# 13-1094

*To Be Argued By:*
CHRISTOPHER M.MATTEI

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 13-1094**

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UNITED STATES OF AMERICA,
*Appellee,*

-vs-

THOMAS THORNDIKE,
*Defendant-Appellant.*

———

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

**BRIEF FOR THE UNITED STATES OF AMERICA**

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## Statement of Jurisdiction

The United States District Court for the District of Connecticut (Alvin W. Thompson, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on March 13, 2013, and an amended judgment entered on March 18, 2013. Joint Appendix ("JA__") 7. On March 20, 2013, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA1, JA7. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

## Statement of Issues Presented for Review

I. Whether the district court properly calculated the sentencing guidelines:

A. Did the district court properly apply a two-level enhancement for sophisticated means where the defendant sought to conceal his offense through the novel use of audit insurance and by fabricating documents and coordinating false submissions to IRS auditors?

B. Did the district court properly apply a four-level role enhancement where the defendant recruited and directed no fewer than nine individuals to fabricate and present false information to IRS auditors?

C. Did the district court properly apply a two-level enhancement for obstruction of justice where the defendant directed individuals to fabricate documents, submitted those documents to the IRS and lied to IRS auditors?

D. Did the district court abuse its discretion by denying the defendant credit for acceptance of responsibility where the defendant failed to demonstrate genuine contrition or appreciation for the harm caused by his conduct?

II. Whether this Court may review the district court's refusal to depart downward on the basis of the defendant's purported charitable activities and the cumulative effect of sentencing enhancements, and whether the district court properly denied the defendant's request for such departures in any event.

III. Whether the district court's sentence was substantively reasonable where the district court thoroughly assessed the § 3535(a) factors and determined that those factors warranted a guideline sentence of 72 months' imprisonment.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

## BRIEF FOR THE UNITED STATES OF AMERICA

### Preliminary Statement

From 2006 to 2009, Thomas Thorndike, a former special agent with the Internal Revenue Service-Criminal Investigation, owned and operated Cornerstone Financial Services ("Cornerstone"), a tax preparation business. Cornerstone was pervaded with fraud. As a matter of routine, Thorndike falsified his clients' tax returns, his personal tax returns and those of his children. In 2008, the Internal Revenue Service ("IRS") initi-

ated an audit of tax returns prepared by Thorndike. In response to that audit, Thorndike led an extensive effort to obstruct the audit and to deceive the IRS.

On September 22, 2011, Thorndike was charged in a 28-count Superseding Indictment. He subsequently pled guilty to two tax offenses, and was sentenced principally to a guideline term of imprisonment of 72 months. On appeal, Thorndike argues that the district court erred in applying sentencing guideline enhancements for sophisticated means, leadership role, and obstruction of justice, and further erred in refusing to give him credit for acceptance of responsibility. The district court properly calculated the guidelines, however, and accordingly these arguments should fail.

Thorndike also argues that the court should have granted downward departures based principally on his charitable activities. These claims are unreviewable on appeal, but the court properly denied the departure requests in any event.

Finally, Thorndike argues that the district court's sentence was substantively unreasonable. For the reasons set forth below, the district court properly exercised its discretion in sentencing Thorndike to 72 months' imprisonment.

The judgment of the district court should be affirmed.

## Statement of the Case

On September 22, 2011, a federal grand jury returned a Superseding Indictment charging Thorndike, in counts 1 through 23, with aiding and assisting the preparation of a false tax return, in violation of 26 U.S.C. § 7206(2); in counts 24 through 27, with making and subscribing a false tax return, in violation of 26 U.S.C. § 7206(1); and, in count 28, with obstruction of the administration of the Internal Revenue Code, in violation of 26 U.S.C. § 7212(a). JA24-35. On October 3, 2012, after extensive pre-trial motions practice, the court impaneled a trial jury. JA11. On October 11, 2012, the parties appeared for trial, and presented opening statements. JA10. Following counsel's remarks, the district court briefly recessed. JA100-101. When the district court resumed the proceeding, the defendant pleaded guilty to counts 17 and 26 of the Superseding Indictment, charging him, respectively, with aiding and assisting the preparation of a false tax return, in violation of 26 U.S.C. § 7206(2), and making and subscribing a false tax return, in violation of 26 U.S.C. § 7206(1). JA10, JA105.

On March 12, 2013, the district court (Alvin W. Thompson, J.) sentenced Thorndike princi-

pally to 36 months' imprisonment on each count to run consecutively, resulting in a total effective term of imprisonment of 72 months. JA7-8.

An amended judgment entered on March 18, 2013. JA7. On March 20, 2013, Thorndike filed a timely notice of appeal. JA1, JA7.

Thorndike is currently serving his term of incarceration.

## Statement of Facts and Proceedings Relevant to this Appeal

### A. The offense conduct

#### 1. Thorndike's fraudulent preparation of his clients' tax returns

From 2006 through 2009, Thorndike owned and operated Cornerstone, a high-volume tax preparation business. Pre-Sentence Report, dated March 19, 2013 ("PSR") ¶¶5-6. During tax season, Thorndike would schedule up to 40 appointments per day, each appointment lasting 15 minutes. PSR ¶6. During that 15-minute period, Thorndike prepared the customer's tax return for a fee of $300 per return. PSR ¶6. Thorndike also encouraged his customers to purchase audit insurance from him for a monthly fee of $12.95. PSR ¶6. In return, Thorndike agreed to represent the taxpayer in the event his/her return was audited, and to retain the services of a private attorney on the taxpayer's behalf. PSR ¶6.

Thorndike routinely falsified his clients' returns, most frequently by fabricating or inflating one or more deductions, such as business losses, non-cash charitable contributions, or employee business expenses. *See* PSR ¶¶9-20. As a result, his clients enjoyed substantial, illegitimate tax refunds, which, in turn, fostered additional business for Thorndike. JA254. Indeed, a 2009 IRS audit revealed that, during the tax years 2006 and 2007, Thorndike's customers were substantially more likely to receive refunds than the average Connecticut taxpayer, and those refunds were nearly 100% higher than the refund received by the average Connecticut taxpayer. PSR ¶7. Ultimately, the IRS audited 71 individual tax returns prepared by Thorndike, 65 of which were found to have reported insufficient tax. PSR ¶20. The average deficiency among those tax returns was $4,193, and the total deficiency was $415,119. PSR ¶20.

**2. Thorndike's obstruction of the IRS audit**

In December 2008, the IRS initiated an audit of individual and business tax returns prepared by Thorndike. PSR ¶8. The IRS informed Thorndike that he was the subject of the audit, and advised him of the principal areas of inquiry, Schedule C business losses and Schedule A non-cash charitable contributions and employee business expenses. PSR ¶8. In early 2009, sever-

al of Thorndike's clients were notified by the IRS that their returns would be audited, including the nine taxpayers described in counts 9-23 of the Superseding Indictment. PSR ¶8. The taxpayers were not informed, however, that Thorndike was the subject of the audit and that their returns were being audited because he had prepared them. PSR ¶8. Generally, these taxpayers contacted Thorndike and asked him to represent them in connection with the audit. PSR ¶8. Thorndike did not advise any of them that he was the subject of the audit, or that he had a conflict of interest in representing them. PSR ¶8. To the contrary, Thorndike advised several taxpayers that the audit of their returns was due to bad luck. PSR ¶8. Thorndike retained Attorney Robert Percy to represent him in connection with the audit, but he led the taxpayers to believe that Mr. Percy had been retained to represent them. PSR ¶8.

Generally, Thorndike coordinated the taxpayers' responses to the audit as follows:

Thorndike scheduled an appointment with each of the nine taxpayers described in the Superseding Indictment. PSR ¶9. For most, if not all, of the taxpayers this meeting was the first time they reviewed their 2006 and 2007 tax returns. PSR ¶9. In reviewing their returns, each of the taxpayers observed that Thorndike had made false entries on their returns. PSR ¶9.

Generally, the taxpayers observed that Thorndike had falsified Schedule A deductions by creating or inflating employee business expenses and both cash and non-cash charitable contributions. PSR ¶9.

Thorndike advised the taxpayers that they would have to create false documents such as mileage logs and contribution rosters in order to support the false entries on their tax returns. *See* PSR ¶¶9-19. Thorndike provided the taxpayers with sample mileage logs and contribution rosters. PSR ¶11, 13. He also provided them with Goodwill receipts that he maintained in his Office so that he could present the receipts as authentic and genuine records of the non-cash charitable contributions. PSR ¶12. He also provided the taxpayers with a roster of items accepted by Goodwill and the corresponding value of those items, so that the taxpayers could list items that would not rouse the suspicion of the Revenue Agent. PSR ¶12. Thorndike instructed the taxpayers to compile the mileage logs and contribution lists such that they equaled the false corresponding figure on their tax returns. PSR ¶9. When taxpayers questioned the propriety of creating false documents for submission to the IRS, Thorndike instructed them doing so was "no big deal." PSR ¶9. Each of the taxpayers complied with Thorndike's instructions and, in each case, Thorndike presented the false docu-

ments to the IRS in support of items that he knew were false. PSR ¶9. *See* PSR ¶¶9-19.

### 3. Thorndike's falsification of his personal returns and his sons' returns

From 2005 through 2008, Thorndike issued payroll checks from Cornerstone to his sons, J.T. and T.T., in order to pay for their personal expenses, including rent, school loans, utilities, etc. PSR ¶¶22, 28, 34, 44. Neither son was actually employed by Cornerstone. PSR ¶¶22, 28, 34, 44. Having reported these payments as wages, Thorndike was required to issue a W-2 to each of his sons, and prepare a tax return for each of them. PSR ¶¶23, 29, 35, 45. Thorndike falsely classified the sons' income as wages on his and their returns, and he then fabricated certain additional items on their returns in order to offset their income and reduce the tax owed on the wages he purportedly paid them. PSR ¶¶23, 29, 35, 45.

With respect to his personal returns, Thorndike routinely and falsely classified personal expenses as business expenses incurred on behalf of Cornerstone. PSR ¶¶22, 25-27, 28, 31-34, 37-44. In doing so, he was able to fraudulently reduce the amount of taxable income generated by Cornerstone. Thorndike falsely classified all manner of personal expenses, including direct payments to his children, renovation and repair

expenses for his personal residence, the cost of a diamond engagement ring, horse riding lessons for his daughter, etc. *See, e.g.*, PSR ¶¶33, 38, 42, 43. In all, from 2005 through 2008, Thorndike's falsification of his and his sons' tax returns alone caused a $144,001 loss to the United States Treasury. PSR ¶52.

### B. The guilty plea

On October 11, 2012, after extensive pre-trial litigation, the parties appeared for trial and delivered opening statements. JA10. Following opening statements, Thorndike advised the court that he wished to plead guilty, and entered guilty pleas to one count of assisting the preparation of a false tax return, in violation of 26 U.S.C. § 7206(2) (count 17) and one count of making and subscribing a false tax return, in violation of 26 U.S.C. § 7206(1) (count 26). The parties did not enter into a written agreement. JA105.

### C. The sentencing

#### 1. The Pre-Sentence Report

The United States Probation Office issued a PSR in preparation for sentencing.[1] JA7-9. The

[1] Thorndike has submitted to this Court three versions of the PSR: (1) the draft PSR, dated January 9, 2013; (2) the revised PSR, dated March 7, 2013,

PSR found that the applicable base offense level under U.S.S.G. § 2T1.4 was 16 because, by the most conservative measure, the loss involved in the offense exceeded $80,000 but was less than $200,000. PSR ¶56. The PSR added two levels under § 2T1.4(b)(1)(B) because Thorndike was in the business of preparing or assisting the preparation of tax returns. PSR ¶57. Next, the PSR added two levels because Thorndike employed sophisticated means in his concealment of the offense. PSR ¶58. The PSR then added four levels because Thorndike was an organizer or leader of criminal activity involving five or more participants. PSR ¶59. The PSR then added two more levels under U.S.S.G. § 3C1.1 because Thorndike obstructed the administration of justice. PSR ¶61. The PSR did not include a downward adjustment for acceptance of responsibility[2] and, therefore, calculated Thorndike's total

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which was referenced by the parties in their sentencing memoranda; and (3) the final, revised PSR, dated March 19, 2013, which was issued following sentencing to reflect the district court's findings and conclusions. In this brief, the government will cite to the final, revised PSR, dated March 19, 2013.

[2] The revised PSR, dated March 7, 2013, included a two-level reduction for acceptance of responsibility in its calculation of the guideline range. Given Thorndike's failure to qualify for this reduction at sentenc-

offense level to be 26. PSR ¶64. Because Thorndike was in Criminal History Category I, the PSR calculated the sentencing range to be 63 to 72 months' imprisonment. PSR ¶107.

The PSR also included a summary of the probation officer's interview of Thorndike. PSR ¶¶92-93. During that interview, Thorndike described his legal circumstances as "disheartening." PSR ¶93. He expressed disappointment that due to his convictions he had lost his business and was no longer involved in fundraising for a charitable organization. PSR ¶93. He did not express any regret for, or acknowledgement of, his illegal conduct. PSR ¶93. And, despite the PSR's lengthy description of his history of dishonest conduct, the defendant described himself to the United States Probation Officer as "honest" without qualification. PSR ¶92.

### 2. The parties' sentencing memoranda

On February 28, 2013, Thorndike filed his memorandum in aid of sentencing. JA139. Thorndike challenged several of the guideline enhancements set forth in the draft PSR. Thorndike argued principally that (1) the sophisticated means enhancement was inapplicable because

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ing, the final PSR did not include any reduction under U.S.S.G. § 3E1.1.

Thorndike's preparation of false tax returns was not sophisticated; (2) the four-level role enhancement amounted to impermissible double counting because he was already receiving an enhancement for being in the business of preparing tax returns which, inevitably, involved multiple customers; (3) the obstruction of justice enhancement was inapplicable because the obstruction, if any, occurred in connection with a civil IRS audit; and (4) a two-level downward adjustment for acceptance of responsibility was warranted. JA141-46. According to Thorndike's calculation, he faced a guideline range of 21 to 27 months' imprisonment. JA146. Thorndike then cited to his difficult childhood, his charitable activities on behalf of a local orphanage, his age and his health to argue for a departure and/or a variance from that range. JA146-52.

On March 4, 2013, the government filed its memorandum in aid of sentencing. First, the government conducted its calculation of Thorndike's guideline range. The government indicated that, although a statistical analysis conducted by the IRS suggested that the total loss involved in Thorndike's offense exceeded $1.8 million, the government was suggesting a more conservative calculation based only on the loss resulting from the conduct charged in the Superseding Indictment, *i.e.*, his false preparation of 14 of his clients' tax returns, 8 of his sons' tax returns and 4

of his own tax returns. That loss was approximately $182,716. JA165-67. With respect to the contested guidelines enhancements, the government argued as follows: (1) the sophisticated means enhancement applied because Thorndike's obstruction required extensive coordination and sophistication; (2) the role enhancement applied because Thorndike led and coordinated the illegal activities of no fewer than nine taxpayers in connection with the obstruction of the IRS's audit; and (3) the obstruction of justice enhancement applied because Thorndike's obstruction of a civil IRS audit related to the investigation and prosecution of Thorndike's criminal offenses. JA168-77. The government expressed skepticism that Thorndike had truly accepted responsibility in light of (1) his post-plea comments to the media that "you can't fight City Hall"; (2) his description of himself as "honest"; and (3) his refusal to provide any meaningful statement concerning the wrongfulness of his conduct. JA177-80.

Having reviewed the various enhancements, the government concluded that, absent any reduction for acceptance of responsibility, the advisory guideline range was 63 to 72 months' imprisonment. JA180. The government then asked the court to impose a sentence of 72 months in order to properly account for the § 3553(a) factors. JA180-89.

On March 10, 2013, Thorndike filed an objection to the revised PSR, dated March 7, 2013, and a reply to the government's sentencing memorandum. JA203. In his reply, Thorndike re-stated his objection to the sophisticated means enhancement. JA204-206. He also argued for the first time that the role enhancement should not apply because the other participants in the criminal activity were not participants at all because they lacked criminal complicity. JA208-209.

### 3. The sentencing hearing

On March 12, 2013, the parties appeared for sentencing.

#### a. The guideline range

In calculating the guideline range, the district court first accepted the parties' stipulation that the loss involved in Thorndike's offense was $182,716, which represented the total amount of loss resulting from the conduct charged in the Superseding Indictment.[3] JA217. Therefore, the district court calculated that Thorndike had a base offense level of 16. JA224; PSR ¶56. The district court then considered the various dis-

[3] The district court noted that the PSR set forth two alternative methods for calculating loss, and indicated that it intended to make alternative findings relating to those other loss calculations. JA217-18.

putes regarding the guideline calculation, and analyzed and overruled several of the defendant's objections to certain sentencing enhancements.[4] JA237-47. Based on these rulings, the district court calculated that Thorndike was in Criminal History Category I and had a total offense level of 26. As a result, he faced a range of 63 to 72 months' imprisonment and a fine range of $12,500 to $125,000. JA249.

**b. Alternative findings**

After accepting the measure of loss suggested by the parties, *i.e.*, the loss stemming from the conduct charged in the Superseding Indictment, the district court noted that the PSR set forth two alternative methods for calculating loss, and indicated that it intended to make alternative findings relating to those other loss calculations. JA217-18.

The district court correctly observed that the first alternative loss calculation was based on an extrapolation from all tax returns prepared by Thorndike for the tax years 2005 through 2009.[5] JA224; PSR ¶52. To estimate the loss associated

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[4] The district court's findings as to each of these contested sentencing enhancements are set forth in the relevant sections below.

[5] The calculation excluded the tax returns described in the Superseding Indictment.

with these returns, the IRS selected only those tax returns that included exorbitant deductions for non-cash charitable contributions and employee business expenses because those items were the principal badges of fraud revealed by the IRS audit. JA166-67; PSR ¶52. For purposes of the calculation, the IRS conservatively selected only those returns that claimed in excess of $2,500 for non-cash charitable contributions and $5,000 for employee business expenses because those amounts exceeded that which would reasonably be claimed on a legitimate return. JA167. Next, the IRS assessed the average tax rate among these returns against the fraudulently claimed expenses to arrive at a loss figure of $1,855,077.14. JA167; PSR ¶52.

The second alternative calculation was based on the actual tax deficiency revealed by the IRS audit of 71 tax returns prepared by Thorndike. That loss amount was $270,023.15. *See* PSR ¶44; JA224-25.

After identifying these two alternative calculations, the court invited argument on whether it should consider these alternative methodologies of calculating the loss amount. Thorndike argued that neither alternative methodology was appropriate because the IRS had not conducted a comprehensive fraud analysis of each return. JA225-26. The government advised the court that it was not necessary to use the alternative

loss calculation for "practical reasons," JA226-27, *i.e.*, because the most conservative loss calculation, when combined with the other enhancements, resulted in a guideline range that encompassed the statutory maximum, *see* JA167. Nevertheless, the government argued that the alternative methodologies were reliable, and maintained that the actual loss likely exceeded $182,716. JA227-29.

Ultimately, the court based its loss calculation on the conduct charged in the Superseding Indictment, which resulted in a loss of $182,716 under U.S.S.G. § 2T1.4. JA224, JA249. The district court noted, however, that had the guideline range not encompassed the statutory maximum, it would have departed "upward at least two offense levels and most likely four offense levels, given the compelling circumstantial evidence that the loss amount used in calculating the Guidelines understates the actual loss to the Treasury." JA261-62.

**c. The sentencing factors**

Following the district court's calculation of the guideline range, the parties presented argument concerning the appropriate sentence. As he had in his sentencing memorandum, Thorndike sought a downward departure based on his charitable work with a local orphanage. JA250. According to Thorndike, he had raised money for

the orphanage and made his home available for parties sponsored by the orphanage. JA150, JA250. Thorndike also urged the court to consider the difficult upbringing he faced as a child and the fact that he had overcome obstacles to become a successful businessman. JA250-52. Finally, Thorndike asked the district court to consider his age and the fact that he suffered from glaucoma and diabetes. JA252.

The government asked the district court to impose a term of imprisonment of 72 months. JA253. The government argued that certain features of Thorndike's offense were particularly troubling. In particular, the government pointed out that Thorndike had victimized not only the United States Treasury, but also his customers who had been subject to back taxes, civil penalties and potential criminal exposure. JA254-55. In discussing the need for specific deterrence, the government noted that Thorndike had repeatedly lied and fabricated documents in connection with prior judicial proceedings and IRS audits. JA254, JA256. The government also highlighted the need for the sentence to promote general deterrence "in order to maintain the integrity of our tax system." JA257. Finally, the government pointed out that Thorndike's annual gross income of approximately $1 million suggested that his relatively small contributions to

the orphanage did not require extraordinary sacrifice on his part. JA256.

After hearing all of these comments, the district judge then proceeded to impose sentence. First, the district judge listed each of the § 3553(a) factors that he was required to consider, and acknowledged that he had considered them. JA258-59. Next, the district judge noted that he had reviewed the PSR, and presided over Thorndike's truncated trial and guilty plea. JA259. The district judge stated that he had reviewed the parties' memoranda and any exhibits that were attached thereto, and considered the remarks of counsel and Thorndike. JA259. Finally, after again reviewing the § 3553(a) factors, the district judge explained his sentence as follows:

> In your case, Mr. Thorndike, I'm most aware of the need to impose a sentence that constitutes just punishment in light of the full scope of your conduct, the need for the sentence imposed to promote respect for the law, and also the need for specific deterrence.
>
> I note that the defendant has moved for a downward departure as part of the determination of what sentence the Sentencing Guidelines suggest imposing in this case based on a substantial history of community service. While the defendant's

charitable work is commendable, it falls well short of being extraordinary, which is the requirement under 5H1.1, in light of his income during the years he made such contributions. Therefore, I conclude that the defendant does not meet the standard for a downward departure under the Guidelines. Moreover, even if he did meet the standard for a departure under the Guidelines, I would choose not to exercise my discretion to make such departure in this case, in determining what sentence the Sentencing Guidelines advise imposing, in light of the full scope of the defendant's conduct.

To the extent that the defendant makes other arguments today, namely his age or his medical condition, I don't believe either of those is an extraordinary situation either.

To the extent there's an argument raised either in the Guidelines context or for a non-guidelines sentence based on the impact of the childhood of the defendant on his conduct, I don't believe there's been any nexus identified. And in any event, there has been a substantial passage of time since the defendant's childhood. And there have been intervening events that put the defendant on notice or should have

served as a wake-up call for him that the conduct was illegal, notwithstanding any feelings he may have carried over from his childhood experiences.

I should also note for the record that, were it not a moot point, I would depart upward at least two offense levels and most likely four offenses levels, given the compelling circumstantial evidence that the loss amount used in calculating the Guidelines understates the actual loss to the Treasury.

Based on all of the foregoing and after a review of all the factors set forth in Title 18 U.S.C. Section 3553, I have concluded that, under the circumstances of this case, a Guidelines sentence is most appropriate.

* * *

Mr. Thorndike, I hereby sentence you to the custody of the Bureau of Prisons for a period of 36 months on Count 17 and 36 months on Count 26, to be served consecutively.

JA260-62.

## Summary of Argument

I. The district court properly calculated Thorndike's Guidelines range:

A. The court properly applied an enhancement for "sophisticated means" because the defendant sought to conceal his offense through the novel use of audit insurance and by coordinating an extensive effort to fabricate documents and to present false information to IRS auditors.

B. The court properly applied a role enhancement because the defendant recruited, directed and coordinated the activities of no fewer than nine individuals who joined his effort to fabricate documents and to submit false information to IRS auditors.

C. The court properly enhanced Thorndike's offense level for obstruction of justice because he fabricated false documents, directed others to do the same, submitted those documents to IRS auditors and lied to the IRS auditors who were examining tax returns Thorndike prepared.

D. The district court did not abuse its discretion by denying Thorndike a reduction for acceptance of responsibility because Thorndike failed to demonstrate genuine remorse or appreciation for the harm his offenses caused.

II. The district court's decision to deny Thorndike's requests for downward departures

is not reviewable in this Court absent some evidence that the court did not understand its discretion to depart. The record here, however, reflects that the court understood its discretion to depart, but nevertheless exercised its discretion to deny Thorndike's requests.

In any event, the court properly denied Thorndike's requests. Thorndike's charitable activities were not extraordinary given his substantial income, and the application of multiple enhancements properly reflected the aggravating features of his conduct.

III. Finally, the district court imposed a substantively reasonable sentence after due consideration of the § 3553(a) factors. Thorndike engaged in substantial and widespread fraud. He then led a complex effort to prevent the IRS from discovering the extent of the fraud, and subjected his own clients to significant criminal and civil liability. Further, Thorndike failed to demonstrate genuine contrition for his conduct, and the district court properly considered the need for specific deterrence to account for Thorndike's history of fraudulent behavior.

## Argument

### I. The district court properly calculated the guideline range when it applied sentencing enhancements for sophisticated means, role in the offense, and obstruction of justice, and denied the defendant credit for acceptance of responsibility.

#### A. Sentencing law generally

After *United States v. Booker*, 543 U.S. 220 (2005), at sentencing, a district court must begin by calculating the applicable Guidelines range. *See United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). After giving both parties an opportunity to be heard, the district court should then consider all of the factors under 18 U.S.C. § 3553(a). The requirement that the district court consider the section 3553(a) factors, however, does not require the judge to precisely identify the factors on the record or address specific arguments about how the factors should be implemented. *See Rita v. United States*, 551 U.S. 338, 356-59 (2007). And although the judge must state in open court the reasons behind the given sentence, 18 U.S.C. § 3553(c), "robotic incantations" are not required. *Cavera*, 550 F.3d at 193; *see also United States v. Goffi*, 446 F.3d 319, 321 (2d Cir. 2006).

On appeal, a district court's sentencing decision is reviewed for reasonableness. *See Booker*,

543 U.S. at 260-62. This reasonableness review consists of two components: procedural and substantive review. *Cavera*, 550 F.3d at 189.

"A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory." *Id.* at 190 (citations omitted). A district court also commits procedural error "if it does not consider the § 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact." *Id.* Finally, a district court "errs if it fails adequately to explain its chosen sentence," including, "'an explanation for any deviation from the Guidelines range.'" *Id.* (quoting *Gall*, 552 U.S. at 51).

With respect to substantive reasonableness, this Court has recognized that "[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact." *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006) (citations and quotations omitted). A sentence is substantively unreasonable only in

the "rare case" where the sentence would "damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009).

### B. Specific guidelines issues

#### 1. Sophisticated means

##### a. Relevant facts

At sentencing, the district court invited the parties to comment on an argument raised by Thorndike on the eve of sentencing concerning the sophisticated means enhancement proposed by the PSR. Thorndike argued that to apply both the obstruction-of-justice and the sophisticated means enhancements would constitute impermissible double counting because the obstructive conduct was the same conduct underlying the sophisticated means enhancement. JA205-06, JA233-34. The government countered that the two enhancements served "two different purposes." JA232. The government argued that the sophisticated means enhancement targeted particularly complex schemes to conceal tax offenses because such schemes "evince[d] a more serious level of criminal intent." JA232. The obstruction enhancement, by contrast, sanctioned conduct that impeded an investigation by any means, regardless of the sophistication level. JA232-33.

The district court then applied the two-level sophisticated means enhancement. First, the district court recited the guidelines' definition of "sophisticated means" as including "'especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense.'" JA237-38. Next, the district court relied on *United States v. Boykoff*, 67 Fed. Appx. 15 (2d Cir. 2003) and *United States v. Lewis*, 93 F.3d 1075 (2d Cir. 1996), in concluding that "conduct of the nature engaged in by the defendant here does fall within the definition of sophisticated means for the purpose of this section of the Guidelines." JA238. As the court observed, the "totality of the defendant's conduct, which included the use of audit insurance to conceal his offense, the fabrication of numerous types of false documents, the coordination of dozens of audit responses, and the handling of audit interviews, constituted the use of especially complex or especially intricate offense conduct pertaining to his concealment of his criminal conduct." JA238. With respect to the defendant's use of audit insurance, the district court noted that, while the concept was not novel, his "use of audit insurance to shield himself from detection was especially complex or intricate conduct." JA238-39.

The district court rejected Thorndike's argument that application of the sophisticated means

enhancement and the obstruction enhancement constituted double counting, as follows:

> In *United States vs. Jackson*, 346 F.3d 22, a case involving an argument that application of a different sophisticated means" enhancement amounted to impermissible double-counting, the court noted that "the imposition of two somewhat overlapping enhancements does not necessarily result in prohibited double-counting. Double-counting is legitimate where a single act is relevant to two dimensions of the Guidelines analysis." . . . Here, a very small subset of conduct the Government points to as sophisticated means is all that is needed to support an enhancement for obstruction of justice. The fact that the conduct was no simple act or series of actions to obstruct justice, but rather, was especially complex or especially intricate conduct, makes an additional enhancement for "sophisticated means" also appropriate.
>
> In addition, while the fact that the defendant had put the audit insurance program in place facilitated his obstruction of justice, his creation of the audit insurance program itself reflected sophisticated forethought and creativity, so the bases for the

> enhancements are not entirely overlapping.
>
> And as the government noted today, the purposes served are different. With respect to obstruction, the focus is on the effect on the investigation; with respect to the sophisticated means, the focus is on the forethought that was given and to making it difficult to detect the offense. So it's really, I guess in simplest terms, a distinction between obstruction and the method of obstruction that is the focus of the two different enhancements.

JA239-40.

The district court then observed that some of the conduct underlying the two enhancements did not overlap at all. In particular, the district court observed that, in 2008, which pre-dated most of Thorndike's sophisticated concealment, Thorndike obstructed the IRS by lying about his 2007 tax return. JA240-241.

Finally, the district court noted that it had considered "whether pursuant to *United States vs. Lauerson*, which is 348 F.3d 329, any downward departure would be appropriate . . . to the extent there are overlapping enhancements." JA241. The district court concluded that no such departure would be appropriate. JA241. The district court then noted that, even if the sophisti-

cated means enhancement should be discounted due to double counting, "a two-level upward departure would be appropriate because of the extensive nature of the obstruction of justice."[6] JA241.

**b. Governing law and standard of review**

Section 2T1.4(b)(2) of the Sentencing Guidelines provides for a two-level enhancement if the offense "involved sophisticated means." U.S.S.G. § 2T1.4(b)(2). Application Note 3 to this section provides as follows:

> For purposes of subsection (b)(2), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means.

U.S.S.G. § 2T1.4(b)(2), Application Note 3. Although the commentary provides examples of sophisticated means, *e.g.*, corporate shells and off-

[6] The defendant raises the double counting argument mainly in opposition to the obstruction of justice enhancement. The government addresses that argument at section I.B.3 *infra*.

shore financial accounts, those examples are neither exhaustive, nor "talismanic." *See United States v. Lewis*, 93 F.3d 1075, 1082 (2d Cir. 1996). Indeed, a tax fraud scheme may not be "singularly or uniquely sophisticated," yet if "it is more complex than the routine tax-evasion case in which a taxpayer reports false information in his 1040 form to avoid paying income taxes . . . or asserts he paid taxes that he did not pay," the enhancement may apply. *See id.* (internal citations omitted). *See also United States v. Kontny,* 238 F.3d 815, 821 (7th Cir. 2001) ("[T]he essence of the definition [of sophisticated means] is merely deliberate steps taken to make the offense . . . difficult to detect." (internal quotation omitted)).

Further, a scheme as a whole may be sophisticated where, even if each individual step is not elaborate, "all the steps were linked together . . . [to] exploit different vulnerabilities in different systems in a coordinated way." *United States v. Jackson*, 346 F.3d 22, 25 (2d Cir. 2003), *vacated on other grounds*, *Lauersen v. United States*, 543 U.S. 1097 (2005); *see also United States v. Jinwright*, 683 F.3d 471, 486 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 843 (2013); *United States v. Halloran*, 415 F.3d 940, 945 (8th Cir. 2005); *United States v. Rettenberger*, 344 F.3d 702, 709 (7th Cir. 2003); *United States v. Wayland*, 549 F.3d 526, 529 (7th Cir. 2008).

This Court reviews the district court's findings of fact for clear error and its application of the sophisticated means enhancement to the facts *de novo*, giving due deference to the sentencing court. *See Lewis*, 93 F.3d at 1079-80.

**c. Discussion**

The district court properly concluded that Thorndike employed sophisticated means in the concealment of his offenses. Focusing on "the totality of the defendant's conduct," the district court determined that, taken together, "the use of audit insurance to conceal his offense, the fabrication of numerous types of false documents, the coordination of dozens of audit responses, and the handling of audit interviews, constituted the use of especially complex or especially intricate offense conduct pertaining to his concealment of his criminal conduct." JA238

The district court's conclusion was reasonable and fully supported by the record. The first notable feature of Thorndike's concealment scheme was a product Thorndike cynically sold his clients: "audit insurance." PSR ¶6. Having falsified many tax returns, Thorndike knew that if his clients were ever audited and forced to explain false items that he entered on their returns, his far reaching fraud would be detected. Therefore, he strongly urged his clients to purchase audit insurance for a monthly fee of $12.95. PSR ¶¶6,

13. In exchange, Thorndike agreed to represent the taxpayer if his or her return was audited, and to provide an attorney purportedly to represent the taxpayer's interests. PSR ¶6.

The district court observed that audit insurance is not a novel concept. The district court properly determined, however, that Thorndike's use of audit insurance was novel because its primary purpose was not to protect the taxpayer, but, rather, to provide Thorndike with a means of concealing his own fraud should his clients' returns be audited in the future. JA238-39. In the event of such an audit, Thorndike would be able to direct the effort to prevent detection of his fraud by (1) getting notice from the taxpayers that they were being audited; (2) directing and assisting in the creation of false documents; (3) controlling information flow to the IRS; (4) attending the audit interviews on behalf of the taxpayers; (5) consulting with his own attorney who he held out to taxpayers as their attorney; and (6) shifting responsibility for the fraud to the individual taxpayer if necessary.

Indeed, this is exactly how the audits played out. Almost without exception, when taxpayers were notified by the IRS that their returns were subject to audit, they contacted Thorndike to claim their audit insurance "protection." PSR ¶¶8-9. This allowed Thorndike to prepare and coordinate the taxpayers' responses to the au-

dits, thereby maximizing the odds that he could conceal the extent of his criminal activities. In short, the district court rightly concluded that Thorndike's manipulation of audit insurance was a sophisticated demonstration of forethought and creativity, which also earned him a monthly annuity.

In addition to the audit insurance, Thorndike's affirmative obstruction of the IRS's audits was quite sophisticated. First, he did not tell his clients that he was the subject of the audit and that their returns were selected for examination because he had prepared them. PSR ¶8. Second, he instructed the taxpayers to create false documents such as mileage logs and donation rosters, which would purport to show expenses that the taxpayers incurred during the years subject to audit. PSR ¶¶9-19. He provided taxpayers with sample mileage logs, and instructed them to enter false mileage information in the logs. PSR ¶¶9-19. For taxpayers whose returns falsely claimed non-cash charitable contributions, Thorndike often provided them with a copy of a blank Goodwill receipt bearing the initials of a Goodwill employee, and instructed them to fill it out. PSR ¶¶10-12, 16. Thorndike provided these taxpayers with a roster of items accepted by Goodwill and the corresponding values for those items. PSR ¶¶10-12, 16, 18. He then instructed taxpayers to select items from the list to arrive

at a total donation value matching the amount he had entered on their returns. PSR ¶¶9-12, 15-16, 18-19. Thorndike compiled each taxpayer's documents, which included false documents that had been created at his direction, and submitted the information to the IRS. PSR ¶¶9-19.

In addition, Thorndike attended each audit interview with the taxpayer and an attorney who Thorndike had hired to represent him—not the taxpayer. *See* PSR ¶¶8, 10. During at least one audit interview, Thorndike fielded the revenue agents' inquiries in an attempt to shield himself from scrutiny. *See* PSR ¶10. In considering all of these features of Thorndike's conduct, the district court took guidance from this Court's unpublished opinion in *United States v. Boykoff*, 67 Fed. Appx. 15, 23-24 (2d Cir. 2003). JA238. In *Boykoff*, this Court affirmed the application of the sophisticated means enhancement where the defendant had "help[ed] a client who was being audited to fabricate restaurant receipts and expense journal entries, and in paying personal expenses from business accounts and characterizing those expenses as business expenses." *Id.* at 23. The enhancement applied because the "fabricat[ion of] receipts and expense journal entries involved 'a plan more complex than merely filling out a false tax return.'" *Id.* at 24 (quoting *United States v. Lewis*, 93 F.3d 1075, 1082 (2d Cir. 1996)). *Boykoff* was fully consistent with the

clear principle this Court articulated in *Lewis*, namely, that though a tax evasion scheme may not be "singularly or uniquely sophisticated," 93 F.3d at 1082, it may yet be, more complex than the routine tax-evasion case because "[e]ven if each step in the planned tax evasion was simple, when viewed together, the steps comprised a plan more complex than merely filling out a false tax return," *id.* at 1083 (citing *United States v. Wu*, 81 F.3d 72, 73-74 (7th Cir. 1996)).

Under *Lewis*, it seems clear that Thorndike's conduct, which involved (1) the novel use of a mechanism to conceal his offense, *i.e.*, audit insurance; (2) the fabrication of numerous types of false documents; (3) the coordination of dozens of audit responses; and (4) the handling of audit interviews, Thorndike's effort to conceal his offenses was sufficiently sophisticated to warrant a two-level enhancement under § 2T1.4(b)(2).

As he did below, Thorndike argues that the enhancement does not apply because the commission of the offenses did not involve sophisticated means. Thorndike simply ignores the fact that the district court's analysis centered on Thorndike's *concealment* of the offense, not its commission. Ultimately, Thorndike's argument amounts to an unsupported assertion that his concealment, as described above, was not sufficiently sophisticated to warrant the enhance-

ment. This Court's decision in *Lewis* and its progeny show otherwise.

**2. Leadership role**

**a. Relevant facts**

In his memorandum in aid of sentencing and his reply to the government's sentencing memorandum, Thorndike objected to the PSR's application of a four-level role enhancement under § 3B1.1. Thorndike argued that the enhancement should not apply because (1) Thorndike was already subject to an enhancement for being a tax preparer, an activity that necessarily involves multiple participants, *i.e.*, clients, and (2) the taxpayers should not be considered participants in the criminal activity because they were not culpable.

The district court overruled the defendant's objection and applied the four-level role enhancement. In doing so, the district court rejected the defendant's double counting argument. The district court observed that the role enhancement applied not because the defendant was a tax preparer, but because he supervised and led numerous other "participants" in the obstruction. JA242. Further, based on the undisputed facts in the PSR, the district court had little difficulty finding that the defendant's offense involved at least nine other participants because "although it was the defendant who successfully

recruited them to participate, both the defendant and the taxpayers participated in criminal conduct." JA242.

### b. Governing law and standard of review

Under U.S.S.G. § 3B1.1, a defendant may receive an upward adjustment in his adjusted offense level if he played an aggravated role in the offense. Where a defendant is "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive," the adjusted offense level increases by four levels. *See id.*, § 3B1.1(a). "In assessing whether a criminal activity 'involved five or more participants,' only knowing participants are included." *United States v. Paccione*, 202 F.3d 622, 624 (2d Cir. 2000) (per curiam). "By contrast, in assessing whether a criminal activity is 'otherwise extensive,' unknowing participants in the scheme may be included as well." *Id.*

In distinguishing between an organizer and a mere manager, the district court should consider "the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and

authority exercised over others." U.S.S.G. § 3B1.1, comment (n.4). *See also United States v. Beaulieu*, 959 F.2d 375, 379-80 (2d Cir. 1992) ("Whether a defendant is considered a leader depends upon the degree of discretion exercised by him, the nature and degree of his participation in planning or organizing the offense, and the degree of control and authority exercised over the other members of the conspiracy."). The government must prove by a preponderance of the evidence that a defendant qualifies for a role enhancement. *See United States v. Ojeikere*, 545 F.3d 220, 222 (2d Cir. 2008).

In evaluating a decision to impose a role enhancement under § 3B1.1, this Court reviews the district court's factual findings for clear error, but reviews a legal determination about the applicability of the enhancement *de novo*. *United States v. Ivezaj*, 568 F.3d 88, 99 (2d Cir. 2009).

**c. Discussion**

The district court properly determined that Thorndike was "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." *See* U.S.S.G. § 3B1.1(a). In this case, Thorndike led no fewer than nine taxpayers in an effort to obstruct the IRS. *See* PSR ¶¶9-19. With respect to each of those taxpayers, Thorndike falsified their tax returns and then instructed them to create false

documents, including mileage logs and charitable donation rosters, to support those false items. *See* PSR ¶¶9-19. The taxpayers, having learned that their returns were false, then joined Thorndike's effort to obstruct the IRS by creating false documents at his request. *See* PSR ¶¶9-19. In most cases, Thorndike provided the taxpayers with the forms that they were to falsify. *See* PSR ¶¶9-19. Thorndike coordinated each taxpayer's response to his/her individual audit and then assumed responsibility for presenting the taxpayer's case to the IRS examiner during the audit interview. *See* PSR ¶¶9-19. In short, Thorndike led at least nine taxpayers as they defrauded the IRS.

Moreover, because Thorndike was the owner of the tax preparation business that was the subject of the audit, his leadership role was particularly key in furthering the effort to obstruct the IRS. *See United States v. DeRiggi*, 72 F.3d 7, 8 (2d Cir. 1995) (observing that "a corrupt executive who is seen to be corrupt by subordinates leads by example"). Thorndike's leadership role in the obstruction of the IRS was critical because if he had not seized control of each taxpayer's audit response, and directed the submission of false materials, the IRS would have quickly learned from each taxpayer that Thorndike was largely responsible for the false entries on the taxpayer's returns. *See United States v. Furkin*,

119 F.3d 1276, 1285 (7th Cir. 1997) (four-level role enhancement applied in prosecution for conspiracy to defraud the IRS and related offenses where the defendant "instruct[ed] at least six others to destroy records, backdate leases, and omit income on corporate books").

Thorndike argues that the taxpayers who created false documents and caused them to be submitted to the IRS, were not criminally responsible for their conduct. Therefore, according to Thorndike, they are not participants in Thorndike's offense within the meaning of U.S.S.G. § 3B1.1. The district court properly rejected this argument because there was ample evidence that each of the taxpayers described in the Superseding Indictment and the PSR were responsible for creating false documents knowing that Thorndike would submit those documents to the IRS on their behalf. *See United States v. Brinkworth*, 68 F.3d 633, 641-42 (2d Cir. 1995) (an individual who had knowledge of and participated in the criminal activity is a "criminally responsible" participant under section 3B1.1). The taxpayers' fabrication of documents for submission to the IRS is criminal conduct. The district court rightly noted that the fact that Thorndike used his position of authority to persuade some of the taxpayers to engage in this conduct does not render the taxpayers innocent. JA243. It merely means that Thorndike

successfully recruited them to participate in an effort to obstruct the IRS, an objective in which both he and the taxpayer had financial and other interests. *See United States v. McLeod*, 251 F.3d 78, 81-83 (2d Cir. 2001) (although decided on other grounds, affirming judgment of district court where role enhancement applied to defendant-tax preparer who directed employees to falsify documents and counseled clients during obstruction of IRS audit).[7]

Thorndike also argues that the district court's application of the role enhancement resulted in impermissible double counting because he was already subject to a two-level enhancement under § 2T1.4(b)(1)(B) for being in the business of preparing tax returns. Thorndike cites no authority for this proposition, and the district court properly rejected it. The district court made the commonsense observation that, "the defendant appropriately receives an additional [role] enhancement because there is an added degree of culpability; namely, he not only prepared false tax returns but, in addition, he was a leader or organizer with respect to nine other individuals who were criminally responsible." JA242-43. That is, Thorndike's direction to nine other people to fabricate documents for submission to the

[7] On appeal, the defendant did not challenge the application of the role enhancement.

IRS was not an act intrinsic to the tax preparer profession.

### 3. Obstruction of Justice

#### a. Relevant facts

In his sentencing memorandum, Thorndike objected to the two-level enhancement for obstruction of justice. Principally, Thorndike argued that the enhancement did not apply because Thorndike's obstruction was in connection with a civil IRS audit and not the criminal investigation that led to his conviction. JA144-45. The government maintained that Thorndike had indeed obstructed the administration of justice by, *inter alia*, lying to the IRS, instructing others to lie to the IRS, directing the creation of false documents for submission to the IRS, and submitting false documents to the IRS. JA175-177.

At sentencing, the district court concluded the defendant's obstruction of the IRS civil audit triggered the obstruction enhancement. JA243. The district court expressly relied on *United States v. Yip*, 592 F.3d 1035, 1041-42 (9th Cir. 2010), *United States v. Thorson*, 633 F.3d 312, 321 (4th Cir. 2011) and *United States v. Fiore*, 381 F.3d 89, 94 (2d Cir. 2004), and noted that its holding was consistent with the analysis set forth in those cases. JA243-44. Further, the court noted that the factual basis for the en-

hancement was summarized in the government's sentencing memorandum. JA244.

**b. Governing law and standard of review**

Section 3C1.1 provides:

> If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.

U.S.S.G. § 3C1.1. This enhancement covers a range of conduct including, *inter alia*, "producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding." U.S.S.G. § 3C1.1, comment (n.4(C)). This enhancement applies to obstruction of civil investigations, including IRS audits, because "subsequent criminal investigations are often inseparable from prior civil investigations, and [obstruction] in the prior proceeding necessarily obstructs—if successful, by preventing—the subsequent investigation." *Fiore*, 381 F.3d at 94; *see id.* (holding that defendant's perjury in civil SEC investiga-

tion that preceded the related criminal securities fraud investigation constituted obstruction under § 3C1.1). *See also Thorson*, 633 F.3d at 321 (defendant's fabrication of document in response to IRS civil audit with the purpose of supporting a tax deduction constituted obstruction of the investigation of his offense under § 3C1.1) (citing *Fiore*, 381 F.3d at 94); *Yip*, 592 F.3d at 1042 (two-level enhancement for obstruction of justice was warranted where defendant provided four false promissory notes and false bank deposit analysis to IRS civil auditor); *United States v. McGovern*, 329 F.3d 247, 252 (1st Cir. 2003) (obstruction during administrative audits by Medicare and Medicaid triggered the enhancement where "the investigation which has been obstructed has a sufficient connection to the offense of conviction").

With respect to a district court's decision to enhance a defendant's sentence for obstruction of justice, this Court accepts the district court's factual findings unless they are clearly erroneous, but reviews *de novo* the ultimate conclusion that a given set of facts constitutes obstruction of justice. *United States v. Agudelo*, 414 F.3d 345, 348 (2d Cir. 2005).

**c. Discussion**

The district court properly applied a two-level enhancement under § 3C1.1 because Thorndike

obstructed or attempted to obstruct justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction.

In December 2008, the IRS advised Thorndike that it had identified discrepancies in returns he prepared, and was initiating a review of his clients' returns. PSR ¶¶7-8. The IRS then sent notices to individual taxpayers that their returns were subject to audit. PSR ¶8. Soon thereafter, Thorndike's taxpayer-clients contacted him to request that he represent them in connection with their audits. Thorndike met with each of the taxpayers, including those listed in the Superseding Indictment. PSR ¶¶8-9. Knowing that he had fabricated items on their returns, Thorndike directed the taxpayers to create false documents in support of those false items. PSR ¶¶9-19. In particular, Thorndike engaged in the following obstructive conduct:

- Provided taxpayers with copies of Goodwill receipts with instructions to backdate the receipts and enter a total value of donations that equaled the false entry on their returns;
- Provided taxpayers with sample mileage logs with instructions to list purported work-related mileage that equaled the amount of miles claimed on their returns;

- Submitted false documents to the IRS in an effort to conceal his criminal conduct;
- Lied to IRS Examiners during audit interviews relating to tax returns that he prepared on his clients' behalf.

PSR ¶¶9-19.

The foregoing conduct is clearly covered by § 3C1.1, which is intended to apply to defendants who "produc[ed] . . . a false, altered, or counterfeit document or record during an official investigation." *See* § 3C1.1, comment (n.4(C)). Thorndike did this by directing the taxpayers listed in the Superseding Indictment to create documents that he knew were false, which he then submitted to the IRS in connection with its official investigation into his preparation of tax returns. Thorndike directed the creation of these documents and submitted them to the IRS in order to prevent the IRS from discovering that he had engaged in the widespread falsification of his clients' tax returns. *See Yip*, 592 F.3d at 1041-42 (two-level enhancement for obstruction of justice was warranted in sentencing defendant for filing false tax returns, conspiracy to defraud government, and failure to report foreign bank transactions, where defendant provided four false promissory notes and false bank deposit analysis to IRS agent conducting audit); *Thorson*, 633 F.3d at 321 (defendant's fabrication of document in response to IRS civil audit

with the purpose of supporting a tax deduction constituted obstruction of the investigation of his offense under § 3C1.1).

Thorndike argues that the obstruction occurred in connection with a civil audit and, therefore, did not bear on the investigation or prosecution of the offense of conviction. Relying on *Fiore, Yip* and *Thorson*, the district court properly concluded that a defendant's obstruction of a civil IRS audit may trigger the enhancement where the audit is antecedent or parallel to a criminal investigation of the same conduct. JA243. Here, there is little question that Thorndike, a former Special Agent with the IRS – Criminal Investigation, sought to prevent the IRS's civil audit team from detecting his extensive criminal conduct so as to forestall, *inter alia*, a criminal prosecution. The civil probe into Thorndike's preparation of tax returns was precisely the focus of the criminal investigation and prosecution. In such circumstances, this Court has recognized that a defendant's obstruction of an antecedent but related civil investigation can trigger the enhancement. *Fiore*, 381 F.3d at 94.

In *Fiore*, this Court affirmed the district court's application of this enhancement where the defendant perjured himself in connection with an SEC investigation, which later led to criminal charges. *See Fiore*, 381 F.3d at 94. This Court squarely held that a defendant's obstruc-

tion of a civil investigation involving conduct relating to the offense of conviction is appropriately sanctioned by § 3C1.1. *See id.* ("Where federal administrative and prosecutorial jurisdiction overlap, subsequent criminal investigations are often inseparable from prior civil investigations, and perjury in the prior proceeding necessarily obstructs—if successful, by preventing—the subsequent investigation.").

In two sentences of his brief, Thorndike argues in the alternative that the district court engaged in impermissible double counting by applying the obstruction enhancement because the sophisticated means enhancement relied on the same conduct. *See* Appellant's Br. at 24. Relying on *United States v. Jackson*, 346 F.3d 22, 25 (2d Cir. 2003), the district court properly concluded that, while there may have been some factual overlap, distinct facts supported each enhancement. JA239. The district court's conclusion was consistent with this Court's holding in *Jackson* that where two enhancements "do not necessarily rely on the same acts," some factual overlap does not preclude the application of both enhancements. *Jackson*, 346 F.3d at 25. In distinguishing between Thorndike's use of sophisticated means and his obstruction, the district court further observed that Thorndike had obstructed the audits of his own tax returns for the 2007 and 2008 tax years. JA240-41.

### 4. Acceptance of responsibility

#### a. Relevant facts

At the outset of the sentencing hearing, the district court advised defense counsel that, on the current record, it did not appear that the defendant had "met his burden with respect to acceptance of responsibility based on what I've heard so far." JA219. Therefore, before calculating the guideline range, the district court wanted to give Thorndike an opportunity to make a presentation on that issue. JA219. In response, defense counsel pointed out that Thorndike had pled guilty, admitted his guilt and provided "forthright" information to the probation office concerning "his life." JA219-20. Defense counsel then invited the district court to hear directly from Thorndike, who gave the following prepared statement:

> I do accept full responsibility for what I've done, Your Honor, and I apologize to the Court and anybody I may have harmed. And I regret what has happened.

JA220-21.

Following Thorndike's statement, the government advised the court of its view that Thorndike had not demonstrated acceptance of responsibility. The government noted the fact that Thorndike pled guilty after trial commenced. JA222. The government then recounted

Thorndike's post-plea statement to the media that "You can't fight City Hall," which suggested that Thorndike did not believe he was guilty, but rather was a "victim of overzealous prosecution." JA221-22. Next, the government observed that Thorndike had made material omissions in his financial disclosure to the probation office. JA222. Finally, the government argued that Thorndike had failed to "sincerely" and "earnestly" accept responsibility for what he did, not least because he had refused to make any statement concerning his actual conduct. JA222-23.

Later in the proceeding, the district court explained its rationale for denying Thorndike a two-level reduction for acceptance of responsibility under § 3E1.1:

> The defendant was charged in 28 counts in a superseding indictment. He pled guilty after opening statements and before any witnesses were called. The defendant made no statement during the plea proceeding that clearly demonstrated acceptance of responsibility for his offense, as opposed to statements acknowledging he was guilty of his offense. This was understandable, given the dramatic change in direction that his case was taking. However, by the time the defendant was interviewed for the Presentence Report, he had had time to think about his conduct.

But the statements to the press by the defendant on the day he pled guilty and his statements in the Presentence Report strongly suggest that his only reasons for pleading guilty were the two following reasons: First, after hearing a summary of the evidence the government proposed to offer during opening statements, he decided to cap his exposure to imprisonment. I believe counsel for the government characterized it as cutting his losses. It appears to me, at least, that he realized he was likely to be convicted on all or almost all of the counts in the superseding indictment. And a lot of the evidence that would be unfavorable to him would go into the record and constitute the basis for a higher guidelines calculation and/or grounds for an upward departure and/or grounds for a non-guidelines sentence above the applicable range of the Sentencing Guidelines. Second, it appears that the defendant realized that his sons were going to have to testify and he did not want them to be hurt.

There is absolutely nothing wrong with either of these motivations. And in fact, as the defendant notes, almost all defendants who plead guilty are pleading guilty to cut their losses. But here, conspicuously ab-

> sent is any indication of a scintilla of remorse for the harm to society resulting from the defendant's conduct or remorse for the fact that people for whom he prepared tax returns were exposed to civil penalties and the potential for criminal charges.
>
> * * *
>
> In addition, the fact that the defendant refers to himself in Paragraph 92 of the revised Presentence Report as a person who is—and I quote—"honest" with no qualification to take note of his extensive record of dishonest conduct . . . also provides to me, at least, an indication as to his mindset.
>
> In light of the foregoing, I conclude that the defendant has not met his burden of demonstrating that there should be a two-level decrease for acceptance of responsibility.

JA244-47.

**b. Governing law and standard of review**

As relevant here, § 3E1.1 of the Sentencing Guidelines allows a district court to reduce a defendant's offense level by 2 levels if "the defendant clearly demonstrates acceptance of responsi-

bility for his offense." § 3E1.1(a); *see United States v. Volpe*, 224 F.3d 72, 75 (2d Cir. 2000) (to qualify for a reduction under § 3E1.1(a), defendant must "'clearly demonstrate[s] acceptance of responsibility for his offense'") (quoting § 3E1.1). The burden is on the defendant to establish that he deserves a reduction under this provision. *See United States v. Chu*, 714 F.3d 742, 747 (2d Cir. 2013) (per curiam) ("[T]he defendant bears the burden of demonstrating that he qualifies for such a reduction.").

"Because the 'sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility,' his determination is given great deference on review." *United States v. Savoca*, 596 F.3d 154, 159 (2d Cir. 2010) (quoting U.S.S.G. § 3E1.1, comment (n.5)); *see also United States v. Reyes*, 9 F.3d 275, 280 (2d Cir. 1993) ("[T]he sentencing judge is unquestionably in a better position to assess contrition and candor than is an appellate court.") (internal quotation marks omitted). "Whether there has been an acceptance of responsibility is a fact-question and the circuit court will not reverse the district court's finding on this issue unless it is 'without foundation.'" *United States v. Giwah*, 84 F.3d 109, 112 (2d Cir. 1996) (quoting *United States v. Harris*, 13 F.3d 555, 557 (2d Cir. 1994)); *see also United States v. Broxmeyer*, 699 F.3d 265, 284 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2786

(2013); *United States v. Hirsch*, 239 F.3d 221, 226 (2d Cir. 2001); *Volpe*, 224 F.3d at 75. This Court reviews factual determinations concerning a defendant's acceptance of responsibility under the clearly erroneous standard. *See United States v. Champion*, 234 F.3d 106, 110-11 (2d Cir. 2000) (per curiam).

"The Guidelines make clear that a guilty plea does not entitle the defendant to an acceptance reduction and that the defendant must prove to the court that he or she has accepted responsibility." *Giwah*, 84 F.3d at 113; *see Hirsch*, 239 F.3d at 226. "Merely pleading guilty to an offense does not ensure the application of the reduction." *Savoca*, 596 F.3d at 159; *see* U.S.S.G. § 3E1.1, comment (n.3) ("A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right."). Moreover, a district court may deny credit for acceptance of responsibility if, for example, the defendant "has engaged in continued criminal conduct that bespeaks 'a lack of sincere remorse.'" *United States v. Defeo*, 36 F.3d 272, 277 (2d Cir. 1994) (quoting *United States v. Cooper*, 912 F.2d 344, 346 (9th Cir. 1990)).

**c. Discussion**

The district court did not abuse its discretion when it determined that Thorndike had not shown "a scintilla of remorse" for the harm he

caused to society and to his former clients. JA246. As an initial matter, it is worth noting that the district court gave Thorndike every opportunity to demonstrate genuine acceptance of responsibility. At the change of plea proceeding, Thorndike failed to give any meaningful account of his offense other than to concur that the government's proof satisfied the elements. JA127-28. At the sentencing hearing, nonetheless, the district court did not hold Thorndike's reticence during his plea colloquy against him. To the contrary, the district court explained that the "dramatic" change in the posture of the case, *i.e.*, from trial to guilty plea, could reasonably explain why Thorndike was not prepared to clearly demonstrate acceptance at his guilty plea. JA244-45.

But as of the time of sentencing, not only had Thorndike not affirmatively demonstrated acceptance, but also he had acted in a manner inconsistent with acceptance of responsibility. The district court noted that Thorndike's post-plea statement to the media that "You can't fight City Hall" seemed to confirm that he pled guilty not because he believed he was guilty but in order to limit his exposure at sentencing and to prevent his sons from having to testify against him. JA245. The district court was quick to note that such tactical considerations are commonplace and did not, standing alone, prevent the defend-

ant from receiving a reduction under § 3E1.1. JA245-46.

In giving him the benefit of the doubt, however, the district court advised Thorndike that he had not yet met his burden of affirmatively demonstrating acceptance in the form of remorse for his conduct. In response to this invitation to accept responsibility, Thorndike gave the following perfunctory statement:

> I do accept full responsibility for what I've done, Your Honor, and I apologize to the Court and anybody I may have harmed. And I regret what has happened.

JA220-21.

Ultimately, Thorndike's pro forma statement to the district court was simply not a genuine statement of acceptance. And, the district judge, who had observed Thorndike at trial, at his change of plea proceeding and at sentencing, was well within its discretion to make that judgment. *See United States v. Rivera*, 96 F.3d 41, 43 (2d Cir.1996) (upholding denial of § 3E1.1 reduction where district court found that the defendant had not credibly demonstrated acceptance of responsibility). *See also See United States v. Kumar*, 617 F.3d 612, 636 (2d Cir. 2010) (defendant's "'carefully worded plea allocution,'" which "'muted the gravity of his complicity'" and his withdrawal of objections to the PSR

on the day of a *Fatico* hearing justified denial of downward adjustment for acceptance of responsibility). This is particularly true where Thorndike continued to describe himself to the probation office as "honest" without any reference to his deceitful criminal conduct. PSR ¶92; JA246. In short, the district court properly concluded that Thorndike lacked any "scintilla" of remorse for his conduct or appreciation for the harm he had caused society and the taxpayers. JA246.

## II. The district court's denial of the defendant's request for downward departures is not reviewable, and was proper in any event.

### A. Relevant facts

The facts pertinent to consideration of this issue are set forth above in the Statement of Facts and Proceedings Relevant to this Appeal.

### B. Governing law and standard of review

This Court has explained that "a refusal to downwardly depart is generally not appealable." *United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006) (per curiam) (quotation marks and citation omitted); *see also United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005); *United States v. Ekhator*, 17 F.3d 53, 55 (2d Cir. 1994) ("When a district has discretion to depart from the sen-

tencing range prescribed by the Guidelines and has declined to exercise that discretion in favor of a departure, its decision is normally not appealable."); *United States v. Desena*, 260 F.3d 150, 159 (2d Cir. 2001).

A narrow exception to this general rule exists "when a sentencing court misapprehended the scope of its authority to depart or the sentence was otherwise illegal." *Stinson*, 465 F.3d at 114 (quotation marks and citation omitted). Absent "clear evidence of a substantial risk that the judge misapprehended the scope of his departure authority," however, this Court presumes that the judge understood the scope of his authority. *Id.* (internal quotations omitted); *see also United States v. Sero*, 520 F.3d 187, 193 (2d Cir. 2008) (per curiam) (noting that the "presumption that a district court understands its authority to depart may be overcome only in the rare situation where the record provides a reviewing court with *clear evidence* of a substantial risk that the judge misapprehended the scope of his departure authority") (internal quotations omitted). Such a substantial risk may arise "where the available ground for departure was not obvious and the sentencing judge's remarks made it unclear whether he was aware of his options." *United States v. Silleg*, 311 F.3d 557, 561 (2d Cir. 2002) (quotation marks and citation omitted).

### C. Discussion

A review of the record demonstrates that the district court thoroughly considered the defendant's requests for downward departures and properly rejected them. Indeed, in this appeal the defendant makes no attempt to suggest that the district court failed to apprehend its authority to depart on the bases proffered by the defendant. Any attempt to do so would be futile because the district court expressly ruled that applicable enhancements did not overlap and, to the extent they did, a departure was not warranted given the full scope of the defendant's conduct. JA241-42. Further, the district court expressly ruled that the defendant's charitable activities fell "well short" of extraordinary and were insufficient to justify a departure. JA260-61. Indeed, the court went even further to note that even if his charitable works did meet the standard for a departure, it would not exercise its discretion to grant a departure in this case. JA261. Finally, the district court also expressly denied the defendant's request for a downward departure for medical reasons. JA261. Under these circumstances, there is simply no basis for this Court to review the district court's denial of the defendant's request for downward departures. *See Stinson*, 465 F.3d at 114 (stating that "a refusal to downwardly depart is generally not appealable").

In any event, even if these arguments were reviewable, they would fail on the merits. First, Thorndike argues that the district court refused to consider a downward departure based on the purported cumulative effect of overlapping sentencing enhancements. In fact, the district court considered that precise issue, even though Thorndike never requested such a departure. JA241. The district court carefully analyzed whether the enhancements for sophisticated means, role and obstruction of justice substantially overlapped, and concluded that they did not. Thorndike has not presented any facts suggesting that the "restrained" and "limited" cumulative effects departure was warranted here. *See United States v. Lauersen*, 362 F.3d 160, 167-68 (2d Cir. 2004). Moreover, the district court reasonably determined that, even if a double-counting reduction was legally supportable and warranted, it would have upwardly departed two levels "because of the extensive nature of the obstruction of justice." JA241. Therefore, any error in this regard was harmless, particularly where the district court considered whether a sentence within the guideline range was greater than necessary to serve the purposes of a criminal sentence and determined that it was not.

Second, Thorndike challenges the district court's refusal to depart below the advisory guideline range based on his purported charita-

ble contributions to the Boys and Girls Village of Milford from 2007 through 2011. Thorndike cited to the following charitable works in support of his request: (1) a contribution of $2,000; (2) a contribution of 25 turkey dinners; (3) hosting two fundraisers that resulted in contributions from other donors totaling approximately $22,000 each; (4) permitting disadvantaged kids to use his pool every other week during the summer months; and (5) a solicitation of a $20,000 donation from Mauro Mercedes of Milford. JA150, JA160-61.

Under U.S.S.G. § 5H1.11, "[c]ivic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted." The district court reasonably determined that Thorndike's charitable activities, while commendable, were not extraordinary. JA260. Essentially, from 2007 through 2009, Thorndike contributed $2,000, helped the organization raise money from others and made his home available for parties sponsored by the orphanage. During this time, Thorndike's annual compensation was approximately $1 million. JA255, JA257. In light of the fact that Thorndike's contributions were relatively modest, the district court correctly concluded that his charitable activities fell "well short" of extraordinary. *See United States v. Canova*, 412 F.3d 331, 359

(2d Cir. 2005) (emphasizing that substantial personal sacrifice is a hallmark of this departure). Moreover, any error in this regard was harmless because the district court expressly stated that, even if Thorndike's charitable efforts were extraordinary, it would have elected not to depart "in light of the full scope of the defendant's conduct." JA261.

## III. The district court imposed a reasonable sentence after due consideration of the § 3553(a) factors.

### A. Relevant facts

The facts pertinent to consideration of this issue are set forth above in the Statement of Facts and Proceedings Relevant to this Appeal.

### B. Governing law and standard of review

The governing law and standard of review are set forth in Section I.A. *supra*.

### C. Discussion

#### 1. The district court's sentence

The district court explicitly recited the § 3553(a) factors it was required to consider, and stated that it had considered each of those factors. JA258-60. Having already discussed at length the circumstances of Thorndike's offense

and his failure to accept responsibility, the district court advised Mr. Thorndike:

> In your case, Mr. Thorndike, I'm most aware of the need to impose a sentence that constitutes just punishment in light of the full scope of your conduct, the need for the sentence imposed to promote respect for law, and also the need for specific deterrence

JA260.

In referencing the "full scope" of the defendant's conduct, the district court emphasized the fact that Thorndike's fraud was extensive and resulted in a substantial loss to the United States Treasury, beyond that which was reflected in the guideline range. JA261-62.

In considering specific deterrence, the district court was presented with ample evidence that Thorndike required deterrence. Not only had the defendant engaged in the multi-year fraud charged in the Superseding Indictment, but he had previously fabricated evidence in connection a bankruptcy proceeding and a civil lawsuit against his former fiancée. *See* PSR ¶¶47-50. Likewise, he had created false documents in connection with the IRS's prior civil audit of his 2007 personal tax return. *See* PSR ¶51. In short, there was substantial evidence that Thorndike

committed fraud as a matter of routine, and showed himself to be a likely recidivist.

The district court also noted that it had considered several mitigating aspects of Thorndike's history and characteristics, including his charitable works, his upbringing and his health, but concluded that such considerations did not warrant a sentence below the guideline range. JA260-61. To the contrary, the district court stated that, given the scale of the loss caused by Thorndike, a sentence above 72 months was likely warranted. JA260-62. And, absent the statutory maximum of 72 months, the district court would have upwardly departed to account for the true extent of the loss to the United States Treasury. JA261-62.

Having identified the guideline range, treated the guidelines as advisory and considered the § 3553(a) factors, the district court did not abuse its discretion in imposing a term of imprisonment of 72 months on Thorndike, who had orchestrated a vast scheme to defraud the United States Treasury and then led a sophisticated effort to obstruct the IRS as it investigated his conduct.

Thorndike disagrees with the district court's balanced analysis of the § 3553(a) factors, and directs this Court to statistics compiled by the United States Sentencing Commission. *See* JA271. He did not present these statistics to the

district court. The point of these statistics is apparently to show that Thorndike's sentence was substantially higher than the mean and average sentences imposed on Criminal History Category I defendants for "tax offenses" in 2012. Of course, the statistics say nothing about whether, under the circumstances of this case, the district court's sentence was unreasonable. *See United States v. Irving*, 554 F.3d 64, 76 (2d Cir. 2009) ("[A]verages of sentences that provide no details underlying the sentences are unreliable to determine unwarranted disparity because they do not reflect the enhancements or adjustments for the aggravating or mitigating factors that distinguish individual cases.") (quoting *United States v. Willingham*, 497 F.3d 541, 544 (5th Cir. 2007) (internal quotations omitted)). Moreover, here the district court imposed a sentence within the guideline range, rendering any concern about an unwarranted disparity mimimal. *See id.* ("[A] reviewing court's concern about unwarranted disparities is at a minimum when a sentence is within the Guidelines range.") (internal quotations omitted). Ultimately, it is hardly surprising that a professional tax preparer whose business model was based on pervasive fraud and who led a brazen effort to obstruct the IRS would be subject to multiple enhancements and a sentence that exceeds the "average" sentence in a run-of-the-mill tax prosecution.

### 2. Reassignment to a different judge on remand is not warranted.

This Court need only address Thorndike's request that the case be reassigned if it finds that remand is warranted. Thorndike offers little analysis in support of his request other than the conclusory assertion that the sentencing judge would be unlikely reach different legal conclusions on remand. Appellant's Br. at 32.

In *United States v. Robin*, 553 F.2d 8 (2d Cir. 1977) (per curiam), this Court identified the following three factors that it considers when evaluating whether reassignment to a different judge is appropriate:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

*Id.* at 10.

In his cursory argument, Thorndike focuses principally on the first factor, contending, in es-

sence, that the district court would not be deterred from imposing a 72-month sentence on remand. But, the focus of the inquiry is not whether the sentencing judge would be able to set aside previously expressed views that are unfavorable to Thorndike, but whether he could do so with respect to "previously expressed views or findings *determined to be clearly erroneous or based on evidence that must be rejected*." *Id.* (emphasis added). That is, on remand, the district court is not required to set aside the views it formed at sentencing, but only those views or findings that were clearly erroneous. Here, even if this Court determines that the district court erred in calculating the guidelines and imposed an unreasonable sentence, there is no evidence in the record that the sentencing judge would refuse to re-calculate the guideline range in accordance with this Court's instructions and impose a sentence within the parameters set by this Court.

Although Thorndike does not discuss them, the remaining two *Robin* factors also weigh against reassignment. First, even if this Court were to find error, there is no suggestion that any error in this case would be so unusual as to necessitate reassignment to preserve the appearance of justice. And second, because Judge Thompson has already invested significant resources in this case—in both pre-trial proceed-

ings and in sentencing proceedings—reassignment would entail the waste of resources significantly out of proportion to any meager benefit that could be derived from reassignment.

## Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: October 31, 2013

Respectfully submitted,

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**Federal Rule of Appellate Procedure 32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,746 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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# Addendum

**U.S.S.G. § 2T1.4. Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud**

**(a)** Base Offense Level:

**(1)** Level from § 2T4.1 (Tax Table) corresponding to the tax loss; or

**(2)** 6, if there is no tax loss.

For purposes of this guideline, the "tax loss" is the tax loss, as defined in § 2T1.1, resulting from the defendant's aid, assistance, procurance or advice.

**(b)** Specific Offense Characteristics

**(1)** If (A) the defendant committed the offense as part of a pattern or scheme from which he derived a substantial portion of his income; or (B) the defendant was in the business of preparing or assisting in the preparation of tax returns, increase by 2 levels.

**(2)** If the offense involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

COMMENTARY

***Application Notes:***

* * *

**3.** Sophisticated Means.--For purposes of subsection (b)(2), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means.

**U.S.S.G. § 3B1.1. Aggravating Role**

Based on the defendant's role in the offense, increase the offense level as follows:

**(a)** If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

**(b)** If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

**(c)** If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

**U.S.S.G. § 3C1.1. Obstructing or Impeding the Administration of Justice**

If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.

COMMENTARY

***Application Notes*:**

* * *

**4. Examples of Covered Conduct.--**The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:

**(A)** threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;

**(B)** committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to con-

duct that forms the basis of the offense of conviction;

**(C)** producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;

**(D)** destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it results in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;

**(E)** escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;

**(F)** providing materially false information to a judge or magistrate judge;

**(G)** providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;

**(H)** providing materially false information to a probation officer in respect to a presentence or other investigation for the court;

**(I)** other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§ 1510, 1511);

**(J)** failing to comply with a restraining order or injunction issued pursuant to 21 U.S.C. 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. 853(p);

**(K)** threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction.

This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.

**U.S.S.G. § 3E1.1. Acceptance of Responsibility**

**(a)** If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

**(b)** If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.