

1
2 In the
3 United States Court of Appeals
4 For the Second Circuit
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7 AUGUST TERM, 2015

8 ARGUED: OCTOBER 22, 2015
9 DECIDED: SEPTEMBER 21, 2016
10

11
12 No. 14-2437-cr
13

14 UNITED STATES OF AMERICA,
15 *Appellee,*

16
17 *v.*
18

19 PAUL M. DAUGERDAS,
20 *Defendant-Appellant.*¹
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23 Appeal from the United States District Court
24 for the Southern District of New York.
25 No. 09 Cr. 00581 – William H. Pauley III, *Judge.*
26

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28 Before: KEARSE, WALKER, and CABRANES, *Circuit Judges.*
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31 Defendant Paul M. Daugerdas appeals from a judgment
32 entered in the United States District Court for the Southern District

¹ The Clerk of the Court is directed to amend the caption as set forth above.

1 of New York (Pauley, *J.*) following a jury trial convicting him of
2 (1) one count of conspiracy to defraud the Internal Revenue Service
3 (“IRS”) in violation of 18 U.S.C. § 371; *see* 26 U.S.C. § 7201 and 18
4 U.S.C. § 1343; (2) four counts of client tax evasion in violation of 26
5 U.S.C. § 7201 and 18 U.S.C. § 2; (3) one count of IRS obstruction in
6 violation of 26 U.S.C. § 7212(a); and (4) one count of mail fraud in
7 violation of 18 U.S.C. §§ 1341 and 1342. He was sentenced
8 principally to 180 months’ imprisonment, three years’ supervised
9 release, \$164,737,500 in forfeiture, and \$371,006,397 in restitution. He
10 argues on appeal that (I) the evidence was insufficient to support his
11 convictions; (II) the indictment was constructively amended; (III) the
12 indictment was duplicitous; (IV) the accumulation of errors at trial
13 violated his due process right to a fair trial; (V) the district court’s
14 supplemental instruction on the Annual Accounting Rule misled the
15 jury; (VI) his sentence was procedurally and substantively
16 unreasonable; and (VII) the government failed to establish the
17 requisite nexus between his crimes and the property sought in
18 forfeiture. Finding no merit in his arguments, we AFFIRM.

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United States Attorney, *on the brief*), *for* Preet
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District of New York, *for Appellee*.

1 HENRY E. MAZUREK (Brian D. Linder, *on the brief*),
2 Clayman & Rosenberg LLP, New York, NY, *for*
3 *Defendant-Appellant*.

4 _____
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6 JOHN M. WALKER, JR., *Circuit Judge*:

7 Defendant Paul M. Daugerdas appeals from a judgment
8 entered in the United States District Court for the Southern District
9 of New York (Pauley, *J.*) following a jury trial convicting him of
10 (1) one count of conspiracy to defraud the Internal Revenue Service
11 (“IRS”) in violation of 18 U.S.C. § 371; *see* 26 U.S.C. § 7201 and 18
12 U.S.C. § 1343; (2) four counts of client tax evasion in violation of 26
13 U.S.C. § 7201 and 18 U.S.C. § 2; (3) one count of IRS obstruction in
14 violation of 26 U.S.C. § 7212(a); and (4) one count of mail fraud in
15 violation of 18 U.S.C. §§ 1341 and 1342. He was sentenced
16 principally to 180 months’ imprisonment, three years’ supervised
17 release, \$164,737,500 in forfeiture, and \$371,006,397 in restitution.
18 He argues on appeal that (I) the evidence was insufficient to support
19 his convictions; (II) the indictment was constructively amended;
20 (III) the indictment was duplicitous; (IV) the accumulation of errors
21 at trial violated his due process right to a fair trial; (V) the district
22 court’s supplemental instruction on the Annual Accounting Rule
23 misled the jury; (VI) his sentence was procedurally and
24 substantively unreasonable; and (VII) the government failed to

1 establish the requisite nexus between his crimes and the property
2 sought in forfeiture. Finding no merit in his arguments, we
3 AFFIRM.

4 **BACKGROUND**

5 The evidence taken in the light most favorable to the
6 government showed the following.

7 Paul M. Daugerdas was a Certified Public Accountant
8 ("CPA") and tax attorney at Arthur Andersen through August of
9 1994; the law firm Altheimer & Gray from the end of 1994 through
10 1998; and the Chicago office of the law firm Jenkins & Gilchrist
11 ("J&G") from 1999 through April 2004. Throughout his career,
12 Daugerdas developed, sold, and implemented a variety of tax-
13 reduction strategies for wealthy clients: the so-called Short Sale
14 Shelter, Short Option Shelter, Swaps Shelter, and HOMER Shelter.
15 Besides Daugerdas's employers, two other entities had significant
16 involvement in this undertaking. The accounting firm BDO
17 Seidman ("BDO") referred its clients to J&G and helped to sell the
18 shelters, and the investment bank Deutsche Bank Alex. Brown
19 ("DB") assisted J&G in the design of the shelters, held informational
20 meetings with clients, and implemented the transactions that
21 composed the shelters.

1 **I. The Development and Sale of the Tax Shelters**

2 Daugerdas designed and sold the shelters beginning in the
3 early 1990s when he was a partner at Arthur Andersen. Although
4 the transactions underlying the shelters changed over time, the facts
5 surrounding their marketing and implementation varied little.
6 Daugerdas designed the Short Sale Shelter, which created losses
7 through the short sale of U.S. Treasury securities followed by
8 transfers between a partnership, a limited liability company, and an
9 S-corporation. In 1999, because Daugerdas and other J&G attorneys
10 were concerned that pending legislation would render the Short Sale
11 Shelter ineffective, they developed the Short Option Shelter as a
12 substitute. This shelter generated losses through the sale of a digital
13 currency option instead of through the short sale of Treasury
14 securities but was otherwise similar to the Short Sale Shelter.

15 In August of 2000, the IRS announced that transactions like
16 the Short Sale and Short Option Shelter would no longer provide the
17 favorable tax treatment that J&G sought for its clients. To replace
18 these two shelters, Daugerdas and his colleagues developed the
19 Swaps Shelter, which simply replaced the digital currency option
20 with a swap transaction. At approximately the same time as he was
21 developing the Swaps Shelter, Daugerdas also worked on
22 developing and implementing the HOMER Shelter. The structure of

1 the HOMER Shelter's underlying transactions was more complex
2 than the structures of the other shelters.

3 As an essential part of the marketing of all the tax shelters,
4 Daugerdas and his colleagues issued "more-likely-than-not" opinion
5 letters to clients who purchased the shelters. Such letters state that
6 "under current U.S. federal income tax law it is more likely than not
7 that" the transactions comprising the shelters are legal and will have
8 the effect sought by the clients. They protect clients from the IRS's
9 imposition of a financial penalty in the event that the IRS does not
10 permit the losses generated by the shelter to reduce the client's tax
11 liability. Paralegals or attorneys who worked for Daugerdas
12 generated these letters and Daugerdas often reviewed and signed
13 them himself. The letters stated that the clients had knowledge of
14 the particular transactions underlying the shelter and that the clients
15 were entering into the shelter for non-tax business reasons. Multiple
16 clients testified that they never made representations of knowledge
17 to Daugerdas or his associates and that, in any event, these
18 representations were false because the clients knew little or nothing
19 about the underlying transactions and entered into the shelters only
20 to reduce their tax liability.

21 Because Daugerdas and his colleagues designed the
22 transactions with a focus on their tax consequences rather than their
23 profitability, they generally did not generate meaningful returns.

1 For example, the clients who engaged in the Short Sale shelter in
2 1998 lost approximately \$685,000 as part of the shelter. Clients who
3 used the Short Option Shelter had a 4.6% to 37.6% chance of
4 doubling their 1% investment. If they did not double their
5 investment, they lost it in its entirety. Swaps Shelter clients were
6 even less likely to profit from their transaction; of the approximately
7 60 participants in the trade, only two made a profit on the trade, one
8 of whom made only one dollar. The chance of any client profiting
9 from the HOMER shelter as it was originally designed was
10 negligible—J&G associate attorney John Beery informed Daugerdas
11 that an implementation issue would prevent any of the HOMER
12 clients from realizing a profit from the transaction. Nevertheless,
13 Daugerdas chose to proceed and even issued “more-likely-than-not”
14 opinion letters falsely stating that some of the transactions had a
15 reasonable possibility of producing a profit. Moreover, the already-
16 low profit potential of all the shelters disappeared entirely when the
17 fees charged by J&G, BDO, and DB for the shelters were taken into
18 account.

19 II. The Backdating of Shelter Transactions

20 As part of the implementation of the Swaps and Short Option
21 Shelters, Daugerdas either directly or through his team at J&G
22 participated in the correction and backdating of certain transactions
23 that had originally been incorrectly implemented on behalf of

1 (1) Matthew Coleman and Greg Blair; (2) Michael Toporek; and (3)
2 the Aronoff family. A lawyer who worked with Daugerdas testified
3 that he discussed with Daugerdas the backdating of transactions and
4 how they could justify it. Another witness testified that Daugerdas
5 was the head of the team of lawyers with whom she communicated
6 regarding backdated transactions.

7 In 2001, to obtain ordinary losses, business partners Coleman
8 and Blair consulted with Daugerdas and decided to enter into the
9 Swaps Shelter. In December 2001, DB broker David Parse's
10 assistant, Carrie Yackee, received authorization from J&G to
11 complete the purchase and sale of Cisco shares as part of the shelter.
12 In February 2002, J&G attorneys realized that this transaction had
13 generated capital losses rather than ordinary losses. To correct this
14 error, J&G faxed to Parse an undated letter asking him to reverse the
15 Cisco sale, along with letters dated December 24 and 28, 2001,
16 directing him to implement transactions that would have the effect
17 of generating the ordinary losses requested by Coleman and Blair.
18 Yackee received these faxes, and ensured that DB carried out the
19 instructions they requested. She eventually returned to J&G the
20 account statements containing the backdated transactions. These
21 statements were used in the preparation of Coleman and Blair's 2001
22 tax returns.

1 For 2001 and 2002, Toporek sought from the Swaps Shelter
2 \$1.3 million in ordinary losses and \$700,000 in capital losses. J&G
3 made a mistake in the instructions given to Parse, requesting the
4 reverse: \$700,000 in ordinary losses and \$1.3 million in capital losses.
5 In March 2002, J&G became aware of this error. After internal
6 discussions regarding how to proceed, Beery asked Parse to
7 implement several transactions in April 2002 but date them to
8 December 28, 2001. After DB implemented the corrective
9 transactions, Daugerdas sent Toporek's tax preparer, Judith
10 Quedenfeld, a letter falsely indicating that the transactions had been
11 completed in 2001 and seeking the return of a prior opinion, which
12 had detailed the original, erroneous transaction. Quedenfeld used
13 documentation of the corrected transaction in the preparation of
14 Toporek's tax returns and, as a result, Toporek was able to claim the
15 losses he had originally sought.

16 J&G attorneys and DB employees engaged in a similar course
17 of conduct to correct mistakes that were made in the implementation
18 of the Short Option Shelter for the Aronoff family. This incident is
19 not at issue in this appeal.

20 **III. Daugerdas's Personal Use of Tax Shelters**

21 Daugerdas also used tax shelters to reduce his personal tax
22 liability. From 1993 to 1998, Daugerdas received more than \$26
23 million in income. He personally used the Short Sale Shelter yearly

1 during that time period, and, as a result, he paid only \$7,315 in
2 federal personal income tax. From 1999 to 2001, Daugerdas had
3 over \$79 million in income. During those years, he used the Short
4 Option Shelter to offset this income and paid no income tax.

5 **IV. Procedural History**

6 In 2009, Daugerdas, Parse, and others involved in the design,
7 marketing, and implementation of the shelters were indicted for
8 conspiracy, tax evasion, obstructing the IRS, and mail fraud.
9 Daugerdas was convicted on all of the counts with which he was
10 charged. The results for the other defendants were mixed. On June
11 4, 2012, the district court granted a new trial based on juror
12 misconduct as to all defendants except Parse, who, the district court
13 found, had waived his right to raise the objection. After this court
14 reversed the district court's determination as to Parse, *United States*
15 *v. Parse*, 789 F.3d 83 (2d Cir. 2015), Parse negotiated a deferred
16 prosecution agreement with the government.

17 On July 1, 2013, the government filed a new indictment,
18 containing charges similar to those in the prior indictment, against
19 Daugerdas and a co-defendant who was later acquitted on all
20 counts. The indictment charged Daugerdas with: (1) one count of
21 conspiracy to defraud the IRS in violation of 18 U.S.C. § 371; *see* 26
22 U.S.C. § 7201 and 18 U.S.C. § 1343; (2) ten counts of client tax
23 evasion in violation of 26 U.S.C. § 7201 and 18 U.S.C. § 2; (3) three

1 counts of personal tax evasion in violation of 26 U.S.C. § 7201;
2 (4) one count of IRS obstruction in violation of 26 U.S.C. § 7212(a);
3 and (5) one count of mail fraud in violation of 18 U.S.C. § 1341 and
4 1342. Daugerdas was ultimately convicted of (1) one count of
5 conspiracy to defraud the IRS; (2) four counts of client tax evasion
6 (arising from the shelters implemented for Coleman and Blair and
7 Toporek); (3) one count of IRS obstruction; and (4) one count of mail
8 fraud. He was acquitted of six counts of client tax evasion and the
9 three counts of personal tax evasion.

10 In May 2014, the district court sentenced Daugerdas to 180
11 months' imprisonment, three years' supervised release, \$164,737,500
12 in forfeiture, and \$371,006,397 in restitution.

13 DISCUSSION

14 Daugerdas presents the following issues for our review:
15 (I) whether the evidence was sufficient to support his convictions;
16 (II) whether the district court's supplemental instruction on the
17 Annual Accounting Rule misled the jury; (III) whether the
18 indictment was constructively amended; (IV) whether the
19 accumulation of errors at trial violated his due process right to a fair
20 trial; (V) whether the indictment was duplicitous; (VI) whether his
21 sentence was procedurally and substantively reasonable; and
22 (VII) whether the government proved the requisite nexus between
23 his crimes and the property sought in forfeiture.

1 **I. Sufficiency of the Evidence**

2 We review de novo a challenge to the sufficiency of the
3 evidence supporting a criminal conviction by “view[ing] the
4 evidence in the light most favorable to the government, drawing all
5 inferences in the government’s favor and deferring to the jury’s
6 assessments of the witnesses’ credibility.” *United States v. Pierce*, 785
7 F.3d 832, 837-38 (2d Cir. 2015) (internal quotation marks omitted).
8 “We will sustain the jury’s verdict if any rational trier of fact could
9 have found the essential elements of the crime beyond a reasonable
10 doubt.” *Id.* at 838 (emphasis and internal quotation marks omitted).

11 **A. The Evidence Supporting Daugerdas’s Mens Rea**

12 Daugerdas first argues that the government failed to prove
13 that he had the necessary mens rea to be guilty of tax evasion, mail
14 fraud, and obstruction of the IRS. The convictions on these counts
15 turned upon the misrepresentations in the tax returns of
16 (1) Coleman and Blair; and (2) Toporek.

17 Daugerdas’s conviction on these counts will stand only if the
18 evidence was sufficient to enable a rational jury to conclude beyond
19 a reasonable doubt that Daugerdas knew that the tax returns of
20 Coleman and Blair and Toporek misrepresented their tax liability in
21 some way. *See United States v. Regan*, 937 F.2d 823, 827 (2d Cir.)
22 *amended*, 946 F.2d 188 (2d Cir. 1991) (stating that the crime of tax
23 evasion requires the “voluntary, intentional violation of a known

1 legal duty” (internal quotation marks omitted)); *United States v.*
2 *Alkins*, 925 F.2d 541, 550 (2d Cir. 1991) (“If an individual believes
3 that the information set forth in a mailing is true, it follows that he
4 cannot have the requisite intent to [commit mail fraud].”); *Parse*, 789
5 F.3d at 121 (“To act or endeavor ‘corruptly,’ within the meaning of
6 [the statute criminalizing obstruction of the IRS], means to act or
7 endeavor with the intent to secure an unlawful advantage or benefit
8 either for one’s self or for another.” (some internal quotation marks
9 omitted)).

10 Daugerdas attacks the sufficiency of the government’s proof
11 that he knowingly developed and sold shelters that violated the so-
12 called economic substance rule. Under this rule, “sham transactions
13 that [cannot] with reason be said to have purpose, substance, or
14 utility apart from their anticipated tax consequences” cannot form
15 the basis of legitimate tax losses under the Internal Revenue Code.
16 *Bank of N.Y. Mellon Corp. v. Comm’r of Internal Revenue*, 801 F.3d 104,
17 113 (2d Cir. 2015) (internal quotation marks omitted).

18 For a jury to conclude that Daugerdas had the necessary mens
19 rea to commit tax evasion, mail fraud, and obstruction of the IRS on
20 the basis of violations of the economic substance rule, they would
21 have to find both that he knew the rule and knew that the
22 transactions lacked economic substance. *See Parse*, 789 F.3d at 121.
23 Our inquiry into whether a transaction lacks economic substance

1 requires us to examine “(1) whether the [clients] had an objectively
2 reasonable expectation of profit, apart from tax benefits, from the
3 transaction; and (2) whether the [clients] had a subjective non-tax
4 business purpose in entering the transaction.” *Bank of N.Y. Mellon*,
5 801 F.3d at 115. This inquiry does not involve “a rigid two-step
6 process,” but instead calls for a “flexible analysis where both prongs
7 are factors to consider in the overall inquiry.” *Id.* (internal quotation
8 marks omitted).

9 **1. Knowledge of the Economic Substance Rule**

10 In *Parse*, we found the following facts sufficient to support a
11 conclusion that Parse knew the economic substance rule: (1) he was
12 an experienced CPA with a master’s degree in business
13 administration; and (2) in connection with his personal use of a
14 similar tax shelter, he received an opinion letter describing the
15 economic substance rule in detail. 789 F.3d at 122. As in *Parse*, on
16 the facts of this case, a rational jury was entitled to conclude that
17 Daugerdas was well-acquainted with the economic substance rule
18 based on evidence that he was an experienced CPA and tax lawyer
19 who explained the economic substance requirement to his clients.

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2. The Economic Substance of the Swaps Shelter

a. Coleman's, Blair's, and Toporek's Objectively Reasonable Expectation of Profit

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4 In arguing that the government failed to prove that he knew
5 that Coleman and Blair and Toporek did not have an objectively
6 reasonable expectation of making a profit from the Swaps Shelter,
7 Daugerdas relies on the legal ambiguity surrounding the question of
8 whether the tax advisory fees associated with each shelter should be
9 factored into the analysis. Daugerdas argues that, because it is not
10 clear whether or not the fees should be included in the calculation,
11 he had a good-faith belief that the fees should not be considered.
12 The lack of economic substance is only apparent, he argues, if the
13 costs associated with the tax advisory fees are included in the
14 calculation.

15 This argument ignores the fact that, even if the tax advisory
16 fees were not included in the analysis, the chance of any Swaps
17 Shelter "investor" earning a profit was still extremely low. The
18 government's expert testified that Coleman and Blair had a 1%
19 chance and Toporek a 3% chance of earning a profit even before the
20 inclusion of the fees. In the end, only two of the approximately 60
21 clients who invested in the Swaps Shelter made a profit, and one of
22 these earned a profit of just one dollar.

23 Moreover, Daugerdas was aware that the possibility of
24 success was low. He acknowledged to Coleman that the transaction

1 was “highly unlikely” to produce a profit and this would happen
2 “only if all the moons were lined up.” Taken together, this evidence
3 permitted a rational jury to infer that, regardless of Daugerdas’s
4 purported belief that advisory fees were properly excluded,
5 Daugerdas knew that Coleman and Blair and Toporek could not
6 have had an objectively reasonable expectation of profiting from
7 their investment.

8 **b. Coleman’s, Blair’s, and Toporek’s Subjective**
9 **Non-Tax Business Purpose in Entering the**
10 **Transaction**

11 The evidence of the low likelihood of Coleman, Blair, and
12 Toporek profiting from the Swaps Shelter provided circumstantial
13 support for inferences that they did not have a subjective non-tax
14 business purpose in entering the transaction, and that Daugerdas
15 knew it.

16 The latter inference is also supported by Coleman’s testimony
17 about his conversations with Daugerdas. Coleman testified at trial
18 that Daugerdas advised him to “focus” on “making the investment
19 for profit purposes” if he were to be audited by the IRS. Tr. 5847.
20 Coleman viewed this advice as an effort to have him “stretch the
21 truth” about why he was entering into the shelter. *Id.* at 5904. This
22 advice was also relevant to the question of whether Daugerdas knew
23 that Toporek did not have a subjective non-tax business purpose in
24 entering the transaction. If Daugerdas could infer, based on the low

1 profit potential, that Coleman and Blair were not intending to make
2 a profit, then he could have inferred the same about Toporek, given
3 that his profit potential was similarly low.

4 A rational jury could thus have concluded that Daugerdas
5 (1) was familiar with the economic substance rule and (2) knew that
6 the transactions lacked economic substance because he knew
7 that (a) Coleman and Blair and Toporek had no objectively
8 reasonable expectation of making a profit from the Swaps Shelter
9 and (b) they did not have a subjective non-tax business purpose in
10 entering the transaction. Therefore, the evidence was sufficient for a
11 jury to find that Daugerdas was guilty of tax evasion, mail fraud,
12 and obstruction of the IRS.

13 **B. The Evidence Supporting Daugerdas's Convictions of**
14 **Conspiracy and Mail Fraud**

15 Daugerdas next argues that the evidence was insufficient to
16 sustain his convictions for conspiracy to defraud the IRS and the
17 same mail fraud count previously discussed because (1) there was
18 no evidence that he participated in the scheme involving illegal
19 backdating; (2) the government failed to prove that the mail fraud
20 affected a financial institution; and (3) the indictment did not allege
21 that the mail fraud affected a financial institution. Each of these
22 contentions is meritless.

1 **1. Evidence of Daugerdas's Participation in Backdating**

2 The record belies Daugerdas's argument that there was no
3 evidence that he participated in the scheme involving illegal
4 backdating. Erwin Mayer, a lawyer who worked with Daugerdas
5 for several years, testified that he had discussed backdating with
6 Daugerdas on multiple occasions and that the discussions concerned
7 "fixes that [he does] for their client situations" and ways to
8 "potentially justify[]" backdating the transactions. Tr. 2339-40.

9 Further, Yackee testified extensively about her
10 communications with J&G employees regarding backdated
11 transactions effected on behalf of Coleman and Blair, Toporek, and
12 the Aronoff family. Although Yackee did not specifically name
13 Daugerdas as a participant in these communications, she stated that
14 he was "the head of that team of people" at J&G with whom she
15 communicated regarding the backdating. *Id.* at 4031-32.

16 Finally, Quedenfeld, who prepared tax returns for Toporek
17 that reflected the backdated transaction, also provided testimony
18 describing Daugerdas's direct involvement in the backdating. She
19 told the jury that she had first prepared returns for Toporek based
20 on the opinion letter, drafted and sent by J&C, that contained the
21 original, incorrect transaction. She sent these returns to Daugerdas,
22 and then received a revised opinion letter signed by Daugerdas that
23 included the backdated transaction and a request to return the

1 original, incorrect opinion letter. She prepared returns based on the
2 new opinion letter and then provided the new returns to Beery, who
3 worked for Daugerdas, for Beery's review.

4 A rational jury could have concluded from the testimony of
5 Mayer, Yackee, and Quendenfeld that Daugerdas participated in the
6 scheme involving illegal backdating by directing his subordinates to
7 effect backdated trades. His argument on this point is therefore
8 without merit.

9 **2. Stipulation that the Mail Fraud Affected a Financial**
10 **Institution**

11 We easily reject Daugerdas's argument that the government
12 failed to prove that the mail fraud affected a financial institution.
13 Without this element, the mail fraud charged would be barred by
14 the five-year statute of limitations. Section 3282 of Title 18 of the
15 United States Code sets a five-year statute of limitations for non-
16 capital federal crimes, whereas § 3293 sets a ten-year statute of
17 limitations for mail fraud "affect[ing] a financial institution." 18
18 U.S.C. § 3293. We agree with the district court that the government
19 must prevail because Daugerdas entered into a pre-trial stipulation
20 that Deutsche Bank "was a financial institution that was 'affected'
21 . . . by the [shelters]." J.A. 972.

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1 **3. Indictment’s failure to allege that the mail fraud affected**
2 **a financial institution**

3 Daugerdas claims error because the indictment did not allege
4 that the mail fraud affected a financial institution. Daugerdas did
5 not raise this claim until after trial, and therefore this challenge is
6 subject to plain error review. *United States v. Nkansah*, 699 F.3d 743,
7 752 (2d Cir. 2012), *abrogated on other grounds by United States v.*
8 *Bouchard*, No. 14-4156-CR, 2016 WL 363259 (2d Cir. July 7, 2016). To
9 obtain a reversal on this basis, Daugerdas “must show (1) there is an
10 error (2) the error is clear or obvious . . . ; (3) the error affected [his]
11 substantial rights . . . ; and (4) the error seriously affects the fairness,
12 integrity or public reputation of judicial proceedings.” *Id.* at 751
13 (alterations and internal quotation marks omitted).

14 Any error could not have affected Daugerdas’s substantial
15 rights, because his stipulation that Deutsche Bank “was a financial
16 institution that was . . . affected by the [shelters]” put him on notice
17 of this element of mail fraud. *See United States v. Doe*, 297 F.3d 76, 88
18 n.12 (2d Cir. 2002) (stating that a defendant’s substantial rights are
19 not affected where information is missing from an indictment if the
20 defendant otherwise had notice of the missing information).
21 Therefore, he cannot establish plain error.

1 II. Constructive Amendment of the Indictment

2 Daugerdas argues that the prosecution's rebuttal summation
3 and the court's supplemental instructions constructively amended
4 the indictment to include a theory of criminal liability based on his
5 violation of the Annual Accounting Rule by including backdated
6 transactions in tax returns that were submitted to the IRS. This rule
7 requires that the tax consequences of a transaction generally be
8 assessed in the returns of the year in which the transaction took
9 place. *See United States v. Skelly Oil Co.*, 394 U.S. 678, 684 (1969).

10 We review de novo the question of whether an indictment
11 was constructively amended. *Pierce*, 785 F.3d at 844. A constructive
12 amendment is a per se violation of the Fifth Amendment, but
13 "significant flexibility in proof" is constitutionally permissible, as
14 long as the indictment provides notice to the defendant "of the core
15 of criminality to be proven at trial." *United States v. D'Amelio*, 683
16 F.3d 412, 417 (2d Cir. 2012) (emphasis and internal quotation marks
17 omitted). Because the "core of criminality . . . involves the essence of
18 a crime, in general terms," and excludes "the particulars of how a
19 defendant effected the crime," *id.* at 418 (internal quotation marks
20 omitted), there is no constructive amendment when the proof at trial
21 does no more than supply the particulars.

22 The indictment in this case was not constructively amended.
23 Daugerdas's claim that the government ignored backdating as a

1 separate theory of liability until its rebuttal summation is
2 contradicted by the text of the indictment, which describes
3 backdating repeatedly. The backdating of tax returns, described in
4 Paragraph 47 of the indictment, is in the section of the indictment
5 that describes the various fraudulent schemes that were involved in
6 the development, sale, and implementation of the tax shelters.
7 Backdating is later listed in Paragraph 63-i as one of the methods by
8 which the conspiracy was carried out. Paragraph 63-i is
9 incorporated into the obstruction and mail fraud counts.

10 Daugerdas correctly notes that, in its opening argument, the
11 prosecution described backdating as evidence that the shelters
12 lacked economic substance. Much of the trial testimony also focused
13 on the economic substance theory of liability. However, presenting
14 backdating as an alternate theory of liability on some of the counts
15 did not change “the essence of the crime, in general terms,” which
16 remained throughout a massive tax fraud orchestrated by
17 Daugerdas. The incidents of backdating and corresponding
18 violations of the Annual Accounting Rule were simply “particulars
19 of how [Daugerdas] effected the crime,” and the government’s
20 reliance on this theory of liability did not amount to a constructive
21 amendment of the indictment. *Id.* at 417-18.

1 **III. Duplicitous Indictment**

2 Daugerdas argues that Count Thirteen, which alleges
3 obstruction of the IRS, was duplicitous because it involves two
4 separate schemes: one based on the use of tax shelters by clients and
5 the other based on Daugerdas's personal use of the shelters.

6 We review properly preserved challenges to an indictment de
7 novo. See *United States v. Vilar*, 729 F.3d 62, 79 (2d Cir. 2013). As we
8 explained in *United States v. Aracri*, 968 F.2d 1512, 1518 (2d Cir.
9 1992), an indictment is duplicitous if it includes multiple crimes in
10 one count, but not if it includes in that count multiple ways of
11 committing a single offense.

12 Under the *Aracri* standard, Count Thirteen is not duplicitous.
13 It alleges a single crime: obstruction of the IRS. It then alleges that
14 this crime was committed in many different ways. The fact that the
15 various methods of committing a single offense can be divided into
16 two separate categories—those that relate to Daugerdas's work on
17 behalf of his clients and those that relate to Daugerdas's personal
18 use of the shelters—does not create duplicity. Cf. *id.* (“[I]t is well
19 established that the allegation in a single count of a conspiracy to
20 commit several crimes is not duplicitous, for the conspiracy is the
21 crime and that is one, however diverse its objects.” (alterations and
22 internal quotation marks omitted)).

1 **IV. Violation of Due Process**

2 Daugerdas argues that (A) the admission of evidence of a non-
3 party's guilty plea to a tax evasion charge; (B) the government's
4 improper summation arguments; and (C) the government's
5 inconsistent positions at summation and sentencing created a trial so
6 riddled with errors that his due process right to a fair trial was
7 violated.

8 **A. The Admission of John Ivsan's Guilty Plea**

9 Daugerdas first objects to the admission of the fact of John
10 Ivsan's guilty plea. Ivsan was a tax attorney and part of a group of
11 advisors who were unaffiliated with Daugerdas but who consulted
12 with Larry Morgan, a Daugerdas client and cooperating witness,
13 about his decision to participate in the Short Sale Shelter. On cross-
14 examination, Daugerdas elicited from Morgan that Ivsan was one of
15 the advisors who concluded that the shelter was legal. Over
16 Daugerdas's objection, the district court allowed the government to
17 introduce, pursuant to Federal Rules of Evidence 609 and 806, the
18 fact that Ivsan had in 2013 pleaded guilty to unrelated tax crimes.
19 When this evidence was introduced, the district court instructed the
20 jury that the jury's consideration of Ivsan's guilty plea was limited to
21 what it revealed about Ivsan's credibility. Ivsan's credibility was
22 relevant to the jury's assessment of the truthfulness of his statement
23 that he believed that the Short Sale Shelter was legal, which is itself

1 relevant to the question of whether Daugerdas, also a tax attorney,
2 had a similar belief. In its summation, the prosecution referred to
3 the guilty plea.

4 We review the district court's ruling for abuse of discretion,
5 *United States v. Taubman*, 297 F.3d 161, 164 (2d Cir. 2002) (per
6 curiam), which requires us to ask if the ruling was "arbitrary and
7 irrational," *United States v. Mercado*, 573 F.3d 138, 141 (2d Cir. 2009)
8 (internal quotation marks omitted).

9 Assuming that the statements that Daugerdas elicited from
10 Morgan about Ivsan's opinion on the Short Sale Shelter constituted
11 hearsay within the meaning of Federal Rule of Evidence 801, it was
12 permissible to use Ivsan's guilty plea to impeach that opinion under
13 Rules 609 and 806, subject to Rule 403's balancing test. The district
14 court did not abuse its discretion in determining that the probative
15 value of Ivsan's guilty plea in impeaching Ivsan's opinion was not
16 "substantially outweighed" by its "danger of . . . unfair prejudice."
17 Fed. R. Evid. 403. The probative value of the evidence lay in its
18 relevance to the jury's assessment of Ivsan's credibility, which was
19 itself relevant to its assessment of whether Daugerdas had a good-
20 faith belief in the legality of his actions. To be sure, the fact that
21 Ivsan was convicted of a tax crime ran a risk of unfairly prejudicing
22 Daugerdas, but here this prejudice was mitigated by the district
23 court's limiting instruction and by the fact that Ivsan himself was

1 unaffiliated with Daugerdas or his firm. The admission of Ivsan's
2 guilty plea did not implicate Daugerdas's right to a fair trial.

3 **B. Errors in the Prosecution's Summation**

4 Daugerdas argues that the prosecutor's summation was so
5 prejudicial that he must receive a new trial.

6 We review de novo a claim that a prosecutor's summation
7 unfairly prejudiced a defendant. *See United States v. Bubar*, 567 F.2d
8 192, 199-200 (2d Cir. 1977). But such a claim presents a significant
9 hurdle for Daugerdas. "The prosecution and the defense are
10 generally entitled to wide latitude during closing arguments, so long
11 as they do not misstate the evidence." *United States v. Tocco*, 135 F.3d
12 116, 130 (2d Cir. 1998). "An improper summation will only warrant
13 a new trial when the challenged statements are shown to have
14 caused substantial prejudice to the defendant; rarely will an
15 improper summation meet the requisite level of prejudice." *United*
16 *States v. Mapp*, 170 F.3d 328, 337 (2d Cir. 1999) (citation omitted).

17 **1. Commentary on Daugerdas's Failure to Produce** 18 **Evidence**

19 Daugerdas identifies two examples of what he believes to be
20 impermissible statements in the prosecution's summation
21 concerning his failure to present evidence: (1) a statement that the
22 defense had not introduced any evidence that anyone had convinced
23 the IRS that the shelter transactions were legitimate; and (2) a

1 statement that Daugerdas did not record his views about the
2 validity of the shelters, seek other legal opinions on the validity of
3 the shelters he was selling, or litigate them in court.

4 The district court sustained the defense objection to the first
5 line of argument and not to the second. Because we are required to
6 look at the entire argument in context, *see United States v. Caracappa*,
7 614 F.3d 30, 41 (2d Cir. 2010), we consider both arguments and
8 conclude that both were permissible. Although the government
9 cannot comment on a defendant's failure to testify, it is permissible
10 to draw the jury's attention to the fact that a defendant did not call
11 witnesses to contradict the government's case or support his own
12 theory of what happened. *United States v. McDermott*, 918 F.2d 319,
13 327 (2d Cir. 1990). A prosecutor's commentary about a defendant's
14 lack of evidence becomes prejudicial only if the jury would
15 "naturally and necessarily interpret the Government's summation as
16 a comment on the defendant's failure to testify" or if the evidence
17 that the defendant has not produced was exclusively in his control.
18 *Id.*

19 Here, although the missing evidence is relevant to
20 Daugerdas's subjective belief in the legality of the shelters, it is not
21 evidence that is only in his control, nor would the jury otherwise
22 interpret the prosecutor's statements as comments on Daugerdas's
23 failure to testify. A witness who had successfully defended one of

1 the shelters before the IRS would provide evidence of a legal
2 ambiguity that could provide circumstantial support for
3 Daugerdas's contention that he had a good faith belief in the legality
4 of the shelters. The same is true of evidence that Daugerdas had
5 either recorded or publicly sought confirmation of this belief. Many
6 witnesses other than Daugerdas could have testified about these
7 actions. Because Daugerdas was not the exclusive source of this
8 evidence, there was no suggestion that he had a duty to testify or
9 produce evidence solely within his control.

10 **2. Commentary on the Law**

11 Daugerdas next points to the prosecutor's comments twice
12 during summation that the jurors would learn from the district court
13 that Daugerdas's legal views about the calculation of profit under
14 the economic substance doctrine were incorrect. These statements
15 were not an improper comment on the law because Daugerdas's
16 subjective view of the law was a fact that was at issue in the case.
17 The government was required to prove that Daugerdas did not have
18 a good faith belief that the shelters at issue were legal. *See supra*
19 Section I.A in Discussion. Therefore the state of the law at the time
20 of the transactions as it bore on Daugerdas's state of mind was
21 relevant to the government's case and was an appropriate subject for
22 the prosecution's comment.

1 **C. Inconsistent Theories at Trial and at Sentencing**

2 Daugerdas relies on *Bradshaw v. Stumpf*, 545 U.S. 175 (2005), to
3 argue that the government's separate theories at summation and
4 sentencing violated his right to due process. *Bradshaw* suggested
5 that the prosecutor's inconsistent theories in two separate
6 prosecutions that each of two defendants had pulled the trigger in a
7 murder had not "affect[ed] the knowing, voluntary, and intelligent
8 nature" of one defendant's guilty plea, but that the inconsistency
9 could have affected the defendant's sentence. *Id.* at 187. This
10 argument fails here because the government did not rely on
11 inconsistent theories. Instead, the government at trial advanced
12 multiple theories that could have supported conviction, but then
13 focused on one of these theories at sentencing. In any event, given
14 the factual differences between these two cases, *Bradshaw* is
15 inapposite. It therefore bears no relationship to the purported
16 inconsistency in this case.

17 In sum, Daugerdas points to no error or combination of errors,
18 in the prosecution's summation or elsewhere, that were so
19 prejudicial as to warrant a new trial.

20 **V. Supplemental Instruction**

21 Daugerdas argues that the district court committed prejudicial
22 error in giving a supplemental instruction about the Annual
23 Accounting Rule.

1 We review jury instructions de novo, looking at the entirety of
2 the jury charge. *Hudson v. New York City*, 271 F.3d 62, 67-68 (2d Cir.
3 2001). Error occurs if the instructions “mislead the jury as to the
4 correct legal standard or do not adequately inform the jury of the
5 law.” *Id.* at 67 (alterations and internal quotation marks omitted).
6 We have cautioned that a trial judge must be especially careful with
7 supplemental instructions in response to jury questions because they
8 are often provided to the jury at crucial moments of deliberation.
9 *United States v. Kopstein*, 759 F.3d 168, 172-73 (2d Cir. 2014). A
10 flawed supplemental instruction can undermine and even invalidate
11 a charge that is otherwise correct if the supplemental instruction is
12 “sufficiently incomplete and misleading.” *Id.* at 172 (internal
13 quotation marks omitted).

14 During his full charge to the jury, Judge Pauley informed the
15 jurors that “the income tax laws . . . are administered on the basis of
16 an annual accounting system, which prohibits the reopening of a
17 prior year’s tax return to take account of events occurring in later
18 years.” J.A. 250. Neither party disputes that this is an accurate
19 statement of the law.

20 During deliberations, the jury sent a note to the judge that
21 referred back to that portion of the instructions and then asked:
22 “What is defined as ‘a prior year’s tax return’? Does this specifically
23 mean a tax return that has already been filed?” Tr. 7758. Judge

1 Pauley responded: “[I]n singling out [this part of the instructions],
2 you’re focusing on the [A]nnual [A]ccounting [R]ule. The [A]nnual
3 [A]ccounting [R]ule prohibits, in connection with the preparation of
4 a tax return for a particular year, consideration of transactions that
5 occur in a subsequent year. Therefore, the answer to that question is
6 no.” *Id.* It is this explanation to which Daugerdas objects.

7 The next day, the jury asked Judge Pauley: “Is there a law or
8 rule within the internal revenue laws that can be considered
9 contradictory to the annual accounting rules cited in the
10 supplemental charge . . . ?” *Id.* at 7791. Judge Pauley responded:

11 [T]he answer to that question is that the law I gave you
12 concerning the annual accounting rule [in the original
13 charge] and in my supplemental instruction is the law
14 that should govern your deliberations. The application
15 of this law depends on the particular facts of each case.
16 In some instances you have heard about as-of reporting.
17 And it may be proper under the internal revenue laws,
18 if the transaction reported on the as-of date actually
19 occurred on that date. On the other hand, it would
20 violate the internal revenue laws to report a transaction
21 that occurred in a subsequent year as occurring during
22 the prior year.

23
24 *Id.* at 7791-92.

25
26 We can resolve Daugerdas’s first two arguments—that the
27 district court erroneously implied that the Rule was absolute and
28 that the district court refused to instruct the jury that the good faith
29 defense applies to this rule—by an examination of the supplemental

1 instruction in the context of the charge as a whole. *Hudson*, 271 F.3d
2 at 67-68. The judge's second supplemental instruction, in which he
3 told the jury that "[t]he application of [the Annual Accounting Rule]
4 depends on the particular facts of each case," rectified any
5 misunderstanding as to whether the Rule was absolute that could
6 have resulted from the first supplemental instruction. See *United*
7 *States v. Velez*, 652 F.2d 258, 262 (2d Cir. 1981) ("[E]ven if some error
8 can be found in the supplemental charge, it will not ordinarily
9 require reversal . . . where a subsequent supplemental instruction
10 cures the defect.").

11 The context in which Judge Pauley gave the supplemental
12 instruction also made it unnecessary for him to reiterate his
13 instruction on the good faith defense. In his charge before the jury
14 retired to deliberate, he stated that "good faith is a complete defense
15 to each of the charges in the indictment" and elaborated on what
16 good faith could mean in this context. J.A. 544-544.1. In light of this
17 explication of the good faith defense, there was no need for him to
18 reiterate it. This is particularly so because he was not tying this
19 guidance to any particular charge, but rather was providing
20 information about a background principle of law that applied
21 broadly to all of the charges.

22 Daugerdas's third and fourth objections to the supplemental
23 instructions are equally meritless. His argument that the

1 supplemental instruction misstated the required mens rea and thus
2 improperly instructed the jury on an element of the offense that the
3 government must prove only makes sense if the Rule itself is a
4 criminal prohibition that can be violated simply by the inclusion of
5 later transactions in the tax return. But the Rule, on its own, is not a
6 criminal prohibition. Instead, the Rule is an accounting principle the
7 violation of which can provide a basis for determining that a
8 defendant violated particular criminal statutes, such as those at issue
9 in this appeal, assuming all of the elements of these crimes,
10 including mens rea, are proven. It is the statutes prohibiting these
11 acts that provide the heightened scienter requirement and it is their
12 violation, not simply a violation of the Annual Accounting Rule, that
13 creates criminal liability.

14 Daugerdas's final argument, that the district court should
15 have confined the supplemental instruction to the conspiracy
16 charge, relies on the incorrect premise that the indictment limited
17 the backdating allegations to the conspiracy charge. This is belied
18 by the text of the indictment, which, as discussed above, describes
19 backdating repeatedly as one of the fraudulent schemes that
20 facilitated the tax shelters and one of the methods by which the
21 conspiracy was carried out and incorporates the backdating into the
22 obstruction and mail fraud counts. Because the jury could have
23 used the backdating to convict on counts other than the conspiracy,

1 it would have been incorrect for the district court to have confined
2 the supplemental instruction to the conspiracy charge.

3 VI. Reasonableness of the Sentence

4 We review challenges to a sentence under a “reasonableness”
5 standard, which is “a particularly deferential form of abuse-of-
6 discretion review.” *United States v. Broxmeyer*, 699 F.3d 265, 278 (2d
7 Cir. 2012) (internal quotation marks omitted). A sentence must be
8 both procedurally and substantively reasonable. *Id.* We address
9 each requirement in turn.

10 A sentence is procedurally unreasonable if the district court
11 “fails to calculate the Guidelines range . . . , makes a mistake in its
12 Guidelines calculation, . . . treats the Guidelines as mandatory . . . [.]
13 does not consider the § 3553(a) factors, . . . rests its sentence on a
14 clearly erroneous finding of fact . . . [.] fails adequately to explain its
15 chosen sentence, [or fails to] include an explanation for any
16 deviation from the Guidelines range.” *United States v. Cavera*, 550
17 F.3d 180, 190 (2d Cir. 2008) (en banc) (internal quotation marks
18 omitted). When we review for substantive reasonableness, “we will
19 set aside a district court’s . . . determination only in exceptional cases
20 where the trial court’s decision cannot be located within the range of
21 permissible decisions.” *United States v. Rigas*, 583 F.3d 108, 122 (2d
22 Cir. 2009) (alteration and internal quotation marks omitted).

1 **A. Procedural Reasonableness**

2 Daugerdas argues that the district court procedurally erred by
3 ignoring the interviews his attorneys had conducted with two
4 members of the jury after the end of the trial, in which the jurors
5 said that they believed he was guilty only of the backdating of
6 transactions, not of the entirety of the fraud charged in the
7 indictment. Because this information was relevant to the district
8 court's determination of the length of Daugerdas's sentence,
9 Daugerdas alleges, it committed procedural error by failing to
10 consider it.

11 Daugerdas fails to identify a procedural error that we have
12 recognized, *see Cavera*, 550 F.3d at 190, and, furthermore, he
13 misrepresents the record. Judge Pauley did not ignore this
14 information; he acknowledged that the interviews existed but
15 determined that they did not justify the imposition of a shorter
16 sentence. Because the district court's conclusion was reasonable,
17 Daugerdas's procedural challenge fails.

18 **B. Substantive Reasonableness**

19 Daugerdas argues that his sentence was substantively
20 unreasonable because it was based primarily on conduct for which
21 he was acquitted—his participation in a massive \$400 million tax
22 fraud. It is well-established that a district judge can take into
23 account acquitted conduct in determining a sentence. *See United*

1 *States v. Gomez*, 580 F.3d 94, 105 (2d Cir. 2009). Daugerdas's citations
2 to the concurrences in *Rita v. United States*, 551 U.S. 338 (2007), and
3 to a law review article do not persuade us that the law is otherwise
4 or that we should somehow embark on a quest to change it.
5 Therefore, his substantive reasonableness challenge also fails.

6 **VII. Errors in Forfeiture Order**

7 Daugerdas argues that the forfeiture order was flawed
8 because the government did not trace the fees paid by clients into
9 the J&G bank account from which Daugerdas was paid by J&G.
10 Instead, he argues, the government established only that (1) J&G
11 deposited Daugerdas's compensation into an account controlled by
12 Daugerdas; and (2) Daugerdas transferred funds from this account
13 to the accounts sought to be forfeited. To obtain forfeiture of these
14 funds, according to Daugerdas, the government was also required to
15 establish the origin of the fees deposited into the J&G bank account
16 and separate the fees paid as a result of the fraudulent conduct from
17 the remainder.

18 We review a district judge's legal conclusions regarding
19 forfeiture de novo and his factual determinations for clear error.
20 *United States v. Sabhnani*, 599 F.3d 215, 261 (2d Cir. 2010). For a
21 criminal forfeiture order to pass muster, the government must
22 establish, by a preponderance of the evidence, the "requisite nexus
23 between the property and the offense." Fed. R. Crim. P.

1 32.2(b)(1)(A); *see United States v. Bellomo*, 176 F.3d 580, 595 (2d Cir.
2 1999). In a criminal forfeiture order issued pursuant to 18 U.S.C.
3 § 982 following a defendant's conviction for mail fraud, the requisite
4 nexus is that the "proceeds [must have been] obtained directly or
5 indirectly" through such fraud.

6 The district court correctly concluded that the money sought
7 to be forfeited had been obtained through Daugerdas's mail fraud.
8 The J&G account from which Daugerdas was paid held only the
9 funds received by the Chicago office. *See* Docket Entry 558 Ex. 6
10 § 2b. The trial evidence established that the entirety of the tax-
11 shelter fee income received by J&G's Chicago office—the pool of
12 money from which Daugerdas was paid—was generated by
13 Daugerdas's criminal acts. *See* Docket Entry 839 p. 11-12. Based on
14 this evidence, the district court did not clearly err in concluding that
15 the funds located in Daugerdas's various accounts were the
16 proceeds of his frauds.

17 We have considered Daugerdas's remaining arguments and
18 find them to be without merit. We take this opportunity to express
19 our appreciation for the commendable way that Judge Pauley
20 handled this litigation.

21 CONCLUSION

22 For the reasons stated above, we AFFIRM the judgment of the
23 district court.