IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Criminal Action
No. 1:11CR161

Plaintiff,

vs. Greensboro, North Carolina

JOHNNY REID EDWARDS, May 11,2012

Defendant.

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TRANSCRIPT OF JURY TRIAL PROCEEDINGS

BEFORE THE HONORABLE CATHERINE C. EAGLES

UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

(At 9:30 a.m., the Defendant was present.)

THE COURT: Good morning. I forgot to announce the exhibits yesterday. Let me do that. The ones that came into evidence and were published: 760 -- these are Government's Exhibits -- 760, 762, 763, 764, 765, and 766, 769 and 770, 266 and 269, 771, 772, 773, 74 and 75. I think that is actually 775A, 292, 293, 295, 297, 301, 302, 304, 309 and 306, 622A, 504, 675, 677, 949, and 957, and Defense Exhibits 1200, 1203A, and 1202B. I think those are all, if I got that straight.

All right. I'll hear from the defendant.

MR. LOWELL: May it please the Court, on behalf of Mr. Edwards, we move for a judgment of acquittal under Federal Rule of Criminal Procedure 29. As Your Honor knows, the standard that the Court applies in hearing this motion this morning is whether any rational trier of fact could find the essential elements of the crimes charged beyond a reasonable doubt.

I'm referring to any number of cases, but the Court could look at the *U.S. versus Collins* case, 412 F.3d. 515, Fourth Circuit, 2005.

In explaining that standard further, the circuit courts have said that a district court has to be satisfied that there's substantial evidence, evidence that a

reasonable finder of fact could accept as adequate and sufficient, to support a conclusion of the defendant's guilt beyond a reasonable doubt. That would be the *Burgos* case at 94 F.3d 849.

In further explaining the standard, Your Honor, the Fourth Circuit in the *Hickman* case, 626 F.3d 756, went further to say that unbridled speculation is an impermissible basis for a conviction in judging a Rule 29 because the standard is proof beyond a reasonable doubt, and other circuits have also concurred that speculation cannot serve as the basis for a conviction, because the burden of proof is the highest in the law, proof beyond a reasonable doubt.

There is, of course, therefore, that reason that the rule drafters included a place between Rule 28 and Rule 30, and that's where Rule 29 exists. Rule 29s are often made to preserve for appeal some argument in the record; and, as the Court has indicated, they are not often granted in the usual case, but this is not the usual case. And, of course, the case law is replete with numbers of Rule 29s that have, in fact, been granted. That's especially the case, Your Honor, when the law is applied to a set of facts for the first time in a technical area, as in the tax laws, the security laws, and, we would offer, in the federal election laws.

In the motion to dismiss era, the government said that this was not a novel setting because there have been many cases on illegal campaign contributions, but that sort of begs the context of when a well-known law is applied to an unusual set of facts. That would be like saying that everybody knows the law against murder; but applying that law to when a person did not shoot a victim, but in an argument said "drop dead," and the victim then, in fact, did drop dead based on having a heart attack, applying the murder law, very obvious and common, to an unusual set of circumstances.

Therefore, Your Honor, I hope that I have, in the time you've given me this morning, the ability to go through the counts, and I think it makes sense to do it in order of the counts and, as to each one, point out whether the government has met that burden such that a reasonable trier of fact could find guilt beyond a reasonable doubt.

So with the Court's permission, let me start with Count One on the conspiracy. The elements, of course, are two or more people making an agreement to break the law, either by defrauding the United States or violating the law of the United States, and then there be an overt act in furtherance of that agreement. So in the prism of the standard of Rule 29, what is there in the record? Let me start with Andrew Young.

To the extent that there is an illegal agreement alleged by the government between Mr. Young and Mr. Edwards, the only testimony on the record is Mr. Young stating that he raised the idea of seeking funds in the spring of 2007 with Mr. Edwards before any checks were either written, if you were to credit his testimony, or before they were cashed, if you would credit the testimony of his wife. In Mr. Young's testimony, of course, there were the four phone calls leading to a meeting; and in Mrs. Youngs', there was a phone call at some point that she could overhear part of part of.

The problem for the government and the evidence is as follows:

One discredits that testimony of Mr. Young, because no reasonable juror could believe anything that he says, and then there's no evidence at all about any agreement.

Or credit the Government's testimony, which is that Mr. Edwards said that he had consulted with lawyers and election law experts and that they had concluded that any such payments that were discussed between the two of them were completely legal.

In this possibility, the only way that the government can get to the jury is for the government to say that the proof is that even though Mr. Edwards said he had

spoken to experts who said the arrangement would be legal, he actually believed it was illegal but was telling Andrew Young that it was legal anyway and that Andrew Young, who wanted to check it for himself, nevertheless agreed with him that it was illegal, notwithstanding the conversation indicating that it was legal and that Mr. Young then did it anyway. And even Andrew Young, who can claim to be talking to former Secretary of State Warren Christopher about Mr. Edwards becoming vice president or being an advisor on Iraq and the budget, never went that far and never made that up.

Let me turn to the possibility of the agreement being with Mrs. Mellon. As to Mr. Edwards and Mrs. Mellon, there is no evidence of any kind of any conversation between Mr. Edwards and Mrs. Mellon on the subject, period. Now, if Andrew Young is Mr. Edwards' agent for this purpose, the evidence is uncontradicted that Andrew Young told Mrs. Mellon that this was not for the campaign and was for a personal issue, and he did so on more than one occasion. Again, Your Honor, credit that testimony in the record by the government, and it means that Mrs. Mellon did not make any agreement to violate any law; or discredit that evidence coming out of the mouth of Mr. Young, and then there is no evidence of any agreement at all.

In fact, the other evidence, apart from Mr. Young,

when Mrs. Mellon wanted to make a political donation, a political organization donation, was that she did it in a fashion that was different than what occurred in the check she wrote to Bryan Huffman, whether that be Center for Poverty & Opportunity, or the One America Committee, or the others.

But standing out from any conversation in the record that you would credit or discredit through the prism of Rule 29 as to what we do or do not hear from Andrew Young is the uncontradicted evidence of Alex Forger; not alleged to be a part of any conspiracy; independently talking to Mrs. Mellon in December of 2007 and asking about the $175,000 check to Bryan Huffman; and then a very clear conversation where Mrs. Mellon's lawyer, Alex Forger, says to her that this cannot be a contribution and Mrs. Mellon saying it is not, it is personal; and Mr. Forger when asked what was the purpose of the contribution saying it was for a personal need. To make the point at the end of that, there's no evidence of an agreement, therefore, between Mr. Edwards and Mrs. Mellon.

Let me turn to Mr. Baron and start again with the possibility that there was an illegal agreement created between the two of them. As to Mr. Edwards and Mr. Baron, again, start with that there's no evidence of any conversation they had. There's evidence that there may be

calls at various times. And when I said before, Your Honor, that there's no evidence of a conversation, I don't mean cell phone records that might be Mr. Edwards picking up one of the phones of a body person or even one of the phones attributed to him and calling anybody or everybody, because in the course of the campaign with a campaign worker, with Mrs. Mellon who's giving large sums of money to the actual organizations, or to even Mr. Baron who was the finance chair, there are any number of reasons for calls to be made.

What I'm saying is where Mr. Young, for example, would say that he overheard a conversation on X date or Y date or Z date, notice that there was no such conversation that he claims to have overheard between Mr. Edwards and Mr. Baron on any occasion with that purpose in mind.

If Mr. Young is Mr. Edwards's agent for this purpose of creating an illegal agreement, the evidence is that after Mr. Edwards and Mr. Young talked about Mr. Young claiming paternity, Mr. Baron was brought in to the arrangement to have Mr. Young and Ms. Hunter leave North Carolina on their way, first, to Ft. Lauderdale, then to Colorado, and ultimately to California.

The only record evidence about Mr. Baron's involvement is Mr. Young saying that Mr. Baron agreed to get involved after The National Enquirer started inquiring, after Ms. Hunter was photographed in the parking lot in

December of '07. But as to that, the evidence that you should recall is that Andrew Young says that at some point, and with him it was hard to pin down what point, that Mr. Edwards and Mr. Baron also confirmed that such payments were legal. If I understand what Mr. Young said, he said that Mr. Edwards had said that Mr. Baron had also concluded that such payments would not implicate any violations of the election law and that Mr. Young may have also checked that out himself.

So, again, Your Honor, there's a choice. You credit that testimony, and, again, that means there's no illegal agreement; or you discredit it, and that leaves no evidence at all.

But what a reasonable trier of fact could not do beyond reasonable doubt is to hear that evidence, assume the words that were spoken were actually the opposite of what Mr. Young says them to be, and then find that a legality based on spinning 180 degrees from what was said to what was meant. The Government's theory, I suppose, will be that Mr. Edwards lied about the affair, and so he lies.

But given that people, candidates and non-candidates, lie about affairs and the evidence that was often stated about Mrs. Edwards' very emotional reactions to any publicity concerning the affair, it is too much of an inference in the standard of proof beyond reasonable doubt

to suggest that if Mr. Edwards lied about his affair, that any otherwise hearsay statement that Mr. Young alleges that he made also meant 180 degrees opposite of what was being said. It is one thing to lie to your wife and anybody who will then get that information in front of your wife about an affair and say that every other statement out of his mouth meant 180 degrees opposite of when was said.

So, again, to credit the government's witnesses' evidence that a story about two campaign workers having an affair was no big deal and a one-day event, this is not Mr. Young and Mr. Baron agreeing to violate the campaign laws to assist Mr. Edwards' now fledgling, dying campaign.

Then as to the evidence about Mr. Baron wanting Mr. Edwards or Mr. Edwards himself considering the positions of vice president or attorney general, we discussed that when I asked for a limiting instruction on what was relevant to then and now. But for this motion, Your Honor, this much we know is clear:

Mr. Baron could have given $325,000 in a wire transfer, he could have given $1 million in a check, he could have given $10 million for every billboard in America to put on "Please, Mr. President, make Mr. Edwards attorney general," and that is not governed by the Federal Election Act. It is not something that would be illegal under any circumstance, it is not charged in the indictment, and it

consequently doesn't go to whether in the actual charges brought the reasonable juror could find beyond reasonable doubt that the actual charges versus something that happened after have been proven.

I want to say a word in Count One about venue, and what I want to say about venue in Count One is that there are no issues of venue because there are overt acts that occurred in the Middle District of North Carolina.

As to all of the counts, and that includes the conspiracy count about which I just addressed the Court --

THE COURT: You left out the evidence from the -- I can't remember which one it was. Maybe it was Mr. Davis, or it might have been one of the other guys who testified around that time about being on the plane with Mr. Edwards and Mr. Baron --

MR. LOWELL: Yes.

THE COURT: -- and Mr. Baron saying they're never going to find her because I'm moving her all around everywhere.

MR. LOWELL: Yes.

THE COURT: Isn't that some evidence that Mr. Edwards knew what was going on?

MR. LOWELL: At this point the answer to your question is "yes." So let me address it now. But what is it evidence of? So let me -- I was going to address that in

whether this is a contribution, but they do merge. They do merge. So let me come to that point.

The evidence is that at some point, and, again, the time frame is not particularly clear, Mr. Davis overheard the conversation on the plane between Mr. Baron and Mr. Edwards in which Mr. Baron was saying that the press is not going to find Ms. Hunter, I am flying them around. The part that we have to connect that to is the part, again, that Mr. Young has given the government and now the jury. Mr. Young's statement that he, Mr. Young, did not tell Mr. Baron that he was not the father of the baby until he met Mr. Baron in Dallas in March of 2008. And so consequently, again, as to whether there is an illegal agreement, what Mr. Baron, according to Mr. Young, knows and believes is that Mr. Young is the father, and what Mr. Baron, according to Mr. Young, is doing is helping Ms. Hunter and Mr. Young.

Now, what the Mr. Young evidence also is, Your Honor, is that Mr. Young had complained to Mr. Baron prior to leaving North Carolina about the incident that he tells graphically, about the press sneaking around his house, peering in the window, upsetting his children, having that event. And so as to the point at which Mr. Baron and Mr. Edwards are having a conversation on an airplane that Mr. Davis is overhearing, what's the state of the knowledge

for what it is that Ms. Hunter is being flown about?

And what is clear and uncontradicted in the evidence is that Mr. Baron did not understand at the time, according to Mr. Young, that Mr. Edwards was the father of the baby. Now, we could all speculate that on the side Mr. Baron had actually told Mr. -- I'm sorry -- Mr. Edwards had told Mr. Baron the truth. Is it possible? I suppose it's possible. But that's why the Fourth Circuit and every other Court of Appeals in America has said you don't judge this motion, nor do you judge proof beyond a reasonable doubt, by what might be and what's speculation. We have a record now, Your Honor. And even Mr. Young, the government's cooperating witness, has provided the means to put the conversation you've asked me about in its proper context.

As to all the counts, I was about to say that there is one gaping hole that will pervade all of them, and that is the issue that there is not one ounce of evidence that would support a conviction based on the government's burden to show that Mr. Edwards took any action with specific intent to violate the law; meaning, that they have to prove beyond a reasonable doubt that Mr. Edwards had knowledge of the law that he was attempting to break and that he purposely and intentionally did so anyway. And as that is a fatal defect for all of the counts in this case, I

want to come back to it at the end as a conclusion.

So then, with your permission, let me turn to the substantive counts of Two through Five. For all of the FECA, Federal Election Campaign Act, counts, the government has to prove beyond a reasonable doubt, the following:

That a payment was made in excess of $2,300 per person per election.

That the payment was a campaign contribution.

That the contribution was received in the Middle District of North Carolina.

And that Mr. Edwards solicited or received that payment: One, knowing it to be a contribution; and, two, knowing and intending that when he realized it to be such, it was in excess of the amounts allowed under the law.

So what ounce of proof is there that this was a campaign contribution? Without getting too technical before we have a charging conference, but we've had many conversations in pretrial and in our preliminary instructions, we are not at the pretrial hearing stage anymore where we dealt with theoretics. Now we have the government's evidence. Now they have rested with the totality of their evidence and under the Rule 29 standard.

The law requires a contribution to be for the purpose of influencing an election. It doesn't say "a" purpose. It says "the" purpose. I noticed that last night,

in light of the state of their evidence, the government has now proposed a new instruction, one that would say that there can be many purposes in mind. And that may be interesting when we argue about it, but let's today talk --

THE COURT: But they've been arguing that all along.

MR. LOWELL: Yeah, but they actually included a new phrase last night, more artful perhaps, but nevertheless more violative of the law itself, which says "the" purpose. I'm going to come back to that, Judge, but for now I want to point out at least what the law is. And as we talked about in the pretrial circumstances, that's not an unimportant provision given that we're in a First Amendment realm and a political speech realm at that.

As to whether it can be "any" purpose, "a" purpose, "a scintilla" of a purpose, or "the" purpose, I want to step back and give you three or two other contexts, because sometimes contexts help. At least they help me.

In national security cases, Your Honor, where the government has to prove that a defendant took actions, like a leak, with the intent to injure the United States or to assist a foreign country, the cases are clear that it cannot be that the defendant had, for example, a 1 percent or 5 percent or 10 percent bad intent, and all the rest of them were not in violation of the statute's prohibitions. In

other words, the cases say that in a criminal context, with liberty and freedom at stake, you can't have a sliding scale of criminal culpability. It either is or it isn't.

In an insider trading case where the government has to prove that the defendant acted on a trade based on information that was not available to the public, if, in fact, the defendant received secret and private information that also was available to the public by another means, even if the defendant didn't know that the information was available by means of other public available sources, the government cannot sustain a verdict, because it's not the fact that there was some private information as against the public information. We don't allow criminal convictions to occur when there can be the possibility of mixed issues on the issue of intent.

So in the federal election context, especially in the realm of First Amendment speech, that is even more the case. It's why we in the Fourth Circuit actually have a case that most other circuits don't, and that's the North Carolina Right-to-Life case versus Leake, where, when applying that phrase "for the purpose," the Fourth Circuit had to come up with something that gave some teeth to that phrase. And as you know as well as us by now, the phrase the Fourth Circuit decided it meant was that the expenditure had to be, quote, unambiguously related to the campaign, end

quote. It's a far cry different from the proposed instruction that it could be for any purpose. So the government may want it to read one way, but the Fourth Circuit has made a phrase that is very clear.

And as to the third type of contribution, that is, where a payment of a candidate's personal expense can, by means of a legal fiction, actually become a contribution, judge, remember that the pivot the government wants is this. For the phrase "for the purpose" language, they want to say that the affair expenses were needed for the campaign. In other words, he needed to have people help him because he was a candidate.

But for the first of the two prongs of the personal expense leg of the contribution theory, that one, if you recall, reads that the expense has to exist irrespective of the campaign. It has to be something that is paid without regard to there being a campaign, and that's where the pivot occurs. Normally, people don't charge in the second kind of contribution and the third.

THE COURT: It -- no, it has to be some -- an expense that exists, regardless of the campaign, not that it's paid regardless of the campaign.

MR. LOWELL: There are two irrespectives. Let me start with the first. The first one means that it has to exist regardless of the campaign. Let's use the word

"regardless" for the moment.

So how does the government say in one side of their argument, for whatever they're putting forth, that this existed only because of the campaign because you had to hide a mistress because if you exposed the mistress, Mr. Edwards would no longer be a viable candidate and then pivot to say that this expense existed regardless of the campaign. It either is an expense that was created because there was a campaign, or it was an expense that existed not because there was the campaign. But it's not like in one theory they get to do it one way, and another, another way.

Mr. Edwards would have expenses for a baby he fathered whether or not there was a campaign or not a campaign. Mr. Edwards would have reasons to hide his affair whether he was a candidate or not, and that turns to the second irrespective.

Now, I want to be as clear about my confusion as I can be. I've practiced for some time. I don't profess to understand statutes as well as the next person, but I can tell you that you can read that regulation on personal expense a hundred times on the issue of what it meant when it is irrespective of the campaign and then the second part where the person makes the payment without regard -- or I'm sorry -- because, if you will, the campaign.

In other words, the government has two things to

show in that third category: That it existed without regard, and then the person made it solely because of the campaign. Because you saw in our cases of Moran and Ensign and others that when there is the ability of the FEC to have found that the person who pays the expense had a friendship, some kind of independent relationship, with the candidate of any kind, the FEC was not shy in indicating that's not a contribution.

That included, if you recall, in the Moran case whether or not a donor friend of Mr. Moran's, the congressman from Virginia, paid Mr. Moran's divorce attorney while Mr. Moran was in an ugly divorce in the middle of his campaign, and that divorce went away, and the FEC found it not to be a contribution. And you'll recall that the FEC in the Senator Ensign case, in which Mr. Ensign paid the woman with whom he was having an affair a severance payment and actually caused his parents to do so, and the FEC found because there was an independent relationship between the person paid the severance and the people paying it, it was not just in the context of a campaign.

Here, the evidence is abundant that both Mrs. Mellon and Mr. Baron had reasons to help Mr. Edwards without regard to his being a candidate in a campaign, whether it be the friendship evidence with Mr. Baron, the notes and their tone from Mrs. Mellon, the visits that they

had both while he was a candidate and in 2008 after he was a candidate, the testimony of Bryan Huffman and Mr. Forger, and people who knew of Mr. Baron's friendship. They are uncontradicted to the following proposition: There was a relationship between both of those individuals and Mr. Edwards that was apart from his being a candidate.

And so with these parameters in mind under Rule 29, the evidence is far from what a reasonable jury could find beyond a reasonable doubt that this was a campaign contribution, because it was not for "the" purpose of influencing an election. There were, as the government now wants there to be, perhaps many purposes, and that complicated formula of irrespective of the campaign and irrespective of the candidacy, because of that friendship, whatever else it means, in FEC precedent means that it was not a contribution.

Let me turn to Count Two then, because what I've just said up to now would apply to Counts Two, Three, Four and Five. Now, let me turn specifically to Count Two.

The evidence in Count Two, which is Mrs. Mellons' payments in 2007, is that Andrew Young told her and Mrs. Mellon agreed that she did not intend to make a campaign contribution, and specifically she said she was not doing that. She wanted to help somebody with a personal need, and she and her lawyer had that independent

conversation.

If it is Andrew Young's purpose that counts in the equation of what is a contribution, and that seems impossible under the law, but if you were to look at that, he again was told, according to him, that it was legal and it was not, therefore, an excessive contribution. If it is Mr. Edwards' view that counts, only Andrew Young says that Mr. Edwards even knew of the funds that Mrs. Mellon was paying, and that certainly is not proof beyond a reasonable doubt. If one credits his testimony, then Mr. Edwards was then also told that it was not a violation of any law.

As to his knowledge, Mr. Forger recounts not only Mr. Edwards' own reaction and state of knowledge in August of 2008, but you also have Mr. Huffman telling Mr. Forger the same thing, that Mr. Edwards did not know of these payments, and it came as a surprise when he found out.

And Mr. Young's real time actions working with Mr. Huffman, not Mr. Forger, going around Mr. Forger with that note he wanted Mrs. Mellon to sign in which he was going to indicate that this was some form of gift that Mrs. Mellon had given to him in that gift statement corroborates that points as well. And then if it were needed, when Wendy Button promised Mr. Edwards confidentiality so that their conversations could be complete and candid, when the issue came up, he, too, said

that he had, quote, just learned about those payments that were made by Mrs. Mellon.

Let's assume here and for each and other -- every count that there were mixed motives nevertheless, that at any of the time any of the players wanted to help Mr. Edwards, because of the concerns for the way Mrs. Edwards reacted, because of the publicity's impact on her, because of the normal things that happen when somebody is having an affair, because some concern for the Youngs and the Paparazzi on their front lawn, because they were concerned about Rielle Hunter's health and the well-being of her and her baby, and because they had a concern that publicity could affect the campaign for president. Then all there is is a purpose. Somebody's purpose. Mr. Young's, Mrs. Mellons's, Mr. Huffman's, Mr. Edwards' or Mr. Baron's, when I get to him. But that doesn't make it "the" purpose; it only makes it a possible purpose.

And the evidence is certainly that Mrs. Mellon was enamored with Mr. Edwards beyond the campaign. Mrs. Mellon sent gifts and personal notes. Mrs. Mellon would do virtually anything for him. But that same evidence then also shows that it is not a personal expense violation, because in that second prong her motive to do so is not dependent on something that occurred only because of his candidacy.

Let me turn to Count Three, which is Mr. Mellon's payments in 2008. Here, Your Honor, there are all the issues that I just indicated as to Count Two, and there are two more. The first of the two more is that a contribution is not a contribution unless it is made during the course of a candidacy. Money paid after there's a candidacy, by definition, is not a contribution, and what is the evidence in that regard?

Here, there was a December 12th, 2007, check, which was received by Mr. Huffman in Monroe, which is in the Western District of North Carolina. It was sent to Ms. Young in Chapel Hill, where nothing happened with it for some time. She then came and picked up the check and moved it back to California where, if you remember, she attempted to deposit it there. It could not happen there, and so it was sent back to Mr. Huffman in Monroe, which is in the Western District of North Carolina, where it was deposited in Charlotte, also a place in the Western District of North Carolina, and that was deposited on February 20th, 2008. Your Honor, Government Exhibit 166 is that check and the back and the deposit slip slowing those dates, and February the 20th, 2008, is a month after the campaign had ended.

The January 23rd, 2008, check was sent to Mr. Huffman in Monroe, in the Western District of North Carolina, and he sent it to Chapel Hill to Ms. Young again

where it sat for some time. Then she picked it up, and she brought it to California, and then she sent it back to Mr. Huffman, who deposited it in Charlotte at the same bank in April -- on April 17, 2008. That's Government Exhibit 168. And again, April 17, 2008, is after the campaign had ended.

So this, Your Honor, is where the rule of *United States versus Chestnut* on what constitutes receipt of a campaign contribution comes into play and is critical. A contribution is made when it's deposited, for all the reasons that we had stated and discussed in the motions practice, and there is no contradiction in the law on that. And, of course, the only reason I'm even having to try to address this issue is because we're dealing in the world of legal fictions. This is not a campaign contribution that's made on a check to the John Edwards for President Campaign. It's an expenditure by a third party over here. And so we're trying to take that and then graft it into the law of normal campaign contributions.

So if the government's theory --

THE COURT: Well, I mean, let me ask you about that, because I'm -- we're talking about Ms. Mellon right now.

MR. LOWELL: Right now we're talking about 2008 Ms. Mellon.

THE COURT: Yes. If Mr. Edwards had gone to see her and had said I need money for my campaign, but I don't want you to give it to the campaign committee, instead, I want you to write checks to Mr. Huffman and go through this elaborate, you know, same scheme that we have, I mean, that's just a contribution. That's not an expenditure that you treat like a contribution. That's just a contribution. And this is --

MR. LOWELL: Yes.

THE COURT: -- the same situation you've got here except you've got an agent and you've got some other issues, but -- so I don't see necessarily why this money that Ms. Mellon -- whatever it was -- put aside, what the purpose of it was and all that. I mean, it seems like it's a contribution, just a regular, old contribution to the candidate, not an expenditure treated like a contribution.

MR. LOWELL: I think we have to untangle that, if I can, a bit. I know this is a little technical, but, I mean, there's a technical error --

THE COURT: I don't know. It seems pretty straightforward to me. I mean --

MR. LOWELL: Then I'm going to try to make it less straightforward to you.

THE COURT: I was afraid of that.

MR. LOWELL: Your Honor, if -- the circumstances

that you just suggested, let's say Mr. Edwards -- and I parish to go down this point because we're now speculating on a conversation we know never happened.

THE COURT: No, I'm not suggesting that he actually did this. I'm just -- I mean, if you want to make it up and say A went to B.

MR. LOWELL: No, no, I want to use Mr. Edwards just as you did.

THE COURT: Go ahead.

MR. LOWELL: If Mr. Edwards had gone to Mrs. Mellon and said I need money for the campaign, but I don't want it to be in a check for the John Edwards for President Campaign, make it to Mr. Huffman, you and I need to then establish what happens next. Does Mr. Huffman now take that money and distribute it to how ever many people that it would be a $2,300 limit and then send it to the campaign? That's the category number one, straight campaign contribution. The Justice Department brings those kinds of conduit reimbursement cases all the time.

Does Mr. Huffman use it for a normal campaign expense? He then pays for ads or pays for staff? Then it becomes an in-kind or expenditure, which turns into a contribution.

Does Mr. Huffman use it to take care of Ms. Hunter? Then you still have to go through what makes it

into a contribution.

The fact that Mr. Edwards would have asked Mrs. Mellon, I need this for the campaign, certainly means that her intent and his intent at that point is to make a campaign contribution. You still need to figure out which of those three it turns out to be.

THE COURT: Why?

MR. LOWELL: Well, just because you still have to peg it to something, but you and I are not going to disagree that if there was such a conversation that it would fit into one of those three for sure. So if that's what you're asking me, I agree. But how do I get past the fact that Mr. Young says and Mr. Forger says and Mr. Huffman says in the conversations with Ms. Mellon, it's not Mr. Edwards saying, I need campaign money, please give it to Mr. Huffman.

So, I guess what you are asking me is if that had happened?

THE COURT: Well, I mean you were saying you have to treat this money like an expenditure or treat it as a contribution, and I was just questioning that.

MR. LOWELL: Okay. Well, let's assume every part of your question to me is true, and now take it as to the point I'm making as to when it's a contribution. Let's establish that it is a contribution. When is it a

contribution? It's a contribution under the law when it's been received, which under the law indicates when it's deposited. And whatever we know about these case -- these events, when Mr. Huffman sends it to the ultimate beneficiaries, I mean, he's a conduit. It's not a contribution in his hands. He's no different than Fred Smith at Federal Express. He's one step away from Fred Smith at Federal Express, but that's all he is. He says it, Mr. Young says it, and that's the way it worked.

So the recipient of the contribution, and I'm using my hands, for the record, to show quotation marks, is because it gets into the hands of those that are using it as a contribution, and that's when you have to peg the date, and the date occurs when it's used, and that occurs when it's deposited.

You either have to decide, Your Honor, as you are squinting at me, to decide that the moment Mrs. Mellon makes the check, it was a contribution, which is not the law. It is not the law. It is not the law until it's received, and the law says it's received when it's deposited. We either accept that or create a new circumstance in which the definition of "contribution" is other than what the law says it to be.

THE COURT: Well, you have that one case that does say once it's -- I mean, when it's deposited, that certainly

means it's received. But it doesn't say that's the only way for it to be received, does it?

MR. LOWELL: No, but -- okay. The only case I know about says what you just said, okay. The only case I know about squarely on point says it's when it's received is when it's deposited.

So now I'm asking, could it possibly be that there is another formulation of law that would say that a contribution is made at an earlier time in the sequence? I suppose we could. But that should be something that either Congress or the Federal Election Commission or a circuit court using whatever precedence it has says, but it doesn't seem that the time to invent that theory of when the government asks in a particular criminal case at a particular criminal time. I mean, you and I can posit that it is possible that that would happen, but I don't see the precedent for it.

And if you think of the reason, the reason makes sense that that's the case because until the campaign has it for its use, it is not a contribution. And the FEC has indicated that when somebody has made a contribution, as an example, it's an excessive contribution because they wrote 2,400 instead of 2,300, it's not deemed a contribution because they've received it, and they send it back, and I'm going to come to the sending back part because there's

evidence about that in this case.

So as you look to me and say, wait, I don't understand, Mr. Lowell, why it is there couldn't be a possibility that the contribution was received, notwithstanding when it was it deposited, after the campaign, I say to you it is a possibility, but it's not ground in any precedent. So you and I could create it, but it doesn't exist on May the 11th, 2012.

And if the government wants, therefore -- I mean, this is the problem, Your Honor. We have normal campaign law precedence. What's a contribution? I sign a check. We know when I wrote it. We know when it was used, deposited, and used by the campaign. And now we're taking that and grafting it into the expenditure side, and it doesn't -- you know, I know you say that it doesn't seem that complicated to you, and I -- okay, it does to me, and that's the best I can say about why it does.

But, Your Honor, in the pretrial proceedings that occurred when we had this exact same conversation, you pointed out to us and to the government the following. You said: "It's a little hard for me to understand how a contribution received after the campaign was over could possibly be made for the purpose of influencing an election."

So as to the 2008 payments, this is all the

evidence has shown now that the actual money, checks, deposit slips, etc., has come in. So now I don't think it's just hard to understand that, I think it's literally impossible for that conclusion to be made.

THE COURT: Well, I mean, that again depends on when it's received.

MR. LOWELL: I agree it does. I totally agree. So if we were all today to create a receipt moment different than the mainstream precedence, then the case could on that basis go forward. But I want to be clear, Your Honor. I think if we all did that in this courtroom, we'd be inventing a new theory.

Can I turn to venue on this count? Because it does overlap.

THE COURT: You've got 20 minutes. I think you told me you'd take about an hour.

MR. LOWELL: I did, and I'm sorry. Please let me continue.

THE COURT: Yeah, no, go ahead.

MR. LOWELL: This the most important thing I have to say, and I'm sorry.

As to venue, just let me say that the December 12, 2007, check was not sent by Mrs. Mellon from the Middle District. It was not received -- I'm sorry -- it was received in the Western District, it was then sent on to

California, and then deposited in the Western District. So where along the line is there a moment of deposit for a contribution to have occurred in the Middle District? The January 23rd check has the same route.

Venue, Your Honor, is not a technicality. In *United States versus Johnson*, 323 U.S. 273, "Questions of venue in criminal cases are not matters of formal legal procedure. They raise deep issues of public policy in light of which legislation must be construed." So consequently, the route of those checks as to where they were held, sent, deposited, are not in the Middle District.

Let me turn to Counts Four and Five on Mr. Baron's 2007 and 2008. All I need to add to what I've said before goes again to the possibility that there were mixed reasons for why Mr. Baron might become involved at the end of 2007. Put aside that campaign insiders new that the campaign had no place to go and was doomed. Put aside Jennifer Palmieri saying that Elizabeth Edwards and John were just looking for a way out to save their family and their dignity and to avoid more publicity.

Mr. Baron was a longstanding friend, not just campaign acquaintance. He's a generous person, according to the evidence, and you've heard that he had made many contributions and, as to the FECA, was careful about the rules. He had heard about Mr. and Mrs. Young's plight

directly from them, and he did not know about the paternity truth until March.

He gave most of the funds, Your Honor, that he ever provided to Mr. Young, Mrs. Young, and to Rielle Hunter long after the campaign ended. Indeed, 80 percent of what he gave was after January 30, 2008, in terms of what was motivating him. So here, again, it is not "the" purpose. At best it might be "some," "a," "minor," "among" possibility purposes.

Let me speak to the venue of those counts. As to 2007, yesterday you heard the following evidence. You heard that there was a flight that took off from Raleigh in the Eastern District of North Carolina. There was no money spent in that moment. You heard that the plane that was paid for was Hop-A-Jet in Ft. Lauderdale. That was the exhibit range of 295 of the government.

He pays for a plane from New Flight, that other charter company, existing in Southern California; the Loews Coronado, San Diego; Four Seasons, Santa Barbara; rentals to Robert Short in Santa Barbara. Pays all of these payments from Dallas. Even if you wanted to or we wanted to invent a new theory of when a contribution is made, the plane leaves from Raleigh. As I said, all the other places are Colorado, California, and Florida. There were no expenditures made by Mr. Toben in the Middle District at the time.

As to the 2008, before the campaign is over, he pays for what? Only the expenses in Colorado and California in that month of January, and he pays, again, from Dallas. So on the issue of venue as to Counts Four and Five as we talked about in the pretrial setting, there was not any theoretical evidence about which we were aware to place his conduct in this District. And the evidence that came into the record only underscored that there's still no evidence that places it in this District.

That's different, Your Honor, from the point of an overt act, which is why I said that there's no issue of venue on the conspiracy count, but there's very much the issues of venue on the counts I've just indicated.

I'd like to turn to the false statement count of six. If there were not campaign contributions, then, of course, there are no limits, and there is no need to report to anybody. But even if there's some remote possibility that a rational jury could find them to be contributions, what is the evidence of how Mr. Edwards took any actions to cause the campaign to withhold them?

The evidence was that in 2004, one campaign person said he recalls, or she recalls, him having reviewed some campaign report; never identified, never indicated whether it was the same of anything in 2008, and never indicating what it would have to do with these kind of expenses.

The government announced day in and day out that they weren't going to call the one person who might be able to explain that, the campaign person in charge of making the forms out and sending them in, Lora Haggard. They decided for their own reasons not to do that. Instead, they called the generic FEC person, Ms. Young, who had nothing to say about how it worked in the John Edwards for President Campaign or anything about him.

The person in charge of reporting was not in court to be asked anything about how those forms were done? She was not in court to talk about what Mr. Edwards did and did not do, what she knew or didn't know. For all we know, you want to talk about possibilities, she knew everything there was to know about these checks and made her own decision not to put them on the form.

But we don't know, and because the government chose not to call her, there is a gaping hole in the evidence about Count Six. If this can be proof beyond reasonable doubt that a trier of fact could find, then we've not just changed that standard, Judge, we will eliminate it. Literally, there's not a single witness on this or any other of the reporting forms, except that we know that there are thousands of pages each quarter, but we know nothing more about them.

And as to the venue, by not calling Ms. Haggard,

or putting on any other evidence, there is no venue in the Middle District of North Carolina, because we don't know where those forms were done. We don't know where they were signed. The treasurer is Mr. Chestnut. You've heard nothing about his location. You've heard nothing --

THE COURT: You mean Chambers?

MR. LOWELL: Chambers, I'm sorry, I said Chestnut. Chambers. We have nothing about that. So all we know is that they were received in Washington, D.C., where there certainly would be venue, and we know that they were sent from someplace, but we don't know where that someplace is.

I want to spend a quick moment on aiding and abetting, and with your indulgence talk about specific intent, and then I'll be done. There's that aiding and abetting charge in each of the counts. And as you said in the pretrial proceedings, when there is a violation that's alleged that the candidate is the only person who can violate the law in receiving the contribution, it's kind of hard to understand how a candidate can aid and abet himself on that violation.

THE COURT: That's -- you know, I know I said that, but aiding and abetting is shorthand where the entire statute actually says counsel, commands, induces, procures or wilfully causes an act to be done which, if directly performed by him or another, would be an offense.

MR. LOWELL: Right.

THE COURT: So, I mean, you can't really aid or abet yourself in terms of aiding yourself or abetting yourself, but you can do those other things in this situation. I mean, to that extent, it's those other words of 18 U.S.C. Section 2 that would seem to apply here so, I mean --

MR. LOWELL: I agree with what you just said, but it still has to start with the premise of what is the violation. In other words, Mr. Edwards could be charged with aiding and abetting Mr. Young's violation, Mr. Edwards could be charged with aiding and abetting by doing all those verbs that you just said, but when the charge is that Mr. Edwards himself is the violator of the receipt of the contribution, then under the law, a person who's the principle cannot be also found guilty to aiding abetting himself in the violation.

To put it in another context, if I am charged with possession of heroin, as the possession offense, and the government had charged me as both the possessor and aiding and abetting the possession of heroin, I cannot be convicted as having been the possessor and aiding and abetting my own possession. Somewhere along the line the choice has to be made, as to whether or not I'm the principle, or I am something other than the principle, and that selection has

not been occurring, and I needed to point it out, because we discussed it prior to the trial's begin.

THE COURT: Has not been occurring -- well, I mean, usually occurs -- I don't think I maybe not quite followed your point about that.

MR. LOWELL: Maybe that's more of a jury instruction issue at this moment, because we identified it that way as such, but an election has to be made by the government as to their theory, and perhaps that's the best place to leave that for now.

Let me turn, lastly, to the specific intent, Your Honor, because it's most important, and because I'm short of time, I apologize. I didn't mean exactly --

THE COURT: It's all right. You still have 10 minutes.

MR. LOWELL: I didn't mean exactly an hour, maybe --

THE COURT: I'll give you a few more, if that's what you need.

MR. LOWELL: All right. Thank you.

Your Honor, it's so important I probably should have started with it, but I actually think, for that reason, it's the best place to end. This one requirement of the government in this case, that is that they prove beyond a reasonable doubt -- this statute is not your normal criminal

statute. There is a number of them that -- like this, but they're called specific intent statutes. They require a higher threshold. The government conceded that pretrial and that's because it exists.

They have to prove beyond -- each count, beyond a reasonable doubt, you know, that a legal agreement, an overt act, the campaign contribution, the excessive payments, but then they have to prove beyond reasonable doubt another requirement, and for each count, that Mr. Edwards acted with knowledge that his actions would violate the campaign laws and with a deliberate and purposeful intention to violate those laws.

Beyond the common sense as to whether anybody would think trying to hide a mistress, and an out-of-wedlock pregnancy, ever could be filtered through campaign finance felony laws, remember that the FEC decisions that existed at the time, that anybody would have looked up if they were looking at the time, was the Congressman Moran decision and the Senator Ensign decision, and those have analogous facts to which, if you dialed them up to look, you would think, if you can pay the lawyer to prevent a messy divorce from being a messy divorce, that's not a contribution. If you can pay your mistress through your parents a severance amount, that's not a contribution.

So what is the evidence that Mr. Edwards'

knowledge, that such payments were covered by the FECA. Certainly not that he made calls from cars to potential contributors or from the office to solicit actual John Edwards for President Campaign checks, and if he knew that the limits for that were 2300, when the checks were made to that direct place. It has to be more than that, but there is no more than that.

Indeed, Your Honor, every witness who had far more campaign law experience than Mr. Edwards, Nick Baldick who had run campaigns for decades, Eileen Mancera, who had been the finance person and chair, and Josh Brumberger, all said that they had never even heard of the topic of how a third party's payment of another third party's personal expenses could be governed by the federal campaign laws. They had never come up; not in their own lives, not certainly with Mr. Edwards, and that's the one that counts.

And there is no other evidence than that. We know Mr. Edwards knew there were campaign rules, and we knew he knows that there's a $2,300 limit for those kind. Where do you make the jump beyond reasonable doubt that he knew that things concerning the affair could be governed by the federal campaign law, and then that he had a purposeful intention to violate it?

And as to the issue that makes us a felony here, that the excess has to be $25,000 for each of those donors,

we still have the evidence of Mr. Edwards not even knowing about Mrs. Mellon's payments at all, and in the period of the indictment where Mr. Baron is charged, we certainly know that there's evidence that he knew that Mr. Baron had flown them out; not whether it was by Hop-A-Jet, not whether it was by You-Get-A-Jet, not whether it was by his own plane. We just know that he knew that that had occurred.

We have no indication that that alone was excessive over the amount. We have no indications he knew how much there was for the Ft. Lauderdale place. Mr. Baron's house is his personal house, so where does the $25,000 knowledge come from, especially because Mr. Young says Mr. Baron didn't tell the truth -- didn't tell Mr. Baron the truth about the pregnancy until March in any event.

And as to Mr. Edwards' knowing and purposeful intention, what is the evidence? Credit Mr. Young again, and all you know is that Mr. Edwards consulted with campaign lawyers and experts, who said it wasn't a violation. Discredit him, and then there's no evidence.

Credit Ms. Button and she says that even then, Mr. Edwards consulted with agents and lawyers who said there was no violation of any law. So there is no evidence that Mr. Edwards had ever said to anybody that what he knew was, A, this is governed by campaign rules. This, meaning

Ms. Mellon and Mr. Baron; two, I don't care; third, let's violate it any way.

THE COURT: You're not saying there has to be direct evidence?

MR. LOWELL: No, no, of course -- no, I'm not, of course.

THE COURT: All right.

MR. LOWELL: I mean, but there certainly has to be evidence; and, again, let me turn to that. So the evidence again goes to Mr. Young not, I guess, saying what Mr. Edwards says, but everybody having to then find that what it meant beyond reasonable doubt was a 180 degrees the opposite.

You know, when Mr. Edwards lied to his wife and to the nation on the ABC interview, there was no campaign left at that moment. No investigation by the grand jury had ever even started. He was not making those statements and those lies for any of that. He was obviously making the statements for what you've heard over and over again, the reaction of Mrs. Edwards. His attempt to try to extricate the family with dignity. Her humiliation, her emotion. Any inference at all cannot just be that he made those statements, he took those lies, because what he was doing was covering up a violation of the FECA. You look at the time and you see that that inference doesn't hold.

Your Honor, what I want to conclude by saying is that you and I and the government will in a moment get up and we can speculate, we can hypothesize, we can create new boundaries for what's a contribution, where venue lies. We can say that a contribution is now under the law when made versus when received. We can do all that, but the place to do that is not in this courtroom.

Rule 29 exists for a purpose. I realize that you know that they're not always granted, but they're not rare. They are there to spare a defendant from going forward when the government has come up short. They're there to save the jury from a week or more of additional evidence that cannot make up for the holes that already exist. They're there to show that while the government gets all the benefit when they bring an indictment, that you indicated, and that they would be held to proving their allegations once the trial began.

Indeed, in the proceedings you've said to us, as follows: That we had raised a number of issues which were thorny and better addressed during the trial after a factual record was more developed. We have that record now on some of those key issues. And even if all those issues, Your Honor, doesn't get through the Rule 29 prism to you, clearly there are so many that have to; venue, receipt, the lack of the ability to ground those contributions in one or the

other of the law.

You have said, I have concerns about the government's arguments on subjective intent of the donor and their interpretation of the phrase "for the purpose of influencing election." In light of what I have been allowed this morning to tell you, running out of a little time, I think that those concerns should be as great as they were in pretrial.

You know, Your Honor, the government knew of your concerns pretrial. You gave them warning. It had notice. They had every opportunity to come up with the goods. They had dozens of agents. They had a score of attorneys. They had subpoenas. They had three years. They could not fill the holes because of their novel theory inherently has holes. And when the government brings such a novel and unprecedented case, they take the risk that it doesn't work. It has no traction, and it cannot be sustained on the evidence, and that's this case.

So, Your Honor, let me say as follows: In order for them to go forward to the jury, they have holes, and here's what they're asking you to be. They're asking you to be a pothole filler. They want you to become a super legislature. Create a definition of contribution that makes the purpose into something else, maybe among other purposes. Disregard the part of the personal expense contribution

expenditure rules that would require somebody not to make the payment because they also had a friendship with them. Disregard that.

Invent a theory in which a candidate can only violate the law and can aid and abet himself in that regard. Ignore the venue problems by finding some way to say that an act occurred in the Middle District that didn't occur in the Middle District, and ignore the Chestnut decision and create a new theory of receipt. Look at how many things you and they -- I'm sorry, how many things they're going to ask you to fill the gaps of in order to get this case to the jury.

Judge, it's a natural tendency to let jury decide cases. They've been here for, I don't know, three or four weeks. After all, what would be lost? Let them make the decision. And I know you have said that these motions are, as you indicated, unusual; but, again, I ask you to consider that this is --

THE COURT: The motions aren't usually. The motions aren't.

MR. LOWELL: Motions aren't, but the granting of them are, but they do occur.

THE COURT: Right. That's true.

MR. LOWELL: So we move, Your Honor, for a judgment of acquittal, and because you've given me the time to present it, and I appreciate that. I also appreciate the

time that you've given yourself to consider what we've said.

You know, the jury has been told to come back and I get that, and I also want to indicate to you that given the extent of the record, and what I've tried to make clear, and we'll give a few more minutes after the government, they, that jury, when they come back on Monday, can spend Monday, Tuesday and whatever, and they still couldn't be that reasonable trier of fact who could find proof beyond reasonable doubt on so many of the things that you've given me the permission to address with you this morning, so we ask you for a judgment of acquittal. Thank you.

THE COURT: Okay. Thank you. If you're going to take longer than 30 minutes, I think I might just take a short break now, so I don't have to make you break up your argument.

MR. HARBACH: I don't know. I feel pretty confident it'll be less than 30 minutes.

THE COURT: Okay. Then go ahead.

MR. HARBACH: I apologize if I end up being wrong about that, Judge.

THE COURT: All right.

MR. HARBACH: Your Honor, I'm going to start by saying, it struck me that a fair amount of what we just heard sounded a lot like jury argument. I'm going to resist the temptation to respond in kind.

I'll start by making a couple of observations about the Rule 29 standard. I won't elaborate on the Black Letter Law that Mr. Lowell provided to you, except to point out one other dimension of it, because so much of his -- at least the first part of his presentation concerned what the Court should conclude about the credibility of Andrew Young.

In that vain, we just direct your attention to *United States versus Romer, 148 F. 3d. 359*. It is Fourth Circuit 1998, in which the court, the Fourth Circuit there states that a district court should not be considering the credibility of witnesses at the stage of Rule 29, but must assume that the jury resolves all contradictions in favor of the government.

With that one other piece of Rule 29 standard, I think I'll start -- I should also point out, Your Honor, certainly in, you know, 20, 25 minutes I don't know that I'll be able to hit everything Mr. Lowell covered. If there is a particular aspect of what he brought to your attention that is of concern to the Court, I hope you'll mention it to me.

With respect to the conspiracy charge, you know, there was a lot of discussion from Mr. Lowell about there being no evidence of a joint intent to violate the law and so forth. I think it is probably worth revisiting, in the first instance what Mr. Young's testimony about his

interactions with the defendant were on that subject.

He was asked on direct examination by me, this is at page 62 of the April 24th transcript. "Did you have any concerns about the legality of what was going on?"

He answered: "Yes, sir."

And I asked him: "Why?"

And his answer was: "He was a viable presidential candidate. This was a truckload of money. Much more money than had ever flowed through our accounts, and getting my wive involved and just the methodology, all seemed crazy."

A little bit later: "How did the amount of money that was at issue with Mrs. Mellon compare to that limit?" That was my question.

The answer was: "It was way, way, way over and this was directly to help him maintain his quest for the presidency ."

Further on that same day, this is page 63.

"Did you ever express any of these concerns that you just described to Mr. Edwards?

"Several times.

"What do you recall him saying about your concerns when you raised it with him?

"Answer: He said it was completely legal, that it was a non-campaign expense, that there might be some tax consequences for the donor, Mrs. Mellon, but none for us."

A little bit later. "How many times would you say you spoke to him about your concerns" -- which it is a fair inference to say his concerns lingered, given the fact that he had several conversations with him.

He said, "About five."

He also testified, and I need not read this into the record, I'm sure Your Honor remembers it, by the fifth conversation, the defendant was frustrated and angry, and said, that he had talked to several campaign finance experts and it was absolutely legal.

The next part is important. At the conclusion of that exchange with the defendant, Mr. Young, when I asked him whether he believed the defendant, said:

"We," plainly meaning him and his wife, "felt extremely uneasy about it. It felt and smelled wrong, but in the end we decided he knew more about the law than we did and we believed him."

Mrs. Young also provided some testimony about one of those exchanges with Mr. Edwards in which she was on the phone call, and I'll direct Your Honor to -- this is April 30 of 2012, page 36 of Mrs. Young's testimony.

Question by Mr. Higdon: "And what were those concerns, why did you think it might not be legal?

"Answer: I knew there were limits. My husband had always been a fundraiser for John Edwards.

"Limits on what?" Was the question next.

"Answer: How much a person can give for the campaign."

Mr. Higdon said: "Go ahead," after Your Honor ruled on an objection.

The answer continued: I knew what my husband did for a living. He was -- this was the end of the quarter. He was calling people, every person he could for $25, for $50 for the last hundred for them to max out, and I'm taking in $35,000 for his mistress, so I needed clarification, how -- tell me how this is legal."

And then she testified that she got clarification in the following form, this is at page 37.

"My husband went back to Mr. Edwards, and Mr. Edwards returned the phone call, and I heard -- I heard Mr. John Edwards tell me on the phone, he checked with the campaign lawyers, this was not a campaign donation and it was not illegal, and get the money in.

"Question: Were those his exact -- when you say, "get the money in," were those his words?

"Answer: Yes, sir."

"Did you all hang up the phone at that point?

"Answer: Yes, sir. He was very short and very angry."

This is but a sampling of the evidence that in the

government's view, and we believe certainly within that of a reasonable juror to conclude, that in the minds of Mr. and Mrs. Young, what they were doing was against the law. They were doing it notwithstanding their own concerns about it, and in part because of what the defendant told them.

So now what is the second half of that?

Mr. Lowell suggests that the evidence in the record is only that the defendant consulted campaign finance lawyers and told Mr. and Mrs. Young it was legal. The inference that he suggests, the only inference that he suggests the jury can draw from that is, that in fact that occurred, that Mr. Edwards had been told by campaign finance lawyers that it was legal, A; or B, that he truly believed it to be legal.

This dovetails with the last argument Mr. Lowell made concerning the defendant's specific intent and knowledge that what he was doing was against the law.

Our evidence on this score comes from several sources. First, and most directly, Mr. Young testified that Mr. Edwards said to him, that he did not want to know about the payments from Mrs. Mellon so he didn't have to lie about it if he were asked. Later on, he was asked about the arrangements that had been made for Mr. Baron -- correction, specifically, the locations that Mr. Young and Ms. Hunter and the crew were at as they were going around the country,

and Mr. Young testified that Mr. Edwards told him he didn't want to know where they were so he didn't have to lie about that in case he has to be sworn in as attorney general.

Actually, the first example in the transcripts was at page 69 on April the 24th.

"Question: Did you tell Mr. Edwards that you were going to Aspen after you left the Western District?

"No, sir.

"Why not?

"Mr. Edwards told us that he did not want to know where we were.

"Question: Did he say why he didn't want to know where you were?

"Answer: He said he didn't want to have to lie if he was asked."

Later at page four on April the 24th, when I was asking Mr. Young about whether he communicated the fact of having received checks from Mrs. Mellon, Your Honor, may recall that Mr. Young testified that he talked about it with Mr. Edwards, usually in some type of code.

I said give, us an example. He said, I would say, "We just received something important to what we're working on, you need to call Ms. Mellon." Now, it's important to remember the context of these conversations, Judge. This is a one-on-one conversation between Mr. Young and Mr. Edwards.

There is no reason to believe that anybody would find out about it and tell Elizabeth Edwards what was going on.

Similarly, one of the voice mails we heard from Mr. Baron included a code word principal. Your Honor may recall that I asked Mr. Young about whether he thought there was any chance that Mrs. Young might have been listening in on the conversation or might later on listen to the voice mail, and he said, no.

I'll come back to the point of that in a minute. When Mr. Young was asked at page 74 why it was that he spoke in code with Mr. Edwards, his answer was:

"Because again, Mr. Edwards said from the beginning, that he wasn't supposed to know about any of this in case he had to be sworn in for attorney general."

Here is the point. We're going to argue to the jury about how they should interpret this evidence, but in the context of Rule 29, in the government's view, a plain inference from this testimony that is within the realm of reason is, that Mr. Edwards knew full well that what he had asked the Youngs to do, vis-a-vis Mrs. Mellon and vis-a-vis, Mr. Baron, was against the law, and so that's the first piece.

Second piece, in the realm of sort of direct evidence, we have the statement from Ms. Button, that Mr. Edwards told her, that the money line that she testified

so much about, needed to come out for legal and practical reasons.

Again, I anticipate having a heated debate in front of the jury about what they should infer from that, but for the purposes of Rule 29, the question is, is it a reasonable inference to conclude from that, that the defendant knew what he had done was against the law, and we believe that it is.

Last in the realm of affirmative evidence, or I should say third, excuse me, there has been plenty of testimony about baseline background knowledge and familiarity with campaign finance laws that the defendant had.

Now, I want to be clear about the point of this. Is the point, we're not suggesting to Your Honor that there is evidence in the record that Mr. Edwards was advised about the specific statutory scheme that's involved here, or the existence of that provision of the Code of Federal Regulations? Not what we're suggesting. It's also not what is required. The point of the evidence that the defense indeed in opening statement said they weren't going to contest, namely that the defendant knew about the limits is that, number one, this is an experienced politician. He didn't just dropout of the sky in '07 and into a world of campaign finance law that he knew nothing about.

The point of that evidence was just to establish that there is a baseline understanding of generally what the rules are; when it comes to contributions from individuals there is a limit and so forth. So that evidence, in our view, is a piece, is a piece of the puzzle in establishing the defendant's wilfulness on that score.

Finally, and maybe most importantly, as we highlighted in our opening statement, the series of false exculpatory statements by the defendant, when the evidence in front of the jury plainly showed those denials to be false, is evidence of consciousness of guilt, and there are several cases to that effect. We may have more discussion about this at the charge conference, but I'll point out at least one for you now.

This *United States versus McDougald*. It is 650 F. 2nd. 532. It is a Fourth Circuit case from 1981, and among other things, it stands for --

THE COURT: 650 F. 2nd --

MR. HARBACH: 650 Fed. 2d. 532. That's a 1981 case, and it is a pretty short opinion and just states pretty matter-of-factly, that a district court in that case properly gave an instruction from which a jury could infer consciousness of guilt by virtue of a false exculpatory statement that the defendant made.

In that vain, I'll also direct Your Honor to just

a couple of other cases. One is an unpublished opinion, *923 Fed. 2d. 849, United States versus Copeland.* It is 1991. The reason I bring that to Your Honor's attention is just to illustrate the point that the false exculpatory statement need not be made to law enforcement. Indeed the *Copeland* opinion is an example, I believe, where the false exculpatory statements were made to the defendant's neighbors. There is another example of that from the Second Circuit, *United States versus Tracy, 639 F. 3d. 32*, and the false exculpatory statements there were made to news reporters.

So, to come back to my point a moment ago. The evidence of the false exculpatory -- I have trouble with that word -- false denials in this case are, obviously, the statement -- most obviously the statement by Mr. Edwards in the SUV on August 18 of '08 to Mr. Young, "I didn't know anything about those checks," when in the government's view, the evidence plainly shows that he did.

The second example of that is, the evidence we heard from multiple sources of the statement that the defendant made, I believe, at Mrs. Mellon's home also in August 2008, when he said that he didn't know anything about the checks that Mrs. Mellon had been sending for the furniture business.

The third and most obvious example of that is the

Nightline interview in August 2008.

Mr. Lowell made a point indicating there that there was no investigation underway when some of those statements were made, and indeed that is -- in a way, that is precisely the point, that there was no investigation underway, and yet the defendant still felt it necessary to make these statements, in the government's view, demonstrates that he knew that the things that he had done and that he had asked and counseled the Youngs to do were against the law, long before an investigation initiated.

I'll also point out in connection with this, there was some argument from Mr. Lowell a moment ago, about the lack of evidence that the defendant knew about certain facts, not about the illegality of what was going on, but about certain important facts, namely the Mellon payments and the Baron payments and so forth.

As to the latter, Your Honor has already pointed out some of the best evidence that Mr. Edwards knew about what Mr. Baron was doing in terms of flying the Youngs and Ms. Hunter around and that came in the form of the airplane conversation that Mr. Davis testified about. In our view, it is also significant to note that Mr. Edwards' reaction to that conversation was, essentially, no reaction at all. He said nothing. One would think that in that situation, if he did not know what was going on, he would have said something

about it, but the evidence is, that he said nothing.

Also in terms of the defendant's knowledge about the facts of what was going on, this was a small piece, but Your Honor may remember that as to at least one of the Bunny Mellon checks, Mr. Young testified that he did talk to the defendant about it in specific detail, and it concerned whether or not -- I believe it was an antique Charleston table, could cost a hundred thousand dollars. Mr. Young indicated that he had that discussion with Mr. Edwards and Mr. Edwards said, that indeed it could. So that's a small piece of specific knowledge that the defendant knew about Mrs. Mellon's checks.

Furthermore, that phone record evidence that was admitted yesterday, although there was not summary chart of it among the phone records that were admitted on the disk through Special Agent Stacy, are the phone records for two phones, both of which were purchased by Ms. Hunter. One is the 4774 phone. One is the 7944 phone. We believe the evidence will show that there was a significant amount of contact between those two phones throughout a lot of the escapade that was involved here.

In addition to that, one of the summary exhibits that was presented to the jury yesterday, is phone records of the 4118 number, which was the number for Ms. Hunter, which by summation, we will be able to argue to the jury,

showed a significant amount of contact, again, in the December to January time frame. We're talking about several significant lengthy phone calls between Mr. Edwards and Ms. Hunter, and, again, that evidence doesn't standalone, but as part of the picture, we think it is certainly arguable to the jury that among the things that were discussed in these lengthy -- I mean, we're talking about 45, 50 minute phone calls, that it was discussed, you know, where these people were, the fact that Mr. Baron was involved, and so forth.

I want to be clear here, that were we in a world that that was the only evidence the government had, probably wouldn't be plausible for us to make that argument, but in light of other circumstances, we will be making that argument, and we think it is part of the picture.

Related to what I said a moment ago about false exculpatories, with respect to factual knowledge about what was going on, we also believe that there was some conscious avoidance by Mr. Edwards. The best evidence of that are the two statements that I led off with, the statement by Mr. Edwards to Mr. Young that he did not want to know the details so he wouldn't have to lie about it.

Now, this is another point where I feel quite confident that when we get in front of the jury, the defense may well and should argue that the defendant's motive there

was that he wouldn't have to lie to Mrs. Edwards, but we think that at least from the standpoint of a reasonable juror, the other inference is equally plausible, that Mr. Edwards didn't want to lie about it because he knew it was against the law so, therefore, he didn't want to know about certain facts.

So, I think in a roundabout way, I've covered the -- both knowledge of the facts issue and the knowledge of illegality.

How much time have I taken, Judge?

THE COURT: Twenty minutes. That's okay. I'm going to give Mr. Lowell plenty of rebuttal time. You know, let's just take a short recess. We'll take a ten minute cease.

(Recess taken from 10:50 a.m. to 11:05.)

THE COURT: All right. Go ahead.

MR. HARBACH: Thank you. I'll try to be more efficient with the remainder of my remarks.

The first thing I would like to point out is a couple of additional little pieces of evidence concerning the defendant's knowledge that I was reminded of over the break.

One was, following the flight out of North Carolina, the testimony from Mr. Toben that Mr. Edwards called him to thank him for what he had done. Plainly an

inference from that that Mr. Edwards knew what was going on. And then also, of course Ms. Button's testimony that Mrs. Edwards told her that he had known all along what Mr. Baron was doing, is also evidence of knowledge.

Now, I should also point out, I think Your Honor knows this, but I'll point out, that what I've been discussing to this point concerning knowledge of the law, knowledge of the facts is a topic that applies to all the charges in the case. I didn't mean to suggest that it only concerns the conspiracy count, of course not.

Returning back to conspiracy for the moment, I want to talk for a little bit about the evidence that the other folks besides Mr. Edwards and Mr. Young knew what they were doing was against the law. I should be clear, that -- no, I'll just continue with that.

Let's talk about Ms. Mellon. First of all, of course there is her note that says, "It is a way to help our friend without government restrictions."

Second of all, there is evidence that Mr. Edwards talked to Ms. Mellon and told Mr. Young that she was good to go, and after that, Mr. Young spoke to Ms. Mellon, and I think every one agrees, it was Ms. Mellon who communicated to Mr. Young, that she wanted the checks to come in a certain way so that Mr. Forger wouldn't know about them.

I don't know mean to suggest that it is critical

to our case, or that we may not even argue that there is an inference there that it was in fact Mr. Edwards who came up with the way that the checks were to flow, but that is really beside the point for present purposes.

The fact that even assuming it was Mrs. Mellon herself who came with up with the way the checks were going to flow all on her own, that indeed is evidence that she knew what she was doing wasn't proper. This is especially so, in light of the evidence that came in through Mr. Forger and Mr. Huffman, that she plainly knew what the legal limits were and the maximums that she was allowed to contribute to the campaign.

As far as her statement to Mr. Forger that they were not contributions, I don't think I need to remind the court about who Mr. Forger is and the force of his personality. As Mr. Lowell recounted it, Mr. Forger stated to her, These cannot be contributions, followed by which Mrs. Mellon says, Well, they weren't, they were for the senator. We would suggest, that the defense has placed a little too much stock in that exchange and that it far from completes the picture about what Mrs. Mellon's state of mind was. I won't say any more about that because that will be argument to the jury.

With respect to Mr. Baron, there has been plenty of testimony, and indeed some of it elicited on cross, that

not only was Mr. Baron knowledgeable about campaign finance law, but he was conscientious about it, which has a twin role of not only communicating that he was conscientious, of course, but also that he knew about the requirements.

Second, with respect to the nexus between Mr. Edwards, Mr. Baron and Mr. Young, insofar as the conspiracy charge is concerned, you may recall that there was an exchange in Mr. Young's testimony, where he talked about when Mr. Edwards first suggested to him that Mr. Baron become involved. I think that precise line that was used is important in that short exchange.

I'll direct Your Honor to the April 24th transcript, pages 35 to 36. I won't read all of it. Suffice it to say, that Mr. Edwards told Mr. Young, that Mr. Baron was going to arrange for them to fly out of the state. Mr. Edwards instructed Mr. Young to call him about the logistics of leaving, and I'll just flag that we made a point of asking at that stage, that Mr. Young was himself at his home in Chapel Hill when this conversation occurred, and Mr. Edwards was in Iowa.

Further on, when Mr. Young testified about his later conversation with Mr. Baron about the logistics and so forth, I asked him the question. "Did Mr. Baron, in that conversation, appear to understand what the plan was?" And the answer was: "Yes, sir." From which we think the jury

could plainly draw the inference that Mr. Edwards had already spoken with Mr. Baron, thereby providing the nexus among those three individuals about what the plan was.

There is, of course, Mr. Baron's statement on the airplane which we've already spoken about, but I wanted to make one other point on that in reference to Mr. Lowell's argument. He suggested to you, that at that -- that the jury should not take that statement for the reason that we think they should, because at the time Mr. Baron didn't know that the baby was in fact Mr. Edwards'. In our view, that is besides the point.

What is charged in the indictment isn't covering up just the pregnancy, but covering up an affair, and part of the purpose of the Iowa hotel room conversation testimony which occurred in October of '07, is to illustrate that Mr. Baron was plainly aware of not only Ms. Hunter's volatility, but the fact that an affair was going on between them.

Finally, with respect to Mr. Baron, there is the testimony received from Ms. Palmieri, concerning the statement that Mr. Baron issued around the time of the August 8th interview, in which he claimed that he was doing this solely to support two friends, Andrew Young and Rielle Hunter, and that Mr. Edwards knew nothing about it.

We believe that -- well, first of all --

incidentally, Ms. Palmieri, who was there and who knows these folks quite well herself, testified that she didn't believe that. So, we think at minimum, at minimum, that is enough basis to conclude that a reasonable juror could conclude that that statement was false.

THE COURT: Did that actually -- Mr. Baron's statement come in?

MR. HARBACH: It only came in through Ms. Palmieri's memory of what he said, Your Honor.

THE COURT: Okay. I just wasn't remembering.

Go ahead.

MR. HARBACH: The actual text of the statement was not offered into evidence, but Ms. Palmieri testified about the gist of what he said and what her view of that statement was.

THE COURT: Okay.

MR. HARBACH: This is another example of something that is plainly false. Among the phone record evidence that will be admitted is, a series of conversations between Mr. Baron and Mr. Edwards between the July 22nd incident where Mr. Edwards was caught at the Beverly Hilton, and the August 8th interview. So taken in context, especially in light of among other things, Mr. Edwards' representation during the Nightline interview that he had "not talked to Mr. Baron about this," we think that that piece, the

evidence of their numerous conversations in lead-up to the interview, is just more circumstantial evidence that both men knew fore-well what they were doing.

Relatively on the subject of Mr. Baron, you heard from Mr. Lowell about the insignificance of all the evidence that we heard about Mr. Edwards' desire to be vice president or be attorney general and Mr. Baron's motivation in that regard. As I think Your Honor knows, because this has been bandied about before Your Honor for some time, that evidence was offered for one principle purpose, and is to rebut a defense theory that was indeed flagged in opening statement, that the fact that Mr. Baron continued to provide support after suspension of Mr. Edwards' campaign, is evidence that the payments in December and January in the first instance, could not have been contributions, so all the evidence about what happens later in 2008, is essentially in the form of rebuttal evidence to that theory.

THE COURT: Do you want to address the venue issue about the contributions, the contribution counts which are, I guess, Four and Five, concerning Mr. Baron?

MR. HARBACH: Sure.

With respect to Counts Four and Five -- with respect to Count Four, the section to liability, as I know you remember we've argued in the past, is important here, and it is that phone call that I mentioned a moment ago that

sets this whole thing in motion; namely, the phone call to Mr. Young, telling him Fred is going to take care of the arrangements, give him a call and, you know, essentially get out of dodge. That phone call is from Mr. Edwards to Mr. Young while he's in North Carolina.

We've cited Your Honor cases about -- in some of our earlier briefing, about phone calls sufficing to establish venue, and so as far as Count Four is concerned, that is an accessorial act by virtue of the cases talk about phone calls committed in the State of North Carolina in this District.

Furthermore, Mr. Young's actions himself, once he has been caused by the defendant to take those actions under Section 2B 18 U.S.C. 2B, namely getting Ms. Hunter together, gathering the group at his property in Chapel Hill, which is just land at that point, to fly out, are also acts in furtherance of, essentially, you know, accepting or receiving the payment, namely, the arrangements that Mr. Baron had made at the behest of the defendant to get out of the District, so that's Count Four.

With respect to Count Five, that's the '08, the '08 piece. Here, a couple of things. It's essentially the same evidence that I just recounted to Your Honor that supports venue for Count Five. Of course Count Five says 2008, but what is important for the Court to remember, what

we argue that you keep in mind when you think about this is, that the core factual conduct that takes place is seamless.

In other words, it is not as though Mr. Baron makes discrete payments in 2007, it stops, and then all of a sudden he decides to do the same thing in 2008. It is a seamless stream of conduct that happens to straddle the calendar year boundary between '07 and '08. Were it not for the fact that the statute defines legal responsibility by the calendar year, there would be no demarcation in the indictment between Count Four and Count Five, and so because of that, and also for all the reasons that we've already discussed and briefed at length to Your Honor about Continuing Offense Doctrine, in the government's view, the evidence that I've just described to you that substantiates venue on Count Four in the Middle District, does the same with respect to Count Five.

THE COURT: What you are saying is, that the thing that has to happen in '08, is the receipt of $25,000 or more in these contributions. You don't have to have the accessorial act in '08. Is that what you are saying?

MR. HARBACH: Not when it is a continuing offense, and that's why that piece is also important for Count Five.

THE COURT: Okay.

MR. HARBACH: So in our view -- in other words, the call that we have just talked about is the beginning of

the offense. The offense is a continuing one. It continues well into '08. Because of the way the statute is written, we were forced to separate it into two separate counts, but it is essentially a single offense, and so a more succinct way of saying it may be, the stuff that happened in '08, was started, commenced, begun by this phone call that we've talked about, just as much as stuff that happened in '07 was.

So to answer your question a moment ago, the Continuing Offense Doctrine is what links that up for purposes of venue.

THE COURT: Okay.

MR. HARBACH: Does Your Honor want me to address venue on any of the other counts, or should I continue?

THE COURT: That was the one I had the most questions about. Well, actually, Count Six.

MR. HARBACH: Count Six, sure. The filing by the campaign. This is, we think, a pretty simple one. There has been testimony that the campaign was headquartered in Chapel Hill. We think from what all of Ms. Young said about how these things were filed and so forth, the inference is a plain and simple one, that they were filed from the campaign headquarters in Chapel Hill, and in a world where venue must be proven by a preponderance of the evidence, we think that's more than adequate to get over that hurdle.

I will also add -- can I stick with Count Six for a moment, not for venue but for substance?

THE COURT: Whatever you want.

MR. HARBACH: Just a brief point on this. Mr. Lowell stated that there was no evidence that Mr. Edwards caused the campaign to do anything, and I just remind Your Honor that what is charged here is a trick, scheme or device to conceal. It is an omission case.

So, when the evidence is, among other things, that the defendant tells a co-conspirator that he doesn't want to know about the payments, again, we think the inference is quite plain, that of course the candidate didn't tell anybody on the campaign about the payments, and so that piece causing the treasurer of the campaign to file reports that didn't contain the relevant information is one that we reach by that pretty simple inference.

Something I haven't spoken about yet that I think I'll conclude with, unless Your Honor has additional questions is, this issue of "the purpose" versus "a purpose." We just filed a brief on this last night. As Mr. Lowell pointed out and as Your Honor pointed out, this has been a subject that's been in debate between the parties for some time.

It is clear that the defendant has put a lot of eggs in this basket, both by the argument you just heard

from Mr. Lowell and, frankly, by opening statement. The government's view is, that that -- that the view that essentially the payments must be paid for the sole purpose of influencing the campaign, which is really the essentialness of the argument that's being made to Your Honor, that that view is not supported by the statute, the case law or commonsense.

Mr. Lowell mentioned or argued by analogy two national security cases involving the language, with the intent. Well, in the government's view, the cases we brought to your attention, the 1959 cases, the violent crime in aid of racketeering cases, involve a statute that contains the identical language. There, the issue is whether the defendant commits a violent crime for the purpose of, identical language, gaining entrance to the racketeering enterprise.

In those cases, defendants I won't say routinely, but not uncommonly, make the argument, that the government must prove it was for the sole or primary purpose of, the defendant robbed a liquor store or beat somebody up or whatever the violent crime in aid of racketeering is. Courts routinely reject that argument. The Fourth Circuit has done so in the *Fiel* case, 35 F. 3d. 997. For the record, it is F-I-E-L. It is a Fourth Circuit case from 1994.

There is another series of cases that are in the briefing filed last night, as well as the briefing we filed in the context of the motions to dismiss that make it clear, that for the purpose of in that statutory scheme, does not require that the government prove that it was the sole purpose or even the primary purpose for the defendant's conduct.

We think that those cases, which involve identical statutory language where the defendant is making the identical argument that Edwards makes here, should be more persuasive to the Court than the cases that Mr. Lowell brought to your attention.

Relatedly, his discussion of the *Leake* case, which again, I won't belabor here because we've argued about it at length, the *Leake* case is not the same language. The *Leake* case involved a phrase, the purpose of which, not for the purpose of, and among other things, just as a matter of simple English, it makes sense that if the legislature is going to say, the purpose of which as opposed to, a purpose of which, the use of the word "the" should be imbued with some meaning. It makes sense. The same isn't true of the phrase, for the purpose of, because for a purpose of, offends standard English construction, as the cases I pointed out to Your Honor illustrate.

I don't want to spend too much more time on this,

because at some level this is plainly an argument we're going to have at the charge conference, but suffice it to say, that the government's view is, that for the purpose of which plainly does not mean for the sole purpose of, or for even the principle purpose of.

More to the point, for purposes of Rule 29, only if they were right, even if sole purpose was the standard, which I mean, it's not, could a rationale juror conclude, that the sole purpose for which Mrs. Mellon made the payments to Mr. Edwards that she did, was to influence his election and to be president of the United States, is that a possible inference that a rationale juror could make on this record. In our view, absolutely.

Furthermore, the same with Mr. Baron, for all the reasons that we've talked about, could a rationale juror conclude that Mr. Baron expended these hundreds of thousands of dollars for the purpose of influencing Mr. Edwards' election to be president, for the sole purpose of doing that? Is that a plausible inference for the jury, even in a world where they're right, which we think they are not, the answer is yes.

I think for Rule 29 purposes, Your Honor need not necessarily resolve that issue, though you certainly can. You're going to have to resolve it soon before we get to the jury charge in this case, but, again, at this stage, we

think that either way that argument fails.

Lastly, the issue of the *Chestnut* issue. These payments that were made by Mrs. Mellon and then deposited after Mr. Edwards suspended his campaign. First of all, the evidence is that the checks were written well before January 30th, and as I've argued before as to the question of whether the checks were -- whether the checks were written for the purpose of influencing an election for federal office, the answer to that question as of the time the checks were written, that just makes commonsense.

The question then becomes, not whether they are contributions, because they're contributions if they are made for the purpose of influencing an election. Mr. Lowell points to *Chestnut* and says, well, they aren't deposited until after January 30th, therefore, they are not contributions. That conflates two issues in the government's view.

As to the first one, could they be made for the purpose of influencing an election? Ask the question at the time the checks are written, and as an aside, remember that with respect to Mrs. Mellon, after January 30th, no more checks. No more checks are written by Mrs. Mellon. That's one little aspect of this in the government's view, substantiates the point that she was doing it for the purpose of influencing the election.

Now, Your Honor knows the quirky details about why these check weren't deposited until later in this case. There has been testimony by Mrs. Young, from the FEC, that the campaign continues after the candidate suspends his campaign, that the campaign -- and she did not testify to this to be clear, but I believe the law is, that a campaign can continue to receive contributions even after a candidate suspends his campaign. I believe it is for limited purposes, among which is to retire debt, I believe.

So the point then comes down to this, because of what I just said, it is not the case that any money that comes in after a candidate suspends his campaign, is automatically not contributions if it's deposited after that date. I didn't say that very clearly, but I think Your Honor gets the point.

The question Your Honor has to resolve is, whether it is appropriate to impose criminal liabilities on Mr. Edwards, by virtue of the fact that the checks -- I'm sorry, notwithstanding the fact that the checks are deposited after he suspends his campaign, and so here is the problem: If Your Honor were to so conclude, we think that an untenable and unreasonable result would follow; namely, that a campaign, even in the classic sense, could avoid application of the Federal Election Campaign Act, by simply delaying deposit of the checks until after the candidate

suspends his campaign.

Say a campaign has an enormous amount of debt. They get a contribution from a donor for a hundred thousand dollars. and then all they have to do is wait until the campaign -- the candidate suspends, deposit the check, and then it is not a contribution.

In the Government's view respectfully, that wouldn't make much sense. Again, we remind the Court, we have to prove wilfulness, and so it is not the case that we have to do anything, we have to prove wilfulness. We have to prove the defendant knew about the checks, the defendant knew the money was coming in, and that he knew his conduct was against the law. We have to do all of that, regardless of when the checks were deposited.

So in the Government's view, there isn't any Constitutional issue that is implicated by holding the defendant criminally liable for those checks that are deposited after he suspends his campaign.

Can I please have a moment, Judge?

THE COURT: All right.

MR. HARBACH: Does Your Honor have any other questions for me? If not, I'll sit down.

THE COURT: No. Thank you.

Mr. Lowell, I'll give you some rebuttal time.

MR. LOWELL: I'm just going to do it in the order,

Judge, because that was the way I was writing down my notes.

THE COURT: That's fine.

MR. LOWELL: Mr. Harbach answered my argument by going back to the standard and talking about the credibility of Mr. Young, and I wanted to make that clear. I understand that part of the law.

What I'm saying to you is, then take them at their word, if you take them at their word, then you credit the things that he says, and many of the things that he says are what I pointed out to indicate that there could not be an illegal agreement between him and Mr. Edwards, unless you do what Mr. Harbach just said, which is to allow it to be a spoken statement with its obvious meaning of consultation with experts and lawyers and saying it's fine, but meaning that it meant the opposite to Mr. Edwards, once spoken.

Let's say you decided that it meant the opposite to Mr. Edwards when spoken, then it means that Mr. Young, went on and agreed that it was an illegal purpose, nevertheless, notwithstanding his actual words that said he understood that Mr. Edwards knew the law better than he did.

I'm not asking you to throw out this case under Rule 29 because Andrew Young will go down in history as the worst liar ever to take an oath in a federal court. That is an argument for the jury, but if you want to give the evidence the government says it is supposed to have, then

they can't have it both ways, and that's what I was pointing out.

As to the issue of conspiracy and knowledge, because Mr. Harbach sort of did that all in one group, he pointed out the statements that Mr. Young made, and they are only out of Mr. Young's mouth, so I get that, but when Mr. Young makes a statement that says that Mr. Edwards didn't want to know something in case he was, "sworn in as attorney general," then again, you take that for what it says. That's not, he didn't want to know it in case somebody asked him while he was running for president of the United States. It's not asking him not to know something because he was still in the candidacy of running for president; at best, attorney general would have occurred at the time Mr. Obama was elected in November and started choosing in December and the swearing-in would occur sometime in January, so whether that is for the purpose of influencing an election, hardly can be the case if you accept Mr. Young's statement as to why Mr. Edwards was purportedly, and I understand we have to accept that statement momentarily for its truth, as illogical as it may be. So assuming you take it for its truth, then it only scores to underscore the issue that it wasn't an agreement for violating a law of a candidacy. It had to be something else.

When I spoke, I wasn't ever saying for Rule 29, that the only inference you can make from something such as that statement was one or another, but even at the Rule 29 standard, Judge, you still need to figure out what a reasonable juror could find.

Now, that's not necessarily on the issue of credibility, but it is the issue of weight. So every time that the government comes up and says, it could be this, Your Honor, and it is also a reasonable inference to that, whatever that formula is, it is not proof beyond a reasonable doubt that a reasonable juror could find.

I want to make that point of the many times Mr. Harbach said that I was arguing the only inference. Indeed, the more that Mr. Harbach argues that there are equally plausible inferences, the more that he is showing that there could never be proof beyond a reasonable doubt.

THE COURT: That sounds like you're saying circumstantial evidence is insufficient to prove guilt beyond a reasonable doubt, which is inconsistent with my understanding of the law.

MR. LOWELL: If I said --

THE COURT: That sounds like what you are saying.

MR. LOWELL: So on the scales of justice, Your Honor, if the preponderance of the evidence is this and proof beyond a reasonable doubt is that, when the government

concedes that there are equal possibilities, we're there. That's all I'm saying. You could prove equal possibilities with direct evidence. You could have witness one take the stand as credibly as possible and say I was there when Mr. Edwards said to Mrs. Mellon, I want this to be a campaign contribution. You could have a credible witness get on the stand with no impeachment of either and say, I was in the same conversation, and it didn't happen. And so consequently in argument, you would obviously say that at that point you have equal testimony. That's direct testimony, but it is still direct testimony that makes the scales of justice equal.

What I'm not talking about is direct or circumstantial. I'm talking about the weight of the evidence. If the government of the United States concedes that things are only possibilities, things are possible inferences, that there were equally proper or improper inferences from what somebody says or what its conclusion is, that's the government of the United States deciding that there is not proof beyond a reasonable doubt. That is what I'm saying. It is not a question of direct or circumstantial. It is the weight of the evidence that a reasonable juror has to find proof beyond a reasonable doubt from. That's all I'm saying. It is not -- it could happen directly, circumstantially or whatever.

I just want this record to be very clear, that what my argument on Rule 29 is, is not that there is only one inference. There could be many inferences, but the more inferences that exist, the more likely that there is not one for which a reasonable juror could find reasonable doubt. Maybe I said that better. Maybe I didn't, but I said it as well as I could.

THE COURT: I understand. Thank you.

MR. LOWELL: As to consciousness of fault arguments and the cases, that is really something we'll argue at some other point, but just for now, I want to say that the context, what the -- what Mr. Harbach has done before trial, and he's done again today is, that he'll take a plausible and very logical and also, what might otherwise be a good argument from a context, and shifting it to a new realm, that realm being the FECA law. For example, those cases on consciousness of fault don't apply in a federal election, securities and exchange technical IRS context.

In order to state that you are avoiding something, you need to know what it is you are avoiding, and in a world of technical violations we will argue, and I don't know why I want to do this now, we will ask you to consider in the Rule 29 standard, what it is that you are avoiding, so I want to get to the exculpatory -- the false exculpatory points that Mr. Harbach spent some time on.

This is an example of how he makes a point that sounds convincing to me until I then remember what it is he is saying. So, yes, Mr. Edwards is making 18,267 falsely exculpatory statements, but he's making 18,267 false exculpatory statements about whether he's having an affair, whether he is the father of the child, whether or not he is going to confront that fact to his family or Mrs. Edwards, and so it sounds right, that we would be in the world of all of those cases where people say it, but those cases are about when somebody says, there is a dead body on the ground, did you shoot them? I didn't shoot them. There is this bag of money in your hand, did you steal it? I didn't steal it. There is a trade that you made on this insider day of information, did you make that trade? I didn't make it.

That's where you take a series of cases on the law that sound right, and shift it into a context, and that's where we're in the quagmire.

No one is going to deny that Mr. Edwards lied and lied and lied. And then the government will argue, see, he lied. And I'll say, yes, he lied, and then we're at the point about what did he lie about, and then you get to the three or four statements about whether he knew about Mrs. Mellon's checks. That could be something that would be a false exculpatory statement, not his affair, but that is

something we have testimony about.

Now, Mr. Young says he did know and many other people says he didn't, so that may not be something that is in the balance, something you decide on Rule 29, but when the government asks you to thread through whether there can be a false exculpatory or conscious avoidance instruction, for example, we have to put it in the context of what he is saying he was falsely exculpating himself about.

When he says that there are tons of calls and there are likely inferences that could be made -- well, for example, the one he uses is the frequency and length of the calls between him and Ms. Hunter in December, and he asked, so couldn't that be about more than, weren't you just found in the parking lot with a big stomach hanging out and everybody, including my wife is going to find out that you are pregnant and are going to assume that I'm the father, what is that going to be? It could be many things, but it could also be the most obvious. Again, for purposes of Rule 29, I want to put that in context.

Mr. Edwards certainly knew that Ms. Hunter was not in North Carolina after The National Enquirer was coming out. Definitely knew that. He definitely knew that she was on a plane, and he definitely knew that Mr. Baron had made the arrangements for that. No one is denying that he knew that, but there are some other elements that the government

has not provided any evidence about, which is, how does he know that it's in the context of the campaign laws? How does he have a specific intent to violate that? How does he know how much is being spent and by whom? Why is that something that naturally flows from the inference, even from the plane ride with Mr. Davis?

It is not simply enough to say that he knew, and that's what Mr. Harbach keeps saying. He obviously knew this and he knew that. The question is, what did he know from the evidence, and that's what I want to keep pointing out, and I just did. It is like him saying that Ms. Button said he knew all along. What did he know all along? He knew all along that Mr. Baron was the person that got them out of North Carolina, no contest. He knew all along that Ms. Hunter was on the road, no contest. He knew that they were staying at Mr. Baron's house in Colorado, no contest. But, that doesn't mean he knew that everybody was plotting for this to be a campaign purpose or knew that was an amount being spent or knew that Mr. Baron was being told by Mr. Young, that Mr. Young was the father.

THE COURT: Can I ask you about one part of that. You're saying knew of the amount being spent. Are you saying that he -- that the government has to prove he knew that $14,000 was spent on this hotel in Ft. Lauderdale and whatever it was, $26,000 was spent on the plane?

MR. LOWELL: In terms of misdemeanor violation of the FEC into a felony is the knowledge of $25,000 --

THE COURT: What turns it into a felony is the spending of it, or the contribution being in excess of that? That's what I'm asking you, are you saying the government has to prove knowledge?

MR. LOWELL: I think they do, otherwise -- you always squint at me and I know I'm not doing a good enough job when --

THE COURT: That just means I'm thinking.

MR. LOWELL: In my household that means, I'm not getting you.

THE COURT: It means I'm concentrating.

MR. LOWELL: Let me come back to that. Let's then use a hypothetical you would have cast to me. What if Mr. Edwards had had that conversation with Mrs. Mellon on the day that you asked me he could of had, and he said, Mrs. Mellon, I want a campaign contribution and I want a campaign contribution of $1,000, I want you to pay it to Mr. Huffman, and let's say Mr. Huffman had already made a 1,000-dollar contribution, so together it would still be under the limit, but it was a conduit or some kind of reimbursement so what you prove is, he knowingly engaged in a violation, but the government could only charge it as a misdemeanor.

The government has the burden beyond a reasonable doubt, if they are going to make this into a felony, to do all the elements, including his knowledge of the law, and what he was asking either Mrs. Mellon or Mr. Baron to do and have an ability to say that there was a natural inference that would be the amount to make it a felony. So, yes, Ma'am, I am saying that they have to show that.

THE COURT: Okay. I don't mean to be disagreeing with you, I just want to be sure I understand what you are saying.

MR. LOWELL: I thought that was the case, and as I said, I was going to take a better shot at it.

Now I want to go to and -- I just did go to the hypothetical about what you and I exchanged on the Mrs. Mellon conversation. I'm going to come back to that in a second. I know I did not say it well, because I actually think it is very hard to say it well, that the third category of contributions on the irrespective of the campaign. I'm going to take one more shot at it, and then I'm going to pass.

There was no existing obligation for Mr. Edwards to pay Ms. Hunter a dollar during the affair, right? I mean, you might be a nice guy. You might, to be somebody who was supporting your mistress, but there is no obligation to do so. That might be different in February when Quinn

was born, but at the point at which that is occurring, there is no obligation. So when you look at the law that says does the expense exist irrespective of the campaign, by definition you got to look somewhere and there was no obligation for him to do so.

What the Government's theory is, that they took it on as an obligation because there was a campaign, that is to say, that if he was taking money out of his own pocket and getting it to Ms. Hunter, he was doing it not because he had a legal obligation to do that. There was no palimony suit. There was no obligation under North Carolina law. He was doing it because of the campaign, is their theory. So what they are saying is, they created the obligation not irrespective of the campaign because there wasn't an obligation other than the campaign. Now I've said it better.

Mr. Harbach addressed the issue of the other people and Mrs. Mellon. I'm not going to belabor that, because that does turn into jury argument, although I will point out, that it is more than what Mr. Forger said to Ms. Mellon with his force of personality and his being a lawyer.

Remember, this all starts with a conversation Mr. Young says that we want to credit with him, that he said way before Mr. Forger, way back when in June of 2007, Andrew

Young says to Mrs. Mellon, let's do this, blah-blah-blah. Then they agree, this is not a campaign purpose, it is for a personal need. The conversation with Forger occurs seven months later. It doesn't happen that we are putting our notion of how Mrs. Mellon can't be a co-conspirator on this issue because of the Forger conversation, it is because of the original Andrew Young conversation.

I already expressed what I have to say about what the language and knowledge of Mr. Baron was as to airplane ride, so I won't belabor that.

I want to spend a couple of moments on venue, and then proceed from there. As it turns out, the Mrs. Mellon check, the second -- the check that I talked to you about in Count Three, is also one that bleeds into 2008. It is not just Mr. Baron's Count Four and Count Five, although you asked me to address it, and you asked Mr. Harbach to address it.

I just want to remind everyone, that there was that issue of how that check ended up where it ended up and when it ended up and it being something that didn't happen until February of 2008 after the campaign.

On that, I want to explain my reaction to the Continuing Offense Doctrine, and that's how I think the charge conflates conspiracy with the substantive counts. You have no quarrel with me. I understand I'm not going to

win the Rule 29 Count One argument on the basis of lack of venue, because there are overt acts. So when Mr. Harbach says that a phone call was made from Mr. Edwards in Iowa to Mr. Young in his house in Chapel Hill, that's what creates an overt act for the conspiracy, but that's not the same as the substantive offense of the contribution.

Here is how I can explain it. If you and I and some other people make an agreement to murder somebody and we talk about that day one in North Carolina, and day two in New Jersey and day three in some other state and on day four we execute the murder in New York, you can't charge me with the murder in North Carolina. You can charge me with conspiracy to plot the murder in any of those states. The act itself, the crime itself, the offense that I just committed, occurred in one place at one time.

What Mr. Harbach wants you to do is have you invent a new crime. He wants you to create a crime called continuing offense of making a campaign contribution, which turns it into a conspiracy under the law.

THE COURT: Well, the Second Circuit appears to apply kind of a conspiracy view when you have aiding and abetting, and I'm using that in the long sense, in committing, you know, committing a crime. You have aiding and abetting and that's the basis for the conviction. They look at the aiding and abetting for the venue as well. I

mean, there is a line of Second Circuit cases they citied --

MR. LOWELL: Yes, I know.

THE COURT: -- from October. I read the briefs from October again yesterday and they are all in there.

MR. LOWELL: Again, I remember that. But again, aiding and abetting as it is applied in the context of one kind of offense, doesn't mean that you take aiding and abetting as a continuing offense in every other context, including in the FECA action.

In other words, it is like Mr. Harbach saying the that words, the purpose, and I'll come to that in just my concluding remarks, means something because it is used in another statute, and he wants to engraft it into the FECA world.

The aiding and abetting cases that was brought to your attention in October, as we responded in October, was in a different context. It doesn't create a Continuing Offense Doctrine, and Mr. Harbach again just articulated that their theory is a continuing offense, because you aggregate contributions to get them into the range of a felony at the $25,000 level per year, but every contribution is itself an event and could be charged as an individual event. If I was exceeding my contributions by five times in a particular year, that's five separate offenses. It is not one count of five different overt acts. That's what the

conspiracy is.

Aiding and abetting in a context of one kind of law offense doesn't make it the same here, and so I just want, as you consider our arguments, to consider that because somebody argues that we can have a Continuing Offense Doctrine, doesn't mean it is so. Some court will have had to have found that applicable in the context of the federal election. All I'm saying there, Judge, I said it again, but I think I want to say it on this point.

We could do this. You and I and Mr. Harbach could get at a conference table and we could create that continuing offense theory for the FECA. We could change the definition of the purpose for the FECA. We could do all of that, but then we would be the United States Congress, and a criminal case that's going for the first time before a jury is not the time to do that.

I'll turn briefly to Count Six, and then to the end. On Count Six, your questions to Mr. Harbach started with venue and then he asked -- he made another point about it in terms of the scheme, trick and device. He says that the campaign is in the Middle District because it was in Chapel Hill, and that's true. From that, he wants to claim that the inference is, that all reports were from there. I don't remember where that comes from, really, I really don't. I mean, Mr. chambers is in Charlotte, so it is not

because Mr. Chambers is doing his work in the Middle District. Ms. Haggard is in Washington, D.C. It is not as if she's doing her work there, and so, it is not a natural piece of evidence to fill in that just because a report exists for a campaign whose headquarters is in Chapel Hill, ergo for purposes of Count Six venue there is enough evidence from which a reasonable trier of fact could find that the venue would lie in the Middle District, solely because the office was there.

There were campaign offices in New York. There were campaign offices in many, many states. That would mean that because the campaign office existed, venue would lie anywhere, without the government showing that the reports generated from there. They were put together there. They were sent from there. They had the ability to call a witness to make that clear, they didn't it, their choice, hole in the evidence, not proof from which a trier of fact could find proof beyond a reasonable doubt, period.

As to the trick, artifice and device, all I can say is, again, the person who would be able to say that this was not something that she knew when she put together the forms, was not called so, therefore, they want the inference to be that the person responsible for having put together the forms was lied to or tricked or deceived by omission. There is no evidence to say that that occurred.

As to *Chestnut*, I don't have much more to say, except that when Mr. Harbach says that Mrs. Mellon sent the check on a date or Mr. Huffman sent it on a date or Mr. Baron created an event on a date, what he is then conflated, to use his phrase, is whether it is they who are being charged for making an illegal campaign contribution or Mr. Edwards being charged for receiving, and what they would like to do is go like this. And it doesn't work. (Indicating.) There are two separate charges under the law. One charges the person who made the excessive contribution, and then when they made it would matter. The other one charged in this case is when the campaign or Mr. Edwards received it, and those are two separate offenses with two separate dates, and the only way they get over that hole in the case is to ask you to ignore the legal difference.

As to the purpose. All I want to say about that is, we are on new ground. We are now trying to create for the first time a construct by which the jury will decide whether this was a contribution, and the one thing that Mr. Harbach left out in his saying that the identical language of the purpose is found in statutes of racketeering and organized crime, is exactly that.

We are in the First Amendment area. We are in the area that we tread incredibly softly when we regulate

political speech and free speech, and the idea that you will expand the definition of the purpose beyond Congress' writing it and the FEC putting it in each of the exhibits we saw on the record, means that Mr. Harbach would have you take a phrase that's -- nobody has the right to be a racketeer. Nobody has the right to be a mobster, but everybody has the right to free speech, and everybody has the right especially to make political speech and it is because of that, that the struggle has occurred to make the purpose mean the purpose in context of this law.

Again, I know the government says we have all of these other cases, but we have *Leake*, and what they do with *Leake* is, they want to be able, as good lawyers can do, to distinguish it. You know, it wasn't under this part of the campaign law, it was under that part of the campaign law, so pay no attention to it. Instead engraft the racketeering law, which makes more sense than the only case we have in the country that actually tries to explain the purpose, and that's in the FEC context where the Fourth Circuit was very much cognizant of the First Amendment issues involved, and because of that said, the purpose means, unambiguously related to the campaign. That is our best compass point.

At the very most, we all ought to embrace the concepts of the purpose and figure out how that is going to be understood and not change the language because of its

context, especially as you were skeptical in pretrial proceedings, Your Honor, when you combine that with the subjective intent of the donor language that the government wants, what you are basically being asked to do by the government, and let's be clear, from my perspective, what they are asking for is a directed verdict. If you were to instruct this jury that if you find that any person on the planet involved; Mellon, Young, Cheri Young, John Edwards, Rielle Hunter had in their mind the possible, a purpose, that this might help the campaign, you can convict Mr. Edwards, as opposed to saying you have to find the purpose, and one is a directed verdict, the other is what the law and the *Leake* case says.

So, I believe the specific intent aspects of this case wipe out all six counts, and I think they do. I think they do on Rule 29. I wouldn't be spending so much time and so much of my breath if I didn't think so.

On the other hand, even if you disagree with me, if you take each of those counts with their flaws separately, they're venue flaws, they're *Chestnut* flaws and some of the others that you can't get over, including in Count Six, all six counts cannot get to the jury under Rule 29, and we ask you to dismiss them. Thank you.

THE COURT: Well, I think I have learned my lesson about explaining things, because I don't always throw that

back in my face when I learn more, but I did go back yesterday and reread some of the briefs from the motion to dismiss phase, and they were very helpful at this stage, you know, because we have this evidence. I went back and I looked at them, and the closest questions in my mind have to do with some of these venue issues, but the government has pointed out, accurately, that the standard on that is preponderance of the evidence, and otherwise I'm satisfied that they presented sufficient evidence to get to the jury on all six of these claims, so I'm going to deny the Rule 29 motion. We will let the jury decide.

I gave the government an extension on their jury instructions. I don't know if the defense wants any time to file. I'll say, I haven't looked at any of what the defense filed and what the government filed yet, because I've been kind of focused on this aspect of it, but I intend to turn my attention to that shortly.

I'll be glad to give the defense a little extra time if you need to, to respond in writing to whatever their special -- I mean, as I envisioned it initially, it was everything could come in at the same time, but particularly if the defense wants to file anything on the request for an instruction on false exculpatory statements, conscious avoidance, I think conscious avoidance was in the initial instructions.

MR. HARBACH: It was, Your Honor.

THE COURT: I don't remember about the false exculpatory statements, but given the fact that I gave them some leeway, I'll be glad to give you all some, particularly if you have cases you want to cite to me, so if you all want to file anything else on the jury instructions, I'll give you to close of business on Monday.

MR. LOWELL: That would be great, Your Honor.

THE COURT: I will do that. Really what I'm talking about is either an alternative wording on what they requested or preferably case law. That's helpful to me.

We'll start Monday at 9:30. Are you all prepared to say who your witnesses will be on Monday?

MR. LOWELL: No, Ma'am, but we will be at the end of the day or first thing tomorrow, we'll tell the government know, in the same schedule we've been adhering to.

THE COURT: If you will let Ms. Powell know before 5:00 o'clock, because I've been trying to, you know, let the world know as well, who the witnesses are likely to be, and we've been doing it at the close of business, and that's kind of how I said she would do it. So she's in a position to answer any questions that there might be about that.

MR. LOWELL: As soon as we get it together, we'll inform her and the government simultaneously, and then

you'll know as well.

THE COURT: That also helps us with planning purposes, if there are any logistical issues that need to be raised.

Okay. What else can we do productively this morning? Nothing. All right. We'll be in recess until 9:30 Monday morning.

(Court adjourned at 12:00 p.m.)

C E R T I F I C A T E

I, J. CALHOUN, RPR, United States District Court Reporter for the Middle District of North Carolina, DO HEREBY CERTIFY

That the foregoing is a true and correct transcript of the proceedings had in the within-entitled action; that I reported the same to typewriting through the use of Computer-Aided Transcription.

THIS TRANSCRIPT CERTIFICATION IS VOID, IF THE SIGNATURE IS NOT ORIGINALLY SIGNED BY THE COURT REPORTER WHO REPORTED THIS MATTER.

Date: 5-11-12

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