No. 14-1587

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

GORDON MCDONALD,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(JUDGE SUSAN WIGENTON)

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court's jurisdiction rested on 18 U.S.C. § 3231. This Court's jurisdiction rests on 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in rejecting a supplemental instruction the defendant requested that would have (a) duplicated other instructions that already told the jury not to convict him based on uncharged objects or crimes and (b) told the jury to ignore unobjected-to testimony of two co-conspirators about acts the defendant took in furtherance of several charged conspiracies.

2. Whether the district court plainly erred in excluding, because of its tendency to confuse the jury, a factually unrelated indictment of certain Sevenson executives; and whether the doctrines of admissions of party opponents, judicial estoppel, and *Brady v. Maryland*, which were not raised below, require any different conclusion.

3. Whether the prosecution's two-word comment in summation about testifying co-conspirators' credibility—when a central theme of the defense's opening argument and cross-examination was their lack of

credibility—was improper and so severely prejudicial that reversal is warranted.

4. Whether the district court plainly erred by tentatively excluding evidence of the defendant's physical health but agreeing with the defendant that his counsel could, if the defendant testified, (a) ask him about his mental health and (b) ask the court to revisit the admissibility of his physical limitations insofar as they bore on his ability to testify.

5. Whether the district court's calculation of the total improper benefit under Sentencing Guideline § 2B4.1 based on the sole estimate in the record for the direct cost of soil removal was clearly erroneous.

STATEMENT OF RELATED CASES

McDonald's co-defendant James Haas pleaded guilty on October 28, 2009 to two counts of the indictment. McDonald's co-defendant John Bennett was extradited from Canada on November 14, 2014, and his trial is scheduled to begin on November 9, 2015.

The following additional co-conspirators of McDonald pleaded guilty to related charges in the District of New Jersey: Norman Stoerr (No. 08-CR-521), JMJ Environmental Inc. and John Drimak (No. 08-CR-522), National Industrial Supply and Victor Boski (No. 09-CR-

141), Bennett Environmental, Inc. (No. 08-CR-534), Zul Tejpar (No. 08-CR-912), Robert Griffiths (No. 09-CR-506), Christopher Tranchina (No. 09-CR-134), and Frederick Landgraber (No. 09-CR-480).

Griffiths appealed from his sentence, and this Court vacated his sentence and remanded for resentencing. *See United States v. Griffiths*, 504 F. App'x 122 (3d Cir. 2012). On remand, Griffiths was resentenced.

Sevenson appealed from the judgment against Stoerr, challenging the district court's restitution determination. This Court held that it lacked appellate jurisdiction because Sevenson was a non-party to the judgment against Stoerr and was thus without standing. *United States v. Stoerr*, 695 F.3d 271 (3d Cir. 2012).

STATEMENT OF THE CASE

On August 31, 2009, a federal grand jury returned a twelve-count indictment charging the defendant, Gordon McDonald, with various offenses arising out of EPA-organized cleanup efforts at two polluted sites in New Jersey: fraud and kickback conspiracies in violation of 18 U.S.C. § 371 (counts 1, 5, 7, 8); major fraud against the United States in violation of 18 U.S.C. § 1031 (counts 2 & 9); conspiracy to launder money in violation of 18 U.S.C. § 1956(h) (count 3); bid rigging in violation of 15 U.S.C. § 1 (count 4); kickback to a prime contractor in violation of 41 U.S.C. §§ 53 & 54 (2009) (current version at 41 U.S.C. §§ 8702 & 8707) (count 6); subscription to a false tax return in violation of 26 U.S.C. § 7206(1) (counts 10 & 11); and obstruction of justice in violation of 18 U.S.C. § 1512(c)(2) (count 12). Indictment (JA78-111).

On June 19, 2013, the district court (Honorable Susan Wigenton) determined that McDonald was competent to stand trial. Tr. 6/19/13 p.146 (SA146). McDonald's expert Dr. Joseph Tracy, a neuropsychologist, testified that McDonald was "cognitively impaired" based on several cognitive and behavioral tests that he conducted on McDonald. Tr. 6/19/13 p.7-8, 11, 15 (SA7-8, 11, 15). Dr. Mirriam

Kissin, a clinical psychologist hired by the court, testified that much of McDonald's apparent memory loss was attributable to "malingering," as evidenced by several well-established tests. *Id.* at p.40, 132 (SA40, 132). Dr. Kissin also noted that "memory problems" alone do not warrant finding a person "incompetent"; rather, "[i]t's a person's ability . . . [to] work with the attorney with their defense given the information that they are now presented with about their case." *Id.* at p.70 (SA70). "[I]n light of Mr. McDonald's functioning throughout the entire time of the evaluation," Dr. Kissin stated that her "opinion is that he certainly should be able to use those same skills to be able to work with his attorney on his defense." *Id.* at p.70-71 (SA70-71).

McDonald's counsel acknowledged that Dr. Tracy's "reports did not squarely go to the issue of competence." *Id.* at p.142 (SA142). The court recognized that the defense expert had established some legitimate "cognitive limitations that Mr. McDonald has," but it also credited Dr. Kissin's finding that McDonald malingered, or exaggerated his problems. *Id.* at p.145 (SA145).

On September 16, 2013, the nine-day trial began. Over seven days, the government put on ten witnesses, including three co-

conspirators who had pleaded guilty to related charges and who testified that McDonald actively participated in their criminal schemes. Trs. 9/16/13-9/20/13, 9/23/13-9/24/13 (SA223-1033, 1034-1350). McDonald called one witness but did not testify. Tr. 9/24/13 p.101-27 (SA1304-1330).

On September 30, 2013, the jury found McDonald guilty on counts 1-7 and 10-12 and not guilty on counts 8 and 9. Tr. 9/30/13 p.13-16 (SA1533-1536).

On March 4, 2014, the district court entered judgment against McDonald on the ten counts of conviction, Judgment (JA3), which was amended on October 20, 2014, to include a restitution order, Amended Judgment (JA11). The court sentenced him to 168 months on counts 3 and 12; 120 months on counts 2, 4, and 6; 60 months on counts 1, 5, and 7; and 36 months on counts 10 and 11—each to be served concurrently, for a total of 168 months' imprisonment. *Id.* at 3 (JA13). The court also sentenced him to a 1-year term of supervised release following imprisonment, and it ordered him to pay a $50,000 fine, the applicable special assessments, and over $4 million in restitution. *Id*. at 1, 4-8

(JA11, 14-18). McDonald never moved for a new trial or for judgment of acquittal.

A. The EPA Cleanup Program

The EPA identifies polluted sites for cleanup through its Superfund program. Tr. 9/16/13 p.64-65 (SA286-87). Under this program, if the polluter is identified, then the polluter is responsible for paying a contractor to remediate the site. *Id.* at p.65-66 (SA287-88). But, if the polluter is not identified or is otherwise not available or not able to pay, then the EPA is responsible for arranging for and paying for the cleanup. *Id.* at p.66 (SA288). In these circumstances, the EPA often engages the Army Corps of Engineers, another government entity, to oversee the cleanup, which involves seeking bids from contractors to—with the help of subcontractors—carry out the cleanup effort. *Id.*

This case arises out of a pollution-cleanup effort arranged by the EPA and conducted by McDonald's employer, the general contractor Sevenson Environmental Services, Inc., with the help of various subcontractors at two polluted sites in New Jersey—Diamond Alkali in Newark, where Agent Orange was manufactured, and Federal Creosote in Manville, where logs were treated with creosote for use as railroad

ties and telephone polls. Tr. 9/16/13 p.72, 114 (SA294, 336), 9/18/13 p.33 (SA581). McDonald served as Sevenson's project manager at both sites. Tr. 9/17/13 p.116, 118 (SA338, 340).

Because the EPA identified Tierra Solutions as the party responsible for the pollution at Diamond Alkali, it was Tierra that hired McDonald's employer, Sevenson, as the general contractor responsible for cleanup at that site. Tr. 9/16/13 p.114 (SA336).

The polluter could not pay for the cleanup of the Federal Creosote site, and so the EPA funded the cleanup and had the Army Corps of Engineers oversee it. Tr. 9/16/13 p.77-78 (SA299-300). The Army Corps hired Sevenson to clean up the Federal Creosote site. *Id.* at p.79 (SA301). When the Army Corps oversees the remediation process, it is bound by regulations that govern the bidding process. Specifically, whenever bids are sought for prime contractors or subcontractors, at least three independent bids must be solicited, and each bidder must be treated fairly. Tr. 9/16/13 p.82, 9/17/13 p.26 (SA304, 397).

B. McDonald Conspired with Subcontractors to Profit Illegally at the Expense of the Federal Government and Tierra Solutions

McDonald, with the assistance of his subordinate Norman Stoerr, arranged for at least three subcontractors (National Industrial Supply, Bennett Environmental, and JMJ Environmental)[1] to give him and other Sevenson employees gifts (including cash, sports tickets, dinners, and cruises) and to pass the gifts off as legitimate costs of cleanup that could be billed to the client (the EPA at Federal Creosote and Tierra at Diamond Alkali). McDonald "had the say in how, when, what, why" in these kickback schemes. Tr. 9/16/13 p.121 (SA343). McDonald and his co-conspirators also manipulated the bidding process so that favored bidders could win subcontracts at artificially inflated prices, which also deprived the EPA and Tierra of money by increasing the amount they paid for the cleanup. They did this through various means, including sharing "last look[s]" at rivals' bids, Tr. 9/18/13 p.108 (SA656), and organizing an agreement among bidders to decide the winner, Tr. 9/23/13 p.32-33 (SA1065-66).

[1] The two counts on which McDonald was acquitted, counts 8 and 9, involved a fourth contractor, Haas Sand and Gravel.

The first of the kickback and fraud schemes (count 7) was planned among McDonald, Stoerr, and Victor Boski. Tr. 9/16/13 p.125-27 (SA347-49); Indictment p.22-25 (JA99-102). Boski owned and ran National Industrial Supply, which Sevenson hired to supply industrial pipes, valves, and other supplies at both the Diamond Alkali and Federal Creosote sites. Tr. 9/16/13 p.125 (SA347). McDonald agreed that Boski would inflate National Industrial Supply's invoices by ten percent for work at both cleanup sites. Tr. 9/16/13 p.137 (SA359). With McDonald's approval, Boski inflated his company's expenses on the projects by creating "no ship" or phantom invoices—that is, invoices requesting payment even though Boski and National Industrial Supply performed no work. *Id.* at p.132 (SA354). In return, Boski gave McDonald and Stoerr cash, paid for them to go on cruises, and provided them other gifts. *Id.* at p.126-30 (SA348-52). Boski also rewarded McDonald and Stoerr by paying falsified invoices issued by shell companies they owned. Tr. 9/17/13 p.19-20 (SA390-91). Because McDonald passed the cost of the inflated and "no ship" invoices along to the Sevenson's clients for reimbursement, the federal government (at the Federal Creosote site) and Tierra Solutions (at the Diamond Alkali

site) bore the cost of these kickbacks. Tr. 9/16/13 p.118, 121, 132 (SA340, 343, 354).

McDonald replicated and extended this scheme with other subcontractors. Sevenson contracted with Bennett Environmental to treat and dispose of contaminated soil at the Federal Creosote site. Tr. 9/17/13 p.56 (SA427). In the second scheme (counts 1-3), McDonald agreed with John Bennett, the head of Bennett Environmental, Inc.,[2] and other executives and employees of the company, including testifying co-conspirator Robert Griffiths, to provide kickbacks to McDonald and other Sevenson employees in exchange for which they steered subcontracts to Bennett Environmental, inflated Bennett's invoices, and passed those inflations off as legitimate costs to be reimbursed by the EPA. Tr. 9/17/13 p.57-65 (SA428-36); Indictment p.1-13 (JA78-90). Bennett gave a variety of kickbacks to McDonald and other Sevenson employees. On numerous occasions, Griffiths arranged for Bennett to pay for prescriptions for McDonald's parents. Tr. 9/18/13 p.133, 142-47 (SA681, 690-95); GX-121 (SA1781-1802). At McDonald's

[2] In this brief, "Bennett" or "Bennett Environmental" refer to the company Bennett Environmental. McDonald's co-conspirator, the owner of Bennett, is always referred to as "John Bennett."

request, Bennett Environmental bought him a wine storage and cooling device with a price tag of $4,967.95, Tr. 9/18/13 p.138, 9/19/13 p.4 (SA686, 714), a plasma television, Tr. 9/19/13 p.4 (SA714), a trip to Key West for McDonald and his wife, Tr. 9/18/13 p.134-35 (SA682-83), and a Mediterranean cruise for McDonald, his wife, and other Sevenson executives and their wives, Tr. 9/19/13 p.45, 52-54 (SA755, 762-64). Stoerr received a cruise and sporting tickets. Tr. 9/17/13 p.64 (SA435).

McDonald also helped Bennett win several additional bids at inflated prices. At first, Bennett was disposing soil from "Lagoon B," a portion of Federal Creosote; Sevenson then sought bids for the same type of work at "Lagoon A," another part of the site. Tr. 9/18/13 p.101(SA649). After an initial round of bidding, Bennett was not the low-cost bidder, and so would not have won. Tr. 9/18/13 p.103 (SA651). McDonald, however, arranged for another round of bids to be solicited, having discussed with Griffiths various "factors that could be manipulated to cause another kind of request for proposal." Tr. 9/18/13 p.105 (SA653). Thus, "certain analytical parameters would be changed and increased," such as the estimated level of soil contamination at Lagoon A. Tr. 9/18/13 p.105-07 (SA653-55). Believing the

contamination was greater than it really was, other bidders would have tended to bid higher than they would have had they known the honest estimate. *Id.* at p.107 (SA655). But "Bennett's price it wouldn't really affect because we knew it was an artificial manipulation." *Id*. McDonald also shared—contrary to government regulation—"last looks" at other companies' bid levels with Bennett to insure that it could win but not by too wide a margin. *Id.* at p.108 (SA656).

Bennett won that bid at a price per ton $13.50 higher than its initial bid, and McDonald and Bennett negotiated a split of this illicit gain—50% to McDonald, 30% for entertaining Sevenson (and occasionally Bennett) employees, and 20% to Bennett. Tr. 9/19/13 p.33, 9/20/13 p.156-59 (SA743, 1024-27); *see also*, *e.g.*, GX-195A (SA1803-04) (invoice for $58,735 from GMEC "approved" by Bennett per "agreement w/ Sevenson"); GX-195B (SA1805) (authorization for wire transfer of $58,735 from Bennett to GMEC); Tr. 9/19/13 p.74-75 (SA784-85) (invoice to compensate McDonald for 50 percent share of $13.50 inflation on soil removal under subcontract; GMEC provided no services described on invoice). Because McDonald passed these inflated prices

off as legitimate costs, the federal government bore the cost of this scheme. Tr. 9/16/13 p.118, 121 (SA340, 343).

In 2003, McDonald also manipulated the bidding for the "Canal B" portion of the Federal Creosote cleanup so that Bennett Environmental would win. Tr. 9/19/13 p.142-48 (SA852-58). Bennett "had to win this contract at any cost at the time." *Id.* at p.149 (SA859). Griffiths sent McDonald around 50 separate bid sheets, containing alternative bids for Bennett ranging from $350 to $500 per ton of soil removed, at $3 to $5 increments. *Id.* at p.148-49 (SA858-59). McDonald opened the sealed bid of Bennett's competitor Clean Harbor with a blade, and he then selected for Bennett the bid (from among the 50 alternatives) that just beat the competition. *Id.* at p.150 (SA860). McDonald was to "pull out all the rest of the bid sheets and shred them." *Id.* at p.149 (SA859). McDonald stapled Clean Harbor's bid envelop shut, and sealed the winning Bennett bid he selected, so that no one realized he had tampered with the bids. *Id.* at p.149-50 (SA859-60). Because Bennett's and Clean Harbor's bids were so close, however, Bennett was jointly awarded that contract along with Clean Harbor. *Id.* at p.151 (SA861).

For over 20,000 tons of soil that Bennett Environmental removed from Lagoon A, Bennett managed to be paid by the EPA at a rate inflated by around $80 per ton. Tr. 9/19/13 p.99 (SA809). Bennett had originally planned to dispose of the soil at a more expensive, "secure landfill," for which the contract price was $498.50 per ton. *Id.* at p.99 (SA809), 9/18/13 p.151 (SA699); *see also* GX-27A at p.37 (SA1685). But Bennett actually used a cheaper method to dispose of the soil, for which the contract price was supposed to be $418.50 per ton. Tr. 9/19/13 p.99 (SA809), 9/18/13 p.151 (SA699). Neither Griffiths, nor any other employee of Bennett, informed the government it used the cheaper method, and so Bennett was paid at the $498 price—yielding a windfall of around $2 million to Bennett. Griffiths referred to this event as the "disposal switch."[3] Tr. 9/19/13 p.81 (SA791). Griffiths told McDonald about the windfall from the disposal switch, and McDonald asked for a 25 percent share of it in return for keeping quiet. *Id.* at p.96-97, 99 (SA806-07, 809); *see also* GX-203A (SA1806) (invoice from GMEC for $253,095); GX-203B & GX-203C (SA1807-08) (two authorizations for wire transfer from Bennett to GMEC totaling $253,095); GX-204A

[3] It was also occasionally referred to as the "soil switch." *See, e.g.,* Tr. 9/19/13 p.108 (SA818).

(SA1809) (invoice from GMEC for $249,910); Tr. 9/19/13 p.81-82 (SA791-92) (explaining invoices were for kickbacks); GX-204B (SA1810) (authorization for wire transfer from Bennett to GMEC for $249,910).

McDonald had a shell company that he used to facilitate this scheme and conceal the payment of kickbacks. Tr. 9/19/13 p.42-43, 107 (SA752-53, 817). McDonald's company was called General Monitoring and Environmental Control (GMEC). Tr. 9/19/13 p.41 (SA751). Bennett gave kickbacks to McDonald by making payments to GMEC, which McDonald owned; McDonald claimed on invoices that GMEC provided Bennett actual services when in fact GMEC provided no legitimate work to Bennett. 9/19/13 Tr. 41-43 (SA751-53). McDonald also shared some of these payments in turn with Griffiths by making payments from GMEC to Griffiths's own shell company, DCP Technical, which was located in Canada. Tr. 9/19/13 p.107, 113 (SA817, 823). To accomplish this, DCP would issue false invoices to GMEC, *e.g.*, GX-231 (SA1812) ($28,866, labeled for "Wetlands Design analysis," which was "really for nothing," Tr. 9/19/13 p.112-13 (SA822-23)), which McDonald would pay through GMEC, *e.g.*, GX-210 (SA1811) (wire transfer for $28,870 from GMEC to DCP).

In the third scheme (counts 4-6), McDonald and Stoerr agreed with John Drimak, who owned JMJ Environmental, to steer contracts to JMJ, to give kickbacks, to pass those kickbacks off as legitimate costs reimbursable by the EPA and Tierra Solutions, and to rig a bid for a subcontract. Tr. 9/23/13 p.9-10 (SA1042-43); Indictment p.13-21 (JA90-98). JMJ provided waste water treatment supplies and services at both Diamond Alkali and Federal Creosote. Tr. 9/17/13 p.16 (SA387). JMJ used inflated invoices for that work to pay McDonald and Stoerr kickbacks. For example, Drimak marked up the cost of certain water barriers JMJ provided to "probably double." Tr. 9/23/13 p.24 (SA1057). In general, McDonald, Stoerr, and Drimak "settled on a number that was much higher" than the normal profit and "then Mr. McDonald was going to receive a third of that, Mr. Stoerr would receive a third of that, and then JMJ would receive the third as its profit for that job." *Id*. As with the other two schemes, the federal government bore the cost because McDonald passed the inflated prices off as legitimate costs. Tr. 9/16/13 p.118, 121 (SA340, 343).

Although Drimak often inflated the prices charged for actual work, he also submitted "fictitious invoices" to Sevenson—i.e., charging

when JMJ did no work at all. Tr. 9/23/13 p.51-53 (SA1084-86). For example, Drimak billed Sevenson for "reagent phosphate potash skid," Tr. 9/23/13 p.52 (SA1085); GX-501 (SA1813-15), even though Drimak "do[es]n't know" what that is. Tr. 9/23/13 p.52 (SA1085). JMJ was paid $6,147 on this invoice for which JMJ did not supply any of the listed product. *Id.* at p.52-53 (SA1085-86). Drimak then used the entire $6,147 to pay Delaware Valley, a floral supply company that provided flowers to a flower shop owned by McDonald's wife. *Id.* at p.53-54 (SA1086-87). Similarly, after Drimak billed Sevenson $3287.36 and $3930 for two months of "monthly chemical," GX-503A (SA1816)—something JMJ did not provide, Tr. 9/23/13 p.60-61 (SA1093-94)—McDonald emailed Drimak (with the subject "Delaware Valley") to ask him to "send over to Barbara at DV two checks, one tomorrow for $3930. and one Friday for $3287.36." GX-503C (SA1820). Drimak wrote checks for those amounts to Delaware Valley, writing "Code Sweet" on the memo line to indicate McDonald's wife's company. GX-503B (SA1817-19); Tr. 9/23/13 p.59-62 (SA1092-95).

For the kickbacks, "Mr. McDonald would have the say in who got what and how much." Tr. 9/17/13 p.17 (SA388). Drimak gave Stoerr

kickbacks in the form of cash: Stoerr testified that Drimak "would come out, shake my hand, and there'd be money in his hand." *Id.* at p.18 (SA389). Drimak met separately to pay McDonald, but Drimak would later inform Stoerr, "I've already taken care of Gordon [McDonald], this is for you." *Id*.

McDonald also helped rig the bidding process so that JMJ could win various subcontracts at Federal Creosote at inflated levels. McDonald wanted JMJ to win a bid on a subcontract at Federal Creosote. But federal regulations require three independent bidders, and so Stoerr, at McDonald's behest, asked Drimak to find other bidders who could submit losing bids. Tr. 9/23/13 p.32, 9/17/13 p.44 (SA1065, 415). Drimak "contacted Mr. Art Senno from Alpha Omega Services and Mr. Mark Fosshage from World Water Works" and asked them to submit losing bids. Tr. 9/23/13 p.33 (SA1066). Both companies, as did JMJ, provided wastewater treatment services. *Id.* at p.33-36 (SA1066-69). In actuality, Drimak created their bids, setting them at intentionally losing levels. *Id.* at p.33, 36 (SA1066, 1069). JMJ won the bid at an inflated price. *Id.* at p.37 (SA1070).

Several government employees testified about McDonald's tax and obstruction offenses (counts 10-12). *See* Indictment p.31-34 (JA108-11). Thomas Mazur, an internal revenue agent for the IRS, testified that McDonald submitted tax returns that included misrepresentations in 2003 and in 2004. Tr. 9/24/13 p.43-45 (SA1246-48). In particular, McDonald deducted various kickbacks as "outside services" on the tax form for his shell corporation, GMEC. *Id.* at p.45 (SA1248). Further, when the IRS investigated McDonald in 2008, McDonald—at a voluntary interview—gave several false statements to Lawrence Clifton, a special agent for the IRS. *Id.* at p.4-5 (SA1207-08). For example, McDonald told the IRS he had done actual consulting work for Drimak, *id.* at p.15 (SA1218), when he had not, Tr. 9/23/13 p.81 (SA1114).

The primary victims of these schemes were the EPA (i.e., the federal government) at the Federal Creosote site and Tierra Solutions at the Diamond Alkali site. Tr. 9/16/13 p.66, 77-78, 114 (SA288, 299-300, 336). The inflated prices charged for the subcontractor work, and the cost of the kickbacks paid to McDonald, were ultimately born by whoever paid for the cleanup at each site. McDonald's schemes at the

Federal Creosote site caused the federal government to lose almost $4 million dollars. Amended Judgment p.8 (JA18).

SUMMARY OF ARGUMENT

This is a "story of greed and just boldness," the district court explained at sentencing. Tr. 3/3/2014 p.44 (SA1596). McDonald's greed was at the heart of the conspiracies he wrought with at least three subcontractors to obtain kickbacks and to commit fraud by treating those kickbacks as legitimate cleanup costs that someone else had to pay. "McDonald was without question the individual that held the key and was essentially the glue to this conspiracy." *Id.* at p.40 (SA1592). Although McDonald raises four challenges to his convictions, none has merit and none was properly preserved.

1. When a subcontractor (Bennett Environmental) received a $2 million windfall from billing for a more expensive means of soil disposal than it actually used, McDonald asked for a 25 percent cut in return for keeping quiet. McDonald asked another subcontractor (JMJ) to submit thousands of dollars in fake invoices so that JMJ could pay for various personal expenses of McDonald's. McDonald never objected to testimony regarding these events, but at the charge conference he asked

for an instruction that would have told the jury to ignore that evidence. The judge properly rejected that instruction: a defendant is not entitled to an instruction telling the jury to accept his version of events. The jury, moreover, was sufficiently instructed that it should not convict McDonald of any crime or object not alleged in the indictment.

2. The district court properly refused to take judicial notice of a separate indictment—wholly unrelated to this case except that it concerned executives at Sevenson who were neither defendants nor witnesses in this case—because it would only serve to "confuse the jury." Rather than taking issue directly with this correct ruling, McDonald variously discusses the doctrines of admissions of party opponents, judicial estoppel, and *Brady v. Maryland*, which were not raised below. But even on de novo review, McDonald could not establish error. The indictment was not excluded on hearsay grounds, and so the exception to the hearsay-exclusion rule for admissions of party opponents is of no moment. Because the indictment involved no overlapping facts with the case here, McDonald cannot point to the sort of contradictory facts that are necessary for a judicial estoppel claim. Finally, because the tax-fraud indictment does not concern defendants

or witnesses in this case, McDonald cannot establish that the government had any obligation to review that investigation's files for favorable evidence under *Brady*.

3. There was nothing improper in the prosecution's closing remarks, let alone something that would warrant reversal. McDonald takes issue only with two words: the prosecution's mentioning that the cooperating co-conspirators have "come clean." But a prosecutor is permitted to refer to witnesses' admissions of guilt and their cooperation pursuant to a plea agreement when their credibility is at issue, as McDonald recognizes. And no reasonable construction of the "come clean" comment amounts to a comment on McDonald's decision not to testify—a decision from which the court said no inference could be made.

4. McDonald also claims that the district court's alleged exclusion of all evidence concerning his medical condition impeded his ability to testify, but what he challenges was not an evidentiary ruling at all. McDonald points only to a portion of the trial where the judge instructed the jurors that McDonald's health was not at issue in the trial, but that instruction was correct. The court did, however, make a

pretrial ruling about the admissibility of McDonald's health issues. Following the suggestion of McDonald's counsel, the court said that McDonald could introduce evidence concerning his mental condition—to explain memory loss, for example—in the event McDonald chose to testify. And while the court ruled tentatively to exclude evidence of his physical condition, it said it could revisit the issue if McDonald testified and aspects of his physical condition became relevant to his ability to testify. These decisions were correct.

5. McDonald also takes issue with one aspect of his sentence—the district court's determination of the base offense level under U.S. Sentencing Guideline § 2B4.1. He claims the district court, in calculating the amount that subcontractor Bennett Environmental gained in return for kickbacks, used an unrealistically low estimate of Bennett's "direct cost" of removing contaminated soil. But his sole basis for questioning the cost estimate, provided by Griffiths, is an irrelevant EPA estimate. In actuality, the EPA study McDonald cites suggests that direct costs at other facilities are even lower than Griffiths had estimated, and so the court's estimate appears conservative.

ARGUMENT

I. The District Court Properly Rejected McDonald's Proposed Instruction

A. Standard of Review

McDonald complains that the district court rejected a jury instruction he proposed. McDonald Br. 18-23. This court reviews a district court's refusal to give a requested jury instruction for abuse of discretion. *United States v. Friedman*, 658 F.3d 342, 352 (3d Cir. 2011).

B. Griffiths's Disposal-Switch Testimony Was Relevant Evidence of Counts 1 and 3

McDonald's proposed supplemental instruction would have told the jury to ignore certain testimony of two co-conspirators, Griffiths and Drimak. *See* Def.'s Supp. Request to Charge (JA153-55). Griffiths had testified that his employer Bennett Environmental was paid by the EPA for disposing over 20,000 tons of soil using an expensive disposal method when in fact it used a much cheaper method. Tr. 9/19/13 p.99 (SA809). McDonald, moreover, asked for a substantial cut of the ill-gotten windfall in return for not informing the government about this deception. *Id.* at p.96-99 (SA806-09). The instruction would have prevented the jury from considering this testimony, and it would have

reminded the jury that McDonald was not charged with any crimes not included in the indictment. *See* JA153-55.

When the district court refused this instruction, however, it accepted a "compromise" suggestion of McDonald's. Tr. 9/24/13 p.136-38 (SA1339-41). Just before instructing the jurors on the charged objects of the conspiracies, the court thus told them: "You should consider only those goals or objects that I will explain to you. Gordon McDonald is not on trial for any conduct, offenses or objectives not alleged in the indictment." Tr. 9/25/13 p.28 (SA1378). The court then explained that "one of the goals or objectives [of the count 1 conspiracy was] to solicit and accept kickbacks" and that another "goal or objective [of that conspiracy was] to defraud the United States through the means of interstate . . . wire communications." *Id*. at p.28-29 (SA1378-79). McDonald's attorney had noted he was "okay" with that compromise. Tr. 9/24/13 p.138 (SA1341). Although he added, "I'm not withdrawing my request for the supplemental [instruction]," he did not explain why the added compromise was insufficient. *Id.*

"A court errs in refusing a requested instruction only if the omitted instruction is correct, is not substantially covered by other

instructions, and is so important that its omission prejudiced the defendant." *United States v. Davis*, 183 F.3d 231, 250 (3d Cir. 1999). To the extent that McDonald simply wanted an instruction telling the jury it should not convict McDonald for uncharged crimes, the district court properly rejected the requested instruction because it would have "duplicated other instructions that the District Court gave." *Friedman*, 658 F.3d at 354. The compromise McDonald suggested and the court accepted already instructed the jury not to consider offenses and objectives "not alleged in the indictment," Tr. 9/25/13 p.28 (SA1378), and the law presumes that the jury will follow its instructions, *United States v. Claxton*, 766 F.3d 280, 299 (3d Cir. 2014). There was no need for another instruction to retread this same ground—indeed, McDonald could (and did) point to this instruction in his closing to argue that the disposal-switch testimony fell outside the charged conspiracy. Tr. 9/25/13 p.140-41 (SA1490-91).

McDonald expressly modeled his proposed instruction on a requested instruction in *United States v. Stewart*, 433 F.3d 273, 309 (2d Cir. 2006), *see* Def.'s Supp. Request to Charge p.3 (JA155) (citing *Stewart*), but that case undermines his argument. As here, the

proposed instruction would have told the jury: "You may not, and I caution you strongly against this, you may not conclude that the government should have charged [the defendant] with [any uncharged crimes] and convict [the defendant] of anything else in place of a charge that was not filed . . . because it appeals to your sense of fairness or justice or what have you." *Stewart*, 433 F.3d at 309; *accord* JA155. The Second Circuit concluded that the district court did not err in rejecting the proposed instruction because, as in this case, the jury was sufficiently instructed on the nature of the charged offenses and their essential elements. *Id.* at 310; *see also* Tr. 9/25/13 p.28-30 (SA1378-80) (instructing the jury on the objects and essential elements of the charged conspiracies).

The infirmities with the rejected instruction, however, went beyond mere duplication. McDonald never objected to admission of the testimony of Griffiths about the disposal switch (or of Drimak about the fictitious invoices). Instead he asked the court to tell the jury to ignore the admitted evidence; but that would have been improper: "A defendant is 'not entitled to a judicial narrative of his version of the facts.'" *Friedman*, 658 F.3d at 353.

Although courts should give a limiting instruction regarding extrinsic, or other-acts, evidence[4] when timely requested, *see United States v. Green*, 617 F.3d 233, 247 (3d Cir. 2010), the proposed instruction was not a limiting instruction. It was an eliminating instruction: rather than explain the limited purposes for which the evidence may be considered, it would have told the jury to ignore the unobjected-to evidence entirely.

In any event, the disposal-switch evidence was intrinsic to the charged counts,[5] and so the district court did not need to give a limiting instruction even if requested. Under *Green*, 617 F.3d at 248-49, evidence is intrinsic if (a) it directly proves the charged offense or (b) it

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[4] This evidence, moreover, was not extrinsic. *See infra* p.30-35.

[5] The government did "agree" with defense counsel during the charge conference that, unlike Griffiths's information, McDonald's indictment did not specifically list the disposal-switch events. Tr. 9/24/13 p.134-35 (SA1337-38). Of course, "the Government is not limited in its proof at trial to those overt acts alleged in the indictment." *United States v. Adamo*, 534 F.2d 31, 38 (3d Cir. 1976). The government's position was that the acts were in furtherance of and facilitated the charged objects and that, though there was "mixed testimony on it," it was "up to the jury to . . . determine whether Mr. McDonald was aware of that soil switch and whether he benefited from that soil switch." Tr. 9/24/13 p.134 (SA1337). The government urged the court to instruct the jury about the charged objects and that the jurors could not determine guilt based on any uncharged objects, *id*. at 137-39 (SA1340-42), which is what the court ultimately did, Tr. 9/25/13 p.28 (SA1378).

shows other acts that facilitate commission of the charged offense. The complained of evidence is intrinsic under both types.

As the government argued in summation, the disposal-switch testimony was direct proof of the charged count 1 conspiracy between McDonald, John Bennett, Griffiths, and others. *See* Tr. 9/25/13 p.96 (SA1446). Count 1 charged McDonald with a conspiracy with multiple objects, including

- to "provide and attempt to provide kickbacks to McDONALD . . ., and include the amount of certain kickbacks in the sub-contract price that [Bennett Environmental] charged to [Sevenson] . . . thereby causing [Sevenson] to include the fraudulently inflated amount as part of the costs it charged to the EPA, contrary to Title 41, United States Code, Sections 53 and 54 [now 41 U.S.C. §§ 8702 & 8707]" and
- to "devise a scheme and artifice to defraud the United States, namely the EPA, and to obtain money and property from the EPA by means of false and fraudulent pretenses . . . contrary to Title 18, United States Code, Section 1343."

Indictment ¶ 10 (JA82-83).

McDonald asserts nonetheless that the scheme—according to which Bennett Environmental was paid around $80 more per ton of disposed soil than it was due under government regulations, and in which McDonald requested and received 25 percent of the ill-gotten proceeds (*see* Tr. 9/19/13 p.97-99 (SA807-09))—was unrelated to the charged kickback conspiracy. McDonald Br. 19-20. Although Griffiths admitted that the payments to McDonald out of Bennett's windfall profits were not for the purpose of rigging a bid or getting inside information on that subcontract, Tr. 9/20/13 p.139-40 (SA1007-08), there was nonetheless ample evidence that the payments were kickbacks within the scope of the charged conspiracy. A "kickback" simply "means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind that is provided to a prime contractor, prime contractor employee, subcontractor, or subcontractor employee to improperly obtain or reward favorable treatment in connection with a prime contract or a subcontract relating to a prime contract." 41 U.S.C. § 8701. The 25 percent paid to McDonald was plainly "money . . . provided to a . . . prime contractor employee," and it was calculated to obtain and reward McDonald for "favorable

treatment"—among other things, for not informing the government (as McDonald's prime-contractor duties obligated him to) that subcontractor Bennett Environmental used a cheaper method of soil disposal than that for which it was compensated. *See* Tr. 9/19/13 p.97-99 (SA807-09). A jury could also reasonably infer that the payments to McDonald were aimed at other kinds of favorable treatment, such as continued steering of subcontracts to Bennett.

McDonald's requested instruction would have removed this evidence from the jury's consideration even though "questions of whether or not a proven overt act is in furtherance of the conspiracy are ordinarily for the jury to decide." *United States v. Fontenot*, 483 F.2d 315, 322 (5th Cir. 1973); *see also United States v. Moussaoui*, 382 F.3d 453, 473 (4th Cir. 2004) ("the scope of an alleged conspiracy is a jury question"); *United States v. Dale*, 991 F.2d 819, 849 n.50 (D.C. Cir. 1993).

Moreover, McDonald does not deny that the disposal-switch testimony related to the separate wire-fraud object of the count 1 conspiracy. Indeed, McDonald concedes that the disposal switch was an "act of deception" and that he shared in the profits from that scheme.

McDonald Br. 10. His insistence that the actions were unconnected to "the charges in the indictment of illegal kickback payments and antitrust violations for price fixing," *id.*, is not only mistaken—the payments to McDonald were kickbacks, *see supra* p.31-32—it is also misses the mark—in the counts involving Bennett Environmental, McDonald was also charged with a conspiracy to commit wire fraud (but not an antitrust conspiracy). McDonald's failure to inform the government of the cheaper method of soil disposal Bennett in fact used, especially when he had an affirmative duty to do so, *see* Tr. 9/19/13 p.101 (SA811), constituted fraud. *See United States v. Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1978) (scheme of fraud may be predicated on "omissions reasonably calculated to deceive persons of ordinary prudence and comprehension"). McDonald is, in any case, liable for the "act[s] of deception" committed by his co-conspirators within the scope of the conspiracy.

The disposal-switch testimony was also direct proof of the count 3 money-laundering conspiracy, and McDonald never disputed the testimony's relevance to that count. McDonald made numerous payments to Griffiths's shell company DCP Technical from McDonald's

25 percent share of Bennett Environmental windfall profits; in summation, the government argued that this "was the money laundering scheme" alleged in count 3. Tr. 9/25/13 p.96 (SA1446).

In addition, the disposal-switch payments facilitated the charged crimes by keeping McDonald from telling the government about Bennett's windfall, which could have led to the deterioration of the charged conspiracy. McDonald admitted the evidence may establish as much; his counsel's summation simply stated: "If this was a conspiracy between Griffiths, ultimately, or Bennett and Mr. McDonald to maybe pay some monies so maybe Mr. McDonald wouldn't turn them in, if that's what it was, he's not charged with that crime." Tr. 9/25/13 p.141 (SA1491). But these payments did further the charged kickback and fraud objects of the conspiracy. *See supra* p.31-33. At the very least they constituted concealment, and concealment to "shield the ongoing conspiracy," such as by holding together the charged kickback and fraud conspiracy here, is an overt act within the scope of the conspiracy. *United States v. Pecora*, 798 F.2d 614, 630 (3d Cir. 1986). Hence, McDonald was not entitled to a limiting instruction that the disposal-switch testimony related only to uncharged crimes.

C. Drimak's Testimony about Fictitious Invoices Was Direct Evidence of Count 5

McDonald's proposed instruction would also have told the jury to ignore co-conspirator Drimak's testimony that McDonald had Sevenson reimburse Drimak's company JMJ for "fictitious invoices" so that Drimak could send money and gifts back to McDonald. McDonald Br. 20-21. But, as with the disposal-switch testimony, testimony from Drimak about fictitious invoices was relevant evidence of the charged crimes. Count 5 charged McDonald with conspiring with Drimak (among others) to give kickbacks (in violation of 41 U.S.C. §§ 53 & 54 (2009)) and commit mail fraud (in violation of 18 U.S.C. § 1341). Indictment p.18-19 (JA95-96). A jury could have determined that Drimak's use of revenue from the fictitious invoices to pay McDonald, including paying off a bill from his wife's floral supplier, constituted a kickback.

McDonald's proposed instruction said in part that "McDonald is not charged with and is not on trial for any alleged improper taking of money from his company," JA154, but that suggestion made little sense. There was no danger the jury would think McDonald was on trial for stealing from his employer. Although Sevenson's payment of JMJ's

artificially inflated costs was an intermediate step in the conspiracy, the testimony established that Sevenson sought and received reimbursement from Tierra Solutions for JMJ's fictitious invoices, *see* Tr. 9/16/13 p.114 (SA336), and the government thus argued in summation that Tierra was the victim of the fictitious invoices, Tr. 9/25/13 p.77 (SA1427).

And that raised another relevant use of the evidence of fictitious invoices—proof of the conspiracy's mail-fraud object. A jury could have determined that passing the cost of the fictitious invoices along to Tierra, while passing them off as actual costs, constituted fraud. As with the disposal-switch evidence, the jury was entitled to consider the fictitious-invoice evidence and determine whether it established that McDonald committed acts in furtherance of the charged kickback and fraud conspiracies.

II. The District Court Properly Excluded the Unrelated Tax-Fraud Indictment

A. Standard of Review

McDonald claims the district court should have taken judicial notice of, and admitted into evidence, an indictment of certain Sevenson executives for tax fraud. *See* McDonald Br. 23; *see also* Tr. 9/24/13 p.94

(SA1297). The district court, however, ruled the evidence was inadmissible for its tendency to confuse the jury. Tr. 9/24/13 p.96 (SA1299).

The district court's balancing under Rule 403 is reviewed for abuse of discretion, according "great deference to the District Court's ultimate decision." *United States v. Universal Rehab. Servs., Inc.*, 205 F.3d 657, 665 (3d Cir. 2000) (en banc). Reversal is not warranted unless the court's analysis and conclusion were "arbitrary and irrational." *Id.*

When an appellant raises a claim for relief for the first time on appeal, it is reviewed for plain error. *United States v. Georgiou*, 777 F.3d 125, 133 (3d Cir. 2015).

B. The Court Did not Abuse its Discretion, Let Alone Plainly Err, in Excluding the Unrelated Tax-Fraud Indictment

McDonald challenges the district court's denial of his request to take judicial notice of an indictment filed in the Western District of New York (WDNY Indictment) charging various officers of Sevenson—McDonald's employer—with a scheme to pay employees off the books and avoid tax liability by reimbursing personal expenses as business

expenses. McDonald Br. 23-28. McDonald wanted to introduce the indictment in order to suggest that McDonald's payment of fictitious JMJ invoices was in furtherance of the tax scheme rather than the kickback and fraud conspiracies alleged in this case. Tr. 9/24/13 p.92-94 (SA1295-97). But McDonald never makes clear the grounds of his challenge, citing, variously, the doctrines of admissions of party opponents (Br. 26-27), judicial estoppel (Br. 23), and the due process concerns of *Brady v. Maryland*, 373 U.S. 83 (1963) (Br. 27). These grounds provide him no support and, in any event, were not raised below. The district court properly excluded the WDNY Indictment for its tendency to confuse the jury. *See* Tr. 9/24/13 p.96 (SA1299).

McDonald's claim that the tax-fraud indictment was admissible as an admission by a party opponent has no legs because the admissions doctrine simply provides an exception to the general hearsay-exclusion rule. *See* Fed. R. Evid. 801(d)(2). The district court, however, did not exclude the indictment as hearsay, but rather because it would "confuse the jury." Tr. 9/24/13 p.96 (SA1299). Whether a statement is an admission has no bearing on the question whether it should be excluded under Rule 403 due to its tendency to confuse. *See* Fed. R. Evid. 403.

McDonald does not, however, claim the court's Rule 403 balancing was erroneous. That makes it especially difficult for this Court to disturb that ruling: "[I]f judicial self-restraint is ever desirable, it is when a [Federal] Rule 403 analysis of a trial court is reviewed by an appellate tribunal." *Universal Rehabilitation Services*, 205 F.3d at 665 (second alteration in original). The court found that the WDNY indictment had very little probative value, stating "there's nothing that's been brought out in this trial which would indicate that there is a correlation between that indictment and the indictment that is before this jury." Tr. 9/24/13 p.96 (SA1299). The only aspect in which there was any factual overlap was superficial—"potentially [the WDNY Indictment] involves some employees from Mr. McDonald's employer of Sevenson"; and so, given that lack of probative value, its introduction "would only serve to confuse this jury and essentially confuse the issues." *Id.* That is hardly the type of "arbitrary and irrational" reasoning that could warrant reversal.

To the extent McDonald argues judicial estoppel should apply here—an argument never raised in the district court—he is wrong. Judicial estoppel does not apply where "[t]here is no inconsistency,"

Linan-Faye Const. Co. v. Housing Auth. of the City of Camden, 49 F.3d 915, 933 (3d Cir. 1995), and McDonald has not pointed to any inconsistency between the two indictments. The tax-fraud scheme involved neither McDonald nor Drimak, and McDonald admitted that the WDNY Indictment did not relate to "Federal Creasote or Diamond Alkali, these two projects, the subject matter, strictly speaking, in this case." Tr. 9/5/13 p.24 (SA194).

In addition, "more is required to find an estoppel against the government. When the government is involved, the party claiming estoppel must establish 'affirmative misconduct or rare or extreme circumstances.'" *Pediatric Affiliates v. United States*, 230 F. App'x 167, 170 (3d Cir. 2007) (quoting *United States v. Pepperman*, 976 F.2d 123, 131 (3d Cir. 1992)). Nothing of the sort has been suggested, let alone demonstrated, here.

McDonald also mentions *Brady v. Maryland* in passing, but he has not preserved any *Brady* claim. During the trial, McDonald merely asked the court to take judicial notice of the WDNY indictment so "[i]t could come into the record as a piece of evidence" and McDonald could "argue its relevant [sic] on closing argument," Tr. 9/24/13 p.94

(SA1297), but never suggested he wanted, or was entitled to, any additional discovery. The only time McDonald ever mentioned *Brady* to the trial court was in a post-conviction letter challenging only the award of restitution to Sevenson.[6] JA156-58. McDonald never moved for a new trial on the basis of *Brady*. *See United States v. Kersey*, 130 F.3d 1463, 1465 (11th Cir. 1997) (*Brady* claim not preserved where "defendant did not precisely articulate a *Brady* violation in his or her motion for new trial"); *United States v. Cooper*, 556 F. App'x 75, 80 n.2 (3d Cir. 2014) (*Brady* claims raised for the first time on appeal reviewed for plain error).

Moreover, McDonald has identified no *Brady* material that was suppressed. Although some cases premise *Brady* claims on the government's failure to review files for exculpatory material, in those cases the unreviewed files pertained to government witnesses at trial. *See United States v. Henthorn*, 931 F.2d 29, 31 (9th Cir. 1991) ("the government has a duty to examine personnel files upon a defendant's

[6] The court awarded Sevenson restitution because Sevenson had reimbursed Tierra Solutions for some of that company's losses and because some of the inflated invoices were found never to have been passed on to Tierra Solutions for reimbursement. Tr. 10/16/14 p.6, 16 (SA1611, 1621); *see also* 18 U.S.C. § 3664(j)(1).

request for their production"). Where the "agent [whose files were not reviewed] played no role in the case," however, "there was no *Henthorn* violation." *United States v. Booth*, 309 F.3d 566, 574 (9th Cir. 2002). Because none of the alleged participants in the tax-fraud scheme were witnesses in this case, McDonald cannot claim *Brady* applies. Thus, even had he properly alleged *Brady* below, the claim would still lack merit.

III. There Was No Impropriety in the Prosecution's "Come Clean" Statement in Summation

A. Standard of Review

McDonald next argues for reversal on the basis of a mundane two-word phrase that the prosecution used in summation, but he did not raise the objection until after his own closing argument. This Court "review[s] a district court's rulings on contemporaneous objections to closing arguments for abuse of discretion." *United States v. Berrios*, 676 F.3d 118, 134 (3d Cir. 2012). Non-contemporaneous objections, however, are reviewed for plain error. *Id.*; *cf. also United States v. Somers*, 496 F.2d 723, 738 n.28 (3d Cir. 1974) (defendants' objections to comments in opening "waived" when not raised "until after the prosecutor had completed his entire opening statement").

B. The Prosecution's Comment Was Appropriate and Could Not Have Prejudiced McDonald

McDonald claims his convictions should be reversed on the basis of two words in the prosecution's summation—"come clean." *See* McDonald Br. 29. McDonald did not raise this objection during, or even immediately after, the government's closing. He raised it after his own closing, suggesting he did not perceive the comment to be too inflammatory at the time. *Cf.* Tr. 9/25/13 p.157 ("MR. LOUGHRY: Unless it's something that I think couldn't be corrected later on, I would not interrupt a lawyer while she's speaking.").

McDonald strains to read in that brief comment improper suggestions that (a) McDonald's guilt could be inferred from his co-conspirators' guilty pleas and (b) his guilt could be inferred from his decision not to testify. McDonald Br. 30. "Improper statements made during summation may warrant a new trial when such statements 'cause[] the defendant substantial prejudice by so infecting the trial with unfairness as to make the resulting conviction a denial of due process.'" *United States v. Brown*, 765 F.3d 278, 296 (3d Cir. 2014). And the "test for determining whether remarks are directed to a defendant's failure to testify is 'whether the language used was

manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" *Bontempo v. Fenton*, 692 F.2d 954, 959 (3d Cir. 1982) (quoting *United States v. Chaney*, 446 F.2d 571, 576 (3d Cir. 1971)). The words, however, were not an improper invitation to infer McDonald's guilt or a remark on his silence; rather, they were a proper comment on why the co-conspirators' testimony was credible.

A central theme of McDonald's defense was that the testifying co-conspirators should not be believed, and his counsel explicitly tied the issue of credibility to their guilty pleas and plea agreements. In his opening, McDonald's counsel suggested that the co-conspirators had fabricated McDonald's involvement in their schemes in order to get lighter sentences for assisting the government. *See* Tr. 9/16/13 p.57-58 (SA279-80). In addition, McDonald's counsel asked two of the three cooperators in cross examination about initial statements made to government agents denying responsibility, *see* Tr. 9/17/13 p.79-80 (Stoerr) (SA450-51), 9/23/13 p.107-08 (Drimak) (SA1140-41), and asked all three about their guilty pleas and plea agreements, Tr. 9/17/13 p.72-

76 (Stoerr) (SA443-47), 9/20/13 p.143-45 (Griffiths) (SA1011-13), 9/23/13 p.133 (Drimak) (SA1166).

Especially when read in this context, the words "come clean" clearly referred to the witnesses' credibility. The prosecution was simply reconciling apparent shifts in the cooperators' stories by arguing the later versions were the accurate ones—i.e., they "came clean." *See Cambridge Dictionary of American Idioms* 72 (Paul Heacock ed., 2003) (defining "come clean" as "to tell the truth about something you have tried to hide"). And McDonald admits, as he must, that this is a proper use for guilty plea evidence. McDonald Br. 29; *see also United States v. Saada*, 212 F.3d 210, 225 & n.16 (3d Cir. 2000) (proper to point to provisions of plea agreement that give witness incentive for truthful testimony). It was also a proper response to McDonald's argument that the guilty plea and plea agreements cast doubt on the witnesses' testimony. *See, e.g.*, Tr. 9/16/13 p.57-58 (SA279-80); *cf. Woods v. Diguglielmo*, 514 F. App'x 225, 227 (3d Cir. 2013) (proper to use plea agreement to question credibility of testifying co-conspirator). The court made clear the limited relevance when it instructed the jury that

the cooperators' "decisions to plead guilty were . . . offered only to allow you to assess the credibility of the witness." Tr. 9/25/13 p.57 (SA1407).

Assuming there was some ambiguity in the words, "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning." *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974). In particular, "in assessing whether an ambiguous prosecutorial remark should be construed as an improper comment on the defendant's decision not to testify, appellate courts should not strain to reach the one interpretation which ascribes improper motives to the prosecutor." *United States v. Brown*, 254 F.3d 454, 465 (3d Cir. 2001) (internal quotation marks omitted).

Even if there were anything improper about the comment, it cannot justify reversal. This Court has left guilty verdicts undisturbed where prosecutors made longer, inflammatory comments in closing. In *United States v. Berrios*, for example, the prosecutor had read a ten-line poem commemorating the murder victim in a murder trial. 676 F.3d 118, 135 (3d Cir. 2012). The poem "serve[d] no purpose other than to appeal to the emotions and sympathies of the jury." *Id.* But because the poem was brief—"a mere ten lines out of over seventy-five pages of

closing argument by the prosecution and thousands of pages of trial transcript"—and the judge instructed the jury that closing arguments are not evidence, "prejudice was minimal and reversal [was] not warranted." *Id.* at 135-36.

Berrios reveals the baselessness of McDonald's claim. Unlike the commemorative poem, the mundane comment "come clean" served a proper purpose—to provide the jury with a reason to credit the cooperators' direct testimony. And if a ten-line poem is brief, a two-word comment is ephemeral.

McDonald points to the not-guilty verdict on the Haas Sand and Gravel-related counts, *see supra* n.1, speculating that the verdict resulted from the prosecutor not including James Haas, that subcontractor's owner, among those who decided to "come clean." McDonald Br. 31. The "come clean" comment related to the witnesses' credibility, and Haas' credibility was not at issue because he did not testify. The split verdict provides no sound basis for McDonald's speculation. The most plausible explanation for the jury's acquittal on the Haas counts is that, without James Haas's testimony, the jury believed the evidence was insufficient. Other possible explanations

include "mistake, compromise, or lenity" by the jury, and so courts should not draw inferences from split verdicts. *United States v. Powell*, 469 U.S. 57, 64-65 (1984).

McDonald also relies on *Bisaccia v. Attorney General of State of NJ*, 623 F.2d 307 (3d Cir. 1980), *see* McDonald Br. 29-30, but the inflammatory nature of the comment in that case only highlights the propriety of the challenged comment here. The prosecution in *Bisaccia* clearly, and colorfully, claimed the guilty plea was evidence of the charged conspiracy: "They [the defendants] said it never happened, you see. Mr. Cicala *pleaded guilty* to something that didn't happen. Ladies and gentlemen, isn't your intelligence being insulted by an argument like that? I mean, aren't these defendants talking down to you as if you were a bunch of five year old children?" *Id.* at 308-09. Compounding the problem in *Bisaccia*, the judge (unlike here and unlike in *Berrios*) gave no limiting instruction.

Lastly, any possibly remaining prejudice was eliminated by the jury instructions. The jury was told, "You must not attach any significance to the fact that Gordon McDonald did not testify." Tr. 9/25/13 p.60 (SA1410). And, like in *Berrios*, the jury was told that

"what the lawyers said or say is not evidence." *Id.* at p.9 (SA1359). "Jurors are presumed to follow the instructions they are given." *United States v. Claxton*, 766 F.3d 280, 299 (3d Cir. 2014). The "single" and at-worst "ambiguous remark—ameliorated by [the] presumption that the jury followed its instruction," *United States v. Pavulak*, 700 F.3d 651, 667-68 (3d Cir. 2012), cannot justify a new trial, let alone McDonald's requested relief, reversal.

IV. McDonald Cannot Claim Error Regarding the Admissibility of His Medical Condition

A. Standard of Review

McDonald claims that the district court erred by excluding evidence concerning his health. This Court reviews "the district court's decision to include or exclude evidence arising under the Federal Rules of Evidence 401, 402 and 403 for an abuse of discretion." *Glass v. Phila. Elec. Co.*, 34 F.3d 188, 191 (3d Cir. 1994).

B. The Prosecution's Comment Was Appropriate and Could not Have Prejudiced McDonald

There was no abuse of discretion here because the only possibly relevant use of McDonald's health was to explain difficulties McDonald

had in testifying, and the court agreed to consider admitting the evidence in the event McDonald testified. But McDonald did not testify.

Before trial, the government moved in limine to exclude mention of McDonald's health at trial. Gov't Mot. in Limine (SA1624-33). In his opposition brief, McDonald contended that if he decided to testify, "simple fairness must allow him to explain his inability to recall." Def. Opp. p.3 (SA1636). At a hearing on this motion, the government drew a distinction between McDonald's physical condition and his mental condition, explaining that the former was irrelevant to the issues at trial whereas the latter may be relevant in the event McDonald testified. Tr. 9/5/13 p.28 (SA198). McDonald agreed "that approach is fair, maybe with one or two exceptions," which turned "on whether Mr. McDonald testifies or not." *Id.* at p.29 (SA199). McDonald simply explained that some aspects of his physical condition may also be relevant: for example, his poor eyesight might explain his inability to read certain documents while on the stand. *Id.*

The court agreed. Rather than decide about the admissibility of McDonald's mental health, the court "reserve[d]" ruling on the issue. Tr. 9/5/13 p.30 (SA200). And, although it ruled tentatively that his

physical condition was "not an issue in the case," the court said if "it becomes an issue in the event Mr. McDonald testifies, that's something we can address as necessary." *Id.* Thus, McDonald could raise issues regarding his physical condition "subsequently if you feel that it's appropriate." *Id.*

On appeal, McDonald does not point to any evidentiary ruling of the district court at all, nor does he relay this important context. *See* McDonald Br. 33-34 (citing Tr. 9/16/13 p.6, 10-11 (JA188, 192-93)). In the transcript pages he does cite, the court merely noted its intention to instruct the jury that McDonald's "medical situation is not an issue," Tr. 9/16/13 p.11-12 (JA193-94), an instruction fully consistent with McDonald's request to have the issue reevaluated if he testified. McDonald's claim, therefore, should be deemed forfeited. *See Lehman Bros. Holdings, Inc. v. Gateway Funding Diversified Mort. Servs., L.P.*, 785 F.3d 96, 99, 101 (3d Cir. 2015) (issue forfeited when appellant "failed to include in the appellate record a transcript necessary to evaluate its principal claim").

In any event, the contention that "McDonald had massive disincentives to testify, given his limitations; the jury would know none

of that," McDonald Br. 35, is baseless. McDonald's decision not to testify cannot have been influenced by the court's in limine rulings. The court never ruled on the admissibility of McDonald's mental condition, and it agreed to consider admitting any aspect of his physical condition if McDonald testified and that aspect became relevant (for example, his poor eyesight). Tr. 9/5/13 p.29-30 (SA199-200).

Because McDonald did not testify, his health post-indictment had no relevance to determining his guilt of the crimes charged in the indictment. Thus, the court's handling of the evidentiary issue and its instruction to the jurors that any "physical challenges" they may observe in McDonald "are not issues in this trial at all" and "are not factors for your consideration in whether he is innocent or guilty," Tr. 9/16/13 p.22 (SA244), are unassailable. In fact, this Court's model jury instructions tell the jury not to allow any "sympathy . . . to influence you." Third Circuit Model Criminal Jury Instruction § 1.02 ("Role of the Jury") (2012). And the commentary to this instruction counsels that "[t]he trial judge may need to mention other characteristics . . . if it appears that they might influence jurors in a particular case." *Id.* cmt. Emphasizing McDonald's poor health to the jury could only have

"appeal[ed] to the jury's sympathies" or otherwise caused the jury "to base its decision on something other than the established propositions in the case." *United States v. Guerrero*, 803 F.2d 783, 785 (3d Cir. 1986) (internal quotation marks omitted).

McDonald also cites, and criticizes, the court's decision at McDonald's competency hearing. *See* McDonald Br. 32-33 (citing competency hearing transcript, JA161, JA166). But he does not challenge that determination, and he cannot. At the end of the competency hearing, McDonald's attorney conceded, "Reasonable minds may differ about whether Mr. McDonald has a serious or perhaps not quite as serious problem with memory, with cognition." Tr. 6/19/13 p.142 (SA142). Accordingly, he admitted that "[t]he Government may turn out to be right, we have not met some kind of legal standard here." *Id.* at p.143 (SA143). In light of that concession and this Court's deferential standard of review, *see United States v. Leggett*, 162 F.3d 237, 241 (3d Cir. 1998) (factual findings in a competency hearing reviewed only for clear error), McDonald cannot contest the competency determination. After all, there is no clear error where the evidence "rise[s] to at least that degree which a reasonable mind might accept to

support a conclusion." *United States v. Delerme*, 457 F.2d 156, 160 (3d Cir. 1972).

V. The District Court Properly Calculated the Gain that Bennett Environmental Received in Return for Kickbacks to McDonald

A. Standard of Review

Finally, McDonald argues the district court erred in determining the base offense level for his crimes. McDonald Br. 35. On a sentencing challenge, this Court reviews "findings of fact for clear error" and "application of the Guidelines to facts for abuse of discretion." *United States v. Kluger*, 722 F.3d 549, 555 (3d Cir. 2013) (internal quotation marks omitted).

B. There Was No Error, Clear or Otherwise, in the District Court's Reliance upon Griffiths's Estimate of Direct Cost

McDonald claims the district court erred in adding twenty levels to the base offense level (of 8) for an aggregate gain of between $7 million and $20 million received by co-conspirators in exchange for kickbacks under U.S.S.G. § 2B4.1. In determining McDonald's sentence, the court relied on the government's benefit calculations. Tr. 3/3/14 p.37-39 (SA1589-91). Focusing on the conspiracy with Bennett Environmental, the government estimated that the value of the benefit

conferred (in return for kickbacks paid to McDonald) was just under $14 million. Improper Benefit Calculation Spreadsheet (SA1648). That calculation involved subtracting Bennett's direct cost per ton of soil removed from the price per ton paid to Bennett multiplied by the total tons of soil disposed.

This methodology was correct. This Court has "adopt[ed] the *Landers* approach and subtract[s] only direct costs, and not indirect costs, when calculating 'net value.'" *United States v. Lianidis*, 599 F.3d 273, 280-81 (3d Cir. 2010) (case involved § 2C1.1(b)(2), but cited cases applying § 2B4.1(b)(1)). And McDonald does not take issue with it. Rather, he claims the government understated direct cost. McDonald Br. 35-37. His proof for this claim is, however, lacking.

This Court "employ[s] a burden-shifting framework to establish that an enhancement applies." *United States v. Diallo*, 710 F.3d 147, 151 (3d Cir. 2013). "[O]nce the Government makes out a prima facie case," "the burden of production shifts to the defendant to provide evidence that the Government's evidence is incomplete or inaccurate." *United States v. Fumo*, 655 F.3d 288, 310 (3d Cir. 2011) (quotation marks omitted).

The government established a prima facie case by calculating the benefit conferred on Bennett Environmental as the difference between the price it received and its direct cost as estimated by its employee Griffiths. McDonald argues that the district court wrongly relied on Griffiths's testimony, but McDonald's argument is faulty for several reasons. First, McDonald says the court used a direct cost estimate of $200/ton of soil removed, and an EPA report shows that $200/ton is merely a portion (disposal) of the direct cost per ton, meaning the true direct cost must be higher (including as it does transportation, incineration, etc.). McDonald Br. 37. But Griffiths's estimate of direct cost for Lagoon A disposal was $257.73, not $200.[7] Improper Benefit Calculation Spreadsheet (SA1648); Tr. 3/3/14 p.22 (SA1574).

Second, the cited EPA figure of $200/ton is the average cost to dispose a ton of *ash*, not of soil. United States EPA, *Appendix B: Baseline Cost Report* 16 (Final Draft July 1999) (JA151). Because

[7] McDonald is wrong that a direct cost estimate of $200/ton of soil removed implies a "150 percent profit margin." McDonald Br. 36. With a contract price of $498/ton, a $200/ton estimate of direct cost implies a gross profit margin (calculated as revenue minus direct cost, divided by revenue, *see* Andrew DuBrin, *Essentials of Management* 554 (2011)) of just under 60 percent. A direct cost of $257.73 (Griffiths's estimate) implies an even lower margin—48 percent.

incinerating a ton of soil yields less than a ton of ash, Tr. 9/20/13 p.135 (SA1003), disposing the ash from a ton of incinerated soil must be less than $200. That $200/ton of ash figure comes from an appendix to an EPA report on hazardous waste removal costs. *See* United States EPA, *Assessment of the Potential Costs, Benefits, and Other Impacts of the Hazardous Waste Combustion MACT Standards: Final Rule* vi (Final Draft July 1999) (Table of Contents entry for "Appendix B" cited by McDonald), *available at* http://www.epa.gov/osw/hazard/tsd/td/combust/pdfs/combust.pdf. But the relevant figures from that report in fact confirm the government's estimate. The EPA report estimated that the median average variable cost per ton of soil for a commercial incinerator was $104.10[8] (excluding transportation costs), *id.* at 3-11; and adding in an estimated $145 per ton in transportation costs,[9] *see id.* at 3-8, that yields an average $249.10 per ton of soil. Thus, the EPA report McDonald cites shows that the government's estimate was conservative because it yielded a lower estimated benefit exchanged for the

[8] The median average variable cost per ton figure of $104.10 is calculated by dividing the median average variable costs per system of $2,606,140 by the median average tons per system of 25,034, which are provided in the EPA report.

[9] $50 per 200 miles * 580 miles from Manville, NJ to Bennett's Quebec facility, *see* Tr. 9/18/13 p.92 (SA640) = $145/ton of soil.

kickbacks than using the EPA's cost estimates would have. McDonald did not even make "the most minimal showing of 'inaccuracy' in the Government's calculations." 655 F.3d at 310.

Even if the EPA cost estimate McDonald cited had been relevant, the government carried its ultimate burden. "[A] sentencing court considering an adjustment of the offense level, *see* Sentencing Guidelines Ch. 3, need only base its determination on the preponderance of the evidence with which it is presented." *United States v. McDowell*, 888 F.2d 285, 291 (3d Cir. 1989). McDonald has cited no other support for his conclusion that the court's finding of total gain to Bennett above $7 million "seems not sufficiently anchored in any sound analysis or evidence to warrant considering." McDonald Br. 37. But, for the benefit to be lower than $7 million, Bennett Environmental's direct cost at the Lagoon A site would have to have been higher than around $372/ton of soil, *see* Improper Benefit Calculation Spreadsheet (SA1648)—substantially higher than Griffths's estimate of $257.73—and McDonald has offered no evidence to suggest Bennett's costs were that high. Accordingly, the district court did not err in determining the total benefit conferred on Bennett

Environmental in return for its kickbacks to McDonald exceeded $7 million. There is "no clear error where the parties submitted conflicting evidence and the district court found the Government's more reliable." *United States v. Jimenez*, 513 F.3d 62, 86 (3d Cir. 2008) (describing *United States v. Napier*, 273 F.3d 276, 279-80 (3d Cir. 2001)).

CONCLUSION

This Court should affirm the judgment of the district court.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 10,874 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point New Century Schoolbook font.

June 19, 2015

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CERTIFICATE OF SERVICE

I, Daniel E. Haar, hereby certify that on June 19, 2015, I electronically filed the foregoing Brief for Appellee United States of America with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the CM/ECF System. I will also send on June 19, 2015, 10 copies to the Clerk of the Court by FedEx.

I certify that I will also send on June 19, 2015, one copy of the foregoing brief to Justin Loughry, counsel for defendant-appellant Gordon McDonald.

June 19, 2015

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I, Daniel E. Haar, hereby certify that on June 19, 2015, I scanned the foregoing brief using Symantec Endpoint Protection Version 12.1.5. I also ran the built-in metadata removal program in Adobe Acrobat XI Pro. No virus was detected, and all metadata were removed.

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