No. 05-1292

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DARRYLL L. BRISTON,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
Crim. No. 04-58 (Bloch, J.)

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment on January 27, 2005. App. 15a-16a (docket sheet).[1] Defendant

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[1] This brief uses the following abbreviations: "App. __" for the page number of appellant's appendix, which is titled "Reproduced Record"; "Supp. App. __" for the page number of appellee's supplemental appendix; "Br. __" for the page number of appellant's opening brief; and "GX __" for the number of the government's trial exhibit. The "App. __" citations are to the trial transcripts unless otherwise apparent from the context or unless otherwise indicated by a parenthetical description.

timely filed his notice of appeal on January 26, 2005. App. 15a (docket sheet). See Fed. R. App. P. 4(b)(2). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the evidence was sufficient to prove that the value of the property that defendant embezzled, stole, or otherwise converted to his own use was at least $5,000, as required by 18 U.S.C. 666(a)(1)(A)(i).

This issue was not properly preserved below. See pp. 18-19 & n.4, *infra*.

2. Whether the funds that the Department of Justice provides to state and local law enforcement agencies under its Equitable Sharing Program are "benefits" within the meaning of 18 U.S.C. 666(b).

Appellant raised this issue below. App. 698-705 (pretrial motion). The district court's ruling appears at App. 47a-51a (hearing transcript).

3. Whether Rankin Borough received "benefits" within the meaning of 18 U.S.C. 666(b) when Community Development Block Grants from the Department of Housing and Urban Development were used to pay for public works projects approved by the Borough.

Appellant raised this issue below. App. 735a-739a (supplemental pretrial motion). The district court's ruling appears at App. 474a-475a.

4. Whether the district court erred by instructing the jury as a matter of law that payments received under the Department of Justice's Equitable Sharing Program are "benefits" for purposes of 18 U.S.C. 666.

Appellant objected to the jury instruction (App. 585a), and the district court overruled the objection at App. 585a-586a.

5. Whether the district court abused its discretion in excluding testimony concerning accusations against Rankin Borough's mayor where such matters had little, if any, relevance to the charges against Briston and introducing them would have resulted in a mini-trial about alleged criminal activity by a non-party, thus creating a substantial risk of juror confusion.

Appellant raised this issue below. App. 503a-508a. The district court's ruling appears at App. 508a-509a.

6. Whether the district court abused its discretion in instructing the jury on Count 1 by referring to the alleged victim as "a person" rather than identifying her by name.

Appellant objected to the jury instruction, and the district court overruled the objection at App. 585a.

STATEMENT OF RELATED CASES

This case has not previously been before this Court. The United States is not aware of any related case or proceeding that is either completed, pending, or about to be presented before this Court or any other court or agency.

STATEMENT OF THE CASE

On March 17, 2004, a federal grand jury returned a two-count indictment against Darryll L. Briston charging him with violating 18 U.S.C. 242 and 666(a)(1)(A) while serving as police chief of Rankin Borough, Pennsylvania. App. 7a (docket sheet), 27a-30a (indictment). The United States filed a superseding indictment on April 14, 2004, adding two obstruction-of-justice charges against Briston. App. 33a-38a; App. 7a (docket sheet). On July 29, 2004, the government filed a second superseding indictment against Briston adding allegations concerning Rankin Borough's receipt of federal benefits, as well as sentencing allegations. App. 39a, 42a; App. 11a (docket sheet).

The second superseding indictment contained four counts. App. 39a-45a. Count 1 charged that Briston, while acting under color of law, stole or otherwise converted to his own use money belonging to a resident of Rankin Borough and thereby willfully deprived that person of property without due process of law, in violation of 18 U.S.C. 242. App. 41a. Count 2 alleged that Briston violated 18

U.S.C. 666(a)(1)(A) by embezzling, stealing, and otherwise, without authority, knowingly converting to his own use $5,855 that belonged to a resident of the Borough and that was under the care, custody, or control of the Borough's Police Department. App. 42a. Count 3 alleged that Briston corruptly endeavored to influence, obstruct, and impede the due administration of justice in a grand jury investigation by causing false documents to be submitted in response to a subpoena, in violation of 18 U.S.C. 1503 and 18 U.S.C. 2. App. 43a. Count 4 charged that Briston violated 18 U.S.C. 1503 and 18 U.S.C. 2 by corruptly endeavoring to influence, obstruct, and impede the due administration of justice in connection with his pending federal jury trial, by causing false and fraudulent evidence to be placed in the Police Department's evidence locker. App. 44a.

On November 1, 2004, the jury found Briston guilty on all counts. App. 643a-644a. The district court sentenced Briston to 37 months in prison (consisting of concurrent sentences of 12 months on Count 1 and 37 months each on Counts 2, 3 and 4) and three years of supervised release, and ordered him to pay $4,255 in restitution and a special assessment of $325. App. 19a-26a (judgment), 687a-693a (sentencing transcript).

STATEMENT OF FACTS

On April 15, 2002,[2] agents of the federal Bureau of Alcohol, Tobacco, and Firearms (ATF), arrested Richard Powell on gun and drug charges. Officers from the Rankin Borough Police Department assisted ATF in the arrest, which occurred at the home of Tamera Brice, Powell's girlfriend. App. 105a-109a, 133a-136a.

During a search of the house, agents discovered $5,855 belonging to Brice. App. 108a-110a, 136a-139a. Agents also found a small amount of marijuana and related paraphernalia. App. 109a-110a, 112a. Brice was never charged with a crime relating to those items. Supp. App. 105 (GX 15, transcript). The lead ATF agent determined that his bureau had no grounds for seizing the money because he saw no indication that it was related to a drug transaction. App. 112a, 122a-123a.

The ATF agents turned the cash over to Rankin police officers. App. 112a. Defendant Briston, the police chief of Rankin Borough, arrived on the scene and took possession of the $5,855. Supp. App. 101-102, 104, 113 (GX 15, transcript); App. 249a-250a, 252a; Supp. App. 3 (GX 1-D, Receipt/Inventory Form).

Within about a week of the seizure of her money, Brice contacted Briston and requested that he return the $5,855 to her and asked what she needed to do to get the money back. App. 147a-148a. Briston told Brice that she would never get

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[2] Appellant incorrectly asserts (Br. 4) that the arrest occurred in 2003.

the money back because it had been seized in a drug bust. App. 148a-149a. Between April 2002 and December 2003, Brice contacted Briston at least three times seeking her money. Each time Briston told Brice that she would never get her money back and that the police were allowed to do whatever they wanted with it. App. 148a-150a, 157a.

Under state procedures for asset forfeiture, a local police department that seizes property is supposed to notify the District Attorney's (DA's) Office (or, in some cases, state or federal prosecutors) so that a judicial proceeding can be initiated to determine whether the money should be forfeited to the government or returned to its owner. App. 254a-255a. The person whose property is seized is supposed to receive notice and an opportunity for a hearing to contest the seizure and seek return of the property. App. 255a. Brice did not receive such notice. See App. 148a-149a. Once seized, money remains the property of the person from whom it was taken until a judge determines whether it should be forfeited to the government. App. 255a-256a. If a court orders forfeiture, the seized item becomes the property of the DA's Office (or other relevant prosecutor's office) and is placed in an asset forfeiture fund. App. 258a. The money does not become the property of the police department that seized it, although that department may

apply for grants from the asset forfeiture fund. App. 258a-259a. Briston was familiar with these asset forfeiture procedures. App. 254a.

In late June 2003 – more than 14 months after Briston took possession of Brice's money – a hit-and-run driver crashed into her vehicle. App. 149a, 518a-519a; Supp. App. 4 (GX 1-E, Incident Information Report). Brice reported the incident to the Rankin Borough Police Department. She had no insurance and needed money to have the vehicle repaired. App. 178a-179a.

Brice again called Briston and asked for her money, but he told her she would never get it back. App. 149a. Briston then came to Brice's house and told her that she could not recover her money because the Police Department had spent it on video equipment. App. 150a. He made this representation even though no judicial proceedings had been initiated to forfeit Brice's money to the government. See App. 266a.

Briston told Brice that he felt sorry for her and would arrange for her vehicle to be repaired at no cost to her. App. 150a. He instructed Brice not to tell anyone about the arrangement. App. 150a-151a.

Briston arranged for Allmor Corporation to repair Brice's vehicle. App. 187a-189a, 267a-269a. Briston told Omar Deer, Allmor's owner, that he had damaged the vehicle and would pay for the repairs out of his own pocket. App.

185a-188a. Briston asked Deer not to discuss the repairs with anyone, including the owner. App. 188a, 211a-212a; see App. 269a-270a. The cost of the repairs was $1,910.82. Supp. App. 10 (GX 5, invoice); App. 190a-193a. Between September 2003 and early 2004, Briston made five payments to Allmor totaling $1,600. App. 194a-196a, 278a-279a; Supp. App. 13 (GX 6, handwritten note).

In September 2003, after the repairs were done, Briston asked Allmor to prepare an invoice stating that the repairs cost $5,787.32. App. 271a-273a. Samuel Deer, the son of Allmor's owner, prepared the invoice as Briston requested, even though it did not accurately reflect the cost of the repairs. Supp. App. 5 (GX 1-H, invoice); App. 272a-273a. But Samuel Deer initially refused to mark the invoice as "paid" because Allmor had never received the amount indicated on the document. App. 273a.

At around the same time, Brice told Rankin Borough Mayor Demont Coleman, who lived in her neighborhood, that she was trying to get back the $5,855 that Briston had taken. App. 265a-266a; see App. 168a. The mayor told Brice that, contrary to what Briston had claimed, her money had not been spent on video equipment. App. 266a; see also App. 469a-470a. The mayor then contacted a governmental official so that proceedings would be initiated to allow Briston to seek recovery of her money. App. 266a.

On December 5, 2003, Brice telephoned Briston and again asked him for her money. Briston told her that she would never get her money back. App. 156a-160a. A few minutes later, Briston came to Brice's house and gave her a document purporting to be a receipt from Allmor stating that the repairs to her vehicle cost $5,787.32. App. 160a-164a; Supp. App. 9 (GX 3, invoice).

Sometime in early December 2003, Briston asked Samuel Deer to provide a second invoice indicating that $5,787.32 had been paid to Allmor for the repair of Brice's vehicle. Deer did so, even though Allmor never received that amount for the repairs. App. 274a-277a; see App. 204a-205a, 229a-230. At Briston's request, Samuel Deer backdated the document to October 9, 2003. Supp. App. 14 (GX 8, invoice); App. 275a-276a.

On December 10, 2003, a hearing was held in state court on Brice's petition seeking return of the money Briston had seized. Supp. App. 98-114 (GX 15, transcript); App. 247a-248a. During the hearing, Briston testified that when he took possession of Brice's money in April 2002, he logged it "into evidence" at the Police Department according to standard procedures. Supp. App. 102, 105 (GX 15, transcript). Briston claimed that in April or May 2003, he contacted an Assistant United States Attorney (AUSA), who instructed him to keep Brice's money in his evidence room until further notice. Supp. App. 102, 111 (GX 15,

transcript); Supp. App. 6 (GX 1-I, memo). (The AUSA disputed that such a conversation took place. App. 494a-496a.) Briston further testified that, with Brice's permission, he used most of her money to fix her vehicle, and that those repairs cost $5,787.32. Supp. App. 103, 106-107 (GX 15, transcript); App. 250a-251a. At the end of the hearing, the state judge ordered Briston to return to Brice $97.68, the alleged difference between the amount seized from Brice and the $5,787.32 that defendant claimed to have spent on the vehicle repairs. App. 263a-264a; see Supp. App. 103 (GX 15, transcript).[3]

In March 2004, the Rankin Borough Police Department was served with a federal grand jury subpoena ordering production of documents pertaining to the seizure, storage, and disposition of Brice's money. The subpoena directed the Department to produce the documents by March 16, 2004. Supp. App. 15 (GX 9, subpoena); App. 468a-469a.

On March 14, 2004, Briston asked Richard Salters, a Rankin police officer, and his girlfriend, April Hurd, to help him forge some documents. App. 340a-343a, 355a-356a, 381a, 388a-389a. In exchange for Salters' assistance, Briston promised to arrange for his promotion to sergeant. App. 352a. At Briston's

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[3] The $97.68 figure is based on Briston's erroneous testimony that $5,885 was seized from Brice. See Supp. App. 101 (GX 15, transcript). The actual amount was $5,855. See App. 110a, 638a.

request, Hurd forged the signatures of Tamera Brice and Samuel Deer on Evidence Release Forms. App. 343a, 347a-348a, 356a, 381a-391a. She agreed to do so because she felt "intimidated and pressured." App. 388a-389a, 392a. The form on which Hurd forged Brice's signature was backdated to September 13, 2003, and stated that Brice had requested that $5,787.32 of the money seized from her on April 15, 2002, be released to Allmor Corporation for vehicle repairs. Supp. App. 7 (GX 1-J, Evidence Release Form); App. 346a-348a, 382a-384a. In fact, Brice never signed such a form. App. 145a-147a. The other form, on which Hurd forged Deer's signature, was backdated to October 9, 2003, and stated that Briston had "released $5,787.32 in cash to Allmore Corp. for vehicle repairs" at Brice's request. Supp. App. 8 (GX 1-K, Evidence Release Form); App. 343a-345a, 385a-387a. Deer did not sign that form. App. 280a-281a. Salters also signed both forms, purporting to have witnessed Brice and Deer sign the documents. App. 345a-346a, 348a. At Briston's request, Salters delivered the forged documents to the U.S. Attorney's Office on March 16, 2004, in response to the subpoena. Those documents included the evidence release forms and the fake invoice for $5,787.32. App. 348a-351a.

On March 17, 2004, the grand jury returned a two-count indictment charging Briston with violations of 18 U.S.C. 242 and 666. App. 9a (docket sheet), 33a-38a (indictment).

Briston was fired as police chief on or about March 28, 2004. See App. 408a-409a, 441a. Although no longer allowed into his old office at the police station, he still had a key to the station's evidence locker. App. 353a, 358a, 400a, 425a-426a.

On March 31, 2004, Rankin police officer Jeff Novak advised Briston that the FBI and Pennsylvania State Police were planning to search the evidence locker. App. 421a-422a. Novak and Officer Nicole Rogers then met with Briston at his request. App. 400a-403a, 422a-425a. During the meeting, Briston handed Novak an envelope and a key and asked him to place the envelope in the evidence locker. App. 425a-427a, 448a; Supp. App. 115 (GX 24, envelope). When he gave Novak the envelope, Briston stated that he "had to keep some things at home," that he did not trust the mayor, and that there was "some stuff" he had to hide from him. App. 426a, 448a, 450a. Novak initially agreed to do as Briston requested, but had a change of heart when he saw Brice's name on the envelope. App. 427a-430a. Novak was familiar with the name and knew that money had been seized from her. App. 428a-429a. Briston then asked Officer Rogers to take the

envelope to the station and place it in the evidence locker, and she did so. App. 404a-409a, 432a-433a.

The following day, the FBI and State Police searched Briston's old office and the evidence locker. App. 452a-456a. They found the envelope that Rogers had placed in the locker. App. 408a, 454a-455a. The envelope, which contained $97.68, had a handwritten notation on the front stating: "As per court order * * * return $97.68 to Tamera Brice." Supp. App. 115 (GX 24, envelope); App. 465a.

On April 14, 2004, a superseding indictment was filed adding the obstruction-of-justice charges against Briston. Those charges alleged that Briston had arranged for false documents to be submitted to the grand jury and for false evidence to be planted in the police station evidence locker. App. 37a-38a (superseding indictment).

SUMMARY OF ARGUMENT

The Court should affirm Briston's conviction.

1. The evidence was sufficient to prove that the value of the property that Briston embezzled, stole, or converted to his own use was at least $5,000, as required by 18 U.S.C. 666(a)(1)(A)(i). Briston's challenge to the sufficiency of the evidence was not properly preserved below and thus should be reviewed only for plain error. Defendant has failed to demonstrate any error, plain or otherwise.

Briston asserts that the amount of money he embezzled, stole, or converted was, at most, $4,255 – the difference between the $5,855 seized from Tamera Brice and the $1,600 that Briston paid for repairs to her vehicle. His reasoning is flawed. The government's evidence would allow a rational jury to infer that Briston had already embezzled, stolen, or converted to his own use the entire $5,855 *before* he began making payments toward the vehicle repairs. By the time Briston made the first payment toward the repairs, he had denied Brice access to the $5,855 for nearly 17 months.

2. Funds that the Department of Justice provides to state and local law enforcement agencies under its Equitable Sharing Program are "benefits" within the meaning of 18 U.S.C. 666(b). This is confirmed by examining the program's "structure, operation, and purpose." *Fischer* v. *United States*, 529 U.S. 667, 681 (2000). Equitable sharing payments are designed to promote long-term policy objectives by encouraging state and local law enforcement agencies to cooperate with the federal government in drug enforcement and other crime-fighting. Recipient agencies are subject to federal regulation, reflecting the ongoing federal interest in their operations. Moreover, one of the purposes of the Equitable Sharing Program is to provide significant advantages to the recipient agencies by

enhancing their crime-fighting capabilities. These features of the program illustrate that equitable sharing funds are "benefits" as defined in *Fischer*.

3. Rankin Borough received "benefits" within the meaning of 18 U.S.C. 666 when federal block grant money was used in 2002 and 2003 to pay for street, sewer, and playground projects approved by the Borough. Briston argues that such block grant money cannot be considered "benefits" to the Borough because the federal funds were not sent directly to the municipality but, instead, flowed to the Turtle Creek Valley Council of Governments (COG), which then paid the project contractors for work done in the Borough. His argument is flawed. When COG administers the federal funds for projects within Rankin Borough it does so as an agent of the Borough. Contrary to Briston's assertion, the Borough exercises actual authority over the expenditure of the funds because the Borough must approve the award of the contracts for the federally-funded projects, as well as the payment of the contractors after completion of the work. The Borough's power to influence how federal funds are spent gives the federal government an interest in ensuring the probity of Borough officials.

4. The district court did not err in instructing the jury as a matter of law that payments received under the Department of Justice's Equitable Sharing Program

are "benefits" for purposes of 18 U.S.C. 666. Whether equitable sharing funds are "benefits" is a question of statutory interpretation properly entrusted to the court.

5. The district court did not abuse its discretion in excluding testimony concerning accusations that Rankin Borough's mayor had attempted to gain access to the Borough police station to tamper with evidence related to the arrests of his son and nephew. Those accusations had little, if any, relevance to the charges against Briston and their admission would have resulted in a mini-trial over explosive allegations of criminal activity by a non-party, thus creating a substantial risk of confusing the jury by diverting its attention away from the charges in the indictment. Given this risk, the exclusion of the testimony did not violate the Compulsory Process Clause of the Sixth Amendment.

6. The jury instruction on Count 1 was not an abuse of discretion. Briston challenges the instruction because it referred to the alleged victim as "a person" rather than identifying her by name. That instruction was proper because it tracked the statutory language and, in the context of the entire trial, would not have confused the jury.

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO PROVE THAT THE PROPERTY DEFENDANT EMBEZZLED, STOLE, OR CONVERTED TO HIS OWN USE WAS "VALUED AT $5,000 OR MORE," AS REQUIRED BY 18 U.S.C. 666

Briston argues (Br. 24-26) that the evidence was insufficient to prove that the property he embezzled, stole, or converted to his own use was "valued at $5,000 or more." 18 U.S.C. 666(a)(1)(A)(i). He did not properly preserve this issue below. At any rate, the evidence was more than sufficient to meet the government's evidentiary burden.

A. Standard Of Review

"Where, as here, a defendant does not preserve the issue of sufficiency of the evidence by making a timely motion for judgment of acquittal at the close of the evidence, this Court reviews the sufficiency of the evidence for plain error." *United States* v. *Mornan*, 413 F.3d 372, 381 (3d Cir. 2005).[4] "A conviction based

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[4] Although Briston moved for judgment of acquittal at the close of the government's case, he did so only as to Count 1 (the Section 242 charge), not the Section 666 count. App. 500a. At any rate, he failed to move for judgment of acquittal at the close of the defense's evidence (see App. 537a-548a), as required to preserve the sufficiency issue for review. See *United States* v. *Anderson*, 108 F.3d 478, 480 (3d Cir.), cert. denied, 522 U.S. 843 (1997). Briston incorrectly suggests (Br. 24) that he preserved the issue in his pretrial motion to dismiss the indictment and in his motion for a new trial. "[A] pretrial motion to dismiss an indictment is

(continued...)

on insufficient evidence is plain error only if the verdict 'constitutes a fundamental miscarriage of justice.'" *United States* v. *Thayer*, 201 F.3d 214, 219 (3d Cir. 1999) (quoting *United States* v. *Barel*, 939 F.2d 26, 37 (3d Cir. 1991)), cert. denied, 530 U.S. 1244 (2000).

Even if Briston had properly preserved the issue, the standard of review would be "particularly deferential." *United States* v. *Hedaithy*, 392 F.3d 580, 604 (3d Cir. 2004), cert. denied, 125 S. Ct. 1882 (2005). "If 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' this Court will sustain the verdict." *Id.* at 605 (quoting *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979)). "[O]nly when the record contains no evidence, regardless of how it is weighted, from which the jury could find guilt beyond a reasonable doubt, may an appellate court overturn the verdict." *United States* v. *Anderson*, 108 F.3d 478, 481 (3d Cir.) (internal quotation marks omitted), cert. denied, 522

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[4](...continued)
not a permissible vehicle for addressing the sufficiency of the government's evidence." *United States* v. *DeLaurentis*, 230 F.3d 659, 660 (3d Cir. 2000). In his motion for a new trial, Briston did not discuss the sufficiency of the evidence pertaining to the value of the property taken. See App. 766a-767a. In any event, a motion for a new trial is "an inappropriate means of raising a challenge to the sufficiency of the evidence." *United States* v. *Wright-Barker*, 784 F.2d 161, 171 n.9 (3d Cir. 1986), superseded in part on other grounds, *United States* v. *Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993), cert. denied, 510 U.S. 1048 (1994).

U.S. 843 (1997). The government's evidence on Count 2 easily withstands scrutiny under this test and thus necessarily satisfies the even more deferential plain-error standard.

B. A Rational Jury Could Find That Briston Embezzled, Stole, Or Converted To His Own Use At Least $5,000

Under Count 2 of the indictment, the government had the burden of proving that Briston embezzled, stole, or converted to his own use property "valued at $5,000 or more." 18 U.S.C. 666(a)(1)(A)(i). As the district court properly instructed the jury,

> To embezzle means knowingly, voluntarily and intentionally to take or to convert to one's own use the property of another which came into the defendant's possession lawfully.
>
> To steal means knowingly to take the property of another with the intent to deprive the owner permanently or temporarily of their rights and benefits of ownership.
>
> Conversion means the deliberate taking or retaining of the money or property of another with any intent to deprive the owner of its use or benefit, either temporarily or permanently. Conversion includes the misuse or abuse of property, as well as use in an unauthorized manner or to an unauthorized extent.

App. 568a-569a.[5]

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[5] These instructions, which Briston has not challenged (see App. 585a-586a), are correct. See *Morissette* v. *United States*, 342 U.S. 246, 271-273 (1952) (defining "conversion"); *Valansi* v. *Ashcroft*, 278 F.3d 203, 219 (3d Cir. 2002)

(continued...)

The evidence was sufficient to prove that the property Briston embezzled, stole, or converted to his own use had a value of at least $5,000. On April 15, 2002, Briston took possession of $5,855 seized from Brice. A few days later, Briston told Brice that she would never get her money back. In June 2003 – more than 14 months after Briston took possession of the cash – he again told Brice that she would never retrieve her money and falsely claimed that the Police Department had spent it on video equipment. See pp. 6-8, *supra*. He made these representations even though no judicial proceedings had been initiated to forfeit the money to the government. This evidence would allow a rational jury to infer that by June 2003, Briston had unlawfully converted, embezzled, or stolen $5,855.

Briston nonetheless argues (Br. 24-25) that the $1,600 he paid to Allmor Corporation to have Brice's vehicle repaired must be deducted from the $5,855 in determining the value of the property that he embezzled, stole, or converted to his own use. That argument is meritless. Briston did not begin making payments to Allmor until September 2003, nearly 17 months after he took possession of the $5,855 and more than two months after he told Brice that her money had already

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[5](...continued)
(defining "embezzlement"); *United States* v. *Schneider*, 14 F.3d 876, 880-881 (3d Cir. 1994) (defining "embezzlement" and "steal") (citing *United States* v. *Henry*, 447 F.2d 283, 286 (3d Cir. 1971)).

been spent. The jury could reasonably infer from this evidence that Briston had completed the embezzlement, theft, or conversion of the $5,855 before he paid any part of the $1,600 toward the repairs. The evidence would further permit the jury to infer that Briston's offer to pay for the vehicle repairs was simply an attempt to keep the victim quiet so that his already-completed crime would remain undetected.

Once a defendant has embezzled, stolen, or unlawfully converted money to his own use, he does not retroactively nullify his crime by giving some or all of the funds back. See *United States* v. *Oliva*, 46 F.3d 320, 322-323 (3d Cir. 1995) (rejecting, as "wholly without merit," the argument that "reimbursement is a defense to embezzlement," and upholding conviction for embezzling union funds even though defendant had reimbursed the union for airline tickets after auditors questioned his use of union money to purchase those tickets); *Savitt* v. *United States*, 59 F.2d 541, 544 (3d Cir. 1932) (affirming conviction for misapplication of bank funds, explaining that "[r]estitution or attempted restitution does not nullify or excuse a previous crime"); *United States* v. *Coin*, 753 F.2d 1510, 1511 (9th Cir. 1985) ("The crime [of embezzlement] occurred and was complete when funds were misapplied; whatever occurred later as to repayment was neither material nor a defense.").

Contrary to Briston's assertion (Br. 26), the district court's restitution order is consistent with the finding that the value of the property stolen, embezzled, or unlawfully converted was at least $5,000. The court ordered Briston to pay $4,255 in restitution which, the court explained, "represents the amount of funds belonging to Miss Brice which were stolen, embezzled, or otherwise unlawfully converted by the defendant to his own use, *less the value of the funds returned* by the defendant to Miss Brice by paying for repairs to her automobile." App. 682a-683a (sentencing transcript) (emphasis added). The court's restitution order thus recognized that the amount originally embezzled, stolen, or unlawfully converted was $5,855.

Whereas a restitution order appropriately focuses on the victim's net loss, Section 666 has a different focus: the "value[]" of the property that has been embezzled, stolen, or converted. 18 U.S.C. 666(a)(1)(A)(i). That value will often be significantly more than the net loss to the victim. See *Valansi* v. *Ashcroft*, 278 F.3d 203, 205-206 & n.3 (3d Cir. 2002) (defendant "embezzled in the aggregate more than $400,000 in cash and checks" from a bank in violation of 18 U.S.C. 656, but was ordered to pay only $32,260.22 in restitution because the checks were recovered before they were cashed).

II

FUNDS THAT THE DEPARTMENT OF JUSTICE PROVIDES TO STATE AND LOCAL LAW ENFORCEMENT AGENCIES UNDER ITS EQUITABLE SHARING PROGRAM ARE "BENEFITS" UNDER 18 U.S.C. 666

Briston was convicted of violating 18 U.S.C. 666(a), which criminalizes certain conduct by an agent of a state or local government if that governmental entity "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b). In 2003, the Rankin Borough Police Department received $19,813.31 in "equitable sharing" funds from the United States Department of Justice (DOJ). Supp. App. 61 (GX 11, letter); App. 491a-494a. Briston argues (Br. 23, 26-36) that these funds do not qualify as "benefits" under Section 666(b). His contention is meritless.

A. Background

As part of the Comprehensive Crime Control Act of 1984, Congress not only added 18 U.S.C. 666 to the criminal code, but also amended the federal forfeiture statute to authorize DOJ to transfer forfeited property to state and local law enforcement agencies. Pub. L. 98-473, Title II, § 309, 98 Stat. 2051-2052 (Oct. 12, 1984) (forfeiture amendments); *id.* at § 1104(a), 98 Stat. 2143-2144

(Section 666). Congress intended that such transfers would "enhance important cooperation between federal, state, and local law enforcement agencies in drug investigations." S. Rep. No. 225, 98th Cong., 1st Sess. 216 (1983). In its current form, the forfeiture statute provides, in relevant part, that

> (1) Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may –
>
> > (A) * * * transfer the property * * * to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property[.]
> >
> > * * * * *
>
> (3) The Attorney General shall assure that any property transferred to a State or local law enforcement agency under paragraph (1)(A) –
>
> > (A) has a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based; and
> >
> > (B) will serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies.

21 U.S.C. 881(e)(1) & (3).

To fulfill the mandate of Section 881(e), DOJ has instituted the Equitable Sharing Program, which is nationwide in scope and provides financial assistance to law enforcement agencies in all 50 states. App. 492a. In 2003, DOJ distributed more than $203 million to law enforcement agencies under the program. App. 492a. Funds distributed through the program come from the DOJ Assets Forfeiture Fund, which Congress established as part of the United States Treasury. 28 U.S.C. 524(c)(1); 21 U.S.C. 881(e)(2)(B); App. 488a, 499a.

DOJ has adopted comprehensive guidelines governing the Equitable Sharing Program. See Supp. App. 18-60 (GX 10, U.S. Dep't of Justice, *A Guide To Equitable Sharing Of Federally Forfeited Property For State And Local Law Enforcement Agencies* (March 1994) ("*Guide*")); App. 488a-490a. The *Guide*, which "is binding upon all state and local agencies seeking federal sharing transfers," Supp. App. 41 (GX 10), imposes restrictions on the use of money or other property distributed under the program. App. 490a-492a. See also *United States* v. *Kranovich*, 401 F.3d 1107, 1110, 1113-1114 (9th Cir. 2005) (discussing some of these restrictions in reviewing a conviction under 18 U.S.C. 666). Failure to comply with these restrictions may subject the recipient agencies to sanctions, including civil actions for breach of contract. Supp. App. 41 (GX 10). Funds distributed through the Equitable Sharing Program may be used only for the law

enforcement purposes set forth in the state or local agency's application for equitable sharing benefits. Supp. App. 43, 55 (GX 10); Supp. App. 61 (GX 11, letter). In addition, all recipients "must implement standard accounting procedures and internal controls * * * to track equitably shared monies and tangible property," and such procedures must be consistent with sample bookkeeping procedures set forth in the *Guide*. Supp. App. 40, 52 (GX 10). Depositing or otherwise commingling equitable sharing funds with other money is prohibited. Supp. App. 55 (# 5) (GX 10). Recipients must submit to DOJ an annual report, certifying that they are in compliance not only with the *Guide* but also the National Code of Professional Conduct for Asset Forfeiture. Supp. App. 41, 55 (# 7), 56, 60 (GX 10).

The *Guide* sets forth detailed examples of permissible and impermissible uses of equitable sharing funds. Supp. App. 32-36, 47-51 (GX 10). For example, the *Guide* prohibits use of forfeited property by employees other than law enforcement personnel, as well as "[a]ny use that creates the appearance that shared funds are being used for political or personal purposes." Supp. App. 34 (GX 10). DOJ also prohibits the use of equitable sharing funds to pay salaries for existing positions or to replace a law enforcement agency's regular appropriations. Supp. App. 34, 36 (GX 10); Supp. App. 61 (GX 11, letter).

In addition, recipients of funds under the Equitable Sharing Program must comply with federal statutes prohibiting race, disability, age, and (in some cases) sex discrimination in federally-assisted programs or activities. See 52 Fed. Reg. 24,450 (# 10) (1987); 65 Fed. Reg. 70,737 (# 9) (2000); 28 C.F.R. Pt. 42, Subpt. G, App. A, at 824 (2004); *id.*, Subpt. I, App. A, at 835; Federal Equitable Sharing Agreement at 2 (April 2005), available at http://www.usdoj.gov/criminal/afmls/forms/ESAgreement-08.pdf.

B. Standard Of Review

Whether equitable sharing funds qualify as "benefits" under 18 U.S.C. 666(b) is a question of statutory interpretation reviewed *de novo*. See *United States* v. *Zwick*, 199 F.3d 672, 678 (3d Cir. 1999) (exercising plenary review in interpreting Section 666), abrogated on other grounds by *Sabri* v. *United States*, 124 S. Ct. 1941, 1945 (2004).

C. Equitable Sharing Payments Qualify As "Benefits"

The only court of appeals that has addressed the issue has correctly concluded that equitable sharing funds provided by DOJ are "benefits" under 18 U.S.C. 666(b). See *United States* v. *Nichols*, 40 F.3d 999, 1000 (9th Cir. 1994). That court held that the Attorney General's sharing of forfeited narcotics assets with a sheriff's department pursuant to 21 U.S.C. 881(e) is "a benefit arising from

a federal program designed to encourage cooperation in drug investigations," and that "as a recipient of such funds, the [sheriff's department] is an agency covered by § 666(b)." *Id.* at 1001.

Nichols is consistent with the Supreme Court's decision in *Fischer* v. *United States*, 529 U.S. 667 (2000). In that case, the Court held that payments received by hospitals under the Medicare program qualify as "benefits" under Section 666(b). In reaching that conclusion, the Court noted that it had previously described Section 666 "as 'expansive,' 'both as to the [conduct] forbidden and the entities covered.'" *Id.* at 678 (quoting *Salinas* v. *United States*, 522 U.S. 52, 56 (1997)). The Court further explained that Medicare payments to hospitals qualify as "benefits" under the dictionary definition of that term because the hospitals "derive significant advantage" by participating in the federal program. *Id.* at 677-678.

Fischer rejected the argument that Medicare payments to hospitals are excluded from coverage under 18 U.S.C. 666(c), which exempts any "bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." The Court concluded that Medicare payments to hospitals "are made for significant and substantial reasons in addition to compensation or reimbursement." *Fischer*, 529 U.S. at 679. "The payments are

made not simply to reimburse for treatment of qualifying patients but to assist the hospital in making available and maintaining a certain level and quality of medical care, all in the interest of both the hospital and the greater community." *Id.* at 679-680. The Court distinguished a hospital that receives Medicare payments from "a contractor whom the Government does not regulate or assist for long-term objectives or for significant purposes beyond performance of an immediate transaction." *Id.* at 680.

The Court also emphasized that in determining whether payments under a federal assistance program qualify as "benefits," "an examination must be undertaken of the program's structure, operation, and purpose." *Fischer*, 529 U.S. at 681. The Court observed that the ultimate determination whether payments are "benefits" "could depend, as it does here, on whether the recipient's own operations are one of the reasons for maintaining the program." *Ibid*. Without holding that any one factor would be dispositive, the Court noted that under the Medicare program, recipients are subject to federal regulation, and that the program is designed to further the federal government's "own interests" by providing it "long-term advantages from the existence of a sound and effective health care system for the elderly and disabled." *Id.* at 679-680.

An examination of the *Fischer* factors shows that DOJ's Equitable Sharing Program provides "benefits" within the meaning of 18 U.S.C. 666(b). Equitable sharing funds are designed to improve the operations of the recipients by enhancing their crime-fighting capabilities. In that sense, the funds meet the dictionary definition of "benefits" because recipients derive significant "advantage" from the federal money, which "aids" the agencies in combating crime, thus "promot[ing]" their "well-being." 529 U.S. at 677 (quoting Webster's Third New International Dictionary 204 (1971)). Like the Medicare disbursements in *Fischer*, equitable sharing payments "are made for significant and substantial reasons in addition to compensation or reimbursement." *Id.* at 679. They promote the federal government's long-term policy objectives by encouraging future cooperation from state and local law enforcement agencies in drug enforcement and other crime-fighting. Moreover, recipients of equitable sharing funds are subject to federal regulation, including the requirements that they use the shared funds only for approved law enforcement purposes, adhere to certain reporting requirements and accounting procedures, and comply with the National Code of Professional Conduct for Asset Forfeiture and certain anti-discrimination statutes. These features of the program's "structure, operation, and

purpose" (*id.* at 681) confirm that equitable sharing payments are "benefits" under 18 U.S.C. 666(b).

Briston nonetheless argues (Br. 34-35) that equitable sharing funds are "akin to compensation and reimbursement for services provided" and thus fall within the exemption of 18 U.S.C. 666(c). In support of that contention, Briston highlights the requirement that equitable sharing payments have "a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture." 21 U.S.C. 881(e)(3)(A). Briston's reasoning is flawed. As *Fischer* makes clear, the fact that payments are intended, in part, as compensation or reimbursement does not preclude them from qualifying as "benefits" under 18 U.S.C. 666(b). One purpose of the Medicare payments at issue in *Fischer* was to reimburse hospitals for "the 'reasonable cost' of services rendered." 529 U.S. at 673.

"Rather than excluding all quid pro quo arrangements, § 666(c) speaks in terms of payments received 'in the usual course of business.'" *Nichols*, 40 F.3d at 1000. Equitable sharing funds cannot be viewed as mere compensation for services rendered in the usual course of business because "the Attorney General may not make a payment solely to reimburse the agency for past efforts." *Ibid.* Rather, he must ensure that any equitable sharing payments "also encourage future

cooperation from that agency." *Ibid.* (citing 21 U.S.C. 881(e)(3)(B)). That cooperation, in turn, promotes the federal government's interest in effective crime-fighting. Thus, unlike payments made in "the usual course of business," 18 U.S.C. 666(c), equitable sharing funds serve "long-term objectives [and] significant purposes beyond performance of an immediate transaction." *Fischer*, 529 U.S. at 680.

Briston argues, however, that because DOJ provided the equitable sharing funds to Rankin Borough in a lump sum, the financial assistance did not entail "the type of regulatory supervision contemplated by *Fischer*." Br. 35. Briston is mistaken. Contrary to his assertion, the federal involvement with the Police Department did not end "[o]nce the police car was purchased with the transferred funds." Br. 35. The Police Department was still required to comply with various requirements, including those in the DOJ *Guide*, the National Code of Professional Conduct for Asset Forfeiture, and certain federal anti-discrimination laws. Under the restrictions imposed by the *Guide*, for example, the Police Department would be in breach of its equitable sharing agreement if it allowed the vehicle it purchased with federal funds to be used for personal or political activities or by other agencies of the Borough government for non-law-enforcement purposes. See p. 27, *supra*.

In addition, Briston contends (Br. 31-32) that Section 666(b) does not cover payments under the Equitable Sharing Program because those funds are not derived from tax revenues. That argument is meritless. See *United States* v. *Peery*, 977 F.2d 1230, 1232 (8th Cir. 1992) (rejecting argument that the term "benefits" under Section 666(b) "means federal tax dollars"), cert. denied, 507 U.S. 946 (1993). Briston bases his argument on a single reference to "taxpayer dollars" in the *Sabri* opinion. See 124 S. Ct. at 1946. He reads too much into the Court's use of that phrase. The Court did not imply, much less hold, that Congress would lack constitutional authority to apply Section 666 to federal monies that are derived from sources other than taxes. Rather, it appears that the Court used the phrase "taxpayer dollars" simply as a common synonym for "public money," "federal dollars," or similar terms. See *id.* at 1945-1947.

Significantly, the Supreme Court has held that Congress's spending powers are implicated even where the federal government distributes funds that are not the property of the United States and are held by the federal government only as a trustee. See *New York* v. *United States*, 505 U.S. 144, 172-173 (1992) (holding that Congress had authority under its spending powers to place conditions on the receipt of funds distributed by the federal government under 42 U.S.C. 2021e). In light of that holding, there should be no question that the disbursement of

equitable sharing funds – which are paid out of the U.S. Treasury and are the property of the United States (28 U.S.C. 524(c)(1); 21 U.S.C. 881(h)) – does, in fact, "implicate the general Congressional spending power." Br. 31.

Next, Briston argues that equitable sharing funds do not qualify as "benefits" because "the option to transfer funds to participating law enforcement is completely discretionary with the Attorney General." Br. 34. His reasoning is flawed. Neither the statutory language nor *Fischer* suggests that the discretionary nature of a funding decision would preclude federal monies from qualifying as "benefits." Contrary to Briston's assertion (Br. 34), the discretionary nature of the funding decision does not diminish the significance of the federal policy objectives the program is designed to promote. Congress mandated that "[t]he Attorney General *shall* assure that any property transferred to a State or local law enforcement agency [under the program] * * * will serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies." 21 U.S.C. 881(e)(3) (emphasis added). That federal goal is particularly weighty because, as Congress has emphasized, "cooperation among Federal, State and local law enforcement agencies is critical to an effective national response to the problems of violent crime and drug trafficking in the

United States." National Law Enforcement Cooperation Act of 1990, Pub. L. 101-647, § 612(1), 104 Stat. 4823 (Nov. 29, 1990).

Finally, Briston contends that interpreting Section 666 to cover equitable sharing funds would violate separation-of-powers principles by allowing the Attorney General "to create the jurisdiction which would then authorize him to prosecute." Br. 35-36. That contention has no merit. Although the Attorney General has discretion to decide whether to provide equitable sharing funds to a state or local agency, it was Congress through its enactment of Section 666 that defined the conduct that would constitute a criminal offense. Thus, interpreting Section 666 to cover equitable sharing funds "in no way 'call[s] into question the principle that the definition of the elements of a criminal offense is entrusted to the legislature.'" *Jones* v. *United States*, 526 U.S. 227, 243 n.6 (1999).

III

RANKIN BOROUGH RECEIVED "BENEFITS" UNDER 18 U.S.C. 666(B) WHEN FEDERAL BLOCK GRANTS WERE USED TO PAY FOR STREET, SEWER, AND PLAYGROUND PROJECTS REQUESTED BY THE BOROUGH

Briston argues (Br. 36-41) that Rankin Borough did not receive "benefits" within the meaning of 18 U.S.C. 666(b) when federal block grants were used in 2002 and 2003 to pay for street, sewer, and playground projects within the Borough. That contention is meritless.

A. Background

In 1974, Congress enacted the Housing and Community Development Act, whose primary objective is "the development of viable urban communities." 42 U.S.C. 5301(c). The Act "creates a 'consistent system of Federal aid,' § 5301(d), by distributing funds committed by Congress through organizations outside the Federal Government, while retaining federal control to assure compliance with statutory federal objectives and implementing regulations." *Dixson* v. *United States*, 465 U.S. 482, 486-487 (1984). The federal Department of Housing and Urban Development (HUD) awards Community Development Block Grants pursuant to that statute. *Id.* at 484. Under the block grant program, grantees and

their subgrantees are subject to extensive federal regulation. See *id.* at 487; 24 C.F.R. Pt. 570.

The Turtle Creek Valley Council of Governments (COG) is a voluntary organization composed of various municipalities within Allegheny County, Pennsylvania. App. 476a-477a. Rankin Borough is a member of COG and has a seat on its board of directors. App. 476a.

One of the services that COG performs is to act as an agent for its member municipalities in helping them obtain HUD block grants. App. 477a-481a. Each municipality decides whether to seek HUD funding for public works projects within its jurisdiction. App. 478a. The municipality then submits an application for HUD funding to COG, which reviews the paperwork and forwards it on behalf of the municipality to the Allegheny County Department of Economic Development. App. 477a-478a. That Department evaluates each proposal, rates it on a point system, and forwards the information to HUD. App. 478a-479a.

If HUD agrees to fund a project, COG administers the block grant as an agent of the municipality. App. 479a-481a. COG solicits bids for the project based on specifications drawn up by the municipality's engineer. App. 477a, 479a. Once bids are received, the municipality decides whether to accept the low bid and authorize award of a contract for the project. App. 479a. If the

municipality gives its approval, COG awards the contract and, acting as the agent for the municipality, enters into an agreement with the winning bidder to perform the work. App. 477a, 479a, 481a; see Supp. App. 64-97 (GX 12 & 13, Articles of Agreement). The municipality typically uses its own engineer to monitor the progress of the contract performance. App. 479a-480a. Once the project is complete, the contractor submits an invoice to COG. App. 477a, 480a. Before COG pays the contractor, the municipality must certify that all work has been completed satisfactorily, and must approve payment of the invoice. App. 480a. If the municipality does not give such approval, COG does not pay the contractor. App. 480a. If a municipality approves payment of the contractor, COG submits the invoice to Allegheny County, which then sends the HUD money to COG. Upon receipt of these federal funds, COG uses the money to pay the contractor on behalf of the municipality. App. 477a-478a. COG does not send the money directly to the municipality. App. 484a.

COG, acting as the agent of Rankin Borough, received and distributed HUD block grant money for several public works projects within the Borough, including $299,910.20 in 2002 for street reconstruction and storm sewer replacement and $95,083 in 2003 to reconstruct streets and build a playground. App. 481a-483a;

Supp. App. 64-97 (GX 12 & 13, Articles of Agreement). On each project, the Articles of Agreement with the contractor stated that:

- COG is "acting as [the] agent for Rankin Borough" in entering the agreement;
- COG "is recognized as the agent for the Municipality in soliciting the proposal, accepting the bid, awarding the contract and administering the [block grant] program on behalf of the Municipality for the project";
- The contractor's bid "has been accepted by the Municipality";
- "All work on the project must be performed to the satisfaction of the Municipality," and "[a]ny construction problems or disputes must be resolved between the Contractor and the Municipality";
- "The Municipality will pay Contractor through [COG] for performance of the Contract";
- "No payments will be made unless first approved by the Municipality";
- "Payments will be in the amount approved by the Municipality"; and
- "Any problems or disputes concerning the approved amount must be resolved between the Contractor and the Municipality."

Supp. App. 64-66, 72-74, 80-82, 89-91 (GX 12 & 13, Articles of Agreement (first page and articles 2, 3, 6 & 7(A) of each)). Rankin Borough, in fact, approved the contract awards for these projects, certified that they were completed satisfactorily, and authorized payment of the contractors upon completion of the work. See Supp. App. 71, 79 (GX 12, letters); Supp. App. 87-88, 96-97 (GX 13, letters); App. 480a.

B. Standard Of Review

Briston's argument turns on the meaning of "benefits" under 18 U.S.C. 666(b), a question of statutory interpretation reviewed *de novo*. See p. 28, *supra*.

C. Rankin Borough Received "Benefits" In 2002 And 2003 Through HUD's Block Grant Program

Although conceding that Rankin Borough "is the ultimate beneficiary of the [HUD block grant] program" (Br. 39), Briston nonetheless contends (Br. 36-41) that the Borough did not receive "benefits" within the meaning of Section 666(b) when block grant money was used for public works projects that the Borough had approved. He asserts that Rankin Borough lacked authority to control the expenditure of the HUD block grant money because those funds flowed to the project contractors through Allegheny County and COG, rather than through the Borough. Absent such control, Briston reasons, no federal interest exists

justifying coverage of the Borough under Section 666. Briston's arguments are meritless.

Briston ignores the fact that COG received and administered the block grant money *as an agent of Rankin Borough*. See p. 39-40, *supra*. Accomplishing something through an agent is tantamount to doing the act oneself. See *Vicksburg & M.R. Co.* v. *O'Brien*, 119 U.S. 99, 104 (1886) ("The acts of an agent, within the scope of the authority delegated to him, are deemed the acts of the principal."). Thus, under long-established principles of agency law, Rankin Borough itself is deemed to have received and administered the block grant money when COG performed those acts on the Borough's behalf.

Moreover, Briston is mistaken when he asserts (Br. 39) that Rankin Borough had no "ability or authority to control" the disbursement of the block grant money. In fact, the Borough decided (1) whether to seek HUD funding for a particular project; (2) whether to approve the award of a HUD-funded contract to a bidder; (3) whether to certify that the contractor had completed the work satisfactorily, a prerequisite for payment by COG; and (4) whether to approve payment of invoices submitted by the contractor. See pp. 38-41, *supra*. The Borough thus exercised actual control over disbursement of the block grant money.

Briston nonetheless argues (Br. 40-41) that Congress's interest in protecting the integrity of the block grant program could be fully vindicated by holding that Allegheny County and COG, but not Rankin Borough, are covered entities under 18 U.S.C. 666(b). That reasoning is flawed because even if all County and COG employees perform their duties honestly in administering the HUD funds, corruption by Rankin Borough officials could nonetheless cause squandering of federal monies. If, for example, a Borough official were to certify, in exchange for a bribe or kickback, that a project had been completed properly and that the contractor should be paid, federal funds might be wasted on defective projects.

Finally, Briston asserts (Br. 37) that the HUD block grants were not used "for law enforcement or the Rankin police department" and that Briston himself neither sat on COG's board of directors nor signed off on HUD-funded grants for projects in the Borough. Those assertions are irrelevant. As the Supreme Court has made clear, the government need not prove a nexus between the defendant's criminal conduct and the particular funds used to establish coverage under Section 666(b). *Sabri* v. *United States*, 124 S. Ct. 1941, 1945-1946 (2004). Because Briston was an "agent" of Rankin Borough, 18 U.S.C. 666(a)(1), and the Borough was covered under Section 666(b) by virtue of the HUD block grants, Briston was

subject to prosecution even if his embezzlement, stealing, or conversion of funds had nothing to do with the HUD money.

IV

THE DISTRICT COURT DID NOT ERR IN INSTRUCTING THE JURY THAT PAYMENTS UNDER THE FEDERAL GOVERNMENT'S EQUITABLE SHARING PROGRAM ARE "BENEFITS" FOR PURPOSES OF SECTION 666

The district judge instructed the jury "as a matter of law that payment of forfeited narcotic assets under the Federal Government's equitable sharing program constitutes a benefit under a federal program involving a grant, contract, subsidy, loan, guarantee, insurance or other form of federal assistance." App. 570a.[6] Briston argues (Br. 41-42) that the jury, not the judge, should have decided whether such payments are "benefits." His argument is meritless. Whether equitable sharing payments are "benefits" within the meaning of 18 U.S.C. 666(b) is a question of statutory interpretation and, hence, an issue of law properly reserved to the court.

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[6] The court's instructions still required the jury to decide whether, in fact, the Police Department received such equitable sharing payments within one year of Briston's criminal conduct, and whether the amount of such payments during that period exceeded $10,000. App. 567a, 570a.

A. Standard of Review

Because the question presented is whether the district court's jury instruction misstated the law, this Court's review is plenary. See *United States* v. *McLaughlin*, 386 F.3d 547, 550, 552 (3d Cir. 2004) (exercising plenary review where issue presented was whether district court "erred by instructing the jury that materiality was a question of law").

B. The Determination Whether Equitable Sharing Funds Are "Benefits" Under Section 666(b) Is A Question of Statutory Construction Properly Reserved To The Court

The determination of whether federal funds constitute "benefits" under 18 U.S.C. 666(b) is a question of statutory interpretation entrusted to the court. See *United States* v. *Peery*, 977 F.2d 1230, 1233-1234 n.2 (8th Cir. 1992) (whether a payment from the federal government is covered by Section 666(b) "is a matter of law for judicial determination"), cert. denied, 507 U.S. 946 (1993). Matters of statutory construction are questions of law. *Spruill* v. *Gillis*, 372 F.3d 218, 232 (3d Cir. 2004). Consequently, "it is fundamental that the construction of a statute is within the province of a judge," not a jury. *United States* v. *Lanni*, 466 F.2d 1102, 1110 (3d Cir. 1972). Thus, in *Lanni*, a case involving Section 302 of the Taft-Hartley Act, this Court held that the district judge had properly refused to give a proposed jury instruction that would have "invited the jury to make its own

interpretation of Section 302." *Ibid.* As in *Lanni*, allowing the jury in this case to decide whether equitable sharing funds are "benefits" would be tantamount to inviting the jury to render its own interpretation of Section 666.

The Supreme Court's decision in *Fischer* v. *United States*, 529 U.S. 667 (2000), illustrates that the determination whether a particular type of federal funding qualifies as a "benefit[]" under Section 666(b) is a legal question of statutory interpretation. The language in *Fischer* indicates that the Court was resolving a legal issue applicable to *all* hospitals receiving payments under the Medicare program, not a factual question that applied only to the parties in that particular case. See *id*. at 681 ("The funds health care organizations receive for participating in the Medicare program constitute 'benefits' within the meaning of 18 U.S.C. § 666(b)."); *id*. at 669 ("Upon consideration of the role and regulated status of hospitals as health care providers under the Medicare program, we hold they receive 'benefits' within the meaning of the statute."). Yet under Briston's logic, the question whether Medicare payments to hospitals are "benefits" under Section 666(b) would have to be submitted to the jury, with jurors presumably free under his theory to find, contrary to *Fischer*, that such Medicare payments are not federal benefits. Briston's position is thus fundamentally at odds with *Fischer*.

Briston's reliance on *United States* v. *Gaudin*, 515 U.S. 506 (1995) (see Br. 42) is misplaced. At issue in *Gaudin* was whether the requirement under 18 U.S.C. 1001 that a false statement be "material" was an element that must be decided by the jury. As the Supreme Court noted, to be "material" a statement must have "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Gaudin*, 515 U.S. at 509 (quoting *Kungys* v. *United States*, 485 U.S. 759, 770 (1988)). That inquiry, which focuses on the context in which the statement and decisionmaking occurred, is necessarily fact-intensive and case-specific.

Quite the opposite is the case with 18 U.S.C. 666(b). As the Supreme Court emphasized in *Fischer*, the determination whether a federal program provides "benefits" under Section 666(b) necessarily analyzes "the program's structure, operation, and purpose." 529 U.S. at 681. The focus is thus on the nature of a federal program, which does not change from case-to-case. That determination, unlike the fact-bound materiality issue in *Gaudin*, is properly viewed as a question of law entrusted to the court.

V

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW THE DEFENSE TO PRESENT TESTIMONY CONCERNING ACCUSATIONS OF WRONGDOING BY RANKIN BOROUGH'S MAYOR

Briston argues (Br. 43-44) that the district court abused its discretion by excluding testimony concerning alleged efforts by the mayor of Rankin Borough to tamper with evidence related to the arrests of his son and nephew, including the mayor's alleged attempts to gain access to the police station to accomplish such evidence-tampering. Defendant contends (Br. 43-44) that the exclusion of the testimony requires a new trial on the obstruction-of-justice charge in Count 4. The refusal to admit this testimony was not an abuse of discretion. The accusations against the mayor had little, if any, relevance to the issues in the case and introducing them would have resulted in a mini-trial that had the potential to confuse the jury and divert its attention away from the charges in the indictment.

A. Background

Officer Jeffrey Novak testified as a government witness concerning Briston's efforts to have Novak and another officer place an envelope in the police station's evidence locker. App. 425a-430a. On direct examination, Novak testified that Briston told him that he did not trust the Borough's mayor and had to

hide "some stuff" from him. App. 426a. During cross-examination, defense counsel elicited similar testimony from Novak that Briston said he did not trust the mayor and "had to keep some things at home." App. 448a, 450a.

Defense counsel later requested permission to introduce testimony from three witnesses pertaining to the mayor. App. 503a-507a. The district court ruled that this testimony was irrelevant and would not be admitted. App. 506a-509a. Defense counsel made the following proffer concerning the three witnesses:

Antonio Walker would have testified that he arrested the mayor's son in February 2003 for receiving stolen property and on suspicion of robbery, and that the mayor asked Walker to drop the charges, but he refused. Walker also would have testified that the mayor tried to enter the police station but that Briston had strict rules denying entry to anyone, including the mayor, who lacked a clearance. In addition, Walker would have testified that he became concerned because the preliminary hearing for the mayor's son was repeatedly postponed, and that he believed the main witness against the mayor's son was being intimidated. Walker shared these concerns with Briston, who then made allegations against the mayor during a report on a local television channel, a tape of which defense counsel proposed to play during Walker's testimony. App. 503a-505a.

Moreover, Walker would have testified that he arrested the mayor's nephew in April 2004 for possession of crack cocaine.[7] Walker confiscated a cell phone, scales, and cash from the nephew and placed them in the station's evidence locker. Walker would have testified that the mayor ordered other officers to return those items to his nephew, thus interfering with attempts to prosecute the nephew. In addition, Walker would have testified that he tried to get a search warrant for the nephew's car because he believed the trunk contained a gun, but that the towing company that had impounded the car released it before he could conduct the search. Defense counsel suggested that the mayor had something to do with the towing company's decision to release the car. App. 505a-506a.

Dana Norman would have testified that, in late 2003, Briston ordered him not to allow the mayor into the police station's records and investigation rooms. According to the defense proffer, Norman and the mayor got into a scuffle when the mayor tried to enter that part of the station; Norman initially refused to let him in, but relented after the mayor threatened to suspend him. App. 506a-507a.

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[7] Briston incorrectly asserts (Br. 18) that the events relating to the mayor's nephew occurred in 2003. In fact, the nephew's arrest occurred *after* Briston asked the officers to put the envelope in the evidence locker. Whatever actions the mayor took in April 2004 in response to his nephew's arrest could not have explained why Briston might have taken Brice's money home with him prior to that date.

Defense counsel suggested in her proffer that this testimony was related to the mayor's alleged attempts to gain access to evidence about his son's case. App. 507a.

William Lucky Price would have corroborated Norman's testimony about the scuffle with the mayor. App. 507a.

During closing argument, defense counsel reminded the jury of Novak's testimony that Briston had claimed that "[t]here are some things I have to keep at home because I just don't trust the mayor." App. 633a. Defense counsel suggested that this testimony undercut the government's theory that Briston had committed obstruction of justice when he arranged for the envelope to be placed in the evidence locker. App. 633a.

B. Standard Of Review

A district court's decision to admit or exclude evidence is reviewed for abuse of discretion. *United States* v. *Retos*, 25 F.3d 1220, 1227 (3d Cir. 1994); *United States* v. *McNeill*, 887 F.2d 448, 453-454 (3d Cir. 1989) (applying abuse-of-discretion standard in rejecting defendant's Sixth Amendment compulsory process claim), cert. denied, 493 U.S. 1087 (1990). "It is the trial court, of course, and not the Court of Appeals, which is in the best position to consider the complicated evidentiary issues involved in a given case." *Retos*, 25 F.3d at 1228.

C. Exclusion Of The Proffered Testimony Did Not Violate The Compulsory Process Clause Because The Evidence Had Little, If Any, Relevance To The Charges Against Briston And Its Admission Posed A Substantial Risk Of Side-Tracking The Proceedings And Confusing The Jury

In challenging the exclusion of the proffered testimony, Briston invokes (Br. 43-44) the Sixth Amendment right to compulsory process. Although the Compulsory Process Clause gives a defendant a qualified right to present witnesses in his defense, *Taylor* v. *Illinois*, 484 U.S. 400, 408-409 (1988), the right "is not unlimited, but rather is subject to reasonable restrictions," including rules of evidence. *Bronshtein* v. *Horn*, 404 F.3d 700, 729 (3d Cir. 2005) (quoting *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998)). To establish a violation of the Compulsory Process Clause, Briston must show that "the excluded testimony would have been material and favorable to his defense," and that the trial judge's ruling "was arbitrary or disproportionate to any legitimate evidentiary or procedural purpose." *Government of Virgin Islands* v. *Mills*, 956 F.2d 443, 446 (3d Cir. 1992).

Briston's claim fails because the exclusion of the proffered testimony was neither "arbitrary" nor "disproportionate to [a] legitimate evidentiary * * * purpose." *Mills*, 956 F.2d at 446. Rather, the exclusion was justified by the need

to avoid a mini-trial on collateral matters that would have posed a significant risk of juror confusion.

The Constitution leaves to trial judges "wide latitude to exclude evidence that is * * * only marginally relevant or poses an undue risk of * * * confusion of the issues." *Crane* v. *Kentucky*, 476 U.S. 683, 689-690 (1986) (internal quotation marks omitted). Moreover, Rule 403 of the Federal Rules of Evidence, which is "unquestionably constitutional," *Montana* v. *Egelhoff*, 518 U.S. 37, 42 (1996) (plurality), "authorizes a district court in its broad discretion to exclude collateral matters that are likely to confuse the issues." *United States* v. *Casoni*, 950 F.2d 893, 919 (3d Cir. 1991).

As this Court has recognized, if the introduction of proffered testimony presents a significant risk of sidetracking the proceedings onto collateral matters and thereby confusing the jury, the exclusion of that evidence does not violate the defendant's constitutional right to present a defense. See *Bronshtein*, 404 F.3d at 728-730. The defendant in *Bronshtein*, who had been sentenced to death for murder, had sought to introduce testimony at his state trial about another individual's role in a robbery that was not directly related to the crime for which defendant was being tried. *Id.* at 728-729. This Court concluded, on habeas review, that the trial judge's exclusion of this testimony did not violate the

defendant's federal constitutional rights. *Id.* at 729-730. In reaching that result, the Court highlighted "the likely danger that the evidence would sidetrack the proceedings and confuse the jury," and emphasized that admission of the testimony "risked submerging the defendant's trial in collateral litigation over an unsolved and (at most) tangentially related crime committed by someone other than the accused." *Id.* at 729.

The same risk existed here. The proffered testimony would have resulted in a mini-trial over accusations of attempted evidence-tampering by the mayor – explosive allegations that posed a risk of confusing the jury and distracting its attention from the crimes charged in the indictment. The risk of confusion was compounded by the fact that the accusations against the mayor occurred against a backdrop of alleged criminal activity by the mayor's son and nephew.

Finally, Briston argues that the exclusion of the proffered testimony was "arbitrary in that the prosecution elicited defendant's statement regarding the mayor from its witnesses on direct." Br. 43. We are aware of only one such witness (Jeffrey Novak) who mentioned Briston's statement about needing to hide things from the mayor. See App. 426a. Novak's brief testimony on that point did not prejudice defendant or open the door to the proffered testimony. If anything, that portion of Novak's testimony aided the defense because (combined with

similar testimony elicited from him on cross-examination), it gave defense counsel a hook to suggest to the jury in closing argument that Briston had a valid reason for not storing certain evidence in the locker. See App. 633a. Thus, even without the testimony excluded by the district judge, the defense was able to present its theory to the jury.[8]

VI

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN INSTRUCTING THE JURY ON COUNT 1

Briston asserts (Br. 44-45) that the district court abused its discretion by failing specifically to name Tamera Brice in its jury instruction on Count 1, the 18 U.S.C. 242 charge. Briston's argument fails because the jury instruction tracked Section 242's language and, in the context of the entire trial, was not capable of confusing the jury. Therefore, the court did not abuse its discretion.

A. Standard of Review

This Court reviews the district court's "decision to use particular language in the jury charge for abuse of discretion." *Grazier* v. *City of Philadelphia*, 328 F.3d 120, 126 (3d Cir. 2003). To determine whether the court abused its

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[8] Consequently, even if the exclusion of the testimony violated the Sixth Amendment, the error was harmless beyond a reasonable doubt. See *United States* v. *Leo*, 941 F.2d 181, 195 (3d Cir. 1991) (finding error harmless).

discretion, this Court examines "whether the charge, taken as a whole and viewed in the light of the evidence, fairly and adequately submits the issues in the case to the jury." *United States* v. *Tiller*, 302 F.3d 98, 103-104 n.3 (3d Cir. 2002) (quoting *Ayoub* v. *Spencer*, 550 F.2d 164, 167 (3d Cir. 1977)). Under this standard, "[t]he trial court should be reversed only if the instruction was capable of confusing and thereby misleading the jury." *United States* v. *Fischbach & Moore, Inc.*, 750 F.2d 1183, 1195 (3d Cir. 1984), cert. denied, 470 U.S. 1029 (1985).

B. The Instruction Was Not An Abuse Of Discretion Because It Tracked The Language Of 18 U.S.C. 242 And, When Viewed In Context, Was Not Capable Of Confusing The Jury

Briston objects to the portion of the jury instruction stating that the government must prove beyond a reasonable doubt "that the defendant deprived a person in any Commonwealth of a right protected by the Constitution or laws of the United States as alleged in the indictment." App. 561a. Defendant argues that the district court should have used Tamera Brice's name in place of "a person." The instruction, as phrased, was not an abuse of discretion.

The jury instruction was correct because its use of the word "person" tracked the statutory language. See 18 U.S.C. 242 ("Whoever, under color of any law * * * willfully subjects any *person* in any State [or] Commonwealth * * * to

the deprivation of any rights * * * protected by the Constitution or laws of the United States" shall be criminally liable) (emphasis added). Courts repeatedly have found jury instructions proper where they tracked the relevant statutory language. See, *e.g.*, *United States* v. *Wise*, 221 F.3d 140, 152 (5th Cir. 2000) (finding no abuse of discretion because the jury instruction "tracked the language of the statute" and was therefore "proper"), cert. denied, 532 U.S. 959 (2001); *United States* v. *Cornillie*, 92 F.3d 1108, 1110 (11th Cir. 1996) (holding that the district court "correctly instructed the jury" where the jury charge "track[ed] the language of the statute").

Briston nonetheless asserts that the instruction on Count 1 "was confusing for the jury." Br. 44. His argument fails. "It is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Estelle* v. *McGuire*, 502 U.S. 62, 72 (1991). When "evaluating the instructions," a court is not to "engage in a technical parsing of [the] language of the instructions, but instead [must] approach the instructions in the same way that the jury would – with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.'" *Johnson* v. *Texas*, 509 U.S. 350, 368 (1993) (quoting *Boyde* v. *California*, 494 U.S. 370, 381 (1990)).

In the context of the entire trial, there was no ambiguity as to the identity of the "person" referred to in the Count 1 instructions. Indeed, in closing arguments, Briston's counsel told the jury that Count 1 was "the count where the prosecution must convince you beyond a reasonable doubt that Darryll Briston denied *Tamera Brice* of her money without due process." App. 613a (emphasis added). The entire thrust of the government's evidence at trial was that Briston took possession of money belonging to *Brice* and then rebuffed *her* attempts to get it back. In its opening statement, the government asserted that the evidence would prove that Briston "stole and converted to his own use $5,855 from *Tamera Brice* and deprived *her* of due process of law by failing to give *her* notice in a court hearing so she could contest the taking of *her* money." App. 91a (emphasis added). Similarly, during closing argument, the prosecutor told the jury that "the evidence proves at Count 1 that, beyond a reasonable doubt, * * * the defendant took $5,855 from *Tamera Brice's* home, put it in his pocket, [and] denied *her her* right to have a Court determine the ownership of the money." App. 598a (emphasis added); accord App. 592a-593a. In light of the government's evidence at trial and the statements by the prosecution and defense counsel, the reference to "a person" in Count 1 would not have confused the jury. The district court's instruction therefore was not an abuse of discretion.

CONCLUSION

The Court should affirm defendant's conviction.[9]

Respectfully submitted,

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[9] Contrary to Briston's assertion (Br. 45), each count of the second superseding indictment is independent of the others, and thus reversal on Count 2 would not require overturning Briston's convictions on the other three counts. Each count charges a separate offense, and none of the counts refers to or incorporates any of the others. See App. 39a-44a (second superseding indictment). The cross-reference in each count to certain introductory allegations in the indictment does not make the counts interdependent.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Wordperfect 9.0 and contains 12,706 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I also certify that the electronic version of this brief, which has been emailed to the Court, is an exact copy of what has been submitted to the Court in written form. I further certify that this electronic copy has been scanned with the most recent version of McAffee VirusScan Enterprise (version 8.0i) and is virus-free.

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September 1, 2005

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2005, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE were served by first-class mail, postage prepaid, on the following:

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I further certify that on September 1, 2005, the appropriate number of copies of the same brief were sent, by first-class mail, postage prepaid, to the Clerk of the United States Court of Appeals for the Third Circuit.

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