UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

Case No. 5:20-CR-28-MW/MJF

UNITED STATES OF AMERICA

v.

JAMES D. FINCH,

Defendant.
_____/

DEFENDANT FINCH'S RENEWED MOTION FOR JUDGMENT OF ACQUITTAL

Defendant James Finch, through undersigned counsel, files his renewed Motion for Judgment of Acquittal under Rule 29(c) of the Federal Rules of Criminal Procedure as to Counts 1 and 2 of the Third Superseding Indictment. Following a multi-day trial, the jury failed to reach a unanimous verdict. After multiple jury questions, and receiving a modified Allen charge, the jury again indicated that it could not reach a unanimous verdict. The Court then granted a mistrial and discharged the jury on March 16, 2023.[1]

"[A] trial judge has the ***duty*** to grant the motion for judgment of acquittal when the evidence, viewed in the light most favorable to the government, is ***so scant***

[1] A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later. Fed. R. Crim. P 29(c).

that the jury could only speculate as to defendant's guilt." *United States v. Herberman*, 583 F.2d 222, 231 (5th Cir. 1978) (emphasis added). "The test is whether a reasonably minded jury must have had a reasonable doubt as to the existence of any of the essential elements of the crime." *Id.*

While the applicable standard certainly carries what is generally characterized as "prosecution-friendly overtones," *United States v. Ortiz*, 966 F.2d 707, 711-12 (1st Cir. 1992), judicial "oversight of sufficiency challenges is not an empty ritual," *id.* at 711-12. This is because the reasonable-doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. 358, 363 (1970).

The evidence will not support a conviction when, even viewed as a whole and in the light most favorable to the government, it "gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged." *United States v. Flores-Rivera*, 56 F.3d 319, 323 (1st Cir. 1995) (internal quotation marks and citation omitted); *see United States v. Guzman-Ortiz*, 365 F. Supp. 3d 215, 218-19 (D. Mass. 2019), *aff'd*, 975 F.3d 43 (1st Cir. 2020); *United States v. Schuchmann*, 84 F.3d 752, 754 (5th Cir. 1996) ("If . . . the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, the conviction should be reversed."). If the only evidence of a defendant's guilt can be described,

at best, as equal to or equally supportive of an alternative theory of the defendant's innocence, or nearly so, then "a reasonable jury *must necessarily entertain* a reasonable doubt." *United States v. El Naddaf*, No. CR 13-10289-2-DPW, 2023 WL 2541555, at *7 (D. Mass. Mar. 16, 2023) (citations omitted).

Also, when weighing the possible theories supported by the evidence, the court "must 'reject those evidentiary interpretations and illations that are unreasonable, insupportable, or overly speculative.' " *United States v. Rodríguez-Martinez*, 778 F.3d 367, 371 (1st Cir. 2015) (quoting *United States v. Spinney*, 65 F.3d 231, 234 (1st Cir. 1995)). A conclusion of guilt depending upon circumstantial inferences, for example, must reasonably be based in the evidence presented at trial, such that "(1) the inferences derive support from a plausible rendition of the record, and (2) the conclusion[ ] flow[s] rationally from those inferences." *United States v. López-Díaz*, 794 F.3d 106, 111 (1st Cir. 2015) (quoting *Spinney*, 65 F.3d at 234). Put another way, the reviewing court should not strain to draw inferences that have not been established sufficiently for a jury to find the defendant guilty of each element beyond a reasonable doubt. *See United States v. Valerio*, 48 F.3d 58, 64 (1st Cir. 1995) ("[A]lthough the government need not exclude every reasonable hypothesis of innocence in order to sustain the conviction, we are loath to stack inference upon inference in order to uphold the jury's verdict." (citations omitted)); *see also United States v. Guzman-Ortiz*, 975 F.3d 43, 55 (1st Cir. 2020) (rejecting

the government's invitation "to engage in . . . impermissible inference stacking" to conclude that the defendant was a member of a conspiracy); *United States v. Burgos*, 703 F.3d 1, 15 (1st Cir. 2012) (holding that "piling of . . . unfounded and unsupported inferences on top of each other by the government is clearly contrary to our own case law and that of the Supreme Court" (internal quotations omitted) (quoting *United States v. DeLutis*, 722 F.2d 902, 907 (1st Cir. 1983)).

A review of the record in this case firmly indicates that there is insufficient evidence to sustain a conviction. In fact, the government's proof depended entirely on an alleged single statement of admitted fraudster Michael White coupled with a government-inserted statement in the Antonius Barnes plea agreement factual statement. Both pieces of evidence, whether taken individually or collectively, are clearly insufficient to sustain a conviction of guilt beyond a reasonable doubt. Therefore, a judgment of acquittal should be granted as to both counts.

I. Insufficient Evidence on All Counts

A. Count 1 – Conspiracy – Insufficient Evidence of an Agreement

The Jury Instructions, ECF No. 533-10, provided in pertinent part:

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

> (1) Defendant James David Finch and Antonius Genzarra Barnes ***in some way agreed together*** to try to accomplish a shared and unlawful plan, specifically, to commit offenses under Title 18, United States Code, Section 666(a)(2), as described in paragraph 9b of the

> indictment;
>
> (2) the Defendant knew the unlawful purpose of the plan and willfully joined in it;
>
> (3) during the conspiracy, one of the conspirators knowingly engaged in at least one overt act as described in the indictment; and
>
> (4) the overt act was committed at or about the time alleged and with the purpose of carrying out or accomplishing some object of the conspiracy.

ECF No. 533-10 at 7.

There is insufficient evidence to support that any of the alleged co-conspirators ***agreed*** to engage in bribery as outlined in the Third Superseding Indictment. A conspiracy to commit bribery requires an illegal agreement between or among the alleged co-conspirators to knowingly and intentionally engage in bribery. As outlined in the jury instructions, the evidence must demonstrate that Defendant Finch and Mr. Barnes agreed together to try to accomplish a shared and unlawful plan, knew the unlawful purpose of the plan, and willfully joined in it. *Id.* The prosecution argued that the jury was required to "connect" the multiple "dots," permitting it reach a verdict of guilt as to both counts. Of course, the prosecution argued in the alternative in final rebuttal, suggesting that even if the jury acquitted on the conspiracy count, it should nonetheless convict on the single substantive count. Trial Tr. vol. 3, 725:22–726:5. Even in a light most favorable to the government, the "dots" represent nothing clear or apparent. And certainly, they do

not "connect." Instead, the "dots" are a mere patchwork of guesses, requiring the jury, and this Court, to do what they are not permitted lawfully to do: layer ***speculation upon speculation***. *See Herberman*, 583 F.2d at 231 (finding that it was the reviewing court's "duty" to grant an acquittal where the "jury could only speculate as to defendant's guilt"); *Valerio*, 48 F.3d at 64 (1st Cir. 1995) (rejecting any invitation to "stack inference upon inference in order to uphold the jury's verdict."); *Guzman-Ortiz*, 975 F.3d at 55 (rejecting the government's invitation "to engage in . . . impermissible inference stacking" to conclude that the defendant was a member of a conspiracy); *Burgos*, 703 F.3d at 15 (holding that "piling of . . . unfounded and unsupported inferences on top of each other by the government is clearly contrary to our own case law and that of the Supreme Court.")

Mr. Barnes, one of the two alleged conspirators—and a cooperating government witness—has denied any bribery agreement between himself and Mr. Finch. Mr. Barnes specifically testified that:

- He did not sell his vote at any time. Trial Tr. vol. 2, 352:20-22; 358:23-25.
- Defendant Finch did not buy his vote at any time. *Id.* at 325:23-24.
- He never possessed a corrupt state of mind. *Id.* at 325:25–326:2.
- Defendant Finch never said anything or did anything at any point to make Mr. Barnes think Defendant Finch intended to bribe him. *Id.* at 362:3-5.

Further, Mr. Finch has also denied any such illegal agreement existed.

In addition to there being insufficient evidence that Mr. Barnes and Mr. Finch specifically intended and agreed to enter into an illegal conspiracy to violate 18 U.S.C. § 666, there is also insufficient evidence that Mr. Finch "knew the unlawful purpose of the plan and willfully joined it." The evidence demonstrates that there was no illegal agreement, unlawful purpose, or meeting of minds that could sustain a conviction for conspiracy. *See United States v. Young*, 39 F.3d 1561, 1566 (11th Cir. 1994) ("It is axiomatic that mere association, without more, cannot give rise to a conspiracy conviction.").

The defense's unrebutted evidence proved that the City Manager was the critical component for nearly all ordinances, contracts, and projects within the City. Without the City Manager's review, approval, and recommendation, ordinances, contracts, and projects may never make it to the commissioners for voting. *See* Trial Tr. vol. 2, 95:11-14 ("The city manager is charged with making the directives of the commission, their policies, the everyday running of the City. They are charged with making sure that happens per the commission's directives and policies, procedures."); *id.* 118:21–1191 ("[T]he litmus test for me was if there was an idea coming through or a proposal, it ran through the city attorney first. If the city attorney had thumbs down, then it didn't go to the commission floor. But, while I was there certainly everything was vetted through the city attorney and put in front of the commission.").

If Defendant Finch was willing to bribe anyone for "certainty"—as the government argued was his motive—then there should or would be evidence of bribing or attempting to bribe the City Manager. But, there was no evidence of this provided to the jury. There was further no evidence of Mr. Finch's bribing or attempting to bribe the City Attorney. And, of course, no evidence was presented that Mr. Barnes somehow provided the "certainty," as claimed by the government. In fact, Mr. Barnes consistently and forcefully denied either that either he or Mr. Finch was part of any bribery conspiracy.

Importantly, two of the three witnesses constituting the core of the government's case were two Lynn Haven City Managers holding that position during the timeframe alleged in the Third Superseding Indictment: Joel Schubert and Michael White. Both witnesses testified favorably to Mr. Finch, indicating that Mr. Finch never offered them anything of value in exchange for official action. *See* Trial Tr. vol. 1, 145:11-12 (Schubert); Trial Tr. vol. 2, 252:16-17 (White).

The same was true for former commissioner Judy Tinder. Trial Tr. vol. 3, 529:10-12, 19-24 (testifying that no one on the commission, including Antonius Barnes, attempted to lobby for her vote); *id.* at 537-38 (testifying that Defendant Finch never offered her anything of value in an attempt to influence her). There was no evidence of attempted influence by or through Defendant Finch. *See also*, Trial Tr. vol. 1, 105 (Q: "Mr. Schubert, did Mayor Anderson ever pressure you to award

projects to Mr. Finch?" A: "No."). Indeed, nearly every witness who had known or met Mr. Finch testified about his honesty and truthfulness and that he has never asked them to do anything improper or illegal. *See* Trial Tr. vol. 3, 552:3-11 (Joseph Edward Mercer); 565:20-566:8 (Lloyd Dale Waldorff); 589:12-15 (Charles Commander); 610:11-18 (Former Bay County Sheriff and FDLE Director Guy Tennell).

There was further no evidence that Mr. Barnes attempted to influence anyone or said anything to anyone that would even "hint" at a bribe or an illegal agreement. *See* Trial Tr. vol. 2, 392:9-16. In fact, multiple witnesses testified that Mr. Finch neither said anything nor did anything that would "hint" at any illegal bargain with Mr. Barnes or any other city official. *See* Trial Tr. vol. 3, 537:23-25 (Judy Tinder); *id.* at 566:9-20 (Lloyd Dale Waldorff).

B. Insufficient Evidence of Corrupt Intent

For Count 2, the substantive bribery count, there is insufficient evidence that Defendant Finch engaged in any bribery, much less with the corrupt intent required for conviction. To convict Defendant Finch, the government must show beyond a reasonable doubt:

> (1) that Antonius Genzarra Barnes was an agent of the City of Lynn Haven;
>
> (2) that the City of Lynn Haven was a local government that received in any one-year period benefits in excess of $10,000 under a Federal program involving a grant, a contract, a subsidy, a loan, a guarantee,

insurance, or any other form of Federal assistance;

(3) that during the one-year period, the Defendant gave or offered something of value to Antonius Genzarra Barnes ***with the intent to influence or reward*** Antonius Genzarra Barnes in connection with any business, transaction, or series of transactions of the City of Lynn Haven, involving something of value of $5,000 or more; and

(4) ***that in so doing, the Defendant acted corruptly***.

ECF No. 533-10 at 10 (emphasis added).

The government's witness, Mr. Barnes, specifically testified that:

- He did not sell his vote at any time. Trial Tr. vol. 2, 352:20-22; 358:23-25.
- Defendant Finch did not buy his vote at any time. *Id.* at 325: 23-24.
- He never possessed a corrupt state of mind. *Id.* at 325:25–326:2.
- Defendant Finch never said anything or did anything at any point to make Mr. Barnes think Defendant Finch intended to bribe him. *Id.* at 362:3-5.

The government's case hinged entirely on the discredited and inconsistent testimony of Michael White, the former City Manager, and his recollection of a single uncorroborated statement purportedly made by Defendant Finch. Michael White testified that there was "an occasion" while he was City Manager where he was "out at Sheffield Park with Mr. Finch." Trial Tr. Vol. 2, 206:13-16. Michael White testified that at Sheffield Park with Mr. Finch they "got to talking about the 17th Street ditch a little bit." *Id.* At 207:13. According to Michael White, Antonius Barnes' name came up and Mr. Finch allegedly said "Well, he's my n[*****], he'll

dance if I tell him to dance." *Id.* At 207:17-19.[2]

In context, however, Michael White testified that the "issue" related to the 17th Street matter that was "coming back before the city commission" was "funding" for "a portion . . . to complete the whole project." *Id.* At 206:3-12. On cross-examination, Mr. White confirmed that the alleged conversation in Sheffield Park was about "financing on the 17th Street ditch." *Id.* at 279:13-7. Michael White claimed both "the 17th Street ditch come [sic] on over into my leadership, *id.* at 279:24-25, as well as "the original contracts were all done before" he was hired as City Manager. *Id.* at 280:5-6. On cross, Michael White admitted that the documents, the records, and the contracts would be the best evidence of timing related to *funding* the 17th Street Ditch. *Id.* at 280:17-21.

The record evidence conclusively shows that the funding associated with the 17th Street ditch was approved by the City commission well ***before*** Michael White was even hired as Lynn Haven City Manager. The unrebutted evidence shows the following:

[2] Of course, this was the statement as reflected in the set of notes produced at the eleventh hour by Mr. White and the government. Despite ten different 302 reports, multiple interactions, and four years of cooperation, and multiple demands by the defense, these notes appear on March 9, 2023, containing information not in the FBI 302 reports or the special agent's notes from December 2019, and just so happen to contain references to the "N" word a mere 87 days after White himself was exposed during defense cross-examination using his own extraordinary, racially charged texts. ECF No. 406, Hr'g Tr. 65-68, Dec. 12, 2022.

- April 28, 2015 – City Commission Minutes – Item #9 – Def.'s Ex. 51 at 26.

NEW BUSINESS:

Item #9. Discussion and possible action regarding award of bid for 17th Street drainage: Staff recommends approval to award 17th Street Drainage Improvements to Phoenix Construction in the amount of $335,132: The City received 3 bids on the project and Phoenix Construction came in as the low bidder for the base bid and deductive bid "A". All base bids for 240' of pipe were over the project budget and a deductive bid "A" was part of the original package that allowed for the deduction of pipe in 8' sections which would allow the project to come within budget. Total award would be for 208' of pipe and still leave a contingency.

Motion by Commissioner Schad: To accept the recommendation of staff as presented.
Second to the motion: Commissioner Ashbrook.

Mr. Leon Miller was concerned with the work beginning on Colorado Avenue.
Mr. Jim Slonina, Panhandle Engineering, stated that you start at the end and work upstream improving so that it does not create flooding issues.
Mr. Miller said the Commission should listen to the people.
Mr. Virgil Duffell stated that he supports Mr. Miller and suggested the City see what the cost of guardrails would be.
Mr. Dale Robitaille commented on the piping of 17th Street ditch.
City Manager Schubert reported that we are exploring guardrails and working on acquiring federal funds – should have an answer in 6-9 months.
Mr. Richard Walker reported that the City had the money and squirreled it away on other projects.

On Vote:	Schad:	aye
	Friend:	aye
	Barnes:	aye
	Ashbrook:	aye
	Anderson:	aye

Motion passed: 5-0

17th Street Drainage Improvements Phoenix Const.

- July 20 & 21, 2015 – Proposals from Phoenix to City of Lynn Haven to fund and finance the completion of the 17th Street Ditch project. Def.'s Exs. 46, 47.

- August 25, 2015–City Commission Minutes – Item #9 – Def.'s Ex. 51 at 75.

Item #14. Discussion and possible action regarding 17th Street Ditch Stormwater Project: City Manager Schubert stated that there is safety issues w/17th Street ditch and the City needs a "fix-it now" approach rather than trying to pipe the ditch incrementally. Change Order #1 is with our current contractor, Phoenix Construction, in the amount of $3,720,000 @ 2.55% interest for 20 years; this amount will pipe the east side of the ditch. Change Order #2 is for the west side in the amount of $1,595,000 and the City would need to partner w/FDOT for maintenance.

Motion by Commissioner Ashbrook: To accept Change Order #1, 3300 on the east side, as presented & work with FDOT of the west side.
Second to the motion: Commissioner Schad.

17th Street Ditch

Mr. Virgil Duffell stated that he is delighted to see this project move forward.
Mr. Richard Walker asked about the City's debt service and wanted to make sure the money was spent on the ditch.
Mayor Anderson stated that she has faith in City Manager Schubert to move the City forward.
City Manager Schubert stated that he hoped he lived up to everyone's expectations.
Mr. Tom Vickers suggested this project be postponed to meet with FDOT to discuss financing options.
Ms. Anita Samson asked about grant options.
Mayor Anderson asked if Change Order #2 if the price would be the same.
Mr. James Finch, Phoenix Construction, stated that Change Order #2 would be good for one year.
Ms. Nancy Singleton commented on the ditch project.

On Vote:	Ashbrook:	aye	
	Schad:	aye	
	Friend:	aye	
	Anderson:	aye	Motion passed: 4-0

- February 28, 2017–City Commission Minutes – Item #14 – Def.'s Ex. 53 at 21.

Item #14. Discussion and possible action regarding piping the balance of the 17th Street ditch: Under a current contract, 17th street East is near completion. In August 2015, the Commission contemplated a change order that would complete the project by piping the West side of 17th Street. The decision was deferred in favor of investigating a partnership with FDOT since they share ownership. In the interim, FDOT has agreed to pipe the 900' they own at their cost. This leaves a balance of approximately 650' of open ditch. The contractor has offered to prorate the original price based on the 650' that remains. Fiscal Impact: $668,000. City Manager Schubert stated that if approved he would suggest to include in the motion: 1) the authority for the Mayor/City Manager to sign the change order in order to expedite the work & also a $35,000 task order for engineering services; 2) if the Commission decides on the west-side at $668,000 the City Manager would suggest to include this amount into the existing $3.72 mil promissory note that was approved for the east-side of 17th Street ditch. City Manager Schubert recommended a 30-year promissory note.
City Attorney Jackson asked if the new promissory note will be at the current rate? City Manager Schubert stated yes.

17th Street Ditch Piping

Motion by Commissioner Barnes: To approve the recommendations of City Manager Schubert as stated above.
Second to the motion: Commissioner Ashbrook.

On Vote:	**Barnes:**	**aye**	
	Ashbrook:	**aye**	
	Schad:	**aye**	
	Friend:	**aye**	
	Anderson:	**aye**	**Motion passed: 5-0**

- July 11, 2017–City Commission Minutes – Item #12 – Def.'s Ex. 53 at 74.
  - Michael White appointed City Manager by 4 – 1 vote.

As a result of the irrebuttable inconsistencies within Michael White's testimony regarding the funding and approval for the 17th Street Ditch project, the Court may conclude that the government elicited perjured testimony in that it was factually impossible for the conversation described by Michael White to have taken place. *Schuchmann*, 84 F.3d at 756; *see also United States v. Osum*, 943 F.2d 1394, 1405 (5th Cir. 1991) ("[T]estimony generally should not be declared incredible as a matter of law unless it asserts facts that the witness physically could not have observed or events that could not have occurred under the laws of nature."). After February 28, 2017, there would have been no need for Defendant Finch to discuss with Michael White the financing of a project that had already been approved by the City Commission prior to the hiring of Michael White. This, of course, is without regard to the fact that no one heard or witnessed this fantastic, racially charged statement that surfaced at the eleventh hour in violation of multiple Court orders requiring earlier production.

Even if the so-called Sheffield Park repulsive statement was made, which it was not, that statement does not establish corrupt intent of Defendant Finch in December 2017 when he provided the $5,000 check to Antonius Barnes. It is nothing more than basic retaliation—invented testimony by the government cooperator who had been exposed as a racist and fabricator some 87 days earlier during an evidentiary hearing. ECF No. 406, Hr'g Tr. 65-68, Dec. 12, 2022.

Again, even Mr. Barnes denied repeatedly that there was any corrupt intent. Trial Tr. vol. 2, 325:25–326:2. He has stated this consistently before arrest, during plea discussions, after plea, and during trial. *See id.* at 325:23-24; 352:20-22; 358:23-25; 362:3-5. The government of course argued and will suggest that the government-drafted statement it inserted into the Statement of Facts used to support Mr. Barnes's plea agreement is somehow sufficient evidence of the parties' agreement and Defendant Finch's intent to influence Mr. Barnes. This argument should be rejected by the Court. The statement authored and cited by the government says:

> BARNES solicited these "loans" from Individual A because BARNES anticipated he have [sic] a subsequent need to obtain loans from banks. BARNES was concerned that if he obtained loans from a bank, it would prevent him from obtaining subsequent loans if needed. At the times he solicited these funds from Individual A, BARNES knew that Individual A had projects with the City and before the City Commissioners. BARNES sought, agreed to accept, and received these things of value from Individual A with the intent that he would be influenced in the performance of official acts. BARNES understood that he was expected, as a result of these payments, to support Individual A's projects as specific opportunities arose. BARNES took official action in favor of Individual A's projects.

Gov't Ex. 5N ¶ 13.

Critically, the so-called Statement of Facts is not substantive proof that can be used against Defendant Finch. First, the Statement of Facts does not contain Barnes's actual statements. The document was a government-drafted summary of items it believed it could prove should Mr. Barnes' case gone to trial. Second, the

statement in paragraph 13 relates to Mr. Barnes, not Defendant Finch. Thus, it's not evidence of Finch's state of mind, which is a necessary element for Count 1, nor is it evidence of Finch's intent or understanding, which is a necessary element for Count 2.

Even if the Court considers it as possible impeachment evidence against Mr. Barnes, it cannot be used as substantive evidence of guilt in a separate trial against Defendant Finch. *United States v. Feliciano*, 761 F.3d 1202, 1210 (11th Cir. 2014) ("Ordinarily a prior inconsistent statement is admissible only for the purpose of impeachment and not as substantive evidence.") (citing *United States v. Livingston*, 816 F.2d 184, 191-92 (5th Cir.1987).[3]

[3] Historically, the government in this case regularly has presented in plea documents factually dubious and unnecessary statements, many of which have turned out to be simply false. This is especially inappropriate where the dubious factual statements relate to a party in interest who is not even present. In *United States v. Michael White, et al.*, No. 5:19-CR-78-RH (N.D. Fla.), Defendant David Horton expressed statements of innocence at his change of plea hearing on May 28, 2020, stating that he could not swear under oath that he knew something that he did not know. The government pushed for the entry of the plea, arguing that it could just be an issue of "semantics." The Court did not accept the plea agreement and statement of facts that was presented, instead setting the matter for trial in August 2020. *Id.* at ECF No. 90. Ultimately, the "semantics" were ironed out by modulating the language, and the Court accepted the defendant's plea. *Id.* at ECF Nos. 105, 106. In *United States v. Joseph Adam Albritton*, No. 5: 20-CR-28-MW (N.D. Fla.), a similar event occurred, requiring the defense counsel to correct the government's proffered statement of facts. *Id.* at ECF No. 223. As it relates to a Statement of Facts in support of a Plea Agreement, the Court's interest is to make sure there is a sufficient factual basis to support a plea of guilty to the charged offense. It is not to lock in a potential witness to a statement that the government can then use in a separate trial

The government presented no evidence from an undercover agent or undercover cooperating witness. Indeed, there were neither tapes, nor wiretaps, nor recordings. There was no testimony of a confession or other evidence by Barnes or Defendant Finch. In fact, there was just the opposite—open, traceable and visible transactions between Defendant Finch and Mr. Barnes.[4]

Aside from the alleged Sheffield Park conversation with serious racial overtones and the dubious statement inserted in the Barnes plea agreement by the government in a separate proceeding, there simply is ***no evidence*** of illegal intent or willful illegal conduct.

There is further zero evidence of concealment of bribes—which have been

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against a party who was not present at the plea hearing and is without the constitutional protections afforded by the Confrontation Clause. Such a result would stand the law on its head, allowing the government to move in for example a Presentence Investigation Report of one defendant as substantive evidence against a separate defendant. Why even call the co-defendant witness? The government could simply offer the unsupported statement drafted by the government and slipped into the factual statement or the PSI. The gross constitutional violations are clearly apparent.

[4] The government presented testimony from Special Agent Crecelius that Barnes purchased items and food from various business or companies and summarily concluded that these expenses were personal and not business related. Trial Tr. vol. 2, 472:1-5. However, this testimony is "so scant that the jury could only speculate" as to a transaction's intended purpose, not draw a reasonable inference of Finch's corrupt intent—which is the required element to find him guilty beyond a reasonable doubt. In truth, the overwhelming documentary and testimonial evidence demonstrated that Mr. Barnes was spending the loan proceeds on exactly what a reasonable person would do in an effort to initiate an insurance business.

long recognized as powerful evidence of corrupt intent. Here, the wholesale absence of concealment evidence alone is sufficient to grant the Renewed Motion for Judgment of Acquittal. *See United States v. Roberson*, 998 F.3d 1237, 1249 (citing *United States v. McNair*, 605 F.3d 1152, 1197 (11th Cir. 2010)). In *Roberson*, the defendant challenged the sufficiency of evidence for a conviction under 18 U.S.C. § 666(a)(2), but in affirming the conviction the Eleventh Circuit held that the nature, timing, secret recording, and routing of payments through charitable foundations and a law firm allowed for reasonable inferences of corrupt intent.

In this case, there is no evidence that ***Defendant Finch*** concealed the principal loan disbursements to Mr. Barnes. The nature of the loan was legitimate. The timing was legitimate. There were no secret recordings. All payments were made via check. The memo line on five out of the seven checks indicated that it was part of their loan agreement. Six of the seven checks were deposited into Mr. Barnes' business bank accounts. All checks were written between (1) the time Mr. Barnes was trying to re-launch his insurance business in September 2015 and (2) the settling and winding down of his business affairs in late-2017 and early-2018. Not a single government witness testified that the checks were intended for any other purpose than for use to support Mr. Barnes' insurance business. In fact, the government's witness admitted that the FBI did not have a forensic accountant analyze Mr. Barnes' business or personal bank accounts. Trial Tr. Vol. 2, 462. In short, from Mr. Finch's

perspective, the business loan was open and notorious in every way.

C. Insufficient Evidence of a Federal Benefit

Here, the City's receipt of federal *benefits* is an essential element of the charges against Defendant Finch. The Court determined that the evidence and testimony presented by the government was sufficient proof of a federal benefit. Trial Tr. vol. 3, 735:4-9.

Upon closer inspection, however, it becomes clear the government failed in its burden. The government presented evidence from only ***state-level*** witnesses that the City of Lynn Haven received ***federal funds***, but "an organization is not a ***beneficiary*** of a federal program merely because the organization receives ***federal funds***." *Fischer v. United States*, 529 U.S. 667, 682 (2000) (emphasis added).

On the morning of March 15, 2023, the Court announced that it had received and reviewed Defendant's Motion for Judgment of Acquittal and would be taking the Rule 29 motion, ECF No. 524, under advisement. Trial Tr. vol. 3, 515. But, the Court also requested the parties to be prepared to discuss *Fischer* and what quantum of proof would be considered sufficient. *Id.* at 515-16.

Following closing arguments, the Court ruled on Defendant's Motion for Judgment of Acquittal, finding that the evidence related to federal benefits was sufficient because "here, for example, we have FEMA describe what it is . . . then we have the money going for a project related to an emergency center." *Id.* at 735:4-

6. Respectfully, government ***did not*** present any testimony from FEMA, NOAA, or the DOJ about a federal program's structure, operation, and purpose to fulfill the requirements of *Fischer*, which was factually and procedurally distinguishable as described below.

"To determine whether an organization participating in a federal assistance program receives 'benefits,' an examination must be undertaken of the program's structure, operation, and purpose." *Fischer*, 529 U.S. at 681. And "there must be a nexus between the funds and their ultimate use to satisfy § 666."[5] *United States v. McLean*, 802 F.3d 1228, 1240 (11th Cir. 2015) ("In other words, to constitutionally cabin § 666 courts must evaluate ***a federal program's*** 'structure, operation, and purpose' to determine if the federal receipts qualify as benefits. Failure to conduct this necessary investigation violates *Fischer*'s admonition that § 666 is not a boundless statute that applies to virtually every state bribery or fraud case.") (emphasis added); *see also United States v. Edgar*, 304 F.3d 1320, 1325 (11th Cir. 2002) ("After *Fischer*, it is clear that the term 'benefits' encompasses only federal funds expended under sufficiently comprehensive programs. Application of this standard is to be guided by reference to a program's 'structure, operation, and

[5] The question whether there exists a nexus between federal funds and the ultimate use of the funds (which is required) and whether there exists a nexus between federal funds and an alleged bribe or fraud (which is not required) are independent questions.

purpose,' as well as the conditions under which recipient entities receive funds."); *United States v. Atalig*, No. 1:18-cr-00013, 2020 WL 5096979, at *3-5 (D.N. Mariana Islands Aug. 31, 2020) (citing *McLean* for proposition that a nexus is required between federal funds and their ultimate use, finding that municipal government pooled monies and no evidence of ultimate use of federal funds, and granting motion for judgment of acquittal based on lack of evidence of a § 666 federal benefit).[6]

Fischer provides an excellent analysis of a qualifying program's "structure, operation, and purpose," but is otherwise factually and procedurally distinct. In *Fischer*, the parties stipulated that Medicare was a qualified federal assistance program. *Fischer*, 529 U.S. at 676. The dispute concerned whether payments made to hospitals were a benefit or a purely commercial transaction, so the Supreme Court analyzed the "structure, operation, and purpose" of the Medicare program to determine whether hospitals were beneficiaries. Conversely, the Supreme Court did not analyze whether the evidence sufficiently demonstrated a program's structure, operation, and purpose beyond a reasonable doubt such that the program qualified

[6] *See United States v. Copeland*, 143 F.3d 1439, 1442 (11th Cir. 1998) ("Punishing the Appellants' conduct might further the statute's goal of protecting the integrity of federal funds, but it is not the role of this Court to expand the scope of § 666 to encompass such behavior . . . . The Government failed to prove that Lockheed is an organization that received, in any one year period, benefits in excess of $10,000 under a federal program . . . . Accordingly, we vacate the Defendants' convictions for bribery under 18 U.S.C. § 666 and § 2.").

as a federal assistance program. *See generally id.* at 690 n.3.

Here, the government presented generic evidence from ***state-level*** witnesses that the City indirectly received funds from federal agencies but failed to present evidence of the structure, operation, and purpose of the ***federal programs*** themselves. The government likewise failed to present sufficient evidence of a nexus between the funds received and their ultimate use. So, the question whether FEMA, NOAA, or the DOJ's passthrough-funding programs constitute the requisite federal ***benefit*** cannot be left to jurors' exercise of common sense and reliance on general knowledge of FEMA, NOAA, or the DOJ's "structure, operation, and purpose." Doing so would allow jurors to substitute extra-record knowledge for gaps in the government's evidence and would relieve the Government of its burden of proving an essential element of the offense. *United States v. Bravo-Fernandez*, 913 F.3d 244, 248-51 (1st Cir. 2019) (reversing § 666 conviction and directing district court to enter a judgment of acquittal).

At most, the government witnesses testified about the State of Florida's component and participation, but not about the federal component and participation. For instance, Joel Schubert testified that Lynn Haven received a grant through FEMA and the Hazard Mitigation Grant Program to purchase a generator for an emergency operations facility. *See* Trial Tr. vol. 1, 95-98. However, Mr. Schubert gave no testimony concerning the structure, operation, and purpose of FEMA or the

Hazard Mitigation Grant Program. *Id.* Further, Mr. Schubert gave no testimony to evidence that the funds received were ultimately used to purchase the generator. *Id.* The funds just as likely could have been intermingled in the City's general funds and ultimately used for something unrelated to a generator. The same is true for Pamela Price's testimony. *See* Trial Tr. vol. 2, 419-27.

Joel Schubert also testified that the City received a grant through the DOJ's Justice Assistance Grant Program. *See* Trial Tr. vol. 1, 95-98. But again, Mr. Schubert gave no testimony concerning the structure, operation, and purpose of Justice Assistance Grant Program. He indicated he was only "generally" familiar with the program and thought the City "probably" applied for a grant. And Mr. Schubert again gave no testimony to evidence how the funds received, if any, were ultimately used. Likewise, Codi Menacof's testimony is devoid of the requisite evidence concerning the structure, operation, and purpose of the DOJ's Edward Byrne Memorial Justice Assistance Grant. *See* Trial Tr. vol. 2, 427-33.

Lastly, Holly Edmond testified that Lynn Haven received grant assistance with a shoreline stabilization project at Kensaul Park. *Id.* at 301-02. Although Ms. Edmond provided testimony about the State's application process and passthrough mechanics, she gave no testimony about NOAA's "structure, operation, and purpose" to determine if the federal receipts qualify as benefits.

In short, the Court must "'scrutinize the actual evidence' the government

presented as to whether federal funds rise to the level of 'benefits.'" *United States v. Doran*, 854 F.3d 1312, 1322 (11th Cir. 2017) (J. Prior, concurring). A lack of evidence precludes an examination of whether any federal funds qualify as federal benefits, and thus, the evidence is insufficient for any rational trier of fact to sustain a conviction. Therefore, the Court should enter a judgment of acquittal as to Counts 1 and 2. *See McLean*, 802 F.3d at 1248 (affirming judgment of acquittal based lack of evidence of a § 666 federal benefit); *Bravo-Fernandez*, 913 F.3d 248-51 (reversing § 666 conviction and directing district court to enter a judgment of acquittal based on lack of evidence of a § 666 federal benefit); *Atalig*, No. 2020 WL 5096979, at *3-5 (granting motion for judgment of acquittal based on lack of evidence of a § 666 federal benefit); *see also Doran*, 854 F.3d 1322 (concurring in judgment reversing conviction based on lack of evidence of a Section 666 federal benefit) (J. Prior, concurring).

D. Unrebutted Evidence Negating Corrupt Intent

One last point is worth noting inasmuch as it reflects the true speculative nature of what the government is asking the jury to do. As noted by the Court following closing arguments, the defense presented the following ***unrebutted*** evidence and testimony:

- There is a process whereby all City projects, contracts, and resolutions were voted on and were vetted by City department heads and staff before being presented to the commissioners.

- The City commissioners voted based on the recommendations of staff.
- The City commissioners generally approved the lowest bid unless there was some other concern about the project itself.
- There was general unanimity among the commissioners if a project or resolution that went through a bidding process was recommended by staff.
- All matters specifically related to James Finch or one of his companies received unanimous approval after staff review and recommendation to the commissioners.
- Commissioner Barnes voted on Finch-related proposals and projects for years and years and years.
- Mr. Finch's bids were accepted because his was the low bid.
- A large contributing factor in Mr. Finch's bids' being lower than competitors was because he was local and had the employees and equipment in place.
- Mr. Finch worked with and offered to work with the City of Lynn Haven not just because he was a businessman, but because he had a vested interest in doing things for the City in which he was born and lived.
- Mr. Finch, "while he may not have a J.D. from Harvard, he's a pretty bright guy."
- Mr. Finch did not influence or attempt to influence Mr. Schubert by offering to sell him a home for thousands of dollars more than Mr. Schubert was wanting to pay.

II. Conclusion

The evidence here is "so scant that the jury could only speculate as to defendant's guilt." Even viewing all the evidence in a light most favorable to the prosecution, a reasonably minded jury must have had a reasonable doubt as to the

existence of any of the essential elements of the alleged crime of conspiracy and bribery. In this case, at least half of the jury, maybe more, concluded that the evidence of Mr. Finch's guilt was insufficient. In a renewed context, upon reflection and review of the record, the Court was eminently correct that this case "barely survive[d] a Rule 29 motion" at the close of the government's case. Upon further review of all the evidence, including the unrebutted evidence from the defense, which should give "equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence," an entry of a Judgment of Acquittal is warranted.

WHEREFORE, Defendant James D. Finch respectfully moves for the entry of a Judgment of Acquittal on Counts 1 and 2 of the Third Superseding Indictment.

Respectfully submitted,

/s/ Guy A. Lewis

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 29, 2023, the foregoing document was with the Clerk of the Court using CM/ECF and that a true and correct copy of the foregoing has been served electronically via the CM/ECF System on all counsel of record.

/s/ Guy A. Lewis
GUY A. LEWIS