No. 09-11101-GG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LUIS M. CANDELARIO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA, No. 6:07-cr-211-ORL-22-DAB
Hon. Anne C. Conway, United States District Judge

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United States of America v. Candelario
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FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

LUIS CANDELARIO,
Defendant-Appellant.

Certificate of Interested Persons and Corporate Disclosure Statement

To the certificate of interested person in appellant's opening brief, appellee adds:

1. Carolyn J. Adams
2. Luis Candelario
3. Scott D. Hammond
4. David P. Rhodes
5. Angel Rodriguez-Vasquez
6. Peggy Ronca
7. Thomas Vander Luitgaren
8. Christine A. Varney
9. Philip J. Weiser

The victims in this case are:

1. Advanced Vehicle Systems
2. AK Specialty Vehicles
3. Fisher Scientific International
4. JPS Communications

Dated: July 14, 2009

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument will be of assistance to the Court.

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STATEMENT OF JURISDICTION

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

STATEMENT OF THE ISSUES

1. Whether the evidence was sufficient to support Candelario's conviction for conspiring to commit wire fraud and honest services fraud.
2. Whether the district court plainly erred in not finding 18 U.S.C. § 1346 unconstitutional on its face or as applied to Candelario.
3. Whether the district court clearly abused its discretion in excluding irrelevant and cumulative evidence concerning prior litigation between Candelario and his employer.
4. Whether the district court abused its discretion in denying Candelario's proposed jury instructions.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

On December 5, 2007, a grand jury sitting in the Middle District of Florida indicted defendant Luis Candelario and Thomas E. Vander Luitgaren ("Vander") on one count of violating 18 U.S.C. § 1349 for conspiring to commit wire fraud

and honest services fraud in violation of 18 U.S.C. §§ 1343 and 1346. Doc. 1, at ¶¶ 6, 16. The indictment charged Candelario with participating in a kickback scheme as part of the sale of several emergency vehicles by JPS Communications Inc. ("JPS"), Candelario's employer, to the Virgin Islands government, in which Candelario, Vander, and Angel Rodriguez-Vasquez ("Rodriguez-Vasquez") "agreed to pay or accept approximately $415,000 in secret kickback or commission payments unbeknownst to their employers" by means of wire communications in interstate commerce. Doc. 1, at ¶¶ 1, 5, 8, 9, 11-14.

On July 1, 2008, the first trial ended in a mistrial because the jury was hopelessly deadlocked. Doc. 247, at 10-11.[1] On October 1, 2008, a jury convicted Candelario and Vander on all charges. Docs. 386, 387. On February 4, 2009, the district court entered final judgment, sentencing Candelario to 18 months in prison, three-years supervised release, a $100 special assessment, and $249,351.27 in restitution (later reduced by four cents). Docs. 437, 464. The court extended the time for Candelario to file a notice of appeal until March 2, 2009. Doc. 435. Candelario filed a notice of appeal on February 28, 2009. Doc. 448. He remains

[1] Candelario moved to dismiss the charges against him on double jeopardy grounds. Docs. 244, 245. The court denied the motion, finding his double jeopardy claim to be "frivolous," retaining jurisdiction for the retrial. Doc. 300, at 11, 16-17. Vander filed an interlocutory appeal (No. 08-14876-DD), challenging the district court's order, Doc. 301, but it was subsequently dismissed, Doc. 395.

free on bail pending appeal. Doc. 437, at 2. Vander has not appealed.

B. Statement of Facts

1. Background

In 2003, the Virgin Islands government sought to procure thirteen emergency vehicles with supporting equipment. Doc. 403 (9/16 Tr.), at 19-21. Its preferred contract provider, Fisher Scientific International, LLC ("Fisher"), could not get the proper vehicle licensing, so the Virgin Islands government entered into a contract with JPS, *id.* at 18, 71, a wholly-owned subsidiary of Raytheon Corp. ("Raytheon"), Doc. 406 (9/22 Tr.), at 4. JPS subcontracted AK Specialty Vehicles, LLC ("AKSV") to provide the vehicles. Doc. 403 (9/16 Tr.), at 12. AKSV subcontracted Advanced Vehicle Systems, LLC ("AVS") to provide bomb disposal equipment. *Id.* at 12-13. JPS provided the communications systems for the vehicles. *Id.* at 41. JPS received $1,114,800, Gov. Exh. 39A; AKSV received $2,338,147, *id.*; and AVS received $832,522, Gov. Exh. 14B.

Candelario was a sales representative for JPS, representing JPS on the Virgin Islands emergency vehicle contract. Doc. 403 (9/16 Tr.), at 9.[2] Vander was general manager of the AKSV plant that provided the vehicles. *Id.*

[2] Candelario worked for Raytheon before JPS, Doc. 408 (9/24 Tr.), at 94-95, and was sometimes referred to as a "Raytheon employee." *See, e.g.*, Doc. 410 (9/26 Tr.), at 131.

Rodriguez-Vasquez was a sales representative for Fisher and served as an "intermediary" helping JPS get the contract. *Id.* at 68, 72.

JPS policy allows its employees to receive commissions but requires that all such commissions be paid by JPS. Doc. 406 (9/22 Tr.), at 7-9, 110, 123-24. JPS policy prohibits other companies from paying a commission directly to one of its employees. *Id.* JPS policy also prohibits its employees from working as an independent sales representative during the period of employment, and from receiving unauthorized commissions. *Id.* Fisher has similar policies. *See* Doc. 403 (9/16 Tr.), at 78-79.

2. Candelario's Involvement In The Conspiracy

Candelario's involvement in the conspiracy began in late 2003. Doc. 403 (9/16 Tr.), at 69. At that point, Rodriguez-Vasquez was looking for a new seller on the emergency vehicles contract because his employer, Fisher, had withdrawn. *Id.* at 72-74. Candelario arranged a "finder's fee" for Rodriguez-Vasquez of approximately $45,000 for facilitating the sale to JPS. *Id.* at 77-80.[3] Rodriguez-

[3] The finder's fee was scheduled to be paid in several installments. Candelario paid Rodriguez-Vasquez $20,000 in cash. Doc. 403 (9/16 Tr.), at 78. Rodriguez-Vasquez also received two wire transfers at a bank in Puerto Rico from Glenn Hower, at AVS, for $3,333.06 and $7,717.50, after Candelario "insinuated that if [AVS] didn't pay the commission, that the contract would be pulled from us." *Id.* at 235; *see also id.* at 80. Hower planned to make an additional wire transfer of $13,566, but did not do so after the government uncovered the

Vasquez kept the payment secret from Fisher because he "would have been fired." *Id.* at 78; *see also id.* at 146 (Candelario advised Rodriguez-Vasquez "to hide [the finder's fee] from Fisher").

Candelario also agreed with Vander, AKSV's plant manager, that AKSV would pay Candelario a secret commission of $340,417, in exchange for kickback payments of $30,000 to Vander. *See, e.g.*, Doc. 404 (9/17 Tr.), at 174-77; Doc. 406 (9/22 Tr.), at 17; Doc. 407 (9/23 Tr.), at 156-59; Doc. 408 (9/24 Tr.), at 46-52, 222-23. Candelario received a $2,500 "advance" on January 13, 2004. Gov. Exh. 30A; Doc. 408 (9/24 Tr.), at 193. Candelario received the remaining $337,647 pursuant to checks payable to his wife, Bernadette Candelario, each for $168,823.50 on March 10, 2004, and May 21, 2004, after submitting phony invoices he prepared from Cooper General (a company Candelario had conducted business with several years before) and Tab Associates LLC (a shell corporation Candelario formed over the internet corresponding to the names of his three children (Tatiana, Ashley, and Bryan)). Doc. 408 (9/24 Tr.), at 145-49, 174, 214; Gov. Exhs. 34, 36.[4] Each of the checks was handwritten, thus avoiding AKSV's

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conspiracy and advised him against it. Doc. 403 (9/16 Tr.), at 101. Rodriguez-Vasquez pled guilty to conspiracy to commit honest services fraud. *Id.* at 70, 107.

[4] Michael Fresco, the general manager for Cooper General, testified that the two phony invoices Candelario prepared did not match its format, had missing

automated payment system, and signed by Vander. Doc. 404 (9/17 Tr.), at 28-42. Shortly after Candelario received the two checks totaling $337,647 payable to his wife, Vander received two checks from Candelario on March 22, 2004, and May 24, 2004, each for $15,000. Gov. Exhs. 37A, 38A; Doc. 408 (9/24 Tr.), at 222-23.[5]

Candelario took numerous steps to hide his commission. Doc. 408 (9/24 Tr.), at 142; Doc. 409 (9/25 Tr.), at 27. As he testified at trial, "I didn't want [JPS] to know that I was getting this $340,000 because they would have [kept] it for themselves." Doc. 408 (9/24 Tr.), at 142. Likewise, Candelario "lied to" Jim Bottomley, an AKSV employee, *id.*, after Bottomley asked him "if AKSV paid any commissions to you for this sale," which would be "an ethics violation" since Candelario was a JPS employee. Gov. Exh. 20; *see also id.* (Bottomley thought commissions were paid to Rodriguez-Vasquez but not to Candelario). Candelario

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information, had the wrong logo, and contained other inaccuracies. Doc. 406 (9/22 Tr.), at 181-87. *Compare* Gov. Exhs. 31A, 33 (phony invoices), *with* Gov. Exhs. 55A, 55B (authentic Cooper General invoices).

[5] AKSV's checks were from its LaSalle Bank account in Illinois. Gov. Exhs. 30A, 34, 36. The money was deposited in Candelario's Bank of America account in Florida. Doc. 404 (9/17 Tr.), at 53; Doc. 407 (9/23 Tr.), at 23. Candelario's checks to Vander were from the same Florida account. Gov. Exhs. 37A, 38A. Although Candelario and Vander claimed the $30,000 was a "loan[]" (Br. 8), Candelario did not list it as a loan on his tax return, Doc. 406 (9/22 Tr.), at 207, take any collateral or charge any interest, Doc. 408 (9/24 Tr.), at 230-31.

falsely responded to Bottomley: "I heard about the [allegation], which really [surprised] me and pissed me off. I know for a fact that [I] was not given any commission and I have a [statement] from [Rodriguez-Vasquez] to prove that." *Id.* Candelario also lied about the commission payment to Ken Marks, the President of JPS, saying the payment "had nothing to do with JPS." Doc. 406 (9/22 Tr.), at 18.[6]

Vander also helped Candelario hide his $340,417 commission payment by falsifying the total amount of commissions in a spreadsheet submitted to executives at JPS. Gov. Exh. 43.[7] Candelario "thank[ed]" Vander for "fixing up [the numbers] a little," noting that he had been "worried," because "if [JPS] saw 300K commission they would really start to ask question[s]." Gov. Exh. 44B. Candelario reminded Vander to "[k]eep a low profile my friend, keep it lowwwwww." *Id.* Once the conspiracy was exposed, Candelario, Vander, and

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[6] Candelario also admitted to fabricating e-mails from his 17-year old son, Bryan Rodriguez, stating that "Luis Candelario should be cloned" and giving the false impression that Bryan was somehow involved with the performance of the contract. Doc. 408 (9/24 Tr.), at 145; Doc. 409 (9/25 Tr.), at 8-16.

[7] The spreadsheet listed total commissions as $102,147. Gov. Exh. 43. This falsification helped hide the commission to Candelario, because the spreadsheet did not state who was paying or receiving the commissions, *id.*, and $102,147 was a more reasonable amount of total commissions on the transaction, Doc. 406 (9/22 Tr.), at 122.

Rodriguez-Vasquez were fired because of the money they received. Doc. 403 (9/16 Tr.), at 214; Doc. 405 (9/18 Tr.), at 87; Doc. 406 (9/22 Tr.), at 111.

The jury convicted Candelario and Vander for conspiring to commit wire fraud in violation of 18 U.S.C. § 1343 and honest services fraud in violation of 18 U.S.C. § 1346, specifically finding Candelario and Vander guilty of both objects of the conspiracy. Docs. 386, 387.[8]

C. Standard of Review

This Court reviews challenges to the sufficiency of the evidence supporting a criminal conviction *de novo*, "'view[ing] the evidence in the light most favorable to the government, with all reasonable inferences and credibility choices made in the government's favor.'" *United States v. Spoerke*, No. 08-12910, 2009 WL 1424042, at *5 (11th Cir. May 22, 2009) (quoting *United States v. Keller*, 916 F.2d 628, 632 (11th Cir. 1990)). The district court's failure to hold 18 U.S.C. § 1346 unconstitutional is reviewable for "plain error" because Candelario did not raise his constitutional challenges in the district court. *United States v. Smith*, 459 F.3d 1276, 1282-83 (11th Cir. 2006); Candelario Br. 18. Evidentiary rulings are subject to review only for "clear abuse of discretion." *Smith*, 459 F.3d at 1295. Finally,

[8] The jury was separately instructed on both grounds. Doc. 412 (9/30 Tr.), at 233-38.

the district court's "refusal to give [] requested jury instruction[s]" is subject to review "for abuse of discretion." *United States v. Svete*, 556 F.3d 1157, 1161 (11th Cir. 2009) (en banc).

SUMMARY OF ARGUMENT

Candelario conspired to defraud his employer of hundreds of thousands of dollars through kickbacks and secret self-dealing. None of Candelario's arguments provides a legitimate basis for overturning his conviction.

1. Candelario was charged with conspiring to commit money or property wire fraud and honest services fraud in violation of 18 U.S.C. §§ 1343 and 1346. The jury was instructed and specifically found Candelario guilty on both grounds. The evidence supporting the charges was overwhelming, proving, *inter alia*, that Candelario paid kickbacks, forged false invoices, fabricated e-mails, and lied to various individuals to receive (and cover-up) over $340,000 in secret commission payments that should have been paid instead to his employer, JPS.

Though Candelario claims that the government's evidence is insufficient to support his conviction, Candelario never even attempts to explain why the evidence failed to prove a conspiracy to commit money or property wire fraud. Indeed, his guilt on this charge is apparent from his own admission that he hid the commission and lied about it because "I didn't want [JPS] to know that I was getting this

$340,000 because they would have [kept] it for themselves." Doc. 408 (9/24 Tr.), at 142.

Because the government presented sufficient evidence to sustain Candelario's conviction for conspiring to commit money or property wire fraud in violation of Section 1343, the Court need not consider the jury's alternative finding that Candelario also conspired to commit honest services fraud. Nevertheless, the evidence was also sufficient to prove a conspiracy to commit honest services fraud. Candelario intended to breach a fiduciary duty by enriching himself at JPS's expense and reasonably should have foreseen that JPS might suffer an economic harm through his self-dealing both in the short-term (because Candelario took money to which JPS was entitled) and in the long-term (because of the reputational harm associated with having employees involved with secret commission payments and kickbacks). The jury was entitled to credit that evidence and convict Candelario for conspiring to commit honest services fraud. Candelario's arguments to the contrary exhibit a misunderstanding of the elements of honest services fraud and the applicable standard of review.

There is no reason why this Court should wait for the Supreme Court to resolve *United States v. Black*, 530 F.3d 596, 600 (7th Cir. 2008), *cert. granted* No. 08-876 (U.S. May 18, 2009), before adjudicating Candelario's appeal.

Candelario's conviction can be sustained without considering the honest services object of the conspiracy because he also conspired to deprive his employer of money or property. But even with respect to honest services fraud, the district court in this case *already gave* an instruction akin to the one that Black has asked the Supreme Court to endorse. Thus, even if the Supreme Court reverses in *Black*, Candelario would not be entitled to any relief.

2. The district court did not plainly err in failing to hold Section 1346 unconstitutional on its face or as applied to Candelario. Numerous appellate courts have rejected identical facial challenges to the constitutionality of Section 1346, and the Supreme Court recently made clear in *United States v. Williams*, 128 S. Ct. 1830 (2008), that facial challenges are inappropriate where the statutory terms have a "settled legal meaning," as is the case with Section 1346. Candelario's as-applied challenge fares no better, as he was not prosecuted for any protected First Amendment conduct.

3. The district court did not clearly abuse its discretion in restricting the evidence Candelario presented regarding his prior employment lawsuit against JPS for racial discrimination. The district court gave Candelario wide leeway in presenting evidence on the subject and only excluded evidence the court found to be "irrelevant and cumulative." That determination was well within its discretion.

Candelario never discusses why the district court's ruling was wrong. Indeed, his arguments are so perfunctory that the Court should deem the issue abandoned.

4. Candelario's argument that the district court erred in rejecting his additional "theory of defense" instructions and Vander's proposed jury instructions 25 and 26 is so perfunctory that the Court should deem the issue abandoned. In any event, those proposed instructions were incorrect or misleading in several respects and/or sufficiently covered by other instructions, and the district court was within its discretion in rejecting them.

ARGUMENT

I. THE GOVERNMENT PRESENTED SUFFICIENT EVIDENCE THAT CANDELARIO CONSPIRED TO COMMIT MONEY OR PROPERTY WIRE FRAUD AND HONEST SERVICES FRAUD.

In reviewing the sufficiency of evidence to support a conviction, this Court "views the evidence in the light most favorable to the government, with all reasonable inferences and credibility choices made in the government's favor," *Spoerke*, 2009 WL 1424042, at *5 (citation and internal quotation marks omitted), and "will not overturn a conviction on the grounds of insufficient evidence 'unless no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,'" *United States v. Wright*, 392 F.3d 1269, 1273 (11th Cir. 2004) (quoting *United States v. Christo*, 129 F.3d 578, 579 (11th Cir. 1997)). The

evidence does not have to be inconsistent with every hypothesis other than guilt, "as the jury is free to choose among reasonable constructions of the evidence." *United States v. Suba*, 132 F.3d 662, 671-72 (11th Cir. 1998).

Here, the government charged Candelario and Vander with conspiring to defraud another in violation of 18 U.S.C. § 1343 to obtain money or property – generally referred to as a "money or property wire fraud," *United States v. Poirier*, 321 F.3d 1024, 1031 (11th Cir. 2003) – and with depriving others of their intangible right to the honest services of its employees – generally referred to as honest services fraud, 18 U.S.C. § 1346. Doc. 1, at ¶ 6. After a trial, the jury was instructed and found Candelario and Vander guilty of conspiring to commit both kinds of fraud. Doc. 412 (9/30 Tr.), at 233-38; Docs. 386, 387 (separately finding both objects of the conspiracy).[9] The government presented more than ample evidence to sustain the charges.

A. The Government Presented Sufficient Evidence That Candelario Conspired To Commit Money Or Property Wire Fraud.

To support a conviction for conspiracy under 18 U.S.C. § 1349, the

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[9] Honest services fraud is a type of mail or wire fraud, *see* 18 U.S.C. §§ 1341, 1343, and 1346, but is often presented as a separate theory from other forms of mail or wire fraud, *see, e.g.*, *United States v. deVegter*, 198 F.3d 1324, 1326-27 (11th Cir. 1999), *cert. denied*, 530 U.S. 1264 (2000); *Black*, 530 F.3d at 600, and was so presented in this case, *see* Doc. 1, at ¶ 6 (indictment); Doc. 412 (9/30 Tr.), at 233-38 (jury instructions); Docs. 386, 387 (verdicts).

government had to present sufficient evidence for a reasonable juror to conclude beyond a reasonable doubt that: (i) the defendant and another person agreed to try to accomplish a common and unlawful plan; (ii) that the defendant, knowing the unlawful purpose of the plan, willfully joined in it; (iii) that one of the conspirators during the existence of the conspiracy knowingly committed at least one overt act; and (iv) that the overt act was knowingly committed to accomplish some object of the conspiracy. *See, e.g.*, Eleventh Cir. Pattern Crim. Jury Instr. 13.1, at 137 (2003) (General Conspiracy Charge). The elements of a traditional "money or property wire fraud" under 18 U.S.C. § 1343 are: (i) "the defendant knowingly devised or participated in a scheme to defraud or for obtaining money or property by means of false pretense, representations or promises;" (ii) "the defendant did so willfully and with an intent to defraud;" (iii) "that the fraud related to a material matter;" and (iv) "that the defendant [used wire communications]." *Poirier*, 321 F.3d at 1031.

The government presented ample evidence proving that Candelario conspired to commit money or property wire fraud, showing, *inter alia*, that Candelario forged false invoices, fabricated e-mails, lied to various individuals to receive (and cover-up) over $340,000 in secret commission payments that should have been paid instead to his employer, JPS, paid kickbacks to Vander shortly after receiving his money, and used interstate wire communications to effectuate the

conspiracy. *See* pp. 3-7, *supra*.[10] The jury was entitled to rely on this evidence – and in particular the timing and method of the commission and kickback payments between Candelario and Vander – when convicting Candelario and Vander for conspiring to commit money or property wire fraud. *See, e.g., United States v. Westry*, 524 F.3d 1198, 1212 (11th Cir. 2008) (per curiam) ("because a conspiracy is predominantly mental in composition, circumstantial evidence is frequently resorted to in order to prove its elements") (citation and internal quotation marks omitted); *United States v. Macko*, 994 F.2d 1526, 1533 (11th Cir. 1993) (juries may infer specific intent wholly from circumstantial evidence); *United States v. Vera*, 701 F.2d 1349, 1357 (11th Cir. 1983) (a conspiracy can be inferred from a concert of action and a defendant's knowing participation in the conspiracy established through proof of acts in furtherance of the conspiracy); *see also United States v. Dial*, 757 F.2d 163, 170 (7th Cir. 1985) ("The defendants' elaborate efforts at concealment provide powerful evidence of their own consciousness of wrongdoing.").

[10] Vander also undertook numerous acts of deceit such as doctoring the amount of total commissions in a spreadsheet to JPS executives to hide the commission to Candelario. Gov. Exh. 43. Candelario "thank[ed]" Vander for "fixing up [the numbers] a little," noting that he had been "worried," because "if [JPS] saw 300K commission they would really start to ask question[s]." Gov. Exh. 44B.

Though Candelario baldly argues (Br. 11, 14, 17) that the evidence was insufficient to sustain a conviction for conspiring to commit money or property wire fraud in violation of Section 1343, he never explains why, arguing only that his conduct did not constitute honest services fraud. Nor could he reasonably contest that he conspired to commit money or property wire fraud given his own admission on the stand that he lied and hid the commission because "I didn't want [JPS] to know that I was getting this $340,000 because they would have [kept] it for themselves." Doc. 408 (9/24 Tr.), at 142; *see also* Doc. 406 (9/22 Tr.), at 18; Gov. Exh. 20. While Candelario testified that the money was rightfully his, *see, e.g.*, Doc. 408 (9/24 Tr.), at 143, the jury was "entitled not only to disbelieve his testimony but, in fact, to find that the opposite of his testimony was true." *United States v. Deverso*, 518 F.3d 1250, 1258 (11th Cir. 2008); *see also United States v. Williams*, 390 F.3d 1319, 1326 (11th Cir. 2004) ("Where some corroborative evidence of guilt exists for the charged offense . . . and the defendant takes the stand in [his] own defense, the [d]efendant's testimony, denying guilt, may establish, by itself, elements of the offense."). Candelario's conviction for conspiring to commit money or property wire fraud must be sustained.

B. The Government Presented Sufficient Evidence That Candelario Conspired To Commit Honest Services Fraud.

Because the jury was separately instructed on money or property wire fraud,

Doc. 412 (9/30 Tr.), at 233-35, and specifically convicted Candelario on that basis, Doc. 386, this Court need not address the sufficiency of the evidence supporting the alternative basis for his conspiracy conviction, honest services fraud. *See United States v. Peacock*, 654 F.2d 339, 348 (5th Cir. Aug. 27, 1981), *vacated in part on other grounds on reh'g*, 686 F.2d 356 (5th Cir. 1982), *cert. denied*, 464 U.S. 965 (1983) (conviction stood where jury returned special verdict specifically finding defendants guilty on 24 counts even though the evidence was insufficient on several counts).[11] Indeed, "[i]n [a case where the Government charged a conspiracy with two objects], it is not necessary for the Government to prove that the Defendant under consideration willfully conspired to commit both of those substantive offenses. It would be sufficient if the Government proves, beyond a reasonable doubt, that the Defendant willfully conspired with someone to commit one of those offenses." Eleventh Cir. Pattern Crim. Jury Instr. 13.2, at 139; Doc. 412 (9/30 Tr.), at 238.[12]

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[11] Decisions handed down by the former Fifth Circuit before the close of business on September 30, 1981, are binding precedent in this Court. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

[12] The same result would hold if the jury rendered a general verdict that did not include separate findings on each object of the conspiracy. *See, e.g.*, *Griffin v. United States*, 502 U.S. 46, 56, 112 S. Ct. 466, 472 (1991) ("Petitioner cites no case, and we are aware of none, in which we have set aside a general verdict because one of the possible bases of conviction was . . . merely unsupported by sufficient evidence."); *United States v. Browne*, 505 F.3d 1229, 1261-62 (11th Cir.

Regardless, the government presented sufficient evidence to sustain the honest services charges as well. To establish honest services fraud in a private-sector case, the government must present sufficient evidence for a reasonable juror to conclude beyond a reasonable doubt that the defendant "intended to breach a fiduciary duty, and that the [defendant] foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach." *United States v. deVegter*, 198 F.3d 1324, 1329 (11th Cir. 1999), *cert. denied*, 530 U.S. 1264 (2000). As the district court explained, the government presented ample evidence to satisfy these elements in this case:

> The Government presented sufficient evidence for the jury to find that Defendants intended to breach a fiduciary duty, and that they foresaw or reasonably should have foreseen that their employers might suffer economic harm. The Government presented evidence that Defendants corrupted the contractual process by diverting over $340,000 towards commission payments, some of which may not have been paid absent the conspiracy, and took steps to conceal the purpose and nature of these commissions from their employers. [Footnote citing "Trial Tr. 148-49, 155-60, 168-69, 228, Sept. 17, 2008 (testimony of AKSV President Phil Supple); Trial Tr. 119:8-23, 123:1-12, Sept. 18, 2008 (testimony of AKSV Chief Financial Officer Blake Bonyko); Trial Tr. 9:8-24, 18:8-22, 115-16, 119-20, Sept. 22, 2008 (testimony of JPS President Kenneth Marks and JPS Vice President of Operations Rick Summers)."] The Government also presented evidence that Defendants should have known that their corruption of the contractual process jeopardized their companies' future contracts and reputations. (Trial Tr. 137:17-20, Sept. 17, 2008; Trial Tr. 125-26, Sept. 18, 2008; Trial Tr. 8-9, Sept. 22, 2008.) Even if the parties to the contract believed that the overall

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2007) (affirming conviction based on *Griffin*).

> contract price was reasonable, the jury could nonetheless find that Defendants should have known that their unauthorized commissions risked economic harm to their employers. *See United States v. Rybicki*, 354 F.3d 124, 128, 145-46 (2d Cir. 2003) [(en banc)], *cert. denied*, 543 U.S. 809 (2004) (upholding honest services fraud convictions even though the government acknowledged that it did not prove that the amount the defrauded parties ultimately paid was unreasonable). Vander's assertion that his witnesses' testimony sufficiently contradicted the Government's evidence is unavailing, as the Court must accept the jury's credibility assessments for purposes of a motion for judgment of acquittal.

Doc. 419, at 4-5; *see also deVegter*, 198 F. 3d at 1331 ("[c]orrupting the process by which [a] recommendation was made poses a reasonably foreseeable risk of economic harm"). Candelario's conduct – enriching himself at his employer's expense through kickbacks and secret commission payments and risking his employer significant reputational harm – falls squarely within the statutory prohibition on honest services fraud. *See deVegter*, 198 F.3d at 1329; *Rybicki*, 354 F.3d at 139-41.[13]

Candelario argues (Br. 13) that his "actions are distinguishable from that in *deVegter* because the process for securing the business transaction had already been initiated, . . . and there was no reasonably foreseeable risk of economic harm

[13] As the Seventh Circuit observed in *Black*: "[I]f the jury found [the employee took the employer's property], this would mean that the defendants, having both deprived their employer of its right to their honest services and obtained money from it as a result, were guilty of both types of fraud. Nothing is more common than for the same conduct to violate more than one criminal statute." 530 F.3d at 600 (citations omitted).

in that Candelario followed through on successfully securing his employer's desired transaction at a profit." But his argument is unpersuasive for several reasons.

First, the honest services fraud statute applies to far more than just the particular circumstances in *deVegter* itself. Indeed, the *deVegter* Court expressly recognized that its standard was derived from a long history of cases involving kickbacks and secret payments that foreseeably risked reputational or other economic harm and suggested that those cases were merely illustrative of the statute's reach. *See* 198 F.3d at 1329 (observing that these cases "illuminate" the application of the honest services fraud statute); *cf. Rybicki*, 354 F.3d at 127, 139-41 (noting that "the statute's clear prohibition applies to a wide swath of behavior" and discussing the application to several private-sector "kickback" and "self-dealing" cases). *See generally United States v. Walker*, 490 F.3d 1282, 1297 (11th Cir. 2007) (the "scope" of the honest services fraud statute is "extremely broad").

Second, and more fundamentally, Candelario is wrong in suggesting (Br. 13) that his actions did not create a reasonably foreseeable risk of economic harm to JPS simply because JPS profited from the deal. The jury was entitled to find that, absent the conspiracy, JPS's profit would have been substantially more. Indeed, Candelario admitted that his gain came directly at JPS's expense "because they

would have [kept the $340,000 commission] for themselves" had it been disclosed. Doc. 408 (9/24 Tr.), at 142. The loss of profits to JPS due to Candelario's conduct was a foreseeable economic harm that he disregarded and that legitimately formed the basis of his conviction in this case. *Cf. Pulte Home Corp. v. Osmose Wood Preserving, Inc.*, 60 F.3d 734, 740 (11th Cir. 1995) (loss of profits are a form of "economic loss"); *Rybicki*, 354 F.3d at 124, 128, 145-46 (upholding honest services fraud convictions even though the government acknowledged that it did not prove that the amount the defrauded parties ultimately paid was unreasonable).[14] Though Candelario evidently believed that his commission was merited because of his efforts "to rescue" the deal (Br. 7), the jury was entitled to disagree and to convict him for secretly taking the issue into his own hands. As Judge Posner has explained:

> [The defendants] are making a no harm-no foul argument, and such arguments usually fare badly in criminal cases. Suppose your employer owes you $100 but balks at paying, so you help yourself to the money from the cash register. That is theft, even though if the employer really owes you the money you have not harmed him. You are punishable

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[14] Indeed, in *deVegter*, this Court held that the defendant inflicted reasonably foreseeable economic harm by "recommend[ing] an inferior [underwriting] proposal over a superior one." 128 F.3d at 1331. The Court did not ask whether the proposal was "good" or "bad"; it sufficed that Fulton County was harmed *relative* to what would have occurred absent the conspiracy. It is no different when an employer profits from a deal but less so than it would have without the employee's fraud.

because you are not entitled to take the law into your own hands.

Black, 530 F.3d at 600 (citations omitted).[15]

Moreover, even if JPS were not entitled to any more money on this particular transaction, Candelario still could be convicted for honest services fraud based on the risk of significant long-term reputational harm that his actions created. Numerous witnesses testified to the deleterious reputational consequences that could befall a company involved in the government contracting process if its employees were known for taking secret commission payments and paying kickbacks. *See, e.g.*, Doc. 405 (9/18 Tr.), at 125-26; Doc. 406 (9/22 Tr.), at 8-9; Doc. 408 (9/24 Tr.), at 50-51. Indeed this harm was precisely why JPS had a policy prohibiting other companies from paying a commission directly to one of its employees. *See, e.g.*, Doc. 406 (9/22 Tr.), at 8-9; Doc. 408 (9/24 Tr.), at 51. *deVegter* makes clear that creating a risk of reputational harm qualifies as a form of "reasonably foreseeable economic harm" that the honest services fraud statute was

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[15] Contrary to Candelario's suggestion (Br. 13), *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006), supports his conviction. In *Brown*, the Fifth Circuit recognized that "bribery and self-dealing are the paradigmatic cases of honest-services fraud." *Id.* at 521. The court overturned the defendant's honest services fraud conviction because the case was "exceptional" insofar as the benefits he appropriated were not "at odds with the employer's expectations." *Id.* at 522. That is certainly not true here where JPS fired Candelario after learning of the commission, Doc. 406 (9/22 Tr.), at 111, and Candelario testified that JPS would have taken the commission had he disclosed it, Doc. 408 (9/24 Tr.), at 142.

meant to prevent. 198 F.3d at 1330.

Candelario argues (Br. 15) that the government's position "misses the forest for the trees, in that there is no dispute that Candelario was having, and had experienced, employment difficulties (even to [the] point of litigation with his employer) and was attempting to transition to other employment, including his own business in the same field." But Candelario had a duty of loyalty to JPS throughout the tenure of his employment, *see, e.g.*, *Rybicki*, 124 F.3d at 142 (employee owes duty of loyalty to employer), and was a JPS employee when he received the secret commission payments and paid the kickbacks at issue in this case. *See, e.g.*, Doc. 408 (9/24 Tr.), at 46 (Candelario was a JPS employee until September 2004), 172 (Candelario was on the JPS payroll until he was fired). The jury was entitled to find that, by engaging in self-dealing, enriching himself at JPS's expense and endangering JPS's reputation, Candelario violated JPS policy, breached his fiduciary duty to the company, and "harm[ed] the purpose of the parties' relationship." *deVegter*, 198 F.3d at 1328-29.[16]

[16] Candelario also violated JPS policy by not disclosing the potential conflict of interest. *See, e.g.*, Doc. 408 (9/24 Tr.), at 47 (JPS has a conflict of interest form for outside employment that might be approved in advance); Doc. 406 (9/22 Tr.), at 14. Courts have upheld convictions for honest services fraud when a conflict of interest was capable of causing "economic or pecuniary detriment [to an] employer." *Rybicki*, 354 F.3d at 140-41 (citing cases).

Candelario suggests that this Court should hold off on adjudicating his appeal until the Supreme Court has reached a decision in *Black v. United States*, No. 08-876, *cert. granted* May 18, 2009. But there is no need for delay. As discussed above (at pp. 13-17), Candelario's conviction can be sustained on the basis of the evidence supporting a conspiracy to commit money or property wire fraud alone. In addition, the district court in this case *already gave* an instruction akin to the one that Black has asked the Supreme Court to endorse. *See* Petition for a Writ of Certiorari at 9, *Black v. United States*, No. 08-876 (U.S. Jan. 9, 2009) (asking the Court to endorse the following instruction: "In order to prove a scheme to defraud, the government must prove that it was reasonably foreseeable to the defendant that the scheme could result in some economic harm to the victim."); Doc. 412 (9/30 Tr.), at 236 (instructing the jury that it had to find "that the [defendant] foresaw or reasonably should have foreseen that the employer might suffer an economic harm as a result of the breach" to convict Candelario of a conspiracy to commit honest services fraud). Candelario thus would not be entitled to relief, even if the Supreme Court reverses in *Black*.[17]

Candelario also criticizes the instructions in this case (Br. 17) for "not

[17] Black's petition also asks the Court to resolve a forfeiture question related to the verdict form that is not presented here. *See* Petition for a Writ of Certiorari at 23-32.

requir[ing proof of] actual economic [or] substantial harm." But Candelario exhibits a "misunderstanding of § 1346." *United States v. Vinyard*, 266 F.3d 320, 329 (4th Cir. 2001). As the Fourth Circuit has explained:

> The reasonably foreseeable harm test neither requires an actual economic loss nor an intent to economically harm the employer. Under this test, the employee need only intend to breach his fiduciary duty and reasonably foresee that the breach would create "an identifiable economic risk" for the employer. Thus, the reasonably foreseeable harm test is met whenever, at the time of the fraud scheme, the employee could foresee that the scheme potentially might be detrimental to the employer's economic well-being. Furthermore, the concept of "economic risk" embraces the idea of risk to future opportunities for savings or profit; the focus on the employer's well-being encompasses both the long-term and the short-term health of the business. Whether the risk materializes or not is irrelevant; the point is that the employee has no right to endanger the employer's financial health or jeopardize the employer's long-term prospects through self-dealing. Therefore, so long as the employee could have reasonably foreseen the risk to which he was exposing the employer, the requirements of § 1346 will have been met.

Id. (citations omitted).

Candelario argues (Br. 17) that restrictions on the scope of prosecutions for honest services fraud are necessary to prevent "'every breach of contract or every misstatement made in the course of dealing'" from serving as a basis for a criminal conviction. But this case goes far beyond a mere "breach of contract" or "misstatement." Candelario conspired to defraud his employer of hundreds of thousands of dollars through self-dealing and kickback payments. This is unquestionably illegal conduct at the core of honest services fraud. His conviction

must stand.

II. 18 U.S.C. § 1346 IS NOT UNCONSTITUTIONAL ON ITS FACE OR AS APPLIED TO CANDELARIO, AND THE DISTRICT COURT DID NOT PLAINLY ERR IN FAILING TO SO HOLD.

In addition to challenging the evidence supporting his conviction, Candelario argues (Br. 18-20) that "[t]he Court should find the honest services fraud statute unconstitutional on its face due to its impact on First Amendment rights, and more specifically as applied in its impact on [Candelario's] First Amendment Rights." But since, as we have already noted, Candelario's conviction can be affirmed because the jury found that he had conspired to commit money or property wire fraud in violation of 18 U.S.C. § 1343, there is no need for this Court to address any of his arguments concerning honest services fraud. *See, e.g., Northwest Austin Mun. Util. Dist. No. One. v. Holder*, No. 08-322, 2009 WL 1738645, at *9 (U.S. June 22, 2009) ("'It is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'") (quoting *Escambia County v. McMillan*, 466 U.S. 48, 51, 104 S. Ct. 1577, 1579 (1984) (per curiam)); *Slack v. McDaniel*, 529 U.S. 473, 485, 120 S. Ct. 1595, 1604 (2000) ("'Court[s] will not pass upon a constitutional question although properly presented in the record, if there is also present some other ground upon which the

case may be disposed of.'") (quoting *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S. Ct. 466, 483 (1936) (Brandeis, J., concurring)).

In any event, Candelario never made his constitutional argument in the district court, and the court's failure to hold Section 1346 unconsitutional is reviewed solely for "plain error." *Smith*, 459 F.3d at 1282-83; *see also* Candelario Br. 18 (admitting that the standard of review on this issue is "plain error"). "Under the plain error standard, . . . there must be (1) error, (2) that is plain, and (3) that affects substantial rights." *Smith*, 459 F.3d at 1283 (citation and internal quotation marks omitted). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (citation and internal quotation marks omitted). Candelario cannot satisfy this demanding standard here because Section 1346 is not plainly unconstitutional on its face or as applied to Candelario.

A. Section 1346 Is Not Facially Unconstitutional.

Candelario first argues (Br. 18-19) that Section 1346 is facially invalid because it is unconstitutionally vague. This argument, however, has been unanimously rejected by the appellate courts. *See, e.g.*, *Rybicki*, 354 F.3d at 143 ("[n]o circuit has ever held . . . that section 1346 is unconstitutionally vague"). As

courts have explained, Section 1346 was enacted to overrule the Supreme Court's opinion in *McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875 (1987), and the scope of its prohibition is clear given the pre-*McNally* caselaw and the cases decided since. *See, e.g.*, *Rybicki*, 354 F.3d at 132-44; *deVegter*, 198 F.3d at 1327-30 (looking to the pre- and post- *McNally* caselaw and explaining that "[t]he cases illuminate th[e] standard for a defrauding of 'honest services' in the private sector").[18] Indeed, the Supreme Court recently made clear that facial challenges are inappropriate where the statutory terms have a "settled legal meaning," *United States v. Williams*, 128 S. Ct. 1830, 1846 (2008), as is the case here. *Cf. id.* (stating that "the laws against fraud [and] conspiracy" are not unconstitutionally vague).

B. Section 1346 Is Not Unconstitutional As Applied To Candelario.

Section 1346 also is not unconstitutional as applied to Candelario. Candelario claims (Br. 18, 20) that Section 1346 was unconstitutionally applied to him because "this prosecution was a political prosecution in retaliation against Candelario's earlier efforts to petition the Government (the Courts) for a redress of

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[18] Before *McNally*, courts upheld convictions for honest services fraud under the mail and wire fraud statutes. *deVegter*, 198 F.3d at 1327 & n.1. However, in *McNally*, "the Supreme Court held that the scope of [the wire and mail fraud statutes] encompassed only schemes to defraud another of money or other property rights, but not schemes to defraud another of intangible rights." *Id.* at 1327. "Congress passed [Section 1346] to overrule *McNally* and reinstate prior law." *United States v. Lopez-Lukis*, 102 F.3d 1164, 1168-69 (11th Cir. 1997).

his grievances concerning racial discrimination against the defendant (as protected under federal law." But Candelario was not prosecuted for anything he said, or for the fact that he filed a lawsuit against JPS; he was prosecuted because he conspired to take over $340,000 of JPS's money through fraud, self-dealing and kickbacks. Candelario introduced no credible evidence that he was prosecuted for his "petition[ing] activity," and indeed the jury was never instructed that it could convict him on that basis.[19]

Candelario argues (Br. 19) that "[s]imilar concerns were raised in the case of *United States v. Siegelman*, [561 F.3d 1215 (11th Cir. 2009)]." But, in *Siegelman*, the charges were "based upon the donation [an individual] gave to [Governor] Siegelman's education lottery campaign." 561 F.3d at 1224. "As such," this Court reasoned, "they impact the First Amendment's core values – protection of free political speech and the right to support issues of great public importance." *Id.* The secret commission payments and kickbacks at the heart of this case enjoy no such lofty First Amendment status.

C. If There Was Error, It Was Not "Plain Error."

Even if Section 1346 were unconstitutional on its face or as applied to

[19] There is also no evidence that Candelario was prosecuted for his race or his politics.

Candelario, the constitutional infirmity was not "plain." "Plain error is, by its terms, error which is so obvious and substantial that it should not have been permitted by the trial court even absent the defendant's timely assistance in detecting it." *United States v. Prieto*, 232 F.3d 816, 823 (11th Cir. 2000). There was no such "obvious and substantial" constitutional error here. As Judge Katzmann noted in *Rybicki*, "[i]t cannot be said that any error with respect to facial vagueness is plain under current law, in a circumstance where every circuit court to address the specific question of [facial] vagueness since the phrase 'honest services' appeared in the statute has found § 1346 to be constitutional on its face." 354 F.3d at 148 (Katzmann, J., concurring) (internal quotation marks omitted). Moreover, it cannot reasonably be argued that any disregard of Candelario's First Amendment rights was "plain" where he was not prosecuted or convicted for anything he said or anything akin to protected speech (such as the campaign contribution in *Siegelman*), and thus his as-applied challenge fails as well.

III. THE DISTRICT COURT DID NOT CLEARLY ABUSE ITS DISCRETION IN EXCLUDING IRRELEVANT AND CUMULATIVE EVIDENCE CONCERNING CANDELARIO'S PRIOR EMPLOYMENT LITIGATION FOR RACIAL DISCRIMINATION.

Candelario also challenges (Br. 21) the district court's evidentiary ruling permitting him "to elicit testimony regarding the previous employment litigation, including the nature of the claims Candelario asserted, the nature of JPS's response

and counterclaims, and the basic terms of the settlement agreement between JPS and Candelario," but preventing him from "introduc[ing] into evidence copies of the pleadings and other documents related to that litigation, [on the ground] that these documents were irrelevant and cumulative." Doc. 419, at 15; Doc. 408 (9/24 Tr.), at 55-66.

Candelario's challenge is "perfunctory" – less than one page of argument and devoid of any case citations – and insufficient to raise the issue on appeal. *See, e.g.*, *U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1287 n.13 (11th Cir. 2007) ("We will not address [a] perfunctory and underdeveloped argument.").

It is also meritless. The former employment lawsuit was a collateral issue to the criminal charges and evidence of fraud and kickbacks in this case, and the district court's decision to give Candelario wide (but not unlimited) freedom to explore the issue at trial was eminently reasonable. "[A] district court enjoys 'considerable leeway' in making [evidentiary] determinations." *United States v. Frazier*, 387 F.3d 1244, 1258 (11th Cir. 2004) (en banc) (citations omitted). This Court has long acknowledged that district courts retain the discretion to limit the presentation of irrelevant and cumulative evidence, even in criminal cases. *See, e.g.*, *United States v. Anderson*, 872 F.2d 1508, 1519 (11th Cir. 1989) ("a defendant's right to present a full and complete defense is not compromised by the

requirement that he comply with the established rules of procedure and evidence. There are necessary limits to this right and it is axiomatic that a defendant's right to present a full defense does not entitle him to place before the jury irrelevant or otherwise inadmissible evidence.") (citations omitted). Because of "the deference that is the hallmark of abuse-of-discretion review," this Court will not "reverse an evidentiary decision of a district court unless the ruling is manifestly erroneous." *Frazier*, 387 F.3d at 1258. Candelario has proven no such "manifest error" here.

While Candelario claims that the court's ruling was "erro[neous]" (Br. 21), he never explains why the excluded documents were not "irrelevant and cumulative" or were so probative that they should have been admitted regardless. Even *assuming arguendo* that the court's ruling were "manifestly erroneous," Candelario still would not be entitled to any relief because the error was harmless in light of the abundant evidence of fraud in this case. *See United States v. Docampo*, No. 08-10698, 2009 WL 1652910, at *3 (11th Cir. June 15, 2009) (holding that, even if an evidentiary ruling "was an abuse of discretion, [this Court] will not result in a reversal of the conviction if the error was harmless"). While Candelario argues the exclusion of evidence "restricted his defense" (Br. 21), he never explains how or establishes that the excluded evidence would have presented something new for the jury to consider that was relevant to the issues before it. Because it is clear from the record that the

admission of the documents would not have had any effect on his conviction, reversal is inappropriate.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REJECTING CANDELARIO'S PROPOSED JURY INSTRUCTIONS.

Finally, Candelario's instructional challenges (Br. 22-23) are also "perfunctory" and fail to raise any issue adequately. Accordingly, they should also be ignored by this Court. In any event, this Court recently held that a district court has "wide discretion as to the style and wording employed in the instructions," and "the failure of a district court to give a requested instruction . . . is error only if the requested instruction is correct, not adequately covered by the charge given, and involves a point so important that failure to give the instruction seriously impaired the party's ability to present an effective case." *Svete*, 556 F.3d at 1161 (citations and internal quotation marks omitted). Candelario has not shown such a serious error here.

The district court's instructions on money or property wire fraud and honest services fraud were based on Eleventh Circuit Pattern Criminal Jury Instructions 51.1 and 51.2, respectively. *See* Doc. 412 (9/30 Tr.), at 233-35 (money or property wire fraud); *id.* at 235-37 (honest services fraud). These instructions provided the jury with a complete and accurate statement of the law and no additional instructions were required. To the limited extent Candelario actually addresses

what he claims were instructional errors, his arguments are without merit.

Candelario proposed two additional sets of instructions regarding wire fraud and honest services fraud (Docs. 332, 336), which were deficient in numerous respects.[20] The district court decided not to give "Candelario's proposed instructions because they were inconsistent with other instructions, misleading, or sufficiently covered by [the] Eleventh Circuit Pattern Instructions [it modified and gave]." Doc. 419, at 20. This ruling was correct and well within the district court's

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[20] Candelario proposed two additional wire fraud instructions and one additional honest services fraud instruction. Docs. 332, 336. His first proposed wire fraud instruction (Doc. 332) improperly suggested that the government had to prove that Candelario "intended to use a 'false wire communication' to be transmitted with the specific intent to deceive or cheat a 'particular employer,'" whereas "18 U.S.C. § 1343 does not . . . require that the wire communication used in furtherance of the scheme include any misrepresentation"; and incorrectly suggested that the e-mails were the only interstate wire communications involved, whereas the government also alleged that interstate wire communications were used to make some of the payments. Doc. 334, at 2-3. His second proposed wire fraud instruction (Doc. 336), among other things, was duplicative of other instructions; presented improper argument to the jury in contravention of *United States v. Paradies*, 98 F.3d 1266, 1287 (11th Cir. 1996), *United States v. Barham*, 595 F.2d 231, 245 (5th Cir. 1979), and *United States v. Silverman*, 745 F.2d 1386, 1399-1400 (11th Cir. 1984); and was misleading because it only focused on Candelario's intent to deceive JPS, while Candelario was "charged with a conspiracy to commit wire fraud against [AKSV, AVS, and Fisher Scientific as well]," and could "be found guilty for agreeing to defraud any one of those companies." Doc. 337, at 1-3. Candelario's proposed honest services fraud instruction (Doc. 332) was unsupported by case law and "unnecessarily duplicative" of the existing instructions on honest services fraud. Doc. 334, at 1.

discretion. Though Candelario challenges this ruling (Br. 22), he does not explain why the district court erred, much less how it "seriously impaired [his] ability to present an effective case," and thus is not entitled to any relief. *Svete*, 556 F.3d at 1161; *cf. United States v. Wilk*, Nos. 07-14176, 07-14196, 2009 WL 1842523, at *7 (11th Cir. June 29, 2009) (holding that there was no instructional error and concluding that "any possible error in the district court's instruction in this case was harmless in light of the overwhelming evidence against [defendant] and the comprehensive [instruction] given by the [district] court").

Candelario's other instructional challenges fare no better. While conceding (Br. 22) that the court did instruct the jury concerning his theory that he acted to prevent his employer from stealing his commission or retaliating against him, Candelario argues (Br. 22-23) that the district court should have given Vander's proposed jury instructions 25 and 26. The government correctly objected that Vander's proposed instruction 25 was not modeled after Eleventh Circuit Pattern Criminal Jury Instruction 51.2 and was unnecessarily repetitive, *see* Doc. 195, at 2. Vander's proposed instruction 26 stated:

> Mr. Vander Luitgaren's authorization of a commission from A.K. Specialty Vehicles to Mr. Candelario, in and of itself, does not establish that Mr. Vander Luitgaren thereby defrauded his employer of its intangible right to his honest services. This is true even if you believe he ethically or morally should not have authorized the commission. In order for this authorization to legally constitute a crime, the government's evidence must convince you,

> beyond a reasonable doubt, that he intended the authorization to cause economic detriment or harm to A.K. Specialty Vehicles.

Doc. 225, at 2; *see also* Doc. 281 (6/24 Tr.), at 122-23 (tendering a similar instruction on behalf of Candelario). The government objected that the proposed instruction was a "misstatement of law." Doc. 281 (6/24 Tr.), at 123.

The district court refused to give these two proposed instructions "because Defendants were not charged with committing the substantive offense of honest services fraud and the requirement that government prove 'economic harm' was sufficiently covered by [the court's instructions at Doc. 412 (9/30 Tr.), at 230-37]." Doc. 419, at 19-20. Though Candelario argues that "[t]he Court's instructions did not sufficiently cover the requirement that the government prove 'economic harm'" (Br. 23), he does not explain why the charge was inadequate or discuss how it impaired his ability to present an effective defense. He thus again has not proven reversible error.[21]

Candelario finally argues (Br. 23) that "the honest services charge instruction is too vague and did not require that the jury find that the defendants had taken any money or property from the complainants." But, as discussed above, the honest

[21] Even if there were error with respect to the honest services instruction, it would be immaterial to his conviction, which could stand on the money or property fraud theory alone. *See* pp. 13-17, *supra*.

services instruction was based on Eleventh Circuit Pattern Offense Instruction 51.2, which used the standard this Court set forth in *deVegter*. *See* Eleventh Cir. Pattern Crim. Jury Instr. 50.2, 51.2, at 315, 325 (Annotations and Comments). The honest services instruction was neither too vague, *see* pp. 27-28, *supra*, nor incorrect. Indeed, the case law is clear that a jury is *not* required to find that Candelario took any money or property from his employer to convict him of honest services fraud, and Candelario's argument is based on a "misunderstanding of § 1346," *Vinyard*, 266 F.3d at 329. *See* p. 25, *supra*. The district court did not abuse its discretion in refusing his proposed jury instructions.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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Dated: July 14, 2009

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,016 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the types style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 10 in Times New Roman 14-point font.

Dated: July 14, 2009

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