

Nos. 14-4192 & 14-4249

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

BENJAMIN SUAREZ,

Defendant-Appellant

On Appeal from the U.S. District Court for the
Northern District of Ohio, Case No. 5:13-CR-00420

OPENING BRIEF OF DEFENDANT-APPELLANT BENJAMIN SUAREZ

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December 29, 2014

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
STATEMENT WITH RESPECT TO ORAL ARGUMENT	vi
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE.....	3
A. The Charges In This Case And Mr. Suarez’s And His Company’s Acquittals On 18 Of The 19 Counts Against Them.	3
B. The Acts Charged In Count 8 And The Evidence Regarding Them.....	5
C. Mr. Suarez’s Objection To The “Attempt” Instruction And The District Court’s Consideration Of And Rulings On His Objections.....	6
D. The Raising Of The Duplicity Issue And The Polling Of The Jury	8
E. The Opinion And The Reconsideration Order	9
SUMMARY OF THE ARGUMENT	10
ARGUMENT	11
I. THE VERDICT ON COUNT 8 VIOLATES DUE PROCESS AND CANNOT STAND BECAUSE THE INSTRUCTIONS DID NOT REQUIRE THE JURY TO FIND THE INTENT ELEMENT.	11
A. The Standard Of Review For The Failure To Instruct The Jury On The Intent Element Is De Novo.....	11
1. Mr. Suarez preserved his objection to the “attempt” instruction’s elimination of the intent element.	11
a. Mr. Suarez timely informed the District Court in writing of his specific objection to the “attempt” instruction and the grounds for the objection.	12

b.	The record and the case law belie the Opinion’s asserted bases for applying the plain-error standard.....	15
i.	The pretrial order is a red herring because the District Court considered Mr. Suarez’s written objections.	16
ii.	After the District Court overruled his objection to the “attempt” instruction, Mr. Suarez did not need to orally repeat it to preserve it.	20
c.	Although not necessary for this Court to find that Mr. Suarez preserved his objection, the declarations provide further confirmation that he did so.....	24
i.	The declarations show that Mr. Suarez followed the District Court’s instructions and complied with the pretrial order when he submitted his objections in Defendants’ Joint Trial Brief.	24
ii.	The declarations show that the District Court made clear during the in-chambers meeting that it had already overruled Mr. Suarez’s objection to the “attempt” instruction.	26
iii.	The District Court abused its discretion in striking the declarations.	27
2.	Whether the instructions eliminated the intent element is an issue of law, and the test is whether a reasonable juror could have understood them as not requiring proof that Mr. Suarez had the requisite intent.	28
B.	The Instructions For Count 8 Failed To Inform The Jury Of The Intent Element And A Reasonable Juror Could Have Understood Them To Not Require Intent.	30
1.	The instruction defining “attempt” erroneously eliminated the intent requirement from Count 8’s first element.	30

2.	The District Court erroneously reasoned that references to “knowingly” informed the jury of the intent requirement.	33
3.	The District Court erroneously reasoned that the instruction defining “substantial step” required the jury to find intent.	36
C.	The Failure To Inform The Jury Of The Intent Element Is <i>Per Se</i> Reversible Error.....	38
1.	Harmless-error analysis does not apply to a failure to instruct the jury on a contested element of the offense.	38
2.	Harmless-error analysis does not apply here because the District Court failed to instruct the jury on the intent element and Mr. Suarez contested that element.	41
D.	Reversal Would Be Proper Even If Plain-Error Review Applied.	47
II.	THE VERDICT ON COUNT 8 VIOLATES DOUBLE JEOPARDY AND CANNOT STAND BECAUSE THE COUNT IS DUPLICITOUS AND THE VERDICT EXPOSES MR. SUAREZ TO A SECOND PROSECUTION FOR THE SAME ACTS.....	49
A.	The Standard Of Review Is De Novo Because Mr. Suarez Preserved His Claim That Count 8 Is Duplicitous.....	49
B.	Count 8 Is Duplicitous And The General Verdict On That Count Violates The Double Jeopardy Clause.	51
C.	The Duplicity In Count 8 Requires Reversal Under Any Standard.....	54
	CONCLUSION	54

TABLE OF AUTHORITIES

Cases

<i>California v. Brown</i> , 479 U.S. 538 (1987).....	29
<i>Douglas v. Alabama</i> , 380 U.S. 415 (1965).....	22
<i>Glenn v. Dallman</i> , 686 F.2d 418 (6th Cir. 1982).....	33, 39, 40, 41
<i>Gradsky v. Sperry Rand Corp.</i> , 489 F.2d 502 (1973).....	<i>passim</i>
<i>Greenlaw v. United States</i> , 554 U.S. 237 (2008).	19, 20
<i>Hoover v. Garfield Heights Municipal Court</i> , 802 F.2d 168 (6th Cir. 1986).....	32, 33, 39, 41
<i>Johnson v. United States</i> , 520 U.S. 461 (1997).....	47
<i>Jones v. United States</i> , 527 U.S. 373 (1999)	13, 15, 20
<i>Koon v. United States</i> , 518 U.S. 81 (1996).....	28
<i>Morgan v. Shirley</i> , 958 F.2d 662 (6th Cir. 1992)	29
<i>Neder v. United States</i> , 527 U.S. 1 (1999).....	<i>passim</i>
<i>Osborne v. Ohio</i> , 495 U.S. 103 (1990)	22, 23
<i>Patterson v. Mintzes</i> , 717 F.2d 284 (6th Cir. 1983)	18
<i>Thompson v. Konteh</i> , 170 F. App'x 945 (6th Cir. 2006).....	29
<i>United States v. Alsobrook</i> , 620 F.2d 139 (6th Cir. 1980).....	53, 54
<i>United States v. Alvarez</i> , 266 F.3d 587 (6th Cir. 2001).....	29
<i>United States v. Bailey</i> , 444 U.S. 394 (1980)	33, 34, 35, 49
<i>United States v. Bilderbeck</i> , 163 F.3d 971 (6th Cir. 1999).....	31, 32, 36, 37
<i>United States v. Blood</i> , 435 F.3d 612 (6th Cir. 2006)	28, 29
<i>United States v. Bryant</i> , 461 F.2d 912 (6th Cir. 1972)	48, 49
<i>United States v. Buckley</i> , 934 F.2d 84 (6th Cir. 1991)	28, 29, 32
<i>United States v. Calloway</i> , 116 F.3d 1129 (6th Cir. 1997).....	35
<i>United States v. Clarke</i> , 134 S. Ct. 2361 (2014).....	28
<i>United States v. Damra</i> , 621 F.3d 474 (6th Cir. 2010).....	48
<i>United States v. Davis</i> , 306 F.3d 398 (6th Cir. 2002).....	52

<i>United States v. Duncan</i> , 850 F.2d 1104 (6th Cir. 1988)	52
<i>United States v. Hamilton</i> , 684 F.2d 380 (6th Cir. 1982).....	15, 20
<i>United States v. Huntington National Bank</i> , 574 F.3d 329 (6th Cir. 2009)	11, 12
<i>United States v. Kakos</i> , 483 F.3d 441 (6th Cir. 2007).....	49, 50, 51, 52
<i>United States v. Kuehne</i> , 547 F.3d 667 (6th Cir. 2008).....	39
<i>United States v. Miller</i> , 767 F.3d 585 (6th Cir. 2014)	40, 41
<i>United States v. Olano</i> , 507 U.S. 725 (1993)	47
<i>United States v. Pennyman</i> , 889 F.2d 104 (6th Cir. 1989)	31, 32
<i>United States v. Pensyl</i> , 387 F.3d 456 (6th Cir. 2004)	28, 29
<i>United States v. Russell</i> , 595 F.3d 633 (6th Cir. 2010)	28
<i>United States v. Savoires</i> , 430 F.3d 376 (6th Cir. 2005)	54
<i>United States v. Semrau</i> , 693 F.3d 510 (6th Cir. 2012).....	48
<i>United States v. United States Gypsum Co.</i> , 438 U.S. 422 (1978).....	34
<i>United States v. Williams</i> , 704 F.2d 315 (6th Cir. 1983).....	13, 31, 32
<i>United States v. Williams</i> , 641 F.3d 758 (6th Cir. 2011).....	19
<i>Visser v. Packer Engineering Associates, Inc.</i> , 924 F.2d 655 (7th Cir. 1991)	29

Statutes

18 U.S.C. § 1512	<i>passim</i>
18 U.S.C. § 3231	1
28 U.S.C. § 1291	1

Rules

Federal Rule of Civil Procedure 51	13
Federal Rule of Criminal Procedure 30	12, 13, 14, 20

STATEMENT WITH RESPECT TO ORAL ARGUMENT

A jury found Defendant-Appellant Benjamin Suarez guilty of an attempt offense. An element of any attempt offense is intent to commit the crime. Over Mr. Suarez's timely, proper, and specific written objection, the District Court gave the jury an instruction defining "attempt" that eliminates the intent element. Under controlling decisions of the Supreme Court and this Court, this instruction violates due process, is *per se* harmful, and requires setting aside Mr. Suarez's conviction.

The count at issue charges three separate acts, identified as (a), (b), "and" (c). Over Mr. Suarez's objection, the District Court instructed the jury that "and" means "any one." This instruction made the count duplicitous. The general verdict of guilty that the jury returned on the duplicitous count violates double jeopardy by exposing Mr. Suarez to a second prosecution for the same acts.

Under Federal Rule of Appellate Procedure 34 and Sixth Circuit Rule 34(a), Mr. Suarez respectfully submits that this Court should hear oral argument in these appeals because they raise important issues regarding his rights under the Due Process and Double Jeopardy Clauses of the Fifth Amendment.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 18 U.S.C. § 3231. On October 8, it denied Mr. Suarez's motion for a new trial. That denial became a final, appealable decision on November 14, when a judgment was entered. (Doc. 354, Notice of Appeal, PageID #s 7385-89 (explaining jurisdiction issues and citing authorities).) On November 25, Mr. Suarez timely moved for reconsideration of the denial. (*Id.*) This motion rendered the otherwise final judgment non-final. (*Id.*) On November 28, Mr. Suarez filed a notice of appeal. (*Id.*) On December 17, the District Court denied the reconsideration motion, making the judgment a final decision and the notice of appeal effective. (*Id.*) On December 18, Mr. Suarez filed a notice of appeal. (Doc. 365, PageID #s 7984-85.) This Court has jurisdiction over both appeals under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Count 8 of the Superseding Indictment charges Mr. Suarez with *attempting* to commit witness tampering in violation of 18 U.S.C. § 1512(b)(1).

After considering and overruling Mr. Suarez's timely, proper, and specific written objection, the District Court gave the jury an instruction defining "attempt" for Count 8 that eliminated the intent element of the offense. (The two elements of an attempt under § 1512(b)(1) have distinct intent requirements. For simplicity, we refer throughout to the first element's intent requirement as "the intent

element.”) No other instruction informed the jury of the intent element of Count 8. The failure to instruct on this element directly conflicts with this Court’s decisions and this Circuit’s pattern jury instruction on the elements of an attempt. Lack of intent was Mr. Suarez’s main defense to Count 8. The evidence was sufficient to support a juror reasonably doubting that he had the requisite intent.

Count 8 charges three separate acts of different types that occurred at different places on different dates. Count 8 charges these acts as (a), (b), “and” (c). The jury questioned whether it could find Mr. Suarez guilty based solely on one of these acts. Over Mr. Suarez’s objection, the District Court responded by instructing the jury that it need only find “any one” of the acts. The jury returned a general verdict of guilty. The District Court denied Mr. Suarez’s request to poll the jury on which act it found him guilty.

On the foregoing facts, the questions presented are:

1. The elimination of the intent element. Does Mr. Suarez’s objection to the “attempt” instruction preserve his claim that it erroneously eliminated the intent element? Does this error violate Mr. Suarez’s right under the Due Process Clause to have the jury find each element of the offense beyond a reasonable doubt? Does this error require or warrant setting aside Mr. Suarez’s conviction?

2. The duplicity in Count 8. Does Mr. Suarez’s objection to the “any one” instruction and/or his request for polling preserve his claim that Count 8 is

duplicitous? Given the duplicity in Count 8, does the verdict violate Mr. Suarez's right under the Double Jeopardy Clause to be free from a second prosecution for the same acts? Does this violation warrant reversing his conviction?

STATEMENT OF THE CASE

A. The Charges In This Case And Mr. Suarez's And His Company's Acquittals On 18 Of The 19 Counts Against Them.

The Superseding Indictment charges Mr. Suarez with ten counts relating to an alleged scheme to make corporate contributions in the spring of 2011 in the names of his company's employees to two candidates for Congress: conspiracy to violate the campaign finance laws prohibiting contributions in the names of other persons and corporate contributions (Count 1), substantive violations of those laws (Counts 2 and 3), causing false statements to be made in the candidates' reports to the Federal Election Commission (Counts 4 to 6), conspiracy to obstruct justice (Count 7), attempted witness tampering (Count 8), and obstruction of justice (Counts 9 and 10). (Doc. 27, PageID #s 126-61.) The Superseding Indictment charges Suarez Corporation Industries, Inc. ("SCI"), Mr. Suarez's company, with all of the same counts except Count 8. (*Id.*) The Superseding Indictment charges Michael Giorgio, SCI's Chief Financial Officer, with all of the same counts except counts 8 and 10. (*Id.*)

Mr. Giorgio solicited all of the campaign donations at issue. Without Mr. Suarez's knowledge, Mr. Giorgio (i) told the donors that SCI would reimburse

them for the amounts of their donations and (ii) directed Barbara Housos, SCI's Controller, to use SCI's funds to reimburse each of the donors. On May 19, 2014, Mr. Giorgio pled guilty to all of the charges against him except Count 9. Mr. Giorgio testified at trial, however, that he *did not know* during the spring of 2011 that the campaign finance laws prohibited his conduct and that he *had no intent* to violate those laws – an element of Counts 1 through 6. (*See, e.g.*, Doc. 307, Tr. of Trial, June 12, 2014, at 149:2-4, Page ID # 6150; *id.* at 69:20-23, Page ID # 6070; *id.* at 182:4-11, Page ID # 6183.)

Mr. Suarez and SCI went to trial. The trial lasted nearly a month, starting on June 2 and ending on June 30. After the government finished its case-in-chief, Mr. Suarez obtained judgments of acquittal on Counts 9 and 10 (the obstruction counts) and SCI obtained a judgment of acquittal on Count 9. (Doc. 360, Tr. of Trial, June 25, 2014, at 11:2 – 12:21, PageID #s 7723-24.) The jury found Mr. Suarez not guilty on seven of the remaining counts against him – all except Count 8, which charges him with attempting to tamper with Ms. Housos's testimony. (Doc. 285, Tr. of Trial, June 30, 2014, at 2:3 – 3:6, PageID #s 3663-64.) The jury found SCI not guilty on all of the remaining counts against it. (*Id.* at 3:8 – 4:13, PageID #s 3664-65.)

For *all* of the counts against Mr. Suarez and SCI, *intent was the key issue*. For all of those counts that went to the jury *except* Count 8, (i) the instructions on

intent were adequate and (ii) the jury returned findings of not guilty. *Count 8 is the only count on which the instructions relating to intent were inadequate.* It is also the only count on which the jury returned a guilty verdict.

B. The Acts Charged In Count 8 And The Evidence Regarding Them

Count 8 charges three acts, identified as “(a),” “(b),” and “(c)”:

Beginning in or around *July or August 2012* and continuing through in or around *February 2013*, in the Northern District of Ohio, Eastern Division, the defendant, BENJAMIN SUAREZ, did knowingly *attempt* to use intimidation, threaten, and corruptly persuade another person and engage in misleading conduct toward another person who worked for SCI, whose initials are B.H., by (a) writing and having to delivered to B.H. at B.H.’s home a one-page note in [Mr.] SUAREZ’s handwriting with an attached five-page typewritten document relating to and providing direction regarding B.H.’s upcoming testimony before a federal grand jury, telling her not to communicate with her own lawyer, and containing an inaccurate version of events that [Mr.] SUAREZ wished to present; (b) writing and circulating an inaccurate letter to the employees of SCI opining that B.H.’s mental abilities had been compromised, referencing medical issues experienced by B.H., alleging that B.H. was under federal investigation, and opining that B.H. had suffered a tragic loss as a result of the investigation; *and* (c) making statements to B.H. opining that B.H.’s mental abilities had been compromised, all with the intent to influence, delay, and prevent the testimony of B.H. in an official proceeding, to wit: testimony before a federal grand jury sitting in the Northern District of Ohio and any subsequent related trial, in violation of Title 18, United States Code, Section 1512(b)(1).

(Doc. 27, Superseding Indictment ¶ 99, PageID # 159 (emphases added).) Ms.

Housos is the person identified with the initials “B.H.”

The evidence at trial shows that (a), (b), and (c) each involve separate acts of different types that occurred at different places on different dates:

- As to (a), Ms. Housos testified that a one-page note in Mr. Suarez's handwriting with an attached five-page typewritten document (Doc. 288-8, Gov't Ex. 501, PageID #s 4302-07) were delivered to her at her home "shortly after [she] returned to work" in "late July, 2012" (Doc. 289, Tr. of Trial, June 20, 2014, at 44:18 – 48:2, Page ID #s 4351 – 4355).
- As to (b), Julianne Dalayanis, SCI's Director of Human Resources, testified that a letter to SCI employees containing a paragraph concerning Ms. Housos (Doc. 293-6, Gov't Ex. 505, PageID #s 5054-57) was prepared and distributed at Mr. Suarez's direction on "February 21st, 2013." (Doc. 292, Tr. of Trial, June 24, 2014, at 153:17-25, PageID # 4748; *id.* at 155:19 – 157:4, PageID #s 4750-52; *id.* at 160:2 – 161:6, PageID #s 4755-56; *id.* at 176:24 – 177:19, PageID #s 4771-72; *id.* at 184:21 – 185:18, PageID #s 4779-80.)
- As to (c), Ms. Housos testified that, "at [SCI's] annual planning meeting" at Glenmoor Country Club in January 2013, Mr. Suarez "said that [she] told him [she] was having memory lapses, but [she] ha[s] no recollection of ever telling him [that]." (Doc. 289, Tr. of Trial, June 20, 2014, at 66:16 – 67:8, Page ID #s 4373 – 4374.)

C. Mr. Suarez's Objection To The "Attempt" Instruction And The District Court's Consideration Of And Rulings On His Objections

On May 9, several weeks before trial and 10 days before he pled guilty, Mr. Giorgio filed Defendants' Joint Trial Brief on behalf of all three defendants. (Doc. 151, PageID #s 1797-1853.) This document states the objections of Mr. Suarez and his co-defendants to the government's proposed jury instructions and proposes substitute language for the objectionable parts of certain instructions.

Through Defendants' Joint Trial Brief, Mr. Suarez specifically objected to the second sentence of Part 5 of the government's proposed jury instruction on the elements of Count 8. That sentence defines "attempt" as follows: "A defendant

may be found to have attempted to intimidate, threaten, corruptly persuade, or engage in misleading conduct if his conduct constituted a substantial step towards committing the crime.” (Doc. 154, Gov’t Proposed Jury Instructions at 55-56, PageID #s 2127-28.) Mr. Suarez objected to the language beginning with “if” on the ground that it eliminated the intent element of an attempt. (Doc. 151 at 6, PageID # 1802.) Mr. Suarez requested that this language be replaced with “*if he intended to engage in criminal conduct* and he performed one or more overt acts which constitute a substantial step towards committing the crime.” (*Id.* (emphasis added).) Mr. Suarez cited a decision by this Court on the elements of an attempt to support his objection and his proposed language. (*Id.*)

The District Court overruled Mr. Suarez’s objection and refused to include his proposed language. Instead, it gave the government’s “attempt” instruction to the jury. (*Compare* Doc. 154 at 55-56, PageID #s 2127-28 (government’s “attempt” instruction), *with* Doc. 297, Tr. of Trial, June 26, 2014, at 233:13-16, PageID # 5324 (using same to instruct the jury on “attempt”).) No transcript recounts the court’s ruling on this instruction because it held an off-the-record, in-chambers meeting with counsel to discuss jury instructions. (*See* Doc. 360, Tr. of Trial, June 25, 2014, at 232:20-23 (“I’ll give you about five minutes and then I’d like to meet you in chambers to go over jury instructions . . .”).) The record makes clear, however, that the court *considered* and *ruled on* Mr. Suarez’s

objection to the “attempt” instruction and all of his other objections in Defendants’ Joint Trial Brief. The court “carefully reviewed” that brief and thus Mr. Suarez’s objections. (*See* Doc. 322, Op. at 19, PageID # 6548.) Further, the court *sustained* some of those objections and made changes to the government’s proposed instructions that directly tracked the corresponding objections.

Before, during, and for several months after the trial, the District Court *never* suggested that Mr. Suarez failed to comply with a pretrial order when he submitted his objections through Defendants’ Joint Trial Brief.

D. The Raising Of The Duplicity Issue And The Polling Of The Jury

On the morning of June 27, the jury asked the District Court a question that raised the issue of duplicity: “In order to find as it pertains to superseding indictment Page 34, Paragraph 99, does the burden have to be met on A, B and C, or any one?” (Doc. 285, Tr. of Trial, June 30, 2014, at 12:21-25, PageID # 3673.) The court and the parties discussed how to respond to this question over the phone, without a court reporter present. The transcript recounting this discussion (i) is based on an account that the court provided and quickly reviewed with counsel three days later and (ii) does not reflect all the relevant statements. Fortunately, the government’s opposition to Mr. Suarez’s motion for a new trial completes the record. In that opposition, the government admitted that in response to the question, Mr. Suarez requested an instruction that the jury “had to unanimously

find all three” and “objected” after the court denied this request. (Doc. 293, Opp’n to Mot. for New Trial at 22, PageID # 4972.) The government also admitted that the court’s response to the question (“[a]ny one beyond a reasonable doubt”) was given “over [Mr. Suarez’s] objection.” (*Id.*)

On June 30, the jury returned its verdicts. At sidebar, Mr. Suarez requested that the court “specifically poll the jury *as to which of the three acts, the A, the B, or the C of Count 8 that they found on.*” (Doc. 285, Tr. of Trial, June 30, 2014, at 6:2-13, PageID # 3667 (emphasis added).) This request evinces a concern about duplicity. The court rejected this request. (*Id.* at 7:3-6, PageID # 3668.) Only the jurors know on which act they based their verdict on Count 8.

E. The Opinion And The Reconsideration Order

On July 14, Mr. Suarez moved for a new trial, claiming in relevant part that two errors – the “attempt” instruction’s elimination of the intent element and the duplicity in Count 8 – each require setting aside the guilty verdict. (Doc. 288, PageID #s 4236-61.) On October 8, the District Court issued an opinion (the “Opinion”), which asserts that plain-error review governs both claims, rejects each, and denies the motion. (Doc. 322 at 7-15, 19-23, PageID #s 6536-44, 6548-52.) On November 14, the court sentenced Mr. Suarez to 15 months in prison and

entered a judgment.¹ (Doc. 339, Judgment, PageID #s 6930-35.) On November 25, he moved for reconsideration, attaching declarations from seven attorneys (five representing him and two representing SCI). (Doc. 349, PageID #s 7308-57.) Mr. Suarez waited until after sentencing to file this motion because it and the declarations refute factually inaccurate statements in the Opinion and he feared that filing it earlier would adversely affect his sentence. (Doc. 363, Reply in Supp. of Mot. for Recon. at 6, PageID # 7973.) The declarations support and corroborate, but are not essential to, these refutations. On December 17, the court entered an order denying the motion and granting the government's motion to strike the declarations (the "Reconsideration Order"). (Doc. 364, PageID #s 7982-83.) Mr. Suarez appealed from both the Opinion and the Reconsideration Order.

SUMMARY OF THE ARGUMENT

The District Court committed legal error in asserting that plain-error review governs Mr. Suarez's claims regarding the "attempt" instruction and the duplicity in Count 8. Under the controlling authorities, Mr. Suarez preserved these claims and the standard of review for both is *de novo*.

Over Mr. Suarez's timely, proper, and specific objection, the District Court gave the jury an instruction defining "attempt" that eliminated the intent element of

¹ Contrary to *Gall v. United States*, 552 U.S. 38, 49-50 (2007), based *solely* on the advisory Guidelines, the District Court determined Mr. Suarez's sentence *before* it considered the factors in 18 U.S.C. § 3553(a).

Count 8. No other instruction informed the jury of that element. The government obtained a guilty verdict on Count 8 without the jury finding every element of the offense, violating Mr. Suarez's right to due process. This error is *per se* harmful because Mr. Suarez contested the intent element and the evidence was sufficient to support a juror reasonably doubting whether that element was proven.

Over Mr. Suarez's objection, the District Court rendered Count 8 duplicitous by instructing the jury that it need only find "any one" of the three charged acts. After the jury returned its general verdict, the court missed a chance to fix the error when it rejected Mr. Suarez's request to poll the jury on which act it found him guilty. The duplicity in Count 8 is reversible error because the verdict violates double jeopardy by exposing Mr. Suarez to a second prosecution for one or more of the same acts.

ARGUMENT

I. THE VERDICT ON COUNT 8 VIOLATES DUE PROCESS AND CANNOT STAND BECAUSE THE INSTRUCTIONS DID NOT REQUIRE THE JURY TO FIND THE INTENT ELEMENT.

A. The Standard Of Review For The Failure To Instruct The Jury On The Intent Element Is *De Novo*.

1. Mr. Suarez preserved his objection to the "attempt" instruction's elimination of the intent element.

Whether Mr. Suarez preserved his objection to the instructions' elimination of the intent element is a question of law that this Court reviews *de novo*. See *United States v. Huntington Nat'l Bank*, 574 F.3d 329, 331 (6th Cir. 2009)

(reaffirming that this Court “give[s] de novo review to [a district court’s] conclusion that [an] argument was forfeited”).

a. Mr. Suarez timely informed the District Court in writing of his specific objection to the “attempt” instruction and the grounds for the objection.

Mr. Suarez preserved his specific objection to the “attempt” instruction’s elimination of the intent element. By submitting this objection and the grounds for it in writing to the District Court before the jury retired to deliberate, Mr. Suarez satisfied Federal Rule of Criminal Procedure 30(d).

Rule 30(d) provides that “[a] party who objects to any portion of the instructions or to a failure to give a requested instruction *must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate.*” Fed. R. Crim. P. 30(d) (emphasis added). The District Court gave the jury the government’s proposed instruction on “attempt.” (*Compare* Doc. 154, Gov’t Proposed Jury Instructions at 55-56, PageID #s 2127-28, *with* Doc. 297, Tr. of Trial, June 26, 2014, at 233:13-16, PageID # 5324.) Mr. Suarez informed the court of his specific objection to that instruction and the grounds for the objection through Defendants’ Joint Trial Brief, which was filed before trial (and thus before the jury retired to deliberate):

The language beginning with “if” in the second sentence of Part 5 of the government’s proposed instruction improperly waters down the government’s burden of proving an attempt by omitting the “intent” and “overt act” elements, both of which are required by Sixth Circuit

precedent. *See United States v. Williams*, 704 F.2d 315, 321 (6th Cir. 1983) (“The two requisite elements of an attempt are (1) an intent to engage in criminal conduct and (2) the performance of one or more overt acts which constitute a substantial step towards the commission of the substantive offense.”). When instructing the jury on what constitutes an attempt for purposes of Count 8, instead of the language beginning with “if” in the second sentence of Part 5 of the government’s proposed instruction, the [District] Court should use the following language that tracks the language quoted from the Sixth Circuit’s decision in *Williams*: “if he intended to engage in criminal conduct and he performed one or more overt acts which constitute a substantial step towards committing the crime.”

(Doc. 151 at 6, PageID # 1802.) By timely informing the court in writing of his specific objection to the “attempt” instruction and the grounds for the objection, Mr. Suarez satisfied Rule 30(d). *See Jones v. United States*, 527 U.S. 373, 388 (1999) (recognizing that a defendant can preserve a claim that a jury instruction is erroneous by submitting an objection in writing before the jury retires).

A decision by this Court applying Federal Rule of Civil Procedure 51, the civil equivalent of Rule 30(d), further confirms that Mr. Suarez satisfied Rule 30(d). The procedure for objecting under the two rules is the same. *See Fed. R. Crim. P. 30* advisory committee’s note (“[O]n a point such as instructions to juries there should be no difference in procedure between civil and criminal cases.”). Like this case, *Gradsky v. Sperry Rand Corp.*, 489 F.2d 502 (1973), “involves complex issues of law.” *Id.* at 503. As here, the district court “requested an early submission of proposed instructions.” *Id.* Like Mr. Suarez, the relevant party (the plaintiff) submitted written requests for jury instructions and written objections to

the instructions proposed by his opponent (the defendant). *Id.* The district court gave nine of the defendant's proposed instructions to the jury over the plaintiff's written objections. *See id.* at 503 & n.3. Before, while, and after "the trial court charged the jury," the plaintiff "*did not formally object* to the court's charge." *Id.* at 503 (emphasis added). In other words, like Mr. Suarez, the plaintiff did not reiterate his objections in the courtroom. *Id.* On appeal, the plaintiff argued that "his detailed requests for jury instructions and his written objections to the defendant's requested jury instructions [we]re sufficient to preserve his objections under Rule 51." *Id.* This Court agreed, holding that the plaintiff's objections were "properly preserved for appeal." *Id.* The Court reasoned that the district court "was aware of the [plaintiff's] objections to the charge as given" because "the instructions were covered by the [plaintiff's] proposals and objections to the [defendant's] proposals." *Id.* The same is true of Mr. Suarez's written objections here.

The plain language of Rule 30(d) supports this Court's decision in *Gradsky* and reinforces the conclusion that Mr. Suarez preserved his objection to the "attempt" instruction. The Rule speaks of "inform[ing] the court of the specific objection and the grounds for the objection." Fed. R. Crim. P. 30(d). The Rule does not suggest that it requires doing so in the courtroom, as opposed to in a written submission. *Id.*

The purpose of Rule 30(d) also bolsters the ruling in *Gradsy* and verifies that Mr. Suarez preserved his objection. That purpose is to “enable [the] trial court to correct any instructional mistakes before the jury retires.” *Jones*, 527 U.S. at 387-88; *accord United States v. Hamilton*, 684 F.2d 380, 385 (6th Cir. 1982) (“The purpose of Rule 30 is to give the trial court an adequate opportunity to correct any mistakes in the jury charge.”). Here, Mr. Suarez’s timely written objection to the “attempt” instruction enabled the District Court to correct the error in that instruction before the jury retired. Under Rule 30(d), Mr. Suarez preserved that objection by including it in Defendants’ Joint Trial Brief.

b. The record and the case law belie the Opinion’s asserted bases for applying the plain-error standard.

Despite Mr. Suarez’s timely and specific written objection to the “attempt” instruction, the Opinion asserts that plain-error review governs Mr. Suarez’s claim regarding that instruction. In doing so, the Opinion does not cite a single case where a court ruled that a defendant who timely submitted a specific written objection to a jury instruction and the ground(s) for the objection *failed* to preserve the objection. (See Doc. 322, Op. at 19-20, PageID #s 6548-49 (citing no such case).) Nor did the government cite any such case. (See Doc. 293, Opp’n to Mot. for New Trial at 27-34, PageID #s 4977-84 (same).) Research by Mr. Suarez’s counsel found no such case. All indications are that no such case exists.

Nevertheless, the Opinion asserts three purported bases for applying plain-error review: (i) that submitting objections through Defendants' Joint Trial Brief supposedly failed to comply with a pretrial order regarding the submission of proposed jury instructions, (ii) that Mr. Suarez did not repeat his objection to the "attempt" instruction during the off-the-record in-chambers meeting, and (iii) that he did not repeat that objection after the jury was instructed. (Doc. 322 at 19-20, PageID #s 6548-49.) The record and the case law belie each of these assertions.

i. The pretrial order is a red herring because the District Court considered Mr. Suarez's written objections.

The Opinion seeks to distinguish Gradsky by asserting that Mr. Suarez violated the pretrial order by submitting his written objections through Defendants' Joint Trial Brief. (See Doc. 322 at 19, 20 n.6, PageID #s 6548-49.) This assertion fails.

Far from suggesting that Mr. Suarez's objections violated the pretrial order, the District Court deemed them properly submitted. The Opinion acknowledges that *the court "carefully reviewed the trial briefs."* (Doc. 322 at 19, PageID # 6548 (emphasis added).) The court thus considered all of the objections in Defendants' Joint Trial Brief. (See *id.*) These facts stand undisputed in the record.

Also undisputed is the fact that the District Court *sustained* some of Mr. Suarez's written objections. Indeed, it sustained objections that he stated *only* in

Defendants' Joint Trial Brief and that appear nowhere else in the record. This fact eviscerates the Opinion's suggestion that the court refused to consider his objections due to a purported failure to comply with the pretrial order. (See Doc. 322 at 19, PageID # 6548.)

When the District Court ruled on the jury instructions, it made changes to the government's proposed instructions that *directly tracked Mr. Suarez's written objections*. A notable example is his objections to the third paragraph of the government's proposed instruction defining the "willfully" element of Counts 2 and 3, the substantive campaign finance charges. That paragraph states: "A reasonable but mistaken interpretation of the campaign finance statutes does not negate the element of intent necessary for a violation of those laws. Such a misinterpretation is instead one piece of evidence to consider regarding the defendant's general knowledge of his/its unlawful conduct." (Doc. 154, Gov't Proposed Jury Instructions at 48, PageID # 2120.) The record shows that the only objections to this paragraph were stated in Defendants' Joint Trial Brief. The version of the government's proposed instructions to which the Opinion refers as the "annotated set" (Doc. 322 at 4, PageID # 6533) does *not* identify *any* objection to the government's proposed "willfully" instruction (Doc. 152-1 at 48 n.15, PageID # 1989). In contrast, Defendants' Joint Trial Brief states detailed objections to the third paragraph of that instruction. (Doc. 151 at 7, 10-13, PageID

#s 1803, 1806-09.) The court *sustained* at least some of these objections and *eliminated the third paragraph*. Comparing the government’s proposed “willfully” instruction with the instruction that the court gave to the jury proves the point. (*Compare* Doc. 154 at 48, PageID # 2120, with Doc. 297, Tr. of Trial, June 26, 2014, at 228:18 – 229:5, PageID #s 5319-20.)

This Court has held in an analogous context that *otherwise-barred* objections are *preserved* where a district court “considered” them. In *Patterson v. Mintzes*, 717 F.2d 284 (6th Cir. 1983), the Court held that, despite a strict statutory time limit, untimely objections to a magistrate judge’s report were preserved because the district court “considered” them and thus granted “implicit leave of court” for an extension. *Id.* at 286, 288. Under the same reasoning, the fact that the District Court considered Mr. Suarez’s objections means that they are preserved *even if* they *otherwise* would have violated the pretrial order (which they would not).

Significantly, *not until the Opinion* – several months after the trial ended – did the District Court suggest that Mr. Suarez’s objections in Defendants’ Joint Trial Brief failed to comply with the pretrial order. Noticeably absent from the record is any earlier suggestion to that effect. Nearly five months passed between the filing of Defendants’ Joint Trial Brief on May 9 and the issuance of the Opinion on October 8. During that period, *no one* involved in this case expressed a

belief that Mr. Suarez's objections failed to comply with the pretrial order. *Even the government* never claimed such a failure occurred. This is so even though the government left no stone unturned in searching for purported reasons to apply the plain-error standard, as evidenced by its "assert[ing] or suggest[ing] on 28 pages of its 48-page opposition" to Mr. Suarez's motion for a new trial that a waiver occurred. (Doc. 300, Reply in Supp. of Mot. at 3, Page ID # 5927 (citing examples).)

The District Court committed legal error by *sua sponte* invoking the pretrial order. This Court has repeatedly held that a "forfeit[ure]" barring plain-error review occurs when the government "fail[s] to request that [a court] apply plain-error review." *United States v. Williams*, 641 F.3d 758, 764 (6th Cir. 2011) (holding that *de novo* review applied for this reason and citing prior decisions to the same effect). Likewise, a forfeiture of the argument that Mr. Suarez did not comply with the pretrial order occurred when the government failed to make that argument in opposing his motion for a new trial. *See id.* By *sua sponte* asserting that Mr. Suarez did not comply with the pretrial order, the District Court violated the "party presentation principle in criminal cases." *Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008). That principle "rel[ies] on the parties to frame the issues for decision and assign[s] to courts the role of neutral arbiter of matters the parties present." *Id.* Courts have generally "approved departures from the party

presentation principle in criminal cases” only “to protect a *pro se* litigant’s rights.” *Id.* Further, the principle has special force where, as here, the government is the party that failed to raise the issue. *Id.* It was improper for the District Court to raise a purported basis for applying plain-error review that the government did not advocate.

In sum, the Opinion wrongly uses the pretrial order to try to justify applying the plain-error standard even though Mr. Suarez preserved his objection to the “attempt” instruction. The Opinion’s assertion that Mr. Suarez failed to comply with the pretrial order is a red herring. Even if such a failure occurred (and none did), it would not change the fact that the District Court considered Mr. Suarez’s objections when it ruled on the jury instructions. That consideration precludes applying the plain-error standard.

ii. After the District Court overruled his objection to the “attempt” instruction, Mr. Suarez did not need to orally repeat it to preserve it.

Mr. Suarez did not need to orally repeat his objection to the “attempt” instruction to preserve it. Neither the text nor the purpose of Rule 30(d) requires such repetition. *See* Fed. R. Crim. P. 30(d); *Jones*, 527 U.S. at 387-88; *Hamilton*, 684 F.2d at 385. Moreover, this Court’s decision in *Gradsky* bars a repetition requirement here. As demonstrated above, that decision expressly holds that a party preserves his claims that jury instructions are erroneous where, as here, he

timely filed written objections and did not repeat them orally when he had opportunities to do so. *See Gradsky*, 489 F.2d at 503. The Opinion violates *Gradsky* by insisting that to preserve Mr. Suarez's objection to the "attempt" instruction, his counsel had to repeat that objection during the in-chambers meeting and/or after the jury charge. (See Doc. 322, Op. at 19-20, PageID #s 6548-49.)

The Opinion tries to circumvent *Gradsky* by claiming that it contains "no indication" that the plaintiff stated in the courtroom that "there were 'no objections'" to the jury instructions. (Doc. 322, Op. at 20 n.6, Page ID # 6549.) As noted above, however, *Gradsky* specifically states that the plaintiff *did not object* to any of the instructions *after* they were given. *See Gradsky*, 489 F.2d at 503. No material difference exists between the lack of an objection and a statement that there were no objections; either way, no objection was made. The facts in *Gradsky* are indistinguishable from those here. Moreover, this Court's reasoning in *Gradsky* condemns the Opinion's attempt to escape that decision's controlling precedential force. The Court expressly rested its holding on the point that the plaintiff's written objections made the district court "*aware of [his] objections* to the charge as given." *Id.* (emphasis added). The same is true of Mr. Suarez's written objections here.

The Opinion's assertion of a repetition requirement also contradicts a Supreme Court decision in a case that involved a written submission and a lack of

a contemporaneous objection to a related jury instruction. In *Osborne v. Ohio*, 495 U.S. 103 (1990), the Court rejected the argument that “[the defendant] waived his right to assert [h]is due process challenge because he failed to object when the instructions were given at his trial.” *Id.* at 122-23. The defendant claimed that his conviction for possessing child pornography violated due process because the jury was not instructed on an element of the offense: that the material he possessed “depict[ed] a lewd exhibition or a graphic focus on genitals.” *Id.* The Court held that the due process challenge was preserved because, “[r]ight before trial,” (i) the defendant’s counsel moved to dismiss on the ground that the applicable statute was “overbroad” in criminalizing the possession of nude photos of children and (ii) the trial judge rejected this argument “in no uncertain terms.” *Id.* at 123-24. The Court explained that, by arguing that the statute was overbroad, “[the defendant’s] attorney pressed the issue of the State’s failure of proof on lewdness before the trial court.” *Id.* at 124. The Court ruled that “*nothing would be gained by requiring [his] lawyer to object a second time, specifically to the jury instructions.*” *Id.* (emphasis added). To support this ruling, the Court relied on a prior decision holding that ““an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient”” to preserve the issue. *Id.* at 125 (quoting *Douglas v. Alabama*, 380 U.S. 415, 422 (1965)). Similarly here, Mr.

Suarez's written objection to the "attempt" instruction brought the elimination of the intent element to the District Court's attention in time for it to correct this error and therefore preserved the issue for appeal. The lack of an oral repetition of the objection is irrelevant under the Supreme Court's ruling in *Osborne*.

In purporting to impose a repetition requirement, the Opinion fails to cite a single supporting authority. The only authority of any kind that the Opinion cites in regard to this supposed requirement is *Gradsky*, which it attempts to distinguish. (See *id.* at 20 n.6, PageID # 6549.) Its attempts fail for the reasons stated above.

Significantly, the Opinion's attempt to justify plain-error review by asserting a repetition requirement directly contradicts the position that the District Court took on this issue on multiple other occasions in this case. Indeed, the court repeatedly recognized that a previously overruled objection is preserved without being repeated when the subject of the objection comes up again. The following exchange early in the trial is one example:

MR. PIERCE [one of Mr. Suarez's trial counsel]: I would renew the objection to this document.

THE COURT: Your objection has already been noted.

MR. PIERCE: Thank you.

THE COURT: And it's already been admitted.

(Doc. 357, Tr. of Trial, June 5, 2014, at 165:20-25, PageID # 7560.) The following statement by the court during Mr. Suarez's sentencing hearing is another example:

THE COURT: First of all, any objections other than *the ones that have already been stated*, and those *are preserved* for the record on appeal.

(Doc. 340, Tr. of Hr'g, Nov. 14, 2014, at 56:16-18, PageID # 6991 (emphases added).) Such statements by the court belie the Opinion's assertions that plain-error review applies due to the absence of an objection by Mr. Suarez to the "attempt" instruction during the in-chambers meeting and the sidebar after the court instructed the jury. (See Doc. 322, Op. at 19-20, PageID #s 6548-49.) The court's practice in this case (putting aside the Opinion) was that an already stated objection need not be repeated to be preserved.

c. Although not necessary for this Court to find that Mr. Suarez preserved his objection, the declarations provide further confirmation that he did so.

The declarations, all made under penalty of perjury, state facts that reinforce the conclusion that plain-error review does not apply. Notably, *none* of the three prosecutors handling this case was willing to dispute *any* of these facts *under oath*. The government offered no declaration of its own.

i. The declarations show that Mr. Suarez followed the District Court's instructions and complied with the pretrial order when he submitted his objections in Defendants' Joint Trial Brief.

The declarations provide further confirmation that Mr. Suarez did not violate the pretrial order by submitting his objections in Defendants' Joint Trial Brief. The order is ambiguous and defense counsel were not sure what it required. (See

Doc. 349, Mot. for Recon. at 4-5, PageID #s 7311-12 (explaining ambiguities).) Trial briefs were due on May 9. (*Id.* at 5, PageID # 7312.) Given their uncertainty, defense counsel agreed that an attorney from the law firm of Walter Haverfield LLP who was then representing Mr. Giorgio would call the District Court to inquire. (*Id.*) On the morning of May 8, this attorney from Walter Haverfield sent one of Mr. Suarez's counsel an e-mail stating in relevant part:

"I spoke with Judge Gaughan's chambers regarding the trial brief. She said that what Judge Gaughan really wants filed jointly are the agreed jury instructions, agreed voir dire, and agreed stipulations. To the extent we do not agree on jury instructions or voir dire, each party will individually file those."

(*Id.* at 6, Page ID# 7313 (quoting Doc. 351-1 Ex. A, E-mail from Rina R. Russo, May 8, 2014, 10:19 AM, PageID # 7375 (emphases added).) Pursuant to these instructions from the court's chambers, Mr. Suarez's counsel submitted his objections in Defendants' Joint Trial Brief. (Doc. 349, Mot. for Recon. at 6, PageID # 7313.) SCI's counsel, one of whom is former Cuyahoga County Court of Common Pleas Judge Robert T. Glickman, likewise submitted their objections in that document. (*Id.*) That the District Court's chambers *instructed* defense counsel to submit their objections in a filing *separate* from the government's "annotated set" further confirms that Mr. Suarez did not violate the pretrial order.

- ii. The declarations show that the District Court made clear during the in-chambers meeting that it had already overruled Mr. Suarez’s objection to the “attempt” instruction.**

The declarations also demonstrate that the District Court conveyed during the meeting to discuss jury instructions that *it had already overruled* Mr. Suarez’s objection to the “attempt” instruction. (See Doc. 349, Mot. for Recon. at 10-13, PageID #s 7317-20.) Given this context, it was reasonable for Mr. Suarez’s counsel to determine that it was neither necessary nor appropriate to repeat the objection.

Mr. Suarez recounted this aspect of the meeting in his motion for a new trial:

At the outset, the [c]ourt stated that it would use the government’s proposed jury instructions, except those for which it identified changes or that it rejected during the meeting. The [c]ourt thus overruled defense counsel’s objections to, and rejected their proposed substitute and alternative language for, all of the government’s instructions as to which the [c]ourt mentioned no change or rejection during the meeting. . . . None of these changes [that the court mentioned] involved the instructions on the elements of Count 8.

(Doc. 288 at 4-5, PageID #s 4239-40 (emphases added).) In its opposition, the government *did not dispute* Mr. Suarez’s account of the meeting in these respects – including that *the court made clear that it had already overruled Mr. Suarez’s objection to the “attempt” instruction.* (See Doc. 293 at 1-49, PageID #s 4951-99 (no dispute on these points).) The Opinion *does not mention* this point. By providing clear and uncontested evidence of facts about the meeting that the

Opinion does not address, the declarations further debunk the notion that Mr. Suarez failed to preserve his objection during the meeting.

iii. The District Court abused its discretion in striking the declarations.

The declarations state facts that corroborate Mr. Suarez’s preservation of his objection to the “attempt” instruction. The District Court abused its discretion by striking the declarations. The Reconsideration Order cites no supporting authority for doing so. It disputes *none* of the specific facts stated therein. Instead, it makes several conclusory assertions (Doc. 364, Order at 1, PageID # 7982), none of which provides a legitimate basis for striking the declarations:

- The declarations’ accounts of the instructions from the court’s chambers properly submit “new evidence” (*id.*) in response to the Opinion’s *new* – and *sua sponte* – allegation about the pretrial order.
- The declarations’ accounts of the meeting are not “new evidence” (*id.*); rather, they are proof of facts stated in Mr. Suarez’s motion for a new trial that the government did not dispute and that the Opinion distorts.
- As Judge Posner has written for the Seventh Circuit, that a declaration is “self-serving” (*id.*) is not a ground for striking it, *see Visser v. Packer Eng’g Assocs., Inc.*, 924 F.2d 655, 659 (7th Cir. 1991).
- The District Court failed to offer a single example of any statement in the declarations that is “inaccurate” or “belied by the record” (Doc. 364, Order at 1, PageID # 7982) – because no such example exists.
- The court was “very disturbed” by the declarations (*id.*) because they challenge and refute the Opinion’s application of plain-error review.

In short, it was unreasonable for the court to refuse to consider the declarations.

2. Whether the instructions eliminated the intent element is an issue of law, and the test is whether a reasonable juror could have understood them as not requiring proof that Mr. Suarez had the requisite intent.

This Court generally reviews challenges to jury instructions for abuse of discretion. *United States v. Russell*, 595 F.3d 633, 642-43 (6th Cir. 2010). Where a jury instruction is claimed to be legally erroneous, however, this Court’s review is *de novo* because an error of law is necessarily an abuse of discretion. *See United States v. Clarke*, 134 S. Ct. 2361, 2369 (2014) (reaffirming that a court of appeals “has no cause to defer to” a district court on “pure questions of law” because “[a] district court by definition abuses its discretion when it makes an error of law”) (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)). This Court thus reviews *de novo* “a jury instruction alleged to be faulty on a question of law.” *United States v. Blood*, 435 F.3d 612, 623 (6th Cir. 2006).

This Court “review[s] a properly preserved objection to a jury instruction by determining ‘whether the charge, taken as a whole, fairly and adequately submits the issues and applicable law to the jury.’” *Blood*, 435 F.3d at 623 (quoting *United States v. Pensyl*, 387 F.3d 456, 458 (6th Cir. 2004)). “Even if an instruction proves impermissible viewed in isolation, the reviewing court upholds the instruction if it takes on a permissible meaning in the context of surrounding instructions.” *United States v. Buckley*, 934 F.2d 84, 87 (6th Cir. 1991). Reversal is appropriate where “the instructions, viewed as a whole, were confusing, misleading, or prejudicial.”

Blood, 435 F.3d at 623 (quoting *Pensyl*, 387 F.3d at 458). Significantly, this Court “will reverse a judgment where the jury instruction ‘*fails accurately to reflect the law.*’” *Id.* (quoting *Pensyl*, 387 F.3d at 458) (emphases added).

This Court’s decisions show that where (as here) an instruction relating to an element of the offense is challenged, “[t]he question is ‘*what a reasonable juror could have understood the charge as meaning.*’” *Buckley*, 934 F.2d at 87 (quoting *California v. Brown*, 479 U.S. 538, 541 (1987)) (emphasis added) (addressing claim that instructions on the element of knowledge were erroneous); *accord Thompson v. Konteh*, 170 F. App’x 945, 952 (6th Cir. 2006) (unpublished) (“The issue is *whether a reasonable juror could have* interpreted these instructions to mean that [the defendant] could be guilty of aggravated murder, the crime charged, *without the state proving that he had the requisite mental state* for aggravated murder.”) (emphases added); *United States v. Alvarez*, 266 F.3d 587, 595 (6th Cir. 2001) (identifying the same question as *Buckley* where the defendants contested the instructions defining the “intentional killing” element); *Morgan v. Shirley*, 958 F.2d 662, 665, 668 (6th Cir. 1992) (stating that “[t]he inquiry turns on what a reasonable juror could have understood from the instructions given by the court” where the defendant attacked an instruction on a statutory presumption relating to the “under the influence of alcohol” element).

B. The Instructions For Count 8 Failed To Inform The Jury Of The Intent Element And A Reasonable Juror Could Have Understood Them To Not Require Intent.

1. The instruction defining “attempt” erroneously eliminated the intent requirement from Count 8’s first element.

Count 8 charges Mr. Suarez with an attempt offense. An element of an attempt is intent to commit the offense. The instruction defining “attempt” erroneously eliminated the intent element. This error violates due process because it allowed the jury to find Mr. Suarez guilty on Count 8 without finding that he had the requisite intent.

Count 8 charges Mr. Suarez with attempting to tamper with Ms. Housos’s testimony in violation of 18 U.S.C. § 1512(b)(1). Such a violation has two elements. Only the first is at issue. That element is “knowingly uses intimidation, threatens, or corruptly persuades another person, *or attempts to do so*, or engages in misleading conduct toward another person.” 18 U.S.C. § 1512(b) (emphasis added).² As to this element, Count 8 charges in relevant part that Mr. Suarez “knowingly attempt[ed] to use intimidation, threaten, and corruptly persuade [Ms. Housos].”³ (Doc. 27, Superseding Indictment ¶ 99.)

² The second element, which includes a distinct intent requirement, is “with intent to influence, delay, or prevent the testimony of any person in an official proceeding.” *Id.* § 1512(b)(1).

³ The Superseding Indictment also charges that Mr. Suarez “knowingly attempt[ed] to . . . engage in misleading conduct toward [Ms. Housos].” (Doc. 27, Superseding Indictment ¶ 99, PageID # 159.) But § 1512(b)(1) does not prohibit

This Court has repeatedly made clear that to be convicted of attempting to commit an offense, a defendant must have intended to commit the crime. For example, in *United States v. Williams*, 704 F.2d 315 (6th Cir. 1983), the Court held that a “requisite element[]” of an “attempt” is “an intent” to engage in the criminal conduct that is the object of the attempt. *Id.* at 321. Similarly, in *United States v. Pennyman*, 889 F.2d 104 (6th Cir. 1989), the Court ruled that “[t]o convict a person of an ‘attempt’” offense, “the government must establish” the “essential element[]” that the defendant had “the intent to engage in the proscribed criminal activity.” *Id.* at 106. In *United States v. Bilderbeck*, 163 F.3d 971 (6th Cir. 1999), the Court reiterated that “[f]or an individual to be convicted of an attempt crime, the government must demonstrate [his] intent to commit the proscribed criminal conduct.” *Id.* at 975. In accordance with these decisions, this Circuit’s pattern jury instruction on “Attempt – Basic Elements” provides that an “element[]” of “attempting to commit [a] crime” is that “the defendant intended to commit the crime.” 6th Cir. Pattern Jury Instruction 5.01, *available at* http://www.ca6.uscourts.gov/internet/crim_jury_insts/pdf/11_Chapter_5.pdf; *see also id.* Committee Commentary (current through Mar. 15, 2014) (discussing and

an attempt to engage in misleading conduct toward a witness. The placement of the phrase “or attempts to do so” *before* the phrase “engage in misleading conduct toward” shows that the statute prohibits only an attempt to intimidate, threaten, or corruptly persuade a witness. The latter phrase is irrelevant here because Count 8 charges an attempt. Although Mr. Suarez did not clarify this point below, it is manifestly correct and he therefore brings it to the Court’s attention.

citing with approval *Williams*, 704 F.2d at 321, *Pennyman*, 889 F.2d at 106, and *Bilderbeck*, 163 F.3d at 975).

Under this Court's precedents, as confirmed by the pattern jury instruction, Count 8 required the government to prove that Mr. Suarez *intended* to intimidate, threaten, or corruptly persuade Ms. Housos – *i.e.*, to use the methods of witness tampering that § 1512(b) identifies as potential bases for an attempt charge. The instruction defining “attempt” erroneously eliminated this intent element. This instruction states: “A defendant may be found to have attempted to intimidate, threaten, corruptly persuade, or engage in misleading conduct if his conduct constituted a substantial step towards committing the crime.” (Doc. 297, Tr. of Trial, June 26, 2014, at 233:13-16, PageID # 5324.) This instruction failed to inform the jury that it could not return a guilty verdict *unless* it found that Mr. Suarez had the requisite intent.

Indeed, the “attempt” instruction allowed the jury to return a guilty verdict based solely on “his conduct.” (*See id.*) “[A] reasonable juror could have understood the [instruction] as meaning” that the government needed only to prove one of the *acts* charged in Count 8. *See Buckley*, 934 F.2d at 87 (quoting *Brown*, 479 U.S. at 541). The “attempt” instruction violates the Due Process Clause because it allowed Mr. Suarez to be found guilty on Count 8 without the government proving the intent element. *See Hoover v. Garfield Heights Mun. Ct.*,

802 F.2d 168, 177-78 (6th Cir. 1986) (holding that “the trial court’s failure to instruct the jury that it had to find [an element of the offense] prevented the jury from considering that element and constituted a directed verdict on it” in violation of due process); *Glenn v. Dallman*, 686 F.2d 418, 420 (6th Cir. 1982) (ruling that “the complete and utter failure to inform the jury of an essential element of the crime” was “a violation of due process”).

2. The District Court erroneously reasoned that references to “knowingly” informed the jury of the intent requirement.

The instructions for Count 8 used the word “knowingly” several times, such as when summarizing the charge in that Count, when quoting § 1512(b), and when discussing the first element. (Doc. 297, Tr. of Trial, June 26, 2014, at 231:25 – 233:1, PageID #s 5322-24.) In denying Mr. Suarez’s motion for a new trial, the District Court reasoned that “by using the word ‘knowingly,’ [it] specifically instructed the jury that it must first find that [Mr. Suarez] intended to commit the crime of witness tampering.” (Doc. 322, Op. at 22, PageID # 6551.) This reasoning is erroneous. Knowledge that a crime will occur and intent to commit a crime are different levels of culpability. The latter is more difficult to prove. Opinions by the Supreme Court and by this Court illustrate these points.

In *United States v. Bailey*, 444 U.S. 394 (1980), the Supreme Court explained the “significant” difference between intent to commit a crime (to which it referred as “purpose”) and knowledge that a crime will occur. *Id.* at 404. A

person who intends to commit a crime (*i.e.*, a person who “act[s] purposefully”) “‘consciously desires that result, whatever the likelihood of that result happening from his conduct.’” *Id.* (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 445 (1978)). In contrast, a person “is said to act knowingly if he is aware ‘that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.’” *Id.* (quoting *United States Gypsum Co.*, 438 U.S. at 445). The “heightened culpability” of an intent to commit a crime vis-à-vis knowledge that a crime will occur “merit[s] special attention” for “offenses such as attempt.” *Id.* at 405. For such offenses, “a heightened mental state separates criminality itself from otherwise innocuous behavior.” *Id.*

The *Bailey* Court made clear that the use of “general intent” to describe the *mens rea* of knowledge does *not* mean that knowledge requires the same *mens rea* as intent to commit a crime. The Court explained that “a good deal of confusion arose” from the common law’s treatment of *mens rea* “as requiring either ‘general intent’ or ‘specific intent.’” *Id.* at 403. After identifying the difference between intent to commit a crime (*i.e.*, purpose or specific intent) and knowledge discussed above, the Court stated: “In a general sense, ‘purpose’ corresponds loosely with the common-law concept of specific intent, while ‘knowledge’ corresponds loosely with the concept of general intent.” *Id.* at 405.

This Court has similarly recognized the important difference between the intent to commit a crime that an attempt offense entails (*i.e.*, “specific intent”) and mere knowledge that a crime will occur (*i.e.*, “general intent”).

In the context of an ‘attempt’ crime, specific intent means that the defendant consciously intends the completion of acts comprising the choate offense. In other words, the completion of such acts is the defendant’s purpose. Where nothing more than general criminal intent is required, in contrast, the requirement may typically be satisfied by a showing that the defendant knew his actions would produce the prohibited result

United States v. Calloway, 116 F.3d 1129, 1135 (6th Cir. 1997). In *Calloway*, this Court emphasized that requiring the government to prove the intent element of an attempt is critical: “[A]ttempt crimes require proof of a specific intent to complete the acts constituting the substantive offense. The intent to finish the crime, coupled with affirmative acts toward that end, is a *sine qua non* of a punishable attempt.” *Id.* at 1135-36 (citation omitted).

The distinction that the Supreme Court and this Court drew in *Bailey* and *Calloway* between intent to commit a crime and knowledge that a crime will occur is critical here. This distinction condemns the District Court’s ruling that its uses of the word “knowingly” made up for its failure to instruct the jury on the intent element. Under *Bailey* and *Calloway*, this ruling is erroneous. A reasonable juror could interpret “knowingly” to mean that the government need not prove that Mr. Suarez intended to tamper with Ms. Housos’s testimony.

3. The District Court erroneously reasoned that the instruction defining “substantial step” required the jury to find intent.

In denying Mr. Suarez’s motion for a new trial, the District Court reasoned that the instruction defining “substantial step” – the overt *act* element of an attempt offense – informed the jury of the intent element. (Doc. 322, Op. at 22, PageID # 6551.) The instruction defining “substantial step” was given immediately after the instruction defining “attempt,” following a paragraph break. (Doc. 297, Tr. of Trial, June 26, 2014, at 233:13-18, PageID # 5324.) The instruction defining “substantial step” states: “The act which constitutes a substantial step must corroborate the defendant’s criminal purpose.” (*Id.* at 233:17-18.) This instruction did *not* require the jury to *find* that Mr. Suarez had the requisite intent. To the contrary, the “must corroborate” language *presupposes* that he had a “criminal purpose.” (*See id.*) The “substantial step” instruction told the jury to decide whether the acts charged in Count 8 were *consistent with* Mr. Suarez having a criminal purpose, not whether he *actually had* such a purpose. *See Bilderbeck*, 163 F.3d at 975-76 (holding that a defendant who “engages in active negotiations to purchase drugs” has “committed the ‘substantial step’ towards the crime of possession required to convict him of attempted possession,” but admonishing that “[t]his does *not* mean that any defendant who engages in active negotiations to purchase narcotics has committed an attempt crime” because “the government

must still prove a defendant's *intent* to possess narcotics") (emphases in original).

The District Court incorrectly treated the substantial step analysis as overlapping with – indeed, as subsuming – the analysis of whether the requisite intent exists. But the two elements of an attempt (intent to commit the crime and a substantial step toward committing it) demand “separate inquiries.” 6th Cir. Pattern Jury Instruction 5.01 Committee Commentary, *available at* http://www.ca6.uscourts.gov/internet/crim_jury_insts/pdf/11_Chapter_5.pdf (citing *Bilderbeck*, 163 F.3d at 975). Whereas the intent analysis entails a subjective inquiry (whether the defendant intended to commit the crime), the substantial step analysis entails an objective inquiry that *assumes* that the requisite intent exists: “The standard for evaluating the substantial step element is objective: whether any reasonable person could find that the acts committed would *corroborate* the firmness of a defendant's criminal intent, *assuming the defendant did, in fact, intend to commit the crime.*” *Id.* (citing *Bilderbeck*, 163 F.3d at 975) (emphasis added).

Because the substantial step analysis assumes that the defendant intended to commit the crime, the instruction defining “substantial step” did *not* require the jury to find that Mr. Suarez had the requisite intent. To the contrary, a reasonable juror could have interpreted that instruction to mean that Mr. Suarez could be

guilty on Count 8 *without* the government proving that he intended to intimidate, threaten, or corruptly persuade Ms. Housos.

C. The Failure To Inform The Jury Of The Intent Element Is *Per Se* Reversible Error.

It is necessarily reversible error that the jury was not instructed that it had to find the intent element of Count 8. The Supreme Court and this Court have repeatedly determined that where, as here, (i) the jury was not instructed on an essential element of the offense and (ii) the element was contested, the defendant's right to due process is violated and the error is *per se* harmful.

1. Harmless-error analysis does not apply to a failure to instruct the jury on a contested element of the offense.

In *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court made clear that a district court's failure to instruct the jury on an element of an offense "*cannot*" be *harmless error* where, as here, "the defendant contested the omitted element" and "the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." 527 U.S. at 19. The defendant in *Neder* was convicted of filing false statements of income on his tax returns. *Id.* at 6. Materiality was an element of these offenses. *Id.* The district court erroneously instructed the jury that it "need not consider" that element. *Id.* (quoting district court). The Court ruled that harmless-error review applied because the defendant "*did not contest* the element of materiality"; indeed, he "*did not argue to the jury* –

and does not argue here – that his false statements of income could be found immaterial.” *Id.* at 4, 15-16 (emphases added). Thus, as this Court has recognized, *Neder* holds that harmless-error review applies “‘where the evidence regarding the omitted element is *undisputed*.’” *United States v. Kuehne*, 547 F.3d 667, 681 (6th Cir. 2008) (quoting *Neder*, 527 U.S. at 19) (emphasis added).

This Court’s earlier decisions in *Hoover* and *Glenn* are consistent in relevant parts with *Neder*. In *Hoover*, this Court held that the trial court’s failure to instruct the jury on an element of resisting arrest – that the arrest was lawful – was a due process violation that *necessarily* required setting aside the defendant’s conviction of that offense. *Hoover*, 802 F.2d at 169, 174, 177-78. The Court ruled that harmless-error review did not apply because “when an instruction prevents the jury from considering a *material* issue, it is equivalent to a directed verdict on that issue and therefore *cannot be considered harmless*.” *Id.* at 177 (emphases added). Nothing in *Hoover* suggests that the defendant conceded the element at issue. To the contrary, the lawful arrest element was material because, as the dissent states, the defendant’s counsel argued that it was not satisfied. *Id.* at 179.⁴

Similarly, in *Glenn*, this Court determined that the trial court’s failure to instruct the jury on an element of the offense of aggravated burglary – that a person

⁴ Although *Hoover* remains good law in relevant part for the reasons stated in the text, it is inconsistent with *Neder* insofar as it states that harmless-error review can *never* apply to a failure to instruct the jury on an essential element of an offense. See *Hoover*, 802 F.2d at 178.

was likely to be in the dwelling burglarized – was an error that was *per se* harmful and warranted *habeas corpus* relief. 686 F.2d at 421-22. The defendant contested that element and “the jury, under proper instruction, may have found either” that it was satisfied or that it was not. *Id.* at 422. The Court ruled that harmless-error review could not apply. *Id.* at 421-22.

More recently, this Court’s decision in *United States v. Miller*, 767 F.3d 585 (6th Cir. 2014), went further and held that an instruction that *misstated* but *did not omit* the element of motive under the federal hate-crime statute was *per se* harmful. *Id.* at 591, 594. The Court relied on *Neder*’s teaching that an instructional error cannot be harmless “‘where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding.’” *Id.* (quoting *Neder*, 527 U.S. at 19). Because “[m]otive was *the key issue* the defendants presented to the jury, and they presented enough evidence to support a finding in their favor on this score,” the error necessarily required reversing their convictions.⁵ *Id.* (emphasis in original).

⁵ Although parts of *Miller* could be read to suggest that harmless-error review applied, the majority opinion expressly analogized to, and relied on, the situation *Neder* identifies where such review cannot apply. *Miller*, 767 at 594 (quoting the language from *Neder*, 527 U.S. at 19, set forth in the text). The majority opinion deemed the situation in *Miller* “more like” the situation *Neder* identifies than a situation where the element in question was uncontested. *Id.*

2. Harmless-error analysis does not apply here because the District Court failed to instruct the jury on the intent element and Mr. Suarez contested that element.

Under *Neder*, *Hoover*, *Glenn*, and *Miller*, this Court should set aside the verdict on Count 8 without conducting harmless-error analysis. Indeed, this Court “cannot” apply harmless-error review to the verdict on Count 8. *See Neder*, 527 U.S. at 19. The jury was not instructed that it had to find the element that Mr. Suarez intended to intimidate, threaten, or corruptly persuade Ms. Housos. “Because the jury was not instructed on the element of [such intent], it did *not* find beyond a reasonable doubt ‘every fact necessary’ to establish every element of [Count 8].” *Hoover*, 802 F.2d at 178 (emphasis in original). The government was not required to meet its “burden of proving the essential elements of the crime to the jury’s satisfaction.” *Glenn*, 686 F.2d at 421. Instead, “the trial court’s failure to instruct the jury that it had to find that [Mr. Suarez intended to tamper with Ms. Housos’s testimony] to convict him of [attempted witness tampering] *prevented the jury from considering that element and constituted a directed verdict on it.*” *Hoover*, 802 F.2d at 177 (emphases added). This error is *per se* harmful because intent “was *the key issue*” that Mr. Suarez raised before the jury on Count 8 and the evidence supported a juror reasonably doubting that he had the requisite intent. *See Miller*, 767 F.3d at 594 (emphasis in original).

This is not a case where the defendant “did not argue to the jury” that the element at issue was not satisfied. *See Neder*, 527 U.S. at 16. Mr. Suarez vigorously “contested” the intent element of Count 8. *See id.* at 19. In his closing argument, Mr. Suarez’s lead trial counsel emphasized that Count 8 “fail[s]” because one of its “elements” is that Mr. Suarez acted with “the intent to influence, delay or prevent using intimidation, threatens or corruptly persuades.” (Doc. 297, Tr. of Trial, June 26, 2014, at 87:22 – 88:4, Page ID #s 5178 – 5179.) With respect to the acts charged in Count 8, counsel argued that “if [Mr. Suarez] had wanted to influence Barb Housos, this isn’t how you go about it”; that Mr. Suarez “certainly wasn’t trying to intimidate witnesses”; and that, rather than evincing criminal intent, the acts in question were merely “[i]nnartful,” “inappropriate,” and “insensitive” and likely resulted from Mr. Suarez being “[p]aranoid.” (*Id.* at 102:6-14, Page ID # 5193.) Counsel also urged the jury to find that, when viewed in their proper contexts, the acts were not intended to tamper with Ms. Housos’s testimony. (*Id.* at 102:20-24, Page ID # 5193.)

Nor is this a case where no reasonable jury could find that the government failed to prove the element in question beyond a reasonable doubt. *Compare Neder*, 527 U.S. at 15 (determining that “no jury could reasonably find that [the defendant’s] failure to report [\$5 million] on his tax returns was not ‘a material matter’”) (emphases added). The evidence on each of the acts charged in Count 8

is sufficient for at least one juror to reasonably doubt that Mr. Suarez *intended* the act to “intimidat[e],” “threaten[],” or “corruptly persuade[]” Ms. Housos. 18 U.S.C. § 1512(b).

As to (a), Ms. Housos’s testimony about the handwritten letter, its text, and her contemporaneous circumstances are sufficient to create reasonable doubt that Mr. Suarez had the requisite intent. Ms. Housos repeatedly testified that *she thought* that Mr. Suarez was *trying to help her* by sending the letter:

- “I really believe his intention on this letter was to help me because he knew how damaged I was from a lot of personal problems.” (Doc. 289, Tr. of Trial, June 20, 2014, at 51:23-25, Page ID # 4358.)
- “I deeply believed, knowing Ben, that he was trying to help me. In his own way, he was trying to help me, no matter what that says. I know what kind of a man he is, and I really think he was very concerned about me.” (*Id.* at 55:6-10, Page ID # 4362.)
- “Q. And in reading the one-page letter, it was your feeling that Ben Suarez was trying to help you, correct? A. Yes.” (*Id.* at 134:23-25, Page ID # 4441.)

The text of the letter and the medical and personal issues that Ms. Housos was facing when she received it corroborate this testimony. The letter begins: “Barb, I want to spare you doing a grand jury testimony *in your condition*. I want to see if you can do an affidavit *like Donna*.” (Doc. 288-8, Gov’t Ex. 501 at 1, PageID # 4302 (emphases added).) Ms. Housos testified that the reference to her “condition” was “talking about [her] medical condition.” (Doc. 289, Tr. of Trial, June 20, 2014, at 135:22-25, PageID # 4442.) In June 2012, *she had surgery to*

remove most of her colon to treat her colon cancer. (Doc. 287, Tr. of Trial, June 19, 2014, at 103:14 – 104:1, PageID #s 4086-87.) Ms. Housos further testified that “Donna” is Mr. Suarez’s sister, whom Ms. Housos knew had been allowed “to do an affidavit in lieu of appearing in front of the grand jury” because of her “health concerns.” (Doc. 289, Tr. of Trial, June 20, 2014, at 136:1-21, PageID # 4443.) Also in June 2012, *Ms. Housos’s son committed suicide.* (Doc. 292, Tr. of Trial, June 24, 2014, at 165:11-21, Page ID# 4760.) This fact sheds additional light on – and makes especially powerful and persuasive – Ms. Housos’s testimony that “[Mr. Suarez’s] intention on this letter was to help [her] because he knew how damaged [she] was from a lot of personal problems.” (Doc. 289, Tr. of Trial, June 20, 2014, at 51:23-25, Page ID # 4358.) All of this evidence supports a juror having a reasonable doubt as to whether Mr. Suarez sent the letter to Ms. Housos with the intent to help her, as she repeatedly testified, rather than with the intent to tamper with her testimony. (See Doc. 297, Tr. of Trial, June 26, 2014, at 100:16-24, PageID # 5191 (closing argument) (referring to what “Barb said – she was so compelling about it – she knew that Ben was trying to help her” and describing the letter as “Ben reaching out to her, she just had cancer surgery, she just lost her son, they have been best friends for 30 years”).)

As to (b), whereas Count 8 makes it sound like the letter sent to SCI’s employees was *all* about Ms. Housos (see Doc. 27, Superseding Indictment ¶ 99,

PageID # 159), the letter is four pages long, contains only one paragraph that refers to Ms. Housos, and never mentions her by name (see Doc. 293-6, Gov't Ex. 505, PageID #s 5054-57). Further, the letter is directed *not* at Ms. Housos, but rather at the U.S. Attorney for the Northern District of Ohio and the lead prosecutor in this case, whom the letter accuses of improperly investigating Mr. Suarez and his company. Page 1 of the letter states: "We believe we have evidence that Cleveland U.S. Attorney Steve Dettelbach and his first assistant Carole Rendon are engaging in malicious prosecution for the purpose of benefiting their careers." (*Id.* at 1, PageID # 5054.) The letter proceeds to allege – again on page 1 – that they are "overzealous" and "willing [to] bend ethics to get publicity." (*Id.*) Near the top of page 2, the letter claims that they "initiated a criminal investigation on a matter that . . . should have gone to the Federal Election Commission" (*id.* at 2, PageID # 5055) – a claim that rings true given the outcome at trial.

The paragraph referring to Ms. Housos appears later on page 2. It makes inappropriate remarks about her personal circumstances discussed above. (*Id.*) Given that the letter as a whole was attacking Mr. Dettelbach and Ms. Rendon, however, a juror could reasonably doubt that these remarks were intended to tamper with Ms. Housos's testimony. A more natural reading is that the remarks were designed to use Ms. Housos's personal tragedies to illustrate the adverse effects that the investigation was having on SCI and its employees – an intent that,

while not tactful or admirable, is *not criminal*. Ms. Housos *directly corroborated this reading*, testifying that Mr. Suarez included the paragraph because he sought “to use [her] tragedies to help this case.”⁶ (Doc. 289, Tr. of Trial, June 20, 2014, at 63:4-5, Page ID # 4370.) Similarly, Ms. Dalayanis, whom Mr. Suarez directed to sign and distribute the letter, testified that Ms. Housos called Mr. Suarez and asked him to remove the paragraph and that he responded by saying that “we all need to do work together and to do what we could do because of the federal investigation,” that “we needed to do this for the company,” and that “[h]e had been advised by his attorneys” to “include that information in the letter.”⁷ (Doc. 292, Tr. of Trial, June 24, at 180:22 – 182:10, Page ID #s 4775-77.)

As to (c), Ms. Housos’s brief testimony on the matter is the only evidence relating to Mr. Suarez stating to her that she had told him that she had memory problems. (Doc. 289, Tr. of Trial, June 20, 2014, at 66:16 – 67:8, Page ID #s 4373-74.) Nothing in this testimony or the statement itself indicates that Mr. Suarez had the requisite intent.

⁶ The transcript of Ms. Housos’s testimony refers to this letter as Government Exhibit 502 because it was mismarked during her trial deposition, which was taken due to her medical conditions. (Doc. 289, Tr. of Trial, June 20, 2014, at 57:8-20, PageID # 4364.)

⁷ Mr. Suarez’s current counsel began representing him long after this letter was sent. The attorneys who represented him then withdrew months before trial.

In sum, the “attempt” instruction’s elimination of the intent element is *per se* harmful error because Mr. Suarez disputed this element and the evidence allows a juror to reasonably doubt that it was proven. *See Neder*, 527 U.S. at 19.

D. Reversal Would Be Proper Even If Plain-Error Review Applied.

Even if plain-error review applied (it does not), reversal would be proper. As the Supreme Court held in another case involving a district court’s failure to instruct the jury on an element of the offense, “before an appellate court can correct an error not raised at trial, there must be (1) ‘error,’ (2) that is ‘plain,’ and (3) that ‘affect[s] substantial rights.’” *Johnson v. United States*, 520 U.S. 461, 466-67 (1997) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)). “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 affect[s] the fairness, integrity, or public reputation of judicial proceedings.’” *Id.* at 467 (quoting *Olano*, 507 U.S. at 732) (alteration in original). All four requirements are satisfied.

First, the elimination of the intent element from the instructions on Count 8 is error for the reasons stated above.

Second, the error is plain, which in this context is “‘synonymous with clear or, equivalently, obvious.’” *Johnson*, 520 U.S. at 467 (quoting *Olano*, 507 U.S. at 734). Omitting the intent element from the “attempt” instruction is a clear error. First-year law school classes on criminal law teach that an attempt requires intent

to commit the crime. This Court's decisions adopt this fundamental principle. This Circuit's pattern instruction on the "Basic Elements" for "Attempt" does too: It provides that an "element[]" of "attempting to commit [a] crime" is that "the defendant intended to commit the crime." 6th Cir. Pattern Jury Instruction 5.01. Yet the District Court failed to instruct the jury that a guilty verdict on Count 8 – which charges an attempt – requires a finding that Mr. Suarez intended to engage in the criminal conduct at issue. His *lack* of intent was his main defense to Count 8. The omission of an instruction on that element goes to Mr. Suarez's guilt or innocence and is therefore plain error. *See United States v. Semrau*, 693 F.3d 510, 528 (6th Cir. 2012) (“*It is clear that omitting instructions that are . . . [related] to elements that go to the question of guilt or innocence is plain error.*”) (quoting *United States v. Damra*, 621 F.3d 474, 498 (6th Cir. 2010)) (omission and alteration in original) (emphasis added).

Third, the plain error affects Mr. Suarez's substantial rights because it allowed him to be found guilty based on his conduct alone. This Court has recognized that “if the jury is not instructed that intent must be found to have existed, the danger is great that a conviction may result on the basis of overt acts alone.” *United States v. Bryant*, 461 F.2d 912, 921 (6th Cir. 1972). The Court has held that where, as here, intent is “the only element in issue,” “[t]he *possibility* that substantial prejudice resulted to [the defendant] from the court's omission of an

instruction on intent” is “‘plain error’ that *affect[s]* ‘*substantial rights*’ of the accused.” *Id.* (emphases added).

Fourth, and finally, the error seriously affects the fairness, integrity, and public reputation of Mr. Suarez’s conviction. For an attempt offense, the “heightened mental state” of intent to commit the crime “separates criminality itself from otherwise innocuous behavior.” *Bailey*, 444 U.S. at 405. By eliminating the intent element, the “attempt” instruction in this case allowed Mr. Suarez to be found guilty on Count 8 without the government proving beyond the “heightened mental state” that separates guilt from innocence. *See id.*

In sum, the error is plain, it affects Mr. Suarez’s substantial rights, and it seriously taints the fairness, integrity, and public reputation of his conviction. The Court should set aside the verdict on Count 8.

II. THE VERDICT ON COUNT 8 VIOLATES DOUBLE JEOPARDY AND CANNOT STAND BECAUSE THE COUNT IS DUPLICITOUS AND THE VERDICT EXPOSES MR. SUAREZ TO A SECOND PROSECUTION FOR THE SAME ACTS.

A. The Standard Of Review Is *De Novo* Because Mr. Suarez Preserved His Claim That Count 8 Is Duplicitous.

“Whether an indictment is duplicitous is a question of law that this Court reviews *de novo*.” *United States v. Kakos*, 483 F.3d 441, 443 (6th Cir. 2007). Mr. Suarez preserved his duplicity claim for two separate and independent reasons.

First, the duplicity issue did not *arise* until the jury questioned whether “the burden ha[s] to be met on A, B and C, or any one.” (Doc. 285, Tr. of Trial, June 30, 2014, at 12:21-25, PageID # 3673.) This question raised the issue because answering “or any one” would allow a general verdict that did not reveal on which act(s) it found Mr. Suarez guilty. In response, Mr. Suarez argued that the burden must be met on (a), (b), *and* (c), as charged in Count 8. Mr. Suarez requested an instruction that the jury “had to unanimously find all three” and “objected” after the District Court rejected this request. (Doc. 293, Opp’n to Mot. for New Trial at 22, PageID # 4972.) Had the request been granted, it would have avoided a duplicity problem: A guilty verdict would have entailed a finding of all three acts, barring a second prosecution for any of them. Subsequently, “over [Mr. Suarez’s] objection” (*id.*), the court instructed the jury that it had to find “[a]ny one beyond a reasonable doubt.” (Doc. 285, Tr. of Trial, June 30, 2014, at 13:5-6, PageID # 3674.) This instruction *created* a duplicity problem and rendered the Superseding Indictment faulty as to Count 8. By requesting an instruction that would have avoided that problem, objecting when the request was denied, and objecting to the instruction that the District Court gave, Mr. Suarez preserved his duplicity claim. *See Kakos*, 483 F.3d at 445 (holding that a defendant preserves a duplicity claim by “object[ing] to the jury instructions which failed to cure the faulty indictment”).

Second, Mr. Suarez’s request for polling again raised the issue of duplicity:

As to Count 8, we would ask that Your Honor specifically poll the jury as to *which of the three acts*, the A, the B, or the C of Count 8 that they found on. If they, in fact, they found unanimity *as to one of those three*, we think we need to preserve *that* for appeal.

(Doc. 285, Tr. of Trial, June 30, 2014, at 6:2-15, PageID # 3667 (emphases added).) This request preserved his duplicity claim because the polling would have fixed the duplicity problem by eliciting from the jury on which of the offenses charged as (a), (b), and (c) it found him guilty. *See Kakos*, 483 F.3d at 444 (indicating that a defendant preserves a duplicity claim where he “in [some] way raise[s] the issue of duplicity before the trial court”). The Opinion errs in asserting that Mr. Suarez raised only a concern about unanimity when he requested polling. (Doc. 322 at 10-12, PageID # 6539-41.) The italicized language in the block quote above reflects a concern about double jeopardy, not unanimity. Rather than asking the District Court to poll the jury on whether it was unanimous on at least one act, the sentences in that block quote asked the court to poll it on which of the acts it found him guilty. That information, if revealed, would have cured the duplicity problem.

B. Count 8 Is Duplicitous And The General Verdict On That Count Violates The Double Jeopardy Clause.

Count 8 is duplicitous because it charges Mr. Suarez with three separate offenses: the alleged acts of witness tampering identified in (a), (b), and (c). The jury entered a general verdict of guilty on Count 8. The verdict does not reveal on

which of the offenses charged in (a), (b), and (c) the jury found Mr. Suarez guilty. Mr. Suarez remains exposed to being prosecuted again for any of these offenses. The general verdict on Count 8 violates his right under the Double Jeopardy Clause to be free from multiple prosecutions for the same offense. *See Kakos*, 483 F.3d at 443-44 (stating that “[t]he overall vice of duplicity is that the jury cannot in a general verdict render its finding on each offense” and that “‘exposure to double jeopardy’” is one of the “adverse effects on a defendant” that may result) (quoting *United States v. Duncan*, 850 F.2d 1104, 1108 n. 4 (6th Cir. 1988)).

The text of Count 8 and the evidence that the government introduced at trial leave no doubt that Count 8 is duplicitous. “‘An indictment is duplicitous if it sets forth separate and distinct crimes in one count.’” *Id.* at 443 (quoting *United States v. Davis*, 306 F.3d 398, 415 (6th Cir. 2002)). A count sets forth separate and distinct crimes if it charges multiple offenses that each require proof of at least one fact that the other(s) do not. *Davis*, 306 F.3d at 416 (stating the test that “‘offenses are separate if each requires proof of an additional fact that the other does not’” to determine whether a count was duplicitous) (quoting 2 Wright & Miller, *Fed. Practice & Procedure* § 142, at 17 (3d ed. 1999)). In Count 8, the acts charged in (a), (b), and (c) each require proof of not just one but several facts that the others do not:

Act	Date	Type	Specific Form	Place Received	Primary Subject	Person Who Conveyed
(a)	late July 2012	document (Gov't Ex. 501)	one-page handwritten note addressed to Ms. Housos with five-paged typewritten document attached	Ms. Housos's home	grand jury testimony of Ms. Housos	Joe May (a courier)
(b)	February 21, 2013	different document (Gov't Ex. 505)	four-page typed letter addressed to all SCI employees	SCI	the federal investigation of SCI	Ms. Dalayanis
(c)	January 2013	conversation	direct one-on-one oral statement to Ms. Housos	Glenmoor Country Club	memory of Ms. Housos	Mr. Suarez

These differences defeat the Opinion's assertion that (a), (b), and (c) are part of one "continuing violation" of § 1512(b)(1). (See Doc. 322 at 13, PageID # 6542.) A *seven-month gap* exists between (a) and (b). A *six-month gap* exists between (a) and (c). Although there is a smaller (though still substantial) gap between (b) and (c), those acts do not resemble one another. And neither (b) nor (c) resembles (a).

The Opinion is mistaken in claiming support for its "continuing violation" theory from *United States v. Alsobrook*, 620 F.2d 139 (6th Cir. 1980). (See Doc. 322 at 13-14, PageID # 6542-43.) That case teaches that multiple acts can be charged in the same count as "a single, continuous scheme" if they are *identical or very similar* and occurred *continuously or regularly*. *Alsobrook*, 620 F.2d at 142-43. The defendant in *Alsobrook* was convicted of one count of traveling in interstate commerce with the intent to carry on unlawful gambling activity. *Id.* at

141. The indictment alleged “a continuing course of interstate travel” on six dates. *Id.* at 142. At trial, the government proved “a *pattern* of [the defendant] travel[ing] by [plane] from California to Michigan and then returning to California” during a period of a few months and engaging in “the *same routine* once he reached Detroit.” *Id.* at 141 (emphases added). With this backdrop, the Court rejected the defendant’s duplicity claim and ruled that “the government’s characterization of the facts as a single, continuous scheme was a fair one.” *Id.* at 142-43. Here, in contrast, as the table above demonstrates, acts (a), (b), and (c) are not part of a “pattern” of identical and continuous conduct in which Mr. Suarez engaged in “the same routine.” *Id.* Moreover, whereas no “potential for double jeopardy” existed in *Alsobrook*, *id.* at 143, the general verdict on Count 8 does not reveal on which of the acts charged in that Count the jury found him guilty. The verdict leaves Mr. Suarez vulnerable to a second prosecution for (a), (b), or (c).

C. The Duplicity In Count 8 Requires Reversal Under Any Standard.

Finally, the double jeopardy violation caused by the duplicity in Count 8 bars the error from being deemed harmless; to the contrary, the error is plain. *See United States v. Savoires*, 430 F.3d 376, 379-81 (6th Cir. 2005) (reversing conviction on duplicitous count under “plain error” standard).

CONCLUSION

For the foregoing reasons, the Court should set aside the verdict on Count 8.

December 29, 2014

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the number of words from the Jurisdictional Statement through the Conclusion is 13,902.

/s/ Brian M. Pierce

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December 2014, copies of the foregoing document and any exhibits thereto were filed through the Court's ECF system, which will provide notice to the following attorneys for the government at the e-mail addresses alongside their names, as indicated on the electronic filing receipt:

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Document	PageID #s
Doc. 27, Superseding Indictment (filed Oct. 22, 2013)	126-61
Doc. 151, Defendants' Joint Trial Brief (filed May 9, 2014)	1797-1884
Doc. 152-1, Proposed Jury Instructions and Verdict Forms (the "annotated set") (filed May 9, 2014)	1942-2048
Doc. 154, Proposed Jury Instructions and Verdict Forms (filed May 9, 2014)	2073-2178
Doc. 357, Transcript of Trial, June 5, 2014, at 143:4 – 230:13 (Eugene Cook)	7538-7625
Doc. 307, Transcript of Trial, June 12, 2014, at 2:4 – 296:23 (Michael Giorgio)	6003-6297
Doc. 287, Transcript of Trial, June 19, 2014, at 89:16 – 250:13 (Barbara Housos)	4072-4233
Doc. 289, Transcript of Trial, June 20, 2014, at 2:7 – 281:23 (Barbara Housos)	4309-4588
Doc. 288-8, Government Exhibit 501 (one-page handwritten note with attached five-page typewritten document)	4302-07
Doc. 293-6, Government Exhibit 505 (letter to SCI employees)	5054-57
Doc. 292, Transcript of Trial, June 24, 2014, at 149:4 – 239:24 (Julianne Dalayanis)	4744-4834
Doc. 360, Transcript of Trial, June 25, 2014, at 7:4 – 12:21 (rulings on motion for a judgment of acquittal)	7719-24
Doc. 360, Transcript of Trial, June 25, 2014, at 232:20-22 (District Court's request for meeting to discuss jury instructions)	7944
Doc. 297, Transcript of Trial, June 26, 2014, at 87:22 – 100:24 (Mr. Suarez's closing argument)	5178-91
Doc. 297, Transcript of Trial, June 26, 2014, at 228:18 – 229:5 (jury instruction on "willfully")	5319-20
Doc. 297, Transcript of Trial, June 26, 2014, at 231:25 – 234:20 (jury instructions on Count 8)	5322-25
Doc. 285, Transcript of Trial, June 30, 2014 (verdicts and polling)	3662-76
Doc. 288, Motion of Benjamin Suarez for a Judgment of Acquittal on Count 8 or, in the Alternative, a New Trial on that Count (filed July 14, 2014)	4236-61

Document	PageID #s
Doc. 293, Government's Response in Opposition to Defendant Suarez's Motion for Judgment of Acquittal / Motion for New Trial Pursuant to Criminal Rules 29 & 33 (filed Aug. 4, 2014)	4951-99
Doc. 300, Reply in Support of Motion of Benjamin Suarez for a Judgment of Acquittal on Count 8 or, in the Alternative, a New Trial on that Count (filed Aug. 14, 2014)	5925-65
Doc. 322, Memorandum of Opinion and Order (entered Oct. 8, 2014)	6530-54
Doc. 339, Judgment in a Criminal Case (entered Nov. 14, 2014)	6930-35
Doc. 340, Transcript of Hearing, Nov. 14, 2014, at 1:1 – 62:22 (sentencing of Mr. Suarez)	6936-97
Doc. 349, Benjamin Suarez's Motion for Reconsideration of the Memorandum of Opinion and Order Denying his Motion for a Judgment of Acquittal on Count 8, or in the Alternative, a New Trial on that Count (filed Nov. 25, 2014)	7308-24
Doc. 351-1, Declaration of Joshua D. Greenberg Ex. A, E-mail from Rina R. Russo, May 8, 2014, 10:19 AM (Nov. 28, 2014)	7369-76
Doc. 354, Benjamin Suarez's Notice of Appeal (filed Dec. 1, 2014)	7385-91
Doc. 363, Reply in Support of Benjamin Suarez's Motion for Reconsideration of Memorandum of Opinion and Order Denying his Motion for a Judgment of Acquittal on Count 8 or, in the Alternative, a New Trial on that Count and Opposition to the Government's Motion to Strike Declararions (filed Dec. 14, 2014)	7968-78
Doc. 364, Order (entered Dec. 17, 2014)	7982-83
Doc. 365, Benjamin Suarez's Notice of Appeal (filed Dec. 18, 2014)	7984-86