15-2869

To Be Argued By:
JOSHUA COLANGELO-BRYAN

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

—against—

JOHN SAMPSON,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

NATHANIEL H. AKERMAN
JOSHUA COLANGELO-BRYAN
DORSEY & WHITNEY LLP
51 West 52nd Street
New York, New York 10019
(212) 415-9200

Attorneys for Defendant-Appellee

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT

John Sampson respectfully submits this memorandum of law in opposition to the government's appeal, which seeks to reverse the dismissal of two counts that charged Sampson with embezzlement pursuant to 18 U.S.C. § 666. The district court (Irizarry, J.) granted Sampson's motion to dismiss these counts for being untimely.

By way of context, judges in the Kings County Supreme Court appointed Sampson as a referee in several cases to oversee foreclosure proceedings in Brooklyn. As a referee, Sampson was required by a New York State statute and court orders to deposit any surplus proceeds from the foreclosure sales with the Kings County Supreme Court Clerk within five days of receiving them.

Sampson received the full sale proceeds, including a surplus, from the foreclosure sale of the Forbell Street Property (per Count 1) by early October 1998 and deposited them in an account under his sole control. Sampson received the full sale proceeds, including a surplus, from the foreclosure sale of the Eighth Avenue Property (per Count 2) by late June 2002 and deposited them in a separate account, also under his sole control. Thus, the obligation to deposit surplus funds with the Kings County Supreme Court, as set forth in the statute and court orders, was in effect in October 1998 and July 2002, respectively. Sampson, however, did not deposit the funds within five days of receipt in either matter.

On this basis alone, the Third Superseding Indictment ("TSI")[1] alleged that Sampson embezzled funds in "July 1998" and "approximately 2002," consistent with Supreme Court jurisprudence, as addressed below. Moreover, the TSI alleged that Sampson had failed to deposit the surplus funds as of 2008, when the government now asks the Court to find that the statute of limitations began to run. By 2008, ten years had passed since Sampson had been required to deposit funds in relation to the Forbell Street Property, and six years had passed since he had been required to deposit funds in relation to the Eighth Avenue Property.

Beyond the TSI's allegations as to when Sampson committed embezzlements, the government argued to the jury during a trial of Sampson on other charges that the embezzlements occurred in "the late 1990s, early 2000s." It also argued to the jury – in a somewhat contradictory fashion – that the embezzlements were completed by the summer of 2006. In addition, the government argued to the district court in two separate post-trial filings that Sampson's embezzlement took place "between 1998 and July 2006." Despite the TSI's allegations, the government's trial arguments, and the government's post-

[1] The government cites the TSI in its papers. Although the government caused the issuance of seven charging instruments in total, it correctly states that the facts relating to the embezzlements did not vary, other than as to jurisdictional allegations. Brief for the United States ("Government's Brief") at 7 n.4. The differences in jurisdictional allegations are addressed in Section III of the Argument below.

trial arguments, the government did not charge Sampson with these embezzlements until 2013, well after the expiration of the five-year limitations period.

Contrary to the government's current position, dismissal of these counts is not avoided by allegations that Sampson engaged in transactions involving certain of the embezzled funds in 2008. Obviously, the government's current argument that embezzlements occurred in 2008 contradicts the TSI and the government's arguments to the jury and the district court. Further, as the district court properly held, engaging in transactions with embezzled funds is not a separate crime.

The embezzlement counts also would properly be dismissed for lack of subject matter jurisdiction, an issue that was briefed before the district court, but not ruled on. The TSI did not allege that Sampson was the agent of an entity that received $10,000 in federal funds during the relevant years, a prerequisite for subject matter jurisdiction pursuant to 18 U.S.C. § 666. Specifically, the TSI alleged that Sampson was an agent of the Supreme Court of the State of New York. However, Sampson was only authorized to act on behalf of the Kings County Supreme Court in matters involving Brooklyn properties, and not on behalf of any entity known as the "Supreme Court of the State of New York," which exists only theoretically in the New York State Constitution. Thus, Sampson actually was an agent of the Kings County Supreme Court. Critically, the TSI did

not allege that the Kings County Supreme Court received the requisite federal funds.

Moreover, for 18 U.S.C. § 666 to apply, Sampson would have to have been an agent of the victim-entity at the time of the embezzlements. Sampson, however, was not an agent of the Kings County Supreme Court in 2008, when the government claims the charged embezzlements occurred, because the foreclosure proceedings at issue had long been terminated and, with them, Sampson's agency. Moreover, Sampson's agency would have terminated when it is said he embezzled funds in 1998 and 2002, as a result of his disloyal acts in perpetrating the embezzlements.

COUNTERSTATEMENT OF ISSUES

1. Had the five-year statute of limitations already expired for embezzlement charges brought in 2013, given that: (i) court orders and a New York State statute required Sampson to transfer funds from accounts under his sole control to the court within five days of receiving the funds in 1998 and 2002, respectively; (ii) Sampson failed to transfer the funds to the court as required; (iii) Sampson further had not transferred the funds to the court as of 2008, when the government contends the charged embezzlements occurred; (iv) the TSI alleged that embezzlements occurred in 1998 and 2002, respectively; and (v) the government represented in separate submissions to the district court and argued to

the jury that the embezzlements occurred in "the late 1990s, early 2000s" and were completed by 2006 at the latest?

2. For purposes of 18 U.S.C. § 666, was Sampson an agent of an entity that received $10,000 in federal benefits within a year of when the offenses allegedly were committed, given that: (i) judges of the Kings County Supreme Court issued the orders creating Sampson's agency; (ii) those orders directed Sampson to act only in individual matters before the Kings County Supreme Court relating to properties in Brooklyn; (iii) Sampson was never authorized to act on behalf of any other entity, including the "Supreme Court of the State of New York"; and (iv) the government does not and cannot allege that the Kings County Supreme Court received the requisite $10,000 during the relevant period?

3. For purposes of 18 U.S.C. § 666, had Sampson's agency terminated before 2008, given that: (i) the Forbell Street Property matter concluded in 1999; (ii) the Eighth Avenue Property matter concluded in 2002; and (iii) Sampson allegedly embezzled funds entrusted to him as agent years before 2008?

COUNTERSTATEMENT OF FACTS AND THE CASE

Sampson does not contest the substance of the government's Statement of Facts, but offers additional detail and certain clarifications in this section.

I. FACTUAL BACKGROUND

As alleged in the TSI, on a number of occasions, Sampson was appointed to act as a "referee for foreclosure proceedings" of "Brooklyn real estate." (GA037 ¶ 4). As a referee, Sampson was directed to conduct "the sale of a foreclosed property, and us[e] the proceeds to repay any outstanding mortgages." (GA039 ¶ 12).

A. New York State Law Required Sampson to Transfer to the Court Any Surplus Funds within Five Days of Receipt

As further alleged, if any proceeds from a foreclosure sale remained after outstanding obligations were satisfied, Sampson had to tender that "surplus" to the clerk of the Kings County Supreme Court. (GA039 ¶ 12). Pursuant to the New York Real Property Actions and Proceedings Law ("RPAPL") § 1354(4), "[a]ll surplus moneys arising from the [foreclosure] sale shall be paid into court by the officer conducting the sale *within five days* after the same shall be received." (emphasis added). As addressed below, court orders in each relevant matter established the same deadline.

B. The Forbell Street Property (Count 1)

On February 17, 1998, Sampson was appointed as referee for the foreclosure sale of the Forbell Street Property. (GA041 ¶ 18). As the TSI set forth: "SAMPSON was required by law to: (1) deposit the proceeds from the sale of the Forbell Street Property into a Referee Account (the 'Forbell Street Referee

Account'); (2) satisfy the mortgage and any other outstanding expenses related to the Forbell Street Property; and (3) promptly deposit with the Kings County Clerk any surplus funds…." (*Id.*) Specifically, a Judgment of Foreclosure and Sale, issued by the Kings County Supreme Court, ordered Sampson to deposit any surplus with the court "within five days," the same period mandated by the RPAPL. (GA068-069).[2] Furthermore, the Kings County Supreme Court ordered Sampson to open the referee account at Citibank (GA066), but Sampson opened that account at Chase Bank. (SA8-SA14).[3]

The TSI further alleged that: "On October 7, 1998, [Sampson] signed a document entitled 'Referee's Report of Sale' for the Forbell Street Property," in which he "represented to the Supreme Court that: (1) on or about February 17, 1998, SAMPSON sold the Forbell Street Property for $115,000; and (2) there were surplus funds of approximately $80,000 (the 'Forbell Street Surplus') resulting from the sale…." (GA041 ¶ 19). In fact, the Referee's Report of Sale provides that the sale occurred on July 9, 1998, not February 17, 1998. (GA074-75).[4] Finally, the TSI alleged that "SAMPSON breached his fiduciary obligations as

[2] One page of the Judgment of Foreclosure and Sale as produced by the government (GA069) is missing text at the top; the defense has been unable to secure a copy of this page on which the missing text appears.

[3] "SA" refers to the Supplemental Appendix submitted by the defense.

[4] To date the sale, the district court referred to the Referee's Deed, which listed the date as October 7, 1998. The district court used that date to decide the motion to dismiss, since it is the latest date. (GA182, n.4).

referee and never deposited any of the Forbell Street Surplus with the Kings County Clerk," thereby embezzling it beginning in "*July 1998*." (GA042 ¶ 20) (emphasis added).[5]

Neither the TSI nor the Government's Brief alleges that Sampson did anything with the surplus in July 1998, other than failing to deposit it. (GA041-42 ¶¶ 18-20). Thus, the TSI alleges that Sampson embezzled the surplus solely on that basis. Given the absence of allegations or evidence that Sampson treated any subset of funds differently from another subset in July 1998, the TSI does not allege that the July 1998 embezzlement involved only a portion of the funds. Rather, it alleges that Sampson embezzled all Forbell Street Property funds by withholding them.

C. The Eighth Avenue Property (Count 2)

On March 18, 2002, Sampson was appointed as referee for the foreclosure sale of the Eighth Avenue Property. (GA042 ¶ 21). As the TSI alleged: "SAMPSON was required by law to: (1) deposit the proceeds from the sale of the Eighth Avenue Property into a Referee Account (the 'Eighth Avenue Referee Account'); (2) satisfy the mortgage and any other outstanding expenses related to

[5] The government's reference to July 1998 as the time when the embezzlement occurred underscores that the Referee's Report of Sale provided that the sale occurred in that month. Ultimately, it is of no moment for present purposes whether the sale and the concomitant embezzlement occurred in July, February or October 1998. For ease of reference, the defense will rely on the allegations in the TSI that Sampson embezzled funds in July 1998.

the Eighth Avenue Property; and (3) promptly deposit with the Kings County Clerk any surplus funds…." (*Id.*). Consistent with the RPAPL, an order issued by the Kings County Supreme Court directed Sampson to deposit any surplus with the court "w/I [sic] 5 days after the same shall be received and be ascertainable, to the credit to [sic] this action, to be withdrawn only on the order of the court." (GA092). In addition, the Kings County Supreme Court ordered Sampson to open the referee account at Independence Savings Bank (GA090), but Sampson opened that account at HSBC. (SA21-SA22).

The TSI further alleged that: "On June 28, 2002, the defendant JOHN SAMPSON signed a document entitled the 'Referee's Report of Sale' for the Eighth Avenue Property," in which he "represented to the Supreme Court that: (1) on May 17, 2002, SAMPSON sold the Eighth Avenue Property for $180,000; and (2) there were surplus funds of approximately $80,000 (the 'Eighth Avenue Surplus') resulting from the sale…." (GA042 ¶ 22). According to the TSI, Sampson "did not deposit the Eighth Avenue Surplus with the Kings County Clerk" but "*in approximately 2002, [] began to embezzle funds* from the Eighth Avenue Referee Account." (GA043 ¶ 23) (emphasis added). While the TSI specified no date in 2002, a deed, dated June 28, 2002, shows that the proceeds had been received by that date, triggering the five-day period delineated by the court order and statute in which the surplus had to be deposited. (SA23-SA25).

Again, there is no allegation that Sampson did anything with the funds in 2002, except for not depositing them. (GA042-43 ¶¶ 21-23). It is on this basis alone that the TSI contends the embezzlement occurred in 2002. Given that all Eighth Avenue Property funds were treated uniformly in 2002, the TSI alleges that all such funds were embezzled at that time.

The government's treatment of the Eighth Avenue Property matter generally illuminates its need to contradict the TSI to stave off dismissal; and notably the TSI itself offers contradictory theories. For example, the TSI alleges, not only that the embezzlement occurred in 2002, but also that $27,500 was embezzled by July 2006 through withdrawals. (GA042-43 ¶¶ 22-24). It then alleges that by June 2008 the full amount that had been in the account at inception was embezzled, which obviously included the $27,500. (GA053 ¶ 56). Thus, according to the TSI, the full amount of the Eighth Avenue Property surplus was embezzled twice (in 2002 and 2008) and the $27,500 was embezzled three times (in 2002, between 2002 and 2006, and in 2008).

II. PROCEDURAL HISTORY

A. The Government Charged Sampson with Embezzlement in 2013

Sampson was indicted on the embezzlement charges in April 2013. Dkt. No. 1. As such, the government charged Sampson with these crimes some fifteen and

eleven years, respectively, after Sampson was required to remit the surplus funds to the court, but failed to do so.

B. The District Court Dismissed the Embezzlement Charges

Before trial, Sampson moved to dismiss the embezzlement counts based on the statute of limitations and for lack of subject matter jurisdiction. The government opposed, including by arguing that the motion was premature and that Sampson's withdrawals of $5,000 or more from the referee accounts constituted offenses separate from the original embezzlements. *See* Government's Brief at 8.[6]

As a procedural matter, the district court found that the motion was not premature because Sampson accepted all allegations in the TSI, and the motion could be decided without a trial on the merits. (GA 188-89). Substantively, the district court held that Sampson embezzled from the Forbell Street Property account in 1998 and from the Eighth Street Property account in 2002 and, thus, "the statutes of limitations have long since expired." (GA 192). More specifically, the district court found that Sampson had been obligated by court orders and statute to transfer surplus funds within five days of filing referee's reports and that

[6] While the government argued that the motion was premature because the government had not made a full proffer, it acknowledges that the district court accepted a supplemental factual submission following oral argument. (Government's Brief at 9). In addition, the government presented extensive evidence at trial. Thus, there is no basis to say presently that the government did not have a full opportunity to present relevant evidence. For these reasons, perhaps, the government does not argue now that Sampson's motion was premature, waiving any such argument.

"[t]hese obligations were a 'duty of immediate payment,' which Defendant failed to comply with." (*Id.*).

On that basis, the district court found this case bore substantial similarities to *U.S. v. Irvine*, 98 U.S. 450, 451 (1878), in which the Supreme Court dismissed as untimely embezzlement charges brought against an attorney who had withheld funds from a client after a demand for payment. (GA 191-92). However, unlike in the government's telling, the district court also cited additional case law. (*Id.*; *compare* Government's Brief at 12-13). Finally, the district court rejected the government's argument that using embezzled funds within the putative limitations period made the charges timely, distinguishing the inapposite cases the government had cited, many of which the government cites again now. (GA 194-95).

III. TRIAL AND POST-TRIAL REPRESENTATIONS BY THE GOVERNMENT REGARDING THE TIMEFRAME OF THE EMBEZZLEMENTS

Prior to Sampson's trial on other charges, including for obstruction of justice, the government asked to introduce evidence of the alleged embezzlements ostensibly "to prove that Defendant hindered communications related to a federal offense," which was an element of two charges, and "to show Defendant's motive for interfering in a federal investigation," *i.e.*, the investigation and prosecution of Edul Ahmad, a longtime friend of Sampson, who had been charged with mortgage fraud. *U.S. v. Sampson*, 2015 WL 2066073, at *6 (E.D.N.Y. May 4, 2015). The

district court permitted the government to introduce this evidence for those purposes. *Id.* at *5-6.

During the trial, the government elicited testimony that a referee is not permitted to do anything with surplus foreclosure funds except to "pay them to the Kings County Clerk within five days from the closing." (SA1:10-13). On this basis, the government argued to the jury that "[t]he Defendant's lying and stealing began quite a while ago, the late 1990s, early 2000s when he deceived the judges who entrusted him with other people's money and embezzled, stole hundreds of thousands of dollars from referee accounts that he controlled." (SA4:3-7). The government also repeatedly told the jury that Sampson had embezzled the funds by 2006 in order to argue that, in 2006, Sampson was forced to take a loan from Ahmad that he sought to conceal. The government referred to the loan-related conduct as evidence of motive on the obstruction counts, obviously an important point for the government. For example, the government asked rhetorically, "[w]hat did the defendant do in July 2006 when he worried he would get caught stealing all this money? He took these checks from Ed Ahmad…." (SA5:2-4). The government pointed to Ahmad's testimony that Sampson had told him in July 2006 that Sampson had embezzled "funds from escrow accounts" in order to argue, "you know this testimony is true because all of the bank records and court records

prove that the defendant did embezzle that money from escrow accounts…." (SA7:9-16).

Following trial, the defense made a Rule 29 motion to reverse convictions on three of the nine counts tried; the jury had acquitted Sampson on the other six counts. The government's opposition to Sampson's motion stated that "between approximately 1998 and July 2006, the defendant embezzled approximately $440,000 from escrow accounts relating to foreclosure proceedings involving four Brooklyn properties."[7] (SA27). Similarly, in its sentencing memorandum, the government asserted that "between about 1998 and July 2006, the defendant embezzled approximately $440,000 from escrow accounts relating to foreclosure proceedings involving four Brooklyn properties." (SA29).

ARGUMENT

The TSI issued in 2013. The statute of limitations for embezzlement is five years. *See infra* Section II(A). Therefore, any embezzlement charged in the TSI must have occurred in 2008 or thereafter for the charge to be timely.

I. THE TSI AND THE GOVERNMENT'S ADMISSIONS ESTABLISH THAT THE EMBEZZLEMENT COUNTS WERE NOT TIMELY

Fatal to the embezzlement charges are the TSI's allegations, the government's trial arguments to the jury, and the government's arguments to the

[7] These proceedings included the Forbell Street Property matter, the Eighth Avenue Property matter and two other matters.

district court post-trial that the embezzlements occurred well before 2008. The TSI alleged that "SAMPSON breached his fiduciary obligations as referee and never deposited any of the Forbell Street Surplus with the Kings County Clerk," thereby embezzling it in "*July 1998*." (GA042 ¶ 20) (emphasis added). Critically, there is no allegation or evidence that Sampson did anything with the surplus in July 1998, except for not depositing it. (*See* GA041-42 ¶¶ 18-20). Given that Sampson did not treat any subset of funds differently from another subset in July 1998, the TSI effectively alleges that Sampson embezzled all funds by withholding them in July 1998.

The TSI further alleged that Sampson "did not deposit the Eighth Avenue Surplus with the Kings County Clerk" but "*in approximately 2002, [] began to embezzle funds* from the Eighth Avenue Referee Account." (GA043 ¶ 23) (emphasis added). Again, there is no allegation or evidence that Sampson did anything with the funds in 2002, except for failing to deposit them. (*See* GA042-43 ¶¶ 21-23). Given that the funds were treated uniformly in 2002, the TSI alleges that Sampson embezzled all Eighth Avenue Property funds at that time by not depositing them. In sum, the government's current argument that embezzlements occurred in 2008 contradicts the government's own charging instrument.

At trial, the government presented evidence that Sampson was not permitted to do anything with the surplus funds other than deposit them with the Kings

County Clerk within five days of closing on the relevant properties. (SA1:10-13). The government also argued to the jury that: (i) Sampson's "lying and stealing began quite a while ago, the late 1990s, early 2000s when he…stole hundreds of thousands of dollars from referee accounts that he controlled." (SA4:3-7); (ii) Sampson had stolen "all this money" by "July 2006" (SA5:2-4); and (iii) by July 2006 Sampson had embezzled "funds from escrow accounts" (SA7:9-16). Then, following trial, the government represented twice to the district court that Sampson had embezzled funds in 1998 and that the embezzlements were complete by "July 2006." (SA27; SA29).

These allegations and arguments are binding on the government and preclude it from arguing now that the embezzlements occurred in 2008. In *U.S. v. GAF Corp.*, 928 F.2d 1253 (2d Cir. 1991), this Court held that a prior inconsistent statement by the government is a party admission. In particular, the Court held that "[c]onfidence in the justice system cannot be affirmed if any party is free, wholly without explanation, to make a fundamental change in its version of the facts between trials, and then conceal this change from the trier of the facts." *Id.* at 1260. The Court also stated that "[t]here is merit still in that 'rough and ready' view of the adversary process which leaves parties to bear the consequences of their own acts." *Id.* at 1262.

While *GAF* involved statements made by the government in two *separate* trials, its rationale can only apply with more force when the government seeks to disavow allegations in a charging instrument and arguments made to a jury and the court in order to make contrary arguments in the *same* case. *See also U.S. v. Salerno*, 937 F.2d 797, 811-12 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 317, 322 (1992) (admitting inconsistent prosecutorial statements) (citing *U.S. v. McKeon*, 738 F.2d 26, 33 (2d. Cir. 1984)); *U.S. v. Lopez-Ortiz*, 648 F. Supp. 2d 241, 246 (D.P.R. 2009) (affidavit of government agent admissible as admission of party-opponent); *U.S. v. Bakshinian*, 65 F. Supp. 2d 1104, 1105-06 (C.D. Cal. 1999) (statements by prosecutor may be admitted as party-opponent admission).

The government represented at trial and in post-trial papers that Sampson embezzled funds in the late 1990s and early 2000s, consistent with the TSI, and that all embezzlements occurred by 2006, because those representations served its purposes in trying to convict Sampson of non-embezzlement charges. Now, the government wishes to abandon those representations because they do not serve its present purpose of trying to revive the embezzlement charges. The government, however, is bound by its prior representations and the TSI, and cannot simply adopt any contrary position to fit its current agenda.

II. THE EMBEZZLEMENT COUNTS WERE PROPERLY DISMISSED AS TIME-BARRED AS A MATTER OF LAW

The Supreme Court has explained the policies underlying statutes of limitations:

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.

Toussie v. U.S., 397 U.S. 112, 114-15 (1970), *superseded on other grounds by* 50 U.S.C. § 462 (creating new statute of limitations for crime at issue). Criminal statutes of limitations "exist[] primarily to protect the rights of the defendant." *U.S. v. Podde*, 105 F.3d 813, 819 (2d Cir. 1997); *see also U.S. v. Levine*, 658 F.2d 113, 119 (3d Cir. 1981) ("Fairness to defendants would appear to be the primary consideration of statutes of limitations."). Statutes of limitations are "the primary guarantee a citizen possesses against stale or long-delayed charges being made against him." *U.S. v. Birney*, 686 F.2d 102, 105 (2d Cir. 1982). For these reasons, "criminal statutes of limitation are to be liberally interpreted in favor of repose." *U.S. v. Marion*, 404 U.S. 307, 322 n.14 (1971).

A. The Statute of Limitations for 18 U.S.C. § 666 Is Five Years

The embezzlement counts, charging violations of 18 U.S.C. § 666, are governed by a five-year limitations period. *See* 18 U.S.C. § 3282 ("no person shall be prosecuted, tried, or punished for any offense…unless the indictment is found…within five years next after such offense shall have been committed."). As such, a prosecution under 18 U.S.C. § 666 must commence within five years of the time when an embezzlement is committed. *See e.g.*, *Pendergast v. U.S.*, 317 U.S. 412, 420 (1943).

18 U.S.C. § 666 is not a "continuing offense." As the Supreme Court explained, in interpreting 18 U.S.C. § 3282, "Congress has declared a policy that the statute of limitations should not be extended 'except as otherwise expressly provided by law.'" *Toussie*, 397 U.S. at 115 (citations omitted). Therefore, an offense is deemed "continuing" only when "the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Id.* Based on the plain language of 18 U.S.C. § 666, courts have consistently held that the statute does not create a continuing offense. *See U.S. v. Yashar*, 166 F.3d 873, 876 (7th Cir. 1999); *U.S. v. Gonzalez*, No. 06 Cr. 726 (WHP), 2008 WL 3914877, at *4 (S.D.N.Y. Aug. 26, 2008); *U.S. v. Sunia*, 643 F. Supp. 2d 51, 72-73

(D.D.C. 2009) (same); *U.S. v. Donehue*, No. C 07-00380 SI, 2008 WL 1900992, at *2 (N.D. Cal. Apr. 28, 2008) (same).

B. The Embezzlements Were Committed Outside the Statute of Limitations

"Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted, or into whose hands it has lawfully come." *Moore v U.S.*, 160 U.S. 268, 269 (1895); *U.S. v. Silverman*, 430 F.2d 106, 126-27 (2d Cir. 1970) (Friendly, J. dissenting) (among embezzlement statutes, "the common thread is that the defendant…has taken another person's property or caused it to be taken, knowing that the other person would not have wanted that to be done.").

It is well established that an embezzlement is complete as soon as a defendant's possession of property becomes wrongful. In *Irvine*, 98 U.S. at 451, an attorney was charged with withholding funds from a client for nearly five years after payment had been demanded. The Supreme Court found that the two-year statute of limitations barred the prosecution, rejecting the government's argument that the wrongful conversion continued for each day the attorney held the money and that the prosecution was timely because the defendant withheld the funds until the indictment issued. *Id.* at 451-52. The Supreme Court held that the crime was committed when there was "a duty of immediate payment [and a failure to

pay]…[an] unreasonable delay…[or] some refusal to pay on demand…as would constitute an unlawful withholding in the meaning of the law." *Id.*

The Supreme Court held further that, once that "criminal act of withholding" exists, it "renders the party liable to indictment." *Id.* at 452. Moreover, "[t]here is in this but one offence…and from that time…the Statute of Limitations applicable to the offense begins to run." *Id.* Finally, the Supreme Court concluded that "[w]henever the act or series of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete, and from that day the Statute of Limitations begins to run against the prosecution." *Id.* at 452-53; *see also Sunia*, 643 F. Supp. 2d at 75 ("The unlawful conversion of property, whether it be through fraud or some other means, is…'completed as soon as there has been an actual taking of the property.'") (citing *U.S. v. McGoff*, 831 F.2d 1071, 1078 (D.C. Cir. 1987)).

As the district court found here, "[a]lthough the defendant in *Irvine* was charged with 'unlawful withholding' and not 'embezzlement,' the facts are very similar to the present case where the Defendant, an attorney who initially was in lawful possession of funds, unlawfully kept or withheld the funds instead of remitting them to their proper owner, and then argued that the statute of limitations had expired when he was indicted." (GA192 n.9).

The government claims that the district court's reliance on *Irvine* was misplaced for two reasons. First, the government asserts that, "[w]hile '[t]he gravamen of the withholding offense in *Irvine* was the failure to pay,' *United States v. Blizzard*, 27 F.3d 100, 103 (4th Cir. 1994), embezzlement involves the fraudulent conversion of another's property by a person who lawfully possesses it at the time of the conversion." (Government's Brief at 17). However, it is indisputable that both in *Irvine* and this case, the defendant had "lawfully possesse[d]" the funds at issue and failed to pay with those funds when required.[8] Moreover, according to the TSI, the government's arguments at trial, and the government's post-trial submissions, Sampson committed embezzlements simply by not transferring the surplus amounts as required (in 1998 and 2002), which is precisely the scenario in *Irvine*. For these reasons, the government's putative distinction between the "failure to pay" and the "fraudulent conversion of another's property by a person who lawfully possesses it" is inapposite.

The government also asserts it was improper to rely on *Irvine* because it "belongs to an ancient line of cases requiring, as an element of the crime of a fiduciary's misappropriating funds…that the victim…must have demanded

[8] *Blizzard* only stands for the proposition that concealing and retaining stolen property is a continuing offense. 27 F.3d at 103. Further, the discussion of *Irvine* in *Blizzard*, if anything, cuts against the government, given that the *Blizzard* court found that the "withholding" offense in *Irvine* required no continuing possession. *Id.* Obviously, embezzlement does not require any continuing possession either.

payment from the fiduciary." (Government's Brief at 17, 19) (contending Sampson did not engage in an "affirmative rejection of a specific demand for funds by a putative victim," but rather engaged in a "passive failure."). By contrast, the government asserts, 18 U.S.C. § 666 has no demand requirement and "no specific demand was made upon Sampson to remit the funds in his escrow account to the [court]." (*Id.* at 18). These assertions are demonstrably false. Court orders and a statute required Sampson to deposit funds within five days. More authoritative "demands" could scarcely be made, and it was on the basis of these demands that the government has alleged embezzlements occurred in 1998 and 2002.[9] Thus, there is no basis in fact for the government's argument that Sampson was not governed by a demand. Rather, the *Irvine* rule that the crime occurs when a "duty of immediate payment" is ignored or when there is "[a] refusal to pay on demand without just excuse" fully applies. 98 U.S. at 451.

The government also expresses concern that a fiduciary might be charged with crimes for "mere mistake" in not returning funds. (Government's Brief at 19). However, the TSI does not contend that Sampson, realizing his "mistake," deposited the funds with the court shortly after the sixth day. Rather, it alleges that Sampson *never* deposited the funds, thereby wrongfully withholding them for ten

[9] The government cannot argue that the orders did not constitute demands because they pre-dated the receipt of funds; otherwise, a principal's directive to an agent to engage in a transaction with monies to be received in the future would be a nullity. Also, the New York State statute at issue was on the books before and after Sampson received the funds.

years and six years, respectively, before the government now contends the embezzlements occurred in 2008. Given these facts, there is no basis to entertain a hypothetical regarding "mere mistake."

The government raises the further concern that a defendant could be prosecuted without forming the intent to convert funds "to his own use." (Government's Brief at 19-20). Again, given the timeframes relevant here, there is no basis to raise such a hypothetical. Moreover, a defendant need not use funds at all to commit embezzlement, and the government cites no authority to suggest otherwise. Indeed, it is the depravation of funds from the rightful owner that is the touchstone of embezzlement, as addressed in the cases cited above. *E.g.*, *Irvine*, 98 U.S. at 452-53 ("Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete"); *see also U.S. v. O'Hagan*, 521 U.S. 642, 681-82 n.1 (1997) (Justices Thomas and Rehnquist concurring in part and dissenting in part) (citations omitted) ("Any 'fraudulent appropriation to one's own use' constitutes embezzlement, regardless of what the embezzler chooses to do with the money….Any diversion of funds held in trust constitutes embezzlement whether there is direct personal benefit or not *as long as the owner is deprived of his money.*") (emphasis added).

The government also contends that, even if there could be an inference of criminal intent drawn when a defendant violates a statute or court order to return

funds, it would not be "so compelling as to constitute proof of criminal intent as a matter of law." (Defendant's Brief at 20). However, as the government itself points out, intent is a question of fact for the jury. (*Id.*). As such, it will never be the case that the government must have – or could have – proof of intent "as a matter of law."

Ultimately, the government's assertions about a "passive failure," "an affirmative rejection of a specific demand," "mere mistake," and "intent" all run afoul of the TSI and the government's prior representations as to when the embezzlements occurred. Again, the TSI alleged embezzlements occurred when Sampson allegedly ignored the statute and court orders by failing to remit funds to the court in 1998 and 2002. The government made the same arguments during and after the trial. The government cannot argue now against its own charging instrument and admissions.

In addition, these assertions are untenable given that, in *Irvine*, the Supreme Court held that an attorney's ignoring a duty of "immediate payment" or a "refusal to pay on demand" constituted a criminal act at the point when it occurred. The government's arguments also run afoul of *Toussie*, a case briefed extensively below, but that the government does not even mention. In *Toussie*, the Supreme Court dismissed a charge for failing to register for the draft based on the statute of limitations. Specifically, the defendant there "was required to register sometime

between June 23 and June 28, 1959," *i.e.*, within five days of his eighteenth birthday, but "did not do so during that period or at any time thereafter." *Toussie*, 397 U.S. at 113. The government did not indict Toussie until 1967, approximately eight years later. It argued that the prosecution was timely because, even though the "crime was complete in 1959…it continued to be committed each day that Toussie did not register," until he was 26. *Id*. at 114. The Court disagreed, holding that the obligation for Toussie to register for the draft "arose when he turned 18" and that "[h]e was allowed a five-day period in which to fulfill the duty, but when he did not do so he then and there committed the crime of failing to register," which was a "single offense." *Id.* at 119.

Here, Sampson had five days after receipt to transfer surplus funds to the court, just as Toussie had five days to register for the draft. Like Toussie, Sampson was subject to an obligation established by statute. Unlike Toussie, Sampson also was subject to an obligation imposed by court orders. Just as Toussie's crime was complete as soon as he failed to register within five days, the alleged embezzlement here was complete as soon as funds were not paid to the court within five days. And, just as the statute of limitations in *Toussie* began to run on the sixth day, the statute of limitations here began to run on the sixth day. Therefore, *Toussie* definitively refutes the notion that a prosecution may not be instituted upon the expiration of a five-day period in which a defendant must act,

even though a defendant charged with draft dodging on the sixth day almost certainly would raise arguments about "mistake," "intent" or the like.

Finally, the government complains that the district court's ruling would "require the government to bring criminal charges at a time when the evidence of actual fraudulent intent may be weak, at best." (Government's Brief at 24-25). Obviously, however, the district court's ruling would not "require" the government to charge a defendant such as Sampson on the sixth day; it merely would start the five-year limitations period in which charges could be brought. The government would only be "required" to bring charges by the end of the fifth year after a failure to remit funds occurred.

Also, even if proof of intent would not be strong for charges brought on the sixth day, that would not make the charges infirm or subject to dismissal for failing to state an offense as a matter of law, including if a defendant argued "mistake," "passive failure" or "intent." And, the government does not concede that a motion to dismiss in that context would be properly granted or that Sampson did *not* as a matter of law commit embezzlement on the sixth day. Therefore, the government's arguments about the weight of potential evidence regarding intent are inapposite.

Moreover, the TSI does not allege that, shortly following the sixth day, in 1998 and 2002, respectively, Sampson remitted the funds. Rather, the TSI alleges

that Sampson had not remitted funds at all as of 2008, when the government now contends the embezzlements occurred. Thus, for the government's present position to be tenable, the law would have to provide (contrary to the TSI) that no embezzlement occurred for ten and six years, respectively, while Sampson held funds after the obligation to remit was effective. For obvious reasons, the government never expressly takes this position. In fact, it avoids any substantive discussion of the multi-year periods in which funds allegedly were held. After all, in another case where an individual wrongfully withheld funds for months or years, the government would certainly contend (consistent with the TSI) that a prosecutable embezzlement had occurred due to the withholding itself.

C. The Cases Cited by the Government Regarding the Retention of Funds Are Inapposite

The government cites several cases it claims "rejected arguments that the crime is necessarily complete merely because the defendant improperly retained funds." (Government's Brief at 21). These cases do not disturb the holdings of *Irvine* or *Toussie* or affect the TSI's allegations and the government's representations that embezzlements occurred when Sampson improperly retained funds. Also, they are fully distinguishable, except for the one Second Circuit opinion cited, which actually militates against the government.

First, the government relies upon *People v. Artman*, 218 Mich. App. 236, 240 (1996), a Michigan state court opinion. (Defendant's Brief at 21). In *Artman*,

the defendant-attorney deposited client funds into a trust account in 1984, pending resolution of a probate matter, which was completed in 1985. However, the defendant did not disburse the funds to the client at that time, instead making mortgage payments for the client and transferring money into her (the defendant's) account. In 1992, the defendant was charged with embezzlement, which she argued would have occurred in 1985. 218 Mich. App. at 238-40. The court found, however, that the only clearly ascertainable crime occurred "when defendant transferred money from the trust account to other accounts." *Id.* at 240.

In *Artman,* "the prosecutor argue[d] that holding money in a trust account, even past the time when the client should presumably receive the funds, is not in itself a conversion or theft." *Id.* at 240. The TSI's allegations and the government's representations regarding embezzlements in 1998 and 2002 are directly to the contrary. Also, the *Artman* victim only was "presumably" entitled to receive funds at the point the defendant claimed the crime was committed. Here, court orders and a statute definitively directed that all funds be transferred on a date certain, which makes this case on all fours with *Irvine*, but unlike *Artman*. Finally, the defendant in *Artman* made payments for the client's benefit while holding the funds, which created a factual issue as to the defendant's intent. No similar action occurred here.

Second, the government cites *State v. Modell*, 260 N.J. Super. 227 (App. Div. 1992), a New Jersey state court opinion. (Government's Brief at 22). In *Modell*, the defendant-agent received a check for a customer he had to remit to fund a pension plan "as soon as possible." 260 N.J. Super. at 252-53. The defendant deposited the check into his personal account two months later. The issue was whether the limitations period began to run when the defendant received the check or deposited it. *Id*. at 251-53. Because it was "unclear where the funds were" between receipt and deposit and, given the amorphous direction to deposit funds "as soon as possible," the court held the action that "objectively and clearly demonstrated misapplication of the funds…was the deposit of the funds in [the defendant's] own account." *Id*. at 253.

Modell is distinguishable for several reasons. First, the *Modell* defendant withheld funds for two months before engaging in other transactions, rather than for many years, as was the case here. Second, court orders and a statute unambiguously directed Sampson to deposit the surpluses within five days, not "as soon as possible." Third, it is not "unclear" what happened to the funds here. Rather, the government alleges that the funds were in accounts as to which Sampson had exclusive authority before being withdrawn. Not only was the court without access to the accounts, but, as addressed, Sampson opened accounts at banks other than those the court had ordered him to use. As such, the accounts in

which Sampson is alleged to have wrongfully withheld funds here were functionally equivalent to a "personal" account.

In *U.S. v. Duhamel*, 770 F. Supp. 2d 414, 416-17 (D. Me. 2011) (*see* Government's Brief at 23), the defendant permissibly transferred funds to an account he controlled, made evidently proper payments therefrom to third parties, and also embezzled specific amounts of money both within and outside limitations period. Under these circumstances, which bear no material resemblance to those here, the government was permitted (perhaps obviously) to prosecute embezzlements within the limitations period.

Finally, the government cites *U.S. v. McCarthy*, 271 F.3d 387, 395 (2d Cir. 2001). (Government's Brief at 24). There, the defendant, a former CEO, had overseen the transfer of funds from his company's pension funds to an account he controlled. After transfer, those funds were used to satisfy a mortgage held by a lender to the company. *McCarthy*, 271 F.3d at 391-93. Subsequently, the defendant was convicted of embezzlement, money laundering, and other charges in relation to this conduct. On appeal, the defendant argued there had been insufficient evidence to support money laundering charges because he had made no payments with criminally derived (*i.e.*, embezzled) proceeds. The government countered that the embezzlement had occurred when the defendant moved funds

from the pension accounts into accounts he controlled and that money laundering occurred when the defendant used the funds to pay expenses. *Id.* at 394.

The Second Circuit held that the embezzlement "was complete when [the defendant] transferred the plan funds from the [] trust accounts into accounts under [the defendant's] control." *Id.* at 395. Explaining this point, the Second Circuit held that, "even if [the defendant's] actions stopped after he transferred the Plans' trust account funds to accounts under his control, he would have completed the crime of embezzlement." *Id.* Therefore, while using "embezzled funds to pay corporate expenses" constituted money laundering, such transactions had no bearing on the commission of the embezzlement. *Id.* Here, Sampson had sole control over the accounts into which funds were originally deposited. Indeed, he was the sole signatory, and these accounts were opened at banks other than those designated by the court. By contrast, in *McCarthy*, the funds initially were in trust accounts of the defendant's employer and only later were transferred to an account the defendant controlled – at which point the embezzlement occurred. *Id.*

D. The TSI's Allegations Regarding Post-Embezzlement Activity Do Not Render the Embezzlement Charges Timely

The government cannot avoid dismissal with allegations about stray transactions in 2008 that, if anything, involved funds from accounts that had been embezzled outside the limitations period. Specifically, the TSI alleged that, "on or about February 13, 2008, SAMPSON transferred $8,000 from the Forbell Street

Referee Account into SAMPSON's personal bank account." (GA042 ¶ 20; *see also* GA052 ¶ 54). It further alleged that, in June 2008, Sampson exchanged one bank check that had been secured with all the proceeds in the Eighth Avenue Property account in 2006 for additional bank checks. (GA043 ¶¶ 25-26; GA053 ¶ 56; *see* Government's Brief at 27) (contending embezzlements occurred when funds were withdrawn or transferred to Sampson's personal bank account).

As addressed, it is black letter law that, once an embezzlement is complete, using embezzled proceeds is not a separate crime. *See Irvine*, 98 U.S. at 452 (as to attorney's wrongfully withholding funds following demand for payment, "[t]here is in this but one offense…and from that time…the Statute of Limitations applicable to the offense begins to run."); *O'Hagan*, 521 U.S. at 681-82 n.1 ("Any 'fraudulent appropriation to one's own use' constitutes embezzlement, regardless of what the embezzler chooses to do with the money."); *McCarthy*, 271 F.3d at 395 (embezzlement "was complete when [the defendant] transferred the plan funds from the [] trust accounts into accounts under [the defendant's] control" and "even if [the defendant's] actions stopped after he transferred the Plans' trust account funds to accounts under his control, he would have completed the crime of embezzlement."); *see also People v. Antilla*, 77 N.Y.2d 853, 855 (1991) (New York Court of Appeals holds defendant committed larceny by opening joint account with funds of great aunt on false pretenses, not by making later

withdrawals from account); *Steinberg v. Zebrasky*, No. 10 Civ. 4372 (RJS), 2011 WL 2565498, at *5 (S.D.N.Y. June 14, 2011) ("Although New York law recognizes the possibility of multiple conversions…the law is quite clear that there can be no 'new' conversion where there has been an unbroken chain of ownership and possession by the defendant.").

In *U.S. v. Hearn*, Criminal No. H-10-500, 2011 WL 1068021, at *1 (S.D. Tex. Mar. 21, 2011), the defendant had worked in Iraq for the State Department. There, he wrongfully arranged for U.S. government trailers to be leased to a private company, with the lease proceeds being sent to a bank account in the Southern District of Texas he controlled. Prosecutors indicted the defendant in that district for converting government property under 18 U.S.C. § 654, and the defendant moved to dismiss for improper venue, arguing, among other things, that his offense had been committed in Iraq. The government contended that the wiring of funds to the account in the district continued the conversion such that the offense did not take place entirely within Iraq. *Id.*

The court disagreed, holding that "[c]onversion is complete the moment the defendant takes, detains, or disposes of the goods – depriving the owner of his authority." *Id.* at *2 (citing Prosser and Keaton on Torts (5th ed. 1984)). Conversion "does not continue everywhere that the defendant may have

transported the good or sent the money that he may have received by hiring it to others." *Id*. The court explained:

> Under the government's theory, if a man took someone else's computer in a restaurant in Virginia, pawned it in North Carolina, and deposited the money from the pawn into his account in a Texas bank, part [sic] the conversion would have also occurred in Texas. This logic is empty. The attack on the owner's title occurred and was complete the moment the man knowingly took the computer of another in Virginia. Likewise, if Hearn converted the trailers, he did it solely in Iraq. No part of the crime could have occurred in the Southern District of Texas regardless of where the payments may have been wired, the trailers used, or anything else after the exercise of 'adverse dominion.'

Id. at *3 (citations omitted); *see also U.S. v. Beard*, 713 F. Supp. 285, 291 (S.D. Ind. 1989) ("what the converter intends to do (or in fact does) with the converted property is irrelevant: the act of 'conversion' is completed upon the initial interference with the owner's interest.")

Here, as the TSI alleged and the government represented, the embezzlements took place in 1998 and 2002 when the surplus funds were not transferred to the court, instead remaining in accounts over which Sampson had sole authority. Indeed, "even if [Sampson's actions] stopped after" he wrongfully held the funds in an "account[] under his control, he would have completed the crime of embezzlement." *McCarthy*, 271 F.3d at 395. And any subsequent transactions with such funds would not constitute separate acts of embezzlement. *See id*.; *Hearn*, 2011 WL 1068021, at *3 ("No part of the crime could have occurred…after

the exercise of 'adverse dominion.'"). Thus, none of the 2008 transactions constituted a separate crime for which a prosecution would be timely.

Ultimately, it is telling that the government never actually takes a position on when the limitations period *did* begin to run, instead arguing simply that it did *not* begin to run on the sixth day. Only in the very last sentence of its brief does the government obliquely address this issue, arguing that "[t]he government should be permitted to argue and the jury should be permitted to find that Sampson had not formed the intent necessary to commit embezzlement and the offense was not complete until he 'affirmatively dealt with the property obtained as his own,'…by withdrawing funds from the referee accounts for cash or transferring them to his personal bank account." (Government Brief at 26-27). Of course, this argument fails because, *inter alia*: (i) the TSI alleged the embezzlements occurred in 1998 and 2002; (ii) the government argued to the jury that the embezzlements occurred in the late 1990s and early 2000s, and were, in any event, complete by 2006; (iii) the government represented to the district court that the embezzlements were complete by 2006; (iv) the binding authorities cited above are to the contrary; and (v) the government has not and cannot take the position that, as a matter of law, no embezzlements occurred due solely to the withholding of funds before 2008.

III. COUNTS 1 AND 2 ARE PROPERLY DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

Subject matter jurisdiction exists pursuant to 18 U.S.C. § 666 only if the defendant was an agent of an entity that received $10,000 in federal benefits in a one-year period during which the alleged offense was committed. 18 U.S.C. § 666(a)(1)-(A) ("Whoever…being an agent" of, *inter alia*, a government or government agency "embezzles"); 18 U.S.C. § 666(b) (principal must receive at least $10,000 in federal benefits in "any one year period"); *see U.S. v. Jackson*, 313 F.3d 231, 234 (5th Cir. 2002) (issue is whether government proved "that the entity of which [the defendant] was an agent received over $10,000 per year of federal funds."); *U.S. v. Harris*, No. 5:07crl-DCB-LRA, 2007 WL 2028948, at *1 (S.D. Miss. July 11, 2007) (government must prove "entity for which the defendant is an agent receives more than $10,000 under a federal assistance program in any one year"). To qualify as an agent, the defendant must be "authorized to act on behalf" of a principal. 18 U.S.C. § 666(d)(1).

The First Superseding Indictment failed to allege that Sampson was an agent of an entity that received the requisite federal funds. Specifically, the First Superseding Indictment alleged that Kings County Supreme Court justices appointed Sampson as referee for the relevant properties (SA35-36 ¶¶ 18, 21); that Sampson acted "on behalf of the Kings County Supreme Court" (*id.* ¶ 4); and that Sampson "owed a fiduciary duty to the Kings County Supreme Court." (SA31 ¶

12). In sum, the First Superseding Indictment alleged that Sampson was an agent of the Kings County Supreme Court. However, the First Superseding Indictment failed to allege that the Kings County Supreme Court received the requisite federal funds – likely because documents produced by the government in discovery revealed it had not – and alleged only that the "New York State Unified Court System" received the requisite funds. (SA34 ¶ 13).

Recognizing this failure, the government secured the TSI, which magically replaced most of the First Superseding Indictment's references to the "Kings County Supreme Court" with references to the "Supreme Court of the State of New York." Specifically, the TSI alleged that justices of the Supreme Court of the State of New York appointed Sampson as referee (GA041-42 ¶¶ 18, 21); that Sampson acted "on behalf" of the Supreme Court of the State of New York (GA037 ¶ 4); and that Sampson "owed a fiduciary duty to the Supreme Court [of the State of New York]." (GA039-40 ¶ 12). The TSI also contended that the Supreme Court of the State of New York received the requisite federal funds. (GA40 ¶ 13).

The government's facile attempt to rewrite history through the TSI is unavailing. Indisputably, judges of the Kings County Supreme Court issued the orders creating Sampson's agency. These orders directed Sampson to act in matters before the Kings County Supreme Court relating to two specific properties in Brooklyn. (GA063-72, GA087-94). The orders granted Sampson no further

authority. Thus, Sampson was an agent of the Kings County Supreme Court, as the government's prior charging instruments had contended.

Critically, nothing authorized Sampson to act on behalf of an entity known as the "Supreme Court of the State of New York" or on behalf of a Supreme Court in any county other than Kings County. *See, e.g.*, *U.S. v. Langston*, 590 F.3d 1226, 1229, 1233-35 (11th Cir. 2009) (reversing 18 U.S.C. § 666 conviction because, while defendant was an agent of the Fire College, an Alabama state agency, he was not an agent of the State of Alabama, given that "an employee of an agency entity cannot be an agent of the principal entity unless the legal construct establishes such a relationship" and defendant's "employment with the Fire College [did] not authorize him to act on behalf of the state under the applicable state law"); *Sunia*, 643 F. Supp. 2d at 65 (vacating 18 U.S.C. § 666 convictions because, while defendants were agents of American Samoan legislature, they could "not be viewed as agents of the American Samoa Departments of Treasury or Education").

The entity known as the "Supreme Court of the State of New York" does not exist in any physical sense, and it does not function other than through courts located in specific counties. Indeed, the "Supreme Court of the State of New York" cannot be located, except in the New York State Constitution. As such, Sampson could not have been an agent of this entity. Rather, Sampson's actual authority and agency were indisputably limited to the two matters in Brooklyn.

Given that the TSI fails to allege that the Kings County Supreme Court received any federal funds, subject matter jurisdiction does not exist.

Regardless of the entity for which Sampson had been an agent, any agency relationship terminated well before the government claims the charged embezzlements occurred in 2008. The Forbell Street Property matter (Index No. 040446/1995) concluded in June 1999. (SA18-19). The Eighth Avenue Property matter (Index No. 033928/2001) concluded in March 2002. (SA20). When those matters were closed, Sampson's agency was terminated; any other result would have Sampson being an agent for life, even in the absence of an active proceeding. There is no authority for the proposition that a Kings County referee enjoys Article-III-like lifetime tenure.

Moreover, Sampson's agency was terminated by the alleged embezzlements occurring when funds were not deposited in 1998 and 2002. *See* Restatement (Second) of Agency § 112 (1958) ("Unless otherwise agreed, the authority of an agent terminates if, without knowledge of the principal, he acquires adverse interests or if he is otherwise guilty of a serious breach of loyalty to the principal."); *Int'l Airport Centers, L.L.C. v. Citrin*, 440 F.3d 418, 420 (7th Cir. 2006) (citations omitted) (same); *U.S. v. Hill*, 579 F.2d 480, 482 (8th Cir. 1978); *cf. Phansalkar v. Andersen Weinroth & Co.*, 344 F.3d 184, 201-02 (2d Cir. 2003) (quoting *Murray v. Beard*, 102 N.Y. 505, 508 (1886)) ("An agent is held to

uberrima fides in his dealings with his principal, and if he acts adversely to his employer in any part of the transaction, or omits to disclose any interest which would naturally influence his conduct in dealing with the subject of the employment, it amounts to such a fraud upon the principal, as to forfeit any right to compensation for services."). Thus, Sampson had long ceased "being an agent" by 2008, precluding the application of 18 U.S.C. § 666. *See* 18 U.S.C. § 666(a)(1).

CONCLUSION

For the reasons set forth above, the dismissal of the embezzlement counts should be affirmed.

Dated: June 16, 2017

Respectfully submitted,

/s/ Nathaniel Akerman
Nathaniel Akerman, Esq.
Joshua Colangelo-Bryan, Esq.
DORSEY & WHITNEY LLP
51 West 52nd Street
New York, NY 10019-6119
(212) 415-9200

Attorneys for John Sampson

Federal Rules of Appellate Procedure Form 6. Certificate of Compliance With Type-Volume Limit

Certificate of Compliance With Type-Volume Limit,
Typeface Requirements, and Type-Style Requirements

1. This document complies with the type volume and word limit of Fed. R. App. P. 32 (a) and Local Rule 32.1(a) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

   ☑ this document contains 9,755 words, **or**

   ☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

   ☑ this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point-size Times New Roman font, **or**

   ☐ this document has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

(s) /s/ Nathaniel H. Akerman

Attorney for John Sampson, Appellee

Dated: June 16, 2017