

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANÍBAL ACEVEDO VILÁ, et al.,

Defendants.

CRIMINAL NO. 08-297 (PJB)

**MOTION OF DEFENDANTS ANÍBAL ACEVEDO VILÁ, LUISA INCLÁN BIRD AND
MIGUEL NAZARIO FRANCO TO DISMISS THE SECOND INDICTMENT
AND INCORPORATED MEMORANDUM OF LAW**

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

INTRODUCTION AND SUMMARY1

ARGUMENT.....4

I. THE CHARGES IN COUNTS 1-4 SHOULD BE DISMISSED.4

**A. Counts 1-4 Do Not Allege Corrupt Official Action Of The Type Required For
 Honest Services Fraud.4**

B. Counts 1-3 Are Multiplicitous.13

C. The Charged Wire Communications Were Not “In Interstate Commerce.”15

**II. COUNT 5 MUST BE DISMISSED BECAUSE A SINGLE TRANSACTION
CANNOT BOTH CREATE ILLEGAL PROCEEDS AND LAUNDER THEM.16**

CONCLUSION.....18

TABLE OF AUTHORITIES

CASES

Luzerne County Retirement Bd. v. Makowski,
No. 3:CV-03-1803, 2007 WL 4211445 (M.D. Pa. Nov. 27, 2007)9, 12

McCormick v. United States,
500 U.S. 257 (1991).....8, 9, 12

Sanabria v. United States,
437 U.S. 54 (1978).....14

United States v. Brandon,
17 F.3d 409 (1st Cir. 1994).....13

United States v. Brumley,
116 F.3d 728 (5th Cir. 1997)8

United States v. Cabrales,
524 U.S. 1 (1998).....17

United States v. Caldwell,
302 F.3d 399 (5th Cir. 2002)15

United States v. Castellini,
392 F.3d 35 (1st Cir. 2004).....17, 18

United States v. Christo,
129 F.3d 578 (11th Cir. 1997)18

United States v. Czubinski,
106 F.3d 1069 (1st Cir. 1997).....5, 6, 7, 8

United States v. D’Alessio,
822 F. Supp. 1134 (D.N.J. 1993)16

United States v. De La Mata,
266 F.3d 1275 (11th Cir. 2001)16

United States v. Fermin Castillo,
829 F.2d 1194 (1st Cir. 1987).....13

United States v. Gagalis,
No. 04-CR-126-0106-PB, 2006 WL 931909 (D.N.H. Apr. 7, 2006)13

| | |
|--|--------------------|
| <i>United States v. Goldberg</i> , 913 F. Supp. 629 (D. Mass. 1996) | 14 |
| <i>United States v. Johnson</i> , 971 F.2d 562 (10th Cir. 1992) | 18 |
| <i>United States v. Keen</i> , 104 F.3d 1111 (9th Cir. 1996) | 14 |
| <i>United States v. Mankarious</i> , 151 F.3d 694 (7th Cir. 1998) | 16, 17 |
| <i>United States v. Mislá-Aldarondo</i> , 478 F.3d 52 (1st Cir.), <i>cert. denied</i> , 128 S. Ct. 132 (2007) | 16 |
| <i>United States v. Pace</i> , 314 F.3d 344 (9th Cir. 2002) | 14 |
| <i>United States v. Rabbitt</i> , 583 F.2d 1014 (8th Cir. 1978), <i>cert. denied</i> , 439 U.S. 1116 (1979)..... | 11 |
| <i>United States v. Richard</i> , 234 F.3d 763 (1st Cir. 2000)..... | 16, 17, 18 |
| <i>United States v. Rivera-Rodriguez</i> , 318 F.3d 268 (1st Cir. 2003)..... | 16 |
| <i>United States v. Rybicki</i> , 354 F.3d 124 (2d Cir. 2003)..... | 8 |
| <i>United States v. Santos</i> , 128 S. Ct. 2020 (2008)..... | 16 |
| <i>United States v. Sawyer</i> , 85 F.3d 713 (1st Cir. 1996)..... | 5, 6, 7, 9, 10, 11 |
| <i>United States v. Sawyer</i> , 239 F.3d 31 (1st Cir. 2001)..... | 11 |
| <i>United States v. Sun-Diamond Growers of California</i> , 526 U.S. 398 (1999)..... | 6 |
| <i>United States v. Urciuoli</i> , 513 F.3d 290 (1st Cir. 2008)..... | 5, 6, 7 |

STATUTES, RULE AND CONSTITUTION

18 U.S.C. § 1343.....5, 15
18 U.S.C. § 1346.....5, 14
18 U.S.C. § 1956(a)18
Fed. R. Crim. P. 7(c).....14
P.R. Const. art. II, § 411

OTHER AUTHORITIES

U.S. Dep’t of Justice, *United States Attorneys’ Manual* (rev. 1997).....17
U.S. House of Representatives Ethics Manual, 102d Cong. (1992)10
U.S. House of Representatives Ethics Manual, 110th Cong. (2008)10

Defendants Aníbal Acevedo Vilá, Luisa Inclán Bird, and Miguel Nazario Franco, by and through undersigned counsel, move to dismiss the indictment in case number 08-297 (the “Second Indictment”) for the reasons set forth below.¹

INTRODUCTION AND SUMMARY

Our motion to dismiss the superseding indictment documented the extraordinary lengths to which the government has gone in investigating and attempting to charge Governor Acevedo Vilá, and the numerous legal defects that infected the resulting indictment. *See* Motion to Dismiss Superseding Indictment, Case No. 08-036, Dkt. No. 182. Now, months after the government said any superseding charges would be brought, an entirely separate indictment surfaces that reflects the same strained effort to stretch and distort the law to cover alleged conduct of the Governor. This Second Indictment suffers from the same legal adventurism that afflicted the first – and indeed suffers from some of the very same legal infirmities – and it should be dismissed in its entirety.

The flaws of the Second Indictment run so deep that only one conclusion may be reached: that the prosecutors have chosen to bring these charges, not because they have any foundation in law or fact, but rather to bootstrap their own efforts to convince the citizens of Puerto Rico that this massive investigation of the Governor has somehow been worth the effort. To that end, the prosecutors have labeled the charges in the Second Indictment as “honest services fraud” and “money laundering” to create the illusion of public corruption, but the *facts* actually alleged in this indictment (like the initial indictment) demonstrate that no corruption of any kind has occurred. It seems difficult to chalk up to coincidence the fact that the government now brings charges purporting to allege corruption after having been taken to task – not only in our

¹ The Defendants request oral argument on this motion.

first motion to dismiss, but also in the Puerto Rican news media – for failing to allege any corrupt behavior by the Governor in the initial indictment. Counts 1-4 of the Second Indictment, which level these fraud charges, are not based on any new information; instead, they are based on information known to the government well before the return of the first indictment and relate to the same allegations of routine meetings that were deemed insufficient to support corruption charges when that indictment was returned.

Not surprisingly, this belated effort to pump up ordinary and wholly innocent political conduct into honest services fraud suffers from a series of defects. *First*, and most fundamentally, the conduct alleged in the Second Indictment does not satisfy the requirements for honest services wire fraud. The Second Indictment alleges that the Governor met with a contributor, Edwin Santana (one of the most substantial business figures on the island), to discuss Santana’s affairs, some time after Santana supposedly helped to retire campaign debt through off-the-books contributions. It couples this with a vague assertion that the Governor directed members of his staff to “provide official assistance.”

The Second Indictment does not claim that any official assistance was actually provided; it does not specify a single official decision made by the Governor or any member of his administration that was supposedly influenced, distorted, or corrupted by improper considerations; it does not claim that Santana obtained any contract he otherwise would not have obtained, or that he received the benefit of a single concrete official action of any sort; it does not even allege that the Governor even talked to any member of his administration as part of any effort to confer any such benefit on Santana. Instead, the Second Indictment appears to be based on nothing more than the fact that the Governor met with Santana, an individual who, in light of his business interests, generally has no trouble obtaining meetings with Puerto Rican government officials, and

that the Governor facilitated a few meetings for Santana with other members of his administration in ways which are not alleged to be other than routine. There is nothing corrupt or improper about such activity. If this is a crime, every elected official in the country is a criminal. Rather, the law is clear that merely facilitating meetings for a businessman, who is also a contributor, is not unlawful as long as the matters and decision to which those meetings pertain ultimately are made honestly on the merits. Especially where campaign contributions are concerned, honest services wire fraud requires a clear quid pro quo, and a corrupted exercise of official decision-making authority. Nothing of the sort is alleged here, and these counts accordingly must be dismissed. Furthermore, and what is virtually inexplicable, the prosecutor knew at the time this Second Indictment was returned that Empresas Santana, the business conglomerate of Edwin Santana, received no favorable action from any agency or department of the Puerto Rico government as a result of any conduct by the Governor. In fact, during the time period covered by the Second Indictment, Empresas Santana's business interests were, in almost all respects, adversely affected by decisions made by Puerto Rico officials, who have stated under oath that the Governor never intruded to influence the outcome. *See* Declaration of Fernando J. Bonilla (Ex. A); Sworn Statement of Lilly Ana Oronoz Rodríguez (Ex. B); Sworn Statement of Mickey Espada (Ex. C); Sworn Statement of Gustavo Vélez (Ex. D); Sworn Statement of Nelson Espinell Ortiz (Ex. E).

Second, Counts 1-3 must be dismissed because they are multiplicitous, and so violate the Fifth Amendment. Each of these three wire fraud charges is predicated upon an email that was also the basis of a wire fraud charge in the March 2008 superseding indictment. This is the clearest possible case of multiplicity: the government seeks to prosecute the very same crime twice on the basis of the very same emails, which are the relevant unit of prosecution for wire

fraud. The Fifth Amendment requires otherwise.

Finally, each of these emails traveled exclusively within Puerto Rico, and so the statute's interstate commerce requirement has not been met for the reasons we explained in the motion to dismiss the first indictment.

The money laundering charge in Count 5 is equally defective. As an initial matter, the dismissal of the wire fraud counts requires the dismissal of Count 5 as well; money laundering requires a predicate unlawful act – which here are the wire fraud charges – and without that predicate, the money laundering charge cannot stand. In addition, Count 5 is flawed on its own terms. It is a basic principle of the money laundering offense that the funds allegedly being laundering must first be the proceeds of an unlawful act; the act that dirties the money cannot be the same one that launders it. That, however, is precisely what Count 5 alleges: the very same \$250,000 payment is both alleged to constitute the wire fraud, and also to be the laundering transaction. For all of these reasons, the Second Indictment must be dismissed.

ARGUMENT

I. THE CHARGES IN COUNTS 1-4 SHOULD BE DISMISSED.

A. Counts 1-4 Do Not Allege Corrupt Official Action Of The Type Required For Honest Services Fraud.

The heart of the Second Indictment is the allegation in Counts 1-4 that Governor Acevedo Vilá deprived the people of Puerto Rico of their right to his honest services as Governor. This occurred, the government alleges, because (a) “Collaborator 18” (who we understand to be Edwin Santana) allegedly paid \$250,000 to “Company E” (which we understand to be Marketing & Media Motivations, Inc.) to retire debt incurred by the Governor’s campaign, and (b) the Governor subsequently met with Santana and “direct[ed]” Luisa Inclán Bird and others to assist Santana “in his dealings with the government of Puerto Rico.” Second Indictment at 5

¶ 4(c). This paltry allegation does not come close to alleging the sort of improper undermining of official decisions and actions required for honest services wire fraud, and so these charges must be dismissed.

“Honest services fraud” is a variety of wire fraud. The basic wire fraud prohibition, 18 U.S.C. § 1343, criminalizes a “scheme or artifice to defraud” under certain circumstances. Section 1346, the honest services provision, simply clarifies that “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” As the First Circuit has explained, honest services fraud “does not encompass every instance of official misconduct that results in [a public] official’s personal gain.” *United States v. Sawyer*, 85 F.3d 713, 725 (1st Cir. 1996) (“*Sawyer I*”). Rather, the government “must also demonstrate that the wrongdoing at issue is intended to prevent or call into question the proper or impartial performance of that public servant’s official duties.” *United States v. Czubinski*, 106 F.3d 1069, 1076 (1st Cir. 1997). “In other words, ‘although a public official might engage in reprehensible misconduct related to an official position, the conviction of that official cannot stand where the conduct does not actually deprive the public of its right to her honest services, and it is not shown to intend that result.’” *Id.* at 1077.

Cognizant of the fact that the “concept of ‘honest services’ is vague and undefined by the statute,” courts have carefully limited the official actions that may constitute honest services fraud. *United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008). “[A]s one moves beyond core misconduct covered by the statute (*e.g.*, taking a bribe for a legislative vote), difficult questions arise in giving coherent content to the phrase through judicial glosses. Closely related concerns are assuring fair notice to those governed by the statute and cabining the statute – a serious crime with serious penalties – lest it embrace every kind of legal or ethical abuse remotely con-

nected to the holding of a governmental position.” *Id.* (citation omitted). Thus, for the statute to be triggered, there must be an actual impact on the official’s performance of public business. In general, this means an impact on the way the officeholder exercises the official powers he acquires by virtue of his office, and not the broad array of less formal political or constituent-service conduct in which all public officials routinely engage.

Thus, the First Circuit has held that the honest services statute embraces “formal official action like votes,” “the informal exercise of influence on bills by a legislator,” and true acts of “influence-buying” involving official business. *Id.* But it has strictly policed the line between official actions on public business, which implicate the honest services fraud statute, and other kinds of less formal or less official conduct, which do not.² So, for instance, that court has held that “an IRS employee who accessed confidential computerized tax files for his own amusement and in violation of ordinary confidentiality restrictions” did not run afoul of the statute, *id.*; although this conduct involved workplace conduct by a public employee involving official files, it did not entail the subversion of his discretion or decisionmaking with respect to his official, public responsibilities. *See Czubinski*, 106 F.3d at 1076-77. Even unlawful gifts fall outside the ambit of the statute unless they are specifically “*intended to influence or otherwise improperly affect the official’s performance of duties.*” *See Sawyer I*, 85 F.3d at 729 (emphasis in original).

² In defining the types of official acts that Congress likely regarded as sufficiently serious to trigger federal felony penalties when it enacted § 1346, it is useful to bear in mind the background against which Congress legislated. “Official acts” were already a defined term in related parts of title 18: under 18 U.S.C. § 201(a)(3), “official acts” that could trigger the gratuities statute were expressly limited to “any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.” *See United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 405, 407 (1999) (payments to induce “generalized goodwill” or for petty or ceremonial activities such as visits and speeches do not trigger the gratuities statute, because “while they are assuredly ‘official acts’ in some sense[, they] are not ‘official acts’ within the meaning of the statute”).

Perhaps most pertinent here, the First Circuit held earlier this year in *Urciuoli* that a state senator who received undisclosed payments in return for contacting mayors and fire chiefs to urge them to comply with state law governing ambulance calls did not violate the statute. *See Urciuoli*, 513 F.3d at 294-96. This sort of informal advocacy with other officials on behalf of a constituent – even one from whom undisclosed payments had been received – did not violate the statute, because “there is no indication that [he] threatened to use official powers in support of his advocacy.” *Id.* at 296. This was not official action within the meaning of the honest services statute because it did not corrupt any official decision or act, but merely constituted the sort of informal oversight or constituent service in which officeholders routinely engage in the shadow of their official powers. This sort of behavior does not sufficiently implicate the “impartial performance of that public servant’s official duties” to call down the serious penalties that attach to an honest services fraud violation. *Czubinski*, 106 F.3d at 1076. *Cf. Urciuoli*, 513 F.3d at 296, 297 (using threat of legislation to try to force private resolution of dispute could be encompassed because such conduct is “closely related to his official functions including legislation” and involves “misusing his official power over legislation”).

What is alleged here is no different from the categories of conduct that the First Circuit has held do not rise to the level of honest services fraud. Meeting with a prominent Puerto Rico businessman who does extensive business with the Commonwealth, or helping to make arrangements so that the businessman can meet with other officials, does not constitute official action of sufficient solemnity to trigger the statute. These are quotidian acts of constituent service – the facilitation of public/private interaction that have no necessary impact on the merits of whatever decisions eventually are made by the responsible officials. *See, e.g., Sawyer I*, 85 F.3d 731 n.15. (“We do not think that the desire to gain access, by itself, amounts to an intent to influ-

ence improperly the legislators' exercise of official duties. The government points to no legislative duty to provide equal access to all members of the public; and, from a practical standpoint, we doubt one exists.”). Absent such an impact, there can be no honest services fraud. The Second Indictment alleges no impact of this sort and therefore alleges no crime. Indeed, to apply the statute to such conduct, which never has been held to fall within its ambit and which is four-square within the boundaries of accepted constituent service, would raise serious questions whether the statute is unconstitutionally vague. *See, e.g., United States v. Brumley*, 116 F.3d 728, 733 (5th Cir. 1997) (en banc) (“some defendants on the outer reaches of the statute might be able to complain that they were not on notice that Congress criminalized their conduct when it revived the honest-services doctrine”); *United States v. Rybicki*, 354 F.3d 124, 137-38 (2d Cir. 2003) (en banc) (§ 1346 covers only those intangible rights protected prior to *McNally*: “There is no reason to think that Congress sought to grant carte blanche to federal prosecutors, judges and juries to define ‘honest services’ from case to case for themselves.”); *id.* at 158-59 (Jacobs, J., dissenting) (concluding that § 1346 is facially unconstitutionally vague); *Czubinski*, 106 F.3d at 1076 n.11 (leaving open the question whether § 1346 is susceptible to constitutional challenge).

What is more, when as here campaign contributions are at issue, honest services fraud and statutes like it are not triggered in the absence of a clear quid pro quo. In *McCormick v. United States*, the Supreme Court held that a Hobbs Act violation relating to campaign contributions can only be found “if the [campaign contributions] are made in return for an explicit promise or undertaking by the official to perform or not perform an official act.” 500 U.S. 257, 273 (1991). This is for the fundamental reason that legislators must both raise money – “campaigns must be run and financed” – and they must also “[s]erv[e] constituents and support[] legislation that will benefit the district and individuals and groups therein.” *Id.* at 272. As a result,

Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done.... [T]o hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant

Id. A contrary rule would risk criminalizing the conduct of every legislator in the country:

To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

Id.

Not surprisingly, given these fundamental problems that a broader reading of such statutes would cause, the *McCormick* requirement applies to other corruption-related statutes as well, including both honest services wire fraud and bribery. *See, e.g., Luzerne County Retirement Bd. v. Makowski*, No. 3:CV-03-1803, 2007 WL 4211445, at *43 (M.D. Pa. Nov. 27, 2007) (collecting cases). It makes no difference whether the contributions in question complied with campaign finance rules; if the claimed *quid* consists of a contribution to a party or campaign rather a payment to an individual, then there must be an explicit *quo* in the form of a true official act. *See McCormick*, 500 U.S. at 271 (“we cannot accept the Court of Appeals’ approach to distinguishing between legal and illegal campaign contributions”); *see also Sawyer I*, 85 F.3d at 728 (violation of state gift statute “does not necessarily entail any improper motive to influence, or otherwise affect, the official *duties* of the recipient”: “To allow every transgression of state governmental obligations to amount to mail fraud would effectively turn every such violation into a federal felony; this cannot be countenanced.”).

Here, the Second Indictment does not nearly satisfy these requirements. The *sole* allegation, upon which all four counts of honest services wire fraud depend, is that Governor Acevedo

Vilá met “with [Santana] to discuss [his] business concerns and proposals as they related to the Puerto Rico government,” and that the Governor directed his “aides and subordinates to provide official assistance to [Mr. Santana] in his dealings with the government of Puerto Rico.” Second Indictment at 4-5 ¶ 4(c); *accord id.* at 5 ¶ 4(f). This is insufficient. There is no allegation that official assistance of the type required by the statute was actually provided by anyone. Participating in meetings and providing referrals for parties interested in doing business with the Puerto Rican government do not deprive the public of its right to honest services, at least so long as the ultimate decisions about how to accomplish public business and spend public funds are made on the merits by government officials exercising uninfluenced judgment. Such actions, whether on behalf of supporters or opponents, far from constituting honest services fraud, are the very types of constituent service expected of public officials. *See U.S. House of Representatives Ethics Manual* ch. 7, at 252, 102d Cong. (1992) (“Constituents frequently request congressional assistance with Government contracts or grants.... Members may generally forward introductory information to an agency from a constituent firm or request information for a constituent on available opportunities.”); *id.* at 308, 110th Cong. (2008) (“While a Member should not discriminate in favor of political supporters, neither need he or she discriminate against them. . . . The fact that a constituent is a campaign donor does not mean that a Member is precluded from providing any official assistance.”). These actions are a necessary and appropriate part of the job for Members of Congress and governors, and they are not illegal – on the contrary, they are very much in the public interest. Indeed, if the honest services statute were interpreted to criminalize meetings with constituents there would be serious questions about its constitutionality.³

³ *See Sawyer I*, 85 F.3d at 731 n.15 (lobbyist efforts to “develop contacts in the Legislature” and “to persuade and influence legislators to benefit certain interests” are “protected by the right ‘to petition the Government for a redress of grievance’ guaranteed by the First Amendment of the

Accordingly, § 1346 properly punishes only those public officials who are impermissibly influenced in the exercise of “decision-making power.” *Sawyer I*, 85 F.3d at 724. “Because the practice of using hospitality to cultivate business relationships is ‘longstanding and pervasive,’” intent to corrupt the judgment of a public official on concrete matters within the sphere of his official duties is “a crucial aspect of proof in any such prosecution.” *United States v. Sawyer*, 239 F.3d 31, 40 (1st Cir. 2001) (quoting *Sawyer I*, 85 F.3d at 741). Meetings and introductions simply do not count. In *United States v. Rabbitt*, for example, which the First Circuit relied upon in *Sawyer I*, the Eighth Circuit reversed the mail fraud conviction of a state legislator who, in exchange for a commission, set up meetings between a friend’s architecture firm and state officials responsible for awarding architectural contracts. *United States v. Rabbitt*, 583 F.2d 1014, 1026 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979). Even though the architecture firm in fact won the contract – and no such allegation has been made here – the legislator’s “conduct did not deprive the citizens of his honest services” “[b]ecause [he] did not control the awarding of the contracts.” *Sawyer I*, 85 F.3d at 725; *see also id.* (relying on *United States v. McNeive*, 536 F.2d 1245, 1246 (8th Cir. 1976), which held there could be no honest services violation when a city plumbing inspector received unsolicited gratuities, because the inspector’s duties were non-discretionary and there was no evidence that the gratuities deterred the inspector from performing such duties).

Here, the Second Indictment does not charge that the Governor’s decisions on any concrete matters of public business over which he exercised authority were corrupted by Santana’s alleged contributions to his campaigns. Indeed, the Second Indictment does not even allege that

United States Constitution; it would be impermissible to rely upon the lobbying position simpliciter to establish a corrupt intent to influence”) (citation omitted); *see also* P.R. Const. art. II, § 4 (“No law shall be made abridging ... the right of the people ... to petition the government for a redress of grievances.”).

any subordinate official within the Governor’s administration was improperly pressured or influenced by him to decide any public matter on grounds other than the public good. The Second Indictment does not allege, for instance, that the Governor directed that a contract be awarded to Edwin Santana, nor even that any government agency take any particular action with respect to Santana. As the government knows, any such allegations would be utterly false. *See, e.g.*, Declaration of Fernando J. Bonilla (Ex. A); Sworn Statement of Lilly Ana Oronoz Rodríguez (Ex. B); Sworn Statement of Mickey Espada (Ex. C); Sworn Statement of Gustavo Vélez (Ex. D); Sworn Statement of Nelson Espinell Ortiz (Ex. E); *see also* Affidavit of Enrique Rodríguez Rodríguez (Ex. F). Because the Indictment does not allege that Governor Acevedo Vila in any way exercised (or agreed to exercise) his decision-making authority to benefit Mr. Santana improperly, the honest services charges must be dismissed.

The Second Indictment likewise fails to satisfy the *McCormick* requirement of a quid pro quo. *McCormick* makes clear that this requirement is not satisfied by the mere suspicious timing of contributions: “to hold that legislators commit a federal crime ... when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have [intended].” 500 U.S. at 272; *see Luzerne County Retirement Bd.*, 2007 WL 4211445, at *44 (“As for the proximity in time between certain campaign contributions and the awarding of investment contracts, the United States Supreme Court explicitly rejected this as an indicator of a quid pro quo.”) (citing *McCormick*, 500 U.S. at 272)). Yet that is all the Indictment alleges here. It does not allege a meeting of the minds, a quid pro quo, or anything approaching what *McCormick* requires. Instead, the Second Indictment makes the facially insufficient allegation that (a) Santana made payments to

retire campaign debt; and (b) subsequently the Governor met with Santana and directed Ms. Inclán “to provide official assistance” to him. *See* Second Indictment at 4-5 ¶¶ 4(b)-(c); *id.* at 5 ¶¶ 4(e)-(f). There was no quid pro quo, none is alleged, and Counts 1-4 must be dismissed.

B. Counts 1-3 Are Multiplicitous.

Next, Counts 1-3 of the Second Indictment must be dismissed because they are multiplicitous. The Fifth Amendment forbids the government from seeking to punish a defendant twice for the same offense, and “[a]n indictment is multiplicitous and in violation of the Fifth Amendment’s Double Jeopardy Clause if it charges a single offense in more than one count.” *United States v. Brandon*, 17 F.3d 409, 422 (1st Cir. 1994). As this Court properly has recognized, “[a] multiplicitous indictment creates two potential problems: first, the defendant might receive multiple sentences for the same offense; second, the jury may be improperly prejudiced by the suggestion that the defendant has committed several crimes instead of one.” *United States v. Gagalis*, No. 04-cr-126-0106-PB, 2006 WL 931909, at *1 (D.N.H. Apr. 7, 2006) (Barbadoro, J.). That is precisely what the government has sought to do in Counts 1-3 of the Second Indictment. Those counts charge three counts of wire fraud that depend upon the *very same* wire communications that form the basis for wire fraud charges in Counts 12, 14 and 16 of the March 2008 Indictment. *Compare* Second Indictment at 6 ¶ 5, *with* March 2008 Indictment at 42-44 ¶ 4. It would be extraordinary if this were permissible, and indeed it is not.

“To assess whether the indictment is either multiplicitous or duplicitous, [the court] first determine[s] the appropriate ‘unit of prosecution’ under the relevant statute.” *Gagalis*, 2006 WL 931909, at *1. Where wire fraud is concerned, the unit of prosecution is the particular wire communication. *See United States v. Fermin Castillo*, 829 F.2d 1194, 1199 (1st Cir. 1987) (“It is well established that each use of the wires constitutes a separate crime under 18 U.S.C.

§ 1343....”).⁴ Accordingly, the Fifth Amendment prohibits doing precisely what the government has done here: multiplying a single wire communication into more than one count of wire fraud.

It is no answer that the original indictment charges these emails as wire fraud *simpliciter*, whereas the Second Indictment charges them as “honest services” wire fraud. Honest services wire fraud is not a separate statutory crime. Rather, 18 U.S.C. § 1346 (the honest services provision) is merely “definitional” – it explains that the term “scheme or artifice to defraud” in § 1343, the principal wire fraud prohibition, includes “a scheme or artifice to deprive another of the intangible right of honest services.” *See United States v. Goldberg*, 913 F. Supp. 629, 636 & n.7 (D. Mass. 1996) (“Because § 1346 merely explains the theory of honest services fraud, it is not a distinct factual offense for which the jury could punish” the defendant.). And it is clear that the government cannot pursue multiple theories of liability for a single statutory violation unless – unlike here – they are included in a single count. *See Sanabria v. United States*, 437 U.S. 54, 66 n.19 (1978) (“[H]ad the Government alleged each ‘theory of liability’ in a separate count, the indictment would have been subject to objection on grounds of multiplicity, the charging of a single offense in separate counts.”); Fed. R. Crim. P. 7(c) 1944 advisory committee note 2 (“The provision contained in the fifth sentence that it may be alleged in a single count that the means by which the defendant committed the offense are unknown, or that he committed it by one or more specified means, is intended to eliminate the use of multiple counts for the purpose of al-

⁴ *Accord United States v. Pace*, 314 F.3d 344, 349 (9th Cir. 2002) (“We have recognized that the nature of a wire fraud offense – the gist and crux of the offense – is the misuse of wires. It is appropriate, therefore, that we interpret the essential conduct prohibited by § 1343 to be the misuse of wires as well as any acts that cause such misuse.” (internal quotation marks and citation omitted)); *United States v. Keen*, 104 F.3d 1111, 1120 (9th Cir. 1996) (“When Congress wishes to make each act or unit a separate crime it knows how to do so, as it demonstrated in the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, which specifically define each mailing or transmission as an offense.”) (quoting *United States v. Pelusio*, 725 F.2d 161, 169 (2d Cir. 1983)).

leging the commission of the offense by different means or in different ways.”).⁵

The appropriate remedy for this Fifth Amendment violation depends on the Court’s resolution of our other arguments for dismissing the various wire fraud charges. If either set of wire fraud charges is dismissed for any other reason, the multiplicity problem falls away. If, however, all of the wire fraud charges otherwise remain intact, then one or the other set of wire fraud charges must be dismissed on multiplicity grounds.

C. The Charged Wire Communications Were Not “In Interstate Commerce.”

Finally, Counts 1-4 also must be dismissed because they do not satisfy the interstate commerce requirement of 18 U.S.C. § 1343. As we explained in our motion to dismiss the March 2008 indictment, which we incorporate here by reference, federal wire fraud charges cannot be sustained unless the charged communications traveled “in interstate ... commerce.” 18 U.S.C. § 1343; *see* Motion to Dismiss (Case No. 08-036, Dkt. No. 182), at 24-27; Reply Br. (Case No. 08-036, Dkt. No. 230), at 13-15. As with the March 2008 indictment, each of the communications charged in this Indictment took place wholly within Puerto Rico and was not “in interstate ... commerce.” Indeed, as noted above, the communications charged in Counts 1-3 are the very same communications charged in Counts 12, 14, and 16 of the March 2008 Indictment and which we have already sought to dismiss on this basis. Because none of the emails underlying Counts 1-4 of the Second Indictment traveled in interstate commerce but were instead sent from one location in Puerto Rico to another, those counts must be dismissed.

⁵ *See also United States v. Caldwell*, 302 F.3d 399, 408 (5th Cir. 2002) (explaining in the duplicity context that “where a mail fraud count alleges only *one* instance of use of the mail in furtherance of multiple schemes (or a single scheme with multiple objects), the jury can find the defendant guilty of only *one* mail fraud offense on that count—regardless whether the jury finds that the defendant devised one or all of the alleged schemes associated with that particular use of the mail.”).

II. COUNT 5 MUST BE DISMISSED BECAUSE A SINGLE TRANSACTION CANNOT BOTH CREATE ILLEGAL PROCEEDS AND LAUNDER THEM.

Count 5 alleges that Governor Acevedo Vilá, together with Luisa Inclán Bird and Miguel Nazario Franco, conspired to commit money laundering. *See* Second Indictment at 7 ¶ 1 (citing 18 U.S.C. § 1956(a)(1)(B)(i), (h)). Once Counts 1-4 are dismissed, Count 5 must be as well. A money laundering charge “requires proof that the monetary transaction involved the proceeds of the predicate offense identified in the indictment.” *United States v. De La Mata*, 266 F.3d 1275, 1292 (11th Cir. 2001). With the dismissal of the only identified predicate offense – i.e., the honest services wire fraud charged in Counts 1-4 of the Second Indictment, *see* Second Indictment at 7 ¶ 1 – there would be no predicate for the money laundering charge, and it would have to be dismissed. *See United States v. D’Alessio*, 822 F. Supp. 1134, 1146 (D.N.J. 1993); *see also United States v. Mankarious*, 151 F.3d 694, 703 (7th Cir. 1998) (“if the money laundering counts in the indictment specified particular predicate offenses,” dismissal of the specified underlying predicate offenses might necessitate dismissal of the money laundering counts).

Count 5 is also independently deficient. Relevant here, the charge of a money laundering conspiracy requires the government to prove (and the indictment to allege) an agreement between the alleged co-conspirators to “conduct[] ‘a financial transaction’ involving the proceeds of some form of unlawful activity.” *United States v. Rivera-Rodriguez*, 318 F.3d 268, 271 (1st Cir. 2003) (quoting 18 U.S.C. § 1956(a)(1)); *see United States v. Mislá-Aldarondo*, 478 F.3d 52, 68 (1st Cir.), *cert. denied*, 128 S. Ct. 132 (2007). Not only did the alleged transactions not involve “proceeds” within the meaning of § 1956, *see United States v. Santos*, 128 S. Ct. 2020, 2026-28, 2031 (2008), it is fundamental to this statute – and clear as a matter of black-letter law – that the activity that gives rise to the underlying proceeds cannot also be the laundering transaction. “[M]oney laundering criminalizes a transaction *in* proceeds, not the transaction that *cre-*

ates the proceeds. Thus, ‘the laundering of funds cannot occur in the same transaction through which those funds first became tainted by crime.’” *United States v. Richard*, 234 F.3d 763, 769 (1st Cir. 2000) (emphases added; citation omitted); *id.* (“the laundering of funds cannot occur in the same transaction through which those funds first became tainted by crime”).⁶ Simply put, before money can be laundered, it must first be dirty.

Here, however, the Second Indictment alleges that the very same conduct both dirtied the money (through the alleged wire fraud in Counts 1-4) and also laundered it. Count 5 depends upon – and indeed explicitly incorporates by reference – the wire fraud scheme alleged in Counts 1-4. *See* Second Indictment at 8 ¶ 3a. As noted above, Counts 1-4 allege that Edwin Santana (“Collaborator 18”) paid \$250,000 to Marketing & Media Motivations, Inc. (“Company E”) in order to retire campaign debts owed by Governor Acevedo Vilá’s campaign to Company E or other vendors. *See id.* at 4-5 ¶¶ 4(a), 4(b), 4(e). The laundering of these funds allegedly arose from the fact that these payments were disguised and not otherwise disclosed. *See id.* at 8-9 ¶¶ 3(b)-(f). But the alleged disguising and lack of disclosure is part and parcel of what allegedly makes the payments themselves unlawful. Under a fair reading of the Second Indictment, the payment of the \$250,000 both creates the alleged “proceeds of ... unlawful activity,” *see id.*; 18

⁶ *See also United States v. Cabrales*, 524 U.S. 1, 7 (1998) (the money laundering statutes “interdict only the financial transactions ..., not the anterior criminal conduct that yielded the funds allegedly laundered”); *United States v. Castellini*, 392 F.3d 35, 45 (1st Cir. 2004) (“the money laundering statute is meant to punish a separate offense from the underlying ‘specified unlawful activity,’ and thus, it criminalizes separate financial transactions involving the funds derived from such illegal activity”); *id.* at 47 (“money laundering requires there to be proceeds of illegal activity and cannot be the same as the illegal activity which produces the proceeds”); *Mankari-ous*, 151 F.3d at 705 (“Money laundering requires proceeds of a discrete predicate crime. That predicate crime must have produced proceeds in acts distinct from the conduct that constitutes money laundering.”); U.S. Dep’t of Justice, *United States Attorneys’ Manual* § 9-105.330 (rev. 1997) (“as a general rule, neither § 1956 nor § 1957 should be used where the same financial transaction represents both the money laundering offense and a part of the specified unlawful activity generating the proceeds being laundered”).

U.S.C. § 1956(a)(i), and also allegedly constitutes the laundering transaction, *see* Second Indictment at 8 ¶¶ 3(a), 3(b). This is a facially defective money laundering charge.

In this regard, this case is on all fours with *United States v. Johnson*, 971 F.2d 562 (10th Cir. 1992), the reasoning of which the First Circuit relied upon in *Richard* in the course of distinguishing its facts, *see* 234 F.3d at 769. In *Johnson*, as here, the alleged underlying criminal activity was wire fraud. 971 F.2d at 569. The wire fraud consisted of a scheme by which investors were falsely told that the defendant could buy pesos at a discount and rapidly sell them at full price. *Id.* at 564-65. Part and parcel of the wire fraud was “causing the investors to wire funds to [defendant’s] account” and – as here – the government charged the same transactions at issue in the wire fraud as money laundering. *Id.* at 569-70. The court overturned the conviction, properly recognizing that “Congress targeted only those transactions occurring after proceeds have been obtained from the underlying unlawful activity.” *Id.* at 569. Other courts have held likewise. *E.g.*, *United States v. Christo*, 129 F.3d 578, 580 (11th Cir. 1997) (*per curiam*); *see also United States v. Castellini*, 392 F.3d 25, 48 (1st Cir. 2004) (money laundering might not have been shown if the defendant had received money “and *did nothing more* with it”). That is the situation here, and it requires that Count 5 be dismissed.

CONCLUSION

We cannot conclude this argument without noting that the Second Indictment is infected with legal flaws so obvious that they had to have been appreciated by the government at the time it asked another grand jury to return a true bill. This, standing alone, calls into question the underlying rationale for the additional charges. All of the facts and circumstances that relate to the allegations contained in the Second Indictment were known to the government well in advance of the return of the First Indictment. In a matter of months, those facts, not initially charged as unlawful conduct, were resurrected and repackaged as evidence of dishonest services and then

selectively fed to grand jurors who were deliberately not told what the prosecutors indisputably knew: that the Governor never intervened to direct the outcome of any decision by any Puerto Rico official which impacted the business of Edwin Santana.⁷

For the foregoing reasons, the Second Indictment should be dismissed.

Dated: September 22, 2008

Respectfully submitted,

/s/Thomas C. Green

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⁷ See Motion of Defendant Anibal Acevedo Vilá for Discovery of Grand Jury Materials, Case No. 08-297 (Dkt. 20).

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CERTIFICATE OF SERVICE

I, Bradford A. Berenson, hereby certify that on this 22nd day of September, 2008, I caused the foregoing Motion of Defendants Aníbal Acevedo Vilá, Luisa Inclán Bird, and Miguel Nazario Franco to Dismiss the Second Indictment and Incorporated Memorandum of Law to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

/s/Bradford A. Berenson _____

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