an ostensible competitor quote to support the IGCE. First, Hayes asked Carson for an "Envistacom quote" that CyberBridge Solutions—a firm owned by Flores's wife—could "bid against." (Ex. 63; Doc. 329-124). Hayes then sent Flores the latest versions of the PWS, RFP, and IGCE for HHS313A; she also sent a spreadsheet of "cost[s] to bid against as Cyber[B]ridge" and an Envistacom quote, which said it was "[p]repared by[] Alan Carson" and listed ten line items priced lower than the corresponding items in the IGCE. (Exs. 65; 66). Twenty-two minutes later, Flores sent a "CyberBridge" quote containing the same ten items, priced higher than Envistacom's quote but lower than the IGCE. (Ex. 67). Like all purported CyberBridge quotes that Flores would prepare, this one did not include his or his wife's name but was signed by someone named Lindsay Weston. (Ex. 67-2-3).

Flores texted Hayes: "If I need to go higher, then I can." (Ex. 203-8-9; Doc. 329-130-131). He added, "I think we want the CyberBridge quote to be a LOT higher than the expected, eventual IntelliPeak

price." (Ex. 203-9). Then, he sent Hayes a new "CyberBridge" quote, describing it as "directly comparable, but higher than Ed's IGCE." (Ex. 69). Flores texted Hayes that the quote was "a little higher than Ed's IGCE…and a LOT higher than the Envistacom quote, which means that when the final RFP comes out, then IntelliPeak can come in lower than CyberBridge." (Ex. 203-9).[4]

2) Documents Sent to Dove and Contracting Officer

Shortly after, Hayes sent Dove the documents that Defendants had prepared—a PWS, RFP, IGCE (with "E Dove" in the file name), Envistacom quote (which had some of the same line items as the IGCE, but priced lower), and "CyberBridge" quote (which had some of the same line items as the IGCE, but priced higher). (Ex. 71). Hayes wrote that she had "spoke[n] with Phil and he is fine with this effort." (Ex. 71-1). Hayes also instructed Dove to "save over the files" and provided him with "[s]uggested email verbiage" that described the quotes as "competitive quotes" (*id.*)—even though, in government contracting, that term refers to quotes prepared independently by the firm submitting them (Doc. 327-164-166). Hayes also suggested that Dove note, when sending the materials, that he "would like to use Intelli[P]eak" for HHS313A. (Ex. 72).

[4] As noted *supra* at 15-16, IntelliPeak's practice was to add a mark-up to Envistacom's prices. (Doc. 327-101).

The same day, Dove sent the documents to Don Hadrick, HHS313A's contracting officer, and Bryan Daines, Hadrick's subordinate. (Ex. 74-1, 6-55; Docs. 328-229; 329-24). The documents were unchanged except for their file names, though the IGCE file name retained "E Dove." (Ex. 74-1, 6-55). Dove copied Hayes's proposed email verbatim (including the phrase "competitive quotes") and added that he "would like to use Intelli[P]eak." (Ex. 74-1; *see* Ex. 71-1). As with all IGCEs and quotes received from Dove, Hadrick believed that Dove had prepared the IGCE and solicited the quotes. (Docs. 328-234-238; 329-19, 25-26). And Hadrick understood "E Dove" in the IGCE's file name to "suggest[]" that Dove had "created this document and finalized it." (Doc. 328-235).

About a month later, in response to changes in funding availability for HHS313A, Hayes sent Dove an updated PWS, RFP, Envistacom quote, and IGCE (with "E Dove" in the file name); she also re-sent the "CyberBridge" quote. (Ex. 105). Hayes provided draft text for Dove to send Hadrick and Lisa Lovelace, a contractor who worked with Hadrick, including the statement that "I" (Dove) "needed to revise the IGCE." (Ex. 105-1; Doc. 329-18). Within minutes, Dove passed along the materials without amendment, using Hayes's text. (Ex. 106).

3) Bid Submission and Evaluation

On September 15, Flores submitted IntelliPeak's bid. (Ex. 111). The price was $3,515,987.72, about $40,000 lower than the cost in the latest IGCE that Hayes sent Dove. (Ex. 111-27; *see* Ex. 105-5).

The next day, Hayes sent Dove an evaluation memo for the bid, telling him to pass the memo to Lovelace after Lovelace confirmed her receipt of IntelliPeak's bid. (Ex. 112-1). The memo identified Dove as the bid's "[r]eviewer" and labeled the price "[a]cceptable and reasonable." (Ex. 112-2, 5). Hayes included proposed language for a cover email, including: "As COR [contracting officer's representative] I"—Dove—"have evaluated" the bid. (Ex. 112-1). After Lovelace confirmed receipt of IntelliPeak's bid, Dove sent her the email and memo, unchanged. (Ex. 113).

When evaluating bids, Hadrick "depend[ed] heavily" on his contracting officer's representative to assess "pricing." (Doc. 329-23). Based on Dove's evaluation memo and the information that Dove had provided (including the IGCEs and quotes), Hadrick concluded that IntelliPeak's price was fair and reasonable. (Docs. 328-235; 329-22-24).

4) Contract Award

Hadrick awarded IntelliPeak the contract for $3,515,987.72, and Flores signed for IntelliPeak. (Ex. 3-1). Hadrick would not have

awarded the contract had he known that Defendants had prepared the IGCE, the CyberBridge quote was a sham, or Envistacom, a non-8(a) firm, would receive over 50% of the proceeds. (Doc. 329-34-36; *see* Exs. 90; 97).

IntelliPeak paid $2,705,434.18 to Envistacom as its subcontractor. (Ex. 153). Hayes received a $23,819.11 commission from Envistacom, along with $20,017.50 from IntelliPeak for work performed under the contract. (Exs. 156; 157).[5]

c. Contract #3 (HHS338A)

1) Creation of Procurement Documents

On August 9, in the same email in which she asked Gannon to prepare paperwork for HHS313A, Hayes asked Gannon to prepare procurement documents for a third sole-source set-aside contract, HHSP233201500338A ("HHS338A"). (Ex. 61-1). The contract involved provision of "highly specialized strategic and technical contractor personnel," as well as field-site and laboratory equipment, to a Navy division, which in turn supported other military agencies. (Ex. 5-3-7).

[5] IntelliPeak paid Hayes for certain work on the second and third contracts. (Ex. 157). Hayes instructed Flores to "make sure" that he did not "show" her "name when billing" this work. (Ex. 117-1).

Defendants then created another sham CyberBridge quote. Hayes sent Flores an Envistacom quote and a spreadsheet with cost estimates. (Ex. 77). After confirming that Hayes was working on a "package for Ed," Flores provided a "CyberBridge" quote with prices significantly higher than the Envistacom quote and slightly higher than the spreadsheet's base-cost estimate. (Exs. 78; 79). Keeping Carson updated, Hayes sent Flores several revised estimates with "costs to bid a Cyber[B]ridge quote to"; Flores responded with updated quotes priced above the estimates. (Exs. 80; 81; 82; 83; 92).

2) Documents Sent to Dove and Contracting Officer

After obtaining the final "CyberBridge" quote, Hayes—blind-copying Carson—sent Dove a PWS; RFP; IGCE with "E Dove" in the file name; Envistacom quote containing items priced lower than the corresponding items in the IGCE; and the "CyberBridge" quote, containing items priced higher than the corresponding items in the IGCE. (Ex. 85-1-50). Hayes reminded Dove to "save over these files." (Ex. 85-1). She included draft text that recommended awarding the contract to IntelliPeak and described the "CyberBridge" quote as a "competitive quote[]." (*Id.*). Using Hayes's text, Dove sent the documents to Hadrick, who was the contracting officer, and Daines. (Ex. 87-1-51; Doc. 328-230). The documents were unchanged except

for their file names (though the IGCE's file name retained "E Dove"). (Ex. 87-1-51).[6]

About a month later, Hayes re-sent Dove the "CyberBridge" quote; provided updated versions of the PWS, RFP, Envistacom quote, and IGCE (with "E Dove" in the file name), reflecting minor amendments; and drafted email text recommending again that IntelliPeak receive the contract. (Ex. 107). Eighteen minutes later, Dove sent the documents to Hadrick and Daines without change, using Hayes's text. (Ex. 108).

3) Bid Submission and Evaluation

The RFP for HHS338A was issued on September 15, and, within two days, Hayes sent Dove an evaluation memo for IntelliPeak's offer. (Exs. 5-1; 114). The memo listed Dove as the bid's "[r]eviewer" and rated IntelliPeak's price "[a]cceptable and reasonable." (Ex. 114-2, 5). Hayes told Dove that, after Lovelace confirmed receipt of IntelliPeak's offer, he should respond with the memo. (Ex. 114-1). Dove did so, largely using cover-email text provided by Hayes. (Ex. 115). Believing Dove had prepared this memo, Hadrick relied on it—along with the

[6] The next day, Hayes advised Dove to use a different 8(a) contractor (not IntelliPeak) for a separate sole-source 8(a) contract because "I think it will look funny having 3 package[s] go through all going to Intelli[P]eak so spaced in such a short time period." (Ex. 90-1).

IGCE and "CyberBridge" quote—when evaluating IntelliPeak's offer. (Doc. 329-29, 31, 33-34).

4) Contract Award

On September 29, Hadrick awarded IntelliPeak the contract for $3,542,270.10—about $50,000 less than the latest IGCE that Hayes sent Dove. (Ex. 5-1; *see* Ex. 107-5). Flores signed for IntelliPeak. (Ex. 5-1). Hadrick would not have awarded the contract had he known that Defendants prepared the IGCE, the CyberBridge quote was a sham, or Envistacom would receive over 50% of the proceeds. (Doc. 329-34-36).

IntelliPeak paid $3,229,409.72 to Envistacom as its subcontractor. (Ex. 155). Hayes received a $29,620.56 commission from Envistacom, along with $30,217.50 from IntelliPeak for work performed under the contract. (Exs. 156; 157).

4. Pretrial and Trial Proceedings

a. Motion to Dismiss

On May 25, 2022, a grand jury indicted Defendants on the three above-described counts. (Doc. 1).

Hayes and Flores moved to dismiss the conspiracy count as untimely. (Docs. 80; 81). The district court denied the motions because, under applicable tolling agreements, the count was timely. (Doc. 109).

b. Discovery

Pretrial, the government produced over 3 million documents. (Doc. 325-17). The productions disclosed investigations involving two government witnesses—Hadrick and Gannon. Specifically, the productions contained a memo by the Department of Health and Human Services' ("HHS") Office of Inspector General ("HHS-OIG"); the memo described HHS-OIG's investigation of the Program Support Center, an HHS component that provided procurement assistance to other agencies, employed Kauzlarich and Hadrick, and formally entered into HHS029A, HHS313A, and HHS338A. (Doc. 328-118, 209, 221-223; App. Tab D; *see* Doc. 323-100-101). As the memo noted, Hadrick was a "main person[] of interest." (App. Tab D-2; *see* Doc. 323-101). The government also produced a transcript of HHS-OIG's interview of Hadrick. (Doc. 175-2).

Two documents referenced an Army "[i]nvestigation" involving Gannon. (App. Tabs B-3; C; *see* Doc. 323-99-100). One noted that the investigation involved a "relationship" between Gannon and an Army officer with whom she often worked, Peter Koch. (App. Tab B-1, 3; *see* Doc. 323-99; *see also* Doc. 328-16-18). Koch was involved with HHS029A, HHS313A, and HHS338A because the Army received goods and services, including some that were the subject of the contracts, through the Navy division that the contracts were designed

to support. (Docs. 327-188-189; 328-31-32, 72-73, 76-77, 179-180; *see* Exs. 1-4; 3-5; 5-4). While Koch did not have authority to authorize the contracts or approve funding for them, he transmitted funding from the Army to HHS. (Docs. 323-88-89; 327-188-189; 328-114).

c. Discovery Motions

On March 9, 2023, four days before trial, Defendants specifically requested—for the first time—Hadrick's personnel file and the HHS-OIG investigation file. (Doc. 323-102, 115). The day before trial, Defendants moved to exclude Hadrick's testimony because the government had not produced these items. (Doc. 175).

In the evening following jury selection the next day, the government learned of an intimate relationship between Gannon and Koch and informed Defendants that same evening. (Doc. 182-1). Later that night, Defendants moved to dismiss or to exclude (among others) Hadrick's and Gannon's testimony based on the non-production of the Hadrick and Koch investigation files. (Doc. 182).

The next day (Tuesday, March 14), while confirming that all discoverable items involving the Koch investigation had been disclosed, the government discovered that a different set of documents, "separate from the specific investigation[]," had not been produced due to an inadvertent error. (Doc. 323-79-83). After the case agent had collected and reviewed the documents, they were not

successfully transferred to the government's document-review platform; the prosecutors thus had not been aware of them. (Docs. 323-80; 325-12-14). The documents comprised six email accounts, one of which was a .mil account that Gannon used for some of her government-contracting work; the account contained 33 non-substantive emails for which she was a recipient, not the author. (Docs. 184-1; 323-80-81; 327-178-180; 328-202).[7] The other five accounts belonged to non-witness government employees (Rachel Borhauer, Dick Larry, Boyd Tomasetti, Mitch Wathen, and Koch)—only some of whom had any connection to HHS029A, HHS313A, or HHS338A. (Docs. 184-1; 323-88-89, 104).

As soon as the prosecutors learned of the unproduced documents, they orally informed Defendants and the court. (Doc. 323-79-80). Defendants—who had not seen the unproduced material—moved to dismiss, asserting that "nothing" could "cure the prejudice" from the new production. (Doc. 323-92). The court twice asked how much time Defendants needed to review the discovery; they said, "any extension" would be "beyond prejudicial." (Doc. 323-92-97).

[7] The documents also included PDFs that the case agent pulled from the email accounts but that, as Defendants acknowledged, were not "relevant to any of the contracts" at issue. (Docs. 323-81, 121-122; 325-6).

As relevant here, the court now had three arguments before it: (1) the government should have produced HHS's (including HHS-OIG's) files regarding HHS-OIG's investigation of the Program Support Center; (2) the government should have produced the Army's Koch investigation file; and (3) these non-disclosures, coupled with the new production, required dismissal. The court held that the government was not required to produce the HHS or Army materials because neither HHS-OIG nor the Army investigators were part of the "prosecution team." (Doc. 323-117-118). As to the new production, the court said that it "d[id]n't find bad faith" by the government and that Defendants had "tried to put me in a box where the only remedy . . . is dismissal. Not interested in a continuance, which I understand, but I'm not going to dismiss the case on this basis." (Doc. 323-119).[8] Instead, on the afternoon of Tuesday, March 14, the court recessed until Thursday, March 16, to allow Defendants to review the new materials. (Doc. 323-128-129). The government produced the outstanding documents that evening. (Doc. 325-6-7).

The next day (Wednesday, March 15), Defendants renewed their motion to dismiss, which the court denied. (Doc. 325-9, 17). They

[8] The court later explained that it "d[id]n't think bad faith [wa]s necessary" for dismissal but reaffirmed that, "given the circumstances," dismissal "was too extreme." (Doc. 327-7).

then expressed their "belie[f]" that they could develop a "plan" for trial to resume on Friday, March 17, and the court extended the recess until that date. (Doc. 325-18, 24). The court also granted Defendants' request to delay cross-examinations of four government witnesses until the next week and gave Defendants the option to tell the government to delay those witnesses' direct examinations. (Doc. 325-20, 22-27).

That evening, the court directed the government to identify "the specific location of any potential *Brady* material" in the production. *See* 23-13765 App. Doc. 74 (Motion to Supplement Record), Ex. 1. On Thursday, March 16, and the morning of Friday, March 17, the government sent Defendants "potentially relevant documents" from the production, "per the court's direction." *See id.* Ex. 2.

d. Trial

Defendants did not seek any additional time to review the new production, and testimony began on Friday, March 17. The government did not introduce any newly produced documents at trial.

After the government rested, Defendants moved for judgments of acquittal, making a "general" argument that "the government ha[d] not met its burden" and specific arguments about purported evidentiary gaps. (Doc. 330-118-121). The court denied the motion. (Doc. 330-132).

Defendants also moved to dismiss based on the new production and other alleged document issues. (Doc. 330-118-119, 133-137). The court denied the motion. (Doc. 330-149-150).

At trial's close, Defendants again moved for judgments of acquittal, which the court denied. (Doc. 330-219-221).

e. Jury Instructions and Closing Arguments

Over the government's objection, the court granted Defendants' request to instruct the jury on an entrapment-by-estoppel defense. (Docs. 330-242-243; 331-5).

In closing, Defendants argued that the government was "trying to hide" Dove, "would have put him on the stand" if he were a true co-conspirator, and was "afraid of the answers" he would have given. (Doc. 331-84-85, 112).

In rebuttal, the government responded:

> [D]efense counsel criticized the government for not calling several witnesses, including Ed Dove. And remember what the judge said, the judge instructed you that the government has the burden of proof, and that's absolutely right. The defendants do not have to produce any evidence at all.
>
> But the defendants do have the ability to call witnesses. They have the ability to subpoena people to be here. The government can't stop that.

(Doc. 331-134). Defendants made an unspecified objection, which the court overruled, and later moved for a mistrial, claiming that the government's statement amounted to "burden shifting." (Doc. 331-134, 144). The court denied the motion because no "inappropriate burden-shifting" had occurred. (Doc. 331-144-145).

f. Jury Deliberations

Deliberations began at 2:07 PM on Friday, March 24. (Doc. 331-143). At 2:40 PM on Monday, the foreperson informed a court-security officer that "four or five of the jurors are refusing to even talk." (Doc. 201-7-8). After discussions with the foreperson and the full jury, the court repeated part of its earlier instructions, telling jurors they "must discuss the case with one another." (Doc. 201-8-9, 16-17). Seventeen minutes later, a subset of jurors (not including the foreperson) sent a note stating, "[w]e did deliberate w/ all jurors over and over" and "[w]e could not agree." (Doc. 199-2). Defendants moved for a mistrial, which the court denied because it was not clear "everyone is done deliberating." (Doc. 201-18-19, 24).

At 4:30 PM that day, the jury provided an update. The foreperson said that further discussion had not "sway[ed] and change[d] the votes of prospective [sic] jurors that already had a vote that was on the other side of the government." (Doc. 201-25). When asked whether anyone wanted to keep deliberating, the foreperson said: "I'm the

only one I would say." (Doc. 201-25-26). Defendants again moved for a mistrial, which the court denied, telling the jury "to continue to deliberate tomorrow." (Doc. 201-27-30).

On Tuesday morning, Hayes and Flores again moved for a mistrial, and Carson moved for a mistrial or, alternatively, re-instruction on the reasonable-doubt standard. (Docs. 194; 202-5-7, 12). The court, which had "no impression" that the jury had "stopped talking," declined to grant a mistrial but re-read the reasonable-doubt charge. (Doc. 202-17-18, 23-25).

At 2:08 PM on Tuesday, after deliberating since that morning, the jurors conveyed another message through the court-security officer: "[T]hey ha[d] not reached a decision," and "nothing [wa]s going to change." (Doc. 202-26). Defendants again moved for a mistrial, which the court denied. (Doc. 202-28-32). The court noted that the jury had "engage[d] in additional deliberations" that morning and that a modified *Allen* charge was appropriate. (Doc. 202-31). Accordingly, at approximately 2:30 PM, the court delivered the Eleventh Circuit's pattern modified *Allen* charge. (Doc. 202-32-35). At 4:28 PM, the jury reported that it had "deliberated all day" and wanted to "come back early in the morning[] and start over." (Doc. 202-35).

There were no further communications, and at 2:15 PM on Wednesday, the jury returned guilty verdicts on all counts against each

Defendant. (Doc. 203-5-7). Defendants renewed their motions for judgments of acquittal, dismissal based on the production at the start of trial, and a mistrial based on the government's rebuttal argument and the court's handling of deliberations. (Doc. 203-19-30). The court denied the motions. (Doc. 203-35-36).

5. Sentencing

Defendants' presentence investigation reports ("PSRs") recommended a base offense level of 6 and a loss amount of $7,887,876.32 (+18), representing the cost to the public of the small-business set-aside contracts that they fraudulently obtained. (Docs. 254-¶¶ 79-80; 281-¶¶ 79-80; 297-¶¶ 79-80). For Carson and Hayes, the PSRs also recommended four-level enhancements for their aggravating roles. (Docs. 281-¶ 82; 297-¶ 82). Defendants objected to these recommendations, claiming that loss should be zero and that they should not receive any aggravating-role enhancements. (Docs. 254-¶ 80; 281-¶¶ 68, 80, 82; 297-¶¶ 80, 82).

Before sentencing, the district court addressed § 2B1.1(b)(1) of the Sentencing Guidelines. (Doc. 236-3-13). That provision increases the base-offense level for fraud depending on the amount of "loss," which the commentary defines as "the greater of actual or intended loss," U.S.S.G. § 2B1.1 cmt. n.3(A). In this case, however, the court applied a special rule for calculating loss, which controls in "case[s] involving

government benefits." (Doc. 236-6-7 (quoting U.S.S.G. § 2B1.1 cmt. n.3(F)(ii)). Under the government-benefits rule, loss is "not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses." U.S.S.G. § 2B1.1 cmt. n.3(F)(ii).

Although this Court held, in a case involving an unintended recipient, that loss under the government-benefits rule was the full contract value, the district court declined to apply that precedent on the ground that IntelliPeak and Envistacom purportedly did not qualify as unintended recipients. (Doc. 236-8-11). As a result, the court looked to a section of the Guidelines commentary providing for various "[c]redits [a]gainst [l]oss," which requires loss to "be reduced" by, among other things, "the fair market value" of any "services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected." U.S.S.G. § 2B1.1 cmt. n.3(E)(i). The court rejected Defendants' argument that the credits should equal "the total amount of the contracts" but otherwise held that the parties had not yet presented "reliable and specific evidence to calculate" the credits. (Doc. 236-11-13).

At each sentencing, the government argued that the full cost of the three contracts, $7,887,876.32, was the appropriate loss amount under the government-benefits rule. (Docs. 240-6 & n.1; 256-4-6; 284-6-7; 285-6-7; 337-4). Based on the district court's holding that

some offset was appropriate to account for the fair market value of the goods and services provided (Doc. 236-13), however, the government alternatively proved the contracts' fair market values.

For HHS313A and HHS338A, the government offered detailed evidence of Envistacom's costs incurred in performing the contracts. (*See* Docs. 248; 315; 318; 337-4; *see also* Doc. 234-7). The government used Envistacom's costs because, although Gannon had testified at trial that Envistacom performed a "majority" of the work on the contracts (Doc. 328-116), at sentencing the government found no "evidence that Intelli[P]eak performed" any "actual work on the[] contracts" (Doc. 258-14-15, 16 n.4).[9] The Envistacom costs on which the government relied were "fully burdened," thus including not only raw costs such as an hourly rate for employees and costs of goods, but also the total costs to Envistacom, including overhead costs, fringe costs, general and administrative costs, material-handling costs, and fees. (Doc. 258-14; *see also* Doc. 234-7). Under HHS313A, Envistacom's fully burdened costs were $1,682,147.23, and under

[9] The only exception was the evidence that Hayes had "billed time under IntelliPeak's name." (Doc. 256-13). Hayes's status as an Envistacom Vice President and her desire to conceal that she received compensation from IntelliPeak, however, indicate that she was not actually an IntelliPeak employee and was performing this work on behalf of Envistacom. (Doc. 256-13); *see supra* at 8, 25 & n.5, 28.

HHS338A, they were $2,065,449.48. (Doc. 258-16). The government proposed offsetting the contracts' total value by the amount of fully burdened costs incurred by Envistacom in performing the contracts, resulting in loss amounts of $1,833,840.49 for HHS313A and $1,476,820.62 for HHS338A. (Doc. 258-15-16).

The government also presented Envistacom documents showing the values that Envistacom declared on customs forms for some of the goods provided under HHS029A. (Docs. 226-12-13; [226-3]-15, 22). (The government did not have declared values for the other goods. (Doc. 226-12-13).) The government determined that the declared values were only 61% of the contract prices for those goods under HHS029A and, extrapolating from that figure, assigned a value to the other goods that was 61% of their contract price. (Docs. 226-13; 258-16). This calculation showed that HHS029A's total contract value was $506,067.28. (Doc. 258-19). Using these numbers resulted in a total offset of $4,253,664 and a post-offset loss amount of $3,634,212.32. (Doc. 258-16).

In the event that the district court did not view costs alone as an appropriate measure of the offset, the government also suggested an alternative measure. Relying on testimony of a defense trial expert, the government determined the labor rates that the United States had paid Envistacom for HHS313A and HHS338A and multiplied those

rates by the total hours that Envistacom worked on those contracts. (Doc. 258-17). The government then added these figures to Envistacom's fully burdened costs for the contracts' non-labor components. (*Id.*). Because the labor rates paid by the government did not simply cover the fully burdened cost of labor to Envistacom (but also incorporated some amount of profit), these calculations resulted in a higher offset and thus a lower loss amount. (Doc. 258-17-18). Specifically, the offset for HHS313A was $1,747,688.60, leading to a loss of $1,768,299.12; the offset for HHS338A was $2,709,754.15, leading to a loss of $832,515.95. (Doc. 258-17-18). Because HHS029A largely covered supplies rather than labor (Doc. 330-197), the government did not recalculate the offset and loss associated with this contract; rather, the government relied on the figures—an offset of $506,067.28 and a loss of $323,551.22—developed using the government's primary methodology. (Doc. 258-19); *see supra* at 40. Combining the offsets for each contract resulted in a total offset of $4,963,510.03 and a total loss of $2,924,366.29. (Doc. 258-16-19).

None of the defendants produced any evidence to support a different offset amount. (*See generally* Docs. 256; 284; 285; 337).

At each sentencing, the district court—reversing its earlier order (Doc. 236-12-13)—ruled that under *United States v. Bazantes*, 978 F.3d

1227 (11th Cir. 2020), the offset was the entire amount of the contracts because the contracts were performed. (Docs. 256-30-32, 56; 284-8, 60-64; 285-9, 72; 337-4, 7). This conclusion resulted in a finding of zero loss. (*Id.*).

The district court also considered the role-in-the-offense enhancement under § 3B1.1 for both Carson and Hayes. The court found that there were at least five criminal participants (Docs. 284-25; 285-23) and that both Carson and Hayes were managers or supervisors of at least one participant (Docs. 284-27; 285-23). As a result, the district court imposed the three-level enhancement that applies to defendants who are "manager[s] or supervisor[s]" of "criminal activity" that "involved five or more participants or was otherwise extensive," U.S.S.G. § 3B1.1(b). (Doc. 284-27-28; Doc. 285-22-24). But the court declined to impose the four-level enhancement that applies to defendants who are "organizers or leaders of a criminal activity that involved five or more participants or was otherwise extensive," U.S.S.G. § 3B1.1(a). (Doc. 284-27-28; Doc. 285-22-24). The court held that the four-level enhancement applies only to defendants who personally organize or lead five or more participants. (Doc. 284-27-28; Doc. 285-22-24).

Based on these findings and others, the district court calculated the following Guidelines ranges:

Defendant	Total Offense Level	U.S.S.G. Range	
Flores	6	0-6 months	Doc. 256-35
Carson	9	4-10 months	Doc. 284-34
Hayes	8	0-6 months	Doc. 285-49
Envistacom	7 (culpability score)	$7,000-$2.25 million (fine range)	Doc. 337-9-10

The district court sentenced Carson to six months in prison, two years of supervised release, and a $250,000 fine (Doc. 269); Flores to four months in prison, two years of supervised release, and a $50,000 fine (Doc. 247); Hayes to three years of probation (Doc. 273); and Envistacom to 12 months of probation (Doc. 312). Based on its finding of zero loss, the court imposed no restitution. (Docs. 256-36-37; 284-34; 285-73; 337-8).

C. Standards of Review

1. This Court reviews for abuse of discretion a decision to give a modified *Allen* charge and deny a mistrial motion. *United States v. Woodard*, 531 F.3d 1352, 1364 (11th Cir. 2008); *United States v. Berroa*, 374 F.3d 1053, 1055 (11th Cir. 2004).

2. This Court reviews preserved sufficiency-of-the-evidence claims de novo, drawing all reasonable inferences and credibility choices in

favor of the verdict. *United States v. Rutgerson*, 822 F.3d 1223, 1231-32 (11th Cir. 2016).

3. This Court reviews the denial of a motion to dismiss based on purported *Brady*, *Giglio*, and Rule 16 violations for abuse of discretion. *United States v. Jordan*, 316 F.3d 1215, 1248-49 (11th Cir. 2003). "A district court abuses its discretion if, in making the decision at issue, it applies the incorrect legal standard or makes findings of fact that are clearly erroneous." *Id.* at 1249. This Court reviews underlying *Brady* and *Giglio* claims, if preserved, de novo, *United States v. Laines*, 69 F.4th 1221, 1229 (11th Cir. 2023), and, if unpreserved, for plain error, *United States v. Gallardo*, 977 F.3d 1126, 1142 (11th Cir. 2020). To establish plain error, a defendant must demonstrate: "(1) error; (2) that is plain; (3) that affects his substantial rights; and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Al Jaberi*, 97 F.4th 1310, 1322 (11th Cir. 2024) (citation omitted).

4. This Court reviews a denial of a mistrial motion based on alleged prosecutorial misconduct during closing argument for abuse of discretion. *United States v. Valois*, 915 F.3d 717, 723 & n.2, 726-27 (11th Cir. 2019). The underlying question of whether prosecutorial misconduct occurred is a mixed question of law and fact reviewed de

novo. *United States v. Osmakac*, 868 F.3d 937, 957 (11th Cir. 2017); *see United States v. Noriega*, 117 F.3d 1206, 1217-18 (11th Cir. 1997).

5. This Court reviews the denial of a motion to dismiss based on the statute of limitations for abuse of discretion and reviews questions about the interpretation and application of the statute of limitations de novo. *United States v. Farias*, 836 F.3d 1315, 1323 (11th Cir. 2016).

6. This Court reviews preserved objections to a sentence's procedural and substantive reasonableness for abuse of discretion. *United States v. Oudomsine*, 57 F.4th 1262, 1264, 1266 (11th Cir. 2023). This Court reviews unpreserved sentencing objections for plain error. *United States v. Rogers*, 989 F.3d 1255, 1261 (11th Cir. 2021).

7. A district court's interpretation of the Sentencing Guidelines and application of the Guidelines to the facts are reviewed de novo. *United States v. Shabazz,* 887 F.3d 1204, 1222 (11th Cir. 2018). This Court "review[s] for clear error the factual findings of the district court." *Id.* This Court reviews the legality of restitution orders de novo and reviews "factual finding[s] regarding the specific amount of restitution for clear error." *United States v. Foley,* 508 F.3d 627, 632 (11th Cir. 2007).

SUMMARY OF THE ARGUMENT

DEFENDANTS' APPEALS

1. The district court did not abuse its discretion by giving a modified *Allen* charge because the charge was not coercive. The court used this Court's approved language; did not know the jury's vote split; and gave the charge after the jury had deliberated for only about two days and after only one declaration from the full jury that it could not reach agreement. After receiving the charge, the jury deliberated for almost another full day. Under this Court's precedents, the charge was appropriate under those circumstances.

2. The evidence supported Defendants' convictions. First, the evidence sufficed to prove the conspiracy, establishing that Defendants collectively created government documents, misrepresented those documents' independence and authorship, and obtained valuable contracts for IntelliPeak (with Envistacom as subcontractor) through those misrepresentations. Second, the same evidence—plus evidence of Defendants' cover-up—sufficiently proved a scheme with intent to defraud. Finally, Defendants failed to prove their entrapment-by-estoppel defense because they did not show that they relied on an official's misrepresentation of law or that such reliance would have been objectively reasonable.

3. The district court did not abuse its discretion by denying Defendants' motions to dismiss based on the delayed production, nor did the court plainly err by failing sua sponte to grant a new trial. After the government's production, the court fashioned appropriate relief by—at Defendants' request—recessing for over two days and postponing certain testimony. Defendants show no substantial prejudice from receiving the time they sought. Nor did the government violate *Brady* or *Giglio*: Defendants identify nothing exculpatory or impeaching in the production, let alone anything that would have created a reasonable probability of a different outcome; they show no prejudice from the production's timing; and the government specifically pointed Defendants to potentially relevant documents pursuant to a court directive to identify any potential *Brady* material. Defendants' other accusations of discovery misconduct are flatly false.

4. The district court acted within its discretion by denying Defendants' requests for sanctions based on the government's failure to produce HHS documents. The prosecution team did not possess those documents. Defendants also do not establish that any further information about the HHS-OIG investigation would have been favorable to Defendants, nor that such information would have created a reasonable probability of a different outcome.

5. The district court did not abuse its discretion by denying a mistrial motion based on a prosecutor's comment about Defendants' subpoena power. This Court has held that such comments are proper. Nor have Defendants shown that the remark affected the trial's outcome: The comment was an isolated statement in a long argument; the prosecutor couched the remark in a reminder that the government bore the burden of proof; the district court, too, so instructed the jury; and the evidence of guilt was strong.

6. The district court correctly denied Hayes's and Flores's motions to dismiss based on the conspiracy count's purported untimeliness. Under Hayes's and Flores's tolling agreements with the United States, the count was timely.

7. Although Flores frames his sentencing challenge as a claim of both procedural and substantive unreasonableness, all of his arguments in fact go to the latter—but he has not established that his sentence was substantively unreasonable. The district court imposed a short (four-month) custodial sentence that was well within the Guidelines range and that, contrary to Flores's claim, was too lenient rather than too severe.

GOVERNMENT'S APPEALS

1. The district court erred by holding that the four-level role enhancement in U.S.S.G. § 3B1.1(a) requires that a defendant personally organize or lead five or more other criminal participants. The text of the Guideline does not impose any such requirement. Instead, the scheme must involve five or more criminal participants and the defendant must be a leader or organizer of at least one other participant in the scheme. Because the district court found that there were at least five criminal participants, and because Carson and Hayes each directed at least one, the court erred when it found as a matter of law that it could not impose the four-level enhancement.

2. The district court applied the wrong legal standard for determining loss at sentencing. After Defendants were convicted of (and Envistacom pleaded guilty to) obtaining three SBA 8(a) contracts by fraud, and after finding that the government-benefits rule applied, the district court fully offset the loss by the contract price, resulting in a loss amount of zero and minimal sentences, because the contracts were performed. It did so based on this Court's precedent in *United States v. Bazantes*, 978 F.3d 1227 (11th Cir. 2020). But *Bazantes* arose in a wholly different context, involving competitively bid contracts, rather than the sole-source set-aside contracts here. Nor in *Bazantes* was there fraud relating to the pricing process, while here Defendants

corrupted the pricing process itself. The government awards 8(a) sole-source set-aside contracts not only to obtain specified goods and services, but also to obtain those goods and services from 8(a) firms that the program is designed to benefit. Defendants defrauded the government of the benefit of its bargain.

3. Because the district court found no loss, it imposed no restitution. But the former holding was error, and thus so was the latter.

ARGUMENT AND CITATIONS OF AUTHORITY

1. The district court did not abuse its discretion by giving a modified *Allen* charge.

Defendants contend that the district court abused its discretion by declining to grant a mistrial during deliberations and by delivering a modified *Allen* charge. Carson Br. 39-48; Hayes Br. 7-14.[10] The court acted comfortably within its discretion.

A. The modified *Allen* charge was not coercive.

"A district court has broad discretion" to deliver a modified *Allen* charge, *United States v. Davis*, 779 F.3d 1305, 1312 (11th Cir. 2015), and a court abuses that discretion "only if the charge was inherently coercive," *United States v. Woodard*, 531 F.3d 1352, 1364 (11th Cir. 2008). To assess whether coercion occurred, this Court "consider[s] [1] the language of the charge and [2] the totality of the circumstances under which it was delivered." *United States v. Bush*, 727 F.3d 1308, 1320 n.6 (11th Cir. 2013) (per curiam). Among the "relevant circumstances" are: (1) the deliberations' "length"; (2) "the number of times the jury reported being deadlocked"; (3) the court's knowledge

[10] Where Hayes and Flores make the same arguments, the government cites only Hayes's brief. Where Carson has adopted Hayes's and Flores's arguments, *see* Carson Br. x, the government attributes those arguments to all Defendants.

of "the numerical split"; and (4) the time between the charge and the verdict. *United States v. Hill*, 99 F.4th 1289, 1310 (11th Cir. 2024).

The modified *Allen* charge was not coercive. The district court gave this Circuit's pattern charge (Doc. 202-33-34), which this Court has approved multiple times, *e.g.*, *Hill*, 99 F.4th at 1310; *Bush*, 727 F.3d at 1320; *United States v. Dickerson*, 248 F.3d 1036, 1050 (11th Cir. 2001).

Nothing in the totality of the circumstances transformed that non-coercive language into a coercive charge. First, the jury had deliberated for just over two days—after hearing evidence and argument for five-and-a-half—when the charge was delivered. (Docs. 331-143, 146-147; 201-31; 202-33-35).[11] This Court has upheld modified *Allen* charges even when juries deliberated for much longer. *United States v. Kramer*, 73 F.3d 1067, 1072 (11th Cir. 1996) (charge delivered after seven days); *United States v. Elkins*, 885 F.2d 775, 783-84 (11th Cir. 1989) (eight days); *United States v. Alonso*, 740 F.2d 862, 876-78 (11th Cir. 1984) (seven days); *cf. Brewster v. Hetzel*, 913 F.3d 1042, 1053 (11th Cir. 2019) ("eleven hours over two days[]" was "not an inordinate amount of time").

[11] Hayes and Flores mistakenly state (Hayes Br. 14) that the jury deliberated for three days before the charge.

Second, there were only two reports that the jury could not agree, one of which was delivered by just a subset of jurors. Specifically, on the second day of deliberations, one juror stated that "we feel like we're done" and a subset of jurors (excluding the foreperson) expressed the same view in a note (Docs. 199-2; 201-16-18, 27); then, on the third day of deliberations, the jurors told the court-security officer they could not reach agreement (Doc. 202-26). But this Court regularly upholds modified *Allen* charges delivered after a jury stated just once or twice that it could not agree. *See Davis*, 779 F.3d at 1312-13 (no coercion where jury stated it could not agree, received modified *Allen* charge, stated it could not agree again, and received another charge directing continued deliberations); *United States v. Sistrunk*, 622 F.3d 1328, 1332, 1334 (11th Cir. 2010) (no coercion where jury twice stated it could not agree as to one or more defendants); *Woodard*, 531 F.3d at 1359, 1364 (no coercion where jury twice stated it could not agree); *see also United States v. Beasley*, 72 F.3d 1518, 1528-29 (11th Cir. 1996) (per curiam) (no coercion where charge delivered after jury reported deadlock); *United States v. West*, 898 F.2d 1493, 1497, 1500-01 (11th Cir. 1990) (same); *Elkins*, 885 F.2d at 783-84 (same).

Third, as the district court confirmed, the jury never revealed its vote split. (Doc. 202-17).

Finally, the jury did not return a verdict until almost 24 hours after the modified *Allen* charge. (Docs. 202-33-35; 203-5-7). In the interim, the jurors deliberated for the remainder of the afternoon after receiving the charge, took an overnight break, "start[ed] over" the next morning, and continued deliberating all morning and into the afternoon. (Docs. 202-35; 203-5). This Court regularly affirms modified *Allen* charges when a jury returns a verdict sooner. *Davis*, 779 F.3d at 1313 (just over two hours after receiving charge); *Bush*, 727 F.3d at 1319-20, 1322 (47 minutes); *United States v. Chigbo*, 38 F.3d 543, 545-46 (11th Cir. 1994) (per curiam) (15 minutes); *United States v. Rey*, 811 F.2d 1453, 1458, 1460 (11th Cir. 1987) (just over 90 minutes); *United States v. Scruggs*, 583 F.2d 238, 239-41 (5th Cir. 1978) (48 minutes).[12]

Considering the circumstances collectively, no coercion occurred. The court sensibly directed the jurors to continue deliberating when a subset indicated they were struggling to reach agreement and reasonably provided this Circuit's standard modified *Allen* charge when the full jury made the same representation; the jury then kept deliberating and returned a verdict about 24 hours later. In *Elkins*,

[12] Fifth Circuit decisions issued before October 1, 1981, are binding. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

this Court found nothing coercive about a modified *Allen* charge that (1) was delivered on Friday afternoon after eight days of deliberations, (2) came after the jury stated it was deadlocked and revealed its vote split, and (3) resulted in a verdict later that day. 885 F.2d at 783-84. In *Scruggs*, the former Fifth Circuit upheld a modified *Allen* charge delivered at 10:28 PM "on a stormy Friday evening," leading to a verdict at 11:26 PM. 583 F.2d at 239-41. And in *Chigbo*, the Court found no coercion where a modified *Allen* charge was delivered after eight jurors revealed their votes (7-1 for conviction) and the jury returned a guilty verdict 15 minutes later. 38 F.3d at 544-46. Here, where the risk of coercion was even lower, the district court acted within its discretion.

B. Defendants' contrary arguments rest on factual mischaracterizations.

Defendants' opposing position relies on misstated facts. First, Defendants claim that the charge "demand[ed] 'those of you who disagree [with a conviction] should reconsider.'" Hayes Br. 12. But the charge urged both those who "[we]re in favor of a conviction" and those who "[we]re in favor of an acquittal" to reevaluate. (Doc. 202-33-34). Nor did the charge state that jurors must "prove their honestly held beliefs" (Hayes Br. 14).

Second, Defendants incorrectly assert that the jury deadlocked four times. Carson Br. 40-43; Hayes Br. 12-13. On one of those purported occasions, the foreperson reported that some jurors were refusing to deliberate. (Doc. 201-7-15). But, as the court found, the foreperson "didn't say" the jurors "were deadlocked." (Doc. 202-17). Indeed, Defendants urged the court "to let the jury continue to deliberate" without further instruction. (Doc. 201-11). On another occasion, the foreperson said the jurors "feel like they're done," but he responded affirmatively when asked whether he wanted to continue discussions. (Doc. 201-26). When the court instructed the jury to keep deliberating, another juror gave "a thumbs up." (Doc. 202-23). Because some jurors wanted to continue talking, there was no deadlock. *See Hill*, 99 F.4th at 1311 (no deadlock where foreperson said, "With further deliberations, it may be we can get somewhere"). And on still another occasion, only a subset of jurors indicated they were deadlocked. *See supra* at 53. Thus, the court delivered the modified *Allen* charge within thirty minutes of the full jury's first indication that it could not agree (Doc. 202-26, 33-35) and after about seven hours of deliberation following a subset's indication of non-agreement (Docs. 201-16-18, 31; 202-33-35)—not after 16 hours of deadlock, as Defendants claim (Hayes Br. 12-13).

Third, Carson inaccurately states that, in addition to giving a modified *Allen* charge, the court earlier "gave an abbreviated modified *Allen* charge." Carson Br. 42. In fact, when delivering instructions at the close of trial, the court—with Defendants' approval (Doc. 180-30)—gave a pattern instruction telling jurors to "discuss the case with one another." (Doc. 331-32). The court repeated the instruction on the second day of deliberations. (Doc. 201-16-17).

That instruction lacked the "hallmarks of an *Allen* charge," such as the statement "that it would be expensive and time-consuming to retry the case[] and that no future jury would be better suited to decide the case." *United States v. Norton*, 867 F.2d 1354, 1366 (11th Cir. 1989). This Court has held that charges without these features are not "*Allen* charge[s]" (or even "watered-down *Allen* charge[s]"). *Id.* Similarly, the court's reinstruction on reasonable doubt—to which Defendants consented (Doc. 202-23-25)—was not a modified *Allen* charge (Hayes Br. 12). Nor were the court's boilerplate statements at various points that the jury should return to deliberate (Carson Br. 43). (Docs. 201-17, 30-31; 202-33-34); *see United States v. Prosperi*, 201 F.3d 1335, 1341 (11th Cir. 2000); *United States v. Brokemond*, 959 F.2d 206, 208 n.2 (11th Cir. 1992).

Fourth, Defendants incorrectly assert that the judge learned the vote split. Carson Br. 44-47; Hayes Br. 10-14. Defendants claim that

the judge stated: "[his] feeling is [he does] know the split." Hayes Br. 11.[13] But the judge said the opposite: "My feeling is I do not know the split." (Doc. 202-17). Defendants also speculate that, because the court-security officer reported that four or five jurors were not deliberating, the vote must have been 8-4 or 7-5 for conviction. Carson Br. 44-46; Hayes Br. 13. That is conjecture: No record evidence suggests that the four or five jurors favored acquittal (or that those who were speaking, or those who were not speaking, shared the same view).

Defendants also claim that the foreperson stated that he wanted to convict and that he was the only juror who favored continued deliberation. Carson Br. 44-46; Hayes Br. 10-14. Even if the foreperson's vague comment suggested a vote for conviction, the jury could not have understood the modified *Allen* charge to endorse his view. The charge was delivered 22 hours *after* the foreperson's comment; stated that jurors should not "give up an honest belief" about the evidence; and said, "if the evidence fails to establish guilt beyond a reasonable doubt, the defendants must have your unanimous verdict of not guilty." (Docs. 201-24-25; 202-33-35).

[13] This is directly quoted from Hayes's brief, including the incorrect pronouns.

Defendants compound their factual misstatements by analogizing this case to *Brewster v. Hetzel*, a habeas case with "extreme" facts in which this Court found "the verdict was coerced." 913 F.3d at 1054, 1056; *see* Carson Br. 40-41, 43, 45-46; Hayes Br. 7-8, 13. There, the jury sent five notes declaring deadlock; thrice disclosed the vote split; received an *Allen* charge; received two more orders to keep deliberating; received a further "lengthy" charge reminding the jurors—who had disclosed an 11-1 split for conviction—that "'beyond a reasonable doubt' does not mean absolute certainty"; had all reading materials confiscated when the holdout juror "beg[a]n doing crossword puzzles"; and delivered a verdict 18 minutes after the confiscation. 913 F.3d at 1047-49. The facts here—only one declaration by the full jury that it could not reach agreement, no disclosure of the vote split, no confiscation of reading materials followed immediately by a verdict—bear no resemblance whatsoever to *Brewster*. The other cases on which Defendants rely (Carson Br. 42, 47-48; Hayes Br. 14) either upheld modified *Allen* charges, *see Lowenfield v. Phelps*, 484 U.S. 231, 235, 240-41 (1988); *Davis*, 779 F.3d at 1312-14; *Rey*, 811 F.2d at 1459-60, or are factually inapposite, *see Brasfield v. United States*, 272 U.S. 448, 449-50 (1926) (jury revealed vote split).

2. The evidence was sufficient to convict.

This Court "will not disturb the verdict 'unless no trier of fact could have found guilt beyond a reasonable doubt.'" *United States v. Bell*, 112 F.4th 1318, 1331 (11th Cir. 2024) (citation omitted). "The evidence need not 'exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt[.]'" *United States v. Grow*, 977 F.3d 1310, 1320 (11th Cir. 2020) (per curiam) (citation omitted). Defendants do not come close to clearing this hurdle.

To prove conspiracy to defraud the United States and to commit major fraud against the United States under 18 U.S.C. § 371 (Count One), the government needed to establish: "(1) an agreement among two or more persons to achieve an unlawful objective; (2) knowing and voluntary participation in the agreement; and (3) an overt act by a conspirator in furtherance of the agreement." *United States v. Gonzalez*, 834 F.3d 1206, 1214 (11th Cir. 2016) (citation omitted).

To prove major fraud against the United States (Counts Two and Three), the government needed to establish that: (1) "the [d]efendant[s] knowingly executed or attempted to execute a scheme with the intent to defraud the United States[] or to obtain money" or property "by means of false or fraudulent pretenses, representations[,] and promises"; (2) "the scheme took place as part of the acquisition of

money" or property "as a contractor with the United States or as a subcontractor or a supplier on a contract with the United States"; and (3) the contract's value was $1 million or more. *United States v. Nolan*, 223 F.3d 1311, 1314-15 (11th Cir. 2000); *see* 18 U.S.C. § 1031(a). The first element requires "a material misrepresentation[] or the omission or concealment of a material fact." *United States v. Merrill*, 685 F.3d 1002, 1012 (11th Cir. 2012). "[A] misrepresentation" made as part of the procurement process "is material if it 'went to the very essence of the bargain.'" *Univ. Health Servs., Inc. v. United States*, 579 U.S. 176, 193 n.5 (2016) (quoting *Junius Constr. Co. v. Cohen*, 257 N.Y. 393, 400 (1931)).

Defendants argue that (1) as to Count One, the evidence was insufficient to establish the first element (the conspiracy's existence) (Hayes Br. 21-22); (2) as to Counts Two and Three, the evidence was insufficient to establish the first element (execution of a scheme with intent to defraud based on material misstatements or omissions) (Carson Br. 49; Hayes Br. 23-33); and (3) as to all three counts, the district court should have granted judgments of acquittal based on the entrapment-by-estoppel defense (Carson Br. 49; Hayes Br. 38-42). Each argument fails.

A. The evidence established the conspiracy.

"An agreement to conspire may 'be proved by circumstantial as well as direct evidence,' and may be inferred from the relationship of the parties, their overt acts and concert of action, and the totality of their conduct." *United States v. Schwartz*, 541 F.3d 1331, 1361 (11th Cir. 2008) (citation omitted). Emails, text messages, and conspirator testimony established that Defendants, along with Dove, Frese, Geist, and Gannon, worked together to obtain by fraud government work for IntelliPeak with Envistacom as subcontractor. *See supra* at 8-28. To achieve that collective goal, the conspirators (1) wrote and submitted sham IGCEs that they falsely represented as independent, government-created estimates (*e.g.*, Exs. 53-1, 42; 105-1, 5; 107-1, 5; Docs. 328-136, 238; 329-25); (2) compiled and submitted sham "competitor" quotes that they falsely represented to have been independently prepared by third parties and solicited by the government (*e.g.*, Exs. 32; 39; 69; 83; Docs. 328-149-151, 235-237; 329-25-26); and (3) wrote and submitted sham evaluation memos that they falsely represented to have been authored by a government employee (*e.g.*, Exs. 112; 114; Doc. 329-21-23, 33).[14]

[14] Carson misdescribes (at 48-51) the conspiracy's misrepresentations as involving just IGCEs, ignoring the quotes and evaluation memos.

Defendants' sole response is to argue that the evidence failed to establish that Dove, Frese, Geist, and Gannon were co-conspirators. Hayes Br. 17-22. This is wrong.

Defendants are simply arguing that "the proof at trial varied" from the indictment by establishing a conspiracy with "fewer conspirators" than the charged one. *United States v. Richardson*, 764 F.2d 1514, 1526 (11th Cir. 1985). Any purported variance would justify reversal only if it "substantially prejudiced a defendant's rights." *Id.* Defendants, however, do not argue they suffered substantial prejudice (Hayes Br. 17-22) and thus have abandoned this argument, *see United States v. Blanco*, 102 F.4th 1153, 1167 n.8 (11th Cir. 2024). Nor could such an argument succeed: A variance of this sort "does not normally cause any substantial prejudice" since "the existence of the conspiracy, rather than the identity of the conspirators, is the most important element." *Richardson*, 764 F.2d at 1526. For that reason alone, the argument falters.

The argument also fails because a reasonable jury could have concluded that Dove, Frese, Geist, and Gannon were co-conspirators. (*E.g.*, Exs. 28; 32; 62; 108); *see supra* at 9-27.

Dove. Defendants claim that federal employees cannot conspire against the United States unless the employee "act[s] outside the scope of [his] employment" to advance "personal interests." Hayes Br. 17.

Defendants cite no authority for this rule, and precedent contradicts it. In *Glasser v. United States*, the Supreme Court upheld a § 371 conspiracy-to-defraud charge against two Assistant United States Attorneys for misconduct committed "in the performance"—not outside the scope—of their "official duties." 315 U.S. 60, 63-64, 66-67 (1942), *superseded in irrelevant part by* Fed. R. Evid. 104(a).[15] This Court has also affirmed § 371 conspiracy-to-defraud convictions against federal employees without applying a scope-of-employment or personal-interest test. *United States v. McCoy*, 356 F. App'x 335, 337, 341, 343 (11th Cir. 2009) (per curiam); *United States v. Lanier*, 920 F.2d 887, 889 & n.5, 897 (11th Cir. 1991). Defendants rely on cases holding that co-conspirators generally cannot be the conspiracy's victim under the Mandatory Victims Restitution Act (Hayes Br. 17), but that principle is wholly inapposite—and, in any event, the United States (not Dove) was the conspiracy's victim.

Flores also claims he had no "direct contact" with Dove. Flores Br. 17. But "the government need not show" that every co-conspirator "had direct contact with each" other co-conspirator, *United States v. McNair*, 605 F.3d 1152, 1196 (11th Cir. 2010)

[15] The jury convicted both defendants. 315 U.S. at 63. The Court upheld one conviction, determining that "substantial evidence support[ed]" it, and reversed the other on grounds not pertinent here. *Id.* at 76-77, 87-88.

(citation omitted), so long as every conspirator "knew the essential unlawful object of the conspiracy and agreed to it," *United States v. Howard*, 28 F.4th 180, 189 (11th Cir. 2022). The government made that showing as to Flores by establishing, among other things, that he worked with Hayes on the cost estimates that were the basis for the sham IGCE for HHS029A (Ex. 11); was "brief[ed]" by Hayes about how Envistacom "desire[d] to proceed" on HHS313A and HHS338A (Ex. 61-1; *see* Ex. 71-1); and prepared fake CyberBridge quotes, which he knew Hayes would submit to the government, to ensure that HHS313A and HHS338A would be awarded to IntelliPeak with Envistacom as subcontractor (*e.g.*, Exs. 69; 79; 203-8-9); *see supra* at 21-22, 26.

Frese and Geist. While Frese and Geist did not believe they had conspired with Hayes and Flores (Doc. 326-100-102, 137-138), extensive evidence showed that Frese and Geist had done so—specifically, by preparing fraudulent quotes as part of a scheme (in which Hayes and Flores participated) to obtain HHS029A for IntelliPeak with Envistacom as subcontractor. (*E.g.*, Exs. 32; 39); *see supra* at 13-14. The jury—which, unlike Frese and Geist, was instructed on conspiracy—reasonably could have rejected their self-serving statements in favor of the evidence disproving those statements.

Gannon. Defendants claim that Gannon testified there was "nothing illegal" about preparing procurement documents (Hayes Br. 19), but she said the opposite: She stated she sent procurement papers from her personal email because she knew drafting them was "not legal." (Doc. 327-133). She merely agreed that there was "nothing illegal" about "help[ing]" a customer or sending Dove "suggested language" for emails. (Doc. 328-62-63). Neither that testimony nor her limited interactions with Flores (Hayes Br. 19-20) undermine her co-conspirator role. *See supra* at 64-65.

B. The evidence established that Defendants executed a scheme with intent to defraud.

Based on the same evidence proving the conspiracy, a reasonable jury could have concluded that Defendants executed a scheme with intent to defraud regarding HHS313A and HHS338A, each the subject of a major-fraud count. *See supra* at 62. Further evidence establishing fraudulent intent includes:

- Carson's and Hayes's using personal email to conceal conduct that was "not legal" (*e.g.*, Ex. 61-1; Doc. 327-133);
- Carson's emailing Hayes and Gannon to apprise them that contracting officers were not monitoring compliance with 8(a)-program requirements (Ex. 60);

- Hayes's instructing Dove to "save over" files (*e.g.*, Exs. 71-1; 85-1);
- Hayes's listing Dove as the "reviewer[]" on evaluation memos, using Dove's name in file names, and drafting emails for Dove suggesting he had prepared documents (*e.g.*, Exs. 105-1; 107-1; 112-2; 114-2);
- Flores's stating in text messages that he was listing "higher" CyberBridge prices so that IntelliPeak could "come in lower" (Ex. 203-8-9); and
- Flores's preparing quotes using his wife's company without including his or his wife's names (*e.g.*, Exs. 69-2-3; 83-2-3).

The evidence also established that Defendants' misrepresentations "went to the very essence of," *Univ. Health*, 579 U.S. at 193 n.5 (citation omitted)—i.e., were material to—the contract awards. Hadrick testified that IGCEs were "very important" to him, he used quotes as a "baseline" when "review[ing]" contractor "proposal[s]," and he "depend[ed] heavily" on Dove's evaluation memos. (Docs. 328-234-235; 329-23, 32). But IGCEs are "no longer useful" if prepared by contractors, and, when pricing information is provided by a "vendor," contracting officers cannot "truly determine" the offer's reasonableness. (Docs. 328-129; 329-85). Thus, in what Carson admits (at 58) was "damning testimony," Hadrick explained that he

would not have awarded HHS313A or HHS338A had he known of Defendants' role in preparing the IGCEs or "CyberBridge" quotes. (Doc. 329-34-36).[16]

In response, Defendants incorrectly assert that the government needed to establish that the contract prices were not fair and reasonable and that the government suffered net pecuniary loss. Carson Br. 49, 55-56; Hayes Br. 23-24, 31-32. While regulations require contracting officers to determine whether prices are "fair and reasonable," 48 C.F.R. § 13.106-3(a), the major-fraud statute does not make unfair or unreasonable prices an offense element, *see* 18 U.S.C. § 1031(a). And while, as discussed *infra* at 111-114, the government proved at sentencing that the contract prices here were not equal to the fair market value of the goods and services provided, the government did not need to show unfair or unreasonable prices at

[16] Carson irrelevantly asserts that the government cannot establish materiality by showing that Hadrick "ha[d] the option" not to award the contracts had he known of Defendants' fraud. Carson Br. 56 (citation omitted). The proof established not just that Hadrick had the option, but that he would not, *in fact*, have awarded the contracts. (Doc. 329-34-36).

trial to establish materiality, which was proved through other evidence. *See supra* at 67-68.[17]

Similarly, to prove major fraud at trial, the government did not need to establish that the work performed under the contracts was worth less than the government paid. In the major-fraud statute, Congress criminalized, with respect to certain government contracts, "knowingly execut[ing], or attempt[ing] to execute, any scheme or artifice with the intent" either "(1) to defraud the United States" or "(2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1031(a); (*see* Doc. 331-28). Nothing in that statutory language incorporates a net-pecuniary-loss element. Indeed, where a defendant provided the government with products different from those that the government had contracted for, this Court affirmed major-fraud convictions without comparing the value of the contracted-for and the actually-provided goods. *See Merrill*, 685 F.3d at 1006-08, 1010, 1015.

That decision is consistent with Supreme Court and Eleventh Circuit precedent holding that other federal fraud statutes include no net-pecuniary-loss element. The Supreme Court has repeatedly held

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[17] Carson asserts (at 49), without citation, that the government "acknowledged that the IGCE[]s reflected fair and reasonable pricing." The government never did.

that, where statutes criminalize conspiracies to defraud the United States, the government need not prove "property or pecuniary loss." *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924); *see Tanner v. United States*, 483 U.S. 107, 128 (1987) (collecting cases).[18] The Supreme Court has also held that, where statutes criminalize the obtaining of money or property through fraud, no showing of net pecuniary loss is required. *Carpenter v. United States*, 484 U.S. 19, 26-27 (1987); *see United States v. Wheeler*, 16 F.4th 805, 828 (11th Cir. 2021); *United States v. Maxwell*, 579 F.3d 1282, 1302-03 (11th Cir. 2009); *see also Neder v. United States*, 527 U.S. 1, 24-25 (1999) ("no place in the federal fraud statutes" for "damages" requirement).[19]

Thus, whether Defendants' major-fraud convictions rested on the conclusion that Defendants acted with the intent "to defraud the United States" or "to obtain money or property" fraudulently, the government did not need to prove net pecuniary loss. This Circuit's pattern jury instructions say nothing different (Hayes Br. 32), simply

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[18] Accordingly, Defendants do not—and could not—contend that the government needed to establish net pecuniary loss to prove conspiracy to defraud the United States under § 371.

[19] The Supreme Court recently granted certiorari to address whether the wire-fraud statute requires proof of net pecuniary loss. *Kousisis v. United States*, 144 S. Ct. 2655 (2024). That decision remains pending.

defining "intent to defraud" as "the specific intent to deceive or cheat someone, *usually* for personal financial gain *or* to cause financial loss." 11th Cir. Criminal Pattern Jury Instructions O43 (emphases added).

Even if there were a net-pecuniary-loss requirement, the government satisfied it. The government introduced invoices showing the total amount that Envistacom charged IntelliPeak for work on HHS313A and HHS338A. (Exs. 120; 121; *see* Doc. 327-151-152, 169-170). The government also introduced evidence showing that IntelliPeak added an 8% mark-up to Envistacom's prices for HHS029A. (Exs. 24-1; 25-1, 6-7; 34-1; 36-1; Doc. 327-101). Adding an 8% mark-up to Envistacom's invoiced prices for HHS313A leads to a contract value of $2,921,868.91, but the government paid $3,515,987.72 for that contract. (Ex. 3-1). Adding an 8% mark-up to Envistacom's invoiced prices for HHS338A leads to a contract value of $3,487,762.50, but the government paid $3,542,270.10.[20] (Ex. 5-1).[21] For both contracts, any reasonable jury would have

[20] Even if the work that Hayes billed to IntelliPeak were added to the contract values (since this work presumably was not captured by Envistacom's invoices), *see supra* at 25 & n.5, 28, there would still be a gap between the contract value ($2,941,886.41 for HHS313A and $3,517,980.00 for HHS338A) and the amount the government paid.

[21] As explained *infra* at 113-114, the government introduced evidence at sentencing showing that the loss to the United States was

concluded that the government suffered a net pecuniary loss by paying for more than it received.

Defendants' remaining contentions all have the same flaw: They draw inferences *against* the verdict. Defendants characterize their conduct as "assisting" Dove (Carson Br. 49) or facilitating an IntelliPeak-Envistacom "partner[ship]" (Hayes Br. 27-29). But the jury reasonably decided that it was fraud—not assistance or partnership—to misrepresent the independence and authorship of quotes, IGCEs, and evaluation memos. And while Gannon may have regarded drafting procurement papers as "business as usual" (Carson Br. 51-53; *see* Hayes Br. 28), she also knew that doing so was illegal (Doc. 327-133). Nor can Defendants substitute their views for the jury's verdict by proposing purportedly "valid explanations" for the use of personal email and the "save over" directives (Hayes Br. 29-31). The jury reasonably could have rejected those explanations for the more compelling conclusion that Defendants were trying to hide conduct that was "not legal" (Doc. 327-133).

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even greater than these figures suggest. The pertinent point for Defendants' sufficiency-of-the-evidence challenges, however, is that a reasonable jury would have found *some* net pecuniary loss, regardless of the exact amount.

Defendants also note that certain regulations—not applicable here[22]—permit information "[e]xchanges" between officials and contractors, suggesting that Kauzlarich and Hadrick supported such exchanges. Hayes Br. 23-26; *see* Carson Br. 53-54. But exchanging information is worlds apart from fabricating documents and lying about their sources, which the regulations do not allow, *see* 48 C.F.R. pts. 13, 15, and the contracting officers did not support (Docs. 328-219-220; 329-34-35). The government's case agent said nothing different (Hayes Br. 26-27): She stated that a single email—on which the government did not rely—was consistent with the regulations and that Dove ultimately sent the fraudulent documents to the contracting officers. (Doc. 329-165, 195). None of that undermines the fact that, as the agent also stated, Dove failed to "do[] his job" by allowing Defendants to "provid[e] those documents" in the first place. (Doc. 329-166).

Impermissibly drawing inferences against the jury's finding of materiality, Defendants claim that the misrepresentations could not have been material because the contracts were sole-source. Hayes

[22] Contrary to Carson's claim (at 54), Part 13—not Part 15—of the Federal Acquisition Regulation governed the procurement processes here. (Doc. 328-191).

Br. 25.[23] But contracting officers still evaluate offers for sole-source contracts, and the officers here relied on Defendants' misrepresentations when doing so. (Docs. 328-139-143, 219-220, 234-235; 329-34-36). Carson nonetheless claims (at 56-57) "there was conflicting testimony" about whether the government needed to prepare IGCEs, but the referenced testimony nowhere states that IGCEs were optional for these contracts. (Docs. 327-182-184; 328-128-130, 134-135). In any event, conflicting testimony is resolved in favor of guilt. *United States v. Watts*, 896 F.3d 1245, 1251 (11th Cir. 2018).

Furthermore, while Hadrick agreed that "a fair and reasonable price" need not be "the lowest price" (Hayes Br. 23), that is consistent with his testimony that he relied on Defendants' misrepresentations in assessing IntelliPeak's prices (Doc. 329-34-36). That Hadrick's subordinate did not rely on third-party quotes to evaluate offers (Carson Br. 56; Hayes Br. 24) is irrelevant because Hadrick—who "had ultimate responsibility" for awarding HHS313A and HHS338A (Carson Br. 58)—did (Docs. 328-228-230, 235; 329-83). Defendants persist by noting that contracting officers can rely on tools besides

[23] While the contracts here were sole-source, it is not correct, as Carson contends (at 4 n.1), that "[a]ll 8(a) contracts are sole-sourced." (Doc. 327-67).

quotes to evaluate offers and that Kauzlarich did so when awarding HHS029A. Carson Br. 58; Hayes Br. 23-24, 50-51. But HHS029A is not the subject of a major-fraud count (Doc. 331-22-23) and, in any event, Kauzlarich also relied on the sham quotes when awarding HHS029A, as did Hadrick when awarding HHS313A and HHS338A. (Ex. 2-92; Docs. 328-161-162, 235; 329-34-35). Finally, a reasonable jury did not need to credit the defense expert's opinion about price reasonableness (Hayes Br. 24). *See United States v. Augustin*, 661 F.3d 1105, 1117 (11th Cir. 2011). The government undercut that opinion on cross-examination (*e.g.*, Doc. 330-192-195) and, at any rate, did not rely on the prices' unreasonableness to prove materiality, *see supra* at 67-68.

C. The district court correctly denied Defendants' motions for judgments of acquittal based on the entrapment-by-estoppel defense.

"Entrapment-by-estoppel is an affirmative defense that provides a narrow exception to the general rule that ignorance of the law is no defense." *United States v. Funches*, 135 F.3d 1405, 1407 (11th Cir. 1998). "To assert this defense successfully, a defendant must actually rely on a point of law misrepresented by an official of the state; and such reliance must be objectively reasonable[.]" *United States v. Eaton*, 179 F.3d 1328, 1332 (11th Cir. 1999) (per curiam) (citation omitted).

There was no evidence that any government official made any misrepresentation about any point of law to any Defendant, let alone that Defendants relied on any such misrepresentation. Even if a misrepresentation had been made, no reasonable person would have believed it was lawful to misrepresent the source of "inherently governmental" papers (Doc. 327-96) and the purportedly competitive nature of quotes (Ex. 85-1) to obtain 8(a) contracts whose proceeds overwhelmingly went to a non-8(a) firm (Exs. 153; 155). A reasonable jury could have—indeed, would have—rejected the entrapment-by-estoppel defense, as the jury did here after being instructed on the defense (Doc. 331-31).

Defendants respond that Dove "ask[ed]" them "to draft documents" and that other officials failed to "raise[] a red flag." Hayes Br. 39-41; *see* Carson Br. 50-53. This argument is a non-starter for Flores and Carson. "For a statement to trigger an entrapment-by-estoppel defense, it must be made directly to the defendant, not to others." *Eaton*, 179 F.3d at 1332. But Flores admits he had no "direct contact" with Dove (Flores Br. 17), and neither he nor Carson refers to a single direct (i.e., non-forwarded) communication from Dove or any other government official. *See* Flores Br. 39-42; Carson Br. 50-55.

In any event, a request to draft documents or a failure to raise red flags is not a representation (or misrepresentation) of law. Entrapment-by-estoppel occurs only when an official provides "assurance" that "specified conduct will not violate the law." *United States v. Alvarado*, 808 F.3d 474, 485 (11th Cir. 2015). And when an official learns of a defendant's conduct but does not specifically "advise" on its legality, the official has not made the "affirmative[] communicat[ion]" necessary for an entrapment-by-estoppel defense. *United States v. Votrobek*, 847 F.3d 1335, 1345 (11th Cir. 2017). Because the evidence does not show that Dove (or anyone else) advised Defendants about the conduct's legality, the defense fails. *See United States v. Johnson*, 139 F.3d 1359, 1365 (11th Cir. 1998).

Describing entrapment-by-estoppel as a doctrine of "fairness," Carson complains that it was "totally unfair" not to prosecute Dove, Gannon, and others. Carson Br. 49, 51 n.12, 53-55 & n.13. But the government's exercise of its "absolute discretion to decide whether to prosecute" non-parties, *United States v. B. G. G.*, 53 F.4th 1353, 1361 (11th Cir. 2022), says nothing about whether the evidence sufficed to convict Defendants. Nor does *United States v. Thompson* (Hayes Br. 38): That decision held only that an entrapment-by-estoppel defense should go to a jury (as Defendants' did), and the defendant there made a "factual proffer" that a Justice Department attorney had

directly told him that his conduct was immune from prosecution. 25 F.3d 1558, 1561-62, 1565 (11th Cir. 1994).

3. Defendants' discovery-related arguments fail.

Defendants wrongly argue that the district court should have granted their motions to dismiss under Rule 16 based on the government's production at the start of trial. Carson Br. 24-33; Hayes Br. 34-36. Carson further claims, incorrectly, that the district court should have either granted Defendants' motions to dismiss based on a purported *Brady/Giglio* violation or sua sponte granted a new trial. Carson Br. 35-39. And all Defendants make unfounded accusations about the government's conduct during discovery. Carson Br. 33-35; Hayes Br. 37. These arguments rest on meritless legal contentions, misstated facts, or both.

A. The district court did not abuse its discretion under Rule 16, and Defendants show no substantial prejudice.

Under Rule 16(d)(2), "the choice of remedy" for delayed disclosure is within a court's discretion. *United States v. Rodriguez*, 765 F.2d 1546, 1557 & n.14 (11th Cir. 1985). To craft relief, courts consider "the reasons for the Government's delay," the prejudice to defendants, and "the feasibility of curing such prejudice by granting a continuance," *United States v. White*, 846 F.2d 678, 691 (11th Cir. 1988), as well as "whether there was any bad faith," *United States v.*

Turner, 871 F.2d 1574, 1580 (11th Cir. 1989). The court must "impose the least severe" remedy necessary "to elicit compliance" with discovery obligations. *United States v. Perez*, 960 F.2d 1569, 1572 (11th Cir. 1992) (per curiam). Dismissal "is an extreme sanction which should be infrequently utilized." *United States v. Jordan*, 316 F.3d 1215, 1249 n.68 (11th Cir. 2003) (citation omitted).

A district court's choice of remedy justifies reversal on appeal only if "the accused" can "show prejudice to substantial rights." *United States v. Kubiak*, 704 F.2d 1545, 1552 (11th Cir. 1983) (per curiam). "Substantial prejudice is established when the defendant shows that he was unduly surprised and did not have an adequate opportunity to prepare a defense or that the mistake had a substantial influence on the jury." *United States v. Rivera*, 944 F.2d 1563, 1566 (11th Cir. 1991).

Defendants' Rule 16 argument fails for two independent reasons. First, the district court did not abuse its discretion. After the government's production, the court recessed for over two days based on Defendants' representation that they "believe[d] that [they] could have a plan" to "get us back into court" and back "at trial" within this period and that this timing reflected "a fair balancing of competing

interests." (Docs. 323-128-129; 325-18, 22-24).[24] The court also granted Defendants' request to delay four witnesses' cross-examinations until at least six days post-production, and Defendants had the option to request postponements of those witnesses' direct examinations. (Doc. 325-20-27). Those witnesses ultimately testified between six and nine days post-production. (Docs. 327-74 (Gannon); 328-116 (Kauzlarich), 220 (Hadrick); 329-90 (Coleman)).[25]

The district court's remedy appropriately reflected the factors relevant to relief. The court found that the delay resulted from an unintentional error, not bad faith. (Docs. 323-80, 117; 330-149). The documents were overwhelmingly extraneous—non-witnesses' email accounts, PDFs that were concededly not "relevant," and non-substantive emails sent to Gannon's .mil account that, as such, were

[24] These statements refute Carson's claim (at 30) that Defendants "made clear" a two-day recess "was insufficient." While Defendants said, when seeking dismissal, that "any extension" would be "beyond prejudicial" (Doc. 323-92-97), they never claimed that, if the court granted a recess, they needed more than two days (Doc. 325-18-20).

[25] Defendants incorrectly state that the production occurred on March 15, 2023 (Hayes Br. 34), and Carson inaccurately says (at 10) that the government "eventually agreed" to produce native files. The government made the production—in native format—on March 14, the same day it discovered the files had not been produced. (Doc. 325-6-7, 10).

not even required to be produced. (Docs. 184-1; 325-6).[26] And any risk of prejudice was further reduced when the court granted Defendants the time they requested for document review and to prepare for witness examinations (Doc. 325-18-27).

Dismissal, on the other hand, would itself have been an abuse of discretion. Severe sanctions, such as dismissal and exclusion of evidence, are unsuitable when (as here) defendants show no prejudice and less-extreme sanctions, such as continuances or postponed examinations, are available to cure any prejudice. *See Jordan*, 316 F.3d at 1253-54; *United States v. Euceda-Hernandez*, 768 F.2d 1307, 1311-12 (11th Cir. 1985); *United States v. Burkhalter*, 735 F.2d 1327, 1329 (11th Cir. 1984); *United States v. Sarcinelli*, 667 F.2d 5, 5-6 (5th Cir. Unit B 1982); *see also Turner*, 871 F.2d at 1580.

Defendants' claim also fails because, for the same reasons they could not show prejudice below, they have not established substantial

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[26] Carson says (at 11) he "was never given access to" Gannon's .mil account, but the prosecution team produced all emails from the account in the team's possession. Moreover, the government never "told the defense" that "6.5 gigabytes" of produced material were "relevant" (Carson Br. 21). The government said the case agent had identified 462 documents as pertinent (Doc. 323-81), but Defendants later conceded that those documents were not "relevant" (Doc. 325-6). Finally, the production included emails from one "potential Government witness[]," Gannon—not six, as Carson states (at 23). (Doc. 323-83).

prejudice on appeal. Courts find no substantial prejudice when defendants claim—as Defendants do here—that they needed more time to assess new evidence but failed to seek a longer recess or continuance. *Scruggs*, 583 F.2d at 242; *see Rivera*, 944 F.2d at 1566; *United States v. Garate-Vergara*, 942 F.2d 1543, 1553 (11th Cir. 1991); *Kubiak*, 704 F.2d at 1552; *United States v. Ross*, 511 F.2d 757, 764 (5th Cir. 1975). Moreover, Defendants used newly produced documents as trial exhibits, to "formulate" cross-examinations, and to refresh recollections (Doc. 330-10-17, 79-81, 134), while the government—far from "building its case" using the production (Carson Br. 31)—introduced none of the newly disclosed documents. *See United States v. Chestang*, 849 F.2d 528, 532-33 (11th Cir. 1988). Finally, Defendants identify nothing in the production that would have undermined the "very substantial" evidence of guilt, *Ross*, 511 F.2d at 757.

Defendants make two flawed counterarguments. First, Defendants claim that the government offered bad-faith explanations for the delay. Hayes Br. 34-35; *see* Carson Br. 29-30. But Defendants do not argue there was clear error in the district court's finding of no bad faith—and thus do not establish that this finding was an abuse of discretion. *See United States v. Frazier*, 387 F.3d 1244, 1258-59 (11th Cir. 2004) (en banc).

In any event, the prosecutors kept Defendants apprised as the government investigated the error's source. In the normal course, the case agent would upload documents to a file-sharing site called USAfx, where they would be downloaded by the prosecutors and uploaded to a document-review platform where Defendants could access them. (Doc. 323-80; *see* Doc. 325-14). Upon discovering the unproduced documents, the prosecutors provided their "current[] understand[ing]": The agent had "uploaded [the files] to . . . USA[fx]. Because of where they got uploaded—and, potentially, that they didn't actually get uploaded, but because they didn't get uploaded, they didn't get downloaded and produced to the defendants." (Doc. 323-80-81).

The next day, after investigating further, the government "clarif[ied]." (Doc. 325-12). While the government could not rule out "a problem" with the "upload" to USAfx, "the error" appeared to have "occurred[] in the download/upload stage"—i.e., when documents were being downloaded from USAfx and uploaded to the document-review platform from which productions were made. (Doc. 325-13-15). That explanation was consistent with the agent's subsequent testimony that she had uploaded the documents to USAfx. (Doc. 330-86-87). And while the government later stated that it did not definitively know where the problem originated (Carson

Br. 26), the government also explained that it "believe[d]" the files were "successfully upload[ed] to USA[fx]" and that the error occurred after that (Doc. 330-139). Nothing about these transparent explanations suggests bad faith.[27]

Carson also incorrectly claims (at 24) that "the government admitted that it was unsure whether all of the discovery ***ever*** was produced" (emphasis in original). While the government could not immediately confirm that the undisclosed documents were the only items unintentionally withheld, the government confirmed the next day that it was "not aware of anything that [the government] intended to produce to the defense that ha[d] not been produced to the defense." (Doc. 325-15).

Second, Defendants claim they were prejudiced, but Hayes and Flores do not identify a single document that would have influenced their defense had they received it earlier. *See* Hayes Br. 36. Carson points (at 37-38) to just six emails involving Gannon's interactions with government officials, but none references the contracts at issue, relates to IGCEs, quotes, or evaluation memos, or includes any Defendant. Claiming that the emails show Gannon used "her

[27] Carson inaccurately claims that the government "first described" the production "as 33 emails sent to Gannon." Carson Br. 10. From the beginning, the government explained that the production contained six individuals' email accounts. (Docs. 184-1; 323-80-81).

business email" to "do[] *plenty* of things that were not under a private business's purview," Carson asserts that the emails would have "impeach[ed]" her testimony that she "used her personal email" when she thought her conduct "was not legal." Carson Br. 38 (emphasis in original). But Carson does not show that the emails in question related to conduct that was outside "a private business's purview"—and thus shows no inconsistency between Gannon's use of her business account and her testimony. In any event, Carson's proposed impeachment would have contradicted his entire defense (as well as much of his appellate argument, *see* Carson Br. 48-54), which rests on the claim that preparing documents for government officials is *within* a private business's purview. (*E.g.*, Doc. 331-67-69).

Defendants also make generalized assertions that the production was "inherently" prejudicial because the new documents "related to the Army" (Carson Br. 23, 29) or might have contained "further support" for an "alternative" defense "theory" (Hayes Br. 36). But Defendants show no *actual* prejudice: Although the government made the production more than 17 months before Defendants filed their opening appellate briefs, Defendants fail to identify any "further support" for their theories. Nor do conclusory assertions that Defendants needed a "length[ier] recess" (Carson Br. 30) explain why

a recess of more than two days—the time they requested (Doc. 325-17-18)—was insufficient.

For the same reasons, Defendants show no prejudice from the production's size. *See* Hayes Br. 36; Carson Br. 28. Upon learning of the six email accounts, the prosecutors promptly produced all emails in those accounts, without having reviewed the emails for relevance, to ensure that Defendants had immediate access to them. (Doc. 323-104, 125-126). Once the government reviewed the emails, it became clear that the overwhelming majority were wholly inapposite, and Defendants never sought additional time (beyond the recess already granted by the Court) to review the new production. (Doc. 325-10-11); *see supra* at 80-81.[28]

Defendants' cited cases provide no aid. Defendants claim that, in *United States v. Feliciano-Francisco*, this Court found "a discovery violation" (Hayes Br. 34), but in fact the Court found "no Rule 16 violation" and "no[] show[ing]" of prejudice. 701 F. App'x 808, 811 (11th Cir. 2017). The other cases (Hayes Br. 34, 36; Carson Br.

[28] Carson says (at 27-28, 33) that he "***still***" has not "complete[d] his review" and that the government produced the documents "in a manner that was virtually impossible to review" (emphasis in original). But on March 15, 2023, one day after the production, Carson's attorney told the court that "Carson[']s defense" team was "able to view" some of the documents. (Doc. 325-7).

31-32) are inapposite because they involved undisclosed evidence that "shattered" the defense's theory, *United States v. Camargo-Vergara*, 57 F.3d 993, 999 (11th Cir. 1995), or "willful" and "reckless" nondisclosures, *United States v. Nelson*, No. 7:20-CR-19 (HL), 2022 WL 1062977, at *3 (M.D. Ga. Apr. 8, 2022); *United States v. Govey*, 284 F. Supp. 3d 1054, 1062 (C.D. Cal. 2018).

B. No *Brady/Giglio* error occurred.

Carson makes two *Brady/Giglio* arguments, and both fail. The first is that the government "withheld" "favorable" evidence and that the district court should have dismissed the indictment or granted a new trial. Carson Br. 37-39.[29] This marks the first time a Defendant has pointed to specific documents in the production that are claimed to be *Brady/Giglio* or has sought a new trial (rather than dismissal) based on *Brady/Giglio*. (Docs. 323-87, 92-93; 325-20). Plain-error review applies. *See United States v. Man*, 891 F.3d 1253, 1276 (11th Cir. 2018).

To establish a *Brady* violation, the defendant must show that (1) "the government possessed favorable evidence to the defendant";

[29] If Hayes's and Flores's passing references to a constitutional violation (Hayes Br. 35-36) are meant to assert a *Brady/Giglio* error, Hayes and Flores abandoned the claim by leaving it undeveloped. *See United States v. Woods*, 684 F.3d 1045, 1064 n.23 (11th Cir. 2012) (per curiam).

(2) "the defendant does not possess the evidence and could not obtain the evidence with any reasonable diligence"; (3) "the prosecution suppressed the favorable evidence"; and (4) "there is a reasonable probability" of a different outcome "had the evidence been disclosed." *United States v. Stein*, 846 F.3d 1135, 1145-46 (11th Cir. 2017) (citation omitted).[30] If a witness's reliability "'may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [the *Brady*] rule." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (citation omitted). When a defendant's *Brady* claim rests on delayed disclosure, he must establish "prejudice"—i.e., that "the material came so late that it could not be effectively used." *United States v. Jeri*, 869 F.3d 1247, 1260 (11th Cir. 2017).

Carson's argument "fails for much the same reasons," *United States v. Stahlman*, 934 F.3d 1199, 1230 (11th Cir. 2019), as Defendants' Rule 16 claim. *See United States v. Hano*, 922 F.3d 1272, 1292 (11th Cir. 2019). Carson identifies no material in the production that is "favorable" to his case, *United States v. Naranjo*, 634 F.3d 1198, 1212 (11th Cir. 2011), or would have created "a reasonable

[30] Carson inverts the burden (at 33) by suggesting that the government must show "no reasonable probability" of a different outcome.

probability" of a different outcome, *Laines*, 69 F.4th at 1231. *See supra* at 84-85. Nor has he shown prejudice from the production's timing, because the court granted a recess of the length Defendants requested (with additional postponements of some cross-examinations and the option of direct-examination postponements). *See United States v. Bueno-Sierra*, 99 F.3d 375, 379-80 (11th Cir. 1996) (per curiam); *see United States v. Knight*, 867 F.2d 1285, 1289 (11th Cir. 1989); *see also supra* at 79-80. There was no error, plain or otherwise.[31]

Carson's second argument is that the government violated *Brady/Giglio* by making the production despite purportedly "never review[ing]" the files, allegedly entitling Carson to dismissal or a new trial. Carson Br. 36, 39. Below, Carson moved only for dismissal on this basis (Doc. 323-87, 92-93), so his request for a new trial is reviewable for plain error while his request for dismissal is reviewed for abuse of discretion. *See Man*, 891 F.3d at 1276. For two reasons, there was no error, plain or otherwise.

First, the government conducted the review that Carson claims was never performed. While the prosecutors, in the interest of time,

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[31] Had plain error occurred under *Brady/Giglio*, the correct remedy would be a new trial. *See Giglio*, 405 U.S. at 155. This would not be one of the "infrequent[]" cases in which the "extreme sanction" of dismissal would be appropriate, *Jordan*, 316 F.3d at 1249 n.68. *See supra* at 81.

initially made the production without having reviewed for *Brady/Giglio* material (Doc. 323-104), the government, per the court's directive to identify any potential *Brady* material, subsequently ran searches and identified "potentially relevant documents" in the production for Defendants. *See supra* at 33.

Second, declining to review documents for *Brady/Giglio* material does not itself violate *Brady/Giglio*. To establish a *Brady/Giglio* claim, the defendant must show that evidence was "suppressed." *United States v. Gallardo*, 977 F.3d 1126, 1142 (11th Cir. 2020). Barring exceptional circumstances (none applicable here, *see United States v. Warshak*, 631 F.3d 266, 297-98 (6th Cir. 2010)), the government cannot have suppressed evidence that was disclosed to defendants, regardless of whether the government first reviewed the evidence. Indeed, this Court rejected an argument that the government had violated *Brady* by providing documents and then "requiring [defendants] to search the discovered materials for exculpatory material." *Jordan*, 316 F.3d at 1253-54; *see Warshak*, 631 F.3d at 297-98 & n.28; *United States v. Morales-Rodriguez*, 467 F.3d 1, 14-15 (1st Cir. 2006); *United States v. Pelullo*, 399 F.3d 197, 212 (3d Cir. 2005); *United States v. Mulderig*, 120 F.3d 534, 541 (5th Cir. 1997); *see also United States v. Tang Yuk*, 885 F.3d 57, 86-87 (2d Cir. 2018) (plain-error review). The district-court case *United States v. Lyons* says nothing

different (Carson Br. 36-37): It dismissed an indictment based on discovery misconduct but nowhere held that the government must specifically identify *Brady/Giglio* material. 352 F. Supp. 2d 1231, 1233, 1241-43 (M.D. Fla. 2004).

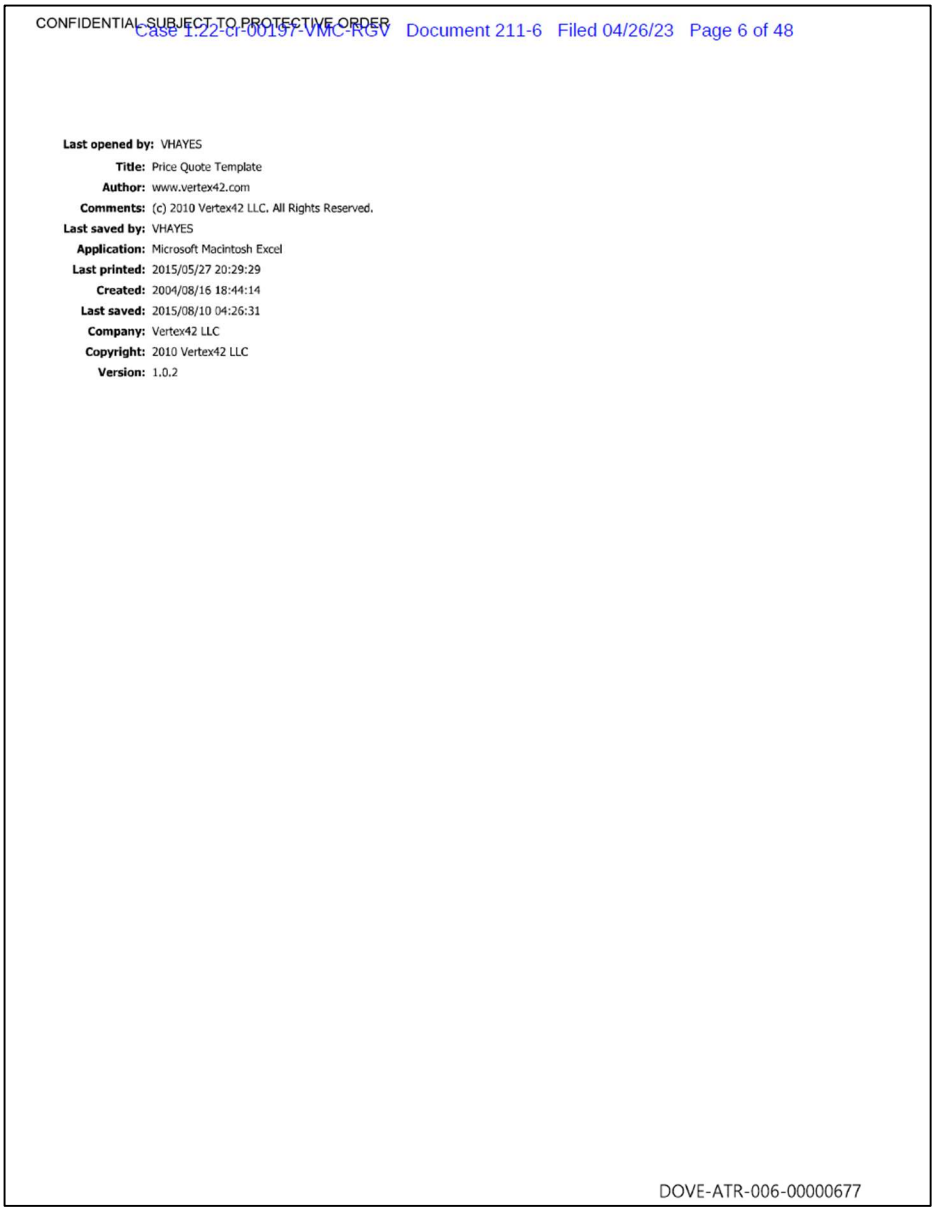
C. Defendants' remaining accusations are baseless.

Defendants make additional accusations about the government's conduct (Hayes Br. 37; Carson Br. 33-35), but these accusations—which Defendants do not claim independently justify reversal—are false.

First, Defendants make the inflammatory and baseless claim that the government "***altered***" documents' "***contents***," citing two versions of the same email that supposedly contain different time stamps ("10:02:32 -0400" and "2:02:31 PM"). Hayes Br. 37 (emphasis in original); *see* Def. Exs. D2-34; D2-35.[32] As Defendants know (because the government told them (Doc. 330-142-143)), the first email reflects local time and the second reflects Greenwich Mean Time; the former, as the "-0400" indicates, was four hours earlier than the latter. And the fact that "there are many versions" of some documents (Hayes Br. 37)—a standard feature of electronic discovery—does not indicate misconduct.

[32] Defendants incorrectly identify the second email's time stamp as 2:31 PM (Hayes Br. 37).

Second, Defendants falsely state that a "prosecutor asked the case agent to change" documents (Hayes Br. 37). During the government's investigation, a prosecutor asked the agent to display certain documents' metadata, which would not normally be visible, on the document's face. This request produced documents that looked like this:



CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER Case 1:22-cr-00197-VMC-RGV Document 211-6 Filed 04/26/23 Page 6 of 48

Last opened by: VHAYES
Title: Price Quote Template
Author: www.vertex42.com
Comments: (c) 2010 Vertex42 LLC. All Rights Reserved.
Last saved by: VHAYES
Application: Microsoft Macintosh Excel
Last printed: 2015/05/27 20:29:29
Created: 2004/08/16 18:44:14
Last saved: 2015/08/10 04:26:31
Company: Vertex42 LLC
Copyright: 2010 Vertex42 LLC
Version: 1.0.2

DOVE-ATR-006-00000677

(Def. Ex. [D2-34]-6). There is nothing "problematic" (Hayes Br. 37) about this practice, which did not involve altering any document's metadata or substance.

Finally, Carson claims (at 33-34) that the government "chose to disclose" the Koch/Gannon relationship "tard[il]y." But the government disclosed the relationship just after learning about it. (Doc. 182-1).

4. The government did not violate *Giglio* by declining to produce HHS documents.

Defendants argue that the district court should have granted Defendants' motion to dismiss or to exclude Hadrick's testimony because the government purportedly violated *Giglio* by declining to produce more documents about the HHS-OIG investigation. Hayes Br. 6, 41-44; Carson Br. 57-60. This argument fails for three reasons.

First, the prosecution team produced all relevant investigation-related materials in its possession. *Brady* and *Giglio* apply only "to evidence possessed by a district's 'prosecution team,'" which consists of "the prosecutor" and "anyone over whom he has authority." *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989) (per curiam); *see Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (habeas); *Moon v. Head*, 285 F.3d 1301, 1309 (11th Cir. 2002) (habeas); *Naranjo*, 634 F.3d at 1212.

HHS did not participate in the investigation, and the prosecutors had no authority over HHS employees. (Doc. 323-115). The documents that Defendants sought were in HHS's—and thus not the prosecution team's—possession. *See supra* at 29, 32; (Doc. 323-101-103).

While the prosecution (at Defendants' request) asked for the investigation file from HHS (Carson Br. 58), that makes no difference because the prosecutors never received the file. In *Meros*, this Court found no *Brady* violation where a prosecutor failed to disclose information that he had "searched for" from other offices but that never made their way from those offices to the prosecution team. 866 F.2d at 1309. An unsuccessful document request does not turn the requested documents into discoverable *Brady/Giglio* material.

Second, Defendants have not established that the requested files contained "favorable"—i.e., "exculpatory or impeaching," *Stein*, 846 F.3d at 1146 (citation omitted)—information. Defendants suggest only that the documents constituted "potential impeachment" (Carson Br. 59) or might have answered "questions" about Hadrick's "credibility" (Hayes Br. 42-43). These conjectures are too "speculative," *United States v. Quinn*, 123 F.3d 1415, 1422 (11th Cir. 1997); *see Naranjo*, 634 F.3d at 1212, to support reversal. Carson also says (at 58) that the HHS-OIG investigation uncovered noncompliance by the Program Support Center with the 8(a)

program's limitations on subcontracting, but he offers no evidence—other than counsel's *ipse dixit* (Doc. 323-112)—that the investigation reached this conclusion. Nor does he "explain how exactly" this finding, *Moon*, 285 F.3d at 1311, would have affected Hadrick's credibility.

Third, there was no reasonable probability of a different outcome. During direct examination, Hadrick discussed the investigation and stated that it had resulted in his placement on administrative leave. (Doc. 328-225-226). Defendants have not shown that the HHS files "would likely [have] contain[ed]" any additional information "material," *United States v. Pitt*, 717 F.2d 1334, 1339 (11th Cir. 1983) (emphasis omitted), to impeaching Hadrick. Indeed, although documents the government produced in June 2022 disclosed the investigation (Doc. 323-99-101), Defendants did not request the HHS files until March 2023, four days before trial, and did not cross-examine Hadrick about the topic—demonstrating the issue's insignificance to the defense.[33]

The cases Defendants cite are far afield. In *Giglio*, the government failed to disclose critical information "attribut[able]" to the prosecutor that contradicted a key witness's testimony, 405 U.S. at 151-54—i.e.,

[33] If a *Giglio* violation occurred, the appropriate remedy would be a new trial, not dismissal. *See supra* at 89 n.31.

information that was favorable, material, and possessed by the prosecution. And in *United States v. Espinosa-Hernandez*, this Court remanded for an evidentiary hearing on—but did not decide—whether a *Giglio* violation had occurred. 918 F.2d 911, 914 (11th Cir. 1990) (per curiam).[34]

5. The government's rebuttal argument did not shift the burden or cause prejudice.

Hayes and Flores incorrectly argue that the district court should have granted a mistrial based on a single statement by a prosecutor, in rebuttal, that Defendants could have subpoenaed witnesses. Hayes Br. 45-47.

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[34] Carson suggests (at 34) that the government should have disclosed the Army's investigation file related to Koch, though Carson does not argue that this nondisclosure independently justifies reversal. The argument fails for the same reasons as the HHS argument. First, the prosecution team did not possess the Army file. (Doc. 323-104-105). While a member of the Army's Criminal Investigation Division was on the prosecution team, that division did not conduct the investigation into Koch; Army officials in Koch's chain of command performed the investigation under an Army regulation. (Doc. 323-104-105; *see* App. Tabs B-1, 3; C; *see also* Doc. 323-99-101). Second, Carson offers mere speculation about the file's contents. Carson Br. 34. Third, Gannon testified on cross-examination that she was involved in an investigation (Doc. 328-24-28), and Carson shows no reasonable probability that additional (unspecified) details would have influenced the jury.

To establish a claim of prosecutorial error in closing argument,[35] Hayes and Flores must show that the challenged statement (1) "w[as] improper" and (2) "prejudicially affected" their "substantial rights." *United States v. Demarest*, 570 F.3d 1232, 1242 (11th Cir. 2009) (citation omitted); *see United States v. Leonard*, 4 F.4th 1134, 1148 (11th Cir. 2021).[36] This Court has held that prosecutors should not "suggest that the defendant has an obligation to produce any evidence or to prove innocence." *United States v. Simon*, 964 F.2d 1082, 1086 (11th Cir. 1992). Such a suggestion is prejudicial only if "so pronounced and persistent that it permeates the entire atmosphere of the trial." *Id.* (citation omitted). Hayes and Flores show neither impropriety nor prejudice.

First, precedent forecloses any argument that the statement was improper. This Court has "specifically held that the prosecution can note that the defendant has the same subpoena power as the Government," *United States v. Schmitz*, 634 F.3d 1247, 1267 (11th Cir.

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[35] The government uses the term "prosecutorial error" because the inquiry here, as with all of Defendants' challenges, is whether there was reversible error, not whether the prosecutor's conduct should be categorized as "misconduct." *See Knight*, 867 F.2d at 1290 (assessing whether "prosecutorial error . . . warrant[ed] a reversal").

[36] Hayes and Flores incorrectly cite a different standard (Hayes Br. 45) that applies on habeas.

2011), "particularly" when—as here (*see supra* at 34)—the prosecutor is "respon[ding]" to defense arguments about a "failure to call a specific witness," *United States v. Hernandez*, 145 F.3d 1433, 1439 (11th Cir. 1998); *see United States v. Blackman*, 66 F.3d 1572, 1578 n.7 (11th Cir. 1995); *United States v. Schardar*, 850 F.2d 1457, 1463 (11th Cir. 1988). The cases cited by Hayes and Flores (Hayes Br. 45-46) do not address prosecutorial references to defendants' subpoena power. *See Sandstrom v. Montana*, 442 U.S. 510, 524 (1979); *In re Winship*, 397 U.S. 358, 364 (1970); *United States v. Soto*, 399 F. App'x 498, 503 (11th Cir. 2010). And while Hayes and Flores claim that Dove would not have testified "without immunity" (Hayes Br. 47), that is mere supposition; in any event, the prosecutor commented on Defendants' undisputed ability to issue subpoenas, not Dove's practical likelihood of testifying.

Second, Hayes and Flores fail to establish prejudice. The prosecutor's remark was not "pronounced and persistent," *Simon*, 964 F.2d at 1086 (citation omitted), but "one moment in an extended trial," *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974) (habeas). The prosecutor prefaced the remark by stating that "the government has the burden of proof" and that "[t]he defendants do not have to produce any evidence at all." (Doc. 331-134); *see Schardar*, 850 F.2d at 1463 (comment "not improper" when prosecutor noted that

"government bore the whole burden"). And the court twice instructed the jury that the government bears the burden of proof and that defendants do not have to offer "any evidence"; the court also noted that attorneys' statements are not evidence. (Docs. 323-133-136; 331-17-18). Because the jury was properly instructed and the evidence of guilt was strong, *see supra* Part 2, "it is improbable"—even had the comment been improper—that the outcome "would have been different but for the prosecution's comments," *United States v. Nerey*, 877 F.3d 956, 971-72 (11th Cir. 2017); *see United States v. Paul*, 175 F.3d 906, 912 (11th Cir. 1999).

6. The district court correctly denied Hayes's and Flores's motions to dismiss for purported untimeliness.

Hayes and Flores assert that the district court should have granted their motions to dismiss the conspiracy count as untimely (Hayes Br. 47-51), but their argument fails.

The applicable statute of limitations was five years. *See* 18 U.S.C. § 3282(a). "[T]o be timely," the indictment "had to be returned within five years of the last alleged overt act," *United States v. Farias*, 836 F.3d 1315, 1321 (11th Cir. 2016), which occurred on October 25, 2016 (Doc. 1-8). Hayes, however, entered a tolling agreement with the United States that extended the limitations period to April 7, 2022; she later entered an amendment that further extended the

period to June 7, 2022. (Docs. [83-2]-1; [83-3]-1). Flores entered a tolling agreement that extended the limitations period to September 23, 2022. (Doc. [83-1]-3). Because the indictment issued on May 25, 2022 (Doc. 1), the conspiracy count was timely under these agreements.

Hayes and Flores incorrectly assert that the tolling agreements applied only to antitrust charges. Hayes Br. 51. Tolling agreements are contracts, *United States v. Smukler*, 991 F.3d 472, 490 (3d Cir. 2021), and "[t]raditional contract-interpretation principles" focus on "the objective meaning of the words used," *Faez v. Wells Fargo Bank, N.A.*, 745 F.3d 1098, 1104 (11th Cir. 2014). The relevant words were:

- Hayes's and Flores's agreements stated that the United States was "conducting a grand jury investigation" of "possible criminal antitrust and related violations of federal laws with respect to United States government contracting ('subject acts')." (Docs. [83-1]-3; [83-2]-1).
- The agreements stated that certain time periods "shall be tolled for the purposes of the statute of limitations period which is or might be applicable to any criminal charge." (Doc. [83-1]-3).

- The amendment to Hayes's agreement "extend[ed]" the "statute of limitations period which is or might be applicable to the subject acts." (Doc. [83-3]-1).

Hayes and Flores do not contest (Hayes Br. 49, 51) that, if the charged conspiracy was a "subject act[]," the count was timely.

The conspiracy count alleged that Defendants had "[c]oordinated in preparing IGCEs" and "[c]oordinated in preparing and procuring purported 'competitive quotes'" to "ensure the sole-source awards" for IntelliPeak. (Doc. 1-6). As the district court found, this alleged collusion was a "subject act[]" because it was "related" to the "possible criminal antitrust . . . violations of federal laws with respect to United States government contracting" that the grand jury was "investigati[ng]" at the time of the tolling agreements. (Doc. 109-7-9 (citation omitted)); *see United States v. Hill*, 643 F.3d 807, 875 (11th Cir. 2011) (discussing breadth of "related to" in proffer agreement). By arguing that "subject acts" encompass *only* antitrust violations, Hayes and Flores read "and related" out of the agreements, violating the "cardinal principle" that no contract provisions should be rendered superfluous, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995).

Hayes and Flores claim that the district court misunderstood the charged conspiracy and improperly relied on a Justice Department

"primer" that discussed "competitive bidding." Hayes Br. 49-51. But the court repeatedly recognized that the contracts at issue were sole-source and referenced the primer only to show that conspiring to prepare IGCEs and quotes is "clearly related to the antitrust violations," such as bid rigging, "the Antitrust Division investigates." (Doc. 109-7-9). The court also referenced the primer to establish that the Antitrust Division prosecutes not only antitrust violations, but also fraud and "other federal felony" offenses. (Doc. 109-8); *see* 28 C.F.R. § 0.40(a); Justice Manual § 7-2.100 (Apr. 2022), https://www.justice.gov/jm/jm-7-2000-prior-approvals#7-2.200. The primer thus confirmed what contract interpretation already established: A charge need not be brought under the antitrust laws to be related to an antitrust violation.

7. Flores's sentence was not unreasonably severe.

Flores argues that his sentence of four months' imprisonment was unreasonably severe because one of his co-conspirators was not charged and because Flores is over 50 years old. Flores Br. 53-55. Flores sought a term of probation but fails to show that the district court's disagreeing with him was an abuse of discretion.[37]

[37] Flores frames the alleged sentencing disparity as procedural error. But disparity challenges relate to a sentence's substantive, not procedural, reasonableness. *See, e.g., United States v. Sotis*, 89 F.4th

"[I]t is only the rare sentence that will be substantively unreasonable." *United States v. Rosales-Bruno*, 789 F.3d 1249, 1256 (11th Cir. 2015) (quoting *United States v. McQueen*, 727 F.3d 1144, 1156 (11th Cir. 2013)). "[W]hen the district court imposes a sentence within the advisory Guidelines range, we ordinarily will expect that choice to be a reasonable one." *United States v. Stanley*, 739 F.3d 633, 656 (11th Cir. 2014) (quoting *United States v. Talley*, 431 F.3d 784, 788 (11th Cir. 2005)). And "[a] sentence imposed well below the statutory maximum penalty is an indicator of a reasonable sentence." *Stanley*, 739 F.3d at 656. "The party challenging a sentence has the burden of showing that the sentence is unreasonable in light of the

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862, 880 (11th Cir. 2023); *United States v. Azmat*, 805 F.3d 1018, 1047-48 (11th Cir. 2015); *United States v. Duperval*, 777 F.3d 1324, 1337-38 (11th Cir. 2015); *United States v. Docampo*, 573 F.3d 1091, 1101 (11th Cir. 2009). Flores also did not preserve any procedural challenge below, so review for procedural reasonableness would be limited to plain error, a heavy burden that Flores does not even attempt to meet. (Doc. 256-57-59 (not raising any procedural concerns about his sentence)). And, in any event, the district court committed no procedural error, plain or otherwise, because it correctly calculated the Sentencing Guidelines range (other than the errors noted in the government's appeal from Flores's sentence), considered the § 3553(a) factors, adequately explained the sentence, and did not otherwise use improper procedures. *See Gall v. United States*, 552 U.S. 38, 51 (2007).

entire record, the [statutory] factors, and the substantial deference afforded [to] sentencing courts." *Rosales-Bruno*, 789 F.3d at 1256.

Flores's sentence is well within the zero-to-six-month Guidelines range as determined by the district court. It is also far below the statutory maximum of ten years on each major-fraud count and five years on the conspiracy count. *See* 18 U.S.C. §§ 371, 1031(a). Flores merely argues that he has a low risk of recidivism because he is over 50. Flores Br. 55. Flores does not address the need for general deterrence in a serious fraud case, which the district court repeatedly emphasized in explaining the need for a custodial sentence. (Doc. 256-53-55, 58). As this Court has held, "[g]eneral deterrence is more apt, not less apt, in white collar crime cases." *United States v. Howard*, 28 F.4th 180, 209 (11th Cir. 2022). In *Howard*, a fraud case, this Court held that "[a] sentence of probation, whether or not coupled with a period of home detention, [was] insufficient" to meet the needs of general deterrence. *Id.* The same is true here.

Flores also argues that his sentence was unreasonable because the district court imposed a sentence of imprisonment while Dove did not receive any sentence. Flores Br. 53-54. This was not an abuse of discretion. Dove is not similarly situated to any of the defendants. Dove was not charged (and thus was not found guilty). Section 3553(a)(6) requires consideration of the "need to avoid unwarranted

sentenc[ing] disparities among defendants with similar records *who have been found guilty* of similar conduct." 18 U.S.C. § 3553(a)(6) (emphasis added). Because Dove was not charged, much less found guilty, "he is not a valid comparator for § 3553(a)(6) purposes" to Flores. *United States v. Martin*, 455 F.3d 1227, 1241 (11th Cir. 2006) (rejecting argument regarding disparate sentences when compared with an acquitted co-defendant).

GOVERNMENT'S APPEALS

The district court erred at sentencing in three ways. First, it erred in ruling that the four-level aggravating-role enhancement requires a defendant to personally organize or lead at least five other criminal participants. Second, the court erred when, in determining the loss caused by the fraud, it ruled that it was required under *United States v. Bazantes*, 978 F.3d 1227 (11th Cir. 2020), to fully offset the price of the contracts because they were performed. Third, the court erred when it imposed no restitution based on its loss finding.

A. The district court erred when it ruled that the four-level role enhancement under § 3B1.1(a) requires a defendant to personally organize or lead five criminal participants.

The PSRs for Carson and Hayes recommended that the four-level aggravating role enhancement under U.S.S.G. § 3B1.1(a) applied to both. (Docs. 281-¶ 82; 297-¶ 82). That subsection provides for a four-level enhancement "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). The district court agreed that the criminal activity involved five or more participants. (Docs. 284-25; 285-23). But the district court erred when it ruled as a matter of law that the four-level enhancement requires the defendant to have "a leadership role over five or more participants." (Doc. 285-23; *see also* Doc. 284-25). Because the district court's ruling

rested on its interpretation of the Guidelines, review is de novo. *Shabazz*, 887 F.3d at 1222.

The district court's interpretation conflicts with the text of § 3B1.1(a). That subsection requires a court to determine whether a defendant organized or led "a criminal activity that involved five or more participants." U.S.S.G. § 3B1.1(a). If a defendant is a leader or organizer, this text makes plain that the only relevant inquiry is whether the criminal activity "involved five or more participants," not whether the leader or organizer personally oversaw five or more participants. The commentary explains that for a defendant to qualify for an enhancement under § 3B1.1, "the defendant must have been the organizer, leader, manager, or supervisor of *one or more* other participants." U.S.S.G. § 3B1.1(a) cmt. n.2 (emphasis added).

Indeed, this Court has relied on this same language to hold that the four-level enhancement applies to defendants who organize or lead "one or more other participants." *Shabazz*, 887 F.3d at 1222 (quoting U.S.S.G § 3B1.1 cmt. n.2); *see also United States v. Ndiaye*, 434 F.3d 1270, 1284 (11th Cir. 2006) (same). Other Circuits have reached the same conclusion. *See United States v. Arbour*, 559 F.3d 50, 56-57 (1st Cir. 2009) (collecting cases from the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits).

Section 3B1.1's structure also counsels against the district court's reading. Under the court's view, if a defendant was an organizer or leader of a ten-person criminal activity but only managed or supervised four participants, the defendant would not receive a four-level enhancement under § 3B1.1(a); he also would not receive a three-level enhancement under § 3B1.1(b) because that enhancement applies only to an individual who is "*not* an organizer or leader" (emphasis added). But it would make little sense for a defendant in this position, who demonstrably played an organizational or leadership role, to be knocked down to a two-level enhancement under § 3B1.1(c), which applies to any defendant who "was an organizer, leader, manager, or supervisor in any criminal activity other than" those described in § 3B1.1(a) or § 3B1.1(b). The only logical inference is that organizers or leaders involved in five-person (or larger) criminal activities receive a four-level enhancement, managers or supervisors involved in such activities receive a three-level enhancement, and organizers, leaders, managers, and supervisors involved in all other criminal activities receive a two-level enhancement.

In ruling otherwise, the district court erroneously relied upon footnoted dicta in a case that was considering only the two-level enhancement under § 3B1.1(c). (*See* Doc. 285-13 (citing *United States*

v. Ramirez, 426 F.3d 1344, 1355 n.3 (11th Cir. 2005))). That dicta gives way to the plain text of the Guideline as well as this Court's holdings. *See United States v. Gay*, 7 F.3d 200, 202 (11th Cir. 1993) (dicta is not controlling).

Because the district court's legal interpretation of the Guidelines was error, Carson's and Hayes's sentences should be vacated and their cases remanded for resentencing.

B. The district court erred when it ruled that the entire value of the fraudulently obtained contracts should be offset against loss.

Under Guidelines § 2B1.1(b), a fraud defendant's base-offense level is increased depending on the amount of "loss." According to the commentary, "loss" generally is the "greater of actual loss or intended loss," U.S.S.G. § 2B1.1 cmt. n.3(A), and actual loss is "the reasonably foreseeable pecuniary harm that resulted from the offense," *id.* cmt. n.3(A)(i). In cases "involving government benefits," however, loss is "not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses." *Id.* cmt. n.3(F)(ii). In addition, the Sentencing Guidelines commentary provides for certain "credits against loss" that reduce, or offset, the total amount of loss. *Id.* cmt. n.3(E). Among the credits against loss is an offset for the "fair market value of . . . the services rendered, by the defendant or other persons acting jointly with the defendant, to the

victim before the offense was detected." *Id.* cmt. n.3(E)(i). "The court need only make a reasonable estimate of the loss." *Id.* cmt. n.3(B).

This Court has held that the government-benefits rule applies to set-aside contracts. *United States v. Maxwell*, 579 F.3d 1282, 1306-07 (11th Cir. 2009); *see United States v. Blanchet*, 518 F. App'x 932, 956 (11th Cir. 2013) (applying government-benefits rule to small-business set-aside contract). Accordingly, the district court held that the government-benefits rule applied here. (Doc. 236-6-8). The court then considered a decision from this Court holding that, where a set-aside contract was awarded to an unintended recipient, "the appropriate amount of loss" was "the entire value of the contracts diverted to the unintended recipient." (Doc. 236-9 (citing *Maxwell*, 579 F.3d at 1306)). The district court held that this decision did not apply because IntelliPeak and Envistacom purportedly were not "unintended recipients"; the court further held that "the loss amount" in this case was "not the total amount the government paid on the three contracts." (Doc. 236-9-11, 13). Instead, the court used "the total amount paid under the contracts" as "the starting point" for calculating loss and decided to reduce that amount by certain credits against loss. (Doc. 236-11); *see* U.S.S.G. § 2B1.1 cmt. n.3(E)(i). Ultimately, the court determined that the amount of the offset should be the total contract value because the contracts were performed.

(Docs. 256-30; 284-9; 285-9-10; 337-4-5). This ruling, resulting in a fraud loss of zero, gutted Defendants' sentences and nullified restitution, even though Defendants obtained $7.8 million of set-aside contracts through fraud.[38]

The government disagrees that IntelliPeak and Envistacom were intended recipients and thus does not believe that any offset was proper. The government does not, however, challenge the intended-recipients factual finding on appeal. Nor has the government argued that the contract funds were diverted to unintended uses.

But, even assuming that any offset was appropriate under the government-benefits rule, the district court legally erred in determining the offset. The proper offset amount is the "fair market value of . . . the services rendered" by Defendants "to the victim

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[38] This ruling is subject to de novo review. In *Bazantes*, this Court "review[ed] the district court's loss determination only for clear error" but "review[ed] *de novo* questions of law about the application of the sentencing guidelines." 978 F.3d at 1249. The court ultimately found that the district court had clearly erred in "finding that there was a loss" because the government had not presented "a speck of evidence" that there was any "pecuniary harm." *Id.* at 1250. Here, the government is not challenging any evidentiary or other factual determination by the district court, but rather the court's interpretation of "fair market value" in the Sentencing Guidelines commentary, *see* U.S.S.G. § 2B1.1(b) cmt. n.3(E)(i), and the court's reading of *Bazantes*. (Docs. 256-32; 284-9-12; 285-9-12; 337-4-7). These are legal questions reviewed de novo.

before the offense was detected." U.S.S.G. § 2B1.1 cmt. n.3(E)(i). Rather than examine the fair market value of Defendants' supplies and services, however, the district court merely asked whether Defendants performed under the contract. In effect, the district court assumed, without making any finding, that the full contract price was the fair market value of Defendants' goods and services.

But that assumption makes little sense in the context of non-competitive programs, such as 8(a) small-business sole-source set-aside contracts, particularly here where Defendants corrupted the pricing process, preparing fraudulent documents that were used to evaluate IntelliPeak's pricing. Under the 8(a) program, the government has an interest in who performs the work in addition to getting the work done. *See Maxwell*, 579 F.3d at 1306 (noting that "the primary purpose" of government set-aside programs "is to help small minority-owned businesses develop and grow, creating new jobs and helping to overcome the effects of past discrimination"). Adapting the Third Circuit's analysis of a different government set-aside program, the government here "did not receive the entire benefit of [its] bargain, in that [its] interest" in having a legitimate small business "perform"—and profit from—"the work was not fulfilled." *United States v. Nagle*, 803 F.3d 167, 183 (3d Cir. 2015). For that reason, "using the profit Defendants received is an appropriate measure for loss." *United States*

v. Nagle, 664 F. App'x 212, 216 (3d Cir. 2016) ("*Nagle II*"). In the context of set-aside contracts, "[t]he materials and services [Defendants] provide[] to [perform the contract] inure[] to the Government's benefit. The profits Defendants receive[] d[o] not." *Id.* at 216 n.8.[39]

Consistent with this measure of the offset, at each Defendant's sentencing the government presented detailed evidence of Envistacom's fully burdened costs for performing two of the contracts (including evidence that Envistacom calculated profits in excess of 56% for each contract), as well as evidence of Envistacom's own valuation of the third contract. (*See, e.g.*, Docs. 313 (Exs. 3, 4); 315 (Ex. 5) (government sentencing exhibits)); *see supra* at 39-40. This analysis presented the district court with a reliable basis to find an offset. *See United States v. Charlemagne*, 774 F. App'x 632, 636

[39] The Guidelines commentary states, "The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined." U.S.S.G. § 2B1.1 cmt. n.3(B). Assuming that *any* offset is appropriate, the government's loss in the 8(a) sole-source set-aside context is appropriately measured by the amount of profits that the government distributed to a firm not entitled to them. Because the firm's profits are, in this setting, a direct measure of loss, the Court need not apply Note 3(B). If the Court finds Note 3(B) relevant, however, that commentary is a proper interpretation of "loss" as used in § 2B1.1(b) and supports the government's measure of the offset in this case.

(11th Cir. 2019) (reducing loss for restitution purposes by "expenses incurred and payments made" by the defendant); *Nagle II*, 664 F. App'x at 216 ("using the profit Defendants received is an appropriate measure for loss").[40] Defendants did not provide any evidence regarding an appropriate offset.[41]

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[40] Some courts have held that judges should calculate offsets in the set-aside context by comparing the total contract price to the amount that the government would have paid in a competitive market. *E.g.*, *United States v. Martin*, 796 F.3d 1101, 1110-11 (9th Cir. 2015). For the reasons explained in the text, however, using fully burdened costs to calculate the offset is more consistent with the 8(a) program's purposes. And as the Third Circuit has explained, using a competitive-contract benchmark can make it "exceedingly difficult to calculate" the offset as compared to a measure based on "Defendants' net profits"—i.e., revenues above costs. *Nagle II*, 664 F. App'x at 216. In any event, even if the competitive-contract benchmark were appropriate, the offset in this case still would not be the contracts' total value. Before the district court, the government presented an alternative offset, based on a defense expert's testimony, that offset the loss amount by Defendants' costs and the profits earned on labor for HHS313A and HHS338A—a fair approximation, based on the available data, of the contracts' value in a competitive market. (Docs. 240-10-13; 258-16-19; 259-16-19; 337-4); *see supra* at 40-41. That alternative resulted in a loss calculation of $2,924,366.29. (Docs. 240-13; 258-19; 259-19; 337-4).

[41] Although this Court has recognized that the government bears the burden of proving loss, *e.g.*, *Bazantes*, 978 F.3d at 1249, Defendants should carry the burden of proving the offset. *See United States v. Bane*, 720 F.3d 818, 828-29 (11th Cir. 2013) (defendant bore

The district court reached a contrary conclusion based on the erroneous belief that *United States v. Bazantes*, 978 F.3d 1227 (11th Cir. 2020), required treating the offset as the full amount paid by the United States under the contracts. (Docs. 256-16-17, 30, 32; 284-9; 285-10; 337-4). *Bazantes* is not controlling.

Bazantes nowhere suggested that courts must always look to the full contract price as the measure of the fair market value of the defendants' services. *Bazantes* held that, on the specific facts of that case, "the government did not prove any loss" because "there [was] not a speck of evidence that the [government] suffered any 'pecuniary harm.'" 978 F.3d at 1250. The government had awarded the contract at issue through a competitive-bidding process, and the

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burden of proving offset to restitution amount); *United States v. Mahmood*, 820 F.3d 177, 194 (5th Cir. 2016) (finding that the defendant "carried his burden at sentencing" to show he rendered legitimate services for which Medicare would have paid absent the fraud); *United States v. Washington*, 715 F.3d 975, 984-85 (6th Cir. 2013) (noting that the defendant "had the burden of proving the specific value" by which the loss amount should have been offset); *United States v. Borrasi*, 639 F.3d 774, 783 (7th Cir. 2011) (explaining that the defendant bore the burden of providing "substantiated evidence" of the fair market value of the services he rendered). Here, however, the government's evidence regarding an appropriate offset was sufficient to meet the burden of proof even if borne by the government. This Court thus need not determine which party should have shouldered the burden.

defendants' fraud did not involve the bidding itself; rather, when performing the contract, the defendants submitted fraudulent payroll records that made it seem as if the defendants were paying payroll taxes for certain employees (when, in fact, defendants were not). *Id.* at 1234-35, 1249-50. Where the government received the contracted-for services at the competitively set price, the Court determined that the government had not proven any loss; indeed, the government did not even "contend" that it had failed to "receive the full, bargained-for benefit" of the contract. *Id.* at 1250. Here, that is precisely what the government contends and what it proved below: Because this was an 8(a) sole-source set-aside contract, not one priced through a competitive-bidding process, the government had bargained for the receipt of goods and services *from an 8(a) firm*—but the government did not receive that benefit of its bargain. *See Maxwell*, 579 F.3d at 1306; *Nagle II*, 664 F. App'x at 216.

Moreover, this case, unlike *Bazantes,* involves fraud related to the contract pricing process itself. While a full offset based on a competitively set price may have been appropriate in *Bazantes*, it is particularly inappropriate where, as here, Defendants corrupted the process used in pricing the contracts. The district court erred by giving Defendants a full offset of the contract prices based upon the very same prices Defendants themselves manufactured.

C. The district court's error in finding loss led to a parallel error when the court ordered no restitution.

The district court tied its decision on restitution to its erroneous finding of no loss. (Doc. 284-34 ("There is no restitution based on my finding that there is no loss."); *see* Docs. 256-56; 285-73; 337-8). The restitution judgment should be vacated and remanded for a determination consistent with a revised loss analysis. *See Charlemagne*, 774 F. App'x at 636 (using "expenses incurred and payments made" to reduce loss in restitution context).

CONCLUSION

This Court should affirm Defendants' convictions, vacate Defendants' and Envistacom's sentences, and remand for resentencing.

Respectfully submitted,

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Today, this brief was filed and served using the Court's CM/ECF system, which automatically sends notification to the parties and counsel of record.

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/s/ Peter M. Bozzo

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