

No. 18-1216

In the
United States Court of Appeals
for the Seventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN BUNCICH,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.
No. 2:16-CR-161 — Hon. James T. Moody, *Judge*.

BRIEF FOR THE UNITED STATES

THOMAS L. KIRSCH II
United States Attorney

DAVID E. HOLLAR
Assistant United States Attorney
Chief, Appellate Division
United States Attorney's Office
5400 Federal Plaza, Suite 1500
Hammond, IN 46320
(219) 937-5500

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES.....	1
STATEMENT OF THE CASE	2
I. Procedural History.....	2
II. Offense Conduct	2
A. General towing duties of the Lake County Sheriff	2
B. Towing policies under Sheriff Buncich	3
C. Towing company “contributions” to Buncich.....	5
1. General polices.....	5
2. Willie Szarmach (CSA Towing)	6
3. Scott Jurgensen (Samson Towing)	8
D. Payments through Downs (2014-2015).....	9
1. April 2014: \$2,000 check & \$500 cash (Count 4)	9
2. October 2014: two \$2,000 checks and \$1,000 cash (Count 5).....	9
3. June-July 2015: \$7,500 cash.....	11
E. Direct payments to Buncich (2016).....	12
1. April 2016: \$6,000 cash	12
2. July-August 2016: \$5,000 cash and \$1,000 check	14
3. September 2016: \$7,500 cash.....	16
III. Indictment	17

IV.	Personal Bank Account Cash Summary Chart (Exhibit 49-2)....	18
A.	Initial motion to admit	18
B.	Defense case-in-chief	22
C.	Renewed motion to admit Exhibit 49-2	25
IV.	Interstate Wire Evidence on Counts 1-3	27
	SUMMARY OF THE ARGUMENT	28
	ARGUMENT	30
I.	Sufficient Evidence Supports Two of Buncich’s Five Wire Fraud Convictions.	30
A.	Sufficient evidence fails to establish the wires alleged in Counts 1 through 3.	30
B.	Sufficient evidence supports Buncich’s wire fraud convictions as to Counts 4 and 5.	32
II.	The District Court Did Not Abuse Its Discretion in Admitting Exhibit 49-2.	38
A.	Exhibit 49-2 presented relevant evidence of Buncich’s unexplained wealth.....	39
B.	Because Exhibit 49-2 was evidence of the charged crime, not evidence of some other bad act, Rule 404(b) does not apply.	44
C.	Any error in admitting Exhibit 49-2 was harmless.	48
	CONCLUSION.....	50

TABLE OF AUTHORITIES**CASES**

<i>Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.</i> , 831 F.3d 815 (7th Cir. 2016)	35
<i>Evans v. United States</i> , 504 U.S. 255 (1992)	35
<i>Federal Election Comm’n v. Nat’l Conservative Political Action Comm.</i> , 470 U.S. 480 (1985)	34
<i>Kann v. United States</i> , 323 U.S. 88 (1944)	31
<i>McCormick v. United States</i> , 500 U.S. 257 (1991)	34
<i>Schmuck v. United States</i> , 489 U.S. 705 (1989)	31
<i>United States v. Adams</i> , 628 F.3d 407 (7th Cir. 2010)	40
<i>United States v. Blagojevich</i> , 794 F.3d 729 (7th Cir. 2015)	35
<i>United States v. Blount</i> , 502 F.3d 674 (7th Cir. 2007)	47
<i>United States v. Bradford</i> , 905 F.3d 497 (7th Cir. 2018)	38
<i>United States v. Cantrell</i> , 617 F.3d 919 (7th Cir. 2010)	30
<i>United States v. Cardena</i> , 842 F.3d 959 (7th Cir. 2016)	passim
<i>United States v. Carrera</i> , 259 F.3d 818 (7th Cir. 2001)	40, 41
<i>United States v. Corner</i> , 598 F.3d 411 (7th Cir. 2010)	40
<i>United States v. Crisp</i> , 435 F.2d 354 (7th Cir. 1970)	40
<i>United States v. Durham</i> , 766 F.3d 672 (7th Cir. 2014)	31
<i>United States v. Ferrell</i> , 816 F.3d 433 (7th Cir. 2015)	39

United States v. Gomez, 763 F.3d 845 (7th Cir. 2014) 39

United States v. Harper, 463 F.3d 663 (7th Cir. 2006) 40

United States v. Harris, 536 F.3d 798 (7th Cir. 2008) 26, 40

United States v. Hawkins, 777 F.3d 880 (7th Cir. 2015) 33

United States v. Hogan, 886 F.2d 1497 (7th Cir. 1989) 26

United States v. Jackson, 983 F.2d 757 (7th Cir. 1993) 40

United States v. LeShore, 543 F.3d 935 (7th Cir. 2008) 40

United States v. Marr, 760 F.3d 733 (7th Cir. 2014) 38

United States v. McGowan, 590 F.3d 446 (7th Cir. 2009) 31

United States v. Molina, 484 Fed. App. 49 (7th Cir. 2012)..... 44

United States v. Noriega, 117 F.3d 1206 (11th Cir. 1997)..... 40

United States v. Penny, 60 F.3d 1257 (7th Cir. 1995)..... 26, 41

United States v. Richardson, 208 F.3d 626 (7th Cir. 2000)..... 30, 33

United States v. Sheneman, 682 F.3d 623 (7th Cir. 2012) 30, 33

United States v. Smith, 816 F.3d 479 (7th Cir. 2016)..... 34

United States v. Stewart, 902 F.3d 664 (7th Cir. 2018) 48

United States v. Turner, 400 F.3d 491 (7th Cir. 2005) 40

United States v. Young, 908 F.3d 241 (7th Cir. 2018) 47

STATUTES

18 U.S.C. § 666(a)(1)(B) 2

18 U.S.C. § 1343..... 2
18 U.S.C. § 1346..... 2, 30
Ind. Code § 3-9-2-4..... 6
Ind. Code § 36-2-13-5..... 3

RULES

Fed. R. Crim. P. 29..... 27
Fed. R. Evid. 401..... 39
Fed. R. Evid. 402..... 18, 39
Fed. R. Evid. 403..... 39, 44
Fed. R. Evid. 404(b)passim

OTHER AUTHORITY

Ind. Const. art. VI § 2.....2, 4

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-1216

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN BUNCICH,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Indiana

BRIEF FOR THE UNITED STATES

JURISDICTIONAL STATEMENT

The jurisdictional statement of the appellant is complete and correct.

STATEMENT OF ISSUES

1. Should the Court accept the government's concession that it failed to introduce sufficient evidence that three of the five charged wires furthered Buncich's fraudulent scheme to deprive the citizens of Lake County, Indiana, of his honest services as County Sheriff?

2. Could a rational jury find the two remaining wires furthered Buncich's scheme to require tow companies wishing to maintain or increase their County tows to contribute to his campaign and the Democratic Party?
3. Did the district court abuse its discretion in admitting evidence that Buncich deposited \$58,100 in unexplained cash into his personal bank account over the course of his scheme?

STATEMENT OF THE CASE

I. Procedural History

This is an appeal of defendant John Buncich's conviction after a 14-day jury trial. R. 152.¹ Buncich stands convicted of five counts of wire fraud, in violation of 18 U.S.C. § 1343 and 18 U.S.C. § 1346, and one count of receiving bribes, in violation of 18 U.S.C. § 666(a)(1)(B). R. 188 (Def. App. 15-23).

II. Offense Conduct

A. General towing duties of the Lake County Sheriff

Indiana law requires each county to have an elected sheriff. Ind. Const. art. VI, § 2. The sheriff is the county's top law enforcement official, responsible

¹ Citations to the district court record are designated as "R." The 14 volume consecutively paginated trial transcript (R. 197-206, 210-213) is cited as "Tr. ___." The trial exhibits are cited as Ex. ___. Buncich's brief is designated "Def. Br." and the appendix attached to his brief is "Def. App." The government's appendix is "Gov. App."

for quelling breaches of the peace and arresting and jailing lawbreakers. Ind. Code § 36-2-13-5.

Much of Lake County is incorporated into cities and towns with their own police departments, leaving the Sheriff primarily responsible to enforce the law in unincorporated parts of the County. Tr. 221-22, 730-731. Secondly, the Sheriff assists and backs up local departments. Tr. 905-907.

In responding to traffic accidents, arresting drivers, or otherwise enforcing the laws, Sheriff's officers sometimes need to tow vehicles. Tr. 228-229, 253, 303. Under Lake County ordinance, the Sheriff was responsible for selecting and approving all companies licensed to tow on the County's behalf. Tr. 1702; Ex. 8. Because tow companies could charge storage fees or sell abandoned cars for scrap, towing for Lake County could be quite lucrative. Tr. 217, 284-285.

Lake County received two sources of revenue from every tow. Exs. 8, 36C. First, an owner wishing to retrieve a vehicle the Sheriff towed had to pay the County \$75 for a tow release. Tr. 284, 401-402; Ex. 36C. Second, every time a tow company towed a vehicle, the company was required to pay a \$50 franchise fee. Tr. 209-210, 229, 285, 402; Exs. 8, 36C.

B. Towing policies under Sheriff Buncich

Buncich became a Lake County police officer in 1971. Tr. 1468. He was first elected Sheriff in 1994 and served through 2002, when his term ended due

to state term limits. Tr. 1469-1471; see also Ind. Const. art. VI, § 2. After an eight year break, Buncich was reelected in November 2010. Tr. 1478. He named his friend Timothy Downs as Chief of Police, the highest ranking officer under the Sheriff. Tr. 274-275, 280-281.

After his 2010 election but prior to taking office, Buncich created a handpicked list of around twelve tow companies. Tr. 277, 373-374, 418-419; Ex. 36B. Buncich divided the County into geographic territories and assigned one or two companies per territory. Tr. 278, 474-475. Buncich made all decisions regarding territories. Tr. 198. There were two maps: one for light towing and one for heavy duty towing. Tr. 1412. Ordinarily, most towing occurred in unincorporated areas where the Sheriff had primary jurisdiction. Tr. 222, 425.

In addition to these territories, certain companies were assigned specialized “details,” meaning they conducted all tows for a given Sheriff’s unit, such as the gang unit, the narcotics unit, or the stolen auto unit. Tr. 278-279. Specialized unit towing could be even more lucrative than geographic towing. Tr. 279. The gang unit in particular was known as the “tow truck police” since its primary mission seemed to be to develop probable cause that vehicles had been involved in crimes and secure authority to tow the car. Tr. 893-894, 915-916. The gang unit frequently was given quotas of cars to tow in some specific part of Gary or another city. Tr. 916, 1001. Buncich received daily reports of gang unit tows and would sometimes complain that certain companies were

not given enough tows. Tr. 1000-1001. He also received a monthly report showing all County tows broken up by tow company. Tr. 280.

Nobody was ever formally kicked off the tow list. Tr. 283. 327-328. However, changes were sometimes made to tow assignments. Tr. 1428. For example, in August 2013, Buncich adjusted the territory of S&S and Bennie's Towing in Gary. Tr. 679-681, 1002; Ex. 38. In May 2016, Herrera's Towing and DC Towing each had their territory cut back. Tr. 201-202, 241; Ex. 38 (email of May 18, 2016). Buncich took away these companies' original territory and reassigned both to tow only in the small town of Whiting. Tr. 283-284; Ex. 38. Neither company performed a County tow between May 18, 2016, and October 31, 2016. Ex. 38 (October 2016 tow report).

C. Towing company "contributions" to Buncich

1. General policies

Buncich held an annual campaign fundraiser called "Summer Fest." Tr. 350, 1480. Buncich directed Downs to sell tickets to this fundraiser. Tr. 285-287. After Buncich was elected Lake County Democratic Chairman in 2014, he also ordered Downs to sell tickets to Democratic Party fundraisers. Tr. 291-292, 351, 1649. Buncich directed Downs to sell to tow companies, including Alternative, Midnight Blue, Samson, and CSA. Tr. 286, 1202.

Tow companies could pay for tickets either by cash or check. Tr. 289. Downs would collect the checks and cash and hand them to Buncich once per

year, often totalling thousands of dollars. Tr. 289-290, 354. Downs believed he would not have kept his job as Chief of Police if he refused to sell tickets. Tr. 291, 341.

Other Buncich subordinates sold tickets to other tow companies. Tr. 309-310. S&S bought its tickets from civilian staff supervisor Ed Davies. Tr. 849, 1532-1533. Bennie's bought from Assistant Chief Willie Stewart. Tr. 309-310, 863. The owner of J.A.N.'s Towing, convicted felon John Nauracy, dealt directly with his "very good" friend Buncich. Tr. 310, 1350, 1659. The County's largest tower, Jerry Kundich of Steve's Towing, also occasionally met with Buncich in Buncich's office. Tr. 337, 360. Over the last four years Buncich was Sheriff Steve's total tows went up 12%, the most of any tow company. Tr. 1819-1820.

2. Willie Szarmach (CSA Towing)

The County's second largest tower (whose tows increased the second most) was Willie Szarmach of CSA Towing. Tr. 187-188, 366, 1820-1821; Ex. 38 (2015 Tow Report). In 2009, when Buncich ran for Sheriff, Szarmach gave him \$500 cash through an intermediary. Tr. 372-373, 412-413. After Buncich won the election, he called Szarmach and assigned him light and heavy towing territories near and including parts of Gary. Tr. 187-188, 374.

Szarmach "contributed" to Buncich to stay on the tow list. Tr. 376. CSA wrote Buncich's campaign a check for \$2,000, the maximum a corporation could contribute. Tr. 375, 1996; see also Ind. Code § 3-9-2-4. Szarmach then

gave additional cash above the limit. Tr. 375-376. CSA was assigned gang unit towing after Szarmach gave Buncich \$1,000 cash. Tr. 379-380. The gang unit was a great source of tows, providing 30 or more in a good month. Tr. 448; see also Def. Exs. 28-30 (chart showing gang unit typically towed over 475 cars per year). CSA also at some point got some Gary towing territory previously assigned to S&S and Bennie's. Tr. 405-406, 845, 866-867; Ex. 38 (Email of March 5, 2015). S&S owner Stanley Bell occasionally bought fundraiser tickets but sometimes declined them and never paid in cash. Tr. 849-850. Bennie's owner Kay Williams also only paid by check and felt pressured to buy tickets. Tr. 864-865. Bennie's was initially assigned the gang unit towing, but it was taken away in May 2011. Tr. 871. Bennie's tows declined substantially from 2012 to 2013. Tr. 1549-1550. Nauracy believed his company, J.A.N.'s, was given fewer tows when he declined to buy tickets. Tr. 1354-1355, 1362.

CSA, one of four heavy towers, was assigned the northeast quadrant. Tr. 382, 765-766. While a light tow was typically worth less than \$800, a heavy tow could sometimes exceed \$10,000. Tr. 384. The northwest quadrant, controlled by S&S, was the most lucrative as many trucks traveled to steel mills in that area. Tr. 382, 426. After Szarmach complained to Downs, Buncich shifted the boundary line so that CSA gained some of S&S's tows. Tr. 383, 692, 853-854; Ex. 38 (Email of Dec. 31, 2015). Szarmach in turn kicked back a percentage of his heavy tow profits to Buncich. Tr. 383.

3. Scott Jurgensen (Samson Towing)

Scott Jurgensen owned Samson Relocation & Towing. Tr. 178-181. Jurgensen had known Downs for thirty years and was placed on the tow list through that connection. Tr. 184-185. In addition to his geographic territory, Jurgensen had the auto detail towing. Tr. 185. At some point, Stan's Towing was given half of Jurgensen's auto detail. Tr. 186.

Jurgensen did not pay to get on the tow list, but believed he needed to buy campaign tickets in order to keep towing. Tr. 191, 202, 225. About five months after starting to tow, Downs approached him about making payments. Tr. 224-225. The two largest towers (Kundich and Szarmach), as well as Gabe Herrera, told Jurgensen they were paying off Buncich. Tr. 226, 259-260.

Szarmach asked Jurgensen if he was willing to pay bribes to build a more lucrative operation. Tr. 189. Szarmach wanted more light tows in parts of Gary geographically controlled by Bennie's and S&S. Tr. 385. The idea was to create a new specialized code/ordinance enforcement unit that would increase the number of available tows. Tr. 385-387. In early 2014, Buncich and Gary's mayor signed a memorandum of understanding clarifying that the Sheriff had authority to enforce Gary city ordinances, including towing abandoned vehicles. Tr. 302-303; 1242-1245; Def. Ex. 4. Throughout 2014 and 2015, Sheriff's officers occasionally enforced Gary ordinances as part of their normal duties, calling on either the tow company assigned to their detail unit, or the

one geographically assigned to the section of Gary where the tow occurred. Tr. 1257, 1529-1530, 1790-1792.

D. Payments through Downs (2014-2015)

1. April 2014: \$2,000 check & \$500 cash (Count 4)

On April 8, 2014, Jurgensen, acting as a confidential FBI informant, met Downs at a restaurant. Tr. 469, 472; Ex. 9V. Jurgensen told Downs he would give “five hundred cash, two thousand dollar check like I did last time.” Ex. 9T, at 4. He asked Downs if he could get Alternative Towing’s area if he came up with another \$2500. Ex. 9T, at 4. Downs told Jurgensen he should wait until May 6, at which point “Everything’s fair game.” Ex. 9T, at 4. Buncich was running for reelection in the May 6, 2014, Democratic primary. Tr. 498. Jurgensen gave Downs a \$2,000 check made out to Buncich’s campaign fund, Buncich Boosters, plus \$500 cash. Tr. 193, 494; Ex. 1A; Ex. 9T, at 6.² Downs told Jurgensen, “He’ll still need more after May.” Ex. 9T, at 7. He said he was going to see Gabe next, and had already seen Jerry. Ex. 9T, at 29-30.

2. October 2014: two \$2,000 checks and \$1,000 cash (Count 5)

Jurgensen and Szarmach met together with Downs in June. Tr. 500-502 (Ex. 10). They told Downs they wanted to increase their towing and wondered if Buncich was planning to “trim down the flock.” Ex. 10T, at 6-7. Downs said

² At trial, Jurgensen could not recall giving Downs \$500 cash in April 2014. Tr. 192, 195, 244.

there were “some people that weren’t very friendly that’ll probably bite the dust,” including S&S. Ex. 10T, at 27. Szarmach asked if either man could get more of the auto detail, and Downs told them to wait until after the November general election. Ex. 10T, at 24-25. Szarmach said he was good with 10 grand and would leave no paper trail. Ex. 10T, at 32, 36.

The three men met again on October 8, 2014. Tr. 521; Ex. 12. Downs told Jurgensen he was selling tickets for a Democratic fundraiser scheduled for October 23. Ex. 12T, at 7. Downs said he “don’t like to pressure anybody into anything,” and you “don’t. It don’t gotta be big.” Ex. 12T, at 7. He also told the men he no longer sold tickets to S&S because he believed its owner tried to record him. Ex. 12T, at 11-12.

The trio met again the next day. Tr. 521; Ex. 13. Downs said he had talked to Buncich, who said he would take heavies away from S&S and give them to Szarmach. Ex. 13T, at 4 (“I talked to the sheriff this morning. He’s said, he don’t give a fuck. He’d give you all the heavy. He’d take it away from fucking S&S....”)

Downs showed the men some tickets which the sheriff was “real interested in.” Ex. 13T, at 23. The men agreed to each pay \$2,500, which Downs needed by October 23. Ex. 13T, at 27-29.

On October 21, 2014, Jurgensen and Szarmach each gave Downs a \$2,000 check made out to the Lake County Central Democratic Committee, as

well as \$500 cash. Tr. 193-195, 524-525; Exs. 1B, 14. They asked how much Jerry Kundich had given, but Downs said Jerry dealt “straight with John.” Ex. 14T, at 21.

3. June-July 2015: \$7,500 cash

On June 1, 2015, Buncich sent out an email regarding “CSA’s newly revised towing district.” Tr. 687-688; Ex. 38 (email of June 1, 2015). Two days later Jurgensen met with Downs, who gave him twenty-five tickets to Buncich’s campaign fundraiser. Tr. 293-294. Jurgensen gave Downs \$2,500 cash and asked if he would be “safe and left alone on the Lake County tow list.” Tr. 199-201, 295; Ex. 16T, at 56-57. Downs assured Jurgensen that he was good until Downs himself ran for sheriff. Tr. 201, 296; Ex. 16T, at 56-57.

After Downs left this meeting, FBI agents confronted him, and he agreed to cooperate. Tr. 296-297, 550. A few days later Downs met separately with Szarmach and Kundich, who each gave him \$2,500 cash. Tr. 299-300, 557-559, 563; Exs. 17-18. On July 15, 2015, Downs took the \$7,500 total cash he had received from Jurgensen, Szarmach, and Kundich to Buncich’s office and handed it to him. Tr. 300-301; Ex. 19V. Buncich put the money in his desk drawer. Tr. 302, 573. In response to a query from Downs, he confirmed that Jurgensen “don’t have to worry about nothing.” Ex. 19T, at 3.

E. Direct payments to Buncich (2016)

1. April 2016: \$6,000 cash

In early March 2016, after speaking to Downs, Buncich agreed to meet with Jurgensen and Szarmach at Delta Restaurant. Tr. 581-582. Szarmach wanted to make a move on Gary and wondered when ordinance towing would kick in. Ex. 23T, at 22. Buncich said he would put two officers on code enforcement. Ex. 23T, at 22. He told the men he was planning to get rid of DC Towing and that “You take care of your friends.” Ex. 23T, at 26, 29.

Days later, Officer Niko Zairis was assigned to do nothing but Gary ordinance towing three days per week. Tr. 208, 704-05. Szarmach and Jurgensen’s tow companies, CSA and Samson, were assigned to alternate tows for Zairis. Tr. 208, 304, 393. Zairis had previously been involved in twenty-six Sheriff’s vehicle crashes. Tr. 305, 892-893, 907. The Sheriff’s Accident Review Board banned him from driving a patrol car for a year and recommended Buncich suspend him for five days. Tr. 305-307, 892-893, 907-912, 960. When Buncich assigned Zairis to Gary ordinance towing he rescinded the driving ban and declined to enforce the suspension. Tr. 307, 892-893, 939, 960-961, 1797. Buncich told Zairis’s supervisor that CSA and Samson should tow for Zairis. Tr. 938, 940, 968. Zairis himself was told his mission was to find and tow abandoned vehicles that violated Gary ordinances. Tr. 964-966. He perceived the assignment’s main purpose was “to get tows.” Tr. 979.

On April 22, 2016, Jurgensen and Szarmach paid Buncich \$6,000 for the promised Gary ordinance towing. Tr. 387-389. Szarmach and Jurgensen parked at Delta with their vehicles facing. Tr. 206. When Buncich arrived, Szarmach stepped out of his truck, leaving the door open and an envelope of \$3,500 cash on the driver's seat. Tr. 206-207, 388. He asked Buncich, "Did you see my new truck?" Tr. 206-207. Buncich leaned into the truck and took the envelope off the seat. Tr. 206-207, 388-391; Ex. 24V. Jurgensen handed an envelope containing \$2,500 cash directly to Buncich, who pocketed it. Tr. 207.

Over lunch, Szarmach asked whether Buncich could get him towing with the Indiana University Northwest campus police. Tr. 220, 388; Ex. 24T, at 23. Buncich employee Ed Davies was the former University police chief. Tr. 798, 1591. Buncich agreed to take care of it. Tr. 397-398; Ex. 24T, at 31. Szarmach later got a call that he was on the University tow list. Tr. 397-398, 441-442, 878.

Szarmach and Jurgensen also complained that Zairis had not called in many tows. Tr. 208-209; Ex. 24T, at 18. Buncich agreed to take care of Zairis right away. Ex. 24T, at 30. Days later Buncich summoned Downs and Zairis to his office. Tr. 619-620; Ex. 25. He told Zairis the Accident Review Board had recommended a five day suspension, which Buncich was waiving. Ex. 25T, at 1-2; Tr. 975. He then asked Zairis about "the tows." Ex. 25T, at 2-3. Zairis offered excuses as to why he had been unable to tow many vehicles, and

Buncich told him to get back out there and “keep it between us.” Ex. 25T, at 6; Tr. 971.

Zairis still called in few tows. Tr. 395-396, 779. Szarmach and Jurgensen met with Buncich to express their frustration, and Buncich said he would increase the tows. Tr. 209. Buncich also told Szarmach and Jurgensen they did not have to pay the County the \$50 franchise fee on Gary ordinance tows. Tr. 211-212, 247-248, 402-403. Szarmach acknowledged to Buncich that not paying the fee would allow more “sponsorship.” Tr. 403. Zairis only ordered a few more tows before busting his knee in an off-duty accident in June. Tr. 307.

2. July-August 2016: \$5,000 cash and \$1,000 check

On July 21, 2016, Buncich, Jurgensen, and Szarmach met again at Delta. Tr. 622-623; Ex. 26. Jurgensen gave Buncich \$2,500 cash. Tr. 632. Buncich asked the men if they wanted any tickets. Ex. 26T, at 30. Szarmach said he wanted 25; Jurgensen did not want any. Ex. 26T, at 30. Szarmach gave Buncich no money at the time but did give him a \$1,000 check and \$2,500 cash at an August 2016 fundraiser. Tr. 400; Ex. 28T, at 1-2.

Jurgensen shared towing responsibilities in the town of New Chicago with another company, Tow Central. Tr. 205. Tow Central had towed for New Chicago for twenty years. Tr. 875-877. Szarmach asked what Buncich could do for Jurgensen in New Chicago. Ex. 26T, at 25. Buncich said he would talk to Sue Pelfrey, as she “owes me a favor.” Ex. 26T, at 26; Tr. 213. Pelfrey, the New

Chicago Water Works Manager, had served on the New Chicago Town Council and was politically influential. Tr. 799, 1296. Pelfrey's daughter worked at the Sheriff's Department and got a new position around August 2016. Tr. 1308-1309. Around the same time, Tow Central was kicked off the New Chicago towing list. Tr. 876-877. Jurgensen got all of New Chicago's tows. Tr. 213, 787, 799.

Also at their July meeting, Buncich said he had someone to replace Zairis. Ex. 26T, at 32. Two weeks later Buncich told Downs they "gotta pick somebody right away." Ex. 27T, at 3. Over the next fourteen minutes, Buncich proposed a host of possible employees to assign before settling on Corporal John Bider. Ex. 27T, at 3-11. Bider declined the assignment. Tr. 308.

On August 24, 2016, Buncich ordered Officer Brian Perez to spend five days a week towing cars in Gary. Tr. 209, 308, 638, 891, 917-919. Buncich personally informed Perez of the assignment at a one-on-one meeting in his office. Tr. 984-985. Perez in turn told his supervisors of the change. Tr. 887-888. This all deviated from the way personnel decisions were normally made and announced. Tr. 888, 890-891. Buncich told the supervisors Perez's job was to find violations, cite car owners, and tow cars using two specific tow companies: CSA and Samson. Tr. 890-891, 920, 986.

Perez called CSA and Samson to tow all cars he found in Gary in violation of state, county, or city law. Tr. 987-989. He compiled a daily

statistical summary of his towing activity. Tr. 992-993. Perez was never given a book of Gary ordinances, nor were city ordinances ever really discussed with him. Tr. 989-990.

3. September 2016: \$7,500 cash

On September 2, 2016, Jurgensen met Buncich in the Delta parking lot. Tr. 214, 640. He gave Buncich \$7,500 cash for getting him the New Chicago towing. Tr. 214. Jurgensen asked Buncich to “keep Pelfrey from putting somebody else on the tow list.” Ex. 30T, at 2. Buncich put the envelope in his back pocket. Tr. 646. Buncich said “We’ll make it work. You got it.” Ex. 30T, at 2. Over breakfast, Jurgensen said things were going well with Perez. Ex. 30T, at 5. Buncich asked Jurgensen to “do 500” for a fundraiser for Indiana gubernatorial candidate John Gregg and told him not to say anything to Szarmach about their meeting. Ex. 30T, at 8-10.

Buncich met with Jurgensen and Szarmach on October 20, 2016. Tr. 651; Ex. 32. Buncich asked the men to buy tickets to a Democratic fundraiser. Ex. 32T, at 4-5. Jurgensen and Szarmach complained that Perez was calling them to tows outside of Gary, upsetting other companies. Ex. 32T, at 7-8. Buncich promised to talk to Perez. Ex. 32T, at 8. When Jurgensen and Szarmach promised they were going to “do the right thing,” Buncich said he was “gonna cut down the numbers here, the firms.” Ex. 32T, at 12.

The FBI searched Buncich's home and office, as well as Szarmach's business locations, in November 2016. Tr. 659-661, 701, 992. In Buncich's home agents found four used and thirteen unused money bands in denominations of \$1,000, \$2,000, and \$5,000. Tr. 660-663; Ex. 35.

Immediately after the search, Perez's assignment ended. Tr. 992-993.

III. Indictment

A grand jury charged Buncich with five counts of wire fraud and one count of bribery. R. 68 (Def. App. 1-14).³ The fraud counts generally alleged that Buncich deprived the citizens of Lake County of their intangible right to his and Downs's honest services by accepting cash and campaign contributions from tow companies, and, in exchange, allowing tow companies to remain on the tow list or increasing their tows. Def. App. 4-6. The indictment also alleged that Buncich deprived Lake County of the \$50 franchise fee for the Gary ordinance tows. Def. App. 5.

The indictment further alleged that Buncich caused five wires to be transmitted in furtherance of the scheme. Def. App. 8-9. The first three alleged wires were "Federal Reserve payroll funds transfer[s]" dated May 5, 2014 (Count 1), November 17, 2014 (Count 2), and August 10, 2015 (Count 3). Def.

³ Downs and Szarmach were charged with related crimes. R. 1; App. 1-9, 12. Downs pled guilty to one count of wire fraud. R. 34. Szarmach pled guilty to three counts of wire fraud and one count of paying bribes. R. 120.

App. 9. The remaining two wires were “Chase wire transfer[s]” on April 8, 2014 (Count 4), and October 21, 2014 (Count 5). Def. App. 9. The latter dates corresponded to the two \$2,000 checks Jurgensen gave Downs. Exs 1A, 1B.

IV. Personal Bank Account Cash Summary Chart (Exhibit 49-2)

A. Initial motion to admit

At trial, the government sought to admit through IRS Agent Gerard Hatagan a chart (Exhibit 49-2)⁴ listing dates and amounts organized into three columns: (1) the dates on which the government alleged Buncich received cash from tow truck drivers; (2) the dates on which cash was deposited into Buncich’s personal bank account; and (3) the dates on which cash was deposited into Buncich’s campaign account. Def. App. 24; Tr. 1024-1027.

Buncich objected to this exhibit on relevance and prejudice grounds under Federal Rules of Evidence 402 and 403. R. 131; Tr. 1027-1028. He noted that there were “at least three video recordings showing [him] accepting money,” and the “sole issue in this case” was whether these payments were made for official acts (as the government alleged) or were instead campaign contributions with “no strings attached.” R. 131, at 4. Consequently, he

⁴ The chart was initially marked Exhibit 49B, *see* Def. App. 25, but ultimately admitted at trial as Exhibit 49-2 (Def. App. 24). The government hereafter refers to the chart as Exhibit 49-2.

asserted, where the money he accepted was eventually deposited was not relevant to the issues being contested at trial. R. 131, at 3-4.

After hearing argument, the district court partially granted the objection. Def. App. 25-26. It concluded that some of the cash deposits were too remote in time to be relevant. Def. App. 25. The court further found on Rule 403 grounds that admitting evidence of the cash deposits into Buncich's personal account would cause jurors to speculate about the source of this cash and concern themselves with matters unrelated to the case. Def. App. 25. The court concluded, however, that the government could introduce evidence of when and how much cash was deposited into Buncich's campaign account to support its argument that the alleged bribes were not legitimate campaign contributions and had not been deposited there. Tr. 1031.

The government then admitted a revised chart (Exhibit 49) reflecting only the amounts deposited in the campaign account, and omitting deposits into the personal account. Tr. 1122-1130, 1178. In addition, Agent Hatagan testified that he reviewed Buncich's campaign account records, as well as Indiana election reports filed by the campaign and the Lake County Democratic Central Committee. Tr. 1035-1037; see also Tr. 794, Exs. 46-48. The April 8, 2014, check Jurgensen wrote to the campaign (Ex. 1A) was listed on the election reports. Tr. 1089. So were the October 21, 2014, checks Jurgensen (Ex. 1B) and Szarmach wrote to the Committee. Tr. 1043, 1100.

Buncich served as his own campaign treasurer and certified that the campaign's reports were true and correct. Tr. 1047, 1777. The reports reflected that the campaign had over \$85,000 in debts, most of it owed to Buncich. Tr. 1050-1051, 1066. Buncich would occasionally write checks off the account to repay the loans. Tr. 1061. Buncich said he wanted this debt fully repaid before he was due to leave office in 2018. Tr. 445.

Although Indiana campaign reports are to identify the name and address of all contributions over \$100, Buncich's reports contained numerous entries identified only as "anonymous cash donations." Tr. 1160-1161, 1070-1074, 1084, 1104-1106. Agent Hatagan had never seen this before in sixteen years of reviewing Indiana campaign finance reports. Tr. 1071.

Agent Hatagan testified in some detail about Exhibit 49, reviewing the cash deposits made into the campaign account after each of Jurgensen and Szarmach's cash payments. Tr. 1122-1129. In summary:

- Although Jurgensen gave Downs \$500 cash on April 8, 2014, no cash contribution in that amount appears on the campaign report close in time thereafter. Tr. 1091.
- The \$500 cash payments Jurgensen and Szarmach made to Downs on October 21, 2014, did not appear on either the Buncich campaign report or the Democratic Committee report. Tr. 1099-1100. No cash deposits were made into the campaign account at

any point in the next six months. Tr. 1125. No repayments on loans were reported in that timeframe. Tr. 1102.

- Within nine days of Downs delivering \$7,500 cash to Buncich on July 15, 2015, Buncich deposited \$3,300 cash into his campaign account. Tr. 1125. No additional cash was deposited into the account in the second half of 2015. Tr. 1126.
- Although Szarmach and Jurgensen alleged they gave Buncich a total of \$6,000 cash on April 22, 2016, no cash was deposited into the campaign account in April or May 2016, and only \$300 was deposited in June. Tr. 1126.
- Within three days of Jurgensen giving Buncich \$2,500 on July 21, 2016, Buncich made three deposits totaling \$2,200 into his personal account. Tr. 1128-1129. He deposited \$2,800 into the campaign account in five smaller amounts between July 23 and August 8. Tr. 1163.
- Although Jurgensen gave Buncich \$7,500 cash on September 2, 2016, no more cash was deposited into Buncich's campaign account after August 8, 2016. Tr. 1129-1130; Ex. 49.

Ultimately, Agent Hatagan concluded that all relevant checks Jurgensen and Szarmach wrote in 2014 and 2015 were documented on campaign finance

reports, but none of the cash was. Tr. 1122. Buncich never filed a 2016 campaign report. Tr. 1594.

B. Defense case-in-chief

In his case-in-chief, Buncich called the owners of four tow companies: Alternative, Simon's, J.A.N.'s, and Stan's. Tr. 1200-1221, 1329-1379, 1396-1403. The owners of Alternative, Simon's and Stan's said they bought fundraising tickets, but never felt pressured or thought it would change their tows. Tr. 1202-1203, 1333, 1399. Each claimed never to have paid in cash. Tr. 1215-1217, 1342-1343, 1402-1403. Nauracy, who owned J.A.N.'s, said Downs asked for cash, but he refused to pay and thought his tows suffered as a result. Tr. 1353-1357.

Buncich testified at length in his own defense. Tr. 1467-2177. He denied ever accepting gifts or gratuities while Sheriff. Tr. 1644. He insisted he selected tow operators based on their equipment, response times, and insurance, and he never required anyone to pay him. Tr. 1483. He claimed that Herrera's and DC's towing boundaries were changed for officer safety. Tr. 1501. He denied ever telling the gang unit or narcotics unit which tow company to use, and said the unit supervisors could use any firm they wanted. Tr. 1516-1517.

Buncich claimed he gave Szarmach additional territory not because Szarmach paid him but because he "got sick of [Szarmach] calling me all hours of the night." Tr. 1507; see also Tr. 1802. On cross-examination, Buncich

testified that Szarmach badgered him for additional territory 5-10 times before he gave in. Tr. 1807. He admitted that phone records showed Szarmach only called his cell phone four times outside of business hours. Tr. 1809.

Buncich claimed that he tasked Zairis with enforcing Gary ordinances because residents raised concerns about abandoned vehicles and Zairis was a “go-getter.” Tr. 1535, 1538. He acknowledged directing Zairis and Perez to use CSA and Samson for their tows but claimed it was his intent to rotate the ordinance towing and that he planned to give the assignment to S&S and Bennie’s next. Tr. 1540-1541, 1876, 1878.

Buncich offered an explanation for each of the alleged cash bribes. In some instances, he denied ever receiving the cash. He claimed that Downs gave him no cash, only Jurgensen’s checks in April 2014 and October 2014. Tr. 1567-1568. He further denied taking \$3500 off the seat of Szarmach’s truck in April 2016. Tr. 1635-1636. Instead, Buncich only leaned into the new truck to examine it. Tr. 1828-1829, 1881-1882, 1949.

Buncich admitted receiving cash from (a) Downs (\$7,500) in July 2015; (b) Jurgensen (\$2,500) in April 2016; (c) Jurgensen (\$2,500) in July 2016; and (d) Jurgensen (\$7,500) in September 2016. Tr. 1569, 1635, 1955, 2033. In each instance, he claimed these were legal campaign contributions made in exchange for fundraiser tickets. Tr. 1569, 1576, 1586-1588, 1639-1640, 2033.

Buncich claimed that he deposited \$3,300 of the \$7,500 cash Downs gave him in July 2015 into his campaign account. Tr. 1606. He took the remaining cash to his fundraiser and used it to pay for the band, desserts, cigars, decorations, door prizes, and tips for bartenders and waitresses. Tr. 1607. Not itemizing these incidentals was “sloppy work” and “not kosher.” Tr. 2085.

Buncich said he deposited Jurgensen’s July 2016 cash payment into his campaign account alongside other cash. Tr. 2052. He listed his cash donations from Jurgensen as “anonymous.” Tr. 2054. He may have broken up the large \$2,500 deposit into smaller amounts when listing them anonymously on his campaign report (Ex. 45) and might have withheld some amounts to pay for campaign incidentals. Tr. 2079-2080, 2084.

Finally, Buncich kept the \$7,500 cash Jurgensen gave him on September 2, 2016, as a partial repayment on his campaign loan. Tr. 1595, 2035-2036. He put a memo in his files noting that he was keeping this cash as a loan repayment—a memo which the FBI must have lost or misplaced when it seized his campaign records. Tr. 1589-1590, 2032-2034, 2061. Buncich acknowledged that, for all prior loan repayments, he wrote a repayment check from his campaign account. Tr. 1844, 2034-2036, 2054, 2067-2068. He meticulously recorded and documented these prior loan repayments, including one on August 19, 2016. Tr. 2062-2063, 2069-2070. But this time he engaged in “sloppy” bookkeeping. Tr. 2059.

C. Renewed motion to admit Exhibit 49-2

After Buncich rested, the government asked the district court to reconsider its exclusion of the evidence of Buncich's cash deposits into his personal account. Def. App. 27-28. The government argued that Buncich opened the door to the exhibit by calling tow truck drivers to testify they did not pay bribes and by himself testifying that he never accepted bribes. Def. App. 27. The government argued that the \$58,100 cash Buncich deposited into his personal account between 2014 and 2016 was unexplained and suggestive of criminal activity. Def. App. 27-28. In response, Buncich argued only that any door opening had been done not by the defense but by the government on cross-examination. Tr. 2263.

After taking a two hour recess to review the matter, the district court granted the motion to reconsider. Def. App. 29-31. It concluded that evidence of cash deposits into Buncich's personal account was relevant because Buncich testified on direct at length "about his handling of cash that he received from various individuals ... and what he did with it." Def. App. 29. The government was entitled to rebut this testimony with evidence supporting "its own theory about what the defendant actually did with cash that passed through his hands." Def. App. 29.

The district court further found the cash deposits relevant because "unexplained wealth is probative of the existence of income derived from

criminal activity.” Def. App. 30, citing *United States v. Hogan*, 886 F.2d 1497 (7th Cir. 1989); *United States v. Penny*, 60 F.3d 1257 (7th Cir. 1995); and *United States v. Harris*, 536 F.3d 798, 811 (7th Cir. 2008). The court further concluded that the high probative value of the evidence was not outweighed by any danger of unfair prejudice, particularly as Buncich himself made the issue of how he handled cash “a highlight of his testimony in this court.” Def. App. 30-31.

The court confirmed with the government that its exhibit only covered cash deposits over “the time frame involved in this Indictment.” Def. App. 31. It then admitted Exhibit 49-2 over Buncich’s objection on “relevancy and prejudice” grounds. Tr. 2280.

Agent Hatagan testified on rebuttal that Buncich’s sole known income from 2014 to 2016 came from his Sheriff’s salary and Social Security. Tr. 2278-2279, 2293. Between April 2014 and September 2016, the government alleged Buncich received \$26,000 in cash payments from Jurgensen and Szarmach. Tr. 2289. Over that time Buncich deposited \$11,240 cash into his campaign account and \$58,100 cash into his personal account. Tr. 2289. Agent Hatagan saw no known source for the cash coming into the personal account. Tr. 2289-2291. Over an unspecified defense objection, Agent Hatagan testified that, because none of the cash was listed as income on Buncich’s tax return, he believed it was from an illegal source. Tr. 2311-2312. He acknowledged,

however, that the cash might have come from a nontaxable source of which he was unaware. Tr. 2314.

IV. Interstate Wire Evidence on Counts 1-3

During the testimony of FBI Special Agent Nathan Holbrook the government introduced (as a group) Government Exhibits 39A-D. Tr. 702-707. Exhibit 39A was identified as “business records [Agent Holbrook] received from the Lake County Government Center regarding the payroll of the Defendant.” Tr. 702. The document contains Buncich’s paycheck data from July 1, 2015, through November 15, 2016. Ex. 39A. Exhibits 39B and 39C were payroll records from 2016 for Zairis and Perez, while Exhibit 39D was a chart summarizing the amount (\$14,675.20) paid to Zairis and Perez for the Gary ordinance towing detail. Ex. 39D; Tr. 704-706.

Later in the trial, the government presented a stipulation signed by Buncich and his lawyer agreeing that “the wire transmissions referenced in Counts One through Five of the Superseding Indictment involve the transmission of information in interstate commerce.” Ex. 41; Tr. 824.

At the close of the government’s case, Buncich orally moved for acquittal under Federal Rule of Criminal Procedure 29. Tr. 1192-1193. As to the wire fraud counts (Counts 1-5), Buncich argued that the wires alleged were “too remote as far as doing anything to further any criminal conduct” and “did not materially further the fraud.” Tr. 1192-1193. The district court denied the

motion. Tr. 1196. A renewed Rule 29 motion at the close of all the evidence was similarly denied. Tr. 2421.

In closing argument, the government made only passing reference to the wires in Counts 1 through 3, telling the jury they were based on “payment of salaries to Lake County employees.” Tr. 2465. The government also referenced the stipulation. Tr. 2464-2465.

During its deliberations, the jury sent out a question asking where it could find “evidence relating” to Counts 1 through 3. Tr. 2560. The district court told the jury it had received all the evidence. Tr. 2561. The jury followed up by asking what a “Federal Reserve payroll fund transfer” was, and was referred to the stipulation. Tr. 2561-2562. The next day the jury convicted on all counts. Tr. 2568.

SUMMARY OF THE ARGUMENT

The United States concedes that it failed to introduce sufficient evidence of “Federal reserve payroll fund” transfers as alleged in Counts 1 through 3 of the indictment. The Court should vacate Buncich’s convictions on those counts.

Sufficient evidence supports Buncich’s convictions on Counts 4 and 5. Taken in the light most favorable to the government, a rational jury could conclude that Buncich required tow companies to provide him with campaign contributions, including the April 2014 and October 2014 checks alleged in Counts 4 and 5, in exchange for remaining on the tow list. The checks were

given alongside cash payments that the jury could conclude went straight into Buncich's pocket. At the time the October 2014 check was written, Buncich through Downs promised to give Szarmach more of S&S's heavy tows, and he later fulfilled that promise by moving the boundary line. Based on this evidence, the jury could reasonably conclude that the campaign contributions were quid pro quo bribes in furtherance of Buncich's scheme to deprive Lake County of his honest services.

The district court did not abuse its discretion in admitting Exhibit 49-2. The evidence was relevant because Buncich's deposit of \$58,100 in unexplained cash wealth into his personal bank account tended to suggest that he was taking bribes. The evidence refuted both Buncich's testimony that he did not receive some of the alleged bribes and his claims as to how he handled the cash he did receive. Nothing about this evidence was unduly prejudicial. The government did not offer the evidence to suggest that some of the cash came from other uncharged illegal acts, let alone ask the jury to infer that Buncich had a propensity to commit financial crimes. Instead, it offered the evidence to show that he took the cash as part of the charged bribery offense. At any rate, Buncich raised no Rule 404(b) objections at trial, and any error along those lines is not plain. Even if the Court thought admission of the exhibit erroneous, such an error would be harmless in light of the other overwhelming evidence of Buncich's guilt.

ARGUMENT

I. Sufficient Evidence Supports Two of Buncich's Five Wire Fraud Convictions.

Buncich argues (Br. 24-33) that the government failed to present sufficient evidence to support any of his wire fraud convictions. When a defendant challenges the sufficiency of the evidence supporting his conviction, this Court views the evidence in the light most favorable to the government and asks whether any reasonable trier of fact could find beyond a reasonable doubt that the defendant committed the crime. *United States v. Richardson*, 208 F.3d 626, 631 (7th Cir. 2000).

A. Sufficient evidence fails to establish the wires alleged in Counts 1 through 3.

To convict a defendant of wire fraud, the government must show that the defendant participated in a scheme to defraud, had an intent to defraud, and used the wires in furtherance of the fraudulent scheme. *United States v. Sheneman*, 682 F.3d 623, 628 (7th Cir. 2012). A fraudulent scheme includes a bribery or kickback scheme intended to deprive citizens of their intangible right to a public servant's honest services. 18 U.S.C. § 1346; *United States v. Cantrell*, 617 F.3d 919, 921 (7th Cir. 2010).

Buncich does not dispute that the government introduced sufficient evidence for the jury to conclude that he intentionally schemed to defraud the citizens of Lake County of his honest services by taking cash bribes. As to

Counts 1 through 3, however, he contends (Br. 26-29) that the government failed to introduce sufficient evidence that the alleged wires existed, let alone that they furthered his scheme. The government agrees.

The wire fraud statute does not punish all forms of fraud but “only those limited instances” in which wires were used as “part of the execution of the fraud.” *Kann v. United States*, 323 U.S. 88, 94 (1944). The wire must be either “incident to an essential part of the scheme” or a “step in [the] plot.” *Schmuck v. United States*, 489 U.S. 705, 710-711 (1989) (quotations omitted).

Each wire transmission in furtherance of the defendant’s scheme constitutes a separate crime. See, e.g., *United States v. McGowan*, 590 F.3d 446, 456-457 (7th Cir. 2009) (upholding conviction on eighteen counts of wire fraud based on eighteen separate telephone calls made in furtherance of a fraudulent scheme). Where the government sufficiently establishes the scheme but fails to introduce sufficient evidence as to the existence of a wire or its role in the scheme, the Court will reverse as to that specific wire. See, e.g., *United States v. Durham*, 766 F.3d 672, 678-679 (7th Cir. 2014) (reversing two of defendant’s ten wire fraud convictions where government inadvertently introduced only “the first pages of much larger exhibits”).

As to Counts 1 through 3, the indictment alleged “Federal Reserve payroll funds transfer[s]” dated (1) May 5, 2014, (2) November 17, 2014, and (3) August 10, 2015. The only payroll evidence introduced at trial came through

Group Exhibit 39A-D and Agent Holbrook's testimony about that exhibit. None of the admitted payroll records covered 2014. Nor was any other evidence introduced of a payroll transfer, or any other wire, occurring in or around May or November 2014 that could sustain Counts 1 and 2.

Buncich's payroll records (Exhibit 39A) do include one payment dated 8/10/15. See Ex. 39A (Pmt Nbr 523059). This particular payment was never referenced at trial. Perhaps a rational jury could have seized upon this payment as the basis for Count 3. Still, no evidence was introduced that this payment went through the Federal Reserve. Nor was any evidence introduced at trial that Buncich, Downs, Szarmach, or any other participant in Buncich's bribery and fraud scheme took actions to further the scheme during the month of August 2015.

In light of these facts, the government agrees with Buncich that insufficient evidence exists to support his conviction on Counts 1 through 3. Those counts should be vacated, and the case should be remanded for resentencing on the remaining counts.

B. Sufficient evidence supports Buncich's wire fraud convictions as to Counts 4 and 5.

Buncich next contends (Br. 29-33) that insufficient evidence supports his convictions on Count 4 and 5. In reviewing this claim, the Court again views all evidence in the light most favorable to the verdict and will reverse only if

no reasonable juror could have found Buncich guilty. *Richardson*, 208 F.3d at 631.

Counts 4 and 5 both alleged that Buncich schemed to deprive the citizens of Lake County of its intangible right to his honest services as Sheriff. Def. App. 4. The indictment alleged that Buncich schemed to obtain cash and campaign contributions from tow companies and, in exchange, either allow those companies to remain on the tow list or increase their towing. Def. App. 5-6.

To convict a defendant of any given count of honest services wire fraud, the government must show that the defendant (1) participated in a scheme to defraud, (2) intended to defraud, and (3) caused a wire in furtherance of the fraudulent scheme. *Sheneman*, 682 F.3d at 628. An honest services fraud scheme covers only bribery or kickbacks. *United States v. Hawkins*, 777 F.3d 880, 882 (7th Cir. 2015). To prevail, the government must show that the bribe in question “entail[ed] a plan to change how the employee or agent does his job.” *Ibid*.

Buncich appears to concede that the government presented sufficient evidence that he participated in an intentional scheme to defraud. The jury could certainly conclude that Sheriff Buncich and his right-hand man Downs received thousands of dollars in cash and campaign contribution checks from at least two of their top towers, Szarmach and Jurgensen. In exchange, the

jury could reasonably find Buncich maintained both men on the tow list, increased Szarmach's heavy towing territory and gang unit towing, awarded both men Gary ordinance towing, and helped them secure additional tow contracts with other departments. Kundich, the County's largest tower whose tows increased the most, similarly paid cash. Meanwhile, the jury could find tow companies that declined to pay cash or make campaign contributions lost business as a result. From all this evidence, the jury could readily conclude that Buncich, in violation of his duty of honest services, awarded county work in exchange for personal benefit, namely cash and campaign checks.

Buncich's claim as to Counts 4 and 5 is that the specific wires alleged in those counts did not further his fraudulent scheme because they were not "anything more than a campaign contribution." (Br. 30-33).

It is true that the wires alleged were campaign contributions. But campaign contributions can be bribes. *McCormick v. United States*, 500 U.S. 257 (1991). "The exchange of an official act for money violates federal law, no matter how the recipient uses the cash." *United States v. Smith*, 816 F.3d 479, 480 (7th Cir. 2016); see also *Federal Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (noting that "dollars for political favors" is the "hallmark of corruption"). To distinguish between bribery and mere political logrolling, honest services fraud requires a "quid pro quo," meaning that the public official "performs an official act (or promises to

do so) in exchange for a private benefit, such as money.” *United States v. Blagojevich*, 794 F.3d 729, 735 (7th Cir. 2015). The crime is complete when the public official receives the payment; “fulfillment of the *quid pro quo* is not an element of the offense.” *Evans v. United States*, 504 U.S. 255, 268 (1992).

Later occurring events can provide evidence that a quid pro quo scheme existed. *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 831 F.3d 815, 824-825 (7th Cir. 2016). The parties need not explicitly use the word “agreement” to find such a quid pro quo arrangement. *Id.* at 826. Nor need the quid pro quo be demanded explicitly or through magic words. *Blagojevich*, 794 F.3d at 738. The jury is free to infer the quid pro quo “from an ongoing course of conduct.” *Evans*, 504 U.S. at 274 (Kennedy, J., concurring).

The evidence here was sufficient for the jury to find that the April 2014 (Count 4) and October 2014 (Count 5) campaign checks were payments in exchange for official acts. In the first place, both checks were handed over alongside cash. While Jurgensen at trial could not recall paying cash in April 2014, he is heard on tape telling Downs he is giving him “five hundred cash, two thousand dollar check like I did last time.” Ex. 9T, at 4. Similarly, in October 2014, Jurgensen and Szarmach each gave Downs \$500 cash with their \$2000 check made out to the Lake County Central Democratic Committee. Tr. 193-195, 524-525; Exs. 1B, 14. The jury could easily conclude that these cash

payments were straightforward bribes and that the checks (and consequent wire transfers) were part and parcel of those bribes.

At any rate, contrary to Buncich's claim, a rational jury could reject the argument that the checks were mere campaign contributions and find instead that they were a quid pro quo for maintaining and increasing Jurgensen and Szarmach's tows. As to Count 4, Jurgensen testified that he believed donating to Buncich's campaign was necessary to maintain a spot on the tow list. Tr. 191, 202, 225. When turning over his first payment, he asked if he could get Alternative Towing's territory if he came up with more money, and Downs told him to wait until after the primary. Ex. 9T, at 4. When Jurgensen made a \$2500 cash payment in July 2015, Buncich assured Downs that Jurgensen "don't have to worry about nothing." Ex. 19T, at 3; see also Ex. 16T, at 56-57. Jurgensen's territory was not changed, but others who did not buy their full allotment of campaign tickets, such as S&S, had territory taken away. Viewing the evidence as a whole, a reasonable jury could conclude that Buncich required campaign ticket purchases as a quid pro quo bribe for maintaining one's towing territory. Jurgensen's April 2014 check to Buncich's campaign was such a bribe. Consequently, the Court should affirm Buncich's conviction on Count 4.

Sufficient evidence equally supports Count 5. In earlier meetings, Downs told Jurgensen and Szarmach that Buncich planned to "trim the flock" and

those that “weren’t very friendly” would “probably bite the dust.” Ex. 10T, at 7, 27. Jurgensen told Downs on October 8 he was going to help Szarmach with heavy tows in exchange for a kickback. Ex. 12T, at 4. The next day Downs said he had talked to Buncich, who agreed to take heavy tows from S&S and give them to Szarmach. Ex. 13T, at 4. At the same meeting, Downs showed Jurgensen and Szarmach Democratic Party tickets the sheriff was “real interested in,” Ex. 13T, at 23. The men agreed to each pay \$2500, which Downs needed by October 23. Ex. 13T, at 27-29. On October 21, they gave Downs \$1000 cash, plus two checks, including the one alleged in Count 5. Tr. 193-195, 524-525; Exs. 1B, 14. After the election, Buncich moved the heavy tow boundary, increasing Szarmach’s tows at S&S’s expense. Tr. 405-406, 845, 866-867; Ex. 38 (Email of March 5, 2015).

From all this, the jury could rationally infer that Buncich moved the heavy tow boundary, intending to increase Szarmach’s tows and profits (as well as Jurgensen’s profits through kickbacks), as a quid pro quo for the cash and campaign checks. The jury could thus find that the \$2000 check alleged in Count 5 was more than a campaign contribution. It was a bribe that furthered Buncich’s honest services fraud scheme. More than sufficient evidence supports Count 5, which this Court should affirm.

II. The District Court Did Not Abuse Its Discretion in Admitting Exhibit 49-2.

Buncich contends (Br. 33-45) that the district court erred in admitting Exhibit 49-2 (Def. App. 24), the chart showing that he deposited \$58,100 cash into his personal bank account between April 2014 and September 2016. This Court ordinarily reviews a district court's decision to admit evidence of a defendant's unexplained wealth for abuse of discretion. *United States v. Cardena*, 842 F.3d 959, 984 (7th Cir. 2016).

Buncich's principal claim on appeal is that Exhibit 49-2 is improper propensity evidence governed by Federal Rule of Evidence 404(b). However, he never raised a Rule 404(b) objection to Exhibit 49-2 in the district court, arguing below only that the evidence should not be admitted on relevance and prejudice grounds. R. 131; Tr. 1027-1028, 2263, 2280. When the defendant raises an "entirely new" evidentiary objection on appeal, this Court reviews only for plain error. *United States v. Bradford*, 905 F.3d 497, 505 (7th Cir. 2018); see also *United States v. Marr*, 760 F.3d 733, 740 (7th Cir. 2014) (reviewing 404(b) claim for plain error where defendant objected twice "but never on propensity grounds"). This standard is met only if the defendant can show an error that is plain and affected both his substantial rights and the fairness, integrity, or reputation of the proceedings. *Bradford*, 905 F.3d at 505-506.

A. Exhibit 49-2 presented relevant evidence of Buncich's unexplained wealth.

“All evidentiary questions begin with Rule 402.” *United States v. Gomez*, 763 F.3d 845, 853 (7th Cir. 2014) (en banc). That rule provides that all relevant evidence is ordinarily admissible. Fed. R. Evid. 402. Evidence is relevant if it makes any fact of consequence more or less probable. Fed. R. Evid. 401; *Gomez*, 763 F.3d at 853. However, evidence of “other crimes, wrongs, or acts” are inadmissible to show a defendant’s propensity to commit criminal conduct. *Gomez*, 763 F.3d at 856; see also Fed. R. Evid. 404(b). Such 404(b) evidence may still be admitted if the government can establish its relevance through “some propensity-free chain of reasoning,” such as to prove a defendant’s motive, knowledge, or identity. *Id.* at 855-856. Evidence of the charged crime itself is not evidence of an “other act” and thus is not subject to Rule 404(b) analysis. *United States v. Ferrell*, 816 F.3d 433, 443 (7th Cir. 2015).

Admissible relevant evidence may be excluded under Federal Rule of Evidence 403 if the district court finds, in its discretion, that the evidence’s “probative value is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. Because the district court is in the best position to assess prejudice, this Court gives its findings under Rule 403 particular deference, reversing only when “no

reasonable person could take the view adopted by the trial court.” *United States v. LeShore*, 543 F.3d 935, 939 (7th Cir. 2008) (quotation omitted).

The district court did not abuse its discretion in admitting Exhibit 49-2 as relevant and not unduly prejudicial. The exhibit, and Agent Hatagan’s accompanying testimony, provided relevant evidence of Buncich’s unexplained wealth. This Court has long held that a defendant’s unexplained wealth is “part and parcel of the circumstances surrounding” a financial crime. *Cardena*, 842 F.3d at 983. A jury reasonably can infer from unexplained wealth that the defendant was involved in cash-heavy criminal activity. *United States v. Harris*, 536 F.3d 798, 811 (7th Cir. 2008) *overruled on other grounds as stated in United States v. Corner*, 598 F.3d 411, 416 (7th Cir. 2010). For that reason, this Court has routinely found unexplained cash deposits probative of guilt. *United States v. Harper*, 463 F.3d 663, 668 (7th Cir. 2006); *United States v. Turner*, 400 F.3d 491, 498 (7th Cir. 2005); *United States v. Carrera*, 259 F.3d 818, 829 (7th Cir. 2001); *United States v. Jackson*, 983 F.2d 757, 766 (7th Cir. 1993). Unexplained wealth is also competent evidence of motive. *United States v. Crisp*, 435 F.2d 354, 360 (7th Cir. 1970). Furthermore, such evidence can corroborate disputed testimony that the defendant received cash payments. *United States v. Noriega*, 117 F.3d 1206, 1215 n.8 (11th Cir. 1997). This is true even if the deposited cash is not tied to any specific charged act. *Cf. United States v. Adams*, 628 F.3d 407, 414-415 (7th Cir. 2010).

This Court has set forth a three-part test for admitting wealth evidence. *Cardena*, 842 F.3d at 983; *United States v. Penny*, 60 F.3d 1257, 1263 (7th Cir. 1995). First, the evidence must create an inference that the defendant was involved in the crime. *Cardena*, 842 F.3d at 983, citing *Carrera*, 259 F.3d at 829. Second, the unexplained wealth must have been acquired during the period the crime occurred. *Ibid.* Third, the government must introduce other evidence to show the income was not derived from legitimate sources. *Ibid.*

The district court did not abuse its discretion in concluding that Exhibit 49-2 met this Court's well-established test. First, other evidence strongly supported the conclusion that Buncich was taking bribes disguised as campaign contributions. Buncich was seen on tape four times receiving cash payments that originated from Jurgensen, Szarmach, and Kundich. These men owned three of the largest Lake County towing companies. After receiving some of these payments, Buncich gave Jurgensen and Szarmach additional towing territory or new assignments, including the Gary ordinance towing. The jury could reasonably infer that the payments personally enriched Buncich and led to the towing assignments.

Second, the unexplained wealth was acquired during the period the crime occurred. Exhibit 49-2 only covered deposits from April 2014 through September 2016. These dates were within the time during which the

government alleged Buncich's scheme operated. See Def. App. 4 (alleging scheme from February 2014 to October 2016).

Finally, the government introduced sufficient evidence that the cash was not derived from legitimate sources. Agent Hatagan reviewed Buncich's bank records and accounted for Buncich's Sheriff's salary, as well as his Social Security check. Tr. 2279, 2293. He believed the source of the cash was illegal activity because he could not identify any legitimate source from which Buncich would have derived \$58,100 in nontaxable cash. Tr. 2311-2312, 2314.

Buncich stresses that the district court excluded the unexplained wealth evidence from the government's case-in-chief. While true, the court acted well within its discretion in reversing course and admitting the evidence on rebuttal. Notably, in the initial briefing and argument on the motion to exclude Buncich represented that there were "at least three video recordings showing [him] accepting money" and that the "sole issue in this case" was whether there were "strings attached to any of these campaign contributions." R. 131, at 4.

The defense case, however, made plain that there were far more factual disputes in the case than just the question of whether the cash payments were ordinary campaign contributions. On the witness stand Buncich denied ever taking bribes and explicitly denied ever having received several of the alleged payments. He claimed that Downs never gave him cash from Jurgensen in April 2014, or from Szarmach and Jurgensen in October 2014. Tr. 1567-1568.

He also denied taking \$3,500 off the seat of Szarmach's truck in April 2016. Tr. 1635-1636. Evidence that Buncich deposited large sums of cash in his personal account within a month or so after each disputed event was relevant because it had some tendency to support the conclusion that these payments were in fact received and that they were bribes Buncich took for doling out County work. See Def. App. 24 (showing that Buncich deposited \$9,800 cash into his personal account in three deposits between April 14, 2014, and May 5, 2014; \$3,000 cash on November 17, 2014; and \$2,000 cash in four deposits between April 29, 2016, and May 19, 2016).

Exhibit 49-2 also was relevant because it had a tendency to rebut the explanations and excuses Buncich gave for how he handled the cash he admitted accepting. Buncich claimed to have deposited some of the cash into his campaign account and spent some directly on campaign expenses. Tr. 1606-1607, 2052, 2079-2080, 2084. He also claimed that he kept Jurgensen's \$7500 September 2016 cash payment as a campaign loan repayment, but said that for all his prior loan repayments he wrote a repayment check from his campaign account. Tr. 1595, 1844, 2034-2036, 2054, 2062-2070. Evidence that Buncich deposited vast amounts of cash into his personal account cast doubt on his testimony that he was really spending cash on campaign expenses or treating cash as undocumented loan repayments. The district court in no way abused its discretion in concluding that this testimony made the question of

how Buncich handled cash a material issue at trial, or in finding Buncich's unexplained personal wealth relevant to that now disputed issue.

The district court also did not abuse its discretion in finding that Exhibit 49-2 satisfied Rule 403 and was not unduly prejudicial. To be sure, Buncich commingled his cash, so the government could not specifically trace exactly which bribe sourced each cash deposit. Still the fact that Buncich deposited more than \$26,000 cash made it reasonably likely that much or all of the \$26,000 in specifically alleged bribes were deposited into Buncich's account for his personal benefit. The court acted well within its discretion in concluding that admitting Exhibit 49-2 and providing the jury with a full picture of Buncich's cash activity in his personal and campaign accounts between 2014 and 2016 best allowed it to assess the credibility of Buncich's denials and explanations. Compare *United States v. Molina*, 484 Fed. App. 49, 54-55 (7th Cir. 2012) (upholding admission of phone call related to charged drug deal even though the call also "contained a discussion ... that related to a different, uncharged transaction").

B. Because Exhibit 49-2 was evidence of the charged crime, not evidence of some other bad act, Rule 404(b) does not apply.

The brunt of Buncich's appellate attack on Exhibit 49-2 relies on Federal Rule of Evidence 404(b). But the district court did not plainly err in failing to

sua sponte exclude the evidence on an inapplicable ground that Buncich himself never raised in the district court.

In the first place, the unexplained wealth evidence was not 404(b) “other act” propensity evidence, but instead direct evidence of Buncich’s crime. It was “part and parcel of the circumstances surrounding” the scheme with which he was charged. *Cardena*, 842 F.3d at 983. The government alleged that Buncich schemed to obtain bribes from tow companies in exchange for awarding towing assignments. It introduced evidence of Buncich’s unexplained cash deposits not to suggest that Buncich committed some other uncharged crime but instead to support its case that he committed the charged offense of taking cash bribes from tow truck drivers and thereby deprived the citizens of Lake County of his honest services as Sheriff.

Nothing in the indictment suggested that Buncich took only \$26,000 in bribes. Instead, the grand jury broadly charged that Buncich used “his status as Sheriff of Lake County and his authority over towing contracts” to obtain cash and contributions from towing companies. Def. App. 5. Jurgensen believed other towing companies were paying bribes. Downs accepted \$2,500 cash from Kundich on at least one occasion. Buncich attempted to defend against the charge by calling several towing company owners who claimed they never paid cash. The jury was free to consider the unexplained cash in Buncich’s personal

account in weighing the testimony of these defense witnesses and deciding whether or not to believe it.

Even if the Court views the unexplained wealth as 404(b) evidence, rather than as evidence of the fruits of Buncich's crime, it should still affirm because the evidence was not admitted for a propensity purpose. *Cardena*, 842 F.3d at 983. Instead, it showed Buncich's motive to commit the crime, as well as his plan to conceal and profit from the proceeds. Exhibit 49-2 also directly impeached Buncich's testimony about what he did with the cash. The evidence served that purpose without asking the jury to rely on any sort of forbidden propensity purpose.

Buncich also claims (Br. 33) that the government failed to provide notice of its intent to admit Exhibit 49-2. He points to Rule 404(b)(2), which requires that prosecution, upon request, to provide "reasonable notice of the general nature of any such evidence" either "before trial—or during trial if the court, for good cause, excuses lack of pretrial notice."

As explained above, the evidence does not fall under Rule 404(b). Therefore, no notice was required. At any rate, in his motion to the district court, Buncich stated that he received a "revised" summary chart and supporting documentation during the trial. R. 131, at 1. He also told the court he was "in no way suggesting a Discovery Violation." R. 131, at 1 n.1. By consciously suggesting a possible violation and refusing to raise it, Buncich has

waived his claim. *United States v. Young*, 908 F.3d 241, 246-247 (7th Cir. 2018). At minimum, Buncich raised no notice objection to the district court and thus would have to show plain error. *United States v. Blount*, 502 F.3d 674, 677-678 (7th Cir. 2007). He cannot do so.

Even if the matter is viewed as merely forfeited, Buncich cannot show plain error because he cannot show either that he received insufficient notice or that the lack of notice affected his substantial rights. *Blount*, 502 F.3d at 678. Buncich told the district court that he received a “revised” exhibit during trial. It thus appears that at least some, and perhaps all, of the information in the chart was adequately disclosed pre-trial. At minimum, it is not plain, clear, or obvious that Buncich lacked advance notice of the chart or any of its contents. *Blount*, 502 F.3d at 678.

Moreover, the purpose of Rule 404(b)’s notice requirement is to give the opponent some idea of what is coming to allow the defendant time to object or to refute the evidence. *Id* at 677. Buncich here had sufficient time to draft a written opposition to Exhibit 49-2, and the question of its admissibility was discussed at length and carefully considered by the district court. The district court under these circumstances did not plainly err in any respect in allowing the jury to consider Exhibit 49-2 as part of its deliberations.

C. Any error in admitting Exhibit 49-2 was harmless.

As a final point, even if the Court thought that admission of Exhibit 49-2 was improper, it should not reverse the conviction because that error was harmless. “The test for harmless error is whether, in the mind of the average juror, the prosecution’s case would have been significantly less persuasive had the improper evidence been excluded.” *United States v. Stewart*, 902 F.3d 664, 683 (7th Cir. 2018) (quotation omitted).

There is no reasonable probability that, absent the chart, the jury would have reached a different verdict. Buncich was caught on tape pocketing large amounts of cash from Jurgensen and Szarmach. After receiving thousands of dollars in cash payments, he increased Szarmach’s heavy towing territory and directed Zairis (and later Perez) to tow cars in Gary as part of some new “Gary ordinance towing” unit that had never previously existed. Zairis and Perez simply towed cars that would have previously been towed either by Gary or by the company territorially assigned, but they now did so for Buncich’s bribe-givers, Jurgensen and Szarmach.

Additionally, even without evidence of Buncich’s other substantial cash deposits, his explanations and excuses for his cash payments were singularly unpersuasive. Buncich claimed he did not take cash out of Szarmach’s truck, but merely leaned in to inspect it. He claimed that he treated \$7,500 he received from Jurgensen as an improperly documented loan repayment, but he

meticulously documented his other loans. He claimed another \$2,500 he received from Jurgensen was split up and deposited in separate transactions, and that Jurgensen was listed as an “anonymous” contributor. Any rational juror would have rejected these incredible explanations. Had the district court excluded the further evidence that Buncich deposited into his personal account vast sums of cash, the government’s case would not have been “significantly less persuasive.” For this reason as well, nothing about the district court’s handling of Exhibit 49-2 entitles Buncich to a retrial.

CONCLUSION

For the foregoing reasons, the Court should vacate Buncich's convictions on Counts 1 through 3, affirm the convictions on Counts 4 through 6, and remand for resentencing.

Respectfully submitted,

THOMAS L. KIRSCH II
United States Attorney

DAVID E. HOLLAR
Assistant United States Attorney
Chief, Appellate Division

By: /s/ David E. Hollar
David E. Hollar
Assistant United States Attorney
United States Attorney's Office
Northern District of Indiana
5400 Federal Plaza, Suite 1500
Hammond, IN 46320
(219) 937-5500

RULE 32 CERTIFICATION

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 11,493 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the Microsoft Word word processing program, with fourteen point Century Schoolbook font.

/s/ David E. Hollar

David E. Hollar

Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Lorene B. Nelson

Lorene B. Nelson

Legal Assistant