20-842(L)

To Be Argued By:
DAVID E. NOVICK

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 20-842(L), 20-1061(Con)
20-1084(Con)

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

-vs-

FREDERIC PIERUCCI, WILLIAM POMPONI,
Defendants,

LAWRENCE HOSKINS,
Defendant-Appellee-Cross Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Federal Rule of Appellate Procedure 26.1 Disclosure Statement

In this criminal case, there are no organizational victims.

Table of Contents

Federal Rule of Appellate Procedure 32(g) Certification

Table of Authorities

Pursuant to "Blue Book" rule 10.7, the Government's citation of cases does not include "certiorari denied" dispositions that are more than two years old

Cases

Statutes

Rules

Statement of Jurisdiction

The United States District Court for the District of Connecticut (Janet Bond Arterton, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. On February 26, 2020, the district court granted a motion for acquittal on Counts 1-7 of the Third Superseding Indictment, charging conspiracy and violations of the Foreign Corrupt Practices Act, and conditionally granted a new trial on those counts, following a jury verdict convicting defendant Lawrence Hoskins ("Hoskins") of those charges and four counts of money laundering. Government's Appendix ("GA") 39 (#617), GA746-GA774, Special Appendix ("SA") 1-SA29. The government filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b)(1)(B) and 18 U.S.C. § 3731 on March 9, 2020. GA39 (#622), GA775. This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3731.

With regard to the money laundering counts of conviction (Counts 8-10 and 12), judgment entered on March 12, 2020. GA39-GA40 (#629), GA777-GA779. On March 24, 2020, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). GA40 (#632), GA780.[1] This Court

[1] The government also filed a notice of appeal after sentencing, GA40 (#634), but is not pursuing any issues beyond the issues set out in this brief.

has appellate jurisdiction over the defendant's appeal pursuant to 28 U.S.C. § 1291.

The Solicitor General authorized this government appeal.

Statement of Issue Presented for Review

Whether, viewing the evidence in a light most favorable to the guilty verdict, a rational jury could have found that the defendant, a senior executive in a corporate support function of multinational holding company Alstom S.A., was an agent of a Connecticut-based Alstom business, Alstom Power Inc. ("API"), in the course of his assisting API to secure a power plant contract in Indonesia, including by hiring consultants to funnel bribes to Indonesian officials, where the defendant repeatedly followed API's instructions and API was in charge of all facets of the project.

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Preliminary Statement

For three years, Lawrence Hoskins ("Hoskins") assisted Connecticut-based Alstom

Power, Inc. ("API") in its efforts to secure a contract to build a power plant in Indonesia by bribing Indonesian government officials who had influence over who won the contract. Hoskins worked for "Alstom International Network," a support function within the Alstom group of companies, and was mandated to assist Alstom businesses, including API, to obtain work. Among other responsibilities, Hoskins helped API identify and negotiate with consultants who would pass the bribes to officials. Ultimately API won the contract, and thanked Hoskins for his support. Hoskins left Alstom shortly thereafter, but the bribe payments he helped negotiate continued for years afterwards.

A jury convicted Hoskins of Foreign Corrupt Practices Act ("FCPA") conspiracy and substantive charges and money laundering conspiracy and substantive charges. However, the district court granted a motion for acquittal, and conditionally granted a new trial, on the FCPA charges because it concluded that the government had failed to prove Hoskins was an "agent" of domestic concern API, as required under *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018), decided by interlocutory appeal in this case. In particular, the district court found that there was insufficient evidence of interim control by API over Hoskins's activities on its behalf. The district

court then, relying in part on those FCPA acquittals, sentenced the defendant to a far-below-guidelines sentence of 15 months' imprisonment.

As set forth below, the evidence was sufficient to prove API's interim control over Hoskins's activities on its behalf, based on extensive evidence of Hoskins seeking approval from API for his actions, Hoskins acceding to API's instructions, API's control over the Tarahan Project and the hiring of consultants, and Hoskins's support role within Alstom. The district court's Rule 29 order substituted its own choice of inferences for that of the jury, misapplied the law of this Court and the Supreme Court, and relied on formal badges of control inconsistent with the highly factual nature of an agency inquiry. The district court's conditional new trial order was based on similarly flawed analysis, usurped the role of the jury, and provided no reason why the guilty verdicts were a miscarriage of justice. This Court should reverse the district court and reinstate the jury verdict in its entirety.

Statement of the Case

On July 30, 2013, a grand jury in New Haven, Connecticut, initially charged Hoskins in a twelve-count Second Superseding Indictment with conspiring to violate the FCPA, pursuant to 18 U.S.C. § 371 (Count 1), substantive violations of the FCPA, pursuant to 15 U.S.C. § 78dd-2 and

18 U.S.C. § 2 (Counts 2-7), conspiring to launder money, pursuant to 18 U.S.C. § 1956(h) (Count 8), and substantive money laundering, pursuant to 18 U.S.C. § 1956(a)(2)(A) and 18 U.S.C. § 2 (Counts 9-12). GA6 (#50). On April 15, 2015 the grand jury returned a Third Superseding Indictment with the same charges. GA12 (#209), GA80-GA112. In short, Hoskins was charged with participating in a scheme to bribe Indonesian government officials to secure a contract, called the Tarahan Project, whereby API and its consortium partners would build a $118 million power plant. GA80-GA112.

Trial began on October 28, 2019. GA32 (#555). On November 8, 2019, the jury returned a verdict convicting Hoskins on Counts 1-10 and 12, and acquitting him on Count 11. GA34 (#583), GA654-GA656.

After trial, Hoskins sought judgment of acquittal on all counts, or in the alternative a new trial. GA34 (#589), GA657-GA701. As relevant here, Hoskins moved for judgment of acquittal or a new trial on the FCPA conspiracy and substantive charges in Counts 1-7 on the grounds that the government had not proven that he was an agent of a domestic concern, as required by this Court's interlocutory ruling in this case, *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018). GA668-GA680. On February 26, 2020, the district court (Janet Bond Arterton, J.) granted the motion for

acquittal and a new trial on Counts 1-7, but denied acquittal or a new trial on the money laundering convictions. GA746-GA774.

The government filed a timely notice of appeal from the court's order of acquittal and new trial on March 9, 2020. GA39 (#622), GA775.

On March 6, 2020, the district court sentenced Hoskins principally to 15 months' imprisonment. GA39 (#625, #629), GA777.

The defendant is currently released on bond, and his reporting date has been delayed, without objection, until July 20, 2020 in view of the COVID-19 pandemic. GA40 (#639). An unopposed motion for further delay is pending. GA41 (#640).

A. Pretrial litigation regarding agency

The government argued at the outset of this case that Hoskins could be held criminally liable for FCPA violations either as an agent of a domestic concern, or as an aider, abettor, or conspirator. *See* GA57. While the latter avenue was foreclosed by this Court on interlocutory appeal, *see Hoskins*, 902 F.3d at 71-72, the former—particularly the content of the agency element—was the subject of intense pretrial litigation.

Even before the interlocutory appeal, in rejecting Hoskins's first motion to dismiss, the district court found no basis to conclude that Hoskins—

as an executive assigned to work at parent company Alstom S.A.—could not also be an agent of subsidiary API. GA73. Instead, the district court held that "it is for a jury at trial in the first instance, and not the Court on a motion to dismiss, to determine whether the Government has proven Defendant to have been an 'agent' of [API]." GA73. The court noted the "highly factual" nature of the inquiry, "considering factors such as 'the situation of the parties, their relations to one another, and the business in which they are engaged; the general usages of the business in question and the purported principal's business methods; the nature of the subject matters and the circumstances under which the business is done.'" GA72 (quoting *Cleveland v. Caplaw Enterprises*, 448 F.3d 518, 522 (2d Cir. 2006)).

Litigation over the definition of "agent" intensified after resolution of the interlocutory appeal—which clarified that Hoskins could *only* be liable as an agent—particularly over the issue of "control." Hoskins moved for a jury instruction that required that "[API] controlled, or had the right to control, Mr. Hoskins's day-to-day work for the duration of the agency relationship." GA161. Hoskins's proposed instruction further required the jury to "consider whether [API] had the right to supervise and assess Mr. Hoskins's

work, the right to approve or disapprove his actions, and the right to terminate his services." GA161.

The government objected, arguing that the defense instruction misstated the three-pronged test for agency—"(1) a manifestation by the principal that the agent will act for him; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal will be in control of the undertaking." GA176 n.3 (quoting *Johnson v. Priceline.com, Inc.*, 711 F.3d 271, 277 (2d Cir. 2013)). The government explained that Hoskins's proposed instruction excised the "undertaking," in favor of a requirement that the principal control the agent or his actions more generally. GA168. Additionally, the government argued that Hoskins's instruction attempted to impose formalistic requirements and unique exemplars on an inherently fact-bound inquiry, GA169-GA174, and ignored this Court's pronouncement that even control over the undertaking "need not include control at every moment," GA174.

The district court rejected the defendant's request for instructions regarding the principal's right to control the "day-to-day" activities of the agent, finding that the request "might wrongly suggest to the jury that a higher level of generalized control over the agent is required, contrary to the Defendant's own acknowledgement that

the control need only be over 'the agent's actions taken on the principal's behalf.'" GA183. Thus, the court determined that its "instruction to the jury will follow the Second Circuit's clear statement of the third requirement of an agency relationship: 'the understanding of the parties that the principal is to be in control of the undertaking.'" GA183. Additionally, the court rejected Hoskins's request for an instruction requiring API's right to supervise, assess, and terminate Hoskins's services and explained that "narrowly listing aspects of an agency relationship as Defendant requests is likely to mislead the jury and is unnecessary to ensure the jury's understanding of agency principles." GA187. The district court deferred resolution of other issues—including the instruction that "control asserted need not include control at every moment." GA183-GA184.

Further litigation ensued over the definition of "undertaking." The government proposed that the jury be instructed "that the 'undertaking' included the defendant's activities in support of API's efforts to secure the Tarahan Project," GA192, and not "only … the retention of agents," GA189; *see also* GA220. In opposition, the defendant contended that the "activities" must be limited to retention of consultants. GA206, GA234-GA237.

At the charge conference, the court settled on a definition of "undertaking" that "consists of the

acts or services which the agent performs on behalf of the principal." GA634. To address Hoskins's concern regarding the breadth of a subsequent instruction—"one may be an agent for some business purposes and not others," GA634—the court narrowed the instruction "to specific events related to the Tarahan Project." GA635.

The district court ultimately instructed the jury as follows:

> To create an agency relationship, there must be, one, a manifestation by the principal that the agent will act for it; two, acceptance by the agent of the undertaking; and, three, an understanding between the agent and the principal that the principal will be in control of the undertaking. The undertaking consists of the acts or services which the agent performs on behalf of the principal. Such control need not be present at every moment, its exercise may be attenuated, and it may even be ineffective. Proof of agency may not – need not be in the form of a formal agreement between agent and principal. Rather, it may be inferred circumstantially from the words and actions of the parties involved. One may be an agent for some business purposes and not others. Here the government must prove that the

> defendant was an agent of a domestic concern in connection with the specific events related to the Tarahan Project.

GA559.

B. Offense Conduct

The evidence at trial consisted of (1) the testimony of former API sales representatives David Rothschild and Larry Puckett and former Alstom employee (in several capacities) Edward Thiessen, all of whom had pleaded guilty and appeared pursuant to cooperation agreements; (2) the testimony of Christopher Varney, API's finance director during the relevant times; and (3) hundreds of contemporaneous emails and other documents introduced through fact witnesses or an FBI special agent.

As relevant here, the evidence showed that Alstom S.A. was a large French holding company for various power generation, power transmission and distribution, and transportation businesses around the world. GA266, GA324. Alstom had various business sectors and units that operated through its subsidiaries. GA324-GA325. Among Alstom's subsidiary companies was Alstom Power Inc. ("API"), a U.S. company based in Windsor, Connecticut. GA266, GA310. API had been in the boiler business (essentially, steam-based power generators) for many years when it was acquired by Alstom around 2000. GA267, GA421, GA423,

GA454. At the time of the relevant events here, Alstom's global boiler business was headquartered at API in Windsor, Connecticut. GA266-67, GA326, GA409, GA421.

Between November 1, 2001 and August 31, 2004, Hoskins was employed by Alstom UK Ltd., a United Kingdom-based Alstom subsidiary, but was seconded to another subsidiary, Alstom Resources Management S.A., in France. GA941-GA943. Hoskins was assigned to work in a division of Alstom called Country Network, later renamed International Network (collectively referred to herein as "International Network"). GA943, GA941, GA996. International Network supported Alstom subsidiaries' efforts to secure contracts around the world. GA287, GA328, GA461, GA1059, GA1061, GA1068. Among other things, International Network "serv[ed] all Sectors based on their needs and requests," provided "[s]ales support as requested by the Sectors," and provided "[s]upport in contract execution (customer contacts) if requested." GA996-GA997, GA999. International Network, which was organized by geographical region, performed a "corporate function," like Information Technology and Human Resources. GA996, GA1024, GA1040. International Network did not have its own profits and losses, and was funded by the business units, including API. GA328, GA416, GA424, GA996.

Hoskins was the Area Senior Vice President for the Asia region in International Network, later expanded to include Asia-Pacific and Eastern and Northern Europe. GA328, GA376, GA943, GA1009, GA1067. In that capacity, Hoskins performed support functions and services for and on behalf of various Alstom subsidiaries, including API. GA328, GA996-GA997, GA999.

One of the projects that Hoskins assisted API in securing was the Tarahan Project. The Tarahan Project was a project, valued at roughly $118 million, to build a coal-fired power plant to provide power to the citizens of Indonesia. The project was bid and contracted through Indonesia's state-owned and state-controlled electricity company, Perusahaan Listrik Negara ("PLN"). GA264, GA267, GA277, GA453, GA461, GA854-GA857. PLN was responsible for choosing who would build the Tarahan Project. GA267, GA325, GA453. Among other roles, Hoskins assisted API in hiring consultants to funnel bribes to PLN and other Indonesian officials. *See*, *e.g.*, GA264, GA326.

API led a consortium that also included Alstom's Indonesian subsidiary (Alstom Power Energy Systems Indonesia, or "PTESI") and a Japanese trading company, Marubeni Corporation, in the bidding and carrying out of the Tarahan Project in Indonesia. GA267-GA268, GA275, GA786.

Alstom S.A. was not part of the consortium and did not sign the consultancy agreements or the Tarahan Project contract. GA316, GA786, GA824, GA835, GA843, GA857-GA858.

Throughout the period that Hoskins worked to help API secure the Tarahan Project, API was in charge of the Tarahan Project and all of the negotiations related to that project. GA275, GA423, GA938. API was intimately involved in, provided instructions regarding, and had ultimate decision-making authority over all aspects of the retention of consultants and the negotiations with those consultants. GA317, GA469. In particular, the head of sales for Alstom's global boiler business and employee of API, Fred Pierucci, "called the shots as far as the strategy on the project and as far as the consultant or agent." GA470; *see also* GA267, GA272, GA356, GA463, GA465. Hoskins "didn't call the shots or the strategy on Tarahan. Fred Pierucci … was in control. So in that sense, Mr. Hoskins would have been reporting to Fred on the Tarahan Project." GA482.

At an early stage of the project, in mid-2002, Hoskins, API, and their co-conspirators decided to hire a consultant to pay bribes to officials to help API, PTESI, and Marubeni win the Tarahan Project. GA268. Initially, they discussed hiring a consultant by the name of Harsono, who was very close with Emir Moeis, a high-ranking member of Parliament who carried significant influence with

PLN. GA268, GA270-GA273. Pierucci provided instructions to Hoskins to obtain information about the status of the Tarahan Project in Indonesia. On August 20, 2002, Hoskins wrote to another co-conspirator: "Fred P[ierucci] asked me to check with [Reza Moenaf] on latest position on Tarahan. I spoke with [Reza Moenaf] and Eko [Sulianto] and game plan is to get Mitsui out (corruption scandal etc) leaving likely bids from ourselves and FW Finland next month….We then plan to appoint Emir who I understand has been previously used by G segment on fee plus expenses basis….Fred will pass through Paris next week and I will brief him." GA860. Reza Moenaf was Alstom's "country president" for Indonesia, reporting to Hoskins, and also the general manager of Alstom's Indonesian business. GA270, GA328, GA462. Eko Sulianto, in turn, reported to Moenaf. GA268, GA329.

Hoskins and his International Network colleagues understood that they could not retain the consultant without first securing approval from API. On August 22, 2002, Moenaf emailed Pierucci and David Rothschild, then the lead API sales representative for Tarahan, reporting to Pierucci, *see* GA264, GA272, copying Hoskins. Moenaf wrote: "Your position concerning the representation is urgently needed. Currently, we are working with Eddie and Bambang in PLN on our 'competition', nevertheless, we would need a

stronger push now. Appreciate your decision a.s.a.p." GA861, GA272. "Eddie" was Eddie Widiono, president of PLN, and "Bambang" was Bambang Tutuko, head of PLN's evaluation team for Tarahan; API intended that both would receive bribes through the consultant. GA264, GA269. Moenaf sent a follow-up email on August 28, 2002, stating, "According to Lawrence [Hoskins], Fred [Pierucci] has already given his 'go-ahead' to proceed with the proposed consultant, Mr M. Please confirm." GA862, GA272-GA273. "Mr. M" was code for Moeis, who would be bribed through the proposed consultant, Harsono. GA272-GA273. Pierucci directed Moenaf—Hoskins's underling—to "finalise the consultancy agreement." GA863, GA273.

But before Moenaf could do so, API intervened. Rothschild advised Pierucci that Harsono was too closely connected with Moeis, and instead recommended Pirooz Sharafi and his company Pacific Resources Inc. ("PRI"). GA273. Sharafi was a Maryland-based consultant who had a close personal relationship with Moeis. GA269. Pierucci agreed, and API decided to hire Sharafi. GA273. This decision was communicated to Moenaf, who was concerned whether Sharafi would be able to pay off PLN's Tarahan evaluation team. GA273-GA274, GA865. Consistent with this concern, in December 2002 Moenaf complained to Hoskins that "[a]s the project proceed, it shown that Pirooz

has been unable to fulfill his tasks and our expectation, he has no grip on PLN Tender team at all. Basically, his function is more or less similar to cashier which I feel we pay too much." GA868. But because API had decision-making authority about which agent to hire, Pierucci and Rothschild made the decision to hire Sharafi, and Hoskins and Moenaf executed on that decision. GA317.

Accordingly, a consultancy agreement was concluded between API and Pacific Resources, dated March 3, 2003, committing 3% of the contract price to Sharafi if API won the contract. GA819-GA825. The agreement included prohibitions against paying bribes to government officials. GA822. Hoskins signed off on the internal Alstom document authorizing Sharafi's agreement on February 15, 2003; Pierucci signed off for API on February 26, 2003. GA859. While Pierucci and API had ultimate decision making authority over hiring a consultant and how much to pay, Hoskins was responsible for ensuring the agreement complied with Alstom policies and the law. GA317, GA417. Hoskins's approval was required "by charter," but yielded to Pierucci's decision to hire a consultant. GA481. Moreover, although Hoskins's approval was intended to ensure compliance with laws and rules, he did not carry out that function in practice. GA317.

By September 2003, the PLN evaluation committee expressed its displeasure with Sharafi and questioned whether they could trust his commitment to bribe them. GA468, GA470, GA878, GA883. In forwarding these complaints to Hoskins, Moenaf harkened back to his earlier concern, commenting that "we have a serious agent problem (as predicted earlier)." GA877. According to Larry Puckett, who had temporarily taken over as lead API sales representative (GA462-GA463), it was ultimately API's decision to change consultants because API was in charge of whether to hire or fire a consultant on Tarahan. GA469.

Puckett also communicated to Pierucci, API's William Pomponi, and Hoskins that there was "recent information that the key (Eddie W.) to the project's success is not pleased with our agent's commitment and actions taken this far." GA883, GA470. Hoskins was well aware of Widiono's importance, since he was involved in discussions about how best to bribe Widiono in Alstom Switzerland's bid for an Indonesian gas project, Muara Tawar. *See*, *e.g.*, GA349, GA870-GA871, GA876. Widiono made clear to Alstom that they were required to use Azmin Aulia as a consultant on Muara Tawar. GA350, GA880. However, on Tarahan it was up to API, and "particularly Fred Pierucci" to change consultants. GA883.

Ultimately, Pierucci and API determined it was necessary to bring in Aulia, and decided to cut Sharafi's commission to 1% and pay Aulia 2%. GA933A, GA277, GA353. Hoskins, Pierucci, and others met with Sharafi in Jakarta, and Hoskins informed Sharafi of the change and that he would only be responsible for bribing Moeis. GA277, GA353. Separately, they then met with Aulia (of PT Gajendra Ahdi Sakti) and Hoskins, on behalf of API, informed Aulia that he would be retained at a 2% commission to pay bribes to PLN officials. GA277, GA353. While Hoskins conveyed the message for API, GA353, it was API's decision. GA469-GA470.

Following the meeting and API's decision to reduce Sharafi to a 1% commission and hire Aulia at 2%, API and Hoskins took steps to put these changes in place. *See* GA887-GA913, GA918-GA928. On September 30, 2003, Moenaf informed Hoskins that, according to Sulianto, "there has been discussions between Fred [Pierucci], Marubeni, and Pirooz [Sharafi] yesterday where Pirooz committed to convince EM [Emir Moeis] that 'one' is enough." GA928, GA356. Hoskins responded to Moenaf's email, in part, "[m]essages re above received." GA927.

Pierucci negotiated a revised terms of payment schedule with Sharafi, with Marubeni's agreement, and directed Hoskins to reissue a re-

vised consultancy agreement for Sharafi to Pierucci and Pomponi. GA892. Pomponi had taken over as lead API sales representative for Tarahan. GA274. Around the same time, Pomponi directed Hoskins to issue a fax to Aulia with the essential terms of a consultancy agreement. GA894.

A revised agreement between API and Pacific Resources (Sharafi) was ultimately executed and dated February 25, 2004. GA837-GA844, GA918-GA926. The agreement was approved by Hoskins and then by Pomponi and Pierucci. GA895.

Hoskins was also involved, on behalf of API, in negotiating terms of payment for an agreement between API and Aulia's company, PT Gajendra. Initially, API offered a consultancy agreement with terms that were tied *pro rata* to API's receipt of payments from PLN on the Tarahan contract over a period of at least 3.5 years. GA929. However, Aulia complained that, because his responsibility was to bribe officials early on, he would be paying most of his money out before he got paid by API. Aulia said to Moenaf, who passed the complaint to Hoskins, that "he is willing to prefinance his scope, fulfilling his commitment upfront (prior he get paid) to get the right 'influence,' but certainly not waiting 2 to 3 years to get paid while most of his scope completed in the beginning." GA929. Similar concerns were voiced by Widiono, one of the intended beneficiaries of the payments. GA931.

Hoskins thus recommended a more aggressive schedule of payments and informed his co-conspirators that the aggressive payment plan was driven by elections in Indonesia. GA936. Hoskins sought API's approval to move forward with his recommended terms, emailing Pomponi: "To clear up any confusion. You proposed an 18 month schedule but it will not fly in Indonesia at this time. In my discussion with Fred and mails as per attached I recommend that we go with the latest proposal: 40/35/20/5….We are all agreed the terms are lousy but there is no choice. Reza sees Eddie tomorrow and needs to confirm this position. Can you give him the all clear today?" GA934-GA935. Responding to Hoskins's specific request for the "all clear," API gave the approval and proceeded with the more aggressive terms of payment. GA934.

Once API had the right consultants in place and the right terms of payment to effectuate the bribes, it succeeded in winning the Tarahan Project. GA847-GA858. Following the news, Pierucci sent a congratulatory email to those who worked on the project thanking everyone for playing their respective roles: "Congratulations to all of you for the remarkable result of this negotiation and especially to…Bill [Pomponi] for successfully leading this negotiation and for being one of the very few who has kept faith with this project…Lawrence/Reza/Eko for the local support without

which we would not have been able to achieve this result." GA938.

API paid the consultants according to their agreements, GA422-GA423, and some of that money was transferred to Indonesian officials, GA369, GA785.

C. Post-trial litigation regarding agency

The jury convicted Hoskins of all FCPA counts, and of all but one money laundering counts. GA654-GA656.

Hoskins filed a motion for a judgment of acquittal or new trial on all counts. As to the FCPA charges, Hoskins argued that the evidence was insufficient for any reasonable jury to conclude beyond a reasonable doubt that he was an agent of API. GA668-GA680. His argument regarding agency again focused on the element of control, claiming that the principal must have "the right to control the day-to-day work of the alleged agent" and the "power to fire the agent," GA670. Hoskins principally relied on corporate organizational and process charts and Hoskins's role in approving aspects of the consultancy agreements, GA671-GA674, and discounted the government's evidence as "a few stray emails in which API representatives asked Mr. Hoskins to assist in various tasks." GA671, GA674-G680.

The government opposed Hoskins's reliance on non-Tarahan-related corporate organizational charts, which were contrary to witness testimony about Tarahan that, for example, "Mr. Hoskins would have been reporting to Fred [Pierucci] on the Tarahan Project." GA718. The government pointed to evidence that proved beyond a reasonable doubt that the defendant was acceding to API's instructions in connection with the hiring of consultants on the Tarahan Project, and that API controlled the undertaking, that is, "that the work that the defendant and others (such as Reza Moenaf) were doing in connection with the consultants on the Tarahan Project, were controlled, and subject to ultimate decision-making authority, by API." GA719.

The district court granted the defendant's motion for acquittal on the FCPA counts, finding that the government had not produced *any* evidence of API's control over Hoskins's actions on Tarahan "consistent with agency relationships." GA763. It also conditionally granted a new trial on those counts. GA772-GA773.

The court held that the element of control cannot be met unless the principal has the right of interim control over how the agent performs the undertaking, *i.e.*, the acts and services on behalf of the principal. GA751. The court found that although the evidence was sufficient to prove that API "controlled the hiring of consultants for the

Tarahan Project" and "gave Mr. Hoskins instructions, which he followed," the government failed to prove that Hoskins "acted subject to API's control such that [he] was an agent of API." GA759. Similarly, the court held that although the evidence showed "a continued demonstration of API's authority to determine the terms upon which consultants would be hired and Mr. Hoskins's assistance in efforts to retain those consultants," the government did not prove that API had "any authority to control Mr. Hoskins's actions." GA761.

The district court also found that "none of the indicia of control which are typical of an agency relationship are present here," and in particular that "Mr. Pierucci could not fire, reassign, demote, or impact the compensation of Mr. Hoskins." GA762-GA763. The district court further held there was no evidence that API "had the power to terminate Mr. Hoskins's authority to participate in the hiring of consultants for the Tarahan Project, to assess Mr. Hoskins's performance, or to otherwise exert control over his actions." GA763.

The district court's conditional grant of a new trial on the FCPA counts relied on the same analysis as in its Rule 29 decision, that is, the alleged insufficiency of evidence on the issue of control. GA773.

Summary of Argument

The district court's order of acquittal on Counts 1-7 or, conditionally, a new trial, should be reversed and the convictions reinstated.

There was sufficient evidence for the jury to conclude that API controlled Hoskins's undertaking on its behalf—his assistance in securing the Tarahan Project and particularly in helping API to retain consultants to funnel bribes to Indonesian officials—and therefore that Hoskins was API's agent. First, the record was replete with examples of Hoskins complying with API's instructions in support of its efforts to secure the Tarahan Project. Second, a rational jury could infer API's control over Hoskins's Tarahan-related activities on its behalf from the ample evidence of API's control over the Tarahan Project and the hiring of consultants. Third, the jury could likewise infer API's control over Hoskins's support activities on Tarahan from the evidence of Hoskins's role within the Alstom organization.

In the face of this ample evidence of an agency relationship, the district court and Hoskins's contrary arguments are unavailing. First, the district court improperly substituted its own view of the evidence for that of the jury, and misapplied cases of this Court and the Supreme Court to suggest a narrower view of control than the law permits. Second, the district court dispensed with the fact-bound agency analysis required by this

Court, and instead relied on a claimed lack of certain "typical" indicia of control (like the right to hire or fire). Third, contrary to Hoskins's argument below, Hoskins's limited approval authority over certain aspects of the consultancy agreements did not undermine API's control.

Finally, the district court abused its discretion in conditionally granting a new trial because it usurped the role of the jury in doing so and provided no reason why the verdict was a miscarriage of justice. The district court simply disagreed with the verdict.

Argument

I. The jury's verdict on Counts 1-7 was supported by sufficient evidence of control.

A. Governing law and standard of review

1. Standard of review

This Court reviews *de novo* a district court's grant of a Rule 29 motion based on a finding that the trial evidence was insufficient to support the jury's verdict, applying the same standard the district court applies in review of the evidence. *United States v. Pauling*, 924 F.3d 649, 656 (2d Cir. 2019) (citing *United States v. Truman*, 688 F.3d 129, 139 (2d Cir. 2012)). The question is whether "'*any* rational trier of fact could have found the essential elements of the crime beyond

a reasonable doubt.'" *United States v. Coplan*, 703 F.3d 46, 62 (2d Cir. 2012) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in *Jackson*). "A defendant challenging a jury's guilty verdict bears a heavy burden." *Pauling*, 924 F.3d at 656 (internal quotation marks omitted). "This is because, in evaluating a sufficiency challenge, [a court] must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence." *Id.* (internal quotes and brackets omitted). An inference, while not "a suspicion or a guess," "is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact that is known to exist." *Id.*

This Court reviews for abuse of discretion the grant of a new trial under Federal Rule of Criminal Procedure 33(a). *United States v. Gramins*, 939 F.3d 429, 443-44 (2d Cir. 2019). A district court has "abuse[d] its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence," *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990), or rendered a decision that "cannot be located within the range of permissible decisions," *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001). "When considering a motion for a new trial under Rule 33, a district court has

discretion to weigh the evidence and in so doing evaluate for itself the credibility of the witnesses." *Truman*, 688 F.3d at 141 (internal quotation marks omitted).

While Rule 33 gives the district court "broad discretion" to grant a new trial, *United States v. Ferguson*, 246 F.3d 129, 133 (2d Cir. 2001), district courts must exercise that discretion "sparingly and in the most extraordinary circumstances," *id.* at 134 (internal quotation marks omitted), and only in order to "avert a perceived miscarriage of justice," *id.* at 133. "In short, the ultimate test for granting a new trial pursuant to FRCRP 33 is whether letting a guilty verdict stand would be a *manifest injustice*." *Gramins*, 939 F.3d at 444 (internal quotation marks omitted) (emphasis in original). *See also United States v. Josephberg*, 562 F.3d 478, 488 (2d Cir. 2009) ("In deciding such a motion, the district court must take care not to usurp the role of the jury, and the ultimate consideration is whether letting a guilty verdict stand would be a manifest injustice.").

2. Governing law on agency

Criminal liability under the anti-bribery provisions of the FCPA attaches to a foreign national operating outside the United States only where the defendant falls within one of certain desig-

nated classes of individuals, including, as relevant here, an "agent of [a] domestic concern." 15 U.S.C. § 78dd-2; *see also Hoskins*, 902 F.3d at 97. A "domestic concern" includes a United States citizen, resident, or company. *See* 15 U.S.C. § 78dd-2(h)(1). However, the FCPA does not define "agent," and thus common law principles apply. *See N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).

"Agency is a legal concept that requires: (1) manifestation by the principal that the agent shall act for him; (2) the agent's acceptance of the undertaking; and (3) the understanding of the parties that the principal is to be in control of the undertaking." *United States v. Wells Fargo & Co.*, 943 F.3d 588, 598 (2d Cir. 2019); *Priceline*, 711 F.3d at 277 (same); *Cleveland*, 448 F.3d at 522 (same).

The determination of an agency relationship "can turn on a number of factors, including: the situation of the parties, their relations to one another, and the business in which they are engaged; the general usages of the business in question and the purported principal's business methods; the nature of the subject matters and the circumstances under which the business is done." *Cleveland*, 448 F.3d at 522 (internal quotation marks omitted). As the Supreme Court has noted, "[o]ne may be an agent for some business purposes and not others so that the fact that one may

be an agent for one purpose does not make him or her an agent for every purpose." *Daimler AG v. Bauman*, 571 U.S. 117, 135 (2014) (quoting 2A C.J.S., Agency § 43, p. 367 (2013)). An agent's "authority may be express or implied, but in either case it exists only where the agent may reasonably infer from the words or conduct of the principal that the principal has consented to the agent's performance of a particular act." *Minskoff v. American Exp. Travel Related Services Co., Inc.*, 98 F.3d 703, 708 (2d Cir. 1996).

This Court has made clear that the principal need not exercise control over the entirety of the undertaking; rather "the principal must maintain control over key aspects of the undertaking." *Commercial Union Ins. Co. v. Alitalia Airlines, S.p.A.*, 347 F.3d 448, 462 (2d Cir. 2003). In determining whether the necessary level of control is present, courts look to whether the purported principal is in a position to provide interim instructions to the purported agent. "The power to give interim instructions distinguishes principals in agency relationships from those who contract to receive services provided by persons who are not agents." *Priceline*, 711 F.3d at 278 (quoting Restatement (Third) of Agency § 1.01 cmt. f). However, "the control asserted need not include control at every moment; its exercise may be very attenuated and, as where the principal is physically absent, may be ineffective." *Cleveland*, 448

F.3d at 522 (quoting Restatement (Second) of Agency § 14 cmt. a). Nor does control require that the principal "micromanage" the agent; "review and oversight" alone are "consistent with agency principles." *Wells Fargo*, 943 F.3d at 598; *see also id*. at 599 ("[A]gency law unquestionably permits a principal to delegate the power to act on its behalf to another party and to give that party some discretion.").

B. Discussion

The district court's grant of acquittal should be reversed because, on *de novo* review, the jury reasonably found sufficient evidence that API had the "power to give [Hoskins] interim instructions" in connection with the undertaking and thus that Hoskins was API's agent. *See Priceline*, 711 F.3d at 278. In fact, on Tarahan, API did not even delegate authority to the defendant to make the ultimate hiring determinations on his own. Instead, during the three-year duration of Hoskins's undertaking on API's behalf, he had to report back and obtain API's approval before taking actions with respect to the hiring of consultants, whether related to which consultants to hire, how much to pay them, when to send them a consultancy agreement, and their terms of payment. The district court's finding to the contrary substituted its own view of the evidence for that of jury, and misapplied the settled law of this Court.

1. There was sufficient evidence of control.

Applying the "exceedingly deferential" standard of review to the jury's guilty verdicts, and "crediting every inference that could have been drawn in the government's favor," there was more than sufficient evidence from which the jury could have concluded that API had interim control over Hoskins's undertaking on its behalf. *See Coplan*, 703 F.3d at 62 (internal citation omitted). Such control was easily inferred from (1) evidence of API's instructions to and authority over Hoskins; (2) evidence of API's control over Tarahan and the hiring of consultants; and (3) documentary evidence of Hoskins's role at Alstom, from which a jury could reasonably have gleaned API's power to give him interim instructions in connection with his efforts on Tarahan.

a. API's instructions to and authority over Hoskins on Tarahan.

First, the evidence at trial showed that for three years, API (through its executives and employees) provided interim instructions to Hoskins on how to carry out his mandate to help them hire consultants and secure the Tarahan Project, and that Hoskins had to continually seek API's approval as he carried out his role.

When API was initially considering hiring a consultant who was close to Emir Moeis, API did

not authorize the defendant to negotiate the consultancy agreement on his own. Instead, API (through Pierucci) instructed the defendant "to check with" the defendant's underling, Alstom's Indonesia country president Reza Moenaf, about the "latest position on Tarahan," about which the defendant was then to brief Pierucci. GA860. Hoskins explained that "*we* then plan to appoint" Emir Moeis as consultant, *id*. (emphasis added), suggesting his own role—along with his subordinates Moenaf and Sulianto—in hiring Moeis's representative as consultant on Tarahan. Rothschild explained that this meant hiring Harsono, who was a close associate of Moeis. GA270-GA271.

But Hoskins could not simply move forward with his role in hiring Harsono for API. Instead, he required further interim instruction from API. To that end, he and his subordinate (Moenaf) sought approval from API to move forward to negotiate with Harsono. Accordingly, Moenaf (copying Hoskins) wrote that API's "position concerning the representation is urgently needed." GA861. He then explained that "*we* are working with Eddie [Widiono] and Bambang [Tutuko] in PLN on *our* 'competition.'" GA861 (emphasis added). Moenaf continued: "nevertheless, we would need a stronger push now. Appreciate your decision a.s.a.p." GA861. Again, a jury could eas-

ily infer that "we" meant Moenaf and his colleagues at International Network—including his boss, Hoskins, who was copied on the email—who were attempting to support API's bid. In other words, Moenaf and Hoskins wished to employ the consultant for a "stronger push" on API's behalf, but could not do so without "[API]'s decision a.s.a.p." Far from "surrender[ing] all control over how" Hoskins worked on API's behalf, *see Priceline*, 711 F.3d at 280, API retained ultimate authority over Hoskins's ability to hire and work with the proposed consultant.

These inferences were confirmed less than a week later when Pierucci met directly with Hoskins and gave "his 'go ahead' to proceed" with Moeis's representative Harsono. GA862. Moenaf, copying Hoskins, then sought confirmation from Pierucci's underling Rothschild, so that Hoskins and International Network (here, acting through Sulianto) could proceed with the paperwork. GA862. At first Pierucci gave that authority, directing Moenaf to "finalise the consultancy agreement" and to "send me the key data so I can approve it officially." GA863. Thus again, the role of International Network—including Hoskins—in support of API required interim instruction from API regarding who to employ as consultant.

Ultimately API decided to withdraw authority from Hoskins to use Harsono, and instead opted to hire Pirooz Sharafi. GA273, GA317. Once API

identified Sharafi, it did not just turn blanket responsibility over to Hoskins and his subordinates to arrange the consultancy agreement with Sharafi. Rather, API communicated directly with Sharafi regarding whether Sharafi could bribe the right government officials, and was involved in the negotiations with Sharafi. *See* GA867. And then Rothschild directed Sulianto and Moenaf to provide "a list of all the team of [PLN] evaluators that he should meet"—a further instruction to International Network consistent with its role in supporting API, that is, providing critical local knowledge about who to bribe. GA867.

API's instructions to Hoskins did not stop simply because Sharafi had been hired. When API, Hoskins, and their co-conspirators learned that Sharafi was not effectively bribing PLN officials, it was up to API to direct Hoskins and International Network as to what action to take. GA468-GA470 (Puckett explaining it was API's decision whether to change consultants). Moenaf wanted to discuss with Hoskins how to "improve the situation," GA877, but neither could act until directed by API. API ultimately made the decision to reduce Sharafi's role and bring on a second consultant (Aulia), and enlisted Hoskins to execute that decision on its behalf during meetings in Jakarta in the fall of 2003. *See* GA353. The jury could easily have concluded in this scenario alone that an agency relationship was established for

the purpose of hiring bribe-paying consultants—Hoskins was tasked with making the formal offers to Sharafi and Aulia, but only at the direction of and on the terms approved by API.

After delivering the news to Sharafi and Aulia, Hoskins executed API's instructions to formalize the arrangements. Hoskins was not even authorized to send the revised consultancy agreement to the consultants without first receiving instructions from API. On October 10, 2013, Pierucci sent an email to Hoskins with instructions regarding the terms (or schedule) of payment for Sharafi: "Please reissue asap the revised consultancy agreement based on the following [terms of payment]….Please send the revised agreement by e-mail to Bill [Pomponi] and myself." GA892. On October 13, 2003, lead API sales representative Bill Pomponi sent an email to Hoskins, copying several others, instructing Hoskins: "Based upon our telecom Sunday, pls go ahead, using today's date, and issue the fax official to Azmin [Aulia]. Pls send copy via [Lotus Notes] attachment to myself." GA894. In each of these instances, Hoskins was given instructions to act on API's behalf in a way that would help conclude the consultancy agreements, and therefore bind API legally. *See* Restatement (Third) of Agency § 1.01 cmt. c (the existence of an agency relationship determines whether a purported agent may "affect the legal rights and duties" of a principal).

Finally, the jury had ample evidence that Hoskins executed interim instructions from API in negotiations with Aulia over the terms of payment for his consultancy agreement. Both Aulia and PLN President Widiono complained that the proposed contract called for *pro rata* payments that would take at least 2-3 years, while the commitments for bribes would need to be fulfilled up front. GA929, GA931. Hoskins undertook, on behalf of API, to resolve this issue. Indeed, the jury could readily conclude that Hoskins—along with International Network colleagues Moenaf, Sulianto, and Yves Mouillet—was negotiating with Aulia based on interim instructions that he received from API. Hoskins, explaining that faster payments were needed because of "elections," suggested that he be authorized to "try" a 12-month payment schedule, but acknowledged he could only do so at Pierucci's direction, saying "if you agree we should try this." GA936. At API's direction, Hoskins tried to negotiate an 18-month term, but reported that the 12-month term was the best they could do. GA935. Still, Hoskins did not move forward on his own because he was still under the control of API in the negotiations. Even though he had reached what he believed was the best deal, he still needed API to give the "all clear" to Moenaf to move forward on the proposed terms. GA935. And, accordingly, only when Pomponi communicated API's "approval" did the deal get done. GA934.

In short, at each stage of hiring consultants, Hoskins acted on behalf and under the control of API. He was not simply given a mandate and left to his devices, but was responsible to, and received interim instructions from, API. All of this was done so that API would win the Tarahan Project—not Alstom S.A. (the parent company) and not the Alstom subsidiary by which Hoskins was employed or the support function to which he was assigned. Accordingly, when the project was finally won, Pierucci thanked Hoskins for his "local support without which we would not have been able to achieve this result." GA938.

b. API's control over Tarahan and the hiring of consultants.

The jury could also have reasonably inferred API's interim control over Hoskins's Tarahan-related activities from the extensive evidence of API's control over the hiring of Tarahan consultants and the Tarahan project in general. *See Pauling*, 924 F.3d at 656 (court must credit "every inference that could have been drawn in the government's favor"); *Minskoff*, 98 F.3d at 708 (evidence of agency can be "express or implied," and can be "infer[red] from the words or conduct of the principal").

As the district court acknowledged, "[t]he Government has thoroughly demonstrated that API was the business leader of the Tarahan Project,

that it exercised authority and leadership over which consultants were hired for that project and according to what terms, and that Mr. Hoskins worked with API on that project." GA763; *see also* GA316 (API "in charge of the Tarahan contract"); GA358 (same); GA423 (same); GA424 (as between International Network and the boiler business in Windsor, "[t]he boiler business was in charge" of the Tarahan Project); GA465 (Pierucci controlled "strategy" and "negotiation tactics"); GA464 (Pierucci was responsible for hiring Sharafi); GA468 (API was responsible for "making the decision about the agent"); GA469 (referring to Pierucci as the "decision maker" for consultant issues).

Because API (and not Alstom S.A., the parent company, or the subsidiary by which Hoskins was employed) controlled the decision of whether to hire a consultant, which consultant to hire, how much to pay the consultant, and terms and conditions by which the consultant was paid, a rational jury could infer that actions of individuals (like Hoskins) working on behalf of API to help it retain a consultant necessarily were controlled by API. Such an inference was ratified by Larry Puckett's testimony, that "Hoskins didn't call the shots or the strategy on Tarahan. Fred Pierucci would call—he was in control. So in that sense, Mr. Hoskins would have been reporting to Fred on the Tarahan Project." GA482.

Indeed, it would be illogical to conclude that, although API controlled every aspect of consultant hiring and the Tarahan Project, and although the defendant was working to help API hire consultants and win the Tarahan Project, the defendant nevertheless had the discretion to do what he saw fit. In fact, whereas there are many examples of Hoskins following API's interim instructions on Tarahan, there are no instances in the evidence where he acted without, or contrary to, their directions.

c. Evidence of Hoskins's support role at Alstom.

Third, although agency must be judged "in connection with the specific events related to the Tarahan Project," GA559, the jury was entitled to find further support for API's interim control over Hoskins' Tarahan-related activities from evidence of the role of Hoskins and International Network within Alstom.

International Network's subservience to the business units was made plain in internal Alstom presentations. According to a February 2002 presentation entitled "International Network," International Network "is serving all Sectors based on their needs and requests" and "is a Sales Support and Service Organization." GA996. International Network's responsibilities included "sales support as requested by Sectors," GA997,

to "[o]ptimize the local condition for the ALSTOM sectors intending to do business in the country," GA1000, and to provide "[a]ssistance to Sectors, Segments, and Country organizations to find adequate and compliant arrangements with third party sales supports," GA1001. A June 2003 presentation also entitled "International Network," contained many identical objectives, including helping business units to find "compliant arrangements with third party sales supports," GA1061, and called upon Area Senior Vice Presidents (like Hoskins) to "[p]rovide Sectors with in depth expertise for the geographical area," GA1068; *see also* GA966 (in a March 2004 presentation, noting "[International Network] is at APC Service to Support your actions in all active Countries … You should not hesitate to request the [Alstom country president] support.").

Consistent with these internal presentations, one Alstom organizational chart showed International Network at the same level as other common corporate support organizations, including information technology and human resources. GA1040. In still another chart, International Network was listed as a "function," like communications, informational technology, and human resources, below the business sectors. GA1024.

These generic documents were echoed by testimony of all four fact witnesses at trial:

- Rothschild testified that "International Network was a support organization and [Hoskins] provided support to Fred Pierucci on an as-needed basis, as he would with all business units." GA287.
- Thiessen testified that "one of the roles of International Network was to support the business units in getting new business." GA328; *see also* GA388 ("one of [International Network's] primary roles was to support the business units."); GA409 ("One of the jobs [of] international network was to support the business units."); GA418 (affirming Hoskins supported negotiations with agents and consultants).
- Puckett testified that "International Network's role was to provide support to the business units in terms of sales, in terms of local relationships. It was basically set up to provide local input, regional input to the business units." GA461.
- API's finance director, Christopher Varney, testified that "International Network was a group of employees that worked in the various countries that we were doing business in to provide the link to the people on the ground, the local teams." GA424.

That the support role was subservient to the business's control was well-known within International Network. Moenaf complained to Hoskins regarding the Muara Tawar project that, as Alstom's country president, he only got involved in the project if the business needed his help. GA914. He lamented further: "I do not know how we could change the way we work (Network – Sector), but today I feel that I have the responsibility without authority. Since sector has the final call, perhaps the answer 'so be it.'" GA914. Thiessen testified that this was a complaint he had also heard regarding the role of International Network from Hoskins's successor, Pedro Sole. GA386, GA414-GA415. In other words, International Network had responsibilities in assisting the businesses, but no authority to act on its own.

The evidence further showed that International Network's support role was partly a function of Alstom's economic structure. Varney confirmed that because the respective Alstom businesses, and not International Network, had the "profits and loss center," they were entitled "to make the ultimate decisions." GA424. Indeed, Varney explained, International Network itself was funded by the business units. GA424; *see also* GA996 ("International Network is financed by all ALSTOM Sectors based on their annual global sales."). That the business units had the ultimate decision-making authority on business matters,

and paid International Network for its assistance, is strong evidence of the businesses' control over International Network's actions on their behalf.

Given this consistent testimony and documentary evidence of International Network's support role and the Alstom businesses' authority, it was entirely reasonable for the jury to conclude that API, as an Alstom business unit, had "[t]he power to give interim instructions" to International Network—and therefore Hoskins—and thus that Hoskins was API's agent. *See Priceline*, 711 F.3d at 278 (citation omitted).

In sum, API's individual instructions to and authority over Hoskins, API's control over all Tarahan matters, and Hoskins's support role within Alstom, all justifiably led to the jury's conclusion that Hoskins was API's agent in helping it secure the Tarahan Project. *See Pauling*, 924 F.3d at 656 (requiring the court to "credit[] every inference that could have been drawn in the government's favor." (citation omitted)).

2. The arguments of the district court and Hoskins do not undermine the jury verdict.

In the face of this ample evidence of API's interim control over Hoskins's activities on its behalf, the district court and Hoskins misapplied

the law and improperly relied on competing inferences to substitute their own judgement for that of the jury. *See United States v. Aquart*, 912 F.3d 1, 44 (2d Cir. 2018) ("it is the task of the jury, not the court, to choose among competing inferences" (internal quotation marks omitted)), *cert. denied*, 140 S. Ct. 511 (2019).

a. The district court's view of interim control was overly restrictive and based on a narrow view of the facts.

In granting the Rule 29 motion, the district court failed to credit "every inference that could have been drawn in the government's favor," *Pauling*, 924 F.3d at 656 (citation omitted). In particular, the court explicitly refused to infer API's interim control over Hoskins's Tarahan-related activities from the extensive evidence of both (1) Hoskins's seeking approval from API and acceding to many API instructions and (2) API's control over Tarahan and the hiring of consultants (on which Hoskins was assisting), and entirely ignored the evidence of Hoskins's support role within Alstom, discussed above. The court held that although the evidence was sufficient to prove that API "controlled the hiring of consultants for the Tarahan Project" and "gave Mr. Hoskins instructions, which he followed," the government failed to prove that Hoskins "acted subject to API's control such that [he] was an agent of API."

GA759; *see also* GA761 (although the evidence showed "a continued demonstration of API's authority to determine the terms upon which consultants would be hired and Mr. Hoskins's assistance in efforts to retain those consultants," the government did not prove that API had "any authority to control Mr. Hoskins's actions"). The court's rejection of this obvious inference was outside its authority and contrary to the law it cited.

First, the district court inaptly applied this Court's decision in *Priceline* to hold that the government did not prove API's power of interim control over Hoskins's actions on its behalf. *See* GA760-GA763. *Priceline* shows just the opposite.

In *Priceline*, this Court held that Priceline was not an agent of its customers with respect to Name Your Own Price transactions because the customers had no right to give interim instructions to Priceline "as to how it procures hotel reservations beyond the initial specifications." 711 F.3d at 279. Specifically, "after the customer thus 'delimit[s] the choices that the service provider has the right to make,' he cedes all other control over the reservation process to Priceline." *Id.* (citing Restatement (Third) of Agency § 1.01 cmt. f).

Contrary to the district court's conclusion, this Court's analysis in *Priceline* highlights why API had interim control over Hoskins's Tarahan-related activities. In *Priceline*, this Court found that the customer gave Priceline initial parameters

and then left the rest to the company. *See* 711 F.3d at 279. Here, conversely, API continued to provide specific instructions about how Hoskins carried out his work for API, and the defendant routinely checked in with API to secure its approval for his actions. API did not simply tell the defendant what kind of consultant it wanted to hire and how much it wanted to pay and then unleash the defendant to pick whichever consultant he deemed appropriate. Rather, the defendant received continuous instructions and repeatedly checked back with API to secure its approval for which consultant to hire, what the terms should be, and when he could communicate the terms to the consultant. *See supra* at 31-37.

Moreover, in *Priceline* this Court explained that there could not have been any interim control because "as a practical matter, there is no 'interim' between the placement of the customer's bid and its acceptance or rejection during which the customer could exert control over Priceline. The electronic transaction is nearly instantaneous." *Id*. at 279. Here, again in contrast, there was ample opportunity for interim control—Hoskins's work for API spanned three years, and API provided instructions from the beginning to the end of that period.

The *Priceline* Court's counterfactual of a real estate broker—accepted by this Court as an

agency relationship—is instructive here. This Court explained:

> A real estate vendor or purchaser retains control over whether to accept an offer received by his agent, a circumstance that imposes a duty on the agent to convey the offer correctly. By contrast, once a Name Your Own Price customer states his hotel preferences and submits his bid, they are irrevocable. He retains no control over the procurement process that would give rise to a duty by Priceline to convey any further information between the moment the offer is submitted and the moment Priceline reports whether the offer was accepted."

Id. at 279. Just like the real estate purchaser or seller, API "retain[ed] control over whether to accept an offer received by [Hoskins]," and maintained control over the "procurement process" during which Hoskins was required to provide "further information." *See id*. at 279; *compare with*, *e.g.*, GA860 (Pierucci instructing Hoskins "to check with" Moenaf about the "latest position on Tarahan," in advance of Hoskins being permitted to retain Moeis's representative as consultant). In fact, Hoskins on numerous occasions was required to obtain the "go-ahead" from API before moving forward with a proposed consultant, proposed terms for the consultant, and proposed revisions to the consultancy agreements. *See*, *e.g.*,

GA862 ("According to Lawrence, Fred has already given his 'go-ahead' to proceed with the proposed consultant, Mr M. Please confirm."); GA894 (Pomponi instructing Hoskins: "Based upon our telecom Sunday, pls go ahead, using today's date, and issue the fax officially to Azmin [Aulia]."); GA934-GA935 (Hoskins seeking "the all clear" from Pomponi to communicate revised terms of payment to Aulia).

To fit this case into the facts of *Priceline*, though, the district court cast the evidence in a different light, describing the emails from Pierucci and Pomponi to Hoskins as "requests" instead of instructions, GA763, and concluding that "these emails demonstrate only that API had the power to control the terms of any consultancy agreement and that Mr. Hoskins at times assisted API or asserted API's position on its behalf in that process." GA761-GA762. Yet if API controlled the terms of any consultancy agreement, API would not be simply making "requests" to carry out those terms on its behalf. Moreover, weighing the evidence and choosing between competing inferences are not the district court's roles once the jury has rendered a verdict. *See Pauling*, 924 F.3d at 656 (on sufficiency challenge, court must "defer[] to the jury's assessment of … the weight of the evidence"). The evidence certainly supported the conclusion that Hoskins was seek-

ing API's approval and acceding to API's instructions, and therefore (applying *Priceline*) was subject to API's interim control in his efforts to help API win the Tarahan Project. That the district court would interpret those approvals and instructions differently does not warrant a judgment of acquittal.

Similarly, the district court simply rejected assigning any weight to API's control over the Tarahan Project and the hiring of consultants, without even considering its possible relevance. GA760. While API's control over the Tarahan Project or the hiring of consultants was not a proxy for control over Hoskins's activities, it was certainly reasonable for the jury to infer that where Hoskins assisted on an endeavor controlled by API, his assistance would also be controlled by API. *See* GA462 ("Mr. Hoskins's role on the Tarahan Project is to support AP -- Alstom Power, Inc., and support the sale of the project."). Indeed, it would be illogical to conclude otherwise.

Second, the district court's reliance on *Hollingsworth v. Perry*, 570 U.S. 693, 714 (2013) was similarly misplaced. GA759-GA762. The district court incorrectly claimed that, like in *Hollingsworth*, Hoskins was assigned "'mere authorization to assert a particular interest' or position on behalf of the purported principal." GA761 (quoting *Hollingsworth*, 570 U.S. at 713). But, like with *Priceline*, a review of *Hollingsworth* and

the facts here shows that the district court misapplied the relevant legal principle.

In *Hollingsworth*, California law assigned a generalized authority to the official proponents of a ballot initiative (in that case, Proposition 8) "to assert the State's interest in the initiative's validity." 570 U.S. at 712 (citation omitted). But, the Court held, that authority did not make the proponents agents of the state—and thus did not confer standing to appeal on behalf of the state—because the state had no right to control the proponents' actions. *Id.* at 713. Among other things, "petitioners answer to no one; they decide for themselves, with no review, what arguments to make and how to make them." *Id.* The Court's holding was consistent with *Priceline*, decided the same year, in that agency could not be based on the purported agent's generalized authority with no right of interim control.

Yet, just like with *Priceline*, the district court turned *Hollingsworth* on its head. Contrary to the district court's contention, Hoskins was not merely assigned blanket authority to "assert [API's] interest" in hiring a consultant, like the proponents of Proposition 8, and then left to decide on his own how to execute that authority. Instead, Hoskins was assigned a support role—at API's request—to assist in retaining consultants and securing the Tarahan Project on API's behalf,

and API retained authority to direct how that assistance was carried out. Indeed, the many examples of instructions to Hoskins cited by the district court, GA761 (and the many more cited by the government) are not what the Court in *Hollingsworth* contemplated as mere assertion of interest, but are instead examples of the interim control exercised over Hoskins's actions in furtherance of his larger mandate to assist API.

Third, in refusing to find *any* evidence of interim control, the district court appeared to require a degree of day-to-day control over Hoskins's work on Tarahan that is unsupported in the law. *See* GA761 ("But absent any evidence that API had a right of interim control over *Mr. Hoskins's actions* to procure consultants according to API's specifications, a rational jury could not determine beyond a reasonable doubt that Mr. Hoskins was an agent of API." (emphasis in original)). In other words, because the district court refused to acknowledge any significance to the evidence of API's instructions to Hoskins or API's control over the hiring of consultants, it appears the district court was seeking some higher level, or more routinized form, of control.

The law does not require such a degree of control. Rather than control over day-to-day activities, this Court requires that API control only "key aspects of the undertaking," *Commercial Union Ins. Co.*, 347 F.3d at 462, and that such

control "need not include control at every moment … and … may be ineffective," *Cleveland*, 448 F.3d at 522 (internal quotation marks omitted). Indeed, this Court has most recently clarified that control can be limited to "review and oversight," rather than micromanagement, and that the agent may even exercise "some discretion" on behalf of the principal. *Wells Fargo*, 943 F.3d at 598-99. On that standard, evidence of API's control over consultant hiring and frequent instructions to Hoskins, and evidence of API's authority over Hoskins and International Network, is surely sufficient to warrant a jury's conclusion that API controlled the "key aspects" of Hoskins's undertaking on API's behalf.

Indeed, there was no evidence in the many contemporaneous emails or other documents, or from witnesses, that suggests that Hoskins acted without authority or interim instructions provided by API. In fact, given that API was the entity seeking the Tarahan Project contract, that it was the entity seeking to retain the consultants, and that it was the entity that ultimately signed the Tarahan Project contract and executed on it, "if [Hoskins] d[id] not act on behalf of [API], on whose behalf d[id] [he] act?" *See Wells Fargo*, 943 F.3d at 600. In short, there was more than sufficient evidence of control under the proper legal standard.

b. The district court's reliance on "typical" indicia of control was misplaced.

Although this Court has been clear that the existence of an agency relationship is a "highly factual" question, dependent on the circumstances of the parties, *Cleveland*, 448 F.3d at 522, the district court nonetheless attempted to import certain typical "indicia of control" that it contended apply generically across factual scenarios, but are lacking here, GA762. Most significantly, the district court cited API's inability to fire or reassign Hoskins as persuasive evidence of a lack of control, by equating those to API's capacity to "terminate the agency relationship." GA762-GA763. However, while the capacity to terminate an agent's authority is certainly required under the common law, this is distinct from the capacity to terminate someone's employment in a broader corporate setting, and the district court appeared to conflate the two in applying an overly restrictive interpretation of that requirement. Applied properly, the facts here are more than sufficient to support a conclusion that API could terminate Hoskins's authority.

Under the common law, the existence of an agency relationship determines whether a purported agent may "affect the legal rights and duties" of a principal, that is, whether the principal

is legally liable for the acts of its agent. Restatement (Third) of Agency § 1.01 cmt. c. The "chief justifications" for such liability are "the principal's ability to select and control the agent *and to terminate the agency relationship*, together with the fact that the agent has agreed expressly or implicitly to act on the principal's behalf." *Id*. (emphasis added). A principal terminates the agency relationship "by revoking the agent's authority." § 1.01 cmt. f. Thus, since a principal will be liable for its agent's actions, it must have the ability to withdraw authorization and avoid further liability. *See* Restatement (Third) of Agency § 3.10 cmt. b ("The justification for the power to revoke or renounce reflects the nature and legal consequences of agency.").

Here, API's power to terminate Hoskins's authority to transact on its behalf, and thus avoid liability for his actions, was easily inferred from the evidence.

First, Hoskins was not given authority to hire consultants absent API's direction, and thus Hoskins could not legally bind API absent its express approval. The consultancy agreements themselves make this clear—they were executed by API on its own behalf and in some cases together with Alstom Prom (another Alstom subsidiary used to funnel payments to consultants, *see* GA434), but not by Hoskins or Alstom S.A. (the

parent). *See* GA819, GA828, GA837. Thus, because Hoskins could not hire a consultant without API's instruction, the jury could reasonably infer that API had the power to terminate Hoskins's authority to hire, negotiate with, or work with a consultant on its behalf.

Likewise, API's power to terminate the agency relationship can be seen in its ability to revoke grants of authority. *See* Restatement § 1.01 cmt. f. (a principal terminates the agency relationship "by revoking the agent's authority."). For example, API initially gave Hoskins and Moenaf authority to work with Moeis's chosen consultant, Harsono, *see* GA862-GA864, but subsequently API revoked that authority, *see* GA273, GA317. Although API instructed Hoskins to begin working to retain Sharafi, rather than revoking his authority altogether, that Hoskins could not simply proceed on the earlier instruction clearly suggests that his broader power as an agent was also subject to revocation.

The power to initiate and terminate the agency relationship also flows from the nature of Hoskins's role with respect to API and other Alstom businesses. The evidence established that Hoskins's role within the Alstom group of companies was generally to "serv[e] all Sectors based on their needs and *requests*," provide "[s]ales support *as requested* by the Sectors," and provide "[s]upport in contract execution (customer contacts) *if*

requested." GA996-GA997, GA999 (emphasis added); *see also* GA287 ("[Hoskins] provided support to Fred Pierucci on an as-needed basis, as he would with all business units.").

It was thus up to the business to initiate the agency relationship with Hoskins. Indeed, the first step in the process of hiring a consultant, and therefore International Network's involvement, came from the business. *See* GA949 ("The need for a [third party] sales supporting Agent can be raised by any Sector organization."). As discussed at length above, these process documents were consistent with the practice on Tarahan, in which API initiated the relationship by asking Hoskins to assist, and then provided many specific instructions. The district court even acknowledged that "[Hoskins] may have performed tasks *upon request* by API employees." GA763 (emphasis added). But the district court ignored the logical extension of its fact-finding, that since API had the authority to make a request for help, the jury could easily infer its right to withdraw that request or withhold further requests. Indeed, it would be illogical—and contrary to the evidence—were API to decide to refrain from hiring a consultant or from bidding on Tarahan at all, but Hoskins was nonetheless empowered to continue his efforts in support of those missions. That is particularly true given API's well-estab-

lished control over Tarahan and the hiring of consultants. *See* GA481 (Puckett emphasizing Pierucci's role in decision making).

Instead of confronting the evidence supporting API's right of termination, the district court inaptly attempted to narrow the Restatement to the right to "fire, reassign, [or] demote." GA762. While firing is certainly a form of terminating authority, it is far from the only kind, and in this context would equate a principal-agent relationship to one of employer-employee. However, because the FCPA separately covers employees of domestic concerns, *see* 15 U.S.C. § 78dd-2(a), the statute cannot be read so narrowly. *See State Street Bank and Trust Co. v. Salovaara*, 326 F.3d 130, 139 (2d Cir. 2003) ("It is well-settled that courts should avoid statutory interpretations that render provisions superfluous.").

Moreover, this Court has held that the existence of an agency relationship does not depend on some preset list of "indicia of control which are typical of an agency relationship," GA762, but is a "highly factual" question, and turns on a number of factors related to the relationship between the parties, the business, and "the circumstances under which the business is done." *Cleveland*, 448 F.3d at 522 (citation omitted).

Here, there was no dispute that Hoskins did not report to API on an organizational chart such

that he could be fired by them. However, the witnesses were equally clear that formal reporting lines did not define the relationship between API and Hoskins on Tarahan. *See*, *e.g.*, GA287 (Rothschild testifying that Pierucci was not Hoskins's boss "on an org chart" but "International Network was a support organization and [Hoskins] provided support to Fred Pierucci on an as needed basis, as he would with all business units"); GA317 (Rothschild testifying that the organizational chart did not "reflect how the Tarahan Project was run" or "the relationship between Alstom Power, Inc., and other Alstom employees on the Tarahan Project"); GA409 (Thiessen testifying that Hoskins did not report to Pierucci "on an HR basis," but "[o]ne of the jobs [of] International Network was to support the business units."); GA482 (Puckett explaining that although Pierucci was not Hoskins's formal boss, in practice "Mr. Hoskins would have been reporting to Fred on the Tarahan Project"). In short, the lack of a formal reporting line between API and Hoskins, and therefore the lack of authority for API to "fire" Hoskins within the broader corporate setting, said little about API's ability to control Hoskins's activities on Tarahan. Instead, following *Cleveland*, this Court need only look at the ample evidence of the actual business practices within Alstom and on Tarahan to find sufficient support for such control.

In fact, while the district court appears to limit agency to formal lines of reporting, the Restatement acknowledges that there can be indirect agency relationships within a corporation. The Restatement posits an illustration of control in an agency relationship:

> A is an employee of S Corporation. P Corporation owns all the stock of S Corporation….A and P Corporation agree that, in performing A's duties as an employee of S Corporation, A shall act as P Corporation directs in the interest of P Corporation. A consents so to act. A is an agent of P Corporation as well as of S Corporation.

Restatement (Third) Agency, § 1.01, cmt. f, Illustrations 7-9. In this illustration, even though A was not an employee of the parent P, he separately agreed to act as its agent. Likewise here, although Hoskins's employment contract was with a different Alstom subsidiary (Alstom UK Ltd.), Hoskins and API agreed (consistent with Alstom's corporate structure) that the defendant would act as API directed in the interests of API in securing the Tarahan Project, and Hoskins consented to so act, and Hoskins repeatedly acceded to API's instructions regarding Tarahan.

Thus, under the Restatement, the defendant was an agent of API.[2]

Indeed, the district court's reliance on specified and "typical indicia" of control misunderstands not only common law principles of agency but also the nature of multinational corporations, particularly where the parent is a holding company that operates through its subsidiaries. Under the district court's reasoning, employees

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[2] The district court purported to cite to a different example of control, concerning "coagents." GA752. However, the district court's citation was mistaken—coagents were invoked by the Restatement to explain "acting on behalf of," § 1.01 cmt. g, and not "control," § 1.01 cmt. f. Indeed, the Restatement's examples of coagency are irrelevant to control. The Restatement speaks of a foreman and laborer who "occupy different strata within an organizational hierarchy." § 1.01 cmt. g. While the laborer is not the foreman's agent because both work on behalf of their employer, the example still assumes the foreman's "full control" of the laborers. Even so, there is no analogy to this case; although both API and the defendant were part of the Alstom SA structure, API and Hoskins were not working for one common employer like a foreman and laborer. API was a separate entity, with its own structure and balance sheet. The evidence unquestionably supported the finding that Hoskins worked "on behalf of" API to retain two consultants, based upon terms dictated by API, in order to help API (and not the parent) secure the Tarahan Project.

would only be agents of a non-operational holding company that may not even employ managers to provide instructions. Here, Alstom's boiler business was headquartered at API and Alstom's worldwide head of boiler sales was based at and employed by API. Hoskins himself was employed by one Alstom subsidiary, seconded to another Alstom subsidiary, and assigned to work on behalf of other Alstom subsidiaries, including API. Like the agency analysis, functional reporting lines in multinational corporations are highly factual and turn on the specific circumstances of any given project or transaction. The evidence supported a rational jury's conclusion that, even if not reflected in an organization chart, Hoskins's activities were controlled by API on the Tarahan Project.

c. Though not relied on by the court, Hoskins's limited approval role does not undermine API's control.

The district court did not base its decision on Hoskins's argument below that Hoskins's role in approving certain aspects of the consultancy agreements meant that he could not have been controlled by API, *see* GA754, finding instead that "[t]he Government has also demonstrated that Mr. Hoskins could not control API," GA763. The district court was correct on this score.

First, any so-called "approval" function was subservient to that of API. Puckett explained that the defendant's approval role was only "by charter," and in reality Pierucci called the shots in connection with hiring of consultants, GA481.

Second, any official approval function was limited to the "process of the document," ensuring "compliance with Alstom's policies," and not the key business-related components like "the terms of payment and the commission," which were controlled by API. GA317; *see also* GA417 (International Network's approval role "was in line that the consultant met with the compliance policies and the company policies").

Third, in practice Hoskins actually exercised no meaningful oversight—even as the agreements he "approved" forbade bribery of public officials, he knowingly participated in a scheme to hire consultants to do just that. GA317; *see also* GA416 (Thiessen testifying that International Network did not actually execute its function to ensure compliance with laws and rules). The jury was certainly entitled to give little (if any) weight to a function limited to making sure the boilerplate provisions in the consultancy agreement matched the boilerplate provisions in other Alstom consultancy agreements, particularly when the defendant and his co-conspirators understood they would be ignored. If anything, Hoskins's

willingness to give his rubber stamp to API's corrupt arrangements demonstrated only further that he viewed himself as obliged to do as the business instructed, rather than applying any independent judgment.

Fourth, even if Hoskins exercised some oversight over the consultancy agreement itself, that does not undermine API's well-documented control over the defendant's activities in connection with the retention of the Tarahan consultants. *See Cleveland*, 448 F.3d at 522 ("the control asserted need not include control at every moment" (internal quotation marks omitted)).

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In sum, the district court upset a valid jury verdict by doing precisely what this Court forbids. The court refused to "credit[] every inference that could have been drawn in the government's favor," explicitly rejecting reasonable inferences of control; it refused to "defer[] to the jury's assessment … of the weight of the evidence," instead recharacterizing the evidence to fit its view of the case law; and it applied an overly narrow definition of agency inconsistent with the "highly factual" nature of this Court's inquiry. The district court's ruling should be reversed.

3. The district court abused its discretion in conditionally granting a new trial.

Finally, this Court should also reject the district court's conditional grant of a new trial, which applies only if the Court reverses the Rule 29 order.

The district court's new trial order turns Rule 33 on its head. The order interprets Rule 33 as free discretion for the district court to sit as fact finder, even if there is otherwise sufficient evidence of guilt, and without any claim of procedural error or manifest injustice in the trial. GA773. While the district court is correct that it is not obliged, under Rule 33, to view the evidence in a light most favorable to the verdict, it may only upset that verdict in "exceptional circumstances," for example, where "testimony is patently incredible or defies physical realities," *United States v. Cote*, 544 F.3d 88, 101 (2d Cir. 2008), and only in order to "avert a perceived miscarriage of justice," *Ferguson*, 246 F.3d at 133 (citation omitted).

The district court, however, points to no procedural error in the trial; no witness whose credibility was even questionable; and no evidence that "defie[d] physical realities," *Cote*, 544 F.3d at 101, such that the verdict was a "*manifest injustice*," *Gramins*, 939 F.3d at 444 (citation omitted) (emphasis in original). Instead, assuming (as the

Court must for this conditional ruling) that a reasonable jury could have found guilt, the district court simply inserted itself into the role of the jury because it disagreed with the jury's weighing of the evidence. *See Josephberg*, 562 F.3d at 488 ("in deciding [a Rule 33] motion, the district court must take care not to usurp the role of the jury").

The district court's reliance on *United States v. Landau*, 155 F.3d 93 (2d Cir. 1998) is misplaced. Unlike here, *Landau* was not decided under Rule 29 or Rule 33; rather, it was a civil case in which this Court reversed the district court's granting of a post-trial motion for a judgment as a matter of law, but remanded for the district court to rule on an alternative motion for new trial, acknowledging the different standards for the two motions. *Id.* at 103-06. Moreover, the *Landau* Court remanded only to allow the district court to assess whether a particular credibility issue warranted a new trial, which would require the district court to specifically explain its difference of opinion with the jury and why, in light of the evidence, that resulted in a miscarriage of justice. *Id.* at 105-06. Unlike in *Landau*, the district court here has suggested no such credibility issue, or particular piece of questionable evidence that may have unjustly swayed the jury towards a guilty verdict. *See Cote*, 544 F.3d at 102 (reversing alternative grant of a new trial because the court improperly

found that the certain testimony was "patently incredible" and "defie[d] physical realities"); *see also United States v. Autori*, 212 F.3d 105, 120 (2d Cir. 2000) (affirming alternative grant of a new trial where district court "based its decision on the dubious testimony of two of the government's main witnesses").

In short, the district court cannot explain why the grant of a new trial in this case would be appropriate, other than it disagreed with the trial's outcome. Accordingly, the conditional grant of a new trial should also be reversed, and the convictions on Counts 1 through 7 should be reinstated.

Conclusion

For the foregoing reasons, the district court's ruling of acquittal on Counts 1 through 7 of the Third Superseding Indictment, and its conditional order for a new trial, should be reversed, and the convictions reinstated.

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Respectfully submitted,

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Federal Rule of Appellate Procedure 32(g) Certification

This is to certify that the foregoing brief complies with the 14,000-word limitation of Second Circuit Local Rule 32.1(a)(4), in that the brief is calculated by the word processing program to contain approximately 13,939 words, excluding the items listed in Federal Rule of Appellate Procedure 32(f).

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