17-343

To Be Argued By:
NATHANIEL H. AKERMAN

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN SAMPSON,

Defendant-Appellant.

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

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT

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INTRODUCTION AND SUMMARY OF ARGUMENT

John Sampson respectfully submits this memorandum in support of the appeal from his convictions on three counts (Four, Nine and Eleven) of the Fifth Superseding Indictment ("FSI"), following a jury trial before Chief Judge Irizarry. Of the FSI's eleven total counts, two were dismissed pretrial and are the subject of a separate appeal (15-2869), and six were the subject of acquittals at trial.[1]

Count Four charged Sampson with obstruction of justice pursuant to 18 U.S.C. § 1503. The government offered evidence that Sampson sought to identify witnesses in the prosecution of Edul Ahmad and it repeatedly argued to the jury that Sampson intended to tamper with witnesses. This Court has held unequivocally that witness tampering can be prosecuted only under § 1512, and not § 1503. Thus, the conviction on Count Four should be reversed and dismissed.

Even if this Court's jurisprudence were otherwise, the district court failed to instruct the jury that Sampson had to have corrupt intent to obstruct Ahmad's prosecution in connection with the government's alternative theory on Count Four that Sampson willfully caused an obstruction pursuant to § 2(b). This error, independently, would warrant reversal and a new trial.

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[1] References to counts herein reflect the enumeration of those counts in the FSI because the judgment refers to the FSI, although Sampson was tried on the Sixth Superseding Indictment ("SSI"). The SSI contained the same charges as the FSI, except for the two embezzlement counts that were dismissed pretrial. For the sake of consistency, all allegations addressed herein are cited by reference to the FSI. Those cited allegations are identical in the SSI.

Count Nine charged Sampson lied to the FBI (per § 1001) by saying he had not seen a photocopy of a "Check Register Page" that agents showed him. The Check Register Page reflected a loan Ahmad had given to Sampson, and Sampson had taken that document from Ahmad months earlier. This conviction should be reversed and dismissed for insufficient evidence.

First, Sampson's answer was literally true because he had never seen the photocopy shown to him. He had only seen the original. Second, Sampson said he needed "clarification," indicating his answer might change if he could check his files, where he had the original document. This statement, in the context of the full record, demonstrates Sampson did not intend to deceive. Third, the district court effectively found that the question asked of Sampson was ambiguous in holding that his response was not literally true. Specifically, the court held that the agents did not ask Sampson whether he had seen the photocopy-document shown to him, which was the actual query, but rather meant to ask whether he had seen the image depicted on the document in any form. There is no authority for reinterpreting a question contrary to its actual words, but, in any event, the government failed to satisfy its specific burden of showing that Sampson's response to an ambiguous question was false.

Count Eleven charged that Sampson, a former State Senator, lied to the FBI (per § 1001) by saying he had not asked his staff to assist with tax matters

involving a liquor store. The district court erroneously refused to admit into evidence an agent's contemporaneous notes of the FBI interview, based on a hearsay objection. When defense counsel had just begun to explain its rationale for admitting the notes, the district court interjected, saying, "[a]bsolutely not. Get away."

The defense wished to admit the notes for two exculpatory non-hearsay purposes. First, the notes do not reflect Sampson's denying he had asked his staff to assist and, thus, were to be offered to show the *absence* of the charged statement. Second, on direct examination, the testifying agent created the misimpression that he had asked Sampson about tax matters relating to the liquor store and, immediately thereafter, about staff assistance. However, the notes show these subjects were addressed in entirely distinct sections of the 90-minute interview, separated by discussions of many other topics. Beyond excluding the notes, the district court precluded the defense from cross-examining the agent on these issues. Therefore, this count is properly remanded for a new trial.

The convictions on all three counts should be reversed and the counts remanded because the government improperly argued that Sampson committed bribery, even though Sampson did not engage in any "official act" as defined by *McDonnell v. U.S.*, 136 S. Ct. 2355 (2016). Moreover, nearly one-quarter of the

trial testimony related to supposed bribery, which cumulatively caused obvious unfair prejudice.

Finally, the district court erred in calculating the Guidelines range and, without adequate explanation, imposed substantial upward variances.

JURISDICTIONAL STATEMENT

Judgment was entered on January 27, 2017. (A1169-A1180). Sampson timely appealed on February 3, 2017. (A1181-A1182). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Should Sampson's conviction on Count Four pursuant to § 1503 be reversed because it was premised on an alleged scheme to tamper with witnesses, which is outside the ambit of § 1503, and, separately, was it reversible error not to instruct the jury that Sampson could only be found guilty if he had the corrupt intent to obstruct in connection with the government's alternative willfully caused theory, asserted pursuant to § 2(b)?

2. Was there sufficient evidence to convict Sampson on Count Nine pursuant to § 1001, given that his response was literally true and reflected no intent to deceive, and, even accepting *arguendo* the propriety of the district court's alternative interpretation of the agents' query, the interpretation rendered the query ambiguous?

3. In the context of Count Eleven, charged pursuant to § 1001, was it reversible error to exclude an agent's contemporaneous notes of the FBI interview, which did not reflect Sampson's making the charged statement, but did show that the sequence of the interview differed materially from the testifying agent's description, and to preclude cross-examination of the agent on those points?

4. Should the convictions be reversed based on the unfair prejudice caused by the massive amount of evidence relating to purported corruption presented by the government and the government's repeated arguments that Sampson committed bribery, which were contrary to *McDonnell v. U.S.?*

5. Were Sampson's sentences reasonable?

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY AND TRIAL EVIDENCE RELATING TO COUNT FOUR

Count Four charged that Sampson endeavored to obstruct the prosecution of Ahmad, a longtime friend, in violation of § 1503. (A80 ¶ 59). It also charged Sampson pursuant to § (2)(b) under a willfully causing theory. *Id.* At trial, the government presented evidence that Sampson sought to identify witnesses against Ahmad and it argued repeatedly in summation that Sampson intended to tamper with witnesses.

A. Procedural History

Notwithstanding the evidence and argument presented to the jury, the government's initial legal theory on Count Four was articulated on June 29, 2015, well into the trial. Specifically, the government made a motion *in limine,* asking the district court to "instruct the jury that an unauthorized effort to obtain nonpublic information regarding the identities of cooperating witnesses constitutes an endeavor to obstruct justice." (A1034). This request applied to both Counts Three and Four.[2] (A1038). The government also asked that the defense be precluded from arguing that "the defendant did not intend to use such information for further illegal purposes." (A1034).

On July 2, 2015, the government submitted proposed edits to a draft jury charge authored by the district court. (A1041-A1051). On Counts Three and Four, the government inserted the following language:

> I instruct you that obtaining confidential law enforcement information without authorization, including obtaining the identities of cooperating witnesses in a pending criminal case, obstructs, impedes and influences the due administration of justice…regardless of whether or not the identities of such cooperating witnesses might later be disclosed in an authorized manner.

(A1049; A1051).

[2] The government's motion referred to these charges as Count One and Count Two because they were so enumerated in SSI, which was before the jury. Count One of the SSI, which is Count Three of the FSI, charged a conspiracy to obstruct pursuant to § 1512. (A79 ¶ 57).

On July 4, 2015, the government filed supplemental proposed edits to the jury charge, which included the language cited just above. (A1072; A1075). Also, the government, in alternatively charging Count Four under a willfully caused theory pursuant to § 2(b), proposed the following language, consistent with its theory that obtaining confidential information by itself constituted obstruction:

> Did the defendant know that information retained by the United States Attorney's Office for the Eastern District of New York regarding the identities of cooperating witnesses was nonpublic information?
>
> Did the defendant intentionally cause another person to obtain this information without legal authorization?
>
> If you are persuaded beyond a reasonable doubt that the answer to both of these questions is "yes," then the defendant is guilty of the crime charged….

(A1076-A1077).

On the previous day, July 3, 2015, the defense had submitted its opposition to the government's June 29 motion *in limine*, arguing that intent had to be proven as an independent element, even if Sampson had sought confidential witness information, and that the government was attempting to create a strict-liability offense. (A1055-A1056). In response, on July 6, the government withdrew its motion in writing, thus disavowing the theory that trying to get confidential information was *per se* obstruction. (A1078-A1079). On July 7, the district court, in addressing the motion *in limine,* stated, "it's Black Letter law that a question of intent is a fact for the jury to determine." (A712:3-19).

B. Trial Evidence

Ahmad loaned Sampson $188,500 in 2006. According to Ahmad, this allowed Sampson to make payments to the Kings County Supreme Court for amounts Sampson had embezzled when serving as a foreclosure referee. (A105:4-A106:16; A108:8-16).

In July 2011, Ahmad was arrested on mortgage-fraud charges. Following the arrest, Sampson told Ahmad "that the way to go forward…is to find out who the…potential cooperators are and then…get a [private investigator] to dig up dirt on them." (A238:2-9; *see also* A245:25-3; A246:3-A247:12; A249:16-A250:19). Ahmad testified that "dirt" meant "anything that they have that will negatively impact [the cooperating witnesses'] credibility." (A245:24-7). Ahmad and Sampson surmised that the witnesses against Ahmad included Leesa Shapiro, Glenn Hirsch and Premraj Hansraj, all of whom had worked with Ahmad. (A239:15-24; A240:1-17; A242:8-A243:17).

Thereafter, Sampson sought the identities of witnesses against Ahmad in three ways. First, Sampson met his friend, Sam Noel, who was a paralegal in the U.S. Attorney's Office that was prosecuting Ahmad. (A110:9-17; A246:3-A249:7; A730:15-A731:15). Sampson asked Noel to find out if Shapiro, Hirsch, Roger Kahn and Hansraj were cooperating and, if so, what they had said. (A730:2-A732:22; A733:20-A737:25). Noel searched PACER, finding Ahmad's case.

(A741:6-A742:9). Noel next accessed "LIONS," a non-public government database. (A744:19-12). Noel found Ahmad, Khan, and "the long PRM name," but nothing indicating that Khan or "PRM" was a witness against Ahmad. (A744:13-A745:10).

Sampson gave Ahmad names of supposed witness he claimed to have received from Noel; however, neither Noel nor anyone else had provided these names to Sampson. (A254:2-A256:24; A274:10-20; A275:11-A279:10; A750:2-A751:11; A752:9-23; A935:1-A937:25).

Second, Ahmad testified that Sampson recommended attorneys for Ahmad's co-conspirators to learn whether the co-conspirators "decided to cooperate…." (A269:13-24). Before Ahmad began cooperating, he had asked Sampson to recommend an attorney for Qayaam Farrouq, an employee who had been questioned by the government, so Ahmad could learn "whether [Farrouq] is going to cooperate…." (A257:9-16; A257:25-A258:7). Sampson recommended Michael Mays. (A258:25-A259:7).

On November 22, 2011, after Ahmad began cooperating (A112:15-16), Farrouq, Nazir Gurmohamed and Steve Massiah, all Ahmad associates, were arrested for mortgage fraud. (A260:9-21; A262:3-A264:17; A267:22-25; A270:7-12; A903:9-46; A911:25-A912:22). Sampson recommended an attorney, John Rodriguez, for Gurmohamed. (A264:22-A265:24). Later that day, Sampson met

Ahmad and told him that Mays, who had represented Farrouq at the arraignment, was "keeping an eye on that case." (A916:15-16).

The third method to identify witnesses was to attempt to hire Warren Flagg, a private investigator who had been an FBI agent, and who supposedly could obtain confidential information from his contacts in law enforcement. (A280:12-16; A281:18-A282:4; A283:4-8; A296:25-5; A974:42-A975:25). On February 28, 2012, Ahmad, in Sampson's presence, asked Flagg how to identify cooperators. (A1009:14-16). Flagg stated, "ultimately, you're going to get that information…in this 3500 material" (A1009:18-19), but warned that, as to any investigation prior to receiving such material, care should be taken not to "have [Ahmad] charged with witness tampering…." (A1009:20-24).

Special Agent Kenneth Hosey testified that the identities of cooperating witnesses are kept confidential so "witnesses don't get hurt, so no one attempts to tamper with them as witnesses." (A771:2-8; *see also* A773:24-1; A775:4-6).

Ultimately, there was no evidence that Sampson secured any confidential information.

II. TRIAL EVIDENCE RELATING TO COUNT NINE

Count Nine charged a violation of § 1001 and alleged that, on July 27, 2012, Sampson "falsely stated and represented to FBI Special Agents that he did not recall seeing the Check Register Page previously, when in fact, as he then and

there well knew and believed, the defendant did recall seeing the Check Register Page previously." (A83 ¶ 69). By way of context, in 2006, Ahmad had memorialized his loan to Sampson on his check register with numbers and notations. (A71-A72 ¶ 33; A120:17-A123:13; *see* A890).

In February 2012, at the FBI's direction, Ahmad created a near-duplicate second version of the 2006 check register entries, again using his check register; this near-duplicate document is referred to as the "Check Register Page." (A285:25-A287:5; A288:7-A289:16; A892-A893). On February 22, 2012, Ahmad showed the Check Register Page to Sampson, telling him it had been subpoenaed, and Sampson retained it. (A113:2-A115:18; A292:10-A293:13). This document was admitted into evidence as Government Exhibit 6A. (A784:18-A785:4; A892-A893).

On February 22, 2012, Ahmad also told Sampson that Sampson had the original and only version of the Check Register Page, and there were no copies. (A294:3-8; A299:16-A300:25; A830:15-25; A1006:1-14). The government, however, had made a photocopy of the Check Register Page (A777:8-14), which was admitted as Government Exhibit 6. (A891). The photocopy is 8.5 inches by 11 inches, while the original Check Register Page (A892-A893), is approximately

4.5 inches by 8.75 inches.[3] The original also is on blue check register paper and contains watermarks, unlike the photocopy, which is in black and white, and on plain copy paper. (*Compare* A892 *with* A891).

When the FBI interviewed Sampson on July 27, 2012, some five months after the February meeting, agents presented the photocopy (A891) of the Check Register Page. (A777:1-14). Agent Hosey testified that he asked Sampson if Sampson had seen the photocopy, and Sampson said that "he had not." (A777:1-7; A780:12-15). Agent Hosey testified that Sampson also asked for "clarification regarding the question," saying that "if he [Sampson] could check his files or there was more information, he may be able to recall." (A780:21-24). Agent Hosey did not respond to Sampson's request for clarification.

III. TRIAL EVIDENCE AND RULINGS RELATING TO COUNT ELEVEN

Count Eleven charged a violation of § 1001 and alleged that Sampson falsely told the FBI that "he did not ask any member of his Senate staff to assist Partner #1 in any matter related to the Liquor Store when…he had asked the Staffer, who was a member of Sampson's Senate staff, to assist Partner #1 in

[3] The version of the Check Register Page in the record before the Court (A891) is on a standard 8.5 x 11 inch piece of copy paper. However, the actual size of the document (which the government has) is ascertainable by reference to the image with a blue background depicted on the version in the record.

resolving the Liquor Store's outstanding sales tax balance owed." (A84 ¶ 73). Agent Hosey testified as follows:

> Q. Did you ask the defendant if he was aware that the liquor store had tax issues?
>
> A. I did.
>
> Q. What did he say about that?
>
> A. He claimed he didn't know. And he said he was aware that [Partner #1] individually had some personal tax issues.
>
> Q. Did you ask the defendant anything regarding his staff and the liquor store?
>
> A. Yes.
>
> Q. What did you ask him?
>
> A We asked him if he had asked his staff to assist briefly in connection with the liquor store….
>
> Q. How did the defendant respond to your question regarding whether he had asked the Senate staff to assist briefly regarding the liquor store?
>
> A. He stated he had not and said that he would not put pressure on his staff to make that kind of inquiry.

(A781:2-A782:2). The government also offered recordings of conversations between Sampson and Celeste Knight, a staffer, in which he asked her to assist on sales tax matters for the liquor store.

A. The FBI's Contemporaneous Interview Notes

The only contemporaneous record of the 90-minute FBI interview were notes taken by an agent. (A790:1-19; A793:7-12; A1185:25-1186:7). These notes

are exculpatory. First, the notes do not reflect that Sampson denied asking staff to assist with the liquor store. Specifically, the notes reflect that the agents "asked about staff assisting Edmon [*i.e.*, Partner #1]." (A1025 (middle of page)). The notes state that Sampson responded by saying he "would not put pressure on staff to make an inquiry." (A1025 (middle of page)). But, the notes contain no reference – at this point or any other – to Sampson's saying he did not ask his staff to assist.

Second, Agent Hosey's testimony created the false impression that he had asked Sampson about the liquor store's tax matters and, just after, about staff assistance. (A781:2-A782:2). However, the notes graphically show that the questions about tax matters and staff assistance were in separate sections of the interview. As addressed, the agents "asked about staff assisting Edmon." (A1025 (middle of page)). Then there was a conversation about whether Sampson had disclosed his interest in the store on Senate ethics forms, and about a range of unrelated topics that took three pages to memorialize. (A1025 (bottom of page) to A1028 (bottom of page)). Only at this point, did the agents question Sampson about tax matters. (A1028 (bottom of page) to A1029). And, the notes reflect no questions about staff assistance regarding tax matters at that stage of the interview or otherwise.

B. The District Court's Refusal to Admit the Notes or Permit Cross-Examination on the Issues Raised Therein

When the defense attempted to admit the notes for the reasons referred to above, the government objected. The following discussion occurred at sidebar:

> The Court: Why don't we hear from the government first to state its objection.
>
> Mr. Tuchmann: Your honor, this is hearsay, and I'm not aware of any reason why these notes should be admitted. They've had the opportunity to cross-examine Special Agent Hosey about this matter. If they wish, they can cross-examine call Special Agent Zacher for this meeting. I'm not sure what the basis is.
>
> The Court: What's the basis for admitting these into evidence? There's no basis.
>
> Mr. Colangelo-Bryan: It would not be offered for the truth, your honor. It's to show the structure of the question, which subjects --
>
> The Court: Absolutely not. Get away.

(A794:2-A795:15).

The district court also precluded the defense from cross-examining Agent Hosey about whether Sampson had denied asking his staff to assist the liquor store:

> Q. Isn't it a fact that John Sampson did not deny that he had asked his staff to assist?
>
> Mr. Tuchmann: Objection.
>
> The Court: Sustained.

(A797:18-21). The district court further precluded the defense from cross-examining Agent Hosey regarding whether he had asked Sampson about staff assistance in the context of tax matters:

> Q. When you were discussing the tax matters that you testified to earlier, isn't it a fact that you did not then ask John Sampson if his office had provided assistance to the liquor store?
>
> Mr. Tuchmann: Objection…
>
> The Court: Sustained.
>
> Q. Was the subject of the tax matters asked later in the interview?
>
> Mr. Tuchmann: Objection.
>
> The Court: Sustained. Move on, I said, about that.

(A801:22-A802:9).

IV. SUPPOSED POLITICAL CORRUPTION

A. Pretrial Motion Practice

Prior to trial, the government moved to introduce "direct evidence of bribery" ostensibly "to prove that Defendant hindered communications related to a federal offense" and "to show Defendant's motive for interfering in a federal investigation." *U.S. v. Sampson*, 2015 WL 2066073, at *6 (E.D.N.Y. May 4, 2015). The defense objected that the conduct at issue did not constitute corruption, and evidence relating to it would be unfairly prejudicial. (A51-A57). In response, the government argued that the evidence of bribery (and of embezzlement, which the government wanted to introduce for the same purposes (*Sampson*, 2015 WL

2066073, at *4)), would "require a total of approximately one day of testimony." (A59-A61). The district court permitted the government to introduce this evidence. *Sampson*, 2015 WL 2066073, at *5-6.

B. Trial Evidence

In October 2009, Ahmad asked Sampson to assist in connection with a permit application to the New York City Department of Environmental Protection ("DEP"). (A149:12-150:4). A Sampson staffer then made what Richard Muller of DEP testified was a typical request to expedite the application. (A477:6-13; A483:6-10). Muller testified further that the staffer made no request to approve the application and no objection when DEP ultimately rejected it. (A477:22-A479:20).

In July 2007, Banking Department and Department of State auditors appeared at Ahmad's office, asking for files. (A182:8-A183:23). Ahmad lied that the documents were off site because the documents would reveal his fraudulent practices; the auditors said they would return later. (A184:12-A185:6). Ahmad immediately asked Sampson to curtail the audit. (A187:11-A188:1). Sampson said he would try, but did not contact Ahmad again that day. (A188:2-11).

The auditors returned the next day. (A190:9-15). Ahmad asked Sampson to come to his office, which Sampson did. (A190:17-A191:8). Sampson asked the auditors if they had authority to take the records, and the auditors answered

affirmatively. (A191:12-A192:15). Sampson asked to speak to their supervisor. (A192:4-5). Then, in Ahmad's words, "[the auditors] dialed the phone, and they put John Sampson on the phone, and, like a minute or so later, minute or two, John told me to give them the files." (A192:7-9). Ahmad provided the files. (A193:16-17).

On August 29, 2008, the Banking Department told Ahmad via letter he was being fined $68,000 for not disclosing certain information to customers. (A900-A901). Ahmad asked Sampson to "get rid of these fines." (A214:1-A217:2). Ahmad testified that Sampson agreed to help, but that Sampson later told him Rholda Ricketts, a Deputy Superintendent, would not annul the fine. (A217:3-10). However, Ricketts testified that Sampson never asked her to rescind the fine. (A701:13-15). Rather, Sampson only asked to extend the time for payment. (A223:7-21). Richard Nieman, the Superintendent, testified this was a reasonable request, and he approved a twelve-month extension. (A636:1-18; A676:11-17; A700:19-25; A705:15-18). An additional two-month extension was granted later at Sampson's request. (A682:9-15).

On July 29, 2008, an administrative hearing was held involving accusations by the Department of State that Ahmad had sent brochures to an individual on a non-solicitation list. (A172:2-A173:15). Prior to the hearing, Ahmad had asked Sampson to represent him, but Sampson said he could not appear before a State

agency and arranged for a colleague from his firm to handle the matter. (A173:18-A174:19). Sampson attended the hearing, but stated, when asked, that he did not represent Ahmad. (A897:11-A898:21). Sampson failed to have an attorney attend a subsequent hearing, resulting in Ahmad's real estate license being suspended. (A175:23-A176:11).

Finally, Ahmad asked Sampson to help him "get on bank lists and REO's companies' lists" and to "set up some meetings…with the REO companies."[4] (A130:11-13; A131:24-A132:2). Ahmad provided names of companies to Senate staffers. (A132:5-A133:2). The staffers arranged meetings with several banks. (A135:20-5). Sampson briefly attended one meeting and said "that he was concerned that more minority brokers needed to be on these REO lists and that…[Ahmad] was a competent broker and company and had the ability to handle their REO, and they should certainly consider putting [Ahmad] on their REO list." (A135:9-A136:19). Ahmad said that he received several brokerships. (A137:25-A138:11).

In addition, legislation was introduced by Sampson to "require banks regulated by New York State to choose from a list of REO brokers, a certain percentage of which would have to be a [sic] minority and women-owned

[4] "REO" refers to a real estate owned property, *i.e.,* a foreclosed property owned by a bank. (A130:25-A131:6).

businesses." (A436:11-A437:22; A900-A901). Ahmad, however, never asked for such legislation and did not even know what happened to the relevant bill. (A137:22-24).

C. The Supreme Court's Decision in *McDonnell*

On June 27, 2016, after the trial, the Supreme Court decided *McDonnell*, narrowly defining an "official act" in the context of bribery. On July 5, 2016, Sampson requested permission to submit a motion because *McDonnell* refuted the government's trial arguments that Sampson had committed bribery, a request the district court denied. (A1094-A1095; Dkt. Sept. 19, 2016 (Order as to John Sampson)).

ARGUMENT

I. THE CONVICTION ON COUNT FOUR SHOULD BE REVERSED AND THE COUNT DISMISSED BECAUSE IT WAS IMPROPERLY SECURED PURSUANT TO § 1503

A. The Government Argued to the Jury that Sampson Sought to Obtain Confidential Witness Information in Order to Tamper with Witnesses

The government's proof on Count Four concerned Sampson's efforts to identify cooperating witnesses in the Ahmad prosecution, as addressed in detail above. *See* Statement of the Case I(B).[5] The government argued repeatedly that Sampson's intent in trying to identify witnesses was to tamper with them.

[5] The government also presented evidence suggesting Sampson made a statement to Ahmad threatening witnesses. However, the government acknowledged that Sampson was "not charged

During its overview of the evidence in summation, the government contended Sampson had suggested how Ahmad could pay for a lawyer to represent Gurmohamed "to try to influence Gurmohamed." (A821:7-A822:13). It also referred to a statement by the private investigator Flagg that, if he asked a "buddy" for information on Ahmad's case it would be "tampering," in order to argue that Sampson wanted Flagg not to perform legitimate background investigations, but to do "something criminal," *i.e.,* tampering. (A827:5-21; *see also* A829:2-7 (rhetorically asking if Sampson's remarks during a call with Ahmad were "about legitimate background research or…about doing something illegal?")). Furthermore, the government contended that Sampson's putative threat to kill witnesses "shows the defendant's criminal purpose when he was talking to Ahmad about finding out the identities of cooperating witnesses." (A824:24-A825:10). Tying this supposed threat to Sampson's purpose attributes the most serious manner of witness tampering to Sampson, even if the government also confusingly conceded Sampson was not charged with trying to kill witnesses.

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in this case with plotting to kill anyone." (A824:24-A825:10). Agent Hosey testified he was unaware of any attempt by Sampson to approach Ahmad's co-conspirators. (A788:7-9). Further, the trial court found the threat was not genuine. *U.S. v. Sampson*, 2016 WL 756565, at *13-14 (E.D.N.Y. Feb. 26, 2016).

Subsequently, the government stated it was turning more fully to Count Four (A831:9-10),[6] which it described as involving "the defendant's efforts to obstruct Ahmad's criminal case during the time between Ahmad's arrest [in] July of 2011 and the summer of 2012, by trying to get confidential law enforcement information, using Sam Noel, Michael [Mays] and Warren Flagg." (A831:11-15). The government emphasized that an "important question for you to think about for this count is whether the defendant's conduct had the natural and probabl[e] effect of obstructing justice…but when you think about that question, please keep in mind what was the defendant's purpose when he did these things." (A832:4-9).

Critically, as to purpose, the government argued that Sampson was "trying to give Ahmad the names and identities of cooperating witnesses so Ahmad could *tamper with them. You saw the defendant tamper with witnesses* in this case; he knew how it's done. What else was the defendant trying to accomplish? He was trying to give Warren Flagg the opportunity to do dirty work with cooperating witnesses…." (A832:9-A833:23) (emphasis added).

The government further stated, "[s]o what other occasions have you heard about when the defendant engaged in conduct similar to the *witness tampering* and

[6] The government referred to "Count Two" because the § 1503 count was so delineated in the SSI.

evidence tampering he's charged with in Counts Three Through Six?[7] First, again…there's the defendant's obstruction of Ahmad's case like it's charged in *Counts One and Two* [*i.e.,* Counts Three and Four of the FSI]." (A835:23-5) (emphasis added). Thus, the government conflated Count Four of the FSI with Counts Five and Six of the FSI, which were formally charged as witness tampering pursuant to § 1512 and were based on the February 22, 2012 meeting between Sampson and Ahmad. (A80-A81 ¶ 61; A81 ¶ 63).

In its rebuttal summation, the government further described various instances in which it contended Sampson had tried to influence the testimony of witnesses in connection with Count Four. (A852:3-5). The government asked "what about the defendant's statement during that recorded meeting, on November 22nd, 2011, in which he told you…how he intended to influence the testimony of Qayaam Farrouq?" (A853:9-13). The government argued also that it was "witness tampering" for Sampson to arrange for "close associates like Michael Mays to represent people like Qayaam Farrouq." (A879:1-3). Moreover, the government went so far as to contend that Sampson actually had tampered with a witness in the case against him, saying he had gotten "his claws" into a witness. (A879:5-A880:8).

[7] The government was referring to Counts Three through Six of the SSI, which are Counts Five through Eight of the FSI.

B. Witness Tampering Is Proscribed by § 1512, Not § 1503

U.S. v. Hernandez, 730 F.2d 895 (2d Cir. 1984), established that § 1503 does not criminalize witness tampering and that such conduct can be prosecuted only under § 1512. In *Hernandez*, this Court reversed a conviction for obstruction pursuant to § 1503, agreeing with the defendant's argument that "his conduct in threatening a witness [was] no longer proscribed by § 1503." *Id.* at 897, 899. In so holding, this Court found that, "[u]ntil 1982, § 1503…prohibited influencing or intimidating 'any witness…any grand or petit juror, or [court] officer,'" but that, through the Victim and Witness Protection Act of 1982, Congress had "removed from § 1503 all references to witnesses, leaving that section to protect jurors and court officers, and enacted a new section, § 1512, addressed specifically and in more detail to the protection of witnesses…." *Id.* at 898.

Given this legislative intent, the Court rejected the government's argument "that although § 1512 absorbs some of the jurisdiction previously given to § 1503, congress intended, in effect, to create two crimes, making witness intimidation and harassment punishable not only under § 1512, but also under the residual clause of § 1503." *Id.* In particular, the government's interpretation was not tenable, given that "congress affirmatively intended *to remove witnesses entirely from the scope of § 1503*." *Id.* (emphasis added).

This Court reaffirmed *Hernandez* in *U.S. v. Masterpol*, 940 F.2d 760, 761 (2d Cir. 1991), reversing a witness-tampering conviction pursuant to § 1503. The government contended that the defendant had engaged in non-coercive attempts to influence a witness, unlike the defendant in *Hernandez*, but the Court rejected this argument. *Id.* at 763.

Just as the defendants in *Masterpol* and *Hernandez,* Sampson was convicted on Count Four pursuant to the residual clause of § 1503. Sampson was convicted for his efforts to obtain confidential witness information, which the government repeatedly argued were undertaken with the intent to tamper with witnesses. This conduct and these arguments are outside the ambit of § 1503, and the conviction on Count Four should be reversed and the count dismissed because Sampson "should have been charged under § 1512 or not at all." *Id.* at 762.

C. The District Court Erroneously Interpreted Second Circuit Law and Found Waiver

The district court denied Sampson's Rule 29 motion to dismiss Count Four, adopting the government's position that *Masterpol* and *Hernandez* did not apply because the government had argued witness tampering only to show "Sampson's *corrupt purpose* was to tamper with witnesses" and not "to convict Sampson under Count [Four] for the substantive crime of witness tampering." *U.S. v. Sampson*, 2016 WL 756565, at *13 (E.D.N.Y. Feb. 26, 2016) (emphasis in original). Neither the government nor the district court cited any law for the proposition that, when a

defendant seeks to identify witnesses, and the government argues the defendant's purpose was to tamper with witnesses, the defendant can be said not to have been convicted of witness tampering.[8]

The district court's finding that Sampson's "corrupt purpose" is somehow separable from the obstruction crime of which he was convicted is contrary to *U.S. v. Quattrone*, 441 F.3d 153, 170 (2d Cir. 2006), which sets forth the single element relevant to a defendant's state of mind in this context, *i.e.,* "that the defendant acted with the wrongful intent or improper purpose to influence the…proceeding…that is, that the defendant corruptly intended to impede the administration of that judicial proceeding." (Internal quotations omitted). The term "corruptly," in turn, means there must be "a connection between the defendant's intentional acts and the likelihood of potentially affecting the administration of justice." *Id.*

To show that Sampson simply tried to obtain confidential information would not prove obstruction, because securing such information, by itself, would not show an intent to obstruct a proceeding. *See U.S. v. Jadue*, 31 F. Supp. 3d 794, 799 (E.D. Va. 2014). The government conceded this point by withdrawing its motion for a jury instruction to the effect that wrongfully seeking confidential information was *per se* obstruction. Statement of the Case I(A). Under that

[8] The government never even attempted to explain this illogical theory to the jury.

theory, there would have been no "connection" between seeking confidential information and "the likelihood of potentially affecting the administration of justice" in Ahmad's case.

For these reasons, the government ultimately (and repeatedly) argued that Sampson's intent was to tamper. It was this theory that putatively provided the connection between Sampson's actions in attempting to secure information and potentially affecting the prosecution of Ahmad. As such, there can be no question that Sampson was convicted of witness tampering as a substantive matter, even though the words "tamper" and "witness" were not expressly in the charge. Any other conclusion would allow the government to secure convictions under § 1503 for conduct properly charged only under § 1512. This would be a tempting tack for prosecutors because proving an "endeavor" suffices for § 1503, as opposed to an "attempt" for § 1512, and "an endeavor is less than an attempt." *U.S. v. Buffalano*, 727 F.2d 50, 53 (2d Cir. 1984) (internal quotations omitted).

The district court also concluded "that Sampson waived the argument that he was convicted improperly under § 1503" because it could not be said that Count Four, as alleged, "disclose[d] no connection [to] witness tampering." *Sampson*, 2016 WL 756565, at **9-11. That the district court found Count Four – on its face – *did* have a "connection [to] witness tampering" vitiates the proposition that

Sampson was not convicted of witness tampering, a point the district court did not address.

That notwithstanding, in concluding the defense should have known *pretrial* that the government would proceed on a witness-tampering theory, the district court ignored that the government *during trial* repeatedly articulated a theory of Count Four that was not based on witness tampering. Again, the government argued in the motion *in limine* and draft jury charges it submitted during trial that Sampson had committed obstruction on Count Four simply by seeking confidential information – without reference to witness tampering or any other purpose to which the information would be put. *See* Statement of the Case I(A). There is simply no basis to impute to Sampson *pretrial* knowledge that the government would proceed on a witness-tampering theory that the government did not formulate until sometime after the trial began.

The district court predicated its waiver holding on (1) the SSI's allegation that "Sampson could arrange to 'take [witnesses] out,'" and (2) the fact that "[t]his sentence appears under Subheading A ('John Sampson's Use of a USAO Employee to Obstruct Justice'), which obviously relates to Count [Four]." *Sampson*, 2016 WL 756565, at *11. The conclusion that the allegations under Subheading A "obviously relate[d] to Count [Four]," simply for being placed there, is wrong. Another allegation under that heading is that Sampson "asked [Noel] to

determine whether the [government] was conducting a criminal investigation of Sampson." (A70-A71 ¶ 30). The allegation that Sampson wanted to determine if *he* was being investigated had nothing to do with Count Four, which is solely about the alleged obstruction of Ahmad's case. (A79-A80 ¶¶ 58-59).

II. THE JURY CHARGE ON THE ALTERNATIVE WILLFULLY CAUSING THEORY FOR COUNT FOUR FAILED TO INSTRUCT PROPERLY ON INTENT

Even absent *Hernandez* and *Masterpol,* the conviction on Count Four would have to be reversed (with a new trial ordered) because the district court erroneously charged the jury in connection with Count Four. By way of background, on July 13, 2015, the district court filed a proposed jury charge, containing a provision regarding the government's alternative willfully causing theory (per § 2(b)) that was based on language suggested by the government. (A1081-A1084; A1075-A1077). In relevant part, the proposed charge stated:

> What does the term "willfully caused" mean?...The meaning…can be found in the answers to the following questions:
>
> Did the defendant…know that there was a…federal prosecution of Edul Ahmad….?
>
> Did the defendant intentionally cause another person to obstruct, impede, or influence, or corruptly endeavor to obstruct, impede, or influence the federal prosecution of Edul Ahmad by obtaining nonpublic information contained in the government's files?...
>
> If the jury is unanimously persuaded beyond a reasonable doubt that the answer to both of these questions is "yes," then the defendant is an aider and abettor and is guilty of Count Two just as if he had actually committed it.

This charge failed to adequately instruct the jury that a guilty verdict required a finding of the requisite corrupt intent to obstruct a proceeding, and essentially resurrected the government's argument that trying to obtain confidential information, by itself, constituted obstruction; an argument the government had disavowed and the district court had found improper. *See* Statement of the Case I(A). Indeed, the first question did not reference Sampson's intent at all. The second question contained a reference to the word "corruptly," while strongly suggesting that simply obtaining non-public information constituted obstruction. This second question also directed a finding of guilt if the jury concluded that Sampson – for any reason – had caused *Noel* (the paralegal) to obstruct the Ahmad prosecution by obtaining non-public information, without any reference to *Sampson's* intent, let alone the requisite intent to obstruct.

At a charge conference, the defense repeatedly objected that this formulation did not make clear the jury had to find Sampson acted with the requisite intent. (A803:10-A804:19; A805:5-8; A806:17-7; A808:6-12). Indeed, the Modern Federal Jury Instructions, which were discussed that day (A803:10-A804:19), provide that the first question relevant to defining "willfully caused" is: "Did the defendant [*describe mental state required for principal offense, e.g.,* know that drugs were being imported into the United States; intend that [the victim] be murdered, *etc*.]?" Sand, et al., Modern Federal Jury Instructions: Criminal ¶ 11.02

(instruction 11-3) (emphasis in original); *see also U.S. v. Ferguson,* 676 F.3d 260, 276 (2d Cir. 2011). As such, it is beyond peradventure that the questions had to describe the "mental state required," *i.e.,* Sampson's corrupt intent to obstruct the Ahmad prosecution, which could not be established simply by pointing to efforts to get confidential information.

In response to these objections, the district court added the word "corruptly" to a different section of the instruction, but made no alterations to the two questions. (A809:4-8). Thus, the jury was charged improperly that if its answers to those questions were "'yes,' then the defendant is an aider and abettor and is guilty of Count Two…." (A888:15-A889:3).

The propriety of this instruction is reviewed *de novo*, and "[a]n erroneous instruction, unless harmless, requires a new trial." *Quattrone*, 441 F.3d at 177 (citations omitted). An error is not harmless "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding." *Id.* at 179 (quoting *Neder v. U.S.*, 119 S. Ct. 1827, 1838 (1999)).

Here, the defense squarely contested the element of intent. As addressed in the Statement of the Case I(B), Ahmad testified that the purpose of identifying witnesses was to gather information to impugn their credibility at trial. The defense argued, based on this testimony and other evidence, that Sampson did not

have corrupt intent. (A837:9-A840:10; A842:18-19; A844:21-2; A846:10-20). The error in the jury charge, therefore, was not harmless.

In *Quattrone,* this Court reversed an obstruction conviction because "the jury was allowed to convict Quattrone of obstruction regardless of whether he intended such," after being given an instruction that "left a bare-bones strict liability crime." 441 F.3d at 179-80. Here, the jury was invited to convict Sampson without finding he acted with intent to obstruct and based simply on his request to Noel for confidential information – a strict-liability theory that the government itself had previously disavowed and the district court had found improper.

III. THE CONVICTION ON COUNT NINE SHOULD BE REVERSED AND THE COUNT DISMISSED FOR INSUFFICIENT EVIDENCE

This Court reviews the sufficiency of the evidence *de novo,* and must reverse if "no rational trier of fact could have found the defendant guilty beyond a reasonable doubt." *U.S. v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005) (internal quotation marks omitted). "If the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt." *U.S. v. Valle*, 807 F.3d 508, 522 (2d Cir. 2015) (citations omitted).

Count Nine alleged that, on July 27, 2012, Sampson lied by telling agents he had not seen the photocopy of the Check Register Page. (A83 ¶ 69). Agent Hosey testified that he showed Sampson the photocopy and asked if Sampson had seen it. (A777:1-7; A780:12-13). Sampson said he had not. (A780:14-15). Agent Hosey testified that Sampson also asked for "clarification regarding the question," by saying that "if he [Sampson] could check his files or there was more information, he may be able to recall." (A780:21-24). There are three separate reasons why this conviction should be reversed.

First, Sampson's answer that he had not seen the document shown to him by the agents was literally true. *Bronston v. U.S.*, 409 U.S. 352, 362 (1973); *U.S. v. DeSalvo*, 797 F. Supp. 159, 172 (E.D.N.Y. 1992) ("The jury should determine whether the question—as the declarant must have understood it, giving it a reasonable reading—was falsely answered….") (citing *U.S. v. Lighte*, 782 F.2d 367, 372 (2d Cir. 1986)). Sampson had never seen the photocopy. Rather, he had seen only the original (recreated) Check Register Page. Moreover, Sampson had been told by Ahmad that he had the only copy of the Check Register Page, which he had taken on February 22, 2012. (A194:3-A195:8; A300:16-24; A830:15-A831:25; A1006:1-14). In addition, the photocopy and the Check Register Page were different colors and sizes. (*Compare* A892 *with* A891). Thus, Sampson had every reason to believe he had not seen the actual document the FBI showed him

(which he had not). As such, Sampson honestly and accurately denied having previously seen the document.

Second, Sampson's full answer shows there was insufficient proof on the requisite element of intent to deceive. *See U.S. v. Shah*, 44 F.3d 285, 289 (5th Cir. 1995). By requesting "clarification" and stating that, "if he could check his files or there was more information, he may be able to recall" (A780:21-24), Sampson was indicating, at the least, that there might be a document in his files which, upon review, could shed light on whether he had seen a document perhaps similar to that shown him. Agent Hosey did not respond to Sampson's request.

That Sampson's response reflected no intent to deceive is underscored by the factual context. Again, Sampson had the original Check Register Page, Ahmad had expressly told Sampson that Sampson had the only version of the document, the photocopy and original differed physically, and the Check Register Page, which Ahmad authored, contained numbers and notations, making it difficult to say with certainty whether its contents were reflected on the photocopy without comparing the two. *See Valle*, 807 F.3d at 516 ("prosecution's proof must be considered in relation to the rest of the evidence presented at trial").

Third, the district court's finding that Sampson's response was not literally true, which was premised on an interpretation of Agent Hosey's inquiry that contradicted the inquiry's actual words, rendered the inquiry ambiguous.

Specifically, the district court held that Agent Hosey "was not asking if Defendant literally had ever seen the *actual photocopy* then being displayed; Special Agent Hosey was asking if Sampson had ever seen the *image* depicted therein." *Sampson*, 2016 WL 756565 at *17 (emphasis added). As a threshold matter, there was no legal basis for the district court to reformulate the relevant question.[9]

Putting that error aside, "[a] question is fundamentally ambiguous when it is not a phrase with a meaning about which men of ordinary intellect could agree, nor one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as testimony."[10] *Lighte*, 782 F.2d at 375 (internal quotations omitted) (question fundamentally ambiguous because use of "you" failed to differentiate between defendant's actions as trustee and as individual). Here, the district court's interpretation of the question as inquiring about the *image,* even though the question literally asked about the *document*, would require that the question have been further defined, which it was not. Any response to a fundamentally ambiguous question is insufficient as a matter of law. *Id.* at 375-76; *U.S. v. Watts*, 72 F. Supp. 2d 106, 109 (E.D.N.Y. 1999).

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[9] The district court relied upon *U.S. v Schafrick,* 871 F.2d 300 (2d Cir. 1989), which does not stand for the proposition that a question can be construed as making an inquiry other than that literally made.

[10] The district court repeatedly refused to instruct the jury as to ambiguity. (A811:25-A813:20; A883:8-A885:6); *see, e.g., U.S. v. Migliaccio*, 34 F.3d 1517, 1523-1525 (10th Cir. 1994).

Moreover, even if the district court's interpretation were viewed as rendering the question ambiguous, but not fundamentally so, the government "must prove beyond a reasonable doubt what it was the defendant meant when making the representation charged as false, thereby eliminating any ambiguity, and must prove that interpretation to be false" or "must prove beyond a reasonable doubt the falsity of any reasonable interpretation that…'would make the defendant's statement factually correct.'" *Watts*, 72 F. Supp. 2d at 114 (*quoting U.S. v. Diogo*, 320 F.2d 898, 907 (2d Cir. 1963)). The government did not satisfy this burden. No evidence was offered that Sampson meant he had not seen the *image* depicted on the photocopy. And, the agents asked no follow-up questions so inquiring. Nor did the agents ask what Sampson meant when he sought clarification. *See Bronston,* 409 U.S. at 360 ("[t]he burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry."). And, obviously, the government failed to prove the falsity of Sampson's statement that he had not seen the document shown him.

IV. THE CONVICTION ON COUNT ELEVEN SHOULD BE REVERSED AND THE COUNT REMANDED BECAUSE OF THE DISTRICT COURT'S IMPROPER EVIDENTIARY RULINGS

Count Eleven charged that Sampson stated he had not asked his staff to assist with the liquor store, even though he had asked a staffer to assist with tax matters relating to the store. (A84 ¶ 73). Agent Hosey testified that he asked

Sampson about tax issues relating to the liquor store and whether Sampson had asked his staff for assistance with the liquor store. Agent Hosey testified further that Sampson said he had not. (A781:2-A782:2).

The only contemporaneous record of the interview was an agent's notes. (A792:14-A793:15). The notes were critical in two respects. First, the notes do not contain the charged statement. That the charged statement is missing is an entirely exculpatory fact that calls into question whether Sampson actually made the statement.

Second, Agent Hosey's testimony created the false impression that the agents questioned Sampson about tax matters just prior to asking about assistance by Sampson's staff. (A781:1-A782:2). Jurors were left with the misleading sense, therefore, that Sampson had tax matters fresh in his mind when asked about staff assistance. This sense obviously would make it easier to believe that Sampson had intentionally lied about not seeking staff assistance on tax matters (if one concluded Sampson actually denied seeking assistance). However, the notes showed that the agents questioned Sampson about tax matters and staff assistance to the liquor store in two entirely distinct portions of the 90-minute interview, separated by discussions of many other subjects. (*See* A1025-1029).

As such, the defense wanted to admit the notes for two non-hearsay purposes. First, the defense wanted to point to the *absence* of the charged

statement to impeach Agent Hosey. *See U.S. v. Jackson*, 504 F.2d 1109, 1109 (2d Cir. 1974) (defendant charged with perjury is permitted "to put into evidence relevant portions of the transcript of the grand jury proceedings."). Second, the defense wished to challenge the false impression that the agents' questions about staff assistance were asked in the context of tax matters. *See Lighte*, 782 F.2d at 373 ("[i]n determining the meaning a declarant gives to a question, a jury…may view it within the context of the entire line of questioning….").

However, the defense was precluded entirely even from explaining to the district court the critical non-hearsay reasons for admitting the notes. Indeed, after the government made a hearsay objection at side bar, defense counsel had just begun to respond when Judge Irizarry stated, "[a]bsolutely not. Get away," and returned to the bench. (A794:2-A795:15).

Beyond refusing to admit the notes, the district court improperly precluded the defense from asking Agent Hosey whether Sampson had actually denied seeking staff assistance. (A797:18-19). There can be no more fundamentally proper inquiry on cross-examination in a criminal case than whether the defendant actually engaged in the act charged. That the government did not even have to explain its objection to this entirely proper question underscores the impropriety of the district court's ruling. (A797:18-21). The district court further precluded the defense from cross-examining Agent Hosey about the misimpression he created by

seemingly testifying that he had asked Sampson about assistance from staff in the context of tax matters. (A801:22-A802:9; A799:14-15 ("The Court:…the order of the questioning is not that big a deal.")).

In sum, the district court simply precluded the defense from challenging the government's proof with highly exculpatory evidence. These rulings amounted to reversible error because they excluded evidence that affected Sampson's "substantial rights and therefore [were] not harmless." *U.S. v. Certified Envtl. Servs.*, 753 F.3d 72, 88, 96 (2d Cir. 2014); *Boyce v. Soundview Tech. Grp., Inc.*, 464 F.3d 376, 385 (2d Cir. 2006) (evidentiary rulings are reviewed for abuse of discretion).

The district court's rulings were not only improper as an evidentiary matter, but also violated Sampson's Confrontation Clause rights. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Cotto v. Herbert*, 331 F.3d 217, 248 (2d Cir. 2003) (quoting *Davis v. Alaska*, 415 U.S. 308, 316 (1974)). This Court has confirmed that "wide latitude should be allowed…when a government witness in a criminal case is being cross-examined by the defendant." *U.S. v. Reindeau*, 947 F.2d 32, 35 (2d Cir. 1991). Importantly, "the trial judge's discretion cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony." *Id.* (internal quotation marks omitted).

A Confrontation Clause error may be excused as harmless only if, "assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). This Court has repeatedly found that the government cannot establish harmless error where, as here, judges restrict cross-examination about whether a crime actually was committed. *See, e.g., Reindeau*, 947 F.2d at 35-36; *U.S. v. Pedroza*, 750 F.2d 187, 197 (2d Cir. 1984); *Harper v. Kelly,* 916 F.2d 54, 56-58 (2d Cir. 1990).

V. SAMPSON'S CONVICTIONS SHOULD BE REVERSED AND THE COUNTS REMANDED BECAUSE OF THE UNFAIR PREJUDICE CAUSED BY THE GOVERNMENT'S BASELESS ARGUMENTS THAT SAMPSON COMMITTED BRIBERY

A. "Official Act" Is Narrowly Defined in *McDonnell*

In *McDonnell,* the Supreme Court held that, in the context of bribery, "an 'official act' is a decision or action on a…formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee…That decision or action may include using [an] official position to exert pressure on another official to perform an 'official act,'…." 136 S. Ct. at 2371-72. Thus, absent the exertion of pressure, the term "official act" does not encompass, *inter alia,* an elected official's actions in:

- arranging a meeting between the official's subordinates and a donor/constituent to discuss the donor's business;
- hosting and attending events designed to encourage state personnel to promote the donor's products;
- contacting other government officials to encourage state entities to do business with the donor;
- promoting the donor's business and facilitating the donor's relationships with government officials; and
- recommending that senior government officials meet with the donor to discuss how the donor's services could benefit the state.

Id. at 2365-66.

B. Sampson's Conduct Did Not Constitute Bribery Under *McDonnell*

The proposition that Sampson committed bribery was highly questionable even before *McDonnell.* Ahmad testified repeatedly that Sampson had "always" helped him for years before the loan was made. (*See, e.g.*, A117:23-2; A125:19-24; A127:20-22). Ahmad testified he worried that, if he did not provide the loan, Sampson would stop helping him, but he said nothing to Sampson about this concern. (A119:1-14). Such evidence does not establish a *quid pro quo*. *See Evans v. U.S.*, 504 U.S. 255, 268 (1992) (public official must "know[] that the payment was made in return for official acts"). Moreover, Ahmad could not say when exactly the loan became a bribe, testifying only that, in his mind, he started to treat the loan as a bribe sometime in 2008 or 2009. (A129:16-A130:7). And,

Ahmad testified that he never forgave any portion of the loan, which vitiates the idea that Sampson engaged in corruption to work off the loan. (A297:1-7).

The government's proof also unquestionably failed to show Sampson performed an official act pursuant to *McDonnell* as part of an illegal exchange. *See* Statement of the Case, IV(B) (detailed discussion of relevant conduct). Ahmad testified that he asked for assistance on a DEP matter without any reference to the loan. (A149:4-A150:12). Richard Muller from DEP testified that a Sampson staffer made a routine inquiry about the status of Ahmad's permit application, but never asked that the application be approved or sought to have the decision denying the application reversed. (A472:1-A473:21; A485:1-15; A483:3-13; A478:1-A479:20).

The July 2007 audit of Ahmad's business began at least a year before Ahmad started to treat the loan as a bribe, in "around 2008, 2009" (A129:16-A130:2), precluding a *quid pro quo*. Also, based on Ahmad's testimony, Sampson did not engage in any official act, whether by pressuring the auditors or otherwise. (A183:3-A194:10). Furthermore, Michael Elmendorf of the Department of State testified Sampson told him that he (Sampson) advised Ahmad to provide the requested records, which Ahmad did. (A604:23-1). Critically, no witness testified to being asked to halt the audit.

Ahmad asked Sampson to "get rid of" $68,000 in fines imposed by the Banking Department because of the audit. (A214:1-A217:2). However, no witness testified to being asked by Sampson to annul the fine. Rather, Sampson simply asked to extend the time for the payment, a request the Superintendent found reasonable. (A636:1-16).

Sampson appeared at a Department of State proceeding involving Ahmad, but stated that he did not represent Ahmad. (A895:11-A896:21). He then failed to have an attorney attend a subsequent hearing, which resulted in the suspension of Ahmad's real estate license. (A175:23-A176:11).

As to the REO issue, Sampson helped arrange meetings for Ahmad and tepidly endorsed Ahmad at one meeting. (A135:9-A136:19). Sampson did introduce an REO-related bill, but that was not part of a bribery scheme because Ahmad never asked for such legislation and in fact had no idea as to what happened with the bill. (A137:22-24).

C. The Government Repeatedly Argued that Sampson Engaged in Bribery

Despite the absence of evidence that Sampson took an official act for Ahmad, the government argued to the jury repeatedly that Sampson had committed bribery. For example, the government contended that "[t]he Defendant first saw a document that he thought might lead the government both to his embezzlement and his bribery." (A849:8-10). It argued that "[b]etween July 2006 and July 2011, the

defendant repaid the loan by doing political favors for Ahmad…." (A815:15-20). Furthermore, the government asked in rhetorical fashion, "[w]ho else but Ed Ahmad can testify about the *quid pro quo* relationship that they had with the defendant?" (A875:8-11).

The government also repeatedly argued that Sampson had abused his position as a lawmaker, using various turns of that phrase. The government called Sampson a "lawmaker who held himself above the law," and asked, "[h]ow else do you explain his frequent abuses of power to do anything he could to help Ed Ahmad?" (A850:3-9; *see also* A102:1-9 ("Instead, John Sampson, the lawmaker, paid his friend back in political favors. You will hear how John Sampson used his power and his influence to benefit his friend."); A836:21-23 ("John Sampson abused his position as a lawmaker when he did favors for Ed Ahmad…."); A869:8-13 ("Ahmad told you how the Defendant constantly compromised his position as State Senator to benefit him, and these civil servants told you the very same thing."); A877:16-18 ("the defendant consistently compromised himself to help out Ed Ahmad."); A882:20-21 (same)).

Finally, the government argued this alleged bribery showed Sampson's "corrupt purpose," an essential element on the obstruction counts:

> And when you're assessing whether the defendant had a corrupt purpose, one of the things you should look at is the *improper quid pro quo relationship* that he had with Ed Ahmad.

(A877:7-A878:25 (emphasis added)).

Moreover, despite the government's representations that the "bribery" evidence would be presented in less than a day, that evidence constituted nearly one-quarter of all trial testimony. Indeed, there were nine government witnesses who testified exclusively about alleged bribery (A426:10-A459:3; A301:1-A342:3; A612:1-A648:5; A651:9-A661:14; A663:1-A706:23; A462:10-A485:18; A486:8-A520:4; A562:3-A611:16; A538:15-A561:21; A520:8-A538:11), and three others who devoted portions of their testimony to the issue. (A103:1-A104:25; A108:10-A109:3; A128:1-A236:6; A343:3-A421:13; A423:3-A424:5; A716:1-A721:19; A724:14-A728:14; A754:4-A755:25; A760:1-A770:24; A777:1-A779:24).

Insofar as the government argued this evidence showed Sampson committed bribery, contrary to *McDonnell,* and argued illogically that it could bear on the element of corrupt purpose as to the obstruction counts, the government caused entirely unfair prejudice. The Supreme Court has held that "'unfair prejudice' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged" with "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Old Chief v. U.S.*, 519 U.S. 172, 180 (1997).

This Court has found evidence of uncharged conduct that actually *was* criminal to have caused unfair prejudice in many cases. *E.g., U.S. v. Gordon*, 987 F.2d 902, 909 (2d Cir. 1993); *U.S. v. Rijo*, 508 Fed. Appx. 41, 44 (2d Cir. 2013). Here, however, the government argued repeatedly that uncharged conduct was criminal when it actually was *not*. *See U.S. v. Peterson*, 808 F.2d 969, 976 (2d Cir. 1987) ("prosecutor's dwelling" on uncharged conduct "strongly suggests that its admission had more than slight effect."). The defense is unaware of any case in which this Court found it permissible for the government to argue that non-criminal conduct was criminal.

Ultimately, given (i) the large number of prosecutions of New York State officials, (ii) the enormous publicity surrounding those cases, (iii) the fact that a quarter of the government's evidence focused on supposed bribery, (iv) the government's repeated arguments that Sampson actually committed bribery, contrary to *McDonnell*, and (v) the government's specific argument that corrupt intent could be inferred on the obstruction counts from the so-called bribery, it cannot be said "with fair assurance that the highly prejudicial evidence on this point did not factor into the jury's decision." *U.S. v. Curley*, 639 F.3d 50, 63 (2d Cir. 2011). This is especially true considering that, around the time of trial, multiple polls demonstrated the public was profoundly cynical about New York's

elected officials and actually expected officials to abuse their offices. (A41-A49).[11]

Beyond improperly arguing that Sampson committed bribery, the government created additional unfair prejudice by repeatedly eliciting testimony – over defense objections – from its supposed bribery witnesses "in the form of legal conclusions" of wrongdoing, contrary to *Cameron v. City of New York*, 598 F.3d 50, 62 n.5 (2d Cir. 2010), and/or in violation of the Supreme Court's edict that the federal government should not "set[] standards of disclosure and good government for state and local officials." *McNally v. U.S.*, 483 U.S. 350, 360 (1987), *superseded on other grounds by Skilling v. U.S.*, 130 S. Ct. 2896 (2010).

For example, Shelly Mayer, a Senate staffer who worked on REO matters, testified that she "was uncomfortable with the fact that Ed Ahmad appeared to be a client of Senator Sampson's firm, and not just a person from the district or a person with whom he did not have [sic] personal relationship." (A324:20-23). Peter Tang, a Department of State auditor, testified he had never "been confronted by another state politician…in the performance of [his] duties." (A498:15-A499:10). Michael Elmendorf of the Department of State testified he was concerned that Sampson had violated the Public Officers Law, which he described as barring legislators from using "their position to…gain benefit for themself or for others."

[11] These polls were submitted to the district court on Sampson's pretrial motion to sever.

(A574:15-24). Rholda Ricketts of the Banking Department testified that, had she known of Sampson's debt to Ahmad, she "would have considered it to be a conflicted relationship" (A684:2-A686:23), and would "have viewed John Sampson to have a personal financial interest in the matter before the Banking Department." (A686:5-12). She also speculated that Sampson "could derive a benefit in relation to the debt he had" with Ahmad, including a "reduction" or "elimination of the debt," matters about which she had no personal knowledge. (A686:13-A687:24).

Witnesses whose primary purpose was not addressing supposed bribery also opined that Sampson had acted wrongfully. (*See, e.g.,* A707:4-A710:15 (Department of Taxation witness testified it would be inappropriate under the Public Officers Law for an elected official to contact the Department about a matter he had an interest in without disclosure); A715:8-18 (Sampson staffer testifies that inquiry Sampson asked her to make to State agency might have been improper)). The testimony describing Sampson's acts as improper, if not corrupt, only added to the unfair prejudice resulting from the so-called bribery evidence.

VI. THE SENTENCES WERE UNREASONABLE

The district court sentenced Sampson to a 60-month term of imprisonment on each count, with all to be served concurrently. (A1171). This sentence was 14 months longer than the high end of the Guidelines range as calculated by the

district court (A1118:5-19) and 33 months longer than the high end of the range as properly calculated (discussed below). The sentence also was 23 months longer than what the Probation Department had recommended. (Revised U.S. Probation Department Sentence Recommendation at 1);[12] *see U.S. v. Stein*, 544 F.2d 96, 103 (2d Cir. 1976) ("[a]lthough the sentencing judge was not required to follow the Probation Officer's recommendation, it often constitutes one of the most important factors considered by the sentencing judge.").

This Court's review of sentencing decisions encompasses both procedural and substantive errors. *U.S. v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008). A district court "commits procedural error where it…makes a mistake in its Guidelines calculation…or rests its sentence on a clearly erroneous finding of fact." *Id.* at 190 (internal citations omitted). A sentence is procedurally unreasonable also if the district court fails to explain it adequately. *U.S. v. Fama,* 636 Fed. Appx. 45, 48 (2d Cir. 2016). When a district court deviates from a Guidelines range, it must "ensure that the justification is sufficiently compelling," and, for a "major variance, the district court bears a higher descriptive obligation." *Id.* at 49 (internal quotations omitted). Finally, the sentencing court is "required to state its reasons with specificity in the written judgment of conviction as required by § 3553(c)(2)." *Id.* at 50 (internal quotations omitted).

[12] This document has been submitted to the Court in a sealed envelope.

To analyze a sentence for substantive unreasonableness, this Court "consider[s] whether the length of the sentence is reasonable in light of the factors outlined in 18 U.S.C. § 3553(a)." *U.S. v. Rattoballi,* 452 F.3d 127, 132 (2d Cir. 2006), *abrogated on other grounds by U.S. v. Chan,* 2017 WL 397889 (2d Cir. Jan. 30, 2017). A district court's failure to explain adequately a variance "affects a defendant's substantial rights." *Fama*, 636 Fed. Appx. at 50 (internal quotations omitted).

"[I]n determining the appropriate standard of review for a district court's application of the Guidelines to the specific facts of a case, [this Court] follow[s] an either/or approach, adopting a *de novo* standard of review when the district court's application determination was primarily legal in nature, and adopting a clear error approach when the determination was primarily factual." *U.S. v. Gotti*, 459 F.3d 296, 349 (2d Cir. 2006) (internal quotations omitted). Substantive challenges are reviewed under an abuse-of-discretion standard. *Cavera*, 550 F.3d at 189.

A. The District Court Erred in Calculating the Guidelines Range for Count Four

The district court found that the adjusted offense level for Count Four was 21, which included a 16-level enhancement per USSG §2B1.1(b)(1)(I) for the amount of Ahmad's fraud; a 2-level increase for an aggravating role per USSG §3B1.1(c); and a 2-level increase for the abuse of a position of public trust per

USSG §3B1.3. (A1114:25-A1115:2; A1117:23-25; Second Addendum to the Presentence Report at 1)[13] (setting forth complete calculation adopted by district court). This resulted in a total offense level of 21, providing a range of 37 to 46 months (A1118:8-16), given that the false-statement counts were disregarded pursuant to USSG §3D1.4(c) for being 9 or more levels less serious than Count Four. *See* USSG §2B1.1(a)(2).

1. There Is No Basis to Impose a 16-Level Enhancement, and the Base Offense Level for Count Four Should Be 14

The district court found that Count Four had a base offense level of 17, applying USSG §2X3.1(a)(1), and determining that the offense level for the underlying fraud was 23 (from which 6 levels were subtracted). Included in the 23 was a 16-level enhancement imposed because the district court found Sampson "was aware that Ahmad was involved in the mortgage fraud," which involved a "$3 million loss." (A1114:2-A1115:2). The 16-level enhancement is a specific offense characteristic (USSG §2B1.1(b)), which is applied pursuant to USSG §2X3.1 only when it was "known, or reasonably should have been known, by the defendant." (USSG §2X3.1 cmt n.1).

There is no factual basis to conclude that Sampson knew or should have known Ahmad committed fraud, let alone a fraud of approximately $3 million.

[13] This document has been submitted to the Court in a sealed envelope.

Rather, Ahmad testified he never told Sampson he had committed fraud because he was concerned that, if he did, Sampson would not help him. (A242:17-24). Therefore, according to Ahmad, even during the period relevant to Count Four, he purposefully did not disclose to Sampson that he had committed fraud, a tack which would have made no sense had Ahmad believed Sampson knew of his criminal activity.

Moreover, Ahmad affirmatively stated to Sampson that he had done nothing wrong. In one exchange, Ahmad told Sampson he was taking his case "to the end" for that reason:

> Sampson: …Yeah, you didn't fucking do anything. Don't start to get fucking panicky. Everybody else is.
>
> Ahmad: I know, I know. I understand that. I know that. That's why I'm taking it to the end…

(A947:30-36). Similarly, in the conversation with Warren Flagg and Sampson, Ahmad proclaimed his innocence:

> Flagg: Now, if you're guilty, that's one thing. I don't really give a shit.
>
> Ahmad: No, no, no, no, no.

(A1010:33-35).

The district court found that Sampson "was aware" Ahmad committed fraud because "Ahmad was clearly very successful," treated Sampson to trips, and provided Sampson with a loan. (A1114:2-10). In addition, Sampson "was very

much aware of the money that could be made from [real estate] transactions." (A1114:11-15). That Sampson knew real estate can be profitable and Ahmad was "successful" does not prove he knew Ahmad was committing fraud. Rather, it supports the conclusion that Sampson believed Ahmad's wealth resulted from the substantial profits the real estate business can generate legitimately, especially during a very prosperous time for the industry.

The district court also found that Sampson knew Ahmad was using straw buyers, citing no specific evidence. (A1114:16-24). The evidence actually was to the contrary. Ahmad told Sampson that individuals who had acted as straw buyers had nothing incriminating to tell the government about him after they were arrested, which would have been true only if those individuals had not acted as straw buyers:

> Ahmad: But there's nothing against them. What are they going to say? What they don't know?
>
> Sampson: But that's the whole point. But nobody – Ed, they know – Ed, your inner circle people that you know of last night, nobody's rushing to say anything.
>
> Ahmad: - Yeah, but what is there to say? There's nothing –

(A918:2-13). During the same conversation, the following exchange also occurred:

> Ahmad: …the government keeps talking about straw buyers. What is the definition of a straw buyer? I mean, nobody lost any money, banks didn't lose any money.

> Sampson: And investors. What's wrong with having partners to invest money in? There ain't nothing wrong with that?
>
> Ahmad: That's what I'm saying. You know.

(A932:8-18).

Finally, even had the evidence suggested Sampson knew of Ahmad's fraud, there is no evidence at all (and the district court cited none) showing how Sampson could have known Ahmad's fraud was worth $3 million. Instead, Ahmad repeatedly told Sampson that the lenders had suffered no losses in connection with any of his mortgages. (*E.g.,* A932:8-18; A272:21-24; A918:2-13). On this independent basis, the 16-level enhancement should not have been applied.[14]

As such, the base offense level for the mortgage fraud – as applied to Sampson – should be 7. USSG §2B1.1(a)(1). Under USSG §2X3.1(a)(1), that offense level is reduced by 6, resulting in a base offense level of 1, which is adjusted upward to 4. USSG §2X3.1(a)(2). The base offense level for obstruction pursuant to USSG §2J1.2(a) is 14. Therefore, this offense level would be applied pursuant to USSG §2J1.2(c)(1) for a base offense level of 14 for Count Four.

[14] Even if it were properly applied, the 16-level enhancement would "substantially overstate[] the seriousness of the offense," warranting a downward departure (USSG §2B1.1 cmt n.20(C)), given that Sampson did not profit from the fraud and had no part in generating the millions of dollars in losses allegedly caused by it.

2. The Evidence Does Not Support an Adjustment for the Abuse of a Position of Public Trust per USSG §3B1.3

The "[p]roper application of § 3B1.3 requires satisfaction of two requirements: first, that [the defendant] occupied a position of trust, and second, that [the defendant] abused that position of trust to commit or conceal his crimes." *U.S. v. Nuzzo*, 385 F.3d 109, 115 (2d Cir. 2004) (internal quotations omitted). On the first element, this Court has emphasized "that the 'defendant's position must involve discretionary authority...[and that] this discretion must have been entrusted to the defendant by the victim.'" *U.S. v. Thorn*, 317 F.3d 107, 120 (2d Cir. 2003) (internal citations omitted).

Second, "[t]he position of...trust must have *contributed* in some significant way to *facilitating* the commission or concealment of the offense (*e.g.*, by making the detection of the offense...more difficult)." *Nuzzo*, 385 F.3d at 115 (emphasis in original). Thus, "(1) the defendant must have enjoyed a superior position, relative to other potential perpetrators, as a result of a trust relationship…and (2) the defendant must have capitalized on that superior position in committing the offense conduct." *Id.* at 116 (internal citations omitted).

There is no evidence that any victim of Count Four entrusted to Sampson any discretionary authority as an attorney or Senator, let alone in a manner that gave Sampson the means to commit the charged obstruction, which precludes

applying the enhancement as a matter of law. *See U.S. v. Huggins,* 844 F.3d 118, 125 (2d Cir. 2016). The district court did not even address this requisite element.[15]

Beyond that, Sampson did not occupy a position that contributed in a significant way to facilitating the obstruction.[16] There is no basis to conclude that Sampson's being a Senator or an attorney put him in a "superior position" to anyone else to secure confidential information about Ahmad's case (or to tamper with witnesses). Noel and the attorneys Rodriguez and Mays plainly had superior positions in that regard, given that Noel worked in the United States Attorney's Office, while Rodriguez and Mays represented Ahmad's co-conspirators, if only briefly. And, Flagg, as a former FBI agent, reportedly still retained connections with law enforcement and prosecutors.

Moreover, Sampson did not use his position at all to commit the obstruction. Even if Sampson had never been a Senator or attorney, he still could have taken all the actions he took. *See Nuzzo,* 385 F.3d at 116-17 (finding no "direct nexus between a position of trust, the abuse of that trust, and the facilitation of the

---

[15] The district court addressed Sampson's actions as a court-appointed referee (A1115:19-A1116:2), but the authority Sampson had as a referee had nothing to do with the obstruction. The district court also discussed Sampson's "life long relationship and friendship with Noel" (A1116:21-22), but that relationship had nothing to do with Sampson's status as a lawyer or Senator.

[16] The district court concluded that Ahmad was "inspired" to give Sampson the loan, not only out of friendship, but also because Sampson was a Senator, and, thus, Sampson's role as a Senator was relevant. (A1117:12-19). That finding is in no way equivalent to a finding that Sampson's being a Senator facilitated the commission of the obstruction.

commission or concealment of the relevant offense conduct."); *see also* USSG §3B1.3, cmt n.1 (abuse of a position of trust includes an attorney's embezzlement from a client, a bank executive's fraudulent loan scheme, and a doctor's sexual abuse of a patient under the guise of an examination).

The district court held otherwise, finding that Sampson understood the process of criminal cases, including the role of cooperators, due to being an attorney. However, the specific actions the district court cited do not show that Sampson's position as an attorney contributed significantly to the commission of the offense. First, the finding that Sampson used his "relationships developed as an attorney in criminal cases to hire the attorneys for Ahmad's codefendants" (A1116:11-13), has no support and is belied by Sampson's having asked someone else to speak with Rodriguez about representing a co-defendant – obviously, Sampson did not need to be an attorney to make a referral in any event. (A918:35-39). Second, contrary to the district court's finding, Sampson did not use his knowledge as an attorney to recruit a private investigator (A1117:8-9), given that he learned of Flagg after soliciting recommendations from a police detective. (A974:44-A975:17). In addition, there was no evidence of Sampson's having experience with 3500 material. (A1117:1-5). Finally, there was no evidence that Sampson understood "what that investigator could do or not do in terms of getting information" (A1117:9-12), given that Flagg disabused Sampson and Ahmad of

the notion they could use an investigator to get confidential information. (A1009:14-25).

In sum, the adjusted offense level for Count Four is properly calculated as 16, *i.e.,* a base offense level of 14 plus a 2-level enhancement for an aggravating role. The total offense level also is 16 because Counts Nine and Eleven are disregarded. Thus, the proper Guidelines range is 21 to 27 months.

B. The District Court Failed to Justify the Substantial Upward Variances

The district court's sentences of 60 months constituted substantial upward variances. The district court failed to explain adequately these variances and made several factual errors in determining the sentences, addressed in sequence below.

The district court referred to the embezzlement counts it had dismissed pretrial, without stating whether it considered that conduct for sentencing purposes. (A1152:4-15; A1154:19-A1155:17). However, the Guidelines range for the embezzlement charges, at worst, would be 41 to 51 months. This conduct cannot justify upward variances to 60 months.

The district court then stated that the obstruction conviction went "to the heart or the integrity of our criminal justice system…." (A1152:16-23). There is no reason to think the Guidelines range for the obstruction does not take into account offenses that go "to the heart or the integrity of our criminal justice system," given that the purpose of obstruction statutes is to prevent the justice

system from being compromised. *See Fama,* 636 Fed. Appx. at 49 (error to recite defendant's criminal history "without explaining why the Guidelines range itself did not already adequately account" for it).

The district court addressed the February 22, 2012 meeting in which Sampson took the Check Register Page, stating, "the arguments by the defense that it was Ahmad who made the suggestion that you not give it to the government are so disingenuous." (A1153:14-A1154:8). However, the recording of that meeting shows that Ahmad *did* first suggest not giving the document to the government. Specifically, after some initial discussion, Ahmad stated "[w]ell, what do I tell them? And, obviously, if I hide this, right – *let's say I don't give them this*, for argument sake….?" (A982:3-A985:5) (emphasis added).

Thereafter, the district court stated that Sampson had abused his position as an attorney. (A1155:18-22). As addressed, the enhancement for an abuse of position of trust as an attorney should not have been applied, but, given that it was, there was no basis for holding Sampson's status as an attorney against him a second time.

The district court found that Sampson "tried to stop" the audit of Ahmad's business and that he caused the drafting of a fraudulent affidavit executed by Ahmad's employee. (A1155:18-A1156:6). As addressed, there was no evidence that Sampson tried to curtail the audit, and the district court cited no specific

evidence. Rather, Sampson instructed Ahmad to produce the records that Ahmad had refused to produce previously. *See* Statement of the Case IV(B).

Ahmad did testify that Sampson urged him to submit a false affidavit in which an employee would accept blame for creating certain fraudulent documents. (A195:13-A197:18). Ahmad claimed, however, that Sampson immediately urged him to blame the employee for creating fraudulent documents, without Sampson's even knowing that the documents were fraudulent. (A194:13-A197:21). This testimony is nonsensical, especially because Ahmad also testified he never informed Sampson that any portion of the affidavit actually was false, which entirely preludes the notion that Sampson urged the creation of a *false* affidavit. (A197:19-21; A203:3-A205:10).

The district court addressed Sampson's failure to note on Senate ethics disclosure forms his interest in the liquor store relevant to Count Eleven and his presence at the administrative hearing concerning Ahmad – where he stated that he did not represent Ahmad. (A1156:10-20). The district court did not explain how this conduct justified its sentencing decisions, but it is axiomatic that the conduct could not justify sentences well above the Guidelines ranges.

The district court referred to Sampson's having practiced law without a license in connection with an appearance in Family Court in March 2016 after Sampson's law license had been suspended. (A1158:18-19). As background,

Sampson had been retained on a *per diem* basis in the relevant matter. Shortly before March 22, 2016, the client asked Sampson to attend a conference on March 22. Sampson told the client he had been suspended, but the client said he could not obtain another attorney, and that he and his adversary had resolved the matter. (A1096 ¶¶ 1-2).

On March 22, Sampson appeared in court, stating that he was withdrawing and that his client had indicated the case could be resolved with an adjournment. (A1087:7-11; A1086:14-24). Due to embarrassment, however, Sampson did not say he had been suspended. (A1096-A1097 ¶ 4). While, clearly, Sampson should have informed the court he had been suspended, he did not request or receive a fee for the appearance, did inform the court that he was withdrawing, and advocated only for an adjournment. (A1096-A1097 ¶¶ 4-5). Moreover, Sampson has already received the ultimate professional penalty of disbarment.

Finally, in its written statement of reasons, the district court checked several boxes in Part VI(C) (A1179), which itself is not an adequate explanation. *Fama,* 636 Fed. Appx. at 50. The district court also provided a brief narrative in Part VIII, which largely referred to generic sentencing factors. (A1180).

C. The Sentences Create Unwarranted Disparities

The sentences imposed by the district court create unwarranted disparities. *See* 18 U.S.C. § 3553(a)(6). Specifically, the government argued that a significant

sentence was necessary for deterrence because "New York has experienced numerous highly publicized corruption scandals in the last few years." (A1089). The district court referred to Sampson as a "prominent politician who betrayed the trust of his constituents," and stated that the 60-month sentence was "warranted to deter similar criminal conduct." (A1180). In this regard, the district court appears to have concluded that Sampson committed acts of political corruption, consistent with its statements during trial at a sidebar. (A395:16-23) ("there's plenty of other testimony about other *quid pro quo*…."). Such a conclusion is precluded by *McDonnell*, as addressed, and constitutes an independent reason why the district court's sentences were improper.

As to disparities, the district court's reference to political corruption warrants comparison to the case of Dean Skelos, a former New York State Senate Majority Leader, who was convicted on eight corruption counts. In making sentencing arguments last year, the government contended that Skelos's "betrayal of the public trust easily exceeds the harm to the public manifest" in other cases involving public officials, including specifically the case against Sampson. (A98) (government's sentencing memorandum in *U.S. v. Skelos*).

Judge Wood agreed that Skelos's crimes were "more egregious than most" committed by New York State legislators and sentenced Skelos to 60 months' imprisonment based on a range of 151 to 188 months. (A1091:16-18; A1092:19-

24; A1093:2-4) (transcript of Skelos sentencing). Thus, Judge Wood imposed a sentence that was 40% of the low end of the range. Judge Wood also found, in analyzing disparity concerns, that the most common sentence for convicted legislators in New York is approximately 70% of the low end of their ranges. (A1092:14-22).

Given these facts and the district court's statement here that it was imposing an upward variance on a "prominent politician" in part to deter similar conduct, there are obvious disparity issues. Indeed, while Skelos received a sentence that was 40% of the low end of the range, despite being convicted of eight corruption counts in a case the government termed more serious than this, and other legislators have received sentences averaging 70% of the low end of the ranges, the district court imposed sentences on Sampson that constituted substantial upward variances.

CONCLUSION

For the reasons set forth above, the convictions on Counts Four, Nine and Eleven should be reversed and, only if applicable, Sampson's sentences should be found unreasonable.

Dated: June 16, 2017

Respectfully submitted,

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

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(s) /s/ Nathaniel H. Akerman

Attorney for John Sampson, Defendant-Appellant

Dated: 6/16/2017

SPECIAL APPENDIX

TABLE OF CONTENTS

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Eastern District of New York

UNITED STATES OF AMERICA
v.
JOHN SAMPSON

FILED
IN CLERK'S OFFICE
US DISTRICT COURT E.D.N.Y.
★ JAN 27 2017 ★
BROOKLYN OFFICE

JUDGMENT IN A CRIMINAL CASE

Case Number: 13-CR-269 (S-5)

USM Number: 82173-053

Nathaniel Akerkman and Joshua Colangelo-Bryan Esqs.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) after a plea of not guilty. 4, 9, and 11 of the fifth superseding indictment (S-5)

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
see page 2			

Counts 1 and 2 of S-5 were dismissed by the Court by order dated 8/12/2015

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☑ The defendant has been found not guilty on count(s) 3, 5, 6, 7, 8, and 10 of the fifth superseding indictment

☑ Count(s) [all open indictments except embezzlement charges subject to appeal ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/18/2017
Date of Imposition of Judgment

s/Dora L. Irizarry, Chief USDJ
Signature of Judge

Dora L. Irizarry, Chief U.S. District Judge
Name and Title of Judge

January 25, 2017
Date

DEFENDANT: JOHN SAMPSON
CASE NUMBER: 13-CR-269 (S-5)

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1503(a), 18 U.S.C. § 1503(b)(3)	OBSTRUCTION OF JUSTICE, a Class C Felony	7/31/2012	4 of S-5
18 U.S.C. § 1001(a)(2)	FALSE STATEMENTS, a Class D Felony	7/27/2012	9 of S-5
18 U.S.C. § 1001(a)(2)	FALSE STATEMENTS, a Class D Felony	7/27/2012	11 of S-5

AO 245B (Rev. 11/16) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: JOHN SAMPSON
CASE NUMBER: 13-CR-269 (S-5)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Counts 4, 9, and 11 of S-5: 60 MONTHS on each count to run concurrently.

☑ The court makes the following recommendations to the Bureau of Prisons:

Designation to FCI Otisville

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☑ before 2 p.m. on 4/21/2017.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JOHN SAMPSON
CASE NUMBER: 13-CR-269 (S-5)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: 3 years per count (concurrent)

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 3A — Supervised Release

DEFENDANT: JOHN SAMPSON
CASE NUMBER: 13-CR-269 (S-5)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: JOHN SAMPSON
CASE NUMBER: 13-CR-269 (S-5)

SPECIAL CONDITIONS OF SUPERVISION

(1) The defendant shall not possess a firearm, ammunition, or destructive device;

(2) The defendant shall comply with the fine payment schedule;

(3) Upon request, the defendant shall provide the U.S. Probation Department with full disclosure of his financial records, including co-mingled income, expenses, assets and liabilities, to include yearly income tax returns. With the exception of the financial accounts reported and noted within the presentence report, the defendant is prohibited from maintaining and/or opening any additional individual and/or joint checking, savings, or other financial accounts, for either personal or business purposes, without the knowledge and approval of the U.S. Probation Department. The defendant shall cooperate with the Probation Officer in the investigation of his financial dealings and shall provide truthful monthly statements of his income and expenses. The defendant shall cooperate in the signing of any necessary authorization to release information forms permitting the U.S. Probation Department access to his financial information and records;

(4) The defendant shall maintain lawful and verifiable employment;

(5) The defendant shall not encumber or liquidate interest in any assets unless it is in direct service of the fine obligation or otherwise has the express approval of the Court.

DEFENDANT: JOHN SAMPSON
CASE NUMBER: 13-CR-269 (S-5)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 300.00	$ N/A	$ 75,000.00	$ N/A

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS $ _____ $ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☑ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☑ the interest requirement is waived for the ☑ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

Judgment — Page 8 of 8

DEFENDANT: JOHN SAMPSON
CASE NUMBER: 13-CR-269 (S-5)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 300.00 due immediately, balance due

☐ not later than _____, or
☑ in accordance with ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

Special assessment and fine are due immediately. The fine shall be made payable to the Clerk of Court for Eastern District of New York at the rate of $25 per quarter while the defendant is in custody and 10% of gross income per month while on supervised release.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Attachment (Page 1) — Statement of Reasons

FILED
IN CLERK'S OFFICE
US DISTRICT COURT E.D.N.Y.
★ JAN 27 2017 ★
BROOKLYN OFFICE

DEFENDANT: JOHN SAMPSON
CASE NUMBER: 13-CR-269 (S-5)
DISTRICT: Eastern District of New York

STATEMENT OF REASONS
(Not for Public Disclosure)

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony and Class A misdemeanor cases.

I. COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

REVISED

A. ☑ **The court adopts the presentence investigation report without change.**

B. ☐ **The court adopts the presentence investigation report with the following changes.** *(Use Section VIII if necessary)*
(Check all that apply and specify court determination, findings, or comments, referencing paragraph numbers in the presentence report.)

1. ☐ **Chapter Two of the United States Sentencing Commission Guidelines Manual** determinations by court: *(briefly summarize the changes, including changes to base offense level, or specific offense characteristics)*

2. ☐ **Chapter Three of the United States Sentencing Commission Guidelines Manual** determinations by court: *(briefly summarize the changes, including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility)*

3. ☐ **Chapter Four of the United States Sentencing Commission Guidelines Manual** determinations by court: *(briefly summarize the changes, including changes to criminal history category or scores, career offender status, or criminal livelihood determinations)*

4. ☐ **Additional Comments or Findings:** *(include comments or factual findings concerning any information in the presentence report, including information that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions; any other rulings on disputed portions of the presentence investigation report; identification of those portions of the report in dispute but for which a court determination is unnecessary because the matter will not affect sentencing or the court will not consider it)*

C. ☐ **The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.**
Applicable Sentencing Guideline: *(if more than one guideline applies, list the guideline producing the highest offense level)* _____

II. COURT FINDING ON MANDATORY MINIMUM SENTENCE *(Check all that apply)*

A. ☐ One or more counts of conviction carry a mandatory minimum term of imprisonment and the sentence imposed is at or above the applicable mandatory minimum term.

B. ☐ One or more counts of conviction carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum term does not apply based on:

☐ findings of fact in this case: *(Specify)*

☐ substantial assistance (18 U.S.C. § 3553(e))
☐ the statutory safety valve (18 U.S.C. § 3553(f))

C. ☑ No count of conviction carries a mandatory minimum sentence.

III. COURT DETERMINATION OF GUIDELINE RANGE: *(BEFORE DEPARTURES OR VARIANCES)*

Total Offense Level: 21
Criminal History Category: I
Guideline Range: *(after application of §5G1.1 and §5G1.2)* 37 to 46 months
Supervised Release Range: 1 to 3 years
Fine Range: $ 7.500 to $ 75.000

☐ Fine waived or below the guideline range because of inability to pay.

DEFENDANT: JOHN SAMPSON
CASE NUMBER: 13-CR-269 (S-5)
DISTRICT: Eastern District of New York

STATEMENT OF REASONS

IV. GUIDELINE SENTENCING DETERMINATION *(Check all that apply)*

A. ☐ The sentence is within the guideline range and the difference between the maximum and minimum of the guideline range does not exceed 24 months.

B. ☐ The sentence is within the guideline range and the difference between the maximum and minimum of the guideline range exceeds 24 months, and the specific sentence is imposed for these reasons: *(Use Section VIII if necessary)*

C. ☐ The court departs from the guideline range for one or more reasons provided in the Guidelines Manual. *(Also complete Section V.)*

D. ☑ The court imposed a sentence otherwise outside the sentencing guideline system (i.e., a variance). *(Also complete Section VI)*

V. DEPARTURES PURSUANT TO THE GUIDELINES MANUAL *(If applicable)*

A. **The sentence imposed departs:** *(Check only one)*
- ☐ above the guideline range
- ☐ below the guideline range

B. **Motion for departure before the court pursuant to:** *(Check all that apply and specify reason(s) in sections C and D)*

1. **Plea Agreement**
   - ☐ binding plea agreement for departure accepted by the court
   - ☐ plea agreement for departure, which the court finds to be reasonable
   - ☐ plea agreement that states that the government will not oppose a defense departure motion.
2. **Motion Not Addressed in a Plea Agreement**
   - ☐ government motion for departure
   - ☐ defense motion for departure to which the government did not object
   - ☐ defense motion for departure to which the government objected
   - ☐ joint motion by both parties
3. **Other**
   - ☐ Other than a plea agreement or motion by the parties for departure

C. **Reasons for departure:** *(Check all that apply)*

☐	4A1.3	Criminal History Inadequacy	☐	5K2.1	Death	☐	5K2.12	Coercion and Duress
☐	5H1.1	Age	☐	5K2.2	Physical Injury	☐	5K2.13	Diminished Capacity
☐	5H1.2	Education and Vocational Skills	☐	5K2.3	Extreme Psychological Injury	☐	5K2.14	Public Welfare
☐	5H1.3	Mental and Emotional Condition	☐	5K2.4	Abduction or Unlawful Restraint	☐	5K2.16	Voluntary Disclosure of Offense
☐	5H1.4	Physical Condition	☐	5K2.5	Property Damage or Loss	☐	5K2.17	High-Capacity, Semiautomatic Weapon
☐	5H1.5	Employment Record	☐	5K2.6	Weapon	☐	5K2.18	Violent Street Gang
☐	5H1.6	Family Ties and Responsibilities	☐	5K2.7	Disruption of Government Function	☐	5K2.20	Aberrant Behavior
☐	5H1.11	Military Service	☐	5K2.8	Extreme Conduct	☐	5K2.21	Dismissed and Uncharged Conduct
☐	5H1.11	Charitable Service/Good Works	☐	5K2.9	Criminal Purpose	☐	5K2.22	Sex Offender Characteristics
☐	5K1.1	Substantial Assistance	☐	5K2.10	Victim's Conduct	☐	5K2.23	Discharged Terms of Imprisonment
☐	5K2.0	Aggravating/Mitigating Circumstances	☐	5K2.11	Lesser Harm	☐	5K2.24	Unauthorized Insignia
						☐	5K3.1	Early Disposition Program (EDP)

☐ Other Guideline Reason(s) for Departure, to include departures pursuant to the commentary in the Guidelines Manual: *(see "List of Departure Provisions" following the Index in the Guidelines Manual.) (Please specify)*

D. **State the basis for the departure.** *(Use Section VIII if necessary)*

DEFENDANT: JOHN SAMPSON
CASE NUMBER: 13-CR-269 (S-5)
DISTRICT: Eastern District of New York

STATEMENT OF REASONS

VI. COURT DETERMINATION FOR A VARIANCE *(If applicable)*

A. **The sentence imposed is:** *(Check only one)*
- ☑ above the guideline range
- ☐ below the guideline range

B. **Motion for a variance before the court pursuant to:** *(Check all that apply and specify reason(s) in sections C and D)*

1. **Plea Agreement**
   - ☐ binding plea agreement for a variance accepted by the court
   - ☐ plea agreement for a variance, which the court finds to be reasonable
   - ☐ plea agreement that states that the government will not oppose a defense motion for a variance
2. **Motion Not Addressed in a Plea Agreement**
   - ☑ government motion for a variance
   - ☐ defense motion for a variance to which the government did not object
   - ☐ defense motion for a variance to which the government objected
   - ☐ joint motion by both parties
3. **Other**
   - ☐ Other than a plea agreement or motion by the parties for a variance

C. **18 U.S.C. § 3553(a) and other reason(s) for a variance** *(Check all that apply)*

- ☑ The nature and circumstances of the offense pursuant to 18 U.S.C. § 3553(a)(1)
  - ☐ Mens Rea ☐ Extreme Conduct ☐ Dismissed/Uncharged Conduct
  - ☐ Role in the Offense ☐ Victim Impact
  - ☐ General Aggravating or Mitigating Factors *(Specify)* _____
- ☐ The history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)
  - ☐ Aberrant Behavior ☐ Lack of Youthful Guidance
  - ☐ Age ☐ Mental and Emotional Condition
  - ☐ Charitable Service/Good Works ☐ Military Service
  - ☐ Community Ties ☐ Non-Violent Offender
  - ☐ Diminished Capacity ☐ Physical Condition
  - ☐ Drug or Alcohol Dependence ☐ Pre-sentence Rehabilitation
  - ☐ Employment Record ☐ Remorse/Lack of Remorse
  - ☐ Family Ties and Responsibilities ☐ Other: (Specify)
  - ☐ Issues with Criminal History: *(Specify)* _____
- ☐ To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))
- ☑ To afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))
- ☑ To protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))
- ☐ To provide the defendant with needed educational or vocational training (18 U.S.C. § 3553(a)(2)(D))
- ☐ To provide the defendant with medical care (18 U.S.C. § 3553(a)(2)(D))
- ☐ To provide the defendant with other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D))
- ☐ To avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6)) (Specify in section D)
- ☐ To provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))
- ☐ Acceptance of Responsibility ☐ Conduct Pre-trial/On Bond ☐ Cooperation Without Government Motion for Departure
- ☐ Early Plea Agreement ☐ Global Plea Agreement
- ☐ Time Served *(not counted in sentence)* ☐ Waiver of Indictment ☐ Waiver of Appeal
- ☐ Policy Disagreement with the Guidelines *(Kimbrough v. U.S., 552 U.S. 85 (2007))*: *(Specify)*

_____

- ☐ Other: *(Specify)* _____

D. ***State the basis for a variance.*** *(Use Section VIII if necessary)*

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Attachment (Page 4) — Statement of Reasons

Not for Public Disclosure

DEFENDANT: JOHN SAMPSON
CASE NUMBER: 13-CR-269 (S-5)
DISTRICT: Eastern District of New York

STATEMENT OF REASONS

VII. COURT DETERMINATIONS OF RESTITUTION

A. ☑ **Restitution Not Applicable.**

B. **Total Amount of Restitution: $** _____

C. **Restitution not ordered:** *(Check only one)*

1. ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).
2. ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).
3. ☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).
4. ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327 or . 3663A, restitution is not ordered because the victim(s)'(s) losses were not ascertainable (18 U.S.C. § 3664(d)(5))
5. ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327 or 3663A, restitution is not ordered because the victim(s) elected to not participate in any phase of determining the restitution order (18 U.S.C. § 3664(g)(1)).
6. ☐ Restitution is not ordered for other reasons. *(Explain)*

D. ☐ **Partial restitution is ordered for these reasons** ***(18 U.S.C. § 3553(c))*****:**

VIII. ADDITIONAL BASIS FOR THE SENTENCE IN THIS CASE *(If applicable)*

Based on the facts and circumstances of this offense, as well as the defendant's personal history and characteristics, a sentence above the advisory guideline range is appropriate. The defendant was an experienced attorney and prominent politician who betrayed the trust of his constituents and close friends. A substantial sentence is warranted to deter similar criminal conduct. The sentence imposed is sufficient, but not greater than necessary, to meet the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

Defendant's Soc. Sec. No.: 062-64-0275

Defendant's Date of Birth: 6/17/1965

Defendant's Residence Address: 105-68 Flatlands 7th Street
Brooklyn, New York 11236

Defendant's Mailing Address: see above

Date of Imposition of Judgment
1/18/2017

s/Dora L. Irizarry, Chief USDJ
Signature of Judge

Dora L. Irizarry, Chief U.S.D.J.
Name and Title of Judge

Date Signed January 25, 2017