10-2645

To Be Argued By:
CHRISTOPHER M. MATTEI

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-2645

UNITED STATES OF AMERICA,

Appellee,

-vs-

RORY JOSEPH,

Defendant-Appellant.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

GUIDELINES

Statement of Jurisdiction

This is an appeal from a judgment entered on June 30, 2010 in the District of Connecticut (Janet C. Hall, J.), following the defendant's entry of a guilty plea to a one-count indictment. Appendix ("A") 27. The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on June 29, 2010, A7, and this Court has appellate jurisdiction over the defendant's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review

1. Did the district court commit plain error in failing to find that the Government breached the plea agreement by (1) advocating for a two-level enhancement for obstruction of justice, and (2) refusing to recommend a three-level reduction for acceptance of responsibility?

2. Did the district court err in (1) applying a two-level enhancement for obstruction of justice; (2) refusing to give credit for acceptance of responsibility; and (3) departing upward based on extreme psychological harm to the victim? In the alternative, was any error harmless because the district court indicated that its 120 month sentence was equally justified as a non-guideline sentence in light of the sentencing factors set forth at 18 U.S.C. § 3553(a)?

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Preliminary Statement

On June 16, 2008, the defendant attacked his live-in girlfriend and the mother of their child. He slapped her, pushed her, pinned her to the ground and threatened her with a broken pool cue and a meat cleaver.

On March 31, 2009, the defendant pleaded guilty in Connecticut Superior Court to several domestic violence offenses. He was released from custody, and a restraining order issued barring him from contacting or harming the

victim. Shortly after his release, the defendant attempted to recruit two individuals, one of whom was cooperating with the Bureau of Alcohol, Tobacco, Firearms & Explosives ("ATF"), to paralyze the victim. In connection with those efforts, the defendant purchased a firearm from an ATF cooperating witness. The defendant was arrested immediately after he took possession of the firearm, and detained in federal custody.

On December 22, 2009, the defendant pleaded guilty to a one-count indictment charging him with unlawful possession of a firearm by an individual who is subject to a restraining order, in violation of 18 U.S.C. §§ 922(g)(8) and 924(a)(2). The plea agreement set forth two potential guideline ranges, and the parties reserved their rights to seek additional adjustments to the applicable guideline range and to seek a non-guideline sentence.

Beginning in August 2009 and continuing through February 2010, the defendant engaged in a five-month campaign to recruit a fellow inmate to arrange the murder of the victim. On June 24, 2010, the district court credited witness testimony about this additional criminal conduct and sentenced the defendant to ten years' imprisonment followed by three years of supervised release. The court arrived at its sentence both based on an upward departure under the guidelines for extreme psychological harm to the victim and based on a non-guideline analysis of the factors set forth under 18 U.S.C. § 3553(a). This appeal followed.

The defendant now claims for the first time that the Government breached the plea agreement by advocating

for a two-level obstruction of justice enhancement under U.S.S.G. § 3C1.1, and by recommending against a downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1. The defendant also claims that the district court made clearly erroneous factual findings, resulting in the improper application of the obstruction of justice enhancement and the improper denial of a three-level reduction for acceptance of responsibility. Finally, the defendant claims that the district court erred by upwardly departing under U.S.S.G. § 5K2.3 based on extreme psychological harm to the victim. For the reasons set forth below, none of these claims has merit. The district court's ten-year sentence reflects a correct application of the guidelines and a reasonable consideration of the factors set forth at 18 U.S.C. § 3553(a).

Statement of the Case

On April 22, 2009, the defendant was arrested pursuant to a criminal complaint, and detained in federal custody. A2. On November 9, 2009, a federal grand jury returned a one-count indictment, charging the defendant with unlawful possession of a firearm by an individual who is subject to a restraining order, in violation of 18 U.S.C. §§ 922(g)(8) and 924(a)(2). A4, A9. On December 22, 2009, the defendant pled guilty to the indictment. A4.

On June 24, 2010, the district court sentenced the defendant to ten years' imprisonment, followed by three years' supervised release. A7. On June 29, 2010, the

defendant filed a timely notice of appeal. A7. He is in federal custody currently serving his sentence.

Statement of the Facts

A. Factual basis

On June 16, 2008, the defendant physically attacked his live-in girlfriend, who was also the mother of their child. PSR ¶ 31.[1] During the attack, the defendant broke a pool cue on a piece of furniture, and forced the victim to kneel before him. PSR ¶ 31. He then placed the butt end of the pool cue against her forehead, and pushed her back. PSR ¶ 31. In addition, the defendant slapped her across her face, pinned her on the ground, grabbed her head, threatened to stab her with the pool cue, and ran at her with a meat cleaver. PSR ¶ 31. Ultimately, a neighbor interceded on the victim's behalf and stopped the attack. PSR ¶ 31.

As a result of the attack, the defendant was arrested, and charged in state court with several domestic violence offenses. PSR ¶ 31. On January 15, 2009, the victim filed an *ex parte* application in state court, seeking a restraining order against the defendant. PSR ¶ 6. On January 29, 2009, following a hearing, Superior Court Judge Kenefick granted the application and issued an order restraining the

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[1] The facts presented are derived from the PSR and its addenda, which were submitted by the defendant in a separate sealed appendix. The Government also relies on evidence presented to the district court in connection with sentencing.

defendant from, "threatening, harassing, stalking, assaulting, molesting, sexually assaulting or attacking," the victim. PSR ¶ 7. The order was scheduled to expire on July 29, 2009. PSR ¶ 7.

On March 31, 2009, the defendant pled guilty to several misdemeanor offenses stemming from his attack on the victim, including threatening, unlawful restraint and reckless endangerment. PSR ¶ 31. On that same date, the defendant was sentenced on each count to concurrent terms of one year of imprisonment, execution suspended, and three years of probation. PSR ¶ 31. He was released from state custody on that date, but remained subject to the restraining order. PSR ¶¶ 7, 33.

On April 9, 2009, Willie Sanders, who was then the target of an ATF firearms investigation, contacted an ATF cooperating witness ("CW") to recruit him to participate in a murder-for-hire solicited by the defendant. PSR ¶ 9. At their initial meeting, Sanders advised the CW that the defendant was willing to pay $80,000 to have the victim "knocked off." Ex. 1;[2] PSR ¶ 9. At ATF's direction, the CW agreed to participate in the attack, but demanded that the defendant pay some money up front. PSR ¶ 9. At a meeting later that day, Sanders advised the CW that the defendant wanted the intended victim paralyzed instead of killed. PSR ¶ 9.

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[2] The Government's sentencing exhibits will be referred to by their exhibit number.

On April 10, 2009, Sanders contacted the CW and informed him that he had arranged a meeting with the defendant at the Branford Inn. PSR ¶ 10. At that meeting, the defendant informed the CW and Sanders of the victim's name, address, make of her vehicle and her daily schedule. PSR ¶ 10. The defendant also said that, "This is not a joke or a game." Ex. 2. When the CW asked the defendant what he wanted done to the victim, the defendant replied, "Just cripple the bitch," and followed up his instruction by saying, "she must not be walking anymore in her lifetime." Ex. 2.

Following this meeting, the CW and Sanders went to the victim's residence to observe her movements. Sanders said:

> . . . So, that means I gotta make sure this shit gets done. I'm going with you, cause I'm gonna make sure . . . you know what I mean? I'll break the bitch the fuck off, dog. I don't play, my nigger. . . . It's that easy. You know what I mean? Just to paralyze a bitch. That easy. . ..

Ex. 4.

Over the next several days, the defendant engaged in a series of negotiations about the planned attack. PSR ¶ 12. Negotiations stalled as it became clear that the defendant would not provide any money up front for the attack. PSR ¶¶ 12-14. Then, on April 17, 2009, the defendant asked whether the CW would be willing to sell him a firearm. PSR ¶ 14. At ATF's direction, the CW advised the

defendant that he had a .38 caliber handgun for sale. PSR ¶ 14. On April 22, 2009, the CW met with the defendant and provided him with a .38 caliber revolver in exchange for $125. PSR ¶ 15. Immediately after the defendant took possession of the firearm, ATF arrested him. PSR ¶ 15.

B. The guilty plea

On December 22, 2009, the defendant pleaded guilty to count one of the indictment. A4. The defendant entered his plea pursuant to a written plea agreement. A11.

The plea agreement included the parties' understanding of the defendant's eligibility for a three-level reduction under U.S.S.G. § 3E1.1 for acceptance of responsibility. In particular, the plea agreement provided:

> At this time, the Government agrees to recommend that the Court reduce by two levels the defendant's Adjusted Offense Level under section §3E1.1(a) of the Sentencing Guidelines, based on the defendant's prompt recognition and affirmative acceptance of personal responsibility for the offense. Moreover, the Government intends to file a motion with the Court pursuant to §3E1.1(b) recommending that the Court reduce defendant's Adjusted Offense Level by one additional level based on the defendant's prompt notification of his intention to enter a plea of guilty. This recommendation is conditioned upon the defendant's full, complete, and truthful disclosure to the Probation Office of information requested, of

the circumstances surrounding his commission of the offense, of his criminal history, and of his financial condition by submitting a complete and truthful financial statement. In addition, this recommendation is conditioned upon the defendant timely providing complete information to the Government concerning his involvement in the offense to which he is pleading guilty. The defendant expressly understands that the Court is not obligated to accept the Government's recommendation on the reduction.

The Government will not make this recommendation if the defendant engages in any acts which (1) indicate that the defendant has not terminated or withdrawn from criminal conduct or associations (Sentencing Guideline section §3E1.1); (2) could provide a basis for an adjustment for obstructing or impeding the administration of justice (Sentencing Guideline §3C1.1); or (3) constitute a violation of any condition of release. Moreover, the Government will not make this recommendation if the defendant seeks to withdraw his plea of guilty. The defendant expressly understands that he may not withdraw his plea of guilty if, for the reasons explained above, the Government does not make this recommendation.

A13.

The plea agreement also included a guidelines stipulation. A14. The parties agreed that the defendant was in Criminal History Category III. A14. The parties also agreed that the defendant started at a base offense level of 14 under U.S.S.G. § 2K2.1. A14. The parties disputed the application of a four-level enhancement under § 2K2.1(b)(6). A14. The parties agreed that, if the enhancement did apply and the defendant received full credit for acceptance of responsibility, the resulting guideline range would be 24 to 30 months imprisonment. A14. If the enhancement did not apply, the parties agreed that the guideline range would be 12 to 18 months imprisonment. A14.

Notwithstanding the foregoing preliminary calculations, the parties "reserve[d] their respective rights to argue for or oppose additional adjustments to, and departures from, the applicable guideline range as determined by the Court. Additionally, both parties reserve[d] their right to argue for and/or oppose a non-guideline sentence." A14. The Government explicitly described the foregoing provision during the defendant's change of plea colloquy, stating, "both parties have reserved their rights to argue for additional adjustments . . . to that guideline range, and also to argue for or oppose a non-guideline sentence," and the defendant confirmed that the written agreement, "as outlined by the Government, fully and accurately" reflected his understanding of the plea agreement. Government's Appendix ("GA") 20-21.

The guideline stipulation also provided that, "[i]n the event the Probation Office or the Court contemplates any sentencing calculations different from those stipulated by the parties, the parties reserve the right to respond to any inquiries and make appropriate legal arguments regarding the proposed alternate calculations." A15. Finally, the guideline stipulation indicated:

> The Government expressly reserves its right to address the Court with respect to an appropriate sentence to be imposed in this case. Moreover, it is expressly understood that the Government will discuss the facts of this case including information regarding the defendant's background and character, 18 U.S.C. § 3661, with the United States Probation Office and will provide the Probation Officer with access to its file, with the exception of grand jury material.

A15.

The plea agreement included the following provision regarding the consequences of any breach by the defendant:

> The defendant understands that if, before sentencing, he violates any term or condition of this agreement, engages in any criminal activity, or fails to appear for sentencing, the Government may void all or part of this agreement.

A18.

C. Sentencing

1. The PSR

The PSR found that the applicable base offense level, under Chapter Two of the Sentencing Guidelines, was 14. PSR ¶ 22. The PSR added four levels, under § 2K2.1(b)(6), because the firearm was possessed in connection with another felony offense. PSR ¶ 23. After subtracting three levels for acceptance of responsibility, the PSR arrived at a total offense level of 15. PSR ¶ 29. The PSR calculated that the defendant had accumulated three criminal history points, placing him in Criminal History Category II. PSR ¶ 32. As a result, the PSR concluded that the defendant faced a guideline sentencing range of 21-27 months' imprisonment. PSR ¶ 54.

The PSR also included a summary of the probation officer's interview of the victim. PSR ¶¶ 16-19. The victim reported that the defendant had abused her physically and verbally beginning in approximately February or March 2007. PSR ¶ 16. She also advised that she had received approximately five letters from prison inmates who had been given her address by the defendant. PSR ¶ 18. The victim advised the probation office that the defendant was "sucking the life out of me, and I want my life back." PSR ¶ 18.

The PSR noted that, depending on the facts adduced at the sentencing hearing, the defendant might be eligible for an upward departure under U.S.S.G. § 5K2.3. PSR ¶ 64.

2. The second addendum

On April 29, 2010, the Government provided the defendant and the probation office with materials related to its investigation of the defendant's post-arrest attempt to have the victim murdered. GA140. On May 10, 2010, the United States Probation Office issued a Second Addendum based on the information. The Second Addendum reported that, while Cornelius Taylor and the defendant were incarcerated together at Wyatt, the defendant informed Taylor that unless somebody "got rid" of the victim the defendant would be convicted of money laundering. PSR, Second Addendum. The defendant then asked Taylor to arrange a meeting between the defendant and a hitman, and offered Taylor $80,000 to arrange the murder. PSR, Second Addendum. The defendant provided Taylor with contact information for people who the defendant claimed would pay for the murder. PSR, Second Addendum.

The Second Addendum also described two letters that the victim received from Theodore Wooten, who, in 2008, had been incarcerated with the defendant at the New Haven Correctional Center. PSR, Second Addendum. In those letters, Wooten advised the victim that the defendant had provided him with the victim's name and address. PSR, Second Addendum. Wooten also informed the victim that, while they had been incarcerated together, the defendant had recruited Wooten to kill the victim. PSR, Second Addendum. When Wooten had refused, the defendant had approached several other inmates with the offer. PSR, Second Addendum.

In light of the defendant's efforts to solicit Taylor to arrange the victim's murder, the Second Addendum explained that the defendant might be eligible for a two-level enhancement for obstruction of justice under U.S.S.G. § 3C1.1. PSR, Second Addendum. Further, the Second Addendum queried whether the application of § 3C1.1. would jeopardize the defendant's eligibility for a downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1. PSR, Second Addendum. The PSR concluded that the defendant did not appear to be eligible for a reduction under § 3E1.1 because he had obstructed justice, and there were no extraordinary circumstances justifying a reduction. PSR, Second Addendum.

On June 1, 2010, the district court provided the parties with a summary of information that was excluded from the PSR, pursuant to Fed. R. Crim. P. 32. Government's Supplemental Sealed Appendix ("GSA") 1. In that summary, the district court advised the parties that the victim had been evaluated by a mental health treatment provider, who concluded that the victim "suffers from an extreme psychological injury . . . as a result of her relationship with the defendant." GSA1.

3. The victim impact statement

In advance of sentencing, the victim submitted a written statement to the Court. In that statement, the victim described the psychological trauma she continued to experience. GSA2. The victim reported that the

defendant's offense conduct and relevant conduct left her "scared all the time." The defendant had circulated her name and address to inmates at the various correctional facilities where he had been incarcerated in the hope that they might attack her. GSA2-3. She stated that it was "terrifying" to know that there may be people out there who intend to do her harm. GSA3. As a result of the defendant's conduct in this regard, she felt insecure in her home and experienced paranoia and anxiety whenever "someone looks in my direction too long." GSA3. The simple pleasure of taking her daughter to the park was no longer possible because "she always feel[s] like [she's] being watched." GSA3. The victim summed up her emotional state as follows:

> There is this feeling inside me that I can't get rid of . . . . I want my life back. I want to get back to a time where I didn't always wait for my fears to come to me. . . . I am doing my best not to let it control my life, but it does. I don't go out. I don't trust. I feel like I'm a sitting duck just waiting. . . . I will never be the same. One day he will be released and there is nothing that anyone can do to give me back my sense of safety or my famil[y's]. He has taken everything from me, but my life, the one thing he wants. And even though I may be breathing, I am not living. I have no way of getting back the sense of self, safety, security, or anything else he has taken from me.

GSA3-4.

4. The parties' sentencing memoranda

On April 21, 2010, prior to the issuance of the Second Addendum, the defendant filed his initial sentencing memorandum seeking a sentence of imprisonment of 21 months, which represented the bottom of the guideline range set forth in the PSR. GA47.

On May 21, 2010, the Government filed its sentencing memorandum. In that memo, the Government analyzed the applicability of U.S.S.G. § 3C1.1 and concluded that the defendant's post-arrest efforts to orchestrate the victim's murder justified the two-level enhancement. GA70. The Government also advised that it still intended to recommend a three-level reduction under § 3E1.1. GA72. The Government moved the district court to upwardly depart because (1) the defendant's criminal history score did not adequately reflect the likelihood that he would recidivate, and (2) the defendant's conduct caused extreme psychological harm to the victim. GA73-81. Finally, the Government sought a non-guidelines sentence above the advisory guidelines range in light of the sentencing factors set forth at 18 U.S.C. § 3553(a). GA81-86. The Government did not advocate for a specific sentence.

On May 27, 2010, the defendant filed a response to the Second Addendum, denying that he had ever solicited Wooten or Taylor to harm the victim. GA106, GA109-110. The defendant also complained that the Government had not advised him in advance of his guilty plea that it was aware of his post-arrest attempt to orchestrate the

victim's murder. GA112. The defendant did not claim that the Government had breached the plea agreement.[3]

On May 27, 2010, the Government filed a reply to the defendant's response to the Second Addendum. GA127. In its reply, the Government responded to the defendant's complaint about the timeliness of the Government's disclosure, as follows:

> . . . [I]n the plea agreement, both parties acknowledged that the stipulation of offense conduct attached to the plea agreement "[did] not purport to set forth all the relevant conduct and characteristics that may be considered by the Court for purposes of sentencing." Further, both parties reserved their rights to address the Court as to the appropriate sentence in this case, in light of the sentencing factors set forth at 18 U.S.C. § 3553(a). Finally, notwithstanding the fact that the Government was under no obligation in advance of the guilty plea to disclose certain information related to Mr. Taylor and Mr. Wooten, the

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[3] The defendant repeated this complaint during the sentencing hearing. In particular, in arguing that he should get a downward adjustment for acceptance of responsibility, the defendant complained that the conduct underlying the obstruction of justice enhancement had been known to the Government at the time of the guilty plea, but not disclosed to the defendant. According to the defendant, the Government's failure to disclose the information in advance of the plea was unfair. GA247.

> Government's then pending investigation into the defendant's attempts to recruit others to harm the victim certainly constituted a legitimate and compelling reason not to make such a disclosure.

GA128. Further, the Government advised that it had disclosed the information to the defendant 33 days in advance of the scheduled sentencing date. GA 127.

5. The sentencing hearing

The parties initially appeared for sentencing on June 1, 2010. At the outset, the district court asked the Government to identify the issues before the court. GA133. The Government stated that the district court first needed to calculate the defendant's guideline range, which would require a resolution of whether the defendant was eligible for the obstruction of justice enhancement and or a reduction for acceptance of responsibility. GA133-134. The Government maintained its position that it would not withhold its recommendation on acceptance based on the defendant's obstructive conduct. GA134. The defendant agreed that the guideline range was in dispute, and renewed his objection to the obstruction of justice enhancement. GA137. With respect to acceptance of responsibility, the defendant stated that he believed the Government had agreed to recommend a reduction. GA137. The district court responded:

> The government has agreed they are sticking by the agreement with one exception. That is your client should understand that if we go forward with the

> hearing which sounds like he wants to on this obstruction question. . . . If the Government feels which I would think they will, that the defendant is contesting facts around this claimed obstruction . . . [f]rivolously or without a basis, then their promise is basically void. They don't have to do that.

GA138. The defendant did not object or indicate in any way that he believed the Government's position, as articulated by the district court, constituted a breach of the plea agreement. Rather, the defendant acknowledged that he had been aware that the Government would seek upward departures and a non-guideline sentence.[4] GA138-139. The defendant also conceded that he was subject to a four-level enhancement under U.S.S.G. § 2K2.1(b)(6) because he possessed the firearm in connection with the felony offense of trying to harm the victim. GA141-142.

The defendant then requested a continuance because he wished to call witnesses to refute Taylor's expected testimony, but had not arranged for those witnesses to be

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[4] At the June 1st hearing, the district court gave the defendant every opportunity to claim that the Government breached the plea agreement and even warned that the Government may not recommend a reduction for acceptance if the defendant contested the facts surrounding the obstruction conduct. The defendant never made any claim of breach and, therefore, did not provide the Government or the district court with the opportunity to analyze the plain language of the plea agreement to determine whether, under its terms, the defendant was entitled to credit for acceptance or had himself violated the agreement, rendering it void.

present. GA138-140. The district court confirmed that the defendant had, indeed, received the Government's disclosure regarding Taylor and Wooten at the end of April, but continued the hearing until June 24, 2010. GA143.

On June 24, 2010, the parties again appeared for sentencing. The district court decided at the outset to address whether the two-level enhancement for obstruction of justice applied. GA151. The Government called Cornelius Taylor as a witness, who testified he met the defendant in August 2009, when they were both incarcerated at the Wyatt Detention Facility in Rhode Island. PSR, Second Addendum; GA158.

Beginning in August 2009 and continuing through February 2010, the defendant attempted to recruit and pay Taylor $80,000 to arrange the victim's murder. GA156-172. Although Taylor had no intention of helping the defendant, he told the defendant that he could arrange the murder. GA160-161. The defendant provided Taylor with several hand written notes containing specific and detailed information about the victim and the victim's family. GA162-165. The defendant intended for this information to be relayed to whomever was going to carry out the murder. GA163. In particular, the defendant provided Taylor with the victim's name, address, and a detailed physical description of the victim and her jewelry. GA162-164; Ex. 9. The defendant also provided Taylor with the makes and models of cars operated by the victim's family members. GA162. The defendant then provided Taylor with the name and phone number of a person who,

according to the defendant, would wire $80,000 to a bank account after the murder was completed. GA165-166; Ex. 11. According to Taylor, the defendant wanted the victim killed because he "didn't want [the victim] to be around where she can testify against him." GA167.

The defendant continued to press Taylor to arrange the murder through February 2010, at which time Taylor terminated his discussions with the defendant because he learned that the defendant had previously tried to recruit Sanders for the same purpose, but had failed to pay Sanders any money in advance. GA166; GA212. With respect to the duration of the defendant's solicitations, Taylor testified as follows:

> Q. Now over what period of time did you have these conversations with Mr. Joseph? I understand they started in August. How long did they continue?
>
> A. They continued until around February.
> . . .
>
> Q. Now, when you were having this conversation with Mr. Joseph and he's attempting to recruit you to do this, what was your impression of his level of seriousness?
>
> A. He was real serious.
>
> Q. What gave you that impression?

A. He wanted her gone because he said that he had a money laundering charge coming up on him. He had found passports in the safe and cut all the stuff up. He didn't want her to be around where she can testify against him.

GA166-167.

On cross examination, the defendant attempted to discredit Taylor by discussing Taylor's criminal history and suggesting that Taylor surreptitiously viewed the defendant's discovery materials and then fabricated the handwritten notes. GA173-193, GA201-202. The defendant also highlighted the fact that Taylor was awaiting sentencing and was hoping to get a benefit by cooperating with the Government. GA197. Further, in the following exchange, the defendant suggested that Taylor's conversations with the defendant did not continue through February 2010:

Q. You didn't continue to see him until February 2010, did you?

A. Say that again.

Q. You didn't continue to see him because he got moved out of your dorm.

A. He got moved right back a week later.

Q. He got moved right back a week later?

A. Yes, he did.

GA177-178.

On redirect examination, Taylor affirmed that the defendant's repeated efforts were serious, stating, "[t]he whole while when I was with my lawyer, he ke[pt] nagging me about getting it done. It was never a joke. He wanted me to get it done." GA212.

The Government then called ATF Special Agent Kurt Wheeler, primarily to rebut the defendant's suggestion on cross-examination that Taylor had created the handwritten notes by reviewing information in the defendant's discovery materials. Wheeler testified, in pertinent part, that discovery materials had been provided to the library at Wyatt Correctional Facility with instructions that only the defendant was to access them and that none of the materials were to be released to the defendant. GA218-219. Further, Wheeler testified that the discovery material itself did not contain certain information that appeared in the handwritten notes. GA219-222.

The district court fully credited Taylor's testimony and applied the two-level enhancement under § 3C1.1. In assessing Taylor's credibility, the district court observed:

> [I]n watching him, in listening to his testimony, in measuring the consistency of it, his demeanor while testifying, his reaction that varied depending on the questions being asked of him and the challenges being made to him on whether he had done

> something or said something. I'm only human. I can only judge whether I think someone is telling the truth or not. I believe he was. I have no question about it at all.

GA237.

In pertinent part, the district court made the following factual findings:

> Mr. Joseph approached [Taylor], not the other way around. . . . That's the testimony and asked him to do something. The something was to get a person to murder the victim. I believe there can't be any happenstance about this. It has to be – it is a conscious act by the defendant and his purpose is to obstruct justice. That is to make the victim at a minimum not available to exercise her rights at sentencing time to influence the decision of the court as to the sentence to be imposed.
>
> I believe that's clearly within the scope of 3[C]1.1 as a basis for obstruction in connection with sentencing. . . . The application note to 3[C]1.1 under note 4 lists specific conduct that's intended to be encompassed within the guideline. K is "threatening the victim of an offense in an attempt from preventing the victim from reporting the conduct constituting the offense of conviction." While the specific conduct at issue here that is attempting to have the victim killed so she would be unavailable at the time of sentencing is not

> specifically addressed. It seems to me that the conduct is far more egregious than a mere threat. . . . So it is the Court's conclusion based upon the testimony of Mr. Taylor that the defendant willfully and with specific intent to obstruct justice sought out Mr. Taylor and requested and discussed with him the idea of hiring someone through Mr. Taylor to murder the victim.

GA239-240.

The Court next asked the parties to address whether the defendant was eligible for a reduction for acceptance of responsibility. GA240. The Government stated that, because it had been aware of some of the defendant's obstructive conduct at the time of the guilty plea, it would not withhold its acceptance recommendation on the basis of the conduct itself. GA241. Instead, the Government withheld its recommendation based on the defendant's false denial of Taylor's testimony that, from August 2009 through February 2010, the defendant tried to have the victim killed. The Government concluded that the defendant had not satisfied the plea agreement's acceptance provision which specifically required him to disclose the circumstances surrounding his commission of the offense. GA241.

The district court concluded that the defendant was not entitled to an acceptance reduction because the defendant's post-arrest and post-plea conduct was simply inconsistent with acceptance of responsibility. GA 255-257. The district court began by finding that the

defendant's solicitation of Taylor was relevant to his offense, and then reasoned:

> [W]hen a person has committed such a crime including the relevant conduct of seeking to obtain a firearm, obtaining it in order to attempt to harm the victim, that when that person prior to sentencing seeks out someone else to harm the victim. In other words, continuing in his efforts to do what led to his offense of conviction and what's relevant conduct, then under Application Note 3, that evidence outweighs even the guilty plea . . . . I don't see how a person who commits a crime which involves a certain set of facts. In other words, the object of his crime, his intent, who then while incarcerated, in effect, does the same thing over again, can be said to have accepted responsibility.

GA256-257.

With a two-level enhancement for obstruction and no reduction for acceptance, the resulting guideline range was 37-46 months. GA257.

The district court then took up the Government's motion for an upward departure based on extreme psychological harm to the victim. GA258. In support of its motion, the Government called Wooten as a witness. Wooten testified that he met the defendant in May 2008 when they were incarcerated together in New Haven. GA261. According to Wooten, the defendant told Wooten that he "wanted [the victim] dead," and asked if Wooten

"could make it happen." GA263. The defendant provided Wooten with a note containing the victim's name, address and phone number. GA264. Wooten stated that he sent the victim three letters. GA266. In one of those letters, Wooten described the defendant's attempts to solicit him and others to harm the victim. GA269; Ex. 6.

Following Wooten's testimony, the district court invited the parties to comment on the Government's motion for an upward departure under § 5K2.3, and the other sentencing factors that the court was bound to consider. GA284-286. The district court reminded the parties that, "although we spent a lot of time on the guideline calculations [] that's not the end of the story, and my sentence must be imposed after reflecting upon a number of factors. Only one of which is the range and the other policy statements in the guidelines." GA286.

Defense counsel then made several arguments in support of a request for a sentence of 37 months, which was the bottom of the guideline range determined by the court. GA297. Specifically, defense counsel highlighted the defendant's relatively minor criminal history. GA287-288. In addressing the Government's motion for an upward departure, defense counsel argued that there was "not enough known" about the victim's condition to support a finding of extreme harm. GA290. The defendant argued against the Government's motion for an upward departure under § 4A1.3 as well and maintained that a sentence of 37 months reflected an appropriate balancing of § 3553(a) factors. GA297-298.

The district court then adopted the facts set forth in the PSR. GA306. With respect to the Second Addendum, the district court adopted the facts pertaining to the defendant's solicitation of Taylor to the extent those facts did not contradict Taylor's testimony. GA306-307. The court did not adopt the facts pertaining to the defendant's solicitation of Wooten. GA306. The court later noted, however, that it did credit Wooten's testimony that the defendant had provided him with the victim's address. GA310.

The Government began its remarks by playing the video recordings of the defendant's solicitation of Sanders and the CW. GA307-308. Those recordings included the defendant's instructions to Sanders and the CW to "cripple the bitch" and his caution that his plan was "not a joke or a game." GA308; Ex. 2. The recordings also included Sanders's statements about what he intended to do the victim: "I'll break the bitch the fuck off dog . . . Just to paralyze a bitch. That easy." GA308; Ex. 4. The Government then provided the district court with its assessment of the sentencing factors, highlighting those that also related to the Government motion for upward departures. GA308-313.

Following the Government's remarks, the victim addressed the district court, in pertinent part, as follows:

> I'm tired of being scared. I'm tired of waiting for something to happen so I can have my life back. I want to be able to laugh again and mean it. I want to be able to trust myself to take my daughter to the

> park and not worry about why this person is looking so long. Why that car followed me off the highway. I want to have that again. I want my family to have the security of living in their home and knowing that nothing is going to happen to them because God forbid. I would have to live with that too. Every action he made, I'm paying for. Every thing that he's done to me, I'm still paying for. I don't know how to stop it. So I'm here. So long as he's close to me, I will never get myself back. I can't do it. I have tried. I sought professional help. I talked to my friends. I talked to my family. It doesn't change me. I go through the motions. I put on the face. I try so hard. It is exhausting. It's been two years now. Two years where I don't deserve any of this. I just want me back.

GA322.

The victim's mother then addressed the district court, stating, in sum, that the defendant had caused the victim to suffer a loss of self-esteem and a paralyzing fear that prevented her from living and raising her child independently. GA323-324.

The district court first analyzed whether the harm suffered by the victim was sufficient to warrant an upward departure under § 5K2.3. GA326-329. It reviewed the legal framework governing § 5K2.3 and noted that the departure applies only where the victim has suffered a psychological injury that is more extreme than that which

would result from the criminal offense and any relevant conduct supporting other enhancements. GA326-329. The district court then held as follows:

> It is the court's conclusion that . . . a victim of this type of crime is going to suffer substantial psychological harm. . . . However, I don't view this as a normal case in the sense . . . that the initial domestic violence, as I understand it, . . . was a serious one. The victim was harmed physically. It sounds like psychological impact on her from that time and it was while her child was in the room with her. And to me that is not quote typical domestic violence setting. Further, it's not just that the defendant here sought to assault to conspire with someone to assault the victim, he sought in the first instance to have her murdered. That's beyond what you would expect from a normal conspiracy to assault someone. Further, a defendant could commit the normal crime of this enhancement by merely speaking to someone and asking them could they help . . . the defendant assault the person who is the protectee. The defendant here did far, far more than that. . . . To me Mr. Joseph's commission of this crime is not normal.

GA328-330.

The court described the injuries suffered by the victim as a result of the defendant's conduct, including: (1) a belief that "the situation will never end," (2)"extreme isolation," (3) an inability to live alone, (4) a "sense of

lack of safety and security," (5) "unusual suspicion," (6) "personality change," (7) "prolonged fear," and (8) a "sense of guilt" stemming from her family's endangerment. GA331-332. The court repeatedly stressed that, in its view, these injuries constituted "much more serious harm than would ordinarily result from this crime." GA331. The court based its decision on (1) the victim's statement at sentencing; (2) the victim's mother's statement at sentencing; and (3) the conclusion of a mental health treatment provider that the victim had suffered extreme psychological injury as a result of her relationship with the defendant. GA330.

The district court then assessed the sentencing factors set forth at 18 U.S.C. § 3553(a). First, the court commented on the nature and circumstances of the offense. The court reviewed the defendant's repeated attempts to inflict serious harm on the victim, commenting:

> [W]e have you on wiretaps talking about in effect, I want this person murdered. And then it becomes well, just cripple her. You are not talking to your friend and brother. You are talking to somebody you think is fully capable of doing what you are asking them to do. It can't possibly be a joke. . . . When you get to a point where you don't have the money to get them to do what you want them to do, you then in effect buy a gun in order to do it yourself.

GA335-336. The district court concluded, "I don't think today you have given up your desire to accomplish what you tried to establish with Mr. Sanders or Mr. Taylor . . . you are not yet deterred. GA337.

Second, the district court considered the defendant's history and characteristics. The district court noted that, despite a difficult upbringing, the defendant had a very good employment record, which would normally suggest a low risk of recidivism. GA337-338. Here, however, the risk of recidivism was more appropriately measured by the fact that his federal arrest "didn't have any effect upon [the defendant] at all." GA338.

Third, the court considered the need for the sentence to reflect the seriousness of the offense. In that regard, the court viewed the offense as serious because of "the risk of harm in domestic violence situations . . . and . . . [the defendant's] continued commitment to accomplish what you set out to accomplish in the commission of this offense." GA338-339.

Fourth, in considering the need for specific deterrence, the district court stated, "you are clearly not deterred now. . . . In effect, you have no respect really for the court which to me is what deterrence is all about." GA339.

Fifth, as to general deterrence, the district court commented that it was considering "the impact of the sentence in this case might have in deterring others in the public who might think about what you have done. I think there's a need for deterrence there, and it would be my

hope that this sentence will cause others to think that they would not do this. . .” GA339.

Sixth, the district court stated that its sentence would protect the public from further crimes, and, in particular, would “prevent [the defendant] from accomplishing the objectives you have set out several years ago to accomplish. . . .” GA339-340. The district court even questioned whether the lengthy sentence it was considering would actually protect the public. GA340.

In imposing sentence, the district court stated:

> I believe that your conduct could more than justify a disparity from the guidelines as I already found under the upward departure which I find resting upon my description primarily of the nature and circumstances of the offense, the need to protect the public and to provide deterrence and the history and characteristics of the defendant. I would ask if you please rise. It is the sentence of this court to impose upon you a period of incarceration of 120 months followed by a period of supervised release of three years. . . .
>
> I understand that the sentence I have imposed is an extremely long one. It is that statutory maximum. I thought very hard about whether the upward departure as well as the Booker variance sentence should go to the maximum. . . . But I finally concluded the maximum is appropriate for all the reasons I articulated. Most importantly while

> physical harm didn't result to this victim, it is only because the defendant happened to seek out a person to commit this crime, this harm, who went to a cooperating witness. God forbid had he gone to somebody else and so in my view, the maximum is appropriate. . . .
>
> In my view the sentence reflects both an upward departure for extreme psychological harm, and I would say for understatement of criminal history for the reasons I articulated in connection with the history and characteristics and the deterrence part of that. But it is also a variance sentence under post-Booker case law. . . . In other words, without the departures, I would have imposed the same sentence. However, because the government asked for the departures, I made those findings and the sentence reflects those departures as well.

GA341-347.

Summary of Argument

I. The Government did not breach the plea agreement by seeking an obstruction enhancement and recommending against a reduction for acceptance of responsibility. With respect to the obstruction enhancement, the plea agreement expressly permitted the Government to seek additional adjustments to the guideline range and a non-guideline sentence. With respect to the acceptance of responsibility adjustment, the plea agreement expressly provided that the defendant would not receive credit for acceptance of

responsibility if he engaged in any future criminal conduct or conduct constituting obstruction of justice. Further, in order to receive credit for acceptance, the defendant was required by the plea agreement to provide the probation office with truthful information about the circumstances surrounding the commission of his offense.

In addition, any error was not plain because the defendant himself breached the plea agreement by continuing to solicit Taylor after pleading guilty. Having breached the plea agreement, the defendant cannot now, for the first time on appeal, attempt to claim the benefits of it. Moreover, no prejudice accrued to the defendant as a result of any alleged breach because the district court explicitly stated that it would have imposed a non-guidelines sentence of 120 months, notwithstanding any adjustments or departures under the guidelines. The defendant is, therefore, entitled to no relief.

II. The district court properly calculated the guideline range and imposed a reasonable sentence in light of the § 3553(a) factors. The court properly found that from August 2009 to February 2010, the defendant repeatedly attempted to arrange the victim's murder in order to render her unavailable as a witness in this case. In view of that finding, the district court properly applied an obstruction of justice enhancement and denied the defendant a downward adjustment for acceptance of responsibility. Likewise, the district court properly exercised its discretion by upwardly departing under U.S.S.G. § 5K2.3 where it found that the defendant's offense conduct had caused the victim extreme psychological harm beyond that

which would normally occur as a result of the defendant's offense.

Finally, even if the district court erred in calculating the defendant's guideline range, the error was harmless because the district court properly assessed the sentencing factors set forth at 18 U.S.C. § 3553(a), stated that it would have imposed the same sentence even if the defendant had been in a different guideline range and imposed a sentence of 120 months' imprisonment.

Argument

I. The Government did not breach the plea agreement.

A. Relevant facts

The facts relevant to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing law and standard of review

In determining whether a plea agreement has been breached, the Court looks to "the reasonable understanding of the parties as to the terms of the agreement." *United States v. Riera*, 298 F.3d 128, 133 (2d Cir. 2002) (internal quotation marks omitted). The Court interprets plea agreements in accordance with principles of contract law, resolving ambiguities in favor of the defendant. *See id.*

To determine whether the Government has breached a plea agreement at sentencing, the Court must engage in a "fact-specific analysis." *United States v. Griffin*, 510 F.3d 354, 361 (2d Cir. 2007). There is no "bright-line rule," and "[t]he circumstances must therefore be carefully studied in context . . . ." *Id.* (internal quotation marks omitted). "[W]here the government's commentary reasonably appears to seek to influence the [sentencing] court in a manner incompatible with the agreement, [this Court] will not hesitate to find a breach . . . ." *Id.*

When the defendant breaches the plea agreement, "the Government is at least entitled to specific performance of the plea agreement." *United States v. Cimino*, 381 F.3d 124, 127 (2d Cir. 2004) (citing *United States v. Alexander*, 869 F.2d 91, 95 (2d Cir. 1989)). The Government also "has the option . . . to treat [the agreement] as unenforceable." *Cimino*, 381 F.3d at 127. *See also United States v. Byrd*, 413 F.3d 249, 251 (2d Cir. 2005) (per curiam) ("When the defendant is the party in breach, the government is entitled to specific performance of the plea agreement or to be relieved of its obligations under it"); *United States v. Merritt*, 988 F.2d 1298, 1313 (2d Cir. 1993) ("a defendant who materially breaches a plea agreement may not claim its benefits").

"[This Court] reviews interpretations of plea agreements *de novo* . . . ." *Riera*, 298 F.3d at 133.

A defendant who fails to object in district court to the Government's alleged breach of a plea agreement has forfeited the claim, unless the defendant can show plain

error. *See Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009); *United States v. MacPherson*, 590 F.3d 215, 219 (2d Cir. 2009) (per curiam). "Such a breach is undoubtedly a violation of the defendant's rights, but the defendant has the opportunity to seek vindication of those rights in district court; if he fails to do so, Rule 52(b) clearly sets forth the consequences for that forfeiture as it does for all others." *Puckett*, 129 S. Ct. at 1429 (citation omitted).

Review for plain error "involves four steps, or prongs":

> First, there must be an error or defect – some sort of deviation from a legal rule . . . . Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings. Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error – discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

Id. (citations and internal quotation marks omitted).

To "affect substantial rights," an error must have been prejudicial and affected the outcome of the district court proceedings. *United States v. Olano*, 507 U.S. 725, 734 (1993). This language used in plain error review is the same as that used for harmless error review of preserved

claims, with one important distinction: In plain error review, it is the defendant rather than the government who bears the burden of persuasion with respect to prejudice. *Id.*

This Court has made clear that "plain error" review "is a very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings." *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (internal quotation marks omitted). Indeed, "the error must be so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Plitman*, 194 F.3d 59, 63 (2d Cir. 1999) (internal quotation marks omitted).

C. Discussion

1. The Government did not breach the plea agreement by seeking a two-level enhancement under U.S.S.G. § 3C1.1.

At sentencing, the Government advocated for a two-level enhancement under § 3C1.1 based on the defendant's five-month campaign – from August 2009 through February 2010 – to orchestrate the victim's murder. In doing so, the Government fully complied with the plain language of the plea agreement.

In the plea agreement, the parties expressly reserved their rights to argue for additional adjustments to the guideline range, as follows:

> The parties reserve their respective rights to argue for or oppose additional adjustments to, and departures from, the applicable guideline range as determined by the Court. Additionally, both parties reserve their right to argue for and/or oppose a non-guideline sentence.

A14. The foregoing language unambiguously put the defendant on notice that the Government might seek additional adjustments not included in the guideline stipulation and might request a sentence above the guideline range. *See United States v. Habbas*, 527 F.3d 266 (2d Cir. 2008) (holding that there was no breach of plea agreement where government argued for an enhancement not included in plea agreement because the range was not binding and the agreement "warned in several different ways that the government was likely to advocate for a higher sentence").

Further, during the defendant's change of plea colloquy, the Government summarized this provision of the plea agreement, stating, "both parties have reserved their rights to argue for additional adjustments and – to that guideline range, and also to argue for or oppose a non-guideline sentence." GA20. The defendant later confirmed that the written plea agreement, "as outlined by the Government, fully and accurately" reflected his understanding of the plea agreement. GA21. *See MacPherson*, 590 F.3d at 223 (Newman, J., concurring) ("A plea colloquy can be examined to determine a defendant's understanding of a plea agreement.").

Not only did the defendant understand that the Government had the right to seek additional adjustments, but he also acknowledged that the Government could "present additional relevant offense conduct to the attention of the Court in connection with sentencing." A20. Thus, the defendant was fully aware that the guideline ranges set forth in the plea agreement were not binding on the Government, the court, or, for that matter, the defendant. He was also aware that additional information could be brought to the court's attention in connection with sentencing. *See Habbas*, 527 F. 3d at 270; *MacPherson*, 590 F.3d at 219 ("[T]he plea agreement and the plea colloquy put the defendant on notice that the *Pimintel* estimate was not binding on the prosecutor.").

Ignoring the plain terms of the plea agreement, the defendant cites to *United States v. Palladino*, 347 F.3d 29 (2d Cir. 2003), for the proposition that the Government may not seek an enhancement based on information known to the Government at the time of the plea unless that enhancement is reflected in the plea agreement. *See* Def.'s Br. at 15. In *Habbas*, however, this Court rejected the defendant's view of *Palladino*:

> [The defendant] contends *Palladino* established a rule that, absent new justifying facts not known to the government at the time of its *Pimentel* estimate, the government is forbidden from advocating or supporting a higher level than it estimated. This misreads *Palladino*. The holding of *Palladino* depended on its particular facts, which were substantially different from the facts herein.

> *Palladino* did not purport to adopt such a broad rule.

527 F.3d at 271. *See also MacPherson*, 590 F.3d at 219 ("*Habbas* explicitly rejected . . . broad rule, categorically prohibiting government from deviating from a *Pimintel* estimate, absent newly discovered facts.") (internal quotations omitted). Rather, this Court has permitted the Government to seek enhancements that were not included in the plea agreement where the plea agreement put the defendant on notice of that possibility.

None of the circumstances that this Court found compelling in *Palladino* are present here. First, the defendant plainly misquotes the plea agreement by suggesting that the parties' offense level estimate was preceded by the language, "based on the information available to the parties." Def.'s Brief at 10, 16.[5] It was not. Rather, that clause related solely to the parties' preliminary calculation of the defendant's criminal history category, not his offense level. A14.

Second, here the Government did not rely solely on information known at the time of the defendant's guilty plea. *See Palladino,* 347 F.3d at 34 (finding breach of plea agreement where Government had "full knowledge" of

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[5] In *Palladino*, the Court found that similar language was relevant to the issue of whether the agreement barred the Government from seeking additional enhancements. This Court has subsequently questioned the materiality of such language to a breach analysis. *See Habbas*, 527 F.3d at 272, n.1.

information justifying new enhancement at time of plea). Although it is true that the Government was aware of Taylor's allegations when the defendant pleaded guilty, ATF was at that very time investigating the defendant's ongoing obstructive conduct, which conduct continued for over a month after he pleaded guilty. GA128, GA166. The Government had no duty to disclose the subject matter of an ongoing investigation and was not barred from seeking an enhancement based on a single course of obstructive conduct that started before and ended after the guilty plea.

2. The Government did not breach the plea agreement by refusing to recommend a three-level downward adjustment under U.S.S.G. § 3E1.1.

At sentencing, the Government recommended against any downward adjustment under U.S.S.G. § 3E1.1. Two provisions of the plea agreement plainly permitted the Government to withhold its recommendation.

First, in the plea agreement, the Government expressly conditioned its recommendation on the "defendant's full, complete, and truthful disclosure to the Probation Office of information requested, of the circumstances surrounding his commission of the offense." A13. This language echoes § 3E1.1, application note 1(A), which provides that "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." U.S.S.G. § 3E1.1 (n. 1(A). Here, the defendant flatly failed to disclose to the

probation office that he had engaged in conduct that the district court properly found was relevant conduct, that is, his attempted solicitation of another individual to murder the victim, who would be a primary witness against him at his sentencing. And, in fact, even at sentencing, he repeatedly and falsely denied that he had engaged in such conduct.

Second, the plea agreement expressly stated that the Government would not make the acceptance recommendation if "the defendant engages in any acts which (1) indicate that the defendant has not terminated or withdrawn from criminal conduct . . .; [or] (2) could provide a basis for and adjustment for obstructing or impeding the administration of justice." A13. Clearly, Taylor's testimony, which the district court properly credited, established that the defendant continued to engage in a criminal conspiracy to murder the victim after the defendant pleaded guilty. In particular, Taylor's testimony established that the defendant's solicitations continued through February 2010, at which time Taylor terminated the discussions. As a result of his post-plea involvement in the criminal conspiracy, the defendant plainly failed to satisfy the conditions required to trigger the Government's obligation to recommend a reduction.[6]

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[6] At sentencing, the Government did not focus on the defendant's disqualification for acceptance on this ground because the defendant did not claim that the Government had breached the plea agreement.

The defendant's reliance on *Griffin*, 510 F.3d 354, is misplaced. First, the plea agreement in this case is materially different than the agreement in *Griffin*. Unlike *Griffin*, the plea agreement in this case expressly conditioned the Government's recommendation on, *inter alia*, the defendant's truthful disclosure of the circumstances of his offense and his termination of criminal conduct. No such conditions were set forth in the *Griffin* plea agreement. Second, in *Griffin*, at the time of the guilty plea, the Government had been fully aware that the defendant intended to contest certain conduct at sentencing, and, nevertheless, agreed to the three-level reduction in the plea agreement. *See id*. at 359. Here, because the defendant's ongoing criminal conduct was under investigation at the time of the plea, the parties had not even discussed the potential impact of that conduct on sentencing. And, of course, at the time of the guilty plea, the Government was not aware of whether the defendant would continue to attempt to hire someone to murder the victim and whether he would ultimately deny that he had engaged in such conduct.

For the foregoing reasons, the Government's refusal to recommend a downward adjustment under § 3E1.1 was not error at all.[7]

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[7] The defendant also suggests that the Government breached the plea agreement by (1) providing the probation office with information regarding the defendant's post-arrest and post-plea conduct and (2) advocating for a non-guideline sentence. *See* Def.'s Brief at 8-9. The defendant seems to (continued...)

3. Any error was not plain.

If any error occurred, it was not plain. Here, the defendant was not entitled to any benefit under the plea agreement because his post-plea conduct was an obvious breach of the plea agreement. *See Byrd*, 413 F.3d at 251 (holding that defendant breached plea agreement requiring him to provide truthful information regarding his knowledge of criminal activity by lying about his relationship with other drug traffickers)*; See Merritt*, 988 F.2d at 1313 ("[A] defendant who materially breaches a plea agreement may not claim its benefits"). Had the defendant claimed below that the Government had breached the plea agreement, the Government would have had an opportunity to respond and argue that the Government's purported breach was no breach at all where the defendant's actions, in trying both before and after the guilty plea to hire someone to murder the victim, had rendered the plea agreement unenforceable. *See United States v. Brumer*, 528 F.3d 157, 159 (2d Cir. 2008) ("Defendants thus materially breached the plea agreements, and having done so, relieved the government

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[7] (...continued)
abandon these points in his brief and cites no evidence in the record to support them. In fact, several provisions of the plea agreement expressly authorized the Government to provide the probation office with additional information concerning the defendant and his offense, A14-A15, A20, and the plea agreement expressly allowed the Government to seek a non-guideline sentence. A14.

of its obligations to comply with them."); *United States v. Gregory*, 380 F.3d 160, 164 (2d Cir. 2001) (finding that defendant breached provision of cooperation agreement barring him from committing or attempting to commit a crime where he was arrested for assault within one week of signing cooperation agreement even though charges were later dismissed). Further, based on the district court's findings that the defendant engaged in post-plea criminal and obstructive conduct, it is apparent that the district court would have concluded that the defendant did breach the plea agreement, thereby releasing the Government from its obligations.

4. Any error did not affect the outcome of the proceeding or seriously affect the fairness of judicial proceedings.

To the extent that this Court concludes that the district court committed plain error in not finding that the Government breached the plea agreement, that error did not affect the outcome of the district court proceedings or "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." *Puckett*, 129 S. Ct. at 1429. With no obstruction enhancement and full credit for acceptance of responsibility, the defendant's guideline range would have been 21-27 months. With the obstruction enhancement and without the acceptance reduction, his guideline range increased to 37-46 months. This increase became insignificant in light of the district court's well-founded view that the sentencing factors set forth at 18 U.S.C. § 3553(a) demanded a sentence of 120 months' imprisonment. *See Habbas*, 527 F.3d at 270

(holding that, where court's imposition of eight-year sentence exceeded sentencing range that included an enhancement sought by the Government, the plea agreement's omission of that enhancement was rendered harmless).

II. The district court properly calculated the guideline range and imposed a reasonable sentence in light of the sentencing factors.

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing law and standard of review

1. 18 U.S.C. § 3553(a)

After the Supreme Court's holding in *United States v. Booker*, 543 U.S. 220 (2005) rendered the Sentencing Guidelines advisory rather than mandatory, a sentencing judge is required to: "(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence." *See United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006).

Consideration of the guidelines range requires a sentencing court to calculate the range and put the calculation on the record. *See Fernandez*, 443 F.3d at 29.

This Court "review[s] the sentencing court's interpretation of the Sentencing Guidelines *de novo*, but review[s] its related findings of fact only for clear error." *United States v. Potes-Castillo*, 638 F.3d 106, 108 (2d Cir. 2011).

The requirement that the district court consider the section 3553(a) factors 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) (affirming a brief statement of reasons by a district judge who refused downward departure; judge noted that the sentencing range was "not inappropriate"). There is no "rigorous requirement of specific articulation by the sentencing judge." *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005). "As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, [this Court] will accept that the requisite consideration has occurred." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005).

This Court reviews a sentence for reasonableness. *See Rita*, 551 U.S. at 341. The reasonableness standard is deferential and focuses "primarily on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005). The Supreme Court has reaffirmed that the reasonableness standard requires sentencing challenges to satisfy an abuse-of-

discretion standard. *See Gall v. United States*, 552 U.S. 38, 46 (2007). Further, the 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.'" *Fernandez*, 443 F.3d at 27 (citations 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), *cert. denied*, 131 S. Ct. 140 (2010).

2. U.S.S.G. § 3C1.1

U.S.S.G. § 3C1.1 provides:

> If (A) 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 (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

"[This Court] subject[s] an obstruction-of-justice enhancement to a mixed standard of review." *United States v. Khedr*, 343 F.3d 96, 102 (2d Cir. 2003) (citing *United States v. Cassiliano*, 237 F.3d 742, 745 (2d Cir. 1998)). "The sentencing court's findings as to what acts were performed, what was said, what the speaker meant by her words, and how a listener would reasonably interpret those words will be upheld unless they are clearly erroneous. A ruling that the established facts constitute obstruction or attempted obstruction under the Guidelines, however, is a matter of legal interpretation and is to be reviewed *de novo*, giving 'due deference to the district court's application of the guidelines to the facts.'" *Cassiliano*, 237 F.3d at 745 (quoting 18 U.S.C. § 3742(e) (1994)) (internal citations omitted).

"The § 3C1.1 enhancement for obstruction is to be imposed only if the obstruction, or attempted obstruction,

was 'willful[ ].'" *Khedr*, 343 F.3d at 102. Generally, the application applies in cases where "the defendant had the specific intent to obstruct justice." *United States v. Hernandez,* 83 F.3d 582, 585 (2d Cir. 1996).

3. U.S.S.G. § 3E1.1

The Guidelines authorize the sentencing court to grant a two-step decrease in offense level to a defendant who "clearly demonstrates acceptance of responsibility for his offense." *United States v. Defeo*, 36 F.3d 272, 277 (2d Cir. 1994) (quoting § 3E1.1(a)). "Entry of a plea of guilty does not assure a defendant of such a reduction." *Id.* In particular, "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." U.S.S.G. § 3E1.1(a), comment. (n.1(A)). Relevant conduct for which a defendant must take responsibility included "acts . . . that occurred . . . in the course of attempting to avoid detection or responsibility for that offense." U.S.S.G. § 1B1.3(a)(1); *see* U.S.S.G. § 3E1.1, comment. (n.1(A)) (cross referencing § 1B1.3).

Even where a defendant enters a guilty plea and truthfully admits his relevant conduct, this admission "may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility." U.S.S.G. § 3E1.1, comment (n.3). The court may deny credit for acceptance if it determines, for example, that the defendant's claim that he accepted responsibility for the offense of conviction is not credible, or determines that the defendant has engaged in continued criminal conduct that

bespeaks "a lack of sincere remorse." *United States v. Cooper*, 912 F.2d 344, 346 (9th Cir. 1990). Moreover, "[t]he Guidelines state that it is rare that a defendant should be granted a reduction in offense level for acceptance of responsibility when the court has deemed it appropriate to increase [his] offense level for obstruction of justice." *Defeo*, 36 F.3d at 277 (citing U.S.S.G. § 3E1.1, comment (n.4)).

Because the sentencing court is in a unique position to evaluate a defendant's acceptance of responsibility, its determination "is entitled to great deference on review," and will "not be disturbed unless it is without foundation." *United States v. Moskowitz*, 883 F.2d 1142, 1155 (2d Cir. 1989) (citing U.S.S.G. § 3E1.1, comment (n.5.)).

4. U.S.S.G. § 5K2.3

U.S.S.G. § 5K2.3 provides:

> If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked.
>
> Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial

> impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

To justify a departure under § 5K2.3, the district court needs to find a psychological injury much more serious than one would expect from the typical offense. *See, e.g., United States v. Crispo*, 306 F.3d 71, 85-86 (2d Cir. 2002). In addition to the injury being "much more serious than that normally resulting from the commission of the offense," there must also be "a substantial impairment of the intellectual, psychological, emotional or behavioral functioning of a victim," with an impairment "likely to be of an extended and continuous duration . . . manifest[ing] itself by physical or psychological symptoms or by changes in behavior patterns." *United States v. Lasaga*, 328 F.3d 61, 65 (2d Cir. 2003).

C. Discussion

1. U.S.S.G. § 3C1.1

Based on the credible testimony of Taylor and Special Agent Kurt Wheeler, the district court properly found that the defendant attempted to arrange the victim's murder in order "to make the victim at a minimum not available to

exercise her rights at sentencing time to influence the decision of the court as to the sentence to be imposed." GA240. The defendant challenges the district court's finding that Taylor was credible as clearly erroneous.

The district court properly credited Taylor's testimony after giving it full and careful consideration. In explaining why it credited Taylor, the district court acknowledged that it had approached Taylor's testimony with skepticism because Taylor, who was incarcerated and awaiting sentencing on a federal narcotics conviction, had an incentive to fabricate his testimony. GA237. The district court closely scrutinized Taylor's testimony as follows:

> [I]n watching him, in listening to his testimony, in measuring the consistency of it, his demeanor while testifying, his reaction that varied depending on the questions being asked of him and the challenges being made to him on whether he had done something or said something. I'm only human. I can only judge whether I think someone is telling the truth or not. I believe he was. I have not question about it at all.

GA237. In addition to Taylor's credible demeanor and testimony, the district court noted that Taylor's testimony was corroborated by Special Agent Wheeler's testimony. Based on Wheeler's testimony, the district court properly concluded that, contrary to the defendant's suggestion, Taylor could not have obtained certain details about the victim and the victim's family by surreptitiously reviewing the defendant's discovery materials because that

information was not contained in the discovery materials. The district court's thorough assessment of Taylor's testimony was not clearly erroneous. GA238.

The defendant also challenges the district court's finding that he attempted to arrange the victim's murder in order make her unavailable at sentencing. Taylor's testimony and the circumstances surrounding the defendant's conduct support the district court's conclusion. In describing the defendant's motivation, Taylor testified, "[h]e didn't want her to be around where she can testify against him." GA167. Further, when the defendant first solicited Taylor, he was in federal custody awaiting trial on a firearms charge stemming, in part, from his relationship with the victim. Evidence concerning that relationship was relevant to show the defendant's motive for obtaining the weapon and to provide context for other evidence, *i.e.*, the recordings where the defendant discusses his relationship with the victim. Therefore, the victim's testimony would have been relevant at trial. The district court could have properly inferred from these circumstances and Taylor's testimony that the defendant acted in order to prevent the victim's participation in this prosecution. *See United States v. Sovie*, 122 F.3d 122, 128-29 (2d Cir. 1997) (upholding obstruction of justice enhancement where defendant sent victim threatening letters from jail to induce her to drop the charges).

More importantly, the defendant continued his efforts to arrange the victim's murder even after he pleaded guilty. The district court could have properly inferred from that fact that the defendant was still seeking to obstruct

justice by preventing the victim's participation at sentencing. *See United States v. Altman*, 901 F.2d 1151, 1163-65 (2d Cir. 1990) (upholding obstruction of justice enhancement where defendant contacted several witnesses while awaiting sentencing and asked one witness not to testify). Given the fact that the victim was likely to play a central role at sentencing, the district court could have properly inferred that the defendant's post-plea conduct aimed to make the victim unavailable at sentencing. This conclusion was not clearly erroneous.

The defendant does not dispute that § 3C1.1 applies where a defendant attempts to prevent the victim from exercising her rights at sentencing. Rather, the defendant argues that the district court's conclusion was clearly erroneous because, according to the defendant, he could not have foreseen that the victim would play a role in the prosecution, and, therefore, lacked the motive attributed to him by the district court. *See* Def.'s Brief at 22-23. In essence, the defendant argues that, in August 2009, he would not have entertained the possibility of being convicted, and, therefore, would not have considered the victim's testimony at trial or sentencing to be a threat. The defendant's claim is not supported by any evidence and is not credible.

The defendant again ignores the fact that his solicitations continued from August 2009 to February 2010. If, according to the defendant, he was incapable of understanding the victim's role in the prosecution in August 2009, surely that fact had changed by February 2010. By that time, he had received the Government's

discovery materials and had stipulated that he had previously attempted to have the victim crippled. Moreover, the defendant's self-serving claims as to what he "would have" believed do not render the district court's contrary findings clearly erroneous.

2. U.S.S.G. § 3E1.1

The district court properly denied the defendant's request for a downward adjustment under § 3E1.1. In essence, the district court concluded that the defendant's post-arrest and post-plea conduct was simply inconsistent with acceptance of responsibility. The district court stated:

> I don't see how a person who commits a crime which involves a certain set of facts. In other words, the object of his crime, his intent, who then while incarcerated, in effect, does the same thing over again, can be said to have accepted responsibility for his offense.

GA257. Given the defendant's five-month campaign to orchestrate the victim's murder while in federal custody, there was more than an adequate foundation for this finding.

The defendant first argues that he did not frivolously contest relevant conduct, pointing to the fact that the district court did not rely on Wooten's testimony in its ultimate sentencing decision. He misunderstands the court's ruling on acceptance, however, which relied, not on his denials, but on a finding that his post-arrest and

post-plea conduct was simply inconsistent with acceptance of responsibility.

Even if the court had denied the acceptance reduction because the defendant had frivolously contested or falsely denied relevant conduct, this denial would have been justified. In his response to the Second Addendum, the defendant stated, "First and foremost, the defendant denies the allegations which have been made by . . . Cornelius Taylor as set forth in the Second Addendum." GA109. At sentencing, the defendant accused Taylor of lying through vigorous cross-examination and the presentation of evidence. GA172-212. Defense counsel argued that Taylor should not be believed, stating, "There's a motive for him to lie and discredit my client. . . . There's a motive to lie because he's trying to get credit because the guy is facing five to 10 years or more." GA230. Based on the foregoing, any finding that the defendant had falsely denied and frivolously contested the fact that he had solicited Taylor to murder the victim was not without foundation. *See United States v. Fredette*, 15 F.3d 272, 277 (2d Cir. 1994).

The defendant next argues that the defendant's solicitation of Taylor was not relevant conduct, and, therefore, not something for which he was required to accept responsibility. Again, the district court's finding did not turn on the defendant's refusal to accept responsibility for his solicitation of Taylor. Still, it is hard to imagine how the defendant's post-arrest and post-plea attempts to murder one of the Government's central witnesses could be anything other than relevant conduct. *See* U.S.S.G. § 1B1.3(a)(1) (defining relevant conduct as "all acts . . .

that occurred . . . in the course of attempting to avoid detection or responsibility for that offense.").

3. U.S.S.G. § 5K2.3

The district court properly applied an upward departure under § 5K2.3. The court identified several features of the defendant's offense conduct that made the offense itself unusually egregious. In particular, the court focused on the severity of the initial domestic attack that prompted the issuance of the restraining order; the fact that the defendant initially intended to have the victim murdered; and the defendant's repeated efforts to bring harm to the victim. In characterizing the defendant's offense as abnormally severe, the court considered the type of harm that would normally result from the defendant's conduct and acknowledged that such conduct would typically cause "substantial psychological harm." GA328. The court then catalogued the various types of harm suffered by the victim in this case, concluding that the psychological harm suffered by the victim exceeded even the substantial harm that a normal victim would suffer. In particular, the court noted the victim's sense of guilt about the endangerment of her family, which the court observed was not "a psychological harm that would normally be experienced in the commission of this crime." GA333-334.

In short, the district court had ample grounds to find that the victim had suffered extreme psychological harm as a result of the defendant's offense and his relevant conduct. *See United States v. Miller*, 993 F.2d 16, 21 (2d Cir. 1993) (affirming district court's departure under

§ 5K2.3 in a threatening case where victim's testimony indicated extreme, pervasive fear that caused the victim to want to leave the city where she lived, and made her afraid to answer the telephone or to open her mail for three years); *United States v. Morrison*, 153 F.3d 34, 54 (2d Cir. 1998) (affirming upward departure under § 5K2.3 where, according to victims' testimony, defendant's threats caused them to experience isolation, personality changes, unusual suspicion towards others, physical relocation and prolonged fear). The district court made the necessary comparative findings in concluding that the harm suffered by the victim was much more serious than would normally result from the offense.

The defendant wrongly argues that there "was no identification of a diagnosis or psychological impairment as required [by] this Court and the guidelines, nor was there a comparison that what [the victim] suffered was greater than normal." Def.'s Brief at 28. As described above, the defendant's assertion is not supported by the record, where the district court received the diagnosis of a mental health professional and undertook an exhaustive comparative analysis of the harm suffered by the defendant relative to that which a normal victim would suffer.[8]

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[8] The defendant cites to statistics regarding injuries suffered by victims of domestic violence. *See* Def.'s Brief at 29, n.4. These statistics were not presented to the district court, and the defendant has not sought leave to supplement the record.

4. 18 U.S.C. § 3553(a)

Even if the district court erred in its guideline analysis, any error was harmless because the district court conducted an exhaustive analysis of the § 3553(a) sentencing factors and concluded, based on that analysis, that a sentence of 120 months' incarceration was necessary to accomplish the objectives of a criminal sentence. *See United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009) ("Where we identify procedural error in a sentence, but the record indicates clearly that 'the district court would have imposed the same sentence' in any event, the error may be deemed harmless, avoiding the need to vacate the sentence and to remand the case for resentencing."), *cert. denied*, 130 S. Ct. 1149 (2010), and *cert. denied*, 130 S. Ct. 1149 (2010). In particular, the district court stated that such a sentence was necessary to account for the egregious nature of the defendant's conduct; the defendant's history and characteristics which reflected a stubborn refusal to be deterred; the need for general deterrence; and an overriding need to protect the public from the defendant. In light of all these factors, the district court expressly stated that its sentence was "also a variance sentence under post-Booker case law. . . . In other words, without the departures, I would have imposed the same sentence." GA347.

Conclusion

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

Dated: July 8, 2011

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(c)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately13,954 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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ADDENDUM

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed --

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for --

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines --

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation, or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into

amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * *

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open

court the reasons for its imposition of the particular sentence, and, if the sentence --

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the

Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

U.S.S.G. § 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that

offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

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

If (A) 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 (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

Application Notes:

1. In General.--This adjustment applies if the defendant's obstructive conduct (A) occurred with respect to the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) an otherwise closely related case, such as that of a co-defendant. Obstructive conduct that occurred prior to the start of the investigation of the instant offense of conviction may be covered by this guideline if the conduct was purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction.

2. Limitations on Applicability of Adjustment.--This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or

statements necessarily reflect a willful attempt to obstruct justice.

3. Covered Conduct Generally.--Obstructive conduct can vary widely in nature, degree of planning, and seriousness. Application Note 4 sets forth examples of the types of conduct to which this enhancement is intended to apply. Application Note 5 sets forth examples of less serious forms of conduct to which this enhancement is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the conduct to which this enhancement applies is not subject to precise definition, comparison of the examples set forth in Application Notes 4 and 5 should assist the court in determining whether application of this enhancement is warranted in a particular case.

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 conduct 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.

5. Examples of Conduct Ordinarily Not Covered.--Some types of conduct ordinarily do not warrant application of this adjustment, but may warrant a greater sentence within the otherwise applicable guideline range or affect the determination of whether other guideline adjustments apply (e.g., § 3E1.1 (Acceptance of Responsibility)). However, if the defendant is convicted of a separate count for such conduct, this adjustment will apply and increase the offense level for the underlying offense (i.e., the

offense with respect to which the obstructive conduct occurred). See Application Note 8, below.

The following is a non-exhaustive list of examples of the types of conduct to which this application note applies:

(A) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;

(B) making false statements, not under oath, to law enforcement officers, unless Application Note 4(G) above applies;

(C) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;

(D) avoiding or fleeing from arrest (see, however, § 3C1.2) (Reckless Endangerment During Flight);

(E) lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under § 3E1.1 (Acceptance of Responsibility).

6. “Material” Evidence Defined.--“Material” evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or information that, if

believed, would tend to influence or affect the issue under determination.

7. Inapplicability of Adjustment in Certain Circumstances.--If the defendant is convicted for an offense covered by § 2J1.1 (contempt), § 2J1.2 (Obstruction of Justice), § 2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), § 2J1.5 (Failure to Appear by Material Witness), § 2J1.6 (Failure to Appear by Defendant), § 2J1.9 (Payment to Witness), § 2X3.1 (Accessory After the Fact), or § 2X4.1 (Misprision of Felony), this adjustment is not to be applied to the offense level for that offense except if a significant further obstruction occurred during the investigation prosecution, or sentencing of the obstruction offense itself (e.g., if the defendant threatened a witness during the course of the prosecution for the obstruction offense).

Similarly, if the defendant receives an enhancement under § 2D1.1(b)(14)(D), do not apply this adjustment.

8. Grouping Under § 3D1.2(c).--If the defendant is convicted both of an obstruction offense (e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1621 (Perjury generally)) and an underlying offense (the offense with respect to which the obstructive conduct occurred), the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of § 3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the

offense level for the obstruction offense, whichever is greater.

9. Accountability for § 1B1.3(a)(1)(A) Conduct.--Under this section, the defendant is accountable for the defendant's own conduct and for conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

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.

Application Notes:

1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:

(A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility;

(B) voluntary termination or withdrawal from criminal conduct or associations;

(C) voluntary payment of restitution prior to adjudication of guilt;

(D) voluntary surrender to authorities promptly after commission of the offense;

(E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

(F) voluntary resignation from the office or position held during the commission of the offense;

(G) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and

(H) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

2. This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under § 1B1.3

(Relevant Conduct) (see Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

4. Conduct resulting in an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply.

5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.

6. Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under

subsection (b) will occur particularly early in the case. For example, to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.

Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. See section 401(g)(2)(B) of Pub. L. 108-21.

Background: The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense by taking, in a timely fashion, the actions listed above (or some equivalent action) is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.

Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps specified in subsection (b). Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner,

thereby appropriately meriting an additional reduction. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range. Section 401(g) of Public Law 108-21 directly amended subsection (b), Application Note 6 (including adding the last paragraph of that application note), and the Background Commentary, effective April 30, 2003.

U.S.S.G. § 5K2.3. Extreme Psychological Injury (Policy Statement)

If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked.

Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended

or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.