No. 19-4147

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff – Appellee,
v.
CLAUD R. KOERBER,
Defendant – Appellant.

On appeal from the United States District Court, District of Utah,
Honorable Frederic Block, No. 2:17-cr-00037-FB

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

August 10, 2020

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Prior or Related Appeals

Pursuant to 10th Cir. R. 28.2(C)(3), the following are prior related appeals:

United States v. Koerber, No. 12-601 (10th Cir. dismissed Apr. 19, 2012).
United States v. Koerber, No. 13-4133 (10th Cir. dismissed Feb. 10, 2014).
United States v. Koerber, No. 14-4107, 813 F.3d 1262 (10th Cir. 2016).
United States v. Koerber, No. 16-4161 (10th Cir. dismissed Oct. 27, 2016).
United States v. Koerber, No. 17-4121 (10th Cir. dismissed Aug. 18, 2017).
United States v. Koerber, No. 17-4128 (10th Cir. dismissed Aug. 21, 2017).
United States v. Koerber, No. 18-4074 (10th Cir. dismissed June 28, 2018).
United States v. Koerber, No. 18-4116 (10th Cir. dismissed Aug. 31, 2018).

Statement of Jurisdiction

The United States District Court for the District of Utah had jurisdiction over this matter pursuant to 18 U.S.C. § 3231. Koerber was convicted after trial of securities fraud, wire fraud, and money laundering.

After sentencing, the court entered the judgment on October 18, 2019. (Aplt.App.23:5572-78.)[1] Koerber filed a timely notice of appeal on October 22, 2019. (Aplt.App.23:5579.) This court therefore has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3231.

Statement of the Issues

Issue 1: Did the court erroneously decide it was not bound to enforce a prior suppression order on collateral estoppel grounds?

Issue 2: When deciding on remand that the dismissal should be without prejudice, did the court erroneously slight factors and exceed this court's mandate by omitting prior factual findings of delays caused by the government's tactics and pattern of widespread misconduct?

Issue 3: Did the court erroneously disregard prior factual findings of the delays caused by the government's tactics and misconduct and of prejudice to the fundamental fairness of the prosecution when deciding no Sixth Amendment speedy trial violation occurred?

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[1] Citations to the Appellant's Appendix will be formatted as "Aplt.App.[Volume Number]:[Bates Number]."

Issue 4: Under the savings statute providing only 60 days to reindict in the event of an appeal, was Koerber timely reindicted 146 days after the 2014 dismissal became final?

Issue 5: Did the district court erroneously decline to suppress QuickBooks accounting files based upon its sua sponte conclusion, unsupported by evidence, that a later version of the electronic file would have been inevitably discovered?

Issue 6: Was the indictment constructively amended at trial when the jury could have convicted Koerber for a "feeder fund" scheme that was not charged in the indictment?

Issue 7: Did the judge abuse his discretion by persistently interfering with the defense's case at trial including suggesting Koerber's guilt, interfering with and rehabilitating impeachment of government witnesses, suggesting the defense's financial expert testimony was not worthy of the jury's consideration, and giving the impression that the defense was not credible?

Introduction

After a prosecution that took more than a decade, Claud R. Koerber was convicted on multiple counts of securities fraud, wire fraud, and money laundering related to his real estate investment business. The jury acquitted him of related tax charges.

Koerber was sentenced to 170 months in prison at the conclusion of a case with a sordid prosecutorial history. At sentencing, the judge explained, "this prosecution has been unlike any others. . . . A 12-year lifespan, the unlimited resources of over six state and federal agencies, a declination of prosecution by the state of Utah's highest authority, multiple judges and multiple recusals, a dismissal with prejudice for prosecutorial misconduct, multiple indictments, multiple appeals, and I suspect there will be another one, two jury trials, victims who testified on behalf of the defendant, a forcible removal of original defense counsel, and a last minute revocation of over a decade of pretrial release." (Aplt.App.64:14188-89.) Before trial, the same judge had already observed, "I think there's a real chance that the Circuit Court can toss this case," after concluding it "should be reversed for any number of reasons." (Aplt.App.51:11232,11234.)

This case involves two distinct stages. The first (from 2009-2016) was defined by a pattern of widespread government misconduct and tactical delay. The second (from 2017-2019) was defined by persistent efforts to disregard the

consequences of the government's prior misconduct by prosecuting Koerber using improperly obtained and previously suppressed evidence.

The government's misconduct led the court to suppress two interviews with Koerber and the fruits thereof. After finding a Speedy Trial Act violation and that the government engaged in a pattern of neglect, dilatory conduct, and tactical delay, the court dismissed the case with prejudice. The government appealed the "with prejudice" determination and this court reversed, explaining that on remand the court retained discretion to dismiss with prejudice after correcting its analysis of two factors.

On remand, however, the district court decided to dismiss without prejudice by omitting prior factual findings about the delays caused by the government's tactics and misconduct. The government returned an untimely reindictment 146 days later, even though the savings statute only provides 60 days to reindict in the event of an appeal.

The court then decided it was not bound by the prior order suppressing interviews and their fruits, which the court had previously explained were foundational to the government's investigation and prosecution strategy.

Armed with the previously suppressed evidence (and its fruits) and excused from all delay, the prosecution avoided a second mistrial and obtained a conviction based on an uncharged theory of fraud based on indirect investments in third-party "feeder funds" rather than investments in Founders Capital.

This court should reverse the conviction and dismiss with prejudice based on (1) the district court's failure to enforce its prior order suppressing evidence as a result of prosecutorial misconduct; (2) the district court's slighting of factors and exceeding this court's mandate on remand by omitting consideration of the government's misconduct; (3) the district court's failure to dismiss on Sixth Amendment speedy trial grounds; (4) the government's untimely reindictment; (5) the district court's failure to suppress QuickBooks files based on its conclusion that they would have been inevitably discovered, despite lacking any evidence supporting that conclusion; (6) the constructive amendment of charges at trial where prosecutors presented an unindicted "feeder fund" scheme to the jury; and (7) the trial judge's abuse of discretion by repeatedly intervening to suggest Koerber's guilt to the jury, rehabilitate government witnesses, and discredit the defense's case.

The conviction is legally erroneous and Koerber's current incarceration is unjust. This court must correct the matter by reversing the conviction and dismissing with prejudice.

Statement of the Case and Facts

1. Koerber Was Indicted for His Business Activity

Claud Koerber was first indicted in 2009. (Aplt.App.1:58.) Each of the indictments in this prosecution charges Koerber with operating a scheme and artifice to defraud through misrepresentations and omissions to obtain investments

directly with a company he owned and controlled, called Founders Capital. (Aplt.App.1:59-62,73-77; 3:709-14; 10:2444-48.) He was not indicted for crimes committed by feeder funds (companies he did not own or control) accepting money from individuals.

Koerber's case has been assigned to several judges over the years, but Judge Waddoups presided early on, for more than five years. Those early years were marked by multiple battles waged and won by Koerber to uncover government misconduct that ultimately resulted in a suppression order and a dismissal.

2. Due to Prosecutorial Misconduct, the Court Suppressed Two Pre-Indictment Interviews and Their Fruits

Prior to his indictment, investigators conducted over ten hours of *ex parte* interviews with Koerber—despite knowing he was represented by counsel—and asked him questions scripted by the prosecutors that were designed to influence him to waive his attorney-client privilege and disclose his trial strategy. (Aplt.App.6:1517.)

Koerber learned about the prosecutors' misconduct only after years of effort to uncover information about the prosecution's involvement in those interviews. (Aplt.App.9:2200.) Once he learned about the misconduct, he moved to suppress the interviews and their fruits. (Aplt.App.4:951,969.) The court held three days of evidentiary hearings and decided that the government's misconduct violated rule 4.2 of Utah Rules of Professional Conduct, which violated 28 U.S.C. § 530B, and that the misconduct also violated the Due Process Clause.

(Aplt.App.6:1538-68.) The district court entered findings describing the prosecutorial misconduct and suppressed the interviews and their fruits.

3. The Government Abandoned Its Appeal of the Suppression Order

The government filed a notice of appeal before obtaining authorization from the Solicitor General to challenge the suppression order. In the notice, the government further confirmed the importance of the suppressed evidence when it certified, as required by 18 U.S.C. § 3731, that "the evidence suppressed and excluded by the order of the district court is a substantial proof of a fact material in the proceeding." (Aplt.App.6:1570-71.) The Solicitor General did not authorize the appeal, so the government moved to dismiss it, which this court granted. (Aplt.App.84:18107.)

Koerber moved for a hearing to determine whether the government had sufficient unsuppressed evidence to proceed. (Aplt.App.7:1820.) In response, the government filed a preliminary witness and exhibit list providing details about its evidence against Koerber. (Aplt.App.7:1840-41; 8:1878-87.) The filing indicated that nearly every potential witness—including most of the witnesses later called at the trial that led to Koerber's conviction—had been discussed in the *ex parte* interviews, was first interviewed after the *ex parte* interviews took place, or participated in the improper interviews.

The suppression order devastated the prosecution. Judge Waddoups found that the interviews were foundational for the investigation and prosecution strategy

because they provided "a roadmap of whom to interview and what documents to obtain and focus on." (Aplt.App.9:2203-04.) The government never appealed this conclusion.

4. All Charges Were Dismissed with Prejudice

Shortly thereafter, Koerber moved to dismiss, which the court granted based on violations of the Speedy Trial Act ("STA"). (Aplt.App.9:2197.) The court dismissed with prejudice due to its findings that the government caused delay through its prosecutorial misconduct, and a widespread pattern of neglect, dilatory conduct, and intentional tactical delay. (Aplt.App.9:2197.)

First, the court found a "pattern of neglect and dilatory conduct in managing the STA clock" by prosecutors, including filing motions to toll the clock, filing an unauthorized appeal, eight faulty ends of justice orders, and more. (Aplt.App.9:2193-94.)

Second, the court relied on its prior findings about the government's improperly using Koerber's privileged information. (Aplt.App.9:2201.) The court had entered a protective order, which amounted to a suppression order, regarding the government's improper reliance on a privileged document—the "To Our Lenders" letter. (Aplt.App.3:666,673-74.) The letter was a draft "prepared for the purpose of seeking advice on whether it should be sent to investors." (Aplt.App.3:678.) The government's reliance on the letter was prejudicial to Koerber because it, in conjunction with the suppressed interviews, provided a

roadmap for the investigation and prosecution. (Aplt.App.3:673-74.) The court also concluded that the government's reliance on the letter caused delay (Aplt.App.9:2201) and that its post-indictment use of the letter "even after it promised to sequester it" caused prejudice and was part of the government's "intentional intrusions on [Koerber's] attorney-client privilege," (Aplt.App.9:2200, 2202 (relying on *Shillinger v. Haworth*, 70 F.3d 1132, 1141 (10th Cir. 1995)).)

Third, the court relied on its finding of "significant problems with the substantive prosecution of this case," amounting to a pattern of widespread and continuous misconduct that began before the original indictment. (Aplt.App.9:2199-200.) The court also found the pattern of continued misconduct amounted to a Fifth Amendment due process violation under *United States v. Ballivian*, 819 F.2d 266, 267 (11th Cir. 1987). (Aplt.App.9:2199-202.) The court had previously found the government engaged in tactical delay through a "puzzling" discovery practice of repeatedly delaying production of evidence to the defendant without justification. (Aplt.App.9:2200.) It also found the government had improperly prolonged its investigation for "at least a year" by asserting it needed time to review twenty boxes of irrelevant discovery. (Aplt.App.9:2198.)

Fourth, the court found that delays and the Speedy Trial Act violation itself were causally linked with the repeated instances of government misconduct. (Aplt.App.9:2196.)

5. The Government Appealed and this Court Remanded for Reevaluation

The government appealed the "with prejudice" determination, but not the dismissal. (*See, e.g.*, Aplt.App.84:18200-01.) This court concluded that "[f]or the most part, the district court properly considered the § 3162(a)(2) factors in deciding to dismiss Koerber's case with prejudice," but that the district court had erred in evaluating the seriousness of the offense and by failing to consider Koerber's contributions to the delay. (Aplt.App.9:2208,2250.) This court remanded with instructions to properly evaluate those factors and explained that the district court "need not reevaluate (but should still include) the other facts and circumstances upon which it relied to dismiss Koerber's case with prejudice," such as the government's misconduct and tactical delay and other facts contributing to this case's "sordid history." (Aplt.App.9:2251.)

This court also affirmed the district court's conclusion that the government's misconduct caused delay, and that it had engaged in intentional tactical delay. (Aplt.App.9:2241-42,2247-48.)

The district court retained discretion to dismiss with prejudice based on those factors. (Aplt.App.9:2251.) Importantly, this court rejected the government's arguments challenging the district court's factual findings, including that Koerber had suffered prejudice from the delays. (Aplt.App.9:2248-49.) For example, in 2016 this court affirmed the district court's finding that the government had lost 27 discs of information, which would create issues going forward if the prosecution were to proceed and that "witnesses' memories were 'already proving severely

impaired,' including one agent who had previously testified that 'he remembers little of several critical communications he had back in 2007 and 2008.'" (Aplt.App.9:2248-49.)

6. Judge Parrish Dismissed the Charges Without Prejudice

On remand, Judge Waddoups recused and Koerber's case was reassigned to Judge Parrish. (Aplt.App.1:50) On August 25, 2016, without holding a hearing, Judge Parrish decided to dismiss without prejudice. (Aplt.App.9:2332.) Contrary to this court's instructions, the district court's reevaluation omitted Judge Waddoups' findings regarding the delays caused by the government's misconduct and widespread pattern of neglect, dilatory conduct, and tactical delay. (Aplt.App.9:2345-47.) Judge Parrish's order ignores the sordid history of this case—it never even mentions the word "misconduct," much less engages with the serious findings of prosecutorial misconduct, neglect, dilatory conduct, and tactical delay that marred the investigation and prosecution of this case.

7. Koerber Was Again Indicted

On January 18, 2017—seven-and-a-half years after the initial indictment, two-and-a-half years after Judge Waddoups dismissed the case, and 146 days after Judge Parrish decided to dismiss without prejudice, Koerber was reindicted. (Aplt.App.10:2443.) At that point, "the statute of limitations had run on all charges," so the government relied on the savings statute, 18 U.S.C. § 3288. (Aplt.App.13:3277.)

After a series of recusals, Koerber's case was assigned to Judge Shelby. (Aplt.App.10:2364.)

8. The Court Refused to Enforce the Prior Suppression Order

On re-prosecution, Judge Shelby concluded that a necessary precursor to deciding certain renewed pretrial motions was to determine whether the court was bound by Judge Waddoups' suppression order. (Aplt.App.31:7284.) Koerber argued the court was bound under the doctrine of issue preclusion. (Aplt.App.13:3120-33.)

The district court disagreed, deciding the order had no preclusive effect, permitting the government to use previously suppressed evidence going forward. (Aplt.App.31:7286.)

9. The Court Denied Koerber's Motion to Dismiss

Koerber argued that the government failed to reindict him within the 60 days allowed "in the event of an appeal," by the savings statute, 18 U.S.C. § 3288. (Aplt.App.13:3277.)

The court disagreed, concluding that even though the government appealed Judge Waddoups' dismissal, it had six months to reindict after the dismissal became final. (Aplt.App.13:3279-82,3284.)

10. Koerber Was Tried and the Court Declared a Mistrial

More than eight years after his initial indictment, Koerber was tried in a 30-day jury trial. On the seventh day of deliberations, the jury failed to reach a

verdict on any count and the court declared a mistrial. (Aplt.App.10:2392; 51:11266.)

11. Koerber's Case Was Assigned to Judge Block

A senior judge from the Eastern District of New York, Judge Block, was assigned to preside over the retrial. (Aplt.App.10:2402.)

Koerber renewed his statute-of-limitations motion. (Aplt.App.14:3628.) Judge Block decided the best course was to deny the motion without analyzing the legal arguments, conduct a trial, then let the Tenth Circuit decide whether the trial should have happened at all. (Aplt.App.51:11235-37.) Koerber also renewed his motions as to the suppression issues. (Aplt.App.15:3691,3706.) But the court agreed with and adopted Judge Shelby's rulings and denied Koerber's renewed motions. (Aplt.App.15:3925-27.)

During the trial that had ended in a hung jury, Koerber learned that the government's case depended on financial data derived from an incomplete password-protected QuickBooks file. (Aplt.App.15:3928.) Koerber alone had the authority to disclose the company files, but he had not done so. (Aplt.App.15:3931-32.) Instead, Koerber had resisted overbroad IRS summonses requesting information such as the QuickBooks files, which resulted in an agreement to produce paper documents, rather than electronic files. (Aplt.App.15:3932-33.) Without Koerber's consent, the government obtained incomplete electronic QuickBooks files from one of Koerber's former employees,

Forrest Allen, who had surreptitiously copied the files in mid-2007. (Aplt.App.15:3944.) But the QuickBooks files were continually updated through the summer of 2008. (Aplt.App.60:13253-54.) After their *ex parte* interviews with Koerber, the government approached Allen and obtained the passwords to the electronic files. (Aplt.App.15:3942 (citing interview records explaining that the passwords were obtained in March 2009).)

Koerber moved to suppress the QuickBooks files on Fourth Amendment grounds because they were seized and searched without a warrant. (Aplt.App.15:3928.) The government opposed the motion, arguing the motion was not timely, and Allen was not a government actor. (Aplt.App.15:3941.) The court denied the motion, under the inevitable discovery exception. (Aplt.App.16:4138.) The government had not briefed or presented evidence supporting that conclusion.

12. Koerber Was Retried on an Unindicted Theory Using Previously Suppressed Evidence

Koerber was retried in nearly one-third the time necessary for the first trial—just twelve days, including voir dire and jury deliberations. (*Compare* Aplt.App.10:2381-92, *with* Aplt.App.10:2413-16.)

The government called seventeen fact witnesses, and nearly all of them were tainted by the suppressed interviews. (Aplt.App.8:1878-87; 16:4175-76,4181-84.) The evidence against Koerber consisted of witnesses who had invested with Koerber but also included witnesses who instead testified they had invested in "feeder fund" companies not controlled by Koerber. (Aplt.App.56:12363,12422;

57:12503-04,12510,12535,12538.) The government relied on an expert witness who testified about Koerber's financial activities based significantly on the incomplete QuickBooks files. (Aplt.App.60:13253-54;62:13808.) It also relied on several cherry-picked recordings and transcripts of Koerber's comments from the suppressed interviews to claim that Koerber intended to deceive investors. (Aplt.App.55:11980-81; 59:13099-100; 63:13951-58.)

13. The Court Suggested Koerber's Guilt and Prejudiced the Defense's Case

Throughout the trial, the judge repeatedly interjected himself into the defense's presentation, including suggesting Koerber was guilty, undermining the defense's impeachment of government witnesses, implying that the defense lacked credibility, discrediting the defense's expert witness, disproportionately limiting the defense's ability to assert Koerber's defenses, and on one occasion, sleeping in front of the jury. (Aplt.App.55:11965,11975,11979-80; 56:12378-80,12383-84,12426; 58:12805; 61:13595-96.)

Koerber was indicted for allegedly defrauding individuals who had invested directly with him. But the evidence at trial (and the jury instructions) made it possible for the jury to convict Koerber on a "feeder fund" theory of indirect investment through third parties by individuals who never invested with Koerber or Founders Capital. (Aplt.App.17:4280; 56:12363,12410-11,12422; 57:12503-04,12510.)

14. Koerber Was Convicted and Sentenced

The second jury returned a guilty verdict in just forty-eight hours. (Aplt.App.10:2416.) Koerber was found guilty for securities fraud, wire fraud, and money laundering, but acquitted on the tax charges. The court sentenced Koerber to 170 months in prison, three years of supervised release, and over $45 million in restitution. (Aplt.App.64:14271-72.) He is currently incarcerated at Terminal Island. The court entered judgment and Koerber filed a timely notice of appeal.

Summary of Argument

This appeal presents seven issues, each of which require the court to vacate Koerber's convictions.

First, the district court erroneously decided it was not bound by its prior suppression order. After learning of prosecutorial misconduct, the court had previously suppressed pre-indictment interviews and their fruits. The government abandoned its appeal of the decision and this court later affirmed factual findings on which the suppression order was based. But on re-prosecution, the district court swept aside the prior suppression order. This court recently held that such a decision is erroneous. *United States v. Arterbury*, 961 F.3d 1095, 1103–04 (10th Cir. 2020). It was harmful error because the suppressed evidence provided a roadmap for the investigation and prosecution. The government certified that the suppressed evidence was substantial proof of material facts in their case and admitted that nearly all of its potential witnesses—and nearly all of the witnesses presented at trial—were tainted by the suppressed interviews. Finally, the government used the suppressed evidence at trial, including recordings from the improper interviews that it highlighted during its arguments to the jury.

Second, the court erroneously decided the dismissal for Speedy Trial Act violations should be without prejudice. After this court remanded for reevaluation of the prejudice determination, the district court slighted the facts-and-circumstances factor and exceeded the mandate. The court ignored its prior

findings about delays caused by the government's tactics and misconduct, all of which were affirmed by this court. The court consequently decided that the parties were equally culpable for the delay without explaining how Koerber could share culpability for delays caused by the government's misconduct. The court then exceeded the mandate by revisiting and mitigating the impact-of-reprosecution and prejudice factors, which had not been remanded, and did so erroneously based on its incomplete factual assessment.

Third, the court erred in its failure to dismiss on Sixth Amendment speedy trial grounds. It disregarded the government's misconduct and intentional tactical delay when assessing whether the government had presented acceptable reasons for delay. It also failed to acknowledge Koerber's efforts to assert his speedy trial rights and disregarded the court's prior conclusion—affirmed by this court—that Koerber had suffered prejudice from the government-caused delays, as well as the prejudice caused by the sheer length of delay.

Fourth, the court erroneously permitted the government to prosecute Koerber based on a reindictment returned outside the time provided by the savings statute. 18 U.S.C. § 3288 provides that, in the event of an appeal, the government has only 60 days to reindict after the dismissal becomes final. Here, there was an appeal but the government reindicted Koerber 146 days after the dismissal.

Fifth, the district court erred by denying a motion to suppress QuickBooks files the government obtained in violation of the Fourth Amendment, on inevitable

discovery grounds. The files were out-of-date and did not reflect high-dollar debt-for-equity transactions and did not include payments made to investors through asset transfers. Assuming the government would have inevitably obtained accounting files from Koerber's company, it would have obtained files from defense at a later date, not the incomplete files they obtained from Forrest Allen.

Sixth, the evidence at trial and the jury instructions constructively amended the indictment because the jury could have convicted Koerber for an uncharged "feeder fund" scheme. Koerber was charged with a scheme involving investments made directly with Founders Capital. But at trial, the government expanded the charge by presenting witnesses who invested with third parties, not Founders Capital. The government did not trace those feeder fund investments to Founders Capital. Consequently, the jury could have convicted based on the uncharged conduct.

Finally, the trial judge compromised the fairness of the trial by persistently interfering at trial, suggesting Koerber was guilty, implying the defense was not credible, undermining the defense's impeachment efforts, and truncating and discrediting the testimony of the defense's expert.

Standards of Review

Issue 1: The application of issue preclusion is a question of law reviewed de novo. *Bell v. Dillard Dep't Stores, Inc.*, 85 F.3d 1451, 1453 (10th Cir. 1996).

Issue 2: A district court's decision dismissing an indictment without prejudice for violations of the Speedy Trial Act is reviewed for abuse of discretion. *United States v. Taylor*, 487 U.S. 326, 335–36 (1988). This court reviews the district court's application of the Speedy Trial Act standards de novo and the underlying factual findings for clear error. *United States v. Pasquale*, 25 F.3d 948, 950 (10th Cir. 1994).

Where the district court's determination was made on remand after this court had affirmed numerous prior and relevant factual findings, the district court's discretion is limited by the mandate rule. *Huffman v. Saul Holdings Ltd. P'ship*, 262 F.3d 1128, 1132–33 (10th Cir. 2011). The district court "must comply strictly with the mandate rendered by the reviewing court." *Ute Indian Tribe of the Uintah & Ouray Reservation v. State of Utah*, 114 F.3d 1513, 1520–21 (10th Cir. 1997) (citation omitted). "The mandate consists of [the appellate court's] instructions to the district court at the conclusion of the opinion, and the entire opinion that preceded those instructions." *Procter & Gamble Co. v. Haugen*, 317 F.3d 1121, 1126 (10th Cir. 2003). "Interpretation of the mandate is an issue of law that [this court] review[s] de novo." *United States v. Shipp*, 644 F.3d 1126, 1129 (10th Cir. 2011).

Issue 3: When reviewing a district court's decision as to the Sixth Amendment right to a speedy trial, this court reviews legal conclusions de novo and the underlying factual findings for clear error. *United States v. Nixon*, 919 F.3d 1265, 1269 (10th Cir. 2019).

Issue 4: This court reviews decisions interpreting and applying a statute of limitations de novo. *Barnes v. United States*, 776 F.3d 1134, 1139 (10th Cir. 2015).

Issue 5: When reviewing the denial of a motion to suppress, this court reviews factual findings for clear error and views those facts in the light most favorable to the government. *United States v. Moore*, 795 F.3d 1224, 1228 (10th Cir. 2015). But it reviews the court's legal conclusions de novo. *United States v. Hernandez*, 847 F.3d 1257, 1263 (10th Cir. 2017).

Issue 6: A claim that the indictment was constructively amended is reviewed de novo. *United States v. Farr*, 536 F.3d 1174, 1179 (10th Cir. 2008).

Issue 7: A judge's interjections at trial are reviewed for abuse of discretion. *United States v. Albers*, 93 F.3d 1469, 1485 (10th Cir. 1996). But the court has limited discretion when its interjections are made in the presence of the jury. *United States v. Scott*, 529 F.3d 1290, 1299 n.10 (10th Cir. 2008).

Argument

1. The District Court Erroneously Decided It Was Not Bound by Its Prior Suppression Order

Judge Waddoups had presided over this prosecution for more than four years when he learned about the government's misconduct arising from *ex parte* interviews between Koerber and federal officials. After conducting a three-day evidentiary hearing and considering extensive briefing by the parties, the court concluded that the government had unethically, illegally, and unconstitutionally planned and conducted the pre-indictment interviews. (Aplt.App.6:1517-18.) Relying on *United States v. Thomas*, 474 F.2d 110 (10th Cir. 1973), and *Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the court suppressed the *ex parte* interviews and their fruits. The government had the opportunity to appeal—it filed a notice of appeal but chose to abandon it, leaving Judge Waddoups' decision unchallenged.

A year later, the district court dismissed the case with prejudice after concluding that the delays caused by the government's dilatory conduct, tactical delay, and widespread misconduct (including the *ex parte* interviews) had violated the Speedy Trial Act ("STA"). At that time, the court also expanded on its suppression order, finding that the *ex parte* interviews provided a roadmap for the investigation and prosecution and had fundamentally compromised the case. The government appealed, conceding the dismissal but challenging the "with prejudice" determination. This court affirmed the district court's factual findings, including those upon which the suppression order was based.

The government reindicted in January 2017. Koerber tried to have the court enforce the prior suppression order under the doctrine of issue preclusion. Less than two months before the first trial, the district court (after reassignment to Judge Shelby) refused to enforce the order, thereby allowing the government to use the previously suppressed evidence and its fruits.

All proceedings since that decision—including two jury trials—were improper. It was an affront to the principles of justice and fairness that govern criminal proceedings for the district court to conclude that, by violating the STA and reindicting the defendant, the government won a do-over that allowed it to escape the consequences of its prior "pattern of widespread and continuous misconduct" that had compromised this case and the possibility of a fair trial going forward. (Aplt.App.9:2197.)

1.1 The Suppression Order Was Binding

The doctrine of issue preclusion is "an extremely important principle in our adversary system of justice" and has applied to criminal prosecutions for a century. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). "[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.*

There can be no doubt that the court's refusal to enforce the prior suppression order was legal error. In *United States v. Arterbury*, 961 F.3d 1095 (10th Cir. 2020), the Tenth Circuit directly addressed the preclusive effect of prior

suppression orders.[2] *Arterbury* is dispositive here and involves strikingly similar procedural facts.

In *Arterbury*, the court concluded two search warrants (including one used to permit a widespread sting operation) were void and suppressed all of the evidence against the defendant that was obtained in the resulting searches. *Id.* at 1097-98. The government initially filed an interlocutory notice of appeal, but before briefing began, it moved to dismiss its own appeal. *Id.* at 1098. The government then moved the district court to dismiss the indictment without prejudice, which was granted. *Id.* While Arterbury's prosecution was dormant, the government prosecuted a different defendant caught in the sting operation. *Id.* at 1098. In that case, the district court also suppressed evidence, relying on the order entered in Arterbury's case. *Id.* But the government appealed the suppression order from the other case. *Id.* And this court reversed, concluding the search was lawful. *Id.* The government therefore decided to reindict Arterbury. *Id.* at 1099. On re-prosecution, Arterbury moved to enforce the prior suppression order under the doctrine of criminal issue preclusion. *Id.* The district court denied the motion, and Arterbury appealed. *Id.* at 1100. This court reversed, concluding that the prior suppression

[2] This issue applies with equal force to the district court's protective order relating to the privileged "To Our Lenders" letter, and Judge Waddoups' findings that the "To Our Lenders" letter and the *ex parte* interviews provided a roadmap for the investigation and prosecution, that the government engaged in a "pattern of widespread and continuous misconduct," and that Koerber suffered prejudice due to that misconduct. (Aplt.App.3:666,673-74; 9:2190,2202-04.)

order was binding on re-prosecution because "the district court decided the suppression issue after full briefing and argument by the parties. And after the court suppressed the evidence, the government not only had an opportunity to appeal, it did so. For its own reasons, it chose to dismiss its appeal without briefing it." *Id.* at 1103.

That is precisely what occurred in this case. The district court suppressed the *ex parte* interviews and their fruits after extensive hearings and argument by the parties. The government had an opportunity to appeal, it did so, then chose to dismiss the appeal without briefing it. The district court and this court also ruled that the government's subsequent attempt to get the court to reconsider was untimely. (Aplt.App.9:2241.) Koerber therefore established the elements of issue preclusion and the district court abused its discretion by choosing to sweep aside the prior suppression order.

The district court was required to enforce the prior order suppressing the interviews and their fruits, which had provided the government with a "roadmap of whom to interview and what documents to obtain and focus on," as well as recordings of Koerber during the interviews discussing his business that the government could selectively use at trial, out of context, in an attempt to present the jury with something akin to admissions of guilt by Koerber. (Aplt.App.9:2204.) *Arterbury* is on all fours and is dispositive of this issue.

The district court decided that issue preclusion did not apply because the prior prosecution did not result in a final judgment on the merits and the suppression order was not necessary to the outcome of the prior proceeding. (Aplt.App.31:7287-89; 15:3925.) As explained by *Arterbury*, however, the order of dismissal is treated as a final judgment for purposes of the suppression order's preclusive effect. 961 F.3d at 1103 (quoting *Leora v. United States*, 714 F.3d 1025, 1029 (7th Cir. 2013)). *Arterbury* also explains that the government's opportunity but failure to pursue its appeal of the prior suppression order renders it a final determination that is "binding even in the event of a dismissal and reinstitution of the charges." *Id.* at 1104. And Judge Waddoups' dismissal order demonstrated that the suppression order was necessary to the outcome because it repeatedly explained that dismissal was based on delays caused by the misconduct that gave rise to the suppression order. This court affirmed that conclusion on appeal when it instructed the court on remand to consider the sordid history of this case.

The district court also decided that the law-of-the-case doctrine did not apply because the reprosecution was not the same case as the prior prosecution. (Aplt.App.31:7286; 15:3925.) The district court's distinction between the iterations of this prosecution does not withstand examination. The indictments in both proceedings arose from the same conduct and involved the same parties. And the savings statute (18 U.S.C. § 3288) relied upon by the government only permitted the reindictment because of its relation to the dismissed indictment—if the

prosecutions were unrelated, then the 2017 indictment was barred by the statute of limitations.

Finally, the court explained that it believed the prior suppression order was clearly erroneous. (Aplt.App.31:7299; 15:3925.) The court accepted the prior factual findings, but found no violation of rule 4.2 of Utah Rules of Professional Conduct or the Due Process Clause. (Aplt.App.31:7299; 15:3925.) Even assuming a violation, it decided the proper remedy was a disciplinary proceeding, not suppression. (Aplt.App.31:7299-300; 15:3925.) Again, the court was wrong.

The government did not appeal the factual findings about the rule 4.2 violation and federal law separately prohibits violations of local ethical rules under 28 U.S.C. § 530B(a). Longstanding Tenth Circuit precedent requires suppression based on such violations. *Thomas*, 474 F.2d at 112. The Due Process Clause also prohibits federal prosecutors from violating publicly known internal agency policies designed to protect constitutional rights, such as the DOJ's guidance to comply with the no-contact rule. *Accardi*, 347 U.S. at 267-68 (holding that the government violates Fifth Amendment due process rights when not complying with its policies and procedures designed to protect rights); Dept. of Justice, Justice Manual § 9–13.200 (Jan. 2020) (prohibiting violations of the no-contact rule). Indeed, even if the prior suppression order was wrongly decided (it was not), *Arterbury* expressly holds that prior suppression orders are binding despite precedent conclusively demonstrating the suppression order was wrong.

Judge Shelby's preference for a disciplinary proceeding would address ethical violations but obviate the consequences for misconduct under federal statutory and constitutional protections prohibiting unethical conduct. Judge Waddoups' chosen remedy was appropriate and did not amount to a clear error that would work a manifest injustice. *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031, 1035 (10th Cir. 2000) (explaining the "exceptionally narrow" grounds for departure from law of the case doctrine). And even if it did amount to clear error, *Arterbury* makes clear that issue preclusion still applies and required enforcement of the earlier suppression order.

Arterbury held that a criminal defendant can invoke the doctrine of issue preclusion and enforce a prior suppression order even when the appellate court had issued a decision confirming the earlier ruling was erroneous.

1.2 Failing to Enforce the Suppression Order Was Harmful

"[T]he government bears the burden to 'prove *beyond a reasonable doubt* that an error is harmless.'" *United States v. Mullikin*, 758 F.3d 1209, 1211 (10th Cir. 2014) (emphasis added). The government cannot satisfy its burden on this record.

First, before the government abandoned its appeal of the suppression order, it certified to the court in its notice of appeal that the suppressed evidence was substantial proof of material facts, as required by 18 U.S.C. § 3731. (Aplt.App.6:1571.)

Second, after the parties' briefing and after the government submitted a list of tainted witnesses and exhibits, Judge Waddoups agreed and concluded, "The information obtained during the interviews, as well as the information contained in the privileged ["To Our Lenders"] draft letter . . . provided prosecutors with a roadmap of whom to interview and what documents to obtain and focus on. The prosecution's approach . . . has fundamentally compromised this case and is certainly prejudicial to [Koerber]." (Aplt.App.9:2203-04.) The government did not challenge this finding on appeal.

Indeed, substantial portions of the investigation took place after the interviews. Six of the charges for which Koerber was convicted (securities fraud and money laundering) were not charged in the initial indictment but were charged in the Superseding Indictment that was returned nine months after the suppressed interviews. (*Compare* Aplt.App.1:63-64, *with* Aplt.App.1:78-83.)

Third, the government's trial strategy demonstrates that the interviews were harmful. Its case was framed around the recordings, which were treated as being akin to confessions of guilt by Koerber. During opening arguments, the government explained that the recordings would prove Koerber intended to deceive investors. (Aplt.App.54:11704,11706.)

They were the finale of the government's case in chief. The government ended its case-in-chief with the testimony of FBI Agent Cameron Saxey. (Aplt.App.59:13098.) Saxey was one of the investigators who participated in the

previously suppressed interviews. (Aplt.App.6:1527-29; 59:13099-100.) Through Saxey, the government introduced recordings of Koerber discussing his business during the suppressed interviews. (Aplt.App.59:13099-100.) The government then played seven audio clips from those interviews and rested its case. (Aplt.App. 59:13101-03,13119.)

During closing arguments, the government claimed the recordings answered the fundamental question before the jury. The government explained, "[T]here are eight statements from Mr. Koerber himself that I want you to consider." (Aplt.App.63:13951.) Five of those eight statements came from the suppressed recordings, which the government played in its closing. (Aplt.App.63:13951-58.) And one of the clips formed the basis for the government's parting words to the jury, after which the government argued the recordings were direct evidence of Koerber's guilt. (Aplt.App.63:13958.)

Fourth, Koerber's decision to testify at his first trial—and the government's use of that testimony in his second trial—also should weigh heavily in the court's consideration of the government's burden. (Aplt.App.38:8601-756; 39:8782-926; 46:10102-256; 47:10270-439; 48:10494-652; 51:11173-85; 73:16105-96.) As Judge Waddoups observed, the suppressed evidence fundamentally compromised the case and the government cannot show beyond a reasonable doubt that Koerber would have chosen to testify in his own case if the court had not erroneously

permitted the government to use the suppressed recordings of him speaking in the interviews.

Finally, Judge Waddoups' order suppressed the fruits of the suppressed interviews, which constitute any evidence obtained after the interviews. Judge Waddoups found that the interviews provided a roadmap for the investigation and prosecution, which fundamentally compromised the case.[3] When unlawfully obtained evidence provides a "roadmap" for the prosecution, this court has held that suppressing all evidence obtained thereafter is the proper remedy. *United States v. Lin Lyn Trading, Ltd.*, 149 F.3d 1112, 1114-16 (10th Cir. 1998). The government's filing purporting to identify tainted evidence confirms that nearly all of its potential witnesses were tainted. Of the seventeen fact witnesses the government called at trial, only one of them, Dale Clarke, was untainted. Eight of the witnesses were first interviewed after the suppressed interviews (Craig Carrol, Jerel Clark, Matson Magleby, Don Hansen, Jeff Goodsell, Garth Allred, Steve Osborne, and Peter Hansen), five were discussed in the suppressed interviews (Michael Isom, Forrest Allen, Dean Hamilton, Frank Breitenstein, and Clark Wilkinson), one participated in the suppressed interviews as an investigator (Agent

[3] For example, as explained in FBI interview documents cited by the prosecution when resisting suppression of the QuickBooks files, the government sought the password for the incomplete QuickBooks files shortly after the *ex parte* interviews. (Aplt.App.15:3942.) The temporal connection indicates that this is precisely the type of "fruit" that Judge Waddoups had in mind when explaining that the interviews provided a roadmap for the government.

Saxey), and two were not disclosed as potential witnesses in the government's filing (Teresa Tuttle Ringger and Austin Westmoreland).

This court should vacate the conviction and dismiss with prejudice.

2. The Dismissal for the Speedy Trial Act Violation Should Have Been with Prejudice

On remand, Judge Parrish slighted the facts-and-circumstances factor by omitting the prior findings about the delays caused by the government's widespread pattern of misconduct and by failing to distinguish the government's tactical delay from the general delays by the defense. Judge Parrish also exceeded the mandate by revisiting and mitigating the analysis that had been affirmed as to prejudice and the impact of reprosecution. Based on those errors, the court erroneously decided that the prior indictment should be dismissed without prejudice.

The STA provides that when deciding whether a case should be dismissed with prejudice, the court should consider "among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the STA] and on the administration of justice." 18 U.S.C. § 3162(a)(2). "[P]rejudice to the defendant" also should be considered. *United States v. Taylor*, 487 U.S. 326, 333-34 (1988).

On remand in 2016, this court explained that "a district court can consider whether the government attempted to gain or did gain tactical advantage through

delay" and that such delay "will weigh 'heavily' against the government." (Aplt. App.9:2243-44.) The instructions on remand were to modify the district court's analysis of just two of the factors. First, this court explained that the seriousness-of-the-offense factor should weigh in favor of dismissal without prejudice. (Aplt.App.9:2230.) The district court complied with that instruction. Second, this court explained that evaluation of the facts-and-circumstances factor should "include Koerber's role in the [STA] delay, if any." (Aplt.App.9:2251.) This court clarified it meant conduct other than delays related to briefing of issues—which are properly excluded under the STA. (Aplt.App.9:2245.) The district court was supposed to "consider any of the other events contributing to the delay for which Koerber may be responsible," such as the government's assertion that Koerber consistently resisted deadlines. (Aplt.App.9:2245.)

The district court was told to consider the delays caused by Koerber alongside "the other facts and circumstances upon which [the court has previously] relied to dismiss Koerber's case with prejudice. (Aplt.App.9:2251.) As for those other facts and circumstances, this court instructed the district court not to revisit the prior findings because they were not clearly erroneous. (Aplt.App.9:2232.) In fact, this court rejected multiple attempts by the government to attack the district court's factual findings, stating in nine separate places in the opinion that they were not clearly erroneous. (Aplt.App.9:2232-33,2235,2240-41,2244,2246.) This court also explained that the district court's prior findings relating to the

government's "problematic conduct" and "pattern of widespread and continuous misconduct" were appropriately included in evaluating the facts-and-circumstances factor. (Aplt.App.9:2192,2202.)

Judge Parrish erroneously dismissed the charges without prejudice by making only glancing reference to the prior (affirmed) findings that the government had engaged in neglect, dilatory conduct, and a pattern of widespread misconduct and tactical delay. The court reached the indefensible conclusion that Koerber was equally culpable for the delays.

For example, Judge Parrish concluded Koerber was culpable for delaying the filing of pretrial motions, such as a motion to suppress. That conclusion directly conflicts with the court's prior (affirmed) findings. The court previously found that the government had engaged in tactical delay by engaging in troubling discovery practices, such as failing to certify it provided all required discovery until more than a year after the indictment, refusing to admit it had relied on privileged information to obtain the indictment, continuing to use the privileged information despite a promise to sequester it, and most importantly, refusing to admit to conducting improper *ex parte* interviews with Koerber. Koerber's pretrial motions—such as the motion to suppress—were premised on this discovery, and therefore could not have been filed until the government's misconduct had been uncovered. Koerber cannot be culpable for the delay in filing the motion to suppress when he had to fight to uncover the government's misconduct and the

court previously found that the government engaged in tactical delay by refusing to admit to it.

In fact, one of the four examples of tactical delay that was affirmed by this court was the government's "producing 1,400 pages of discovery *after* the district court held the hearing on whether to dismiss with or without prejudice despite having that evidence for years." (Aplt.App.9:2242.) Meaning, every time the government asked for a pretrial motion deadline and the defense resisted, the government still had not disclosed all of its discovery.

Judge Parrish also made no reference to Judge Waddoups' prior finding about the government's excluding six months under the STA by filing appeals without the Solicitor General's authorization. (*Compare* Aplt.App.9:2199, *with* Aplt.App.9:2345-47.) Nor did Judge Parrish reference or appear to consider the finding that "the Government had inappropriately based the superseding indictment in substantial part on attorney-client privileged information" after being ordered to sequester it. (*Compare* Aplt.App.9:2199, *with* Aplt.App. 9:2345-47.)

Judge Parrish even ignored Judge Waddoups' finding about the government's "most egregious[]" conduct—its "tactic of illegally planning and conducting impermissible *ex-parte* interviews with Defendant in February 2009 when he was represented by counsel, thus violating his due process rights, interfering with his attorney-client privilege, and inquiring into or attempting to interfere with his advice of counsel, though he was as yet unindicted, resulting in

the suppression of those interviews and all fruits derived therefrom." (*Compare* Aplt.App.9:2201, *with* Aplt.App.9:2345-47.) Those are serious findings. And they required serious consideration on remand. And indeed, the Supreme Court instructs that governmental delay other than "isolated unwitting violation[s]" should tip the scales in favor of dismissal with prejudice. *Taylor*, 487 U.S. at 339.

Judge Parrish also did not attempt to identify specific periods of delay that are attributable to the individual parties. Instead, the court's analysis rests on generalities and selective findings to conclude the parties are equally culpable for all of the delay.[4] But there is no plausible rationale for how Koerber's efforts to assert his rights and resist this prosecution balance equally against the pattern of widespread misconduct, including delayed discovery disclosures, inappropriate use of privileged information, and other "problematic conduct" and "tactical delay[s]" that "result[ed] in the STA violation." (Aplt.App.9:2228,2242-43,2248.) The defense has searched and has found no authority excusing STA-linked misconduct, let alone when combined with tactical delay by the government.

[4] Koerber's briefing carefully detailed the culpability for each day of delay from his arraignment on June 19, 2009, to April 23, 2014, when he filed his successful motion to dismiss. (Aplt.App.9:2259J-2259XX.) The court ignored that analysis entirely even though Judge Waddoups had previously found that Koerber's accounting of each delay was the more accurate, reliable, and "[m]eticulous[]" accounting and adopted his conclusions. (Aplt.App.9:2193.) Departing from this prior finding and ignoring Koerber's detailed accounting of culpability for each STA-related delay, while generalizing macro-level calendar delay, exceeded the mandate and resulted in a slighting of this factor.

Based on this incomplete and slighted assessment of the findings relevant to the facts-and-circumstances factor, the court proceeded to reevaluate the impact-of-reprosecution and prejudice factors, which exceeded this court's mandate and resulted in slighting the factors. Specifically, Judge Parrish explained that the impact-of-reprosecution and prejudice to the defendant factors were "somewhat mitigated" by its finding that Koerber shared culpability for the delay. (Aplt.App.9:2347.) The court's analysis is in direct tension with its prior finding that "[t]he court fails to see how it can allow reprosecution on this record," in part due to the court's decision to suppress the *ex parte* interviews and their fruits. (Aplt.App.9:2202.) The district court did not explain how the prosecutorial misconduct was mitigated by Koerber's culpability for general delays. Nor could it—Koerber had good cause for delays that allowed him to uncover the government's misconduct and discovery delays. The government's misconduct, however, is inexcusable. And any delays from briefing the pretrial motions are irrelevant because that time is excluded under the STA. (Aplt.App.9:2244-45.)

Judge Parrish also failed to consider the trial prejudice that resulted from the "sordid history of this case," which Judge Waddoups found "undermine[d] Defendant's possibility of receiving a fair trial." (*Compare* Aplt.App.9:2203-04, *with* Aplt.App.9:2344-48,2350-51.) The government alone was found to have undermined the possibility of a fair trial. General delays caused by Koerber's defense strategy did not mitigate this finding. It is remarkable that any federal

court would allow a trial to go forward after acknowledging that it might not be a fair trial, let alone when the unfairness was the result of the government's intentional conduct.

The court also had found that "the lapse has caused the government to lose critical information [and] . . . [w]itness memories are already proving severely impaired . . . . Personally, Defendant has . . . faced financial ruin, family issues, and health issues as a result of being subject to the abuse of process and misconduct by stewards who hold the overwhelming resources of the federal government." (Aplt.App.9:2203.) "The prosecution's approach, relying on a privileged document and violating rules of professional conduct and due process, has fundamentally compromised this case and is certainly prejudicial to defendant." (Aplt.App.9:2204.)

Additionally, the district court had previously relied on *United States v. Ballivian*, 819 F.2d 266, 267 (11th Cir. 1987), to conclude that Koerber suffered prejudice due to the government's "pattern of widespread and continuous misconduct." (Aplt.App.9:2199,2202.) And having concluded Koerber had been prejudiced, the district court relied on Tenth Circuit precedent including *Shillinger v. Haworth*, 70 F.3d 1132, 1141 (10th Cir. 1995), to conclude dismissal with prejudice was warranted. (Aplt.App.9:2204.)

Judge Waddoups found that misconduct infected this prosecution from its inception, after presiding over the prosecution for more than five years. On

remand, Judge Parrish ignored Judge Waddoups' weighty findings after she had presided over the case for just three months and without holding a hearing. That disparity should weigh heavily in this court's analysis of whether the district court abused its discretion. Judge Parrish had no discretion to exceed the mandate or ignore Judge Waddoups' prior findings. Judge Waddoups entered multiple findings that the delays in this case were caused by government misconduct and a pattern of neglect, dilatory conduct, and tactical delay. "Any such finding, suggesting something more than an isolated unwitting violation, would clearly . . . alter[] the balance" and weigh in favor of dismissal with prejudice. *Taylor*, 487 U.S. at 339.

3. Koerber's Sixth Amendment Speedy Trial Right Was Violated

The district court also erred in denying Koerber's motion to dismiss for violating his right to a speedy trial under the Sixth Amendment. The district court's analysis misapplied the Sixth Amendment test by disregarding several of Judge Waddoups' prior findings about delays caused by the government's misconduct and the resulting prejudice.

Sixth Amendment speedy trial rights are assessed by considering (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of a desire for a speedy trial, and (4) whether the delay prejudiced the defendant. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). "[I]t is the prosecution's burden (and ultimately the court's) and not the defendant's responsibility to assure that cases are brought to trial in a timely manner." *United States v. Seltzer*, 595 F.3d 1170,

1175-76 (10th Cir. 2010). A violation of the constitutional speedy trial right requires dismissal with prejudice. *United States v. Toombs*, 574 F.3d 1262, 1274 (10th Cir. 2009). Each of these factors weighs in favor of dismissal.

First, the defendant must demonstrate the delay was presumptively prejudicial, and if so, weigh the strength of this factor based on the length of the delay. *United States v. Medina*, 918 F.3d 774, 780 (10th Cir. 2019). Delays of one year are generally sufficient. *United States v. Batie*, 433 F.3d 1287, 1290 (10th Cir. 2006). The district court correctly ruled that this factor weighed entirely in Koerber's favor. (Aplt.App.9:2349.)

For the second factor, "[i]t is incumbent upon the government to present acceptable reasons for the delay." *United States v. Margheim*, 770 F.3d 1312, 1326 (10th Cir. 2014). Successful attempts to "delay a trial to gain a tactical advantage over the defense will weigh 'heavily' against the government." *United States v. Koerber*, 813 F.3d 1262, 1283 (10th Cir. 2016) (quoting *Barker*, 407 U.S. at 531). The district court erroneously determined that this factor was a draw. (Aplt.App.9:2349-50.) The district court disregarded Judge Waddoups' findings that the government caused delay with its misconduct and pattern of neglect, dilatory conduct, and tactical delay. It is difficult to understand how the government could have satisfied its burden to present acceptable reasons for its delays. Misconduct is, by definition, an unacceptable reason for delay. *See Taylor*, 487 U.S. at 339. The years of delay due to the government's discovery delays,

unauthorized appeals, untimely attempts to seek reconsideration, faulty motions for delay, and the years lost to litigating the prosecutorial misconduct are each inexcusable sources of delay. General delays caused by Koerber do not mitigate the government's widespread misconduct. Nor does Koerber share culpability for the government's misconduct. This factor is not a draw. It "weigh[s] 'heavily'" in favor of dismissal. (Aplt.App.9:2244.)

Even accepting Judge Parrish's determination that Koerber shared culpability for some delay, the district court did not detail the periods of delay for which each of the parties is culpable. It also did not explain why the delays resulting from the government's misconduct did not violate Koerber's speedy trial rights regardless of Koerber's culpability for the delays attributable to him. Given the extreme length of the delay, Koerber could be considered solely culpable for significant periods of time—years, even—and this factor should still weigh heavily in his favor. That is because the government is solely responsible for significant periods of delay due to its misconduct. This court previously rejected the government's claim that its role in the STA violation was "unintentional." (Aplt.App.9:2247.) This court noted the government's claim that it made "consistent efforts to move the case to trial." (Aplt.App.9:2247.) This court bluntly responded, "We disagree with the government." (Aplt.App.9:2247.) This court referenced the district court's prior finding relating to "the approach that has been taken" by the government and the need to "prevent the erosion of citizens' faith in

the even-handed administration of the laws." (Aplt.App.9:2247.) With these findings in place on remand, the district court abused its discretion to not weigh this Sixth Amendment factor heavily in favor of dismissal.

As for the third factor, "the sooner a criminal defendant raises the speedy trial issue, the more weight this factor lends to his claim." *Jackson v. Ray*, 390 F.3d 1254, 1263 (10th Cir. 2004). The court concluded that this factor weighed against dismissal because Koerber did not assert his right to a speedy trial throughout the delays and resisted setting a trial date. (Aplt.App.9:2350.)

First, Judge Parrish overlooked the repeated references to speedy trial rights that Koerber began making three years earlier. In a status conference in August 2013, defense counsel said, "With respect to the trial date, of course, we're very concerned about getting a date and moving forward and we are concerned about the [STA]." (Aplt.App.27:6545.) And during the fall of 2013, Koerber submitted filings expressly invoking his speedy trial right. (Aplt.App.7:1581.) In the spring of 2014, defense counsel warned the court in a hearing that Koerber would be filing motions based on violations of his speedy trial rights. (Aplt.App.29:6842.) Shortly thereafter, he filed a motion to dismiss on speedy trial grounds. (Aplt.App.7:1703-04.)

Second, the district court ignored the procedural context for the timing of Koerber's asserting his speedy trial rights. That point was not missed by this court, which already concluded that although "[t]he government can point to times when

Koerber acquiesced to continuances . . . [he] did not simply acquiesce to delays; instead, he asserted other rights in various motions—motions that took the district court considerable time to resolve." (Aplt.App.9:2245-46.) A criminal defendant should not be forced to choose between a speedy trial and a fair one. Indeed, if Koerber had not litigated the privilege and suppression issues, it is clear now that his trial would have been unfair. Thus, his consistent assertion of speedy trial rights for a year after litigating those issues should weigh in his favor.

The culmination of Koerber's efforts to uncover the government's misconduct (which took significant time) was the district court's suppression order, which was entered well over four years after his indictment. The government initially appealed the order, but withdrew the appeal because it was not authorized by the Solicitor General. Roughly two months later, Koerber moved to dismiss on speedy trial grounds. Koerber therefore diligently and timely asserted his rights. He fought to uncover the government's misconduct, and once successful, immediately began asserting his speedy trial rights.

When balancing the factors on remand, the district court concluded that only the third factor weighed against dismissal. Consequently, the court's foregoing errors in its analysis of the third factor alone demonstrates a Sixth Amendment violation.

For the fourth factor, "[t]he individual claiming the Sixth Amendment violation has the burden of showing prejudice." *Seltzer*, 595 F.3d at 1179. "In cases

of 'extreme' delay, the defendant need not present specific evidence of prejudice, but can rely on a 'presumption of prejudice' resulting from the prolonged delay." *Medina*, 918 F.3d at 781.

The district court ruled that this factor weighed modestly in favor of dismissal, but again erroneously observed that "much of the prejudice [Koerber] suffered as a result of the delays was of his own making." (Aplt.App.9:2350-51.)

The shear length of delay in this case is prejudicial. Prejudice is presumed from delays of six or more years. *Medina*, 918 F.3d at 781. The district court denied Koerber's motion on speedy trial grounds more than seven years after Koerber was indicted. Prejudice is therefore presumed.

In addition to the presumption, prejudice has been shown. The court's reasoning was erroneously premised on skewed and incomplete factual findings and ignored Judge Waddoups' findings that delays caused by the government's misconduct and tactical delay had prejudiced Koerber and had "undermine[d] Defendant's possibility of receiving a fair trial." (Aplt.App.9:2203.) It is difficult to imagine a weightier form of prejudice when deciding whether delay should preclude reprosecution.

Judge Waddoups also concluded that the delay relating to "[t]he prosecution's approach, relying on a privileged document and violating rules of professional conduct and due process, has fundamentally compromised this case and is certainly prejudicial to defendant." (Aplt.App.9:2204.) On appeal, this court

concluded, "[w]e agree with the district court's conclusion that Koerber showed prejudice," including its findings that the government's delay had led to it losing 27 discs of information and the severely impaired memory of witnesses. (Aplt.App.9:2248-49.) It also agreed—more than four-and-a-half years ago, as of this writing—that "with the passage of time, the prejudice grows." (Aplt.App.9:2248.)

Even under Judge Parrish's skewed analysis, she concluded the prejudice factor weighed modestly in favor of dismissal. Adding the government's tactical delay and misconduct to the prejudice analysis as well as the risk of an unfair trial (the most severe form of prejudice) tips the scales so that this factor weighs heavily in favor of dismissal.

4. The Government's Reindictment in 2017 Was Time Barred

The government failed to reindict Koerber within the time provided by the savings statute, 18 U.S.C. § 3288. This court should vacate the conviction that arose from the government's untimely indictment.

Under the savings statute, if an indictment is dismissed after the statute of limitations has expired, "a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information, or, in the event of an appeal, within 60 days of the date the dismissal of the indictment or information becomes final." 18 U.S.C. § 3288.

The government reindicted Koerber on January 17, 2017, but at the very latest, the dismissal of the prior indictment became final 146 days earlier, on August 25, 2016. A unique aspect of this prosecution is that the government's prior appeal did not challenge the dismissal, it only challenged the consequence of that dismissal—the prejudice determination. (Aplt.App.9:2208,2343; 13:3283.) The final ruling on the dismissal itself was Judge Waddoups' order on August 14, 2014—two years, five months, and four days before the government returned the reindictment. The government's failure to appeal the dismissal itself meant that its reindictment years later was untimely.

The government has previously argued that even though it did not appeal the dismissal itself, the dismissal did not become final until August 25, 2016, when Judge Parrish decided the dismissal should have been without prejudice. (Aplt.App.11:2778-79.) Even under the government's reasoning, the reindictment was untimely because it was returned 146 days later.

The government may now argue that Judge Parrish's decision became final only after Koerber's attempted appeal. But defendants cannot appeal dismissals without prejudice for STA violations on an interlocutory basis. (Aplt.App.84:18263-64.) Judge Parrish's decision was final for purposes of § 3288 when it was entered because "a premature notice of appeal 'shall have no effect'. . . . In short, it is as if no notice of appeal were filed at all." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982).

The district court erroneously concluded the reindictment was timely because it reasoned "the sixty-day provision [of § 3288] applies only when a district court dismisses an indictment without prejudice, the decision is then appealed, and the appellate court subsequently affirms the dismissal without prejudice. In any other situation, the six-month provision applies." (Aplt.App.13:3281.)

Criminal statutes of limitation prohibit prosecutions beyond defined periods of time, which is a "longstanding congressional 'policy of repose' that is fundamental to our society and our criminal law." *Bridges v. United States*, 346 U.S. 209, 215-16 (1953). Consequently, they should be "liberally interpreted in favor of the accused." *Waters v. United States*, 328 F.2d 739, 742 (10th Cir. 1964); *accord United States v. DeLia*, 906 F.3d 1212, 1222 (10th Cir. 2018).

The plain text of the statute provides two possible time frames: (1) six months or (2) "in the event of an appeal," sixty days. As applied to this case, the statute's application is simple. The government appealed the dismissal and therefore had sixty days to reindict from the date the dismissal became final.

The court decided that practical application of the statute is unclear because it does not describe what happens if the dismissal first happens on appeal rather than in the district court or if the government appeals only a prejudice determination. This is the crux of the district court's error because the plain text provides an answer. Those scenarios all occur "in the event of an appeal," so the

statute requires the government to reindict within 60 days of the dismissal becoming final. The difference between those scenarios is simply the procedural pathway by which the dismissal becomes final.

Similarly, the court incorrectly concluded that the phrase "in the event of an appeal" only applies to appeals of dismissals without prejudice. That limitation is nowhere in the text, and this approach certainly does not favor repose. The statute simply provides the government with 60 days to reindict "in the event of an appeal" without any limitation on the type of dismissal that was appealed.

The only federal appellate court to consider this language has reached a result contrary to the district court here. In *United States v. Spanier*, 744 F. App'x 351 (9th Cir. 2018) (unpublished), the Ninth Circuit concluded that the 60-day timeframe applies, and that the dismissal is final once there is a post-appeal prejudice determination. *Id.* at 354. There, the district court had denied a motion to dismiss based on an STA violation. *United States v. Spanier*, 637 F. App'x 998, 999 (9th Cir. 2016) (unpublished). The Ninth Circuit reversed, holding that there had been a violation, that dismissal was mandatory, and remanding for a prejudice determination. *Id.* at 1000-01. On remand, the district court concluded the dismissal should be without prejudice. *Spanier*, 744 F. App'x at 355. The government reindicted. The Ninth Circuit decided it was timely because it was returned within 60 days of the district court's prejudice determination. *Id.* at 354. In this case, where the government had appealed the district court's prior order, it

was also required to reindict Koerber within 60 days of the district court's final prejudice determination.

Other circuits agree that the 60-day time frame applies when it involves the appeal of a dismissal. *E.g.*, *United States v. Garcia*, 268 F.3d 407, 411 n.2 (6th Cir. 2001) ("Should the government choose to appeal the dismissal of the indictment, it will have sixty days from the date the dismissal of the indictment becomes final in which to issue a new indictment."), *overruled on other grounds by United States v. Leachman*, 309 F.3d 377, 383 (6th Cir. 2002); *United States v. Bolton*, 893 F.2d 894 (7th Cir. 1990) (per curiam) (observing that § 3288 "gives the government 60 days to file a new indictment after the dismissal of an invalid indictment").

If this court finds ambiguity in the plain text, it "may seek guidance from Congress's intent, a task aided by reviewing the legislative history." *McGraw v. Barnhart*, 450 F.3d 493, 499 (10th Cir. 2006). The legislative history shows that the "in the event of an appeal" clause was intended to allow the government to appeal adverse decisions while limiting the time to reindict afterward.

Before § 3288 was amended in 1988, it only allowed the government to reindict within six months of dismissal, regardless of whether there was an appeal. 18 U.S.C. § 3288 (1964). That created a longstanding problem when the government wanted to appeal a dismissal because appeals almost always take longer than six months, after which time the limitations period would have expired.

The initial proposed amendment would have allowed the government to reindict "within six months after the dismissal becomes final," without creating a separate time frame when an appeal was taken. S. 1630, 97th Cong., 1st Sess. § 511(f) (as introduced to the Senate, Sept. 17, 1981) (Attachment L hereto). This is the approach Judge Shelby took in this case. But at a Senate committee hearing, the American Bar Association complained that "six months is too lengthy a period in which to permit the government to file a new indictment," after the lengthy process of an appeal and recommended a 60-day period instead. *Reform of the Federal Criminal Laws: Hearings on S. 1630 Before the S. Comm. on the Judiciary*, 97th Cong. 11842 (1981) (statement of William Greenhalgh & George C. Freeman, Jr., on behalf of the ABA) (Attachment M hereto). In response, the Senate Judiciary Committee reduced the proposed time frame to four months. S. Rep. No. 97-307, at 151 (1981) (Attachment N hereto). That version of the bill failed to pass.

In 1988, Congress revisited the problem and amended the statute by inserting the clause currently in the statute. The House of Representatives' section-by-section analysis explains that the clause was intended to provide 60 days to reindict "in the event of an appeal *resulting in* the dismissal of charges." H.R. Res. 595, 100th Cong. § 7801 (1988), 134 Cong. Rec. H1108-01 (daily ed. Oct. 21, 1988), 1988 WL 182261 (emphasis added). In other words, Congress

intended to provide 60 days to reindict if an appeal was taken and the end result of that appeal is a dismissal, as happened here.

In subsequent legislation, Congress confirmed that § 3288 was intended to provide the government 60 days to reindict after challenging a dismissal on appeal. When enacting 18 U.S.C. § 3296—which gives the government 60 days to reindict counts that were dismissed pursuant to a plea agreement if the plea is subsequently vacated—the conference committee report expressly analogized the provision to § 3288. H.R. Rep. 107-685, at 187 (2002) (Conf. Rep.), 2002 WL 31163881.

The reindictment was untimely and the subsequent prosecution should be reversed.

5. The District Court Erroneously Concluded the Government Would Have Inevitably Discovered Incomplete QuickBooks Files

The government obtained incomplete QuickBooks accounting files for Koerber's company and the passwords to access them, without Koerber's authorization and without a warrant, in violation of the Fourth Amendment.

Koerber moved to dismiss the files, but the court denied the motion, ruling that the government would have somehow inevitably discovered the files. (Aplt.App.16:4142.)

"Searches conducted without a warrant are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1248 (10th Cir. 2003) (quotation omitted). "[T]he defendant bears the burden of proving

whether and when the Fourth Amendment was implicated." *United States v. Hernandez*, 847 F.3d 1257, 1263 (10th Cir. 2017) (quotations omitted). "The government then bears the burden of proving that its warrantless actions were justified [by an exception]." *United States v. Carhee*, 27 F.3d 1493, 1496 (10th Cir. 1994).

As the owner and controlling manager, only Koerber had the authority to disclose the files and their passwords, which he did not do. (Aplt.App.15:3931.) Instead, the government obtained the files from Forrest Allen, who had no authority to possess or produce them. (Aplt.App.15:3942-43.) Koerber had a reasonable expectation of privacy in any company records for which he did not authorize a release, particularly those records that were password protected. Consequently, without a warrant compelling disclosure, the government's seizure and search of the files without authorization implicates the Fourth Amendment.

The government did not satisfy its burden to justify the warrantless search and seizure. Evidence obtained through an unconstitutional search is inadmissible under the exclusionary rule, unless an exception applies. *Mapp v. Ohio*, 367 U.S. 643, 655-58 (1961). One such exception is that "the exclusionary rule is inapplicable if the evidence inevitably would have been discovered by lawful means." *United States v. Souza*, 223 F.3d 1197, 1202-03 (10th Cir. 2000). The government must "establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful

means." *Nix v. Williams*, 467 U.S. 431, 444 (1984). To satisfy its burden, the government must present evidence of "'demonstrated historical facts,' not 'speculative elements.'" *United States v. White*, 326 F.3d 1135, 1138 (10th Cir. 2003) (quoting *Nix*, 467 U.S. at 444 n.5).

The government did not identify any evidence—much less a preponderance of the evidence—that it would have discovered the Allen QuickBooks files. In fact, it presented no evidence. It only asserted the inevitable discovery defense in a cursory footnote, citing no evidence. (Aplt.App.15:3947.) Nor could it—any data that Koerber would have disclosed would have been up-to-date and complete and therefore materially different. The court erroneously dismissed that concern, concluding that if the government somehow would have lawfully obtained the complete QuickBooks files, it was entitled to Allen's incomplete versions too. (Aplt.App.16:4142.) Since no evidence was produced, and the government had not argued this point, it is unclear when the government would have obtained the files, thus affecting the content of the files that the government would have obtained. The court elided the real concern—incomplete accounting records are misleading and different in kind, not degree, from complete accounting records. The incomplete files omitted significant transactions where investors, such as Isom, had swapped debts owed to them by Koerber's company in exchange for equity in a new company. Allen's incomplete files distorted financial reality.

Finally, the government cannot satisfy its burden to show beyond a reasonable doubt that the error was not harmless. *United States v. Mullikin*, 758 F.3d 1209, 1210-11 (10th Cir. 2014). The government's sole source of evidence about Koerber's actual financial activities, which the government used to convince the jury that Koerber had misled investors, was an expert witness, Angela Mennitt. (Aplt.App.62:13808.) Her testimony was a critical component of the prosecution, but her testimony was derived largely from analysis of the incomplete QuickBooks files. (Aplt.App.60:13253-54.) Because her analysis was based on incomplete and misleading information, her testimony was also incomplete and misleading.

6. Koerber's Indictment Was Constructively Amended to Encompass an Uncharged "Feeder Fund" Scheme

Koerber was charged with fraud related to a scheme to get investors to place money in Founders Capital. But the jury could have believed it could convict Koerber for devising a scheme or artifice relating to money invested in other companies—so called feeder funds that Koerber did not control—without connecting those investments to Founders Capital.

Years before trial, Judge Waddoups had explained that the government would not be permitted to broaden its charges beyond those arising from investments made in Founders Capital. (Aplt.App.5:1043.) Leading up to the second trial, Koerber was concerned that the government would attempt to convict him based on investments made in feeder funds. He moved to exclude evidence of investments that were not made with Founders Capital or that could not be linked

to a direct investment with Founders Capital. (Aplt.App.16:3980-82,3984,3991.) But the court allowed the evidence of investments with others and consequently the jury could have convicted Koerber for uncharged conduct.

"[A]fter an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Stirone v. United States*, 361 U.S. 212, 215-16 (1960). Constructive amendment occurs when "the evidence presented at trial, together with the jury instructions, raises the possibility that the defendant was convicted of an offense other than that charged in the indictment." *United States v. Apodaca*, 843 F.2d 421, 428 (10th Cir. 1988). If the government's proof at trial includes uncharged conduct that would satisfy a necessary element of the offense, the court "need[s] some way of assuring that the jury convicted the defendant based solely on the conduct actually charged in the indictment," which is typically "provided by jury instructions requiring the jury to find the conduct charged in the indictment before it may convict." *United States v. Miller*, 891 F.3d 1220, 1232 (10th Cir. 2018). "Reversal is required if [a conviction for unindicted conduct] was *permissible* under the court's instructions, the evidence adduced, and the arguments of counsel." *Hunter v. State of N.M.*, 916 F.2d 595, 599-600 (10th Cir. 1990).

Each of the charges on which Koerber was convicted required the government to show Koerber devised a scheme or artifice to defraud. (Aplt.App.17:4277-79,4284-88.) The indictment clearly defined the scheme as

being limited to investments made directly in Koerber's company, Founders Capital, not other companies: "Defendant KOERBER accepted money from individuals and companies through Founders Capital and with the representation that Founders Capital would use the money to make 'hard money' or bridge loans to other entities." (Aplt.App.10:2444.) The indictment reiterated this point by asserting that the scheme included alleged misuse of "substantial amounts of the money invested with Founders Capital." (Aplt.App.10:2445.) It asserted Koerber "knew that most of the money placed with Founders Capital" was diverted for other purposes, which he did not disclose to "many investors and potential investors with Founders Capital." (Aplt.App.10:2446.) Finally, it asserted that Koerber "used money placed with Founders Capital to make interest payments to earlier investors." (Aplt.App.10:2446-47.) There was no allegation in the indictment about "feeder funds," investments in other companies, or a scheme involving representations or solicitations by other individuals or entities.

The jury instructions defined a different and broader scheme than the indictment: "It is no defense to an overall scheme to defraud that Mr. Koerber was not involved in the scheme from its inception or played only a minor role with no contact with the investors and purchasers of the promissory notes. Nor is it necessary for you to find that Mr. Koerber was the actual offeror or seller of the security. It is sufficient if Mr. Koerber participated in the scheme or fraudulent conduct that involved the offer or sale of a security from Founders Capital."

(Aplt.App.17:4280.) In other words, the jury was told that it could convict Koerber for investments made in feeder funds that he did not control, so long as he received any capital from those feeder funds. The indictment did not expansively charge Koerber with a scheme simply "involving" a security with Founders Capital. It was far more specific, charging Koerber for fraud from investments made directly with him or his company. By instructing the jury that it could convict for conduct that "involved" Founders Capital, the jury could have believed that the government had proven Koerber engaged in a scheme to defraud based on evidence that some individuals invested money in companies other than Founders Capital due to their belief that Founders Capital was "involved," even if the government did not trace the indirect investment directly to Founders Capital.

Indeed, at trial, the government introduced evidence of four investors who invested with so-called feeder funds instead of Founders Capital and did not introduce evidence connecting those specific feeder-fund investments to an investment in Founders Capital. The jury instructions permitted the jury to convict Koerber based on these investments due to the investors' belief that their investments "involved" Founders Capital, even though none of these investors were mentioned in the indictment and none of the investments involved instances where Koerber "accepted money . . . through Founders Capital" or where money was "invested with Founders Capital." (Aplt.App.10:2444-45.)

First, Jeff Goodsell testified that he invested his money with Jason Vaughn's company, Freestyle Holdings. (Aplt.App.56:12363.) The government presented no evidence that Freestyle Holdings was owned or controlled by Koerber or Founders Capital. Nor did the government call Vaughn as a witness or otherwise introduce evidence tracing Goodsell's money to Founders Capital. The jury could have convicted merely on evidence that Goodsell's investment somehow "involved" Founders Capital.

Second, Austin Westmoreland testified that he invested with Paul Bouchard's company, Hunters Capital, Inc. (Aplt.App.56:12410-11,12422.) The government presented no evidence that Hunters Capital was owned or controlled by Koerber or Founders Capital. Nor did the government call Paul Bouchard as a witness or otherwise introduce evidence tracing Westmoreland's money to Founders Capital. In fact, prosecutors and Westmoreland knew that his money was never invested in Founders Capital, but was used by Bouchard to pay out other investors in Hunters Capital. (Aplt.App.16:4148,4168; 83:18035.) They also knew that Westmoreland had already been awarded $270,000 in restitution for his investment with Bouchard and Hunters Capital. (Aplt.App.16:4146-47,4172; 83:18033.)

Third, Garth Allred and Frank Breitenstein both testified that they invested with Bill Hoopes' company, Vonco. (Aplt.App.57:12503-04,12510.) The government presented no evidence that Vonco was owned or controlled by

Koerber or Founders Capital. Nor did the government call Bill Hoopes as a witness or otherwise introduce evidence tracing Allred's or Breitenstein's money to Founders Capital.

In each instance, the jury could have convicted Koerber based on the uncharged "feeder fund" scheme, rather than the direct investment scheme, merely by relying on some evidence of indirect involvement with Founders Capital. For example, during closing arguments, the government argued that Breitenstein's investment with Bill Hoopes was direct evidence of Koerber's guilt. (Aplt.App.63:13943.) But the government did not tell the whole story and remind the jury that Breitenstein testified that he invested in Vonco and received his investment returns from Vonco, a company not owned or controlled by Koerber. That argument demonstrates a "reasonable probability that, but for the [constructive amendment], the result of the proceeding would have been different." *United States v. Kaufman*, 546 F.3d 1242, 1252 (10th Cir. 2008). And that is just one of four government witnesses whose testimony is tainted by the constructive amendment error.

That is no minor error. The difference between charging Koerber for fraudulently obtaining investments in his own company as opposed to investments in some else's company (e.g., Freestyle Holdings, Hunters Capital, or Vonco) "is not merely a semantic one." *United States v. Farr*, 536 F.3d 1174, 1182 (10th Cir. 2008). Even if Koerber could be legally culpable for such third-party activity, this

feeder fund scheme was not charged by the grand jury in the indictment and there is no allegation pertaining to indirect investments. Thus, Koerber was deprived "of both his Fifth Amendment right to be indicted by a grand jury on the charges against him and his Sixth Amendment right to receive notice of those charges." *Miller*, 891 F.3d at 1237. Allowing the government to pursue an uncharged and more expansive theory of the scheme at issue fundamentally altered the evidence that was material to the prosecution and the defense. Permitting such a constructive amendment contravenes a "fundamental precept" of constitutional law and "could reflect poorly on the public reputation of the judiciary." *Id.* at 1237-38. Because the scheme amendment could have applied to all of the securities fraud or wire fraud charges and the money laundering charges are derivative thereof, the court must reverse Koerber's conviction on all charges.

7. Judge Block Abused His Discretion by Persistently Interfering at Trial

The district court abused its discretion by suggesting to the jury that Koerber was guilty and persistently taking control of questioning witnesses, undermining the defense's impeachment efforts, and implying the defense was not credible.

"The trial judge is allowed to participate in a trial and ask questions of witnesses in order to ascertain the facts. He cannot show hostility toward one side or become an advocate for one side." *United States v. Latimer*, 548 F.2d 311, 314 (10th Cir. 1977). Although a judge can interrogate witnesses under Federal Rule of Evidence 614, this court has warned that doing so "in a criminal case creates a

unique risk that the judge will be perceived as an advocate . . . and that in exercising this power [to question witnesses] a judge must take care not to create the appearance that he or she is less than totally impartial." *United States v. Scott*, 529 F.3d 1290, 1299 (10th Cir. 2008) (alteration in original) (citation omitted). "If a trial court continually intervenes so as to unnerve defense counsel and throw him off balance, in a supposedly fair trial, and causes him not to devote his best talents to the defense of his client, then this is ground for reversal, no matter what counsel's experience and equipoise may be." *Bursten v. United States*, 395 F.2d 976, 983 (5th Cir. 1968), *quoted in United States v. Davis*, 442 F.2d 72, 73 (10th Cir. 1971).

One of the major themes of the defense at trial was how witness testimony had changed over time due to fading memories and false statements. The trial record is replete with examples of Judge Block's assuming control of witness examinations in a way that undermined the presentation of this defense as well as its expert witness, thus further compromising the already undermined fairness of the trial.

First, the judge failed to remain neutral by suggesting Koerber's guilt early in the trial. Defense counsel cross-examined an important government witness, Michael Isom, who had been previously convicted of fraud, to demonstrate he had changed his story and offered false testimony. The questioning sought to demonstrate Isom had offered false testimony and cooperated with the government

to minimize the consequences for his prior fraud conviction. (Aplt.App.55:11965,11975,11979-80.) While the defense was developing Isom's testimony to describe the conduct that led to his own conviction, the judge impatiently interjected with leading questions, including summarizing Mr. Isom's conduct as simply being a "copycat" of Koerber's. (Aplt.App.55:11965.) In other words, the judge put his thumb on the scale and suggested to the jury that Koerber's business conduct was illegal like Isom's had been and that Koerber should be found guilty.

Second, the court's interruptions also undermined the defense's powerful impeachment of Isom. Prior to the retrial, the defense had found an agreement signed by Isom, which showed that contrary to his prior testimony and statements to the FBI over the last decade, he had agreed to exchange debts owed to him for equity in Founders Capital. (Aplt.App.55:11975-76; 81:17735.) The agreement was signed in 2007, at a point in time when Isom knew how Koerber was using Founders Capital's money. (Aplt.App.55:11975-76; 81:17735.)

To demonstrate Isom's willfulness and persistence in the lie, the defense asked how many times he had met with the government over the past decade. (Aplt.App.55:11979-80.) He responded by underestimating the number of meetings by half. (Aplt.App.55:11979-80.) Defense counsel asked him to review his notes to count the meetings, but the judge would not allow it. (Aplt.App.55:11979-81.) The judge cut short the questioning as if the repeated

false testimony of an important government witness was unimportant: "No, we're not going to count them. . . . You can make your representation. You can make a representation as an officer of the court. And if the government does agree we can move on." (Aplt.App.55:11980-81.) The court cut short the impeachment and declined to allow defense counsel to show the jury Isom's wet signature on the agreement. The court undermined the impact of Isom's false testimony and how Isom's story had changed over time because of the distracting way in which the court forced it to come out through the judge's impatience. Rather than believing Isom had lost credibility, the jury likely believed the defense had.

Third, in other instances, the judge rehabilitated government witnesses after the defense's cross-examination. Austin Westmoreland (a police officer and fraud investigator) testified that he had invested with Koerber, but on cross, he clarified that he invested in a "feeder fund", Hunters Capital. (Aplt.App.56:12422.) In fact, he had previously testified that he knew his money never reached Koerber or Founders Capital. (Aplt.App.16:4148; 83:18035.) Indeed, Westmoreland had already been awarded $270,000 in restitution for his investment in Hunters. (Aplt.App.16:4146-47,4172; 83:18033)

To illustrate Westmoreland's unreliability (whether due to failing memory or false testimony), defense counsel asked him who paid interest to him on the investment. Westmoreland said he did not know. (Aplt.App.56:12426.) This court has already acknowledged Koerber was prejudiced by fading memories as far back

as 2014. The judge intervened, asking sarcastically if Santa Claus had deposited money into his bank account. (Aplt.App.56:12426.) He then asked if Westmoreland believed the payments were coming from "these organizations," without specifying whether he was referring to Koerber's company or Hunters Capital. (Aplt.App.56:12426-27.) Westmoreland simply answered, "Yes, sir." (Aplt.App.56:12427.) To the jury, the implication was clear—the defense's questioning was not serious and any contradictions in the witness' testimony should be disregarded.

Similarly, the judge undermined the defense's impeachment of another government witness, Jeff Goodsell. He testified—contrary to previous testimony—that he knew little about the risk involved in the real estate market. (Aplt.App.56:12378.) When defense counsel attempted to present him with a printed version of his prior inconsistent testimony, after confirming that he had previously testified under oath, the following exchange occurred:

> [Defense]: Well, let me approach, if I may, Your Honor?
> [Judge]: What do you want to ask him?
> [Defense]: I want to confirm his prior testimony, Your Honor.
> [Judge]: You don't have to do that. Next question.
> [Defense]: Do you remember testifying that –
> [Judge]: Is there anything there that you have that's inconsistent with what he's testified to here today?
> [Defense]: Yes, Your Honor.
> [Judge]: So read what he said that you think was inconsistent.
> [Defense]: Do you remember testifying about the risk of real estate, So I felt—one, I trusted [Koerber], and, two, I felt like because it was real estate that it would be fairly low risk, but I did understand that there was risk involved.

> [Judge]: Do you remember testifying on a prior occasion saying that type of thing?
> [Goodsell]: I—sorry. Ask the question again.
> [Judge]: Did he say that?
> [Defense]: Yes, Your Honor, he said that under oath.
> [Judge]: Are you representing that he said that?
> [Defense]: Yes, Your Honor.
> [Judge]: So be it. Next question.

(Aplt.App.56:12378-80.) Rather than allowing the defense to impeach the witness with conflicting prior testimony, the court instead forced the defense to represent the contents of the email without comment from the witness, implying that the inconsistency was not worthy of requiring the witness to answer for it.

Shortly thereafter, the defense asked Mr. Goodsell about a promissory note, to show that it made no mention of Founders Capital or Koerber. (Aplt.App.56:12381,12383.) The defense directed Mr. Goodsell to a section of the document and asked if he understood the language. (Aplt.App.56:12383.) Rather than allowing the witness to answer, the court dismissively stated, "We can read it. Everyone can read English in this courtroom, I think. You can read it. I can read it. The jurors can read it." (Aplt.App.56:12383.) When defense counsel continued to walk through the promissory note to demonstrate that the witness understood it contained no reference to Founders Capital or Koerber, the judge interjected again and said,

> We can all read it, okay? The jury understands you want to bring that point home . . . . You want to bring that point home, right? You can even say that. You can tell the jurors you've read the note. We've all read it. There is nothing there that says anything about that. You can say it. I'll let you do it, okay? What else do you want to tell us that's

> not in the note? There's nothing about Judge Block in the note either, right?

(Aplt.App.56:12383-84.)

The judge overruled the defense's objection to his comments, explaining, "I don't think you appreciate the judge's sense of humor." (Aplt.App.56:12431-32.)

The judge also fell asleep while the defense was cross-examining an IRS agent, Steven Roberts, and was awoken when an objection was made. Once awake, the judge blamed defense counsel for putting him to sleep and said that if the judge is falling asleep, the jury might as well too. (Aplt.App.58:12805.)

The government rested after presenting witnesses for six days. The defense estimated it would present witnesses for three days. (Aplt.App.59:13145-46; 60:13413.) After the first day, while discussing the defense's planned witnesses, the judge commented that the pace was "moving along fine." (Aplt.App.60:13413.) Even so, the next morning, the judge appeared to grow impatient.

During the morning break, the defense had already completed questioning nine witnesses. But the court chastised defense counsel about the pacing, saying, "I have a superseding obligation to make sure that this trial is not going to last eight weeks when I hear a lot of irrelevant information." (Aplt.App.61:13489.) There was no basis for that concern; the trial was nearly complete.

The judge also disproportionately limited the parties' time. The government was given ample time to present its case, which took six days. The defense, on the other hand, took three days. Despite the defense taking half as long as the

prosecution, Judge Block grew impatient, increasingly interrupting the defense's presentation of witnesses and development of facts. The judge's asymmetrical treatment of the defense is best illustrated by his differential treatment of the parties' experts.

One of the defense's critical witnesses was David Hardman, an expert witness CPA who had performed extensive financial analysis of Koerber's business using the full QuickBooks data, and comparting it to the incomplete data relied on by the government's expert. (Aplt.App.61:13537-41.) The court had acknowledged that Hardman's testimony was the defense's direct response to the government's expert, which required the witnesses to be given similar time before the jury: "I will give you plenty of latitude from the government just like we gave the government's expert the opportunity to fully explain with all of her charts what she wanted to tell the jurors." (Aplt.App.61:13535.) That did not happen.

Instead, the judge signaled to the jury that it was not worth their time to carefully consider Hardman's testimony. Less than an hour into Hardman's testimony, the judge took over the questioning. (Aplt.App.61:13587.) He repeatedly spoke dismissively about the number of slides Hardman had prepared and pushed for conclusions without allowing Hardman to provide further explanations or factual context. After learning that Hardman had prepared 54 slides for his testimony, the judge mockingly implied that the slides were frivolous and that the defense intended to keep the jury for "an extra three or four weeks."

(Aplt.App.61:13587-90.) But the government's competing expert witness, Angela Mennitt, had testified using a similar 43-slide presentation. (Aplt.App.17101-43.) The judge also commented about Hardman's testimony being long-winded, even though it had been underway for less than an hour. (Aplt.App.61:13587-90.) Based on the judge's interventions in front of the jury, Hardman became concerned that his opinions would be misunderstood:

> [Judge]: . . . [I]t's Friday afternoon, we have been here for two weeks, you know, and I'm just trying to be practical.
> [Hardman]: You know as you prepare for this and you have painstakingly prepared—
> [Judge]: I get it.
> [Hardman]: —stuff and at the end of the day it is like I would hate to see the answer is, okay, that is what Mr. Hardman thinks, we're done. Because I think that doesn't convey fully in a visual way what the jury should see from my conclusions.
> [Judge]: I'll let counsel do what she wants, but, you know, I don't think there is any question that he was getting money and he was investing in all sorts of businesses and you thought that was okay.
> [Hardman]: I believe that the way that—
> [Judge]: He ran a good shop and he was an honest person and he invested in businesses to make money. What else are we talking about?
> [Hardman]: Well—
> [Judge]: I get it. I get it. That is your testimony, right? A-1, A-okay?
> [Hardman]: In a nutshell that's my testimony.

(Aplt.App.61:13595-96.) The message from the judge to the jury was clear—the judge believed Hardman's testimony was a waste of their time.

The judge justified his impatience by explaining that he was obliged to make sure the trial did not last as long as the trial that ended with a hung jury. This trial was roughly one-third the length of the prior trial and there was no risk that it would go as long as the prior trial. Federal judges do not have discretion to suggest the defendant's guilt, demean the defendant's case, make jokes at the expense of the defense's credibility, or sleep in front of the jury. This court should therefore reverse.

Conclusion

This court must vacate Koerber's conviction and dismiss with prejudice. From the beginning, this prosecution has been tainted with misconduct and has been an unseemly spectacle. The government has been allowed to move forward without any consequences for its misconduct. That is a miscarriage of justice that this court cannot permit. The charges should have been dismissed with prejudice as a result of the delays caused by the misconduct. And the government was allowed to prosecute Koerber with an untimely indictment. At the very least, on reprosecution, the court erroneously refused to enforce its prior suppression order, allowing Koerber to be prosecuted with evidence obtained unlawfully. At trial, the government obtained a conviction under a theory that it had not charged in the indictment while the trial judge repeatedly undermined the defense's case, including suggesting Koerber was guilty in front of the jury.

Statement of Counsel as to Oral Argument

Appellant believes that oral argument will assist the court in resolving these issues due to the complexity of the issues and procedural history as well as the seriousness of the issues raised.

Dated this 10th of August, 2020.

Respectfully submitted,

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1. This brief contains 15,686 words, which complies with the court's July 31, 2020 Order granting Appellant leave to file a brief not to exceed 16,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

Dated this 10th day of August, 2020.

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I hereby certify that with respect to the foregoing Brief of Appellant:

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Dated this 10th day of August, 2020.

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Certificate of Service

I hereby certify that on the 10th day of August, 2020, I caused the foregoing *Brief of Appellant* to be filed via the CM/ECF System, which electronically served the following:

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