No. 09-2476

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

AZUREEIAH O'CONNOR,
Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division
Case No. 05 CR 672
The Honorable Judge Elaine E. Bucklo

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT AZUREEIAH O'CONNOR

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UNITED STATES OF AMERICA, Plaintiff-Appellee, v. AZUREEIAH O'CONNOR, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division Case No. 05 CR 672 Hon. Elaine E. Bucklo, Presiding Judge.

DISCLOSURE STATEMENT

I, the undersigned counsel for the Defendant-Appellant, Azureeiah O'Connor, furnish the following list in compliance with Fed. R. App. P. 26.1 and Cir. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case: AZUREEIAH O'CONNOR

2. Said party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court: Sarah O'Rourke Schrup (attorney of record), James Lee (senior law student), Kevin O'Keefe (senior law student), and Evan Boetticher (senior law student) of the Bluhm Legal Clinic at the Northwestern University School of Law. The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear:

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over Azureeiah O'Connor's case pursuant to 18 U.S.C. § 3231 (2006), which states that the "district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." This jurisdiction was based on a single-count indictment against O'Connor charging violation of 18 U.S.C. § 1343 (2006). (App. A89, Count Six.)[1]

O'Connor was indicted on July 27, 2005 (App. A77), and tried before a jury. On January 9, 2009, the jury returned a guilty verdict. (App. A33-35.) O'Connor filed timely motions for judgment of acquittal pursuant to Rule 29(a) and (c) and for a new trial on March 5, 2009. (R. 406; R. 410.) The district court denied O'Connor's motions on April 10, 2009, (App. A10), and entered judgment on the verdict on June 5, 2009, (App. A11).

This appeal is from that final order of judgment. (App. A11.) This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (2006), which grants jurisdiction of "all final decisions of the district courts of the United States." O'Connor filed her timely notice of appeal on June 5, 2009. (App. A150.)

[1] References to the sequentially paginated trial transcript shall be denoted as (Trial Tr. ___), references to the sentencing transcript of June 5, 2009 as (Sent. Tr. ___), and all other status hearings as (Status Hr'g.___). All other references to the Record shall be denoted as "R." and the Record number. Where helpful for clarity, the name of the Record document will immediately follow its number. References to the material in the short appendix shall be denoted as (App. A_).

STATEMENT OF THE ISSUES

I. Whether the indictment should be dismissed with prejudice for violations of both the Speedy Trial Act and the defendant's constitutional right to a speedy trial.

II. Whether the jury instructions were misleading, caused a constructive amendment of the indictment, and failed to instruct the jury on an element of the offense.

III. Whether the evidence presented at trial was sufficient to support a verdict of wire fraud.

IV. Whether the district court abused its discretion in refusing to remove irrelevant and prejudicial information from the indictment before giving it to the jury during deliberations.

STATEMENT OF THE CASE

This is a direct appeal from a criminal case. The government filed an indictment against Azureeiah O'Connor and eight other co-defendants on July 27, 2005. (App. A77-79.) The indictment charged O'Connor with two counts of wire fraud, 18 U.S.C. § 1343, and one count of aiding and abetting, 18 U.S.C. § 2. (App. A89, 92.) The government later voluntarily dismissed one of the wire fraud counts. (App. A69.) The government did not charge O'Connor with conspiracy to commit wire fraud. (App. A89, 92.)

Seven defendants, including O'Connor, were arrested and arraigned on August 11, 2005. (App. A38-41.) The last co-defendant was arraigned on August 22, 2005. (App. A1.) O'Connor entered a plea of not guilty and was released on bond. (R. 24; R. 27.) By March 6, 2008, O'Connor was the only remaining defendant from the nine individuals originally charged. (App. A77-79; R. 126; R. 136; R. 138; R. 143; R. 144; R. 154; R. 161; R. 332.)

Between O'Connor's arraignment and voir dire, there were a total of nineteen status and motion hearings. (App. A2; App. A102; App. A103; App. A4; R. 121; R. 131; R. 140; R. 146; R. 151; R. 157; App. A107; R. 273; R. 305; R. 345; App. A6; App. A7; R. 370; R. 374; R. 378.) Three pretrial conferences were held. (App. A5; R. 358; R. 388.) On twelve separate instances, the court excluded time pursuant to the ends-of-justice provision of the Speedy Trial Act, 18 U.S.C. § 3161(h)(7), encompassing the entire period between September 2, 2005 and January 5, 2009. (App. A2; App. A102; App. A103; App. A3; App. A4; App. A105; App. A106;

App. A107; App. A108; App. A5; App. A6; App. A7.)

On September 2, 2008, eight days before trial, the government filed an emergency motion for a Rule 15 deposition. (R. 367.) The court granted the motion two days later and reset the trial date once more to January 5, 2009. (App. A7.)

O'Connor moved to dismiss the indictment on speedy trial grounds on December 31, 2008. (R. 389.) The district court denied this motion immediately prior to voir dire on January 5, 2009. (App. A8; App. A28.)

On January 5, 2009, three years, four months, and twenty-six days after her arraignment, O'Connor's trial began. (App. A8.) Testimony began on January 6, 2009, and ended on January 8, 2009. (R. 392; R. 395; R. 397.) The jury found O'Connor guilty of the sole remaining count in the indictment. (App A9; App. A33-35.) The district court sentenced O'Connor to fifty months in prison, three years of supervised release, and ordered her to pay restitution of over $950,000. (App. A12-13, 15.) O'Connor timely filed her notice of appeal that same day. (App. A150.)

STATEMENT OF FACTS

Cross's Fraud Scheme

For a period of at least twenty months, beginning February 2, 2001 at the latest and ending October 10, 2002 at the earliest, Shaun Cross operated a scam to defraud mortgage lenders through the use of his title insurance companies, Title First and First International. (App. A77-83; App. A179-81; Trial Tr. 117:10-20, 139:4-5.) Cross enticed certain individuals ("straw buyers") to purchase homes, promising that he would, in turn, purchase those homes from them within a few months and make the mortgage payments in the interim. (Trial Tr. 271:11-272:17.) In exchange for disclosing their Social Security numbers, attending the closings, and signing the closing documents, including the Uniform Residential Loan Application ("URLA"),[2] Cross paid each of the straw buyers up to $5,000 in cash or checks drawn from his Title First and First International bank accounts. (Trial Tr. 219:1-220:23, 278:18-279:15.) At closing, the straw buyers signed URLAs that had been filled out with their actual names and Social Security numbers. (Trial Tr. 275:10-277:12.) The remaining information on these forms, however, was falsified by Cross. (Trial Tr. 240:14-242:9, 293:7-296:19.) The falsified information included bank account statements, income statements, employer history, addresses, and credit history, among other things. (Trial Tr. 240:14-242:9, 293:7-296:19.) The straw buyers were unaware of the falsified information on the application. (Trial Tr. 240:14-242:9, 293:7-296:19.)

[2] The URLAs that O'Connor allegedly submitted are included in the Appendix. (App. A217-41.)

After closing, Cross received the mortgage funds through his title insurance companies. (Trial Tr. 116:13-19, 121:19-122:3.) Instead of making the mortgage payments on behalf of the straw buyers, Cross kept these loan payouts. (Trial Tr. 232:18-233:25.) Furthermore, Cross never repurchased the properties from the straw buyers as he had indicated he would. (Trial Tr. 232:18-233:25, 287:22-288:25.) Finally, Cross continued using the straw buyers' identities for additional mortgages without their knowledge, providing applications with forged signatures. (Trial Tr. 416:13-418:14, 469:24-471:5.) Several straw buyers did not discover these other transactions until they received foreclosure or past-due notices. (Trial Tr. 233:2-16, 288:10-289:10, 469:24-471:5.)

From February 2, 2001 to October 10, 2002, Cross convinced at least six people to participate in these transactions as straw buyers and received eighteen mortgage disbursements in their names, totaling $3,725,150. (Trial Tr. 114:23-115:6, 119:22-120:8, 123:11-22, 127:6-17, 128:16-129:1, 131:5-16, 134:17-135:3, 140:8-19.)

O'Connor's Involvement

In 1999 O'Connor, a high school dropout and nail technician, secured a position as an independent loan officer for a company called Express Mortgage. (App. A178; Trial Tr. 104:16-19; Sent. Tr. 40:17-18.) Her only formal training for this position was a "Mortgage 101" class that she took through her employer; immediately thereafter, she began assisting homebuyers seeking mortgage financing. (Trial Tr. 104:25-105:9.) At the time she began her employment, loan officers were not required to take certification exams. (Sent. Tr. 52:3-22.) Later, when exams were

required, it took O'Connor, who suffers from a learning disability, eight tries to pass the exam. (Sent. Tr. 49:3-50:19, 52:3-22.) O'Connor worked for Express Mortgage until approximately March 2002, when she began submitting applications on behalf of Home First Mortgage. (Trial Tr. 104:16-24.)

A mutual friend introduced Cross to O'Connor. (App. A179.) After discovering that O'Connor was a new loan officer, Cross told her that he was a real estate investor and that he used straw buyers to obtain mortgages and purchase properties, which he then repaired and sold for a profit. (App. A179-81.) Cross also told O'Connor, as he had told the straw buyers, that he paid the mortgages on these properties and that he often had the deed transferred to his name after a few months. (App. A179-80; Trial Tr. 223:12-224:8, 271:11-272:17, 341:4-18, 394:6-395:16, 463:16-22, 537:3-538:15.)

After meeting Cross, O'Connor submitted several mortgage applications for purchases that Cross organized. (App. A180.) Cross provided all of the necessary documents for these loan transactions. (App. A181.) When O'Connor reviewed these loan packages, she thought that they were legitimate. (App. A181.)

After the Federal Bureau of Investigation began investigating Cross, O'Connor voluntarily met with FBI Special Agent Eric Kaley and provided several details regarding her involvement with Cross. (Trial Tr. 103:3-6.) Kaley, who testified at trial, relied on his notes from the meeting and testified that O'Connor specifically remembered applications for three of the alleged straw buyers: Dana Powell, Dorea Henry, and Larry Hall. (App. A182; Trial Tr. 110:9-20, 111:14-18.) O'Connor met

with Hall in person. (Trial Tr. 111:14-18.) O'Connor also spoke with Powell via telephone and met with her. (Trial Tr. 110:9-20.) O'Connor spoke to someone claiming to be Henry on the phone and tried to attend her closing. (App. A182; Trial Tr. 112:6-11.) On the day of that closing, however, Cross never picked up O'Connor as he had promised and the closing proceeded without her involvement. (Trial Tr. 112:6-11.)

O'Connor was indicted for her participation in two of Cross's transactions: Dimitra Yost's closing on June 29, 2001, and Kimberly Dunlap's closing on May 22, 2002, but was tried only for the Yost closing. (App. A89, 92.) At trial, the government presented evidence relating to the Yost transaction and six additional uncharged transactions where O'Connor allegedly submitted loan applications for the straw buyers. (Trial Tr. 123:1-124:12; App. A217-41.) The government also presented evidence that O'Connor had received two checks for $10,000 each from Cross. (App. A183.) As a loan officer, O'Connor interviewed the loan applicants and submitted their URLAs to prospective lenders. (Trial Tr. 114:3-115:23; *E.g.* App. A217-18.) Loan officers sign the application, include their name, company, and contact information, and indicate whether the method of interview was face-to-face, mail, or telephone. (Trial Tr. 115:7-23.)

Of the seven URLAs that bear O'Connor's name, four were both signed and marked as having interviewed the applicant in person. (App. A217-18; A219-21; A232-34; A238-41.) Two URLAs indicated that a face-to-face interview occurred, but those applications were not signed. (App. A226-31; A235-37.) The remaining

URLA was signed by O'Connor, but no interview method had been selected. (App. A222-24.) This last application was for Yost's closing on June 29, 2001, and was the basis for O'Connor's conviction. (App. A89; App. A222-24.)

Trial and Sentencing

At trial the government gave a detailed description of Cross's activities. The straw buyers testified that the information provided on the mortgage form was inaccurate and they did not recognize any information on it save the name and Social Security number. (App. A188-91; Trial Tr. 293:10-296:19; 349:14-352:4; 420:20-421:20; 553:23-556:1.) Cross also provided fake documentation, such as bank statements and tax forms to supplement the URLA. (Trial Tr. 563:8-564:6.) The straw buyers admitted to signing the forms and to receiving payments from Cross for giving him their names and Social Security numbers. (Trial Tr.214:15-220:23, 275:10-279:23, 343:9-344:10, 345:18-346:23, 397:18-398:19, 410:14-412:20, 466:23-469:9, 542:3-544:24.) However, they almost uniformly testified that they were unaware of his fraudulent scheme or that he was falsifying the information on the form. (Trial Tr. 257:21-258:7, 262:13-24; 337:3-12, 374:2-18, 570:16-24.) None were prosecuted. (Trial Tr. 257:10-17; 313:24-314:1, 365:21-24, 375:13-377:12, 429:8-13, 475:5-476:14.)

At trial, the government questioned each straw buyer about their mortgage applications and pointed out the falsified sections to the witnesses and the jury. These included the bank balances, employer, cash deposit balances, and whether the buyer intended to use the mortgaged property as his primary residence. (App.

A188-90; Trial Tr. 295:1-296:19; 351:6-20; 421:5-20; 555:2-23.)

The government's theory at trial was that O'Connor's misrepresentations in the "scheme" were: (1) the names on the URLA, because she knew that they were straw buyers; and (2) her checking the box where she was to identify the interview method of these prospective borrowers. (Trial Tr. 90:19-24.) The government also argued that these statements were material to the lenders, although it offered no lender testimony or other evidence to confirm its position. (Trial Tr. 90:12-16.) Instead it pointed to a single boilerplate line on the URLA, which stated that the lender would "rely" on the information in the form. (App. A217-41.) The government further argued in its closing arguments that O'Connor believed that the mortgages would be paid by Cross rather than the straw buyers. (App. A216.) Yet the government never tried to prove that O'Connor knew or had reason to suspect that Cross would not make the mortgage payments to these lenders. Further, there was no evidence introduced at trial that O'Connor knew that Cross was lying on the mortgage applications or that Cross was appropriating the loan money. (Trial Tr. 583:18-22) (government explaining that whether or not O'Connor knew information was false is not relevant). Finally, the government offered no evidence that O'Connor knew that Cross paid the straw buyers for their participation.

During the jury instruction conference immediately before deliberations, defense counsel requested that the other defendants' names be removed from the indictment. (Trial Tr. 505:11-20.) Long before the trial, the other defendants had entered pleas and were no longer parties to the case. (R. 126; R. 136; R. 138; R. 143; R. 144; R.

154; R. 161; R. 332.) Defense counsel believed that their inclusion in the version of the indictment given to the jury would be not only unnecessary and irrelevant, but also prejudicial. (Trial Tr. 505:11-20.) The government wanted the co-defendants' names to stay, expressing concern that the jury might wonder why persons discussed at trial were not indicted; the government suggested instructing the jury not to wonder about uncharged defendants. (App. A204-05.) Defense counsel argued that including the co-defendants in the indictment actually undermined the jury instruction by emphasizing the co-defendants, and their presumed guilt, to the jury. (App. A209.)

The district court expressed uncertainty as to how to deal with the request and tabled its decision. (App. A206.) The next day the district court denied the defense motion, saying, "As far as the indictment, I asked somebody what, because I really couldn't find anything . . . ." (App. A30.) The district court then amended the jury instructions to caution the jurors not to "speculate why any other person whose names you may have heard during the trial or who was named in the indictment in this case as a defendant is not currently on trial before you." (App. A30; Trial Tr. 657:22-25.)

The district court gave a number of instructions relating to the charged wire fraud count, as well as a series of other instructions relating to alternate theories of liability. The district court gave ten instructions relating to the substantive count of wire fraud. (App. A117, 124-30, 132, 134.) The district court expressly declined to give defense counsel's proposed modification of the knowingly *mens rea*

instruction. (R. 379 at 2) ("You may not conclude that the defendant had knowledge if she was merely negligent in discovering the truth"). In addition, the district court gave an aiding and abetting instruction, even though the government had not proceeded on an aiding or abetting theory at trial. (App. A213) (government explaining the elements of wire fraud). Finally, the district court gave an assortment of other instructions. Specifically, the district court gave the government's proposed "joint venture" instruction, which read:

> An offense may be committed by more than one person. The defendant's guilt may be established without proof that the defendant personally performed every act constituting the crime charged.

(Trial Tr. 661:12-15.) The district court did not instruct the jury about the interplay between these various instructions or the requisite agreement that must be proved before the jury may apply conspiracy theories of liability, nor did it outline the elements of a conspiracy. (Trial Tr. 653:12-663:12.) The next day the jury found O'Connor guilty of one count of wire fraud. O'Connor received fifty months' imprisonment, three years' supervised release and was ordered to pay $952,007 in restitution. (Sent. Tr. 62; App. A12-13, 15.) This appeal timely followed. (App. A150.

SUMMARY OF THE ARGUMENT

O'Connor's conviction rests on an extreme violation of her speedy trial rights, a series of confusing and misleading jury instructions, and insufficient evidence of O'Connor's intent to commit wire fraud. In addition, the jury was given a prejudicial form of the indictment during deliberations. Accordingly, this Court should vacate O'Connor's conviction or, in the alternative, reverse her conviction and remand for a new trial.

First, O'Connor's rights under the Speedy Trial Act and under the Sixth Amendment were abridged by a delay of over 506 days in bringing her to trial. The district court engaged in a pattern of excluding time without making any findings on the record for two and a half years. This practice is plainly prohibited under the Act and this Court's precedent interpreting it. The district court further abused its discretion on two occasions by excluding time for continuances caused by the: (1) government's failure to exercise diligence in preparing for trial; and (2) by the court's own schedule. Again, interests-of-justice exclusions on these grounds are prohibited by the plain statutory language of the Speedy Trial Act. Finally, the district court erred in denying O'Connor's Speedy Trial Act motion because the district court both failed to make the appropriate findings when the continuance was granted, and it made different findings to justify the continuance later. This was an improper retroactive exclusion of time.

Because of this delay, O'Connor's defense was hindered by the fading memory of

almost every witness. For similar reasons, the apparent prejudice stemming from the government's neglect in waiting over three years to try O'Connor demonstrates that she has been denied her Sixth Amendment right to a speedy trial.

Second, the jury instructions confused and misled the jury. The instructions constructively amended the indictment to include an uncharged conspiracy count. Moreover, they failed to adequately explain the law or all of the elements of the offense. The instructions allowed the jury to attribute to O'Connor the acts of others under the doctrines of conspiracy, joint venture, and aiding and abetting. The court failed to explain the prerequisites for the application of these doctrines, such as the prior agreements required to prove a conspiracy or joint venture, or the overt acts that demonstrate aiding and abetting.

Third, the evidence presented at trial was insufficient to support a conviction of wire fraud. The government's evidence failed to prove two material elements; it could not show that O'Connor intended to defraud the victim banks, nor could it prove her "knowing participation" in the scheme, because it provided no evidence that she had been alerted to the fraud.

Finally, O'Connor was prejudiced by surplusage left in the indictment. The indictment sent back with the jury included information irrelevant to O'Connor's charge, which created the illusion of a broad conspiracy and implied her deep involvement in Cross's scheme. Even though O'Connor had never met most of the people mentioned in the indictment and all of them had entered pleas before trial, the government nonetheless insisted that their inclusion was necessary "evidence"

to "prove" its theory of the scheme. However, under Federal Rule of Criminal Procedure 7(d) the court should have stricken this irrelevant and prejudicial material from the indictment.

ARGUMENT

I. This Court should vacate O'Connor's conviction due to the government's violation of the Speedy Trial Act and the Sixth Amendment

A. The indictment must be dismissed for violation of the Speedy Trial Act

The district court erred in failing to dismiss the indictment following a delay of more than three years between O'Connor's arraignment and the beginning of her trial. The Speedy Trial Act requires courts to dismiss an indictment if seventy days or more elapse between a criminal defendant's appearance before a judicial officer and the start of voir dire, subject to certain exclusions authorized in the statute. 18 U.S.C. §§ 3161(c)(1) & (h); 3162(a)(2) (2006). The purpose of the Speedy Trial Act is not only to protect the interests of defendants, but also to protect the public's interests. *Zedner v. United States*. 547 U.S. 489, 501 (2006); *see also* Pub. L. No. 93-619, 88 Stat. 2076, 2076 (1974) (stating that Congress enacted the Act "[t]o assist in reducing crime and the danger of recidivism by requiring speedy trials . . ."). The district court and the government bear joint responsibility to ensure that the strictures of the Act are satisfied. *United States v. Toombs,* 574 F.3d 1262, 1273 (10th Cir. 2009); *United States v. Nance*, 666 F.2d 353, 358 (9th Cir. 1982) (stating that judge is responsible for criminal docket and protecting all defendants' speedy trial rights).

A defendant's speedy trial rights may be violated in three ways. First, the trial court may commit clear error by either failing to exclude time at all or by failing to make the requisite findings to support an ends-of-justice exclusion under

§ 3161(h)(7)(A). *See, e.g., United States v. Janik*, 723 F.2d 537, 544 (7th Cir. 1983) (holding that speedy trial clock ran during two separate periods when the district court: (1) failed to exclude time; and (2) did not make the necessary findings to support its order excluding time). Second, a court may violate the Act by excluding time on an impermissible basis; this Court reviews such decisions *de novo*. *United States v. Leora*, 565 F.3d 406, 411 (7th Cir. 2009); *see United States v. Vega*, 860 F.2d 779, 786-87 (7th Cir. 1988), *abrogated on other grounds by United States v. Durrive*, 902 F.2d 1221, 1226 (7th Cir. 1990). Finally, even if the court identifies a basis for excluding time and makes findings on the record to support that exclusion, this Court will reverse when those factual findings are clearly erroneous. *United States v. Salerno*, 108 F.3d 730, 734 (7th Cir. 1997). All three types of error are present in this case.

In this case, the last co-defendant was arraigned on August 22, 2005. (App. A1.) Voir dire for O'Connor's trial began on January 5, 2009. (App. A8.) Of the three years, four months, and fourteen days in the interim (1229 days), at most 723 days were properly excluded, leaving a 506-day delay—well above the statutory maximum of seventy. These 506 days of unexcused delay resulted from of the above-mentioned procedural, legal, and factual errors.[3] (R. 389; App. A8; *see* App. A28-29) (district court denying motion to dismiss but noting that it "will be careful to specifically make findings on the record in the future."). Accordingly, this Court

[3] The most conservative estimate of days that should have been included is 506 days. An additional 87 days are arguably excludable, but should be included according to a plain reading of the text of the Speedy Trial Act. *See infra* note 5; Sec I.A.1.a.

should vacate O'Connor's conviction and, because of the egregious length of the violation in this case, order a dismissal with prejudice.

1. The district court's ends-of-justice exclusions were erroneous in the absence of specific factual findings

Beginning on September 2, 2005, the district court categorically excluded every day until trial pursuant to the ends-of-justice exclusion of the Speedy Trial Act. *See* 18 U.S.C. § 3161(h)(7)(B)(iv);[4] (App. A2; App. A102; App. A103; App. A3; App. A4; App. A105; App. A106; App. A107; App. A108; App. A5; App. A6; App. A7.) Although continuances are sometimes permissible under the Act, the use of the ends-of-justice exception is tempered by the court's duty to make on-the-record findings to support any exclusion of time. *See* § 3161(h)(7)(A) ("No such period of delay . . . shall be excludable . . . unless the court sets forth . . . its reasons for finding that the ends of justice are served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial."); *Zedner*, 547 U.S. at 498-99. Such findings are required so that ends-of-justice continuances are only granted in the limited set of instances where the interests of justice outweigh not only the defendant's interest in a speedy trial, but also the public's interest. *Id.*; *see also id.* at 501 ("As [the legislative history] illustrate[s], the Act was designed not just to benefit defendants but also to serve the public interest . . . ."). This Court typically reviews a district court's factual findings for clear error. *Leora*, 565 F.3d at 411. But where, as in this case, the district court

[4] The Speedy Trial Act was amended in 2008, and the "ends-of-justice" subparagraph was renumbered from 3161(h)(8) to 3161(h)(7). *See* Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110-406, § 13(3), 122 Stat. 4291, 4294 (2008). Accordingly, references to 3161(h)(8) made prior to 2009 are equivalent to 3161(h)(7).

fails to make any factual findings for its ends-of-justice orders, the appropriate standard of review is *de novo*. *United States v. Parker*, 508 F.3d 434, 438 (7th Cir. 2007) (using *de novo* standard where district court made no factual findings). Even if this Court were to apply a clear-error standard, the conclusory character of the district court's ends-of-justice exclusions that did no more than track the statutory language of § 3161(h)(7)(B)(iv) was still improper. *See United States v. Thomas*, 788 F.2d 1250, 1258-59 (7th Cir. 1986) (holding that a brief notation in the record is an insufficient basis for an ends-of-justice exclusion). As demonstrated below, the lack of express findings by the district court for three of those twelve exclusions means that there are at least 293 includable days.

The district court excluded every day from September 2, 2005 to May 19, 2008 based on nine separate ends-of-justice exclusions, pursuant to § 3161(h)(7)(B)(iv).[5] (*See* App. A2; App. A102; App. A103; App. A3; App. A4; App. A105; App. A106; App. A107; App. A108; App. A5.) In nearly every instance, the district court extended this exclusion of time all the way through each rescheduled trial date, an approach that was unsupported by the record and is disfavored by the courts. (*See* App. A102; App. A3; App. A4; App. A105; App. A106; App. A107; App. A108; App. A5); *see also United States v. Lattany*, 982 F.2d 866, 868 (3d Cir. 1992) (stating that ends-of-justice continuances should be reasonable in length); *cf. United States v. Beech-Nut*

[5] As a threshold matter, although the district court excluded the fifty-seven days between the last defendant's arraignment on August 22, 2005, and the filing of a defendant's first pretrial motion on October 20, 2005 for motions preparation pursuant to *United States v. Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985), (*see* App. A1), 18 U.S.C. § 3161(h)(1) does not explicitly permit this exclusion, and the Supreme Court is currently considering the propriety of such exclusions, which may impact the Speedy Trial calculations in this case. *Bloate v. United States*, No. 08-728 (2009).

Nutrition Corp., 871 F.2d 1181, 1198 (2d Cir. 1989) (stating that the length of the pretrial delay should be "reasonably related to the actual needs of the case"). For example, as detailed below, in its May 12, 2006 order, the district court excluded time from that date to a new January, 22, 2007 trial date, nearly eight months later, based on trial preparations. (App. A4; *see also* App. A20.) Yet the record in no way indicates that the parties requested or needed all that time for trial preparation, particularly since the trial date had already been continued for "trial preparation" since September 2, 2005. (App. A2; App. A102; App. A103; App. A3); *see also Zedner*, 547 U.S. at 506-07 (holding that passing references to complexity are insufficient to support an ends-of-justice exclusion); *United States v. Bryant*, 523 F.3d 349, 361 (D.C. Cir. 2008) (holding that a "passing reference to the 'interest of justice'. . . does not indicate that the judge seriously considered the 'certain factors' that § 3161(h)(8)(A) specifies."); *United States v. Williams*, 511 F.3d 1044, 1058 (10th Cir. 2007) (holding that an order excluding time for trial preparation without any other findings on the record is insufficient to invoke ends-of-justice exclusion); *United States v. Perez-Reveles*, 715 F.2d 1348, 1352-53 (9th Cir. 1983) (holding that conclusory ends-of-justice exclusions for plea negotiations and case complexity were improper); *see also United States v. Tennessen*, 763 F.2d 74, 76 (2d Cir. 1985) ("Congress intended that [the ends-of-justice] exclusion be 'rarely used' . . ."). As detailed below, at least 293 days were improperly excluded in this manner.

a. January 27, 2006 through May 11, 2006[6]

[6] As noted earlier, *see supra* note 5, the period between the final arraignment and October 19, 2005 should have been included in the speedy trial clock in whole or at least in part. In

In its minute order of January 27, 2006, the court, on its own motion, reset the trial date from May 15, 2006 to July 17, 2006, and excluded all time up through the new trial date "for trial preparations under 18:3161(h)(8)(B)(iv)." (App. A3.) Thus, although the district court's order is slightly more detailed than a blanket ends-of-justice exclusion, there is nothing else on the record to show that the court engaged in the required factor balancing before excluding time. *See* § 3161(h)(7)(A); *Parker*, 508 F.3d at 438. In fact, the court did not even hold a hearing when it summarily excluded this time. (*See* App. A3); *see also United States v. Barnes*, 159 F.3d 4, 13 (1st Cir. 1998) (holding that time could not be excluded for ends of justice where the court *sua sponte* continued the trial date and made no findings on the record); *United States v. Pasquale*, 25 F.3d 948, 952 (10th Cir. 1994) (finding that court did not properly exclude time for ends of justice, where minute orders did not contain specific findings). Accordingly, this exclusion is invalid, and time should be included unless otherwise excludable. *See Williams*, 511 F.3d at 1058 (finding time includable where district court did not issue specific findings for trial preparation exclusion).

Turning to the excludable time,[7] as of January 27, 2006, three motions were

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the next span of time—October 28, 2005 through January 26, 2006—the district court again excluded time for the ends of justice. (App. A102; App. A103.) Although the district court failed to make specific findings on the record for these exclusions, (*see* App. A152; App. A153-54), the docket sheet indicates that pretrial motions had been filed or were under consideration since October 20, 2005. Therefore, Appellant does not challenge this period of time.

[7] For the reader's convenience, the speedy trial calculations are also summarized in a supplementary table in the Appendix. (App. A242-43.)

pending. (*See* R. 88-90.) All were resolved on February 23, 2006. (*See* R. 107-09; R. 113.) O'Connor then filed a motion on March 2, 2006, which was granted on March 7, 2006. (*See* R. 110; R. 112.) A status hearing was held on March 17, 2006. (R. 116.) O'Connor filed a motion to adopt her co-defendants' motions on March 29, 2006, which was neither opposed nor heard. (R. 117.) In fact, it was not technically resolved until December 29, 2006. (R. 150.) Because no hearing was given nor required, at most thirty days can be excluded while it was pending.[8] *See Henderson v. United States*, 476 U.S. 321, 329 (1986).

Excluding the above-mentioned time, between January 27, 2006 and May 11, 2006, there were at least thirty-nine includable days, with an additional thirty days if O'Connor's motion to adopt does not exclude time.

b. May 12, 2006 through December 28, 2006

In its minute order of May 12, 2006, the district court reset the trial date to January 22, 2007, over eight months later, and excluded every "day through the trial date for continuity of counsel and trial preparations under 18:3161 (h)(8)(B)(iv)." (App. A4; *see also* App. A20.) As before, there is nothing in the record to support the ends-of-justice exclusion beyond the findings in the minute order and the court's conclusory statement that "[t]ime will be excluded until trial for preparation." (App. A4; *see also* App. A20.) Accordingly, all of this time should be included in the speedy trial count unless otherwise excludable. *See* § 3161(h)(7)(A);

[8] Colloquy between the court and O'Connor's counsel indicates that the motion to adopt (R. 117) pertained to motions that had already been decided. (*See* App. A155-56.) Indeed, the district court referred to the motion in an offhand way and never formally ruled on it; no time should be excluded as a result.

Parker, 508 F.3d at 438; *Thomas*, 788 F.2d at 1258-59.

The excludable time between May 12, 2006 and December 28, 2006, however, is limited. On December 7, 2006, a co-defendant moved to substitute counsel, which was resolved on December 14, 2006. (R. 128; R. 142.) Subtracting this time and the dates of hearings on May 12, 2006, November 17, 2006, December 6, 2006, December 18, 2006, and December 21, 2006 (R. 120; R. 121; R. 126; R. 143; R. 146), there are 218 includable days.

c. March 24, 2008 through April 30, 2008[9]

During its pretrial conference on March 24, 2008, the district court reset the trial date to May 19, 2008, and excluded every day through that trial date "in the interest of justice and trial preparations under 18:3161 (h)(8)(B)(iv)." (App. A5.) Though nominally for "trial preparation," (App. A21), there are no specific findings in the record referencing the Act that would support the exclusion for either "the interest of justice" or "trial preparations."[10] Accordingly, all of this time should be

[9] Beginning December 29, 2006, O'Connor and a co-defendant requested a series of continuances that ultimately reset the trial date to March 24, 2008. (*See* R. 146; App. A105; R. 159; App. A106; App. A107; R. 323; App. A108.) The Speedy Trial Act does not expressly exclude time for continuances requested by defendants, but O'Connor is willing to concede that this time is excludable. *See United States v. Larson*, 417 F.3d 741, 746 (7th Cir. 2005); *but see Williams*, 511 F.3d at 1057-58 (finding that continuance requested by defendant was not excludable absent specific findings); *United States v. Saltzman*, 984 F.2d 1087, 1091 (10th Cir. 1993) (defendant's continuance request insufficient to toll the clock) (quoting Admin. Office of the U.S. Courts, *Amended Speedy Trial Act Guidelines* (Aug. 1981)).

[10] Even if the time to prepare proper certifications for the government's trial exhibits is a facially sufficient basis for an ends-of-justice exclusion, (*see* App. A161-64), as discussed in the next section, the district court clearly erred in excluding time because of the government's lack of diligent preparation. *See infra* § 3161(h)(7)(C); pages 31-32; *see also* (App. A161-64) (court stating that it has to continue the trial because the government's certifications were insufficient and expressing concern that the government did not provide sufficient notice to the defendant).

included unless otherwise excludable. *See* § 3161(h)(7)(A); *Parker*, 508 F.3d at 438; *Thomas*, 788 F.2d at 1258-59.

On March 24, 2008, the government orally moved to dismiss count nine of the indictment. (App. A157.) Although the docket states that this motion was not decided until June 5, 2009, (App. A76), the transcript of the pretrial conference shows that it was decided that very day, (App. A159). On April 30, 2008, O'Connor filed an evidentiary objection to the government's use of certain exhibits at trial. (*See* R. 354 Ex. C.) Between March 25, 2008 and April 29, 2008, inclusive, there are thirty-six includable days.

In summary, then, between October 28, 2005 and April 30, 2008, there are a total of at least 293 includable days, and up to 322 days. *See supra* Sec. I.A.1.a. Accordingly, this Court should vacate O'Connor's conviction and dismiss the underlying indictment.

2. The district court clearly erred when it granted two ends-of-justice exclusions for reasons that are specifically prohibited by the Speedy Trial Act

In two instances when the district court made contemporaneous statements on the record to exclude time pursuant to the ends of justice under § 3161(h)(7)(A), the court not only failed to make the requisite specific findings, but also granted exclusions that are expressly prohibited by the Act. *See* § 3161(h)(7)(C) (prohibiting exclusions based on the "general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of . . . the Government.").

In the first instance, on March 24, 2008, the district court ostensibly excluded time from that date through May 19, 2008 because the government had failed to adequately certify its trial exhibits in lieu of testimony from records custodians. (*See* App. A5; App. A165-66.) Then, in the second instance, on May 1, 2008, the court seemingly excluded time from that date through September 22, 2008 because of its own scheduling problems. (*See* App. A6; App. A22-23) (district court indicating that it would be at a judicial conference and/or out of the country during currently scheduled trial dates). Both exclusions are prohibited by the plain language of the Speedy Trial Act and constitute clear error. *See* § 3161(h)(7)(C); *United States v. Gonzales*, 137 F.3d 1431, 1434-35 (10th Cir. 1998)(holding that ends-of-justice exclusion was improper where there were no findings as to the extent of the government's diligence in preparation); *United States v. Andrews*, 790 F.2d 803, 808 (10th Cir. 1986) (stating "[n]either a congested court calendar nor the press of a judge's other business can excuse delay under the Act" and holding that delay caused by judge's attendance at seminar would count towards the speedy trial calculation). In light of these errors, almost no time for this period should be excluded.

Once the erroneous exclusions are disregarded, there are a total of 151 days that should be included in the speedy trial calculation as a result of these two improper exclusions. Specifically, between March 25, 2008 and April 30, 2008, there are thirty-six includable days. *See supra* Sec. I.A.1.c. Following the status hearing on May 1, 2008, the only excludable time was for O'Connor's evidentiary objection to

the government's proposed trial exhibits, which was resolved at the next pretrial conference on May 9, 2008. (R. 358.) Thus, between May 10, 2008 and September 1, 2008, inclusive, there are 115 includable days. Accordingly, this Court should vacate O'Connor's conviction and remand with instructions to dismiss the indictment.

3. The district court abused its discretion in denying O'Connor's motion to dismiss the indictment based on the Speedy Trial Act violation from September 2, 2008 to December 31, 2008

On January 5, 2009, moments before the jury was impaneled, the district court denied O'Connor's speedy trial motion by entering findings to justify an earlier *sua sponte* order excluding time. (*See* App. A7; App. A28-29.) But these findings still fail to justify the district court's ends-of-justice exclusion on September 4, 2008, as the district court failed to satisfy the most basic requirement of excluding time under the Speedy Trial Act: making the necessary factual findings, "if only in the judge's mind, ***before*** granting the continuance . . . " *Zedner*, 547 U.S. at 506 (emphasis added). The reason for this procedural requirement is to prevent courts from subverting the Speedy Trial Act by abusing the ends of justice catchall. *Id.* at 508-09; *see also Janik*, 723 F.2d at 544-45 ("If the judge gives no indication that a continuance was granted upon a balancing of the factors . . . until asked to dismiss the indictment . . ., the danger is great that every continuance will be converted retroactively into a continuance creating excludable time."). In short, courts cannot retroactively justify ends-of-justice exclusions. *See Zedner*, 547 U.S. at 507-08; *see also Janik*, 723 F.2d at 545 (holding that an improper ends-of-justice analysis in

response to a motion to dismiss under the Speedy Trial Act will not satisfy the Act's requirements for specific findings); *United States v. Crane*, 776 F.2d 600, 606 (6th Cir. 1985) ("The reasons stated by the judge in his findings must actually have been the factors motivating his decision to grant the continuance.").

On September 4, 2008, the court heard arguments regarding the government's emergency motion for a Rule 15 deposition of Gloria Roach, an allegedly essential witness residing in California. (*See* App. A170-73; R. 367.) During this hearing, the government also notified the court—for the first time—that another allegedly essential witness, Dana Powell, was unavailable due to her child's serious illness. (App. A173.) The court agreed to the government's request, and reset the trial once again, to January 5, 2009.[11] (App. A174.) That day, the court entered a minute order, excluding every day through that trial date "in the interest of justice for trial preparation under 18:3161 (h)(8)(B)(iv)." (App. A7.) At no point in the transcript, however, does either the government or the court mention exclusion of time.

On December 31, 2008, O'Connor moved to dismiss the indictment due to a speedy trial violation. (*See* R. 389.) In ruling on January 5, 2009, the district court made factual findings on the record to exclude time from September 4, 2008 to that day. (*See* App. A28-29.) The court initially noted that it had originally excluded time for trial preparation. (App. A28-29); *see also* § 3161(h)(7)(B)(iv). The district court then proceeded, however, to make the factual findings that supported an ends-

[11] On May 1, 2008, the trial date was moved to September, over four months away, specifically to accommodate the government and its witnesses. (*See* App. A168-69) (government stating that it could not try the case on July 1, 2008 followed by parties jointly proposing a September trial date that "would be convenient for [the government's] people . . .").

of-justice exclusion based on witness unavailability, a separate ground on which to exclude time. (App. A28-29); *see also* § 3161(h)(3)(A). Thus, the district court's retroactive justification of its September 4, 2008 order excluding time was an impermissibly inconsistent recasting of its original stated reasons for excluding time and, therefore, an abuse of discretion.

Because the district court's stated reasons for excluding the entire swath of time between September 2008 and January 2009 were erroneous, a standard calculation of otherwise-includable days shows that the speedy trial clock ran for ninety-eight days.[12] During this period, there were five instances where motions were pending. (R. 367; R. 369; R. 371; R. 373; R. 374; R. 375; R. 377; R. 378; R. 384; R. 387; R. 389-391.) There was also a separate status hearing on September 22, 2008. (R. 370.) Excluding the days for these motions, ninety-eight includable days remain. This Court should therefore vacate O'Connor's conviction and dismiss the indictment.

4. The indictment should be dismissed with prejudice

O'Connor was prejudiced by the extended delay before she was brought to trial and, considering the extent of neglect on the part of the government and the court in inexcusably delaying the trial for over three years, this Court should order that the indictment be dismissed with prejudice under § 3162(a)(2). Although the prejudice inquiry is one that is typically undertaken in the district court, this Court may make the requisite findings if the answer is clear. *See Janik*, 723 F.2d at 546. In determining whether to dismiss with prejudice, courts consider: (1) the

[12] *See also* Speedy Trial Timeline. (App. A242-43.)

seriousness of the offense; (2) the facts and circumstances that led to the dismissal; and (3) the impact of re-prosecution on the administration of the Speedy Trial Act and on the administration of justice. *United States v. Smith*, 576 F.3d 681, 689 (7th Cir. 2009). Applying those factors in this case shows that the indictment should be dismissed with prejudice.

First, O'Connor was charged with one count of wire fraud, a non-violent felony. As discussed below, O'Connor played a minor role, if any at all, in the overall scheme, and the government's proof of her guilt was scattershot and insufficient. In addition, prejudice abounds in a case with such a lengthy delay. Nearly every witness had some difficulty recalling the events from 2001 and 2002 during their testimony. (*See* App. A192-93) (witness Yost testifying: "I don't remember a lot."); (*see also* App. A194 (Yost), App. A195 (Dunlap), App. A196-97 (Dunlap), App. A198 (Powell), App. A199-200 (Powell), App. A202-03 (Powell), App. A211-12 (Hall)). Even Agent Kaley, who testified to the events that were the most proximate in time to the trial, had difficulties remembering key details of the events at issue. (*See, e.g.,* App. A186; App. A187) ("I'm not sure that we discussed that unless it's in the report. I don't recall specifically whether it was cash or check."). The 506-day delay not only prejudiced the defendant, but also is representative of the inexcusable neglect on the part of the government, which further warrants a sanction harsher than dismissal without prejudice.[13] *See United States v. Russo*, 741 F.2d 1264, 1267-68 (11th Cir. 1984) (holding that prosecutor's negligence supported dismissal

[13] *See infra* pages 31-32, for specific examples of the government's failure to exercise due diligence in bringing this case to trial.

with prejudice). Accordingly, dismissal with prejudice under § 3162(a)(2) is the appropriate remedy.

B. This Court should vacate O'Connor's conviction due to the government's violation of O'Connor's right to a speedy trial, as guaranteed by the Sixth Amendment

For similar reasons, the delay in bringing O'Connor to trial also violated her Sixth Amendment right to a speedy trial. In order to show a Sixth Amendment violation, O'Connor must show: (1) an uncommonly long delay; (2) the government is more responsible for the delay than the defense; (3) she asserted her right to a speedy trial; and (4) she was prejudiced as a result of the delay. *United States v. Gearhart*, 576 F.3d 459, 463 (7th Cir. 2009); *see also Barker v. Wingo*, 407 U.S. 514, 530 (1972).

Because O'Connor was arraigned in August 2005 and did not go to trial until January 2009, almost three and a half years later, the first prong is satisfied. *United States v. White*, 443 F.3d 582, 589-90 (7th Cir. 2006) (courts generally find that delays in excess of a year are presumptively prejudicial, and therefore require inquiry into the remaining three prongs).

Second, the majority of the delay did not lie at the defendant's feet. (*Compare* 1229 days between arraignment and voir dire, *see supra* Sec. I.A.; *with* 450 days during defendants' continuances, *supra* note 9.) Moreover, many large swaths of time passed by without any indication that the government was using due diligence to get the case to trial in a timely manner. *See United States v. Jackson*, 508 F.2d 1001, 1005 (7th Cir. 1975) (stating that the government bears full responsibility for

delays caused by its failure to be prepared for trial). For example, from December 6, 2006 to May 25, 2007, while the government was occupied with making sure the defendants who had entered a plea were being sentenced, virtually nothing happened in O'Connor's case apart from motions to continue and to substitute counsel. (*See generally* App. A49-52.) Similarly, the jury was literally outside the courtroom door for impaneling on March 24, 2008 when the court continued the trial so the government could obtain the proper certifications of its trial exhibits. (*See* App. A160, 165-66.) Also, O'Connor was ready to proceed in September 2008 when the court once again continued the trial because of the government's motion for a Rule 15 deposition. (App. A7.) The reasons for the delay this time were the government's need to conduct an emergency deposition of a witness in California who could not travel because she was on dialysis (App. A170), and because a witness was unavailable due to the birth of her child four to six weeks earlier (App. A173). This motion, filed less than three weeks before the September 22, 2008 trial date (s*ee* App. A7; R. 367), which had been specifically set so that the government would have its witnesses available, (*see* App. A168-69), resulted in the continuance of the trial date to January 5, 2009, more than four months later (App. A7). Thus, *Barker's* second factor is amply satisfied here.

Third, O'Connor asserted her right to a speedy trial on December 31, 2008, which satisfies the third *Barker* factor. (R. 389); *United States v. Brock*, 782 F.2d 1442, 1447 (7th Cir. 1986) (a motion to dismiss based on a prosecutorial delay satisfies the third *Barker* requirement).

Finally, as noted above, there can be little doubt that O'Connor suffered prejudice. When analyzing the extent of prejudice suffered by a defendant because of the prosecution's delay, the impairment of the defendant's ability to present a defense weighs heavily in favor of a Sixth Amendment violation. *See White*, 443 F.3d at 591. Several witnesses at trial affirmatively testified that they could not remember facts because so much time had lapsed. (*See, e.g.*, App. A199-200 (witness Powell agreeing that she does not remember because "[i]t was eight years ago"); App. A192 (witness Yost saying "I do not recall signing a check. This was seven years ago.")); *see also supra* Sec. I.A.4.

This Court should vacate O'Connor's conviction and remand to the district court with instructions to dismiss the indictment with prejudice.

II. The jury instructions constructively amended the indictment, failed to give the jury the proper elements of the crime, erroneously lowered the government's burden of proof, and confused the jury

The district court gave a series of jury instructions that constructively amended the indictment to include unexplained and unproven theories of guilt, that failed to instruct the jury on the elements of the offense, and that lowered the government's burden of proof. A new trial is warranted "[w]hen the instructions as a whole give the jury a misleading impression or inadequate understanding of the law," thus prejudicing the defendant. *Bronk v. Ineichen*, 54 F.3d 425, 430 (7th Cir. 1995); *see also United States v. Johnson,* -- F.3d ---, 2009 WL 3271218, at *8 (7th Cir. Oct. 14, 2009).

The instructions, taken as a whole, likely misled and confused the jury and,

therefore, O'Connor did not receive a fair trial. Specifically, the court's failure to explain the interplay between the various theories of guilt, both charged and uncharged, proven and unproven, almost certainly confused and misled the jury to O'Connor's detriment. The failure to explain and supplement the joint venture instruction (App. A135) was particularly troublesome because it constructively amended the indictment and inadequately instructed the jury on the elements of a conspiracy charge. Defense counsel did not object to the series of instructions as a whole and, therefore, this Court reviews the issue for plain error. To reverse a conviction for plain error, this Court must find that: (1) an error occurred; (2) the error was "plain," meaning that it was obvious or clear under the law at the time; (3) the error affected the defendant's substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of the trial. *United States v. Johnson*, 437 F.3d 665, 677 (7th Cir. 2006).

A. The jury instructions as a whole were given in error

The district court committed three errors in the instructions it gave to the jury. First, the joint venture instruction constructively amended the indictment to include an uncharged conspiracy count. Second, the court never instructed the jury on all of the necessary elements of a conspiracy. And finally, these errors lowered the government's burden of proof on the substantive wire fraud count.

1. The joint venture instruction constructively amended the indictment to include an uncharged conspiracy count

Constructive amendment of the indictment occurs when the "permissible bases for conviction are broadened beyond those presented to the grand jury." *United*

States v. Blanchard, 542 F.3d 1133, 1143 (7th Cir. 2008). Constructive amendment may occur through the government's presentation of evidence, its argument, the jury instructions given by the court, or all three. *United States v. Cusimano*, 148 F.3d 824, 829 (7th Cir. 1998). "Such broadening runs afoul of the Grand Jury Clause of the Fifth Amendment, which limits the available grounds for conviction to those specified in the indictment." *United States v. Haskins*, 511 F.3d 688, 692 (7th Cir. 2007).

Joint venture instructions are typically used to admit hearsay evidence; they are not meant, standing alone, to be construed as instructing on a theory of guilt or its elements. *See, e.g.*, *United States v. Bernard*, 287 F.2d 715, 720 (7th Cir. 1961). In *Bernard*, this Court approved the giving of a joint venture instruction only because it was accompanied by explicit instructions telling the jury that it must first find beyond a reasonable doubt that an agreement existed among the relevant parties before applying the principles in the joint venture instruction to the evidence at trial. *Id.* at 720; *United States v. Pronger*, 287 F.2d 498 (7th Cir. 1961) (reversing conviction in absence of this type of explanation). A joint venture instruction given without explanation constructively amends the indictment to allow the jury to convict the defendant on an uncharged conspiracy count. *United States v. Woods*, 148 F.3d 843, 849 (7th Cir. 1998) (noting that the joint venture instruction from the Federal Criminal Jury Instructions of the Seventh Circuit would have created a constructively amended conspiracy charge if given to the jury unaltered). The joint venture instruction in this case did precisely that: allowed the jury to convict

O'Connor for a conspiracy by imputing to her the acts of others even though no conspiracy had been charged or agreement proven.

2. The jury was never informed of the elements of the constructively amended conspiracy charge

Not only was the indictment constructively amended to include a conspiracy charge, but the jurors were also never informed of the requisite elements of the charge or allowed to find them. To legitimately convict O'Connor of conspiracy, the jury had to find all the necessary elements beyond a reasonable doubt. Here the jury was never given a critical element of conspiracy: the existence of an agreement and O'Connor's intent to join that agreement. *United States v. Corson*, 579 F.3d 804, 810 (7th Cir. 2009) ("The crime of conspiracy is the agreement itself."). Putting aside the fact that the government never alleged or offered evidence of a conspiratorial agreement, no instruction told the jury that it had to find this agreement beyond a reasonable doubt. Instead, the jury was allowed to convict O'Connor as a conspirator without finding the requisite agreement.

Furthermore, the district court never explained conspiracy or its elements to the jury. It is the district court's responsibility to ensure that the jury is fully informed with clear and cohesive instructions. *See Bollenbach v. United States*, 326 U.S. 607, 612 (1946) (stating that jury's ability to do its job "depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria."). Given the complexities of conspiracy law, this Court has cautioned judges to provide "sufficient guidance to juries on the[se] nuanced principles." *United States v. Stotts*, 323 F.3d 520, 522 (7th Cir. 2003). Yet in this

case, the district court gave only the pattern joint venture instruction without ever explaining its applicability or limits and without providing the jury with a full understanding of conspiracy principles. Furthermore, the instructions implied that the requisite agreement had already been proven beyond a reasonable doubt, an additional error in itself. *See Pronger*, 287 F.2d at 500 (finding that the giving of a confusing joint venture instruction effectively told the jury that the government had already proven the threshold element of common concert of action and even if they "did not have that effect, they merely succeeded in confusing the jury"); *see also United States v. Allegretti*, 340 F.2d 243, 247 (7th Cir. 1964) (finding that the district court's actions had "the effect of suggesting to the jurors that the court believed that a conspiracy existed, and for that reason invaded the province of the jury"). The district court essentially took the issue of agreement out of the jury's hands and treated the conspiracy charge as if a conspiracy had already been proven. For these reasons, the jury instructions also were erroneous.

3. The instructions lowered the government's burden of proof on the wire fraud charge by allowing the acts of others to substitute for those personally required of the O'Connor

The joint venture instruction given in combination with the wire fraud elements instruction (App. A124) erroneously lowered the government's burden of proof on the wire fraud charge. The jury was first correctly instructed on the elements of wire fraud but then, perplexingly, it was told via the joint venture instruction that it could use a conspiracy theory under which "guilt may be established without proof that the defendant personally performed every act constituting the crime

charged." (App. A135; Trial Tr. 661:12-15.) In other words, the jury was told that, while wire fraud contained certain elements, it could find O'Connor guilty as long as *someone* satisfied the requisite elements. For example, the jury could have found that O'Connor did not have the requisite intent, but Cross did, and still have found O'Connor guilty of wire fraud. Thus the jury was allowed to find O'Connor guilty without finding that the elements of wire fraud had been met.

The role for conspiracy doctrines in wire fraud cases is limited to proving the scheme. *United States v. Wilson*, 506 F.2d 1252, 1257 (7th Cir. 1974). These doctrines cannot substitute others' intents and actions for the substantive elements of wire fraud that the defendant herself must possess and commit. They may only be used to find a *scheme* without finding that the defendant carried out all elements of the *scheme*. *See United States v. Joyce*, 499 F.2d 9, 16 (7th Cir. 1974) (finding that defendant was responsible for acts of scheme in which he participated despite not having complete knowledge of all mailings sent in scheme). The joint venture instruction telling the jury that it need not find that the defendant "personally performed every act constituting the *crime*" (rather than the scheme), impermissibly lowered the government's burden of proof by allowing the jury to convict O'Connor with others' acts and intent.

B. The errors in the jury instructions were plain and they affected O'Connor's substantial rights

The constructively amended conspiracy charge, the failure of the court to give the elements of that charge, and the improper lowering of the government's burden of proof were not just errors, they were plain errors. This Court has held generally

that plain errors are those that are clear or obvious, or where the law is settled. *United States v. Stott*, 245 F.3d 890, 900 (7th Cir. 2001). Each of the errors alleged above satisfy the threshold standard for plainness. That agreement is a necessary predicate of a conspiracy charge could not be plainer, and altering the government's burden of proof is equally conspicuous.

Not only must the error be plain, it must affect the defendant's substantial rights. *United States v. Olano*, 507 U.S. 725, 734 (1993). Usually, this means that "the error must have been prejudicial" and "affected the outcome of the district court proceedings." *Id.* That is, the defendant must establish "a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." *United States v. Dominquez Benitez*, 542 U.S. 74, 82 (2004) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985) (internal quotation marks omitted). Errors in instructing the jury on the law can be particularly damaging. *United States v. Perez*, 43 F.3d 1131, 1139-40 (7th Cir. 1994) (finding failure to instruct the jury on specific intent was plain error affecting substantial rights when jury could have convicted defendant without finding requisite specific intent).

Like *Perez,* the jury could have convicted O'Connor without believing that she had the specific intent to commit wire fraud or that she knowingly participated in the scheme. Likewise, the jury could have convicted O'Connor under a conspiracy theory without first finding the existence of an agreement. Either scenario would have resulted in an improper conviction and, thus, affected O'Connor's substantial rights.

When the errors strike at the heart of a defendant's constitutional rights, courts are even less willing to affirm unpreserved errors under the blanket of plain-error review. This Court has held that "failure to give any instruction on an essential element of a criminal offense is fundamental error, requiring reversal of the defendant's conviction." *Cole v. Young*, 817 F.2d 412, 423 (7th Cir. 1987). This Court will generally reverse cases in which a jury is not properly instructed on the elements of an offense. *United States v. Kerley*, 838 F.2d 932, 938-39 (7th Cir. 1988) (finding that in most cases a failure to give the jury the elements of the offense is per se reversible error); *see also United States v. Golomb*, 811 F.2d 787, 793 (2d Cir. 1987); *Gov't of Virgin Is. v. Brown*, 685 F.2d 834, 839 (3d Cir. 1982). And in the rare instances where courts declined to automatically reverse due to such instructional errors, it was because the instructions merely misstated a standard rather than wholly omitting an element of the offense, as was the case here. *See Kerley*, 838 F.2d at 939 (erroneous failure to distinguish between various types of knowledge was not reversible per se*); Pope v. Illinois*, 481 U.S. 497, 501-03 (1987) (applying wrong objective standard definition deemed harmless error). Therefore, because the district court completely failed to instruct the jury on the elements of conspiracy, this Court should find that these plain errors affected O'Connor's right to a fair trial.

C. The errors seriously affected the fairness, integrity, and public reputation of the trial

This Court will invoke its discretion under this last prong of the test to correct a plain, substantial error when "an issue is closely contested and supported by

conflicting evidence," *United States v. Westmoreland*, 240 F.3d 618, 635 (7th Cir. 2001), such as in instances where the error "goes to the very basis of the jury's ability to evaluate the evidence," *United States v. Douglas*, 818 F.2d 1317, 1322 (7th Cir. 1987) (internal quotations omitted). This Court has found that "where the existence of a conspiratorial agreement was closely contested and conflicting evidence was presented on the issue, the failure to ensure a jury finding on this essential element undermined the essential fairness and integrity of the trial." *United States v. Mims*, 92 F.3d 461, 466 (7th Cir. 1996).

The errors here compromised the integrity of the judicial process and the public's perception of it. Where, as here, the court allows a defendant to be convicted of a crime, the crucial element of which was not even given to the jury, let alone proven beyond a reasonable doubt, public faith in the legitimacy of the courts erodes. The fairness of O'Connor's case was seriously compromised because almost every element of the wire fraud count in this case was supported by conflicting or even nonexistent evidence. The government's own theory posited that O'Connor had neither the specific intent to defraud banks nor knowledge of the scheme to defraud. (*See, e.g.,* App. A214.) Given the meager evidence combined with the fact that the jury was never asked to find the elements of a conspiracy charge, O'Connor's rights were compromised in a way that affects public confidence in and the legitimacy of the proceedings.

III. The evidence presented at trial was insufficient to support a jury finding that O'Connor had specific intent to defraud the victim banks or that she acted knowingly

The government's own theory at trial and the evidence presented cannot sustain O'Connor's wire fraud conviction. This Court will overturn the verdict on insufficiency grounds when, viewing the evidence in the light most favorable to the government, no rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *United States v. Morris*, 498 F.3d 634, 637 (7th Cir. 2007). A guilty verdict cannot rest on a jury's speculative inferences. *Piaskowski v. Bett*, 256 F.3d 687, 693 (7th Cir. 2001). In order to convict O'Connor of wire fraud the government had to prove beyond a reasonable doubt that: (1) the defendant knowingly devised or participated in a scheme to defraud or to obtain money or property by means of materially false pretenses, representations, or promises; (2) the defendant did so knowingly and with an intent to defraud; and (3) the defendant caused an interstate wire communications to be sent for the purposes of carrying out the scheme. 18 U.S.C. § 1343; (App. A124.) The evidence presented at trial was insufficient to prove that O'Connor knowingly participated in a scheme to defraud or that O'Connor intended to defraud the banks. Failure to prove each of these elements is independently sufficient grounds on which the Court should overturn the conviction.

A. The government's evidence at trial was insufficient to prove that O'Connor had specific intent to commit wire fraud

To secure a conviction for wire fraud the government must prove a specific intent

to defraud, which requires the jury find that the defendant willfully acted "with the specific intent to deceive or cheat, usually for the purpose of getting financial gain for one's self or causing financial loss to another." 18 U.S.C. § 1343; *United States v. Roberts*, 534 F.3d 560, 571 (7th Cir. 2008). In other words, the government had to prove that O'Connor intended to cheat the banks. The government never proved this specific intent, and its own trial theory affirmatively disproved its case.

The government's theory at trial was inconsistent with the legal proof required to prove O'Connor's intent to defraud the victim banks in this case. The government's position was that O'Connor's intent stemmed from her knowledge that Cross, as opposed to the legal buyers of the property, would be paying the mortgages. (App. A214-15) (government arguing in closing that O'Connor expected the mortgages to be paid by Cross). The problem with this theory is that it does not constitute wire fraud, which requires the Government to show that O'Connor intended to cheat the banks out of funds. The only way that O'Connor could have intended this result was if she knew that Cross was walking away from the mortgage payments. Yet the government argued exactly the opposite: that she knew Cross was going to pay. If O'Connor expected the payments to be made, then she cannot possibly have intended to cause loss to the banks. The government's own theory, if proven, cannot sustain the conviction.

The government's evidence in support of its faulty theory also failed to prove O'Connor's specific intent to defraud banks. The government offered only one piece of evidence to prove this element: O'Connor's knowledge that Cross was using straw

buyers for these purchases. (App. A214-215.) But straw buying does not equate with criminal activity. *United States v. Kingston*, 971 F.2d 481, 487 (10th Cir. 1992) ("'straw buyers' or 'straw sellers' are not necessarily criminals"). And this Court has emphasized that, without more, one defendant's knowledge of another defendant's use of straw buyers cannot establish the requisite intent to defraud. *United States v. Bailey*, 859 F.2d 1265, 1273-75 (7th Cir. 1988) (finding insufficient evidence of specific intent where the defendants knew of the principal defendant's intention to use a straw buyer to obtain a loan and were paid to participate in the transaction).

The government offered no evidence that O'Connor knew that the buyers' information on the mortgage application was falsified, that she knew that Cross never intended to pay the mortgages, or that she herself intended to cheat the lenders. In fact, the evidence proves, if anything, O'Connor's lack of ill intent. Agent Kaley himself testified from his interview notes with O'Connor that she, like every other witness brought to testify at trial, believed Cross to be a wealthy real estate investor who would cover these mortgages and eventually transfer them into his name. (App. A179-80.) O'Connor told Kaley that she thought Cross's loan deals looked clean. (App. A185.) Although the mortgage application transferred legal ownership of the properties to the straw buyers, there was nothing inherently deceptive about Cross making mortgage payments on their behalf, as O'Connor believed would happen. The straw buyers were still liable for the mortgages. O'Connor's knowledge that the transaction involved a qualified straw buyer backed by a wealthy investor in Cross cannot equate to an intent to defraud. Thus, the

evidence presented at trial, while perfectly consistent with the government's theory, is insufficient to prove that the defendant intended to cause a loss to the ultimate victims of Cross's scheme: the mortgage lenders. Her conviction should be vacated.

B. The government failed to provide any evidence that O'Connor knowingly participated in the crime

The government failed to prove beyond a reasonable doubt that O'Connor knowingly participated in a scheme to defraud the lender banks. In order to sustain a fraud conviction as either a principal or as an aider or abettor, the government must show that the defendant had an understanding and "knowledge of [the scheme's] fraudulent nature . . . not merely knowledge of shadowy dealings." *Bailey*, 859 F.2d at 1273-74 (finding that although the defendants had business experience and received $5000 for simply signing a piece of paper, their reliance on the skill of the principal offenders indicated a lack of understanding of the scheme). Here, the government wholly failed to prove that O'Connor knowingly participated in a scheme whose object was to defraud lenders.

The government may prove the defendant's knowledge of the crime charged or the scheme alleged by direct evidence or inferences derived from circumstantial evidence. See *United States v. Jackson*, 540 F.3d 578, 594 (7th Cir. 2008); *see also Ratzlaf v. United States*, 510 U.S. 135, n.19 (1994) (citing *United States v. Spies*, 317, U.S. 492, 499-500 (1943)) (stating that the government also can circumstantially prove knowledge through *reasonable* inferences from the evidence). In fraud cases, circumstantial proof of knowledge may include the defendant's intimate involvement in promoting the scheme. *United States v. Lee,* 558 F.3d 638, 647 (7th

Cir. 2009) (finding that the defendant's frequent presence and assistance in running a massage spa/brothel indicated he knowingly joined the conspiracy). But when the defendant lacks such intimate involvement with the scheme, or where she otherwise lacks information, education, or experience, courts have been unwilling to ascribe the requisite level of knowledge to that defendant. *Bailey*, 859 F.2d at 1275 (noting defendant's lack of skill in the area in which the fraud occurred as a factor in determining whether the defendant possessed the requisite *mens rea*).

In *United States v. Price*, the defendant was aware that the company for which she worked was having financial difficulties and at one point she lied on their behalf as part of a delaying tactic against customers complaining about the non-delivery of machines. 623 F.2d 587, 591-92 (9th Cir. 1980), *overruled on other grounds by United States v. De Bright,* 730 F.2d 1255, 1259 (9th Cir. 1984). Although Price's actions did assist in the carrying out of the scheme, which involved collecting payment for machines that were never delivered, the court found that she lacked the necessary knowledge or intent because she had only been with the company for three months and had only superficial involvement with the scheme. *Id.* The court also found instructive the defendant's lack of education and business experience as well as the lack of direct evidence of knowledge or intent. *Id.* at 592. The court held that her "mere involvement in an unsavory, fly-by-night scheme is not sufficient to establish knowing participation in a scheme to defraud." *Id.* (internal quotation marks omitted).

There was no direct evidence that O'Connor knew of Cross's scheme to defraud

the banks or that she knowingly agreed to assist the widespread scheme to defraud the banks the government alleged at trial. In fact, the government's own witnesses undercut any finding that O'Connor was a knowing participant in Cross's scheme to defraud. As noted above, O'Connor explicitly told Agent Kaley that she believed that Cross would assume responsibility for the straw buyers' mortgages. (App. A179-80, 182.) Moreover, the information provided to her on the mortgage applications demonstrated that the straw buyers themselves had ample resources with which to cover these mortgages. (*See, e.g.*, App. A189) (indicating straw buyer as having $5200/mo income and over $48,000 in savings). In short, whether the straw buyers received the money from Cross or paid the mortgages from their own pockets, there was nothing in the information provided to O'Connor to indicate that the mortgages would go unpaid and, thus, that the banks would be defrauded.

Nor is there circumstantial evidence of her knowing participation. Although the government made much of O'Connor's supposed role as the "gatekeeper" loan officer, mere participation in a transaction that turns out to be part of a fraudulent scheme is insufficient for a fraud conviction. *Bailey*, 859 F.2d at 1273. The government provided no proof that the mortgages went into delinquency during her involvement or that she knew that this would likely occur. Moreover, O'Connor's lack of skill and experience as a loan officer undercuts her knowing participation in the scheme to defraud. The extent of O'Connor's training was a Mortgage 101 class and on-the-job training with Express Mortgage during the booming real estate market of 2000. (App. A179.) O'Connor never completed high school and had been a loan officer for

only one year when Cross targeted her for his scheme. (App. A178.) O'Connor, like all of the straw buyers who testified at trial, relied upon the experience of a smooth, well-spoken real estate "investor." (App. A179, 200-01.) Finally, as in *Price,* O'Connor's involvement with this scheme was superficial. She was not privy to Cross and his associates in a way that would have alerted her to this scheme. There is no evidence that she knew of Cross's payments to the straw buyers. To infer O'Connor's knowledge of Cross's scheme to defraud from her minor role is unreasonable.[14] *See Ratzlaf*, 510 U.S. at 149 n 19.

IV. Refusal to remove the surplusage in the indictment was an abuse of discretion and unfairly prejudiced O'Connor

The district court erroneously refused to remove from the indictment material that had no bearing on O'Connor's case and served merely to prejudice the jury. Decisions to strike indictment surplusage are at the trial court's discretion and are therefore reviewed here for an abuse of discretion. *United States v. Marshall*, 985 F.2d 901, 905 (7th Cir. 1993); *United States v. Poore,* 594 F.2d 39, 41 (4th Cir. 1979). To determine if portions of an indictment should be stricken under Federal Rule of Criminal Procedure 7(d), courts: (1) examine whether the information is irrelevant; and, if so, (2) decide whether the surplusage is inflammatory or prejudicial. Fed. R.

[14] For similar reasons the government failed to prove that O'Connor aided and abetted wire fraud, a theory charged in the indictment but not offered as a theory of liability at trial. To be an aider or abettor a defendant must knowingly associate with the criminal venture, participate in it and try to make it succeed. *United States v. Kasvin*, 757 F.2d 887, 890 (7th Cir. 1985). Thus, aiding and abetting shares similar knowledge and intent requirements that, as shown above, were unfulfilled in this case. Moreover, the government failed to prove O'Connor committed the requisite affirmative, overt act to push the criminal activity along. *United States v. Beck*, 615 F.2d 441, 449 (7th Cir. 1980). Submitting the applications was merely O'Connor's job and the government never showed that O'Connor knew that the forms she submitted for Cross contained falsehoods.

Crim. P. 7(d); *see United States v. Groos*, 616 F. Supp. 2d 777, 789 (N.D. Ill. 2008).

A. The district court erroneously refused to strike irrelevant material from the indictment before giving it to the jury

The indictment given to the jury contained irrelevant references to O'Connor's former co-defendants and acts beyond the scope of O'Connor's involvement. Indictment surplusage is material unrelated to the allegations whose removal leaves no conceptual void in explaining the defendant's criminal acts. *United States v. Bucey*, 691 F. Supp. 1077, 1082 (N.D. Ill. 1988) (citing *United States v. Hattaway*, 740 F.2d 1419, 1425 (7th Cir. 1984)). Surplusage can range from a few words to entire paragraphs. *United States v. Brighton Bldg. & Maint. Co.*, 435 F. Supp. 222, 230-31 (N.D. Ill. 1977) (striking phrases "at least" and "among others"); *Groos*, 616 F. Supp. 2d at 789 (striking seven paragraphs of background, context, and law as irrelevant). Evidence that meets the standard of evidentiary relevance for trial may not necessarily satisfy the indictment-surplusage inquiry. *Compare* Fed. R. Evid. 401 *with* Fed R. Crim. P. 7(c) (indictment must contain "a plain, concise, and definite written statement of the *essential* facts constituting the offense charged.") (emphasis added); *see also United States v. Presgraves,* 2009 WL 2753190 at *10 (W.D.Va. Aug 25, 2009) (striking indictment material that was relevant to the trial but irrelevant for surplusage purposes).

O'Connor's indictment was rife with surplusage. First, the caption included eight other defendants that had long since entered pleas and whose names were irrelevant to O'Connor's single-count prosecution. Moreover, three of the listed co-defendants—Monique Hobson, Latonya Allen, and Lynelle Wells—were so

irrelevant to O'Connor's case that they were never mentioned once at the trial.

Second, the body of the indictment also included many paragraphs that were entirely unrelated to O'Connor's alleged acts. *(See, e.g.*, App. A141-42, ¶¶ 3, 4, 6, 8; App. A143-46, ¶¶ 5, 6, 11, 14.)[15] Some paragraphs relate solely to irrelevant defendants. (App. A142, ¶¶ 7-8.) Others mention O'Connor but include irrelevant acts of other defendants. (App. A145, ¶¶ 8-9.) These superfluous paragraphs served only to supply information that was outside of O'Connor's charged conduct. (*See, e.g.,* App. A145-46, ¶ 11); *see also United States v. Daniels*, 95 F. Supp. 2d 1160, 1167 (D. Kan. 2000) (striking five paragraphs because they consisted of information outside of the charges).

Finally, several paragraphs describing the scheme include information ultimately irrelevant to O'Connor's alleged role in the scheme but whose language erroneously implies her involvement. (App. A143-44, ¶ 3) (stating "defendants obtained over $6.2 million in mortgage loan proceeds" although O'Connor could only have taken part in a fraction of these deals.); (App. A144, ¶ 6); (App. A80, ¶ 7) (implying that O'Connor took part in crimes of others by including "other co-schemers"). The court erred by including a substantial number of people and actions with which O'Connor was not involved.

B. The district court erred because the information was prejudicial and inflammatory

This irrelevant indictment material was also prejudicial because it implied

[15] In the original indictment, paragraph 1 had subparts a-j. In the juror's version of the indictment, those paragraphs were numbered so that they counted the first paragraphs up to 10 and then began recounting with paragraph 2 on page 3. (App. A141-43.)

O'Connor's involvement in uncharged crimes, overstated her role and gain in Shaun Cross's scheme, and created a false association with others' bad acts. Material is prejudicial when it serves only to inflame the jury, confuse the issues, and blur the elements necessary for conviction. *United States v. Climatemp*, 482 F. Supp. 376, 391 (N.D. Ill. 1976); *United States v. Lavin*, 504 F. Supp. 1356, 1362-63 (N.D. Ill. 1981) (striking claim because it prejudicially, "overstate[d] both the scope and result of the alleged fraud"); *see also Groos*, 616 F. Supp. 2d at 790 (removing paragraphs on terrorism and national security because they could inflame the jury); *Brighton Bldg.*, 435 F. Supp. at 230-31 (striking the phrases "at least" and "among others" because they prejudicially allowed jury to draw inferences about extent of defendant's criminality beyond indictment).

Like the defendant in *Groos*, O'Connor was prejudiced when the indictment linked her to eight con men whose guilt was assumed throughout the trial. The indictment's inclusion of so many actors in its caption and of their roles in Cross's scheme also implied a greater relationship and cohesion of will than actually existed. In addition, as in *Lavin,* the indictment overstated O'Connor's involvement through sweeping allegations; the indictment twice impermissibly states the total amount going to the "defendants" as $6.2 million, falsely implying that O'Connor shared in these proceeds. (App. A143, ¶ 3; App. A147, ¶17.) Moreover, the indictment's erroneous inclusion of the terms "co-schemers" and "others" allowed the jury to falsely infer her involvement in more crimes than the one with which she was charged. (A144-45, ¶¶ 6, 7, 10); *see also Brighton Bldg.*, 435 F. Supp. at 230-31.

Finally, this surplusage was not harmless error. Fed. R. Crim. P. 52(a). Non-harmless, unfair prejudice occurs when indictment errors might cause confusion between the accused and the separate activities of others. *United States v. Kotteakos*, 328 U.S. 750, 774 (1946) (finding the variance between the number of conspiracies at trial and in the indictment was not harmless error because the jury may transfer guilt from one conspiracy to another); *United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000) (finding the cumulative errors harmful). Indictments, like instructions, are the last thing the jury receives from the court before deliberations, making errors particularly damaging. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 412-13 (1999) (finding erroneous language in a bribery instruction was not harmless error). Given the paucity of other evidence of O'Connor's guilt of wire fraud, the impact of this surplusage, which tied O'Connor to a scheme in a way that the evidence did not, cannot be deemed harmless. Accordingly, this Court should reverse her conviction.

CONCLUSION

For these reasons, O'Connor respectfully requests that this Court vacate the conviction or, in the alternative, reverse and remand for a new trial.

Respectfully Submitted,

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No. 09-2476

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. AZUREEIAH O'CONNOR, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division Case No. 05 CR 672 Hon. Elaine E. Bucklo, Presiding Judge.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 13,641 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 12 point Century Schoolbook font with footnotes in 11 point Century Schoolbook font.

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Dated: November 5, 2009

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

AZUREEIAH O'CONNOR,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Case No. 05 CR 672

Hon. Elaine E. Bucklo, Presiding Judge.

CIRCUIT RULE 31(e) CERTIFICATION

I, the undersigned, counsel for the Defendant-Appellant, Azureeiah O'Connor, hereby certify that I have filed electronically, pursuant to Circuit Rule 31(e),versions of the brief and all of the Appendix items that are available in non-scanned PDF format.

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CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Azureeiah O'Connor, hereby certify that on November 5, 2009, two copies of the Brief and Required Short Appendix of Appellant, as well as a digital version containing the brief, were sent by United States mail to the following individual:

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ATTACHED REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT AZUREEIAH O'CONNOR

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Case No. 05 CR 672

Hon. Elaine E. Bucklo, Presiding Judge.

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

I, the undersigned, counsel for the Defendant-Appellant, Azureeiah O'Connor, hereby state that all of the materials required by Circuit Rules 30(a), (b) and (d) are included in the Appendix to this brief.

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RULE 30(a) SHORT APPENDIX TABLE OF CONTENTS

RULE 30(b) APPENDIX TABLE OF CONTENTS

No. 09-2476

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
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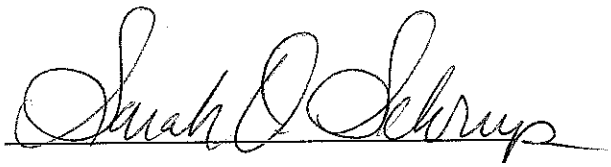
Case No. 05 CR 672

Hon. Elaine E. Bucklo, Presiding Judge.

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

I, the undersigned, counsel for the Defendant-Appellant, Azureeiah O'Connor, hereby state that all of the materials required by Circuit Rules 30(a), (b) and (d) are included in the Appendix to this brief.



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Dated: November 5, 2009

RULE 30(a) SHORT APPENDIX TABLE OF CONTENTS

RULE 30(b) APPENDIX TABLE OF CONTENTS

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Elaine E. Bucklo	Sitting Judge if Other than Assigned Judge	Ian H. Levin
CASE NUMBER	05 CR 672 - 9	DATE	8/22/2005
CASE TITLE	USA vs. Monique Hobson		

DOCKET ENTRY TEXT:

Arraignment held. Defendant voluntarily surrendered on 8/22/05. Defendant informed of her rights. Attorney William H. Hooks is given leave of court to file his appearance on behalf of defendant. Defendant enters plea of not guilty to all counts. 16.1(A) conference to be held by 8/18/05. Defendant's pretrial motions to be filed by 8/30/05. Response due by 9/9/05. Status hearing before Judge Bucklo set for 9/2/05 at 10:15 a.m. Time is excluded pursuant to 18:3161(h)(1)(F) and U.S. vs. Tibboel, 753, F. 2d. 608 (7th Cir. 1985).

Docketing to mail notices.
*Copy to judge/magistrate judge.

	Courtroom Deputy Initials:	SM

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Elaine E. Bucklo	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	05 CR 672 - all	DATE	9/2/2005
CASE TITLE	USA vs. Cross, et al.		

DOCKET ENTRY TEXT:

Status hearing held and continued to 10/28/05 at 10:00 a.m. Defendants' appearance at the next status will be waived at the request of their counsel. Any pretrial motion must be filed by 10/24/05. Time from this day through the status hearing is excluded for motions, trial preparations and plea negotiations under 18:3161 (h)(8)(B)(iv)(X-T4).

Docketing to mail notices.

Courtroom Deputy Initials:	MPJ

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Elaine E. Bucklo	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	05 CR 672 - all	DATE	1/27/2006
CASE TITLE	USA vs. Cross, et al.		

DOCKET ENTRY TEXT

On court's own motion, trial set for 5/15/06 is reset for 7/17/06 at 9:30 a.m. with the back-up trial for 6/26/06 remaining unchanged. Time from this day through 7/17/06 is excluded for trial preparations under 18:3161 (h)(8)(B)(iv)(X-T4).

Docketing to mail notices.

Courtroom Deputy Initials:	MPJ

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Elaine E. Bucklo	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	05 CR 672 - all	DATE	5/12/2006
CASE TITLE	USA vs. Cross		

DOCKET ENTRY TEXT

Status hearing held and continued to 11/17/06 at 10:15 a.m. Three-week trial set for 1/22/07 at 9:30 a.m. Pretrial conference set for 1/17/07 at 4:00 p.m. Parties have until 1/12/07 to file voir dire, jury instructions and a joint statement of the case. Any motion in limine to be filed by 1/8/07. Time from this day through the trial date is excluded for continuity of counsel and trial preparations under 18:3161 (h)(8)(B)(iv)(-T4).

Docketing to mail notices.

00:15

Courtroom Deputy Initials:	MPJ

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 3.1.3
Eastern Division

UNITED STATES OF AMERICA

Plaintiff,

v.

Case No.: 1:05–cr–00672
Honorable Elaine E. Bucklo

, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, March 24, 2008:

MINUTE entry before Judge Honorable Elaine E. Bucklo: As to Azureeiah O'Connor, pretrial Conference held and continued to 5/9/2008 at 03:00 PM. Jury Trial reset for 5/19/2008 at 09:30 AM. Time from this day through trial date is excluded in the interest of justice and trial preparations under 18:3161 (h)(8)(B)(iv). Mailed notice (mpj,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 3.1.3
Eastern Division

UNITED STATES OF AMERICA

Plaintiff,

v.

Case No.: 1:05–cr–00672
Honorable Elaine E. Bucklo

, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, May 1, 2008:

MINUTE entry before Judge Honorable Elaine E. Bucklo:As to Azureeiah O'Connor, status hearing held on 5/1/2008. Pretrial Conference set for 5/9/2008 at 03:00 PM. Jury Trial reset for 9/22/2008 at 09:30 AM. Time from this day through trial is excluded in the interest of justice under 18:3161 (h)(8)(B)(iv). Mailed notice (mpj,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 3.2.2
Eastern Division

UNITED STATES OF AMERICA

Plaintiff,

v.

Case No.: 1:05–cr–00672
Honorable Elaine E. Bucklo

, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, September 4, 2008:

MINUTE entry before the Honorable Elaine E. Bucklo: Government's emergency motion [367] to take Rule 15 deposition of witness in California heard on 9/4/08 and the motion is granted as to Azureeiah O'Connor (5). Jury Trial reset for 1/5/2009 at 09:30 AM. Pretrial Conference reset for 12/11/2008 at 04:00 PM. Status hearing on the issue of how governement would take the Rule 15 deposition set for 9/22/2000 at 09:30 AM. Time from this day through new trial date is excluded in the interest of justice for trial preparation under 18:3161 (h)(8)(B)(iv). Mailed notice (mpj,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Elaine E. Bucklo	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	05 CR 672 - 5	DATE	1/5/2009
CASE TITLE	USA vs. O'Connor		

DOCKET ENTRY TEXT

Voir dire begun and concluded. Jury Trial continued to 1/6/09 at 9:30 a.m. Defendant's motion to dismiss indictment (389) heard on 1/5/09 and the motion is denied for the reasons stated in court.

Docketing to mail notices.

03:00

	Courtroom Deputy Initials:	MPJ

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Elaine E. Bucklo	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	05 CR 672 - 5	DATE	1/9/2009
CASE TITLE	USA vs. O'Connor		

DOCKET ENTRY TEXT

Jury deliberation held and concluded. Enter Jury verdict of guilty as charged in the indictment. Jury trial ends. Any post trial motion due by 3/9/09; and response by 3/30/09. The cause is referred to the probation department for the preparation of a presentence investigation report. Any objection to the PSI report, and motion will be due by 3/30/09; and response by 4/6/09. Sentencing set for 4/10/09 at 10:30 a.m.

Docketing to mail notices.

00:10

	Courtroom Deputy Initials:	MPJ

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 3.2.2
Eastern Division

UNITED STATES OF AMERICA

Plaintiff,

v.

Case No.: 1:05–cr–00672
Honorable Elaine E. Bucklo

, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Friday, April 10, 2009:

MINUTE entry before the Honorable Elaine E. Bucklo:Motion for acquittal [406] is denied as to Azureeiah O'Connor (5). Motion for new trial [406] is denied as to Azureeiah O'Connor (5). As to Azureeiah O'Connor, Sentencing held on 4/10/2009 and continued to 6/5/2009 at 02:00 PM. Mailed notice (mpj,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Northern District of Illinois

UNITED STATES OF AMERICA
v.
Azureeiah O'Connor

JUDGMENT IN A CRIMINAL CASE

Case Number: 05 CR 672-5

USM Number: 18104-424

Phillip A. Turner
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☑ was found guilty on count(s) Count Six of th eindictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1343	Wire Fraud	6/29/2001	six

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☑ Count(s) any renmaing count ☑ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

6/5/2009
Date of Imposition of Judgment

Elaine E. Bucklo
Signature of Judge

Elaine E. Bucklo Judge
Name of Judge Title of Judge

6-8-09
Date

O 245B (Rev. 09/08) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: Azureelah O'Connor
CASE NUMBER: 05 CR 672-5

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Fifty (50) months

☐ The court makes the following recommendations to the Bureau of Prisons:

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Azureelah O'Connor
CASE NUMBER: 05 CR 672-5

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

Three (3) years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Judgment—Page 4 of 6

DEFENDANT: Azureelah O'Connor
CASE NUMBER: 05 CR 672-5

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a drug aftercare treatment program which may include urine testing at the direction of the probation officer, up to 104 tests per year.

Upon release from custody, any remaining restitution balance shall be paid on monthly payment schedule equal to at least 10 percent of the defendant's net monthly income.

The defendant shall maintain gainful employment while on supervised release. If the defendant is not employed within 60 days of the supervision or if unemployed for 60 days after termination or lay-off from employment, she shall perform 20 hours of community service per week at the direction of and in the discretion of her probation officer until gainfully employed, unless excused by the probation officer for schooling or other acceptable reasons.

The defendant shall not in cur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment schedule.

The defendant shall provide the probation officer with access to any requested financial information.

Judgment — Page 5 of 6

DEFENDANT: Azureelah O'Connor
CASE NUMBER: 05 CR 672-5

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$	$ 952,007.37

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
See Victim Information Sheets		$952,007.37	

TOTALS	$ 0.00	$ 952,007.37

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☑ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☑ the interest requirement is waived for the ☐ fine ☑ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

1 of 3

Victim Information Sheet
AZUREEIAH O'CONNORS
05 CR 672-5

A.

B.

C.

D.

2 of 3

E.

Date Closed	Buyer	Property Address	Mortgage Broker	Lender	Loan Amount	Loss Amount
4/18/2001	LH	2646 Christina Drive, Lansing, IL	Express Mortgage	Homeside Lending /Matrix	$190,000.00	$3,530.12
5/2/2001	DP	4111 S. Indiana, Chicago, IL	Express Mortgage	Equicredit to Fairbanks Cap	$285,000.00	$169,016.84
6/29/2001	DY	4324 S St. Lawrence, Chicago, IL	Express Mortgage	Matrix Financial Corp	$285,000.00	$171,884.27
5/23/2002	KD	2010 S 4th Ave, Maywood, IL	Home First	Taylor, Bean, & Whitaker, Ocala, FL	$137,500.00	$137,500.28
7/29/2002	DH	4111 S. Indiana, Chicago, IL	Home First	First Capital Mort/ Household Mort	$220,500.00	$220,270.50
8/1/2002	GR	1637 S. Trumbull, Chicago, IL	Home First	Taylor, Bean, & Whitaker, Ocala, FL	$160,000.00	$159,855.36
10/10/2002	GR	1640 S. Trumbull, Chicago, IL	Home First	First Capital Mortgage	$99,000.00	$89,950.00
						$952,007.37

A18

DEFENDANT: Azureeiah O'Connor
CASE NUMBER: 05 CR 672-5

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

☑ Lump sum payment of $ 952,107.37 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

☑ Special instructions regarding the payment of criminal monetary penalties:

The costs of incarceration and supervision are waived.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☑ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

See Victim Information sheets

] The defendant shall pay the cost of prosecution.

] The defendant shall pay the following court cost(s):

] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

All right. Time will be excluded until trial for preparation.

MS. AMDUR: Okay.

MR. RATHE: Thank you, Your Honor.

(End of proceedings.)

C E R T I F I C A T E

I, Michael P. Snyder, do hereby certify that the forgoing is a complete true, and accurate transcript of the proceedings had in the above-entitled case before the Honorable ELAINE E. BUCKLO, one of the judges of said Court, at Chicago, Illinois, on May 12, 2006.

/S/ Michael P. Snyder — October 27, 2009

Official Court Reporter — Date
United States District Court
Northern District of Illinois
Eastern Division

the 30th. What time is that good?

THE COURT: Well, if you, probably any time, although technically I'm supposed to have a -- oh, even if I do, but that's a bench trial. What time do you want?

MR. TURNER: Make it afternoon?

THE COURT: 3 o'clock?

MR. TURNER: Okay. 3 o'clock then, pretrial conference or conference.

THE COURT: Well, it will be very short unless we've got an issue. But I want to know if you've got any issues and any issues we need to know about then. 3 o'clock?

MR. TURNER: 3 o'clock.

MS. JOHNSON: Your Honor, the government moves that we exclude time.

THE COURT: Time will be excluded for preparation.

MS. JOHNSON: April 30th at 3 p.m., is that correct?

THE COURT: Yes. Thank you.

All right. I guess we'll essentially go to trial.

MR. PASQUAL: Okay, Judge. Thank you very much.

THE COURT: Thank you. Well, if you change your mind and decide you want to agree to them and want an earlier trial, let me know. Okay.

MR. TURNER: Okay, Judge. Thank you very much.

(End of proceedings.)

THE CLERK: 05 CR 672, USA versus O'Connor; for status.

MS. JOHNSON: Good morning, Your Honor. Lela Johnson on behalf of the United States.

MR. TURNER: Good morning, Your Honor. Philip Turner on behalf of the defendant, Miss O'Connor.

THE COURT: Good morning.

You know, that date isn't going to work for me. I either need to know, I need to know to find some other judge to do it. See, I could just bump it to that Wednesday. The problem is unless you can promise me this is going to be a two-day trial, I'm worried because we are leaving the country the following week or essentially long enough that I couldn't possibly keep a jury hanging, sitting there. That wouldn't be a good idea.

So that Monday and Tuesday, the problem is they get mad when we don't show up at the Seventh Circuit judicial conferences. I'm thinking if this thing has gone on this long, maybe we should just find another date. I think at the time I was so annoyed at putting it off again that I put it in there without thinking about it.

Now, so we have some choices, but partly it depends on you and your client because if you say "No, I want it right then," I am either going to have to tell Collins Fitzpatrick and Judge Easterbrook "Sorry, I have to try a case on Monday; I

can't go to the conference" or I will have to find another judge who can do it, because otherwise it would be too much time. You'd have to agree to excluding time is what we are really coming down to.

MR. TURNER: And, Judge, I've spoken to my client. We agree. And I've spoken to the prosecutor, so we can do that.

THE COURT: All right. Well, you're going to have first -- actually, you know when we could do it, we'll just bump them where I just set this, we could do this on July 1st. Would you be available then?

MS. JOHNSON: Actually, Your Honor, we can't -- well, based on the availability of --

THE COURT: Tell me when you people are available.

MS. JOHNSON: Go ahead.

MR. TURNER: Judge, I was thinking, and that's always a dangerous thing, but that we could set it far enough in the future that it would be a date when it would be convenient for her people, which I know they have some scheduling problems and it's the summer and people have planned vacations.

THE COURT: Just tell me when you want to do this. Had you people talked?

MS. JOHNSON: We did.

THE COURT: What would you like to do?

MS. JOHNSON: September 22nd.

THE COURT: Well, a week later since he said he was worried about the 9th.

MR. TURNER: Well, you know what, Judge? I'll just do it. I'll make sure, I'll just be ready.

THE COURT: Okay. So we'll talk about it all on the 9th.

Okay, thank you very much.

MS. JOHNSON: Thank you, Your Honor.

And may we have time excluded?

THE COURT: And time will be excluded for continuity of counsel.

MR. TURNER: We have no objection to the exclusion of time. As I said before, no objection to the exclusion of time.

THE COURT: Thank you.

MR. TURNER: Thank you, Judge.

MS. JOHNSON: Thank you, Your Honor.

(End of proceedings.)

C E R T I F I C A T E

I, Michael P. Snyder, do hereby certify that the forgoing is a complete true, and accurate transcript of the proceedings had in the above-entitled case before the Honorable ELAINE E. BUCKLO, one of the judges of said Court, at Chicago, Illinois, on May 12, 2008.

/S/ Michael P. Snyder — October 23, 2009

Official Court Reporter — Date
United States District Court
Northern District of Illinois
Eastern Division

RULE 10(e) INDEX TO THE TRANSRIPT OF THE PROCEEDINGS

[1] The following references to the sequentially paginated trial transcript include the volume number, where Vol. 1 corresponds to the proceedings on January 5, 2009, Vol. 2 to January 6, 2009, Vol. 3 to January 7, 2009, Vol. 4 to January 8, 2009, and Vol. 5 to January 9, 2009.

[2] Gloria Roach's testimony was presented at trial through a videotape of her Rule 15 Deposition on December 18, 2008. (*See* R. 440.) Her direct examination and cross examination began on pages 6 and 52 of her deposition transcript, respectively. (*See* R. 440.)

[3] Gov't Ex. Roach was identified and marked at her Rule 15 Deposition on December 18, 2008. (*See* R. 440.)

(Proceedings in open court. Venire out.)

THE COURT: Good morning.

Okay. I have a motion to dismiss the indictment. I've looked at it, I've looked at the cases, I've looked at the statute. I guess I should say thank you for teaching me something that had not really come up. We will be careful to specifically make findings on the record in the future. However, the law seems to be pretty clear that I can make those findings now.

I'm not sure what is meant by Judge Woods' admonition to be specific, but we did say in the order "for trial preparation," and it was pretty clear I thought from the hearing that the reason for continuing the trial was that a witness was both essential and unavailable. That at the time was on the representation of the government, but it's been supplemented by an affidavit. I could have done the trial earlier, as I think I made clear at that hearing. I'd said it would have to be on backup, and as always happens, of course, we could have done it at some point. But you did not want a backup date, which I understand, and you readily agreed to the January 5 date.

But to make sure this is very specific, the government represented and we talked about at that hearing why this witness was very important, and the government explained the importance and gave a good explanation, which is supported

by the record, as to why this witness was unavailable, that she had recently had a baby, the baby's health did not allow her to leave; and, therefore, that was why I granted the continuance. It's obvious that's why I granted the continuance, but for that same reason I think the time is properly excludable.

Anything else?

MR. PASQUAL: Just make my appearance. Morris Pasqual on behalf of the United States.

MS. JOHNSON: Lela Johnson on behalf of the United States.

MR. TURNER: Phillip Turner on behalf of the defendant, who is present before the Court.

THE COURT: All right. We are just waiting for the jury panel to get up here. I'm afraid we may have more potential jurors than I need. Let me just see if there's anything else.

Do I have a statement of the case?

MS. JOHNSON: Yes, Your Honor.

THE COURT: Yes, we do.

MS. JOHNSON: I would provide you with a revised list of names, list of witnesses and names that may be mentioned at trial.

THE COURT: Okay.

MS. JOHNSON: I've provided one to counsel and the court reporter.

for an ostrich instruction, so you're not having to deal with the ostrich instruction since he didn't have to do it and that's really a part of it. So we won't do that.

The rest of defendant's 2 was really government's 1, or not government's 1, but is one of the government's instructions.

Defendant's No. 3, those two paragraphs are supposed to be given in the alternative. The government did not object to the first paragraph of it, so we'll use that.

And the government agreed to defendant's 4.

As far as the indictment, just a minute. Well, go ahead with that. I'm missing something here.

(Pause.)

THE COURT: Have you otherwise, how are you going to get the changes made?

MS. JOHNSON: I don't think we are going to read these before lunch, so we can have them made over lunch.

THE COURT: Okay. As far as the indictment, I asked somebody what, because I really couldn't find anything, and this is what I understand that sometimes is done. Maybe it would be the best way is that you can't really remove the other defendants, I think, but in your Government instruction 13, if you would just modify that, this was my suggestion, to say, it says, "You should not speculate why any other person whose names you may have heard during the trial is not currently on

trial before you," to change it to "You should not speculate why any other person whose names you may have heard during the trial or who is named in the indictment in this case as a defendant is not currently on trial before you."

And that way you would keep all that, which I understand why you're saying that you need and there really isn't any effective way perhaps to modify, to take it all out, but that it would solve that. Does anybody have any problem with that?

MR. PASQUAL: No, Judge.

MS. JOHNSON: No, the government doesn't.

MR. TURNER: Your Honor, I would object. I ask that the indictment be recaptioned United States versus just this defendant, that the other names that are named in the scheme be, the names be left in, but that the things before that, that they are named as defendants, defendants, that that be taken out so that it would remain the same, that is, their names, but not those people named as defendants.

THE COURT: Well, that's the other way to do it, of course.

MR. PASQUAL: Your Honor, the difficulty there is that the government charged a single common scheme among all these defendants to commit these offenses. If the jury gets that version, they are left wondering, well, where is the -- the only defendant named in the case is Azureeiah O'Connors, as

if somehow she was the only one indicted and it's a one-person scheme when it's not. It's a common scheme that was alleged.

The instruction Your Honor proposed will tell the jury you should not concern yourself with the whereabouts or the dispositions as to the other defendants, and I think that solves the problem.

THE COURT: Do either of you have any actual cases where any of this has come up one way or another. If it's come up, either as a ruling or another example of how it's been actually done?

MR. TURNER: You know, I am trying to think, Judge. I can't say for certain, but I've always, my belief is that every time it's been limited to just the defendant; however, the other names stay in the scheme or conspiracy, but only this defendant.

But if there's a conspiracy count, for example, and it says, you know, the defendant Joe Blow and so and so, you name the other person. But otherwise, if they are named as defendants, you're raising the issue and then you're saying in the instruction to try to take away the issue that you raised.

MR. PASQUAL: What is the issue, Your Honor is going to instruct the jury.

THE COURT: All of you have been lawyers here for a long time.

MR. PASQUAL: I'll respond to your question, Judge.

(Proceedings in open court. Jury in.)

THE COURT: Good morning.

Mr. Winter, do you speak for the jury?

JUROR WINTER: Yes.

THE COURT: Has the jury reached a unanimous verdict?

JUROR WINTER: Yes, ma'am.

THE COURT: All right. Would you please hand it to the marshal.

All right. I'm now going to read the verdict, that is, publish it. Please listen carefully. You may be polled as to whether this is your verdict.

We the jury find the defendant Azureeiah O'Connor guilty as charged in the indictment.

It is signed by all of the jurors.

Do you wish to have the jury polled?

MR. TURNER: Yes, ma'am.

THE COURT: Miss Chapman, does the verdict as published constitute your verdict in all respects?

VENIREMAN CHAPMAN: Yes.

THE COURT: Mr. Crocetti, does the verdict as published constitute your verdict in all respects?

VENIREMAN CROCETTI: Yes.

THE COURT: Mr. Cronkrite, does the verdict as published constitute your verdict in all respects?

JUROR CRONKRITE: Yes.

THE COURT: Mr. Docherty, does the verdict as published constitute your verdict in all respects?

JUROR DOCHERTY: Yes.

THE COURT: Miss Galle, does the verdict as published constitute your individual in all respects?

JUROR GALLE: Yes.

THE COURT: Mr. Jones, does the verdict as published constitute your verdict in all respects?

VENIREMAN JONES: Yes.

THE COURT: Mr. Klimek, does the verdict as published constitute your verdict in all respects?

JUROR KLIMEK: Yes.

THE COURT: Mr. Nevins, does the verdict as published constitute your verdict in all respects?

JUROR NEVINS: It does.

THE COURT: Mr. Pawlicki, does the verdict as published constitute your verdict in all respects?

JUROR PAWLICKI: Yes.

THE COURT: Miss Thames, does the verdict as published constitute your verdict in all respects?

VENIREMAN THAMES: Yes.

THE COURT: Mr. Winter, does the verdict as published constitute your verdict in all respects?

JUROR WINTER: Yes.

THE COURT: Mr. Young, does the verdict as published

constitute your verdict in all respects?

VENIREMAN YOUNG: Yes.

THE COURT: All right. I will instruct the clerk to enter the verdict, and I will formally excuse you and thank you on behalf of everyone and the United States and the courts for your service as jurors.

I would like, if you, I know the weather is terrible out there, but if you have just five minutes, if you could come back to chambers, I would like to give you certificates and to thank you personally and to answer any questions that you may have. So I will see you back there for a couple minutes.

Okay, thank you.

(Jury discharged) at 10:38 a.m..)

THE COURT: Do you wish some additional time?

MR. TURNER: Yes. For post-trial motions, Judge?

THE COURT: Yes.

MR. TURNER: Yes. I just have some matters to attend to. I'm wondering if I could have at least 30 days?

THE COURT: If you think you need the transcript, you may want more than that.

MR. TURNER: Well, okay.

THE COURT: Well, do you want to say 45?

MR. TURNER: If I could have 45.

THE COURT: Well, make it 60.

MR. TURNER: And, Judge, in the interim, I may have

THE CLERK: 2005 C CR 672, USA versus O'Connor; for sentencing.

MS. JOHNSON: Good morning, Your Honor. Lela Johnson on behalf of the United States.

THE COURT: Good morning.

MR. TURNER: Good morning, Your Honor. Phillip Turner on behalf of the defendant Miss O'Connor, who is present before the Court.

THE COURT: Good morning.

First of all, the motion for judgment of acquittal is denied. I've decided that there just isn't any basis there on which I could grant it.

Okay. Let's talk about sentencing.

MR. TURNER: And, Judge, excuse me. I assume that the motion for new trial is also denied?

THE COURT: That's also denied.

MR. TURNER: Okay.

THE COURT: Okay.

MR. TURNER: Judge, in connection with the sentencing, I received just a little while ago a letter from the defendant's mother which she wanted the Court to look at.

THE COURT: All right.

MR. TURNER: The government hasn't seen it, so I will give it to the government first, and then we can tender it.

THE COURT: You know, the one issue I saw in here, by