NOS. 09-3388, 09-3389, 09-3390, and 09-3442

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA,
Appellant/Cross-Appellee

v.

VINCENT J. FUMO and RUTH ARNAO,
Appellees/Cross-Appellants

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APPEALS FROM JUDGMENTS OF CONVICTION AND SENTENCE
IN CRIMINAL NO. 06-319-03, -04 IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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# FIRST-STEP BRIEF OF APPELLANT UNITED STATES OF AMERICA

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

Statutes and Rules

**Miscellaneous**

## STATEMENT OF SUBJECT MATTER JURISDICTION

**Because defendants Vincent J. Fumo and Ruth Arnao were charged in an indictment with violations of federal criminal law, the district court had subject matter jurisdiction over the case pursuant to 18 U.S.C. § 3231.**

## STATEMENT OF APPELLATE JURISDICTION

Based upon the timely filing of notices of appeal by the government from the orders of judgment in a criminal case entered by the district court, this Court has jurisdiction over this matter under 28 U.S.C. § 1291. In addition, this Court has jurisdiction pursuant to 18 U.S.C. § 3742 to review the sentences imposed on the defendants.

## STATEMENT OF ISSUES

1. Did the district court miscalculate the guideline ranges?

   a. Did the court commit clear error in its determination of the loss caused by Fumo's fraud on the Pennsylvania State Senate? (The government preserved this issue through its arguments in its sentencing memoranda and at the sentencing hearing. App. 744-53, 1516-21.)

   b. Did the court commit clear error in its determination of the loss caused by Fumo and Arnao's fraud on Citizens Alliance? (The government preserved this issue through its arguments in its sentencing memoranda and at the sentencing hearing. App. 764-65, 768-69, 774-75, 1532-37.)

   c. Did the court erroneously decline to impose a two-level increase in Fumo's offense level under U.S.S.G. § 2B1.1(b)(8)(A), which applies where the defendant misrepresented that he was acting on behalf of a charitable organization? (The government preserved this issue through its arguments in its sentencing memoranda and at the sentencing hearing. App. 832-38, 1551-52.)

   d. Did the court erroneously decline to impose a two-level increase in the offense levels of both Fumo and Arnao for use of sophisticated means, U.S.S.G. § 2B1.1(b)(9)(C)? (The government preserved this issue through its arguments in its sentencing memoranda and at the sentencing hearing. App. 838-45, 1554-55.)

2. Did the district court err in refusing when sentencing Fumo to state or consider a final guideline

**range? (The government preserved this issue in its sentencing memoranda and at the sentencing hearing for Fumo. See, e.g., App. 1558.)**

**3. Did the district court err in failing to specify whether its sentencing reduction for Fumo, resting on "extraordinary" public service, was based on a departure or a variance? (The government preserved this issue in its sentencing memoranda and at the sentencing hearing for Fumo. See, e.g., App. 1558.)**

**4. Did the district court err in failing to address the numerous grounds argued by the government as supporting a much more substantial sentence for Fumo? (The government presented these arguments in its sentencing memoranda and at the sentencing hearing for Fumo. App. 998-1010, 1585-90.)**

**5. Did the district court err in failing to state justification for the substantial downward variance granted to Arnao, and in failing to address the grounds argued by the government for a within-guideline sentence? (The government presented its view in its sentencing memoranda**

**and at the sentencing hearing for Arnao. App. 1742-73, 1817-26.)**

## STATEMENT OF THE CASE

Vincent J. Fumo was convicted of 137 charges of fraud, tax evasion, and obstruction of justice committed while he served as a Pennsylvania State Senator. He defrauded the State Senate; Citizens Alliance for Better Neighborhoods ("Citizens Alliance"), a nonprofit charitable organization which he had created; and the Independence Seaport Museum ("ISM"), a Philadelphia institution on whose board he served. His aide, Ruth Arnao, was convicted of all 45 charges brought against her for fraud and tax offenses related to Citizens Alliance, and obstruction of justice. But despite the overwhelming evidence of millions of dollars in fraud, as well as proof of an intense multi-year effort by the defendants to obstruct the federal investigation and prosecution, the district court imposed lenient sentences which were only a fraction of the terms appropriately advised by the Sentencing Guidelines. The announcement of these sentences set off an unprecedented storm of public outrage throughout Pennsylvania.

The sentences rested on numerous procedural errors made by the district court, which miscalculated the

applicable guideline ranges, declined to consider the guideline range in sentencing Fumo, did not state any justification for a huge sentencing variance granted to Arnao, and failed to address or resolve numerous arguments made by the government for more substantial and appropriate sentences. The government presents this appeal to remedy these errors and seek remand for resentencing of the appellees.

In the criminal proceedings, the government originally brought obstruction charges against two of Fumo's computer aides, Leonard Luchko and Mark Eister, in June 2006. On February 6, 2007, that indictment was superseded and considerably expanded, with Fumo and Arnao added as defendants, and the full range of fraud, tax, and obstruction charges against them added to the indictment. App. 115-386.

The trial was considerably delayed due to a change in Fumo's defense counsel. Ultimately, jury selection began on September 8, 2008, but then halted after a week when the judge became ill. Jury selection resumed on October 20, 2008, before a newly assigned judge. The trial then

continued for close to five months, largely on a four-day-a-week schedule. The government called 80 witnesses, and rested its case on January 26, 2009; the defense called 25 witnesses, and rested its case on February 18, 2009, after which the government briefly called three rebuttal witnesses. Fumo testified in his defense; Arnao did not. The closing arguments were extensive; the prosecution and defense presented approximately 13 hours each of closing argument.

On March 16, 2009, after more than four days of deliberation, the jury convicted Fumo of all 137 counts presented against him, and convicted Arnao of all 45 counts against her.

Specifically, Fumo was convicted of two counts of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 371 (Counts 1 and 65); one count of conspiracy to defraud the United States, in violation of Section 371 (Count 99); one count of conspiracy to obstruct justice, in violation of Section 371 (Count 109); 60 counts of mail fraud, in violation of 18 U.S.C. § 1341 (Counts 2-33, 66-90, 104-06); 39 counts of wire fraud, in violation of 18 U.S.C.

§ 1343 (Counts 34-35, 37-64, 91-98, 107-08); two counts of aiding and assisting the filing of a false tax return, in violation of 26 U.S.C. § 7206(2) (Counts 101 and 103); nine counts of obstruction of justice, in violation of 18 U.S.C. § 1512(b)(2)(B) (Counts 110, 111, 113, 116, 119, 122, 123, 128, 132); two counts of obstruction of justice, in violation of 18 U.S.C. § 1512(c)(1) (Counts 117 and 126); and 21 counts of obstruction of justice, in violation of 18 U.S.C. § 1519 (Counts 112, 114, 115, 118, 120, 121, 124, 125, 127, 129, 130, 131, 133-141). The government moved at trial to dismiss two additional wire fraud counts (Counts 36 and 38).

Arnao was convicted of one count of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 371 (Count 65); one count of conspiracy to defraud the United States, in violation of Section 371 (Count 99); one count of conspiracy to obstruct justice, in violation of Section 371 (Count 109); 25 counts of mail fraud, in violation of 18 U.S.C. § 1341 (Counts 66-90); eight counts of wire fraud, in violation of 18 U.S.C. § 1343 (Counts 91-98); two counts of filing a false tax return, in violation of 26 U.S.C.

§ 7206(2) (Counts 100 and 102); one count of obstruction of justice, in violation of 18 U.S.C. § 1512(b)(2)(B) (Count 132); one count of obstruction of justice, in violation of 18 U.S.C. § 1512(c)(1) (Count 126); and five counts of obstruction of justice, in violation of 18 U.S.C. § 1519 (Counts 121, 124, 127, 129, 134).

On July 8, 2009, the district court held a day-long hearing regarding the Sentencing Guideline calculations concerning both Fumo and Arnao. App. 1498-1564. The next day, it issued a brief order, stating (but not explaining) most of its guideline rulings. App. 1565-66. (The guideline calculations are discussed at length in the Statement of Facts section of this brief.)

At the sentencing hearing for Fumo held on July 14, 2009, the court stated that the guideline range was 121-151 months, roughly half the range advocated by the Probation Office and the government. The court further stated that it granted a downward departure on the basis of Fumo's public service, and imposed a final sentence of 55 months' imprisonment, consisting of 36 months on Counts 101 and 103, and 55 months on every other count of conviction,

all sentences to run concurrently. (In a later order, the court stated that it did not specify the extent of the departure, or the final guideline range, and that its sentencing reduction was more in the nature of a variance. That development is also discussed at greater length below.) The court also ordered a three-year term of supervised release, a $411,000 fine, a $13,700 special assessment, and restitution totaling $2,340,839.46. App. 13-18.[1]

On July 21, 2009, the court held a sentencing hearing for Arnao. It determined, over the government's objection, that the guideline range for her was 70-87 months. The court granted a downward variance and imposed a sentence of imprisonment of one year and one day, to run concurrently on all counts. It also imposed a term of three years' supervised release, a $45,000 fine, a $4,500 special

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[1] The restitution award excluded sums which the victims had previously recovered, and included prejudgment interest. The court's findings were as follows:

| | Loss | Restitution |
|---|---|---|
| Senate | 1,293,927.42 | 1,413,819.05 |
| Citizens | 958,080.36 | 792,802.42 |
| ISM | 127,906.88 | 134,217.99 |
| Totals | 2,379,914.66 | 2,340,839.46 |

assessment, and restitution to Citizens Alliance jointly and severally with Fumo. App. 26-31.

Neither Fumo nor Arnao filed an appeal of their convictions and sentences within the 10-day period then afforded by Federal Rule of Appellate Procedure 4(b) for a defense appeal. On August 12, 2009, the government filed timely appeals of the sentences, and the defendants subsequently filed notices of cross-appeal. App. 1-12.

## STATEMENT OF FACTS

I. Background.

Vincent J. Fumo, through his acumen, savvy, drive, and often sheer ruthlessness, was, without dispute, one of the leading public officials of his time in Pennsylvania. His influence permeated all levels of government in the state, including the executive and judicial branches, and local government affairs in his hometown of Philadelphia. He gained that influence, in part, through the criminal acts proven in this case -- the use of state employees and contractors to assist other individuals' campaigns, leading the successful candidates to repay Fumo's largesse with loyalty to his wishes.

Fumo was first elected to the State Senate in 1978, to complete the term of a predecessor who was removed from office upon conviction of unrelated criminal offenses.[2]

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[2] In 1980, Fumo was reelected despite having recently been convicted in federal court of participating in a scheme, during his pre-Senate days, to place local Democratic workers as "ghost employees" on the state legislative payroll. The conviction was later overturned by the trial court, which found that the government had incorrectly charged multiple fraudulent schemes as one. That ruling was affirmed on appeal. See United States v.

(continued...)

Fumo PSR ¶ 14.[3] Fumo was reelected to a full four-year term in 1980, and remained in office until 2008.

Fumo was a man of many interests and pursuits. He was an attorney, who by 2000 and in subsequent years earned close to $1 million each year from a local law firm to

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[2](...continued)
Camiel, 689 F.2d 31 (3d Cir. 1982).

[3] The record in this case, consisting of over four months of trial testimony, thousands of exhibits, and other documents, is enormous. That is a reflection of the numerous criminal schemes at issue, and the long persistence of those crimes. The government has included in the appendix the transcripts of all sentencing proceedings, and also transcripts of most but not all of the trial proceedings; we provide precise citations to those transcripts with respect to factual issues that relate to the claimed sentencing errors. For example, as the government claims that the court miscalculated the loss regarding Citizens Alliance's purchase of goods for Fumo, the brief presents direct citations to relevant testimony and the appendix includes pertinent exhibits regarding that topic. In contrast, where various schemes and calculations are not at issue in this appeal, the brief relies on citations to the presentence reports, and the appendix does not include hundreds of exhibits and additional testimony which proved those matters. Any additional information on those topics will be provided at the Court's request.

In all quotations in this brief, the spelling, punctuation, etc. are the same as in the originals. All references to presentence reports are to the final revised reports issued by the Probation Office; those reports, as well as the "statement of reasons" section of the court's sentencing judgments, are included in a sealed appendix (referred to as "Sealed App.").

attract business to it. App. 2020. He was a banker, who took over a local institution started by his grandfather and acted as its chairman throughout his Senate tenure. App. 3961. He became a farmer, acquiring a Harrisburg-area farm in 2003. See, e.g., App. 2594. He owned a Philadelphia mansion which he restored, App. 1920-24, as well as homes at the New Jersey shore and in Florida. At all of his homes, he engaged in numerous hobbies. For instance, he was a licensed electrician, and an avid boater. App. 2027, 2584-85.

His Senate aides referred to his wide-ranging endeavors as "Fumo World,"[4] and their job was to serve his needs, whether legislative, political, or personal, at all hours of the day and night. Fumo drew no line between his government and personal affairs, leading to the widespread frauds proven in this case. Although he was a man of considerable wealth, he was driven to acquire more, and often professed to confidants a philosophy that one should

[4] See, e.g., App. 4427 (closing argument, referencing Exh. 610, App. 5163).

only spend "other people's money," which he referred to as "OPM." App. 2587.

II. Fraud on the Senate.

The first portion of the indictment (Counts 1 through 64) alleged that Fumo engaged in extensive fraud on the Pennsylvania State Senate.

In part, Fumo demanded that Senate employees serve him in any manner he desired, even during nights and weekends, to further his political goals and attend to his personal wants. Senate employees were paid with public funds to provide personal and campaign services to Fumo on state time. Moreover, Fumo routinely approved salaries for the most loyal staff members who provided personal and political services on his behalf which were substantially in excess of the salaries designated by a Senate committee (on which Fumo served) for the actual Senate jobs for which the employees were retained. In this manner, Fumo disbursed hundreds of thousands of dollars more than warranted for these employees. Fumo PSR ¶¶ 20-25.

In Philadelphia, Fumo maintained a "district office," where approximately ten employees were hired to provide constituent services to residents of Fumo's senatorial district. These staffers, under Fumo's direction, acted as both his legislative and campaign staff, and provided him with extensive personal services, all in violation of state law. For example, two employees, Gina Novelli and Jamie Spagna, in succession, were given virtually no Senate duties, even though they were compensated only through the public payroll. Instead (in exchange for Senate salaries of $30,000 per year and more), each organized Fumo's political fundraisers, handled his political mailings, and paid the bills for Fumo's personal accounts and personal businesses.[5] Each also handled the campaign account of a Philadelphia City Councilman who was close to Fumo, during regular Senate business hours. Fumo PSR ¶¶ 33-37. Indeed, Fumo blatantly corrupted the

[5] In a typical e-mail, on May 1, 2004, Fumo wrote to four of his Senate staffers: "Phone number 215-687-1338 My personal cell phone. I just got a call that we currently owe $259.25 on this account! Who pays for this and why the fuck is it not paid?????????? I want an IMMEDIATE answer!!!!!!!!!!!" App. 5162.

political process, using state resources to wage campaigns on his own behalf and for allies. For example, in 2002, Fumo pressed his Senate staff into service for months in an unsuccessful Pennsylvania gubernatorial campaign of a Democratic candidate. App. 1913-21, 2336-39, 2345, 2773-81, 3404.

Fumo similarly used his Senate employees for all of his personal needs. Secretaries and aides handled all of his personal finances, and countless and myriad private affairs and personal tasks. Strikingly, one $31,000 a year aide, Lisa Costello, acted as Fumo's housekeeper, regularly cleaning his Philadelphia mansion. Fumo PSR ¶¶ 71-77. Another assistant, Christian Marrone, spent much of the first 18 months of his tenure on the Senate staff as the "project manager" for the refurbishment of Fumo's 33-room mansion. App. 1920-24. Fumo had three drivers on his payroll (two in Philadelphia and one in Harrisburg), and when they were not driving Fumo to all of his Senate, political, and personal events and appointments, they ran personal errands for him such as, among many others, shopping, driving his young daughter to school and

elsewhere, servicing his cars, picking up and delivering packages of merchandise Fumo acquired, and transporting Fumo's dry cleaning to and from the home of Fumo's attorney (where a servant cleaned clothes in a manner Fumo preferred). App. 1969-70, 2003-04, 2563, 2585, 2589-94, 2684-85, 2929, 3094, 3411.[6] When Fumo took annual vacations in Martha's Vineyard, Massachusetts, Senate aides drove two vehicles there for him from Philadelphia, loaded with the luggage of Fumo and his guests, while the Fumo party traveled on a private plane. At the end of the vacations, two staffers returned to drive the vehicles and luggage home. App. 2629-31.[7]

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[6] Revealingly, in February 2005, after the investigation began, Fumo informed his ex-wife that he could not arrange any transportation for their daughter while he was in Florida, stating, "Since the Inquirer and the Feds are all over my ass, I want to keep the use of staff for these things at an absolute minimum." App. 5228.

[7] Extensive bank and account records attested to the Senate staff's extensive efforts in handling Fumo's personal and business finances. Meanwhile, the e-mail evidence which survived Fumo's effort to delete all of his electronic correspondence dramatically revealed his penchant for demanding that Senate aides perform even the most menial tasks. One of countless informative messages was one dated April 16, 2001, when Fumo wrote to Arnao (in a message titled "Tool Crib"), "I have received NO SCREWS!!!!!" Arnao

(continued...)

Fumo also supervised more than a dozen Senate staff members in Harrisburg, where Fumo served as the chairman of the Senate Democratic Appropriations Committee (SDAC), and in that capacity controlled a $5 million budget. Fumo PSR ¶ 16; App. 1845-46. While by and large the Harrisburg staff was a more professional lot, consisting primarily of career experts in state budget matters, Fumo also misused the assistance of Harrisburg staffers as he deemed necessary. For example, when Fumo acquired a Harrisburg-area farm in 2003, he delegated several Harrisburg employees to undertake the numerous tasks

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[7](...continued)
replied, "this is fucking wonderful now where are all the screws that lou [Senate driver Lou Leonetti] separated. I am telling you that if you don't babysit everyone of them nothing gets done right I specifically told him what to do with them and i thing david [Senate driver David Nelson] took the ones for the shore down. I will find out." App. 5429. See also App. 5095-96 (after moving into the refurbished mansion, Fumo provided Marrone with one of many lists of tasks, adding, "And I need Lil +/or Gina [Senate secretary Lillian Cozzo and Senate aide Gina Novelli] to come up and label with the label maker, every switch plate so we know what it does."); App. 5230 (David Nelson scheduled to help Senate computer aide Don Wilson in a difficult installation in Fumo's home of an X Box and other personal electronic equipment); App. 5226 (Fumo directs Senate aide Maryann Quartullo to have Nelson "get a box of ammo for [girlfriend] Dottie's gun").

involved in establishing the farm as a residential and commercial enterprise. See, e.g., App. 2829-47; Fumo PSR ¶¶ 78-105.

Fumo misused the resources of the Senate in other ways. He gave Senate equipment, including laptop computers, to non-Senate employees, including his valet, Senate contractors, girlfriends, and family members, and then delegated his Senate computer aides to assist those people with their computer-related problems as well as perform their Senate duties. Fumo PSR ¶¶ 151-56.

Besides exploiting his employees, Fumo abused his authority to use Senate funds to hire "contractors" for legislative-related tasks. For example, Fumo gave a state contract, which ultimately reached over $40,000 a year, to private investigator Frank Wallace. Wallace's duty, supposedly, was to act as an investigator for the SDAC on issues relevant to pending legislation. But while the investigator assisted with a few such tasks, in the main Fumo set him loose on personal and political missions, such as conducting surveillance on Fumo's former wife and girlfriends, as well as the new boyfriends whom ex-

girlfriends dated; and endeavoring to dig up defamatory information regarding Fumo's political rivals during campaigns and at other times. All of this was compensated with state money. Fumo PSR ¶¶ 40-57.

Similarly, Fumo gave a state contract, which reached over $80,000 a year, to consultant Howard Cain, whose primary role was to assist Fumo in numerous political races, and also gave a lucrative contract to a younger political operative, Philip Press, for the same purpose. And Fumo used state contracts to compensate his friends, making them ghost employees. Fumo PSR ¶¶ 58-62. One, Michael Palermo, was retained for $45,000 a year and more to provide alleged transportation expertise, but did virtually nothing other than assist Fumo in managing Fumo's farm. Fumo PSR ¶¶ 94-100. Another, Mitchell Rubin, was the boyfriend and later husband of Fumo's aide, defendant Ruth Arnao, and was paid $30,000 per year for five years, in return for no work at all. Fumo PSR ¶¶ 106-09.

To further this fraud, the government proved, Fumo made numerous false statements to the Senate Clerk, who was the body's paymaster. For example, every annual contract

for Wallace, Cain, Press, Palermo, and Rubin submitted to the Clerk for payment was false, in that each stated the legislative services which the contractor was supposedly to perform (often with great specificity, as in the case of Palermo's contract to provide transportation analysis and advice, see App. 5116). The statements that the contractors would perform proper Senate-related services were false, and the contracts never disclosed the true personal and political services for which the contractors were retained (or the fact that Fumo simply intended to hand out public money to Palermo and Rubin for nothing).[8]

Similarly, with respect to most of the full-time Senate employees whose services were enlisted for personal and political tasks for Fumo (including Ruth Arnao, Lisa Costello, Daniel Coyne, Christian Marrone, Lou Leonetti, David Nelson, Gina Novelli, Maryann Quartullo, Gerald Sabol, Charles Sholders, Jamie Spagna, and Donald Wilson), the evidence established that Fumo, abetted by his chief aide in

[8] In separate proceedings, Cain, Palermo, and Rubin each pled guilty to charges uncovered during this investigation, and were sentenced. Of these contractors, only Cain cooperated with the government and testified at trial. None of these defendants filed appeals.

Harrisburg, Paul Dlugolecki, regularly provided false job descriptions to the Clerk in order to justify the employees' salaries (and often to reward these and other loyal employees by classifying them in elevated positions which did not match the Senate duties which the employees also performed). None of these submissions ever identified the personal and political campaign work that these employees did.

A typical example involved Jamie Spagna. On December 10, 2001, Fumo and Dlugolecki submitted a form to the Clerk to justify her salary at the time of $30,000 per year, which stated that Spagna did the following: "Assist with constituent services. Review and prepare correspondence. Attend meetings with Senator. Research legislation." App. 5038. As Spagna testified, this was totally false at the time, and concealed the fact that at that time she exclusively performed personal and political work as directed by Fumo. Fumo PSR ¶ 39; App. 2479-80.

An example of the misclassification of loyal employees involved Roseann Pauciello. Numerous witnesses confirmed that her only Senate-related work involved

assisting politically connected constituents who visited Fumo's Senate district office; apart from that, she handled many of Fumo's personal affairs and joined him in business ventures. App. 1920, 1997-98, 2317-19, 2563, 2920. She had long been one of Fumo's closest friends, and for her loyalty she was falsely classified as a "chief of staff," although Fumo's local office already had a chief of staff. By 2005, she was paid over $106,000 per year, tens of thousands of dollars more than the highest-level constituent relations pay grade allowed by the Senate. See App. 5085.

The government, upon adding up all of the money paid to employees and contractors for personal or political work, as well as other misuses of state funds, conservatively estimated that Fumo defrauded the Senate of at least $2,440,282.49 during the period roughly spanning from 1998 until 2006.[9]

[9] Needless to say, the loss was actually far higher, given that Fumo acted in this fraudulent fashion throughout his years in office. For instance, Cain testified that his contractual relationship with the Senate, allowing him to be paid by Fumo with taxpayer money for serving as Fumo's campaign operative, began in 1986. App. 2297. But the government necessarily limited its estimate to a time period for which thorough records remained available.

III. Fraud on Citizens Alliance.

In 1991, Fumo and his Philadelphia staff started an entity which later became known as Citizens Alliance for Better Neighborhoods. The stated purpose was to better the neighborhoods in Philadelphia, particularly in Fumo's district, by providing services which the City of Philadelphia was unable or unwilling to provide. With a small staff of laborers and a fleet of work vehicles, it collected trash, cleaned streets, trimmed trees, cleared snow, and tidied alleys and abandoned lots. Fumo PSR ¶¶ 159-62.

Citizens Alliance received nearly all of its funding due to Fumo's influence as a state senator. He directed grants to Citizens Alliance from the state and other entities over which he had influence, and then, beginning in 1998, gained $17 million from the Philadelphia Electric Co. (PECO) for Citizens Alliance, as part of a settlement of claims Fumo brought against the utility in his capacity as a senator and individually. The PECO settlement involved proceedings before the state's Public Utilities Commission regarding deregulation of electricity

**distribution; Fumo took stands adverse to PECO on the Senate floor and in the litigation he brought, then reached a compromise with PECO on various positions, extracting the $17 million contribution as part of the settlement. Fumo PSR ¶¶ 163-65.[10]**

**When the PECO money began to arrive, Citizens Alliance took on grander missions. It acquired properties in need of renovation along the Passyunk Avenue corridor in South Philadelphia, opened a charter school in South Philadelphia, and attempted to create an office building for high-technology companies, among other endeavors. Id.**

**At the same time, Fumo and co-defendant Ruth Arnao (a Senate employee on Fumo's staff who was the nominal director of Citizens Alliance) persistently and routinely skimmed from Citizens Alliance's accounts for their personal benefit, causing a loss to Citizens Alliance in excess of**

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[10] **Fumo and PECO did not publicly disclose the Citizens Alliance contribution. Fumo PSR ¶ 260. It was publicly exposed by the *Philadelphia Inquirer* years later, in November 2003, in a series of articles which prompted an acceleration of an ongoing federal investigation of Fumo, and triggered Fumo's desperate effort to destroy evidence, which will be discussed. See, e.g., App. 5528; Fumo PSR ¶ 349.**

$1.5 million. In Counts 65 through 98, Fumo and Arnao were charged with defrauding Citizens Alliance.

In part, Citizens Alliance paid for an astonishing number of power and other tools, costing more than $90,000, that Fumo (a tool aficionado) stashed in his four homes.[11] It bought 19 Oreck vacuum cleaners and floor machines, for $6,528.28, which went to every floor of every one of Fumo's houses. It paid for shopping sprees at the Jersey shore, during the summer months, when Fumo and Arnao met at Sam's Club, Home Depot, and Lowe's locations near Atlantic City to stock up on thousands of dollars of goods for their summer residences. Fumo PSR ¶¶ 183-95, 315.

Citizens Alliance supplied Fumo and his Senate office with expensive vehicles (despite the fact that Fumo always had a leased Cadillac properly paid for by the state). Citizens Alliance bought a new, fully loaded $38,000 minivan which Fumo used as his vehicle at the shore.

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[11] The government's theory was that Fumo and Arnao largely limited the personal thefts to items which Citizens Alliance might logically buy, like tools, a bulldozer, and similar equipment, thus hiding the defalcations in a blizzard of records of similar acquisitions. The fraud was uncovered only through a painstaking FBI investigation, as discussed later.

It bought a fully appointed, $52,000 SUV, complete with navigation devices and video screens, for use by Fumo's drivers at the Philadelphia Senate office. It bought a $25,000 Jeep for Arnao's personal use, among other vehicles.[12] In total, Citizens Alliance spent $387,325.19 on the acquisition, maintenance, and insurance of luxury vehicles for the personal use of Fumo, Arnao, and others they favored, including family members and aides. Fumo PSR ¶¶ 197-210, 315.

Citizens Alliance also became the landlord of the Senator's district office on Tasker Street in Philadelphia, and then spent extraordinary sums to lavishly furnish and appoint Fumo's office. Although the Senate paid only $90,000 in rent during a five-year period, Citizens Alliance spent over $600,000 to create what had to be the most extravagantly furnished district office in the Commonwealth. Further, this office also served as Fumo's campaign office and ward headquarters, yet for most of the relevant period,

[12] As stated earlier, Senate employees every year drove vehicles to and from Martha's Vineyard for Fumo's vacation, also hauling the luggage of Fumo and his guests. Those vehicles were bought by Citizens Alliance for Fumo and Arnao.

**Fumo's campaign committee paid no rent at all. Citizens Alliance also paid for cell phones for many of Fumo's Senate employees in Philadelphia. It also paid for a cell phone for Fumo's adult daughter. Fumo PSR ¶¶ 211-17, 315.**

**As with his Senate staff, Fumo used Citizens Alliance's employees as his personal minions. The laborers were at his beck and call. They routinely traveled during work hours to the Jersey shore, where they repaired and painted his dock and deck, undertook other construction tasks, picked up trash, and provided other assistance. They were regularly dispatched to his Philadelphia home, to pick up trash, clear snow, power-wash his deck, deliver his large amount of Christmas decorations, and more. They traveled to the Harrisburg-area farm, to deliver Citizens Alliance equipment and other personal items obtained by Fumo. For the most part, Fumo did not pay for any of this assistance. Fumo PSR ¶¶ 218-28.**

**The equipment purchased by Citizens Alliance which Fumo used at his farm included a bulldozer, obtained by Citizens Alliance in 2003 at a cost of $27,000 (plus another $16,000 for repairs a few months later) because Fumo needed**

to clear parts of the farm; a lawn tractor; a dump truck; an all-terrain vehicle (ATV); and a Ford F-150 pickup truck. Fumo PSR ¶¶ 229-39.

Fumo used Citizens Alliance money not only to enrich himself, but also to further political goals, in stark violation of the federal limitations on Citizens Alliance's activities as a 501(c)(3) tax-exempt charitable organization. In part, Citizens Alliance paid over $250,000 for political polling which Fumo desired to gauge the strength of various candidates. Fumo PSR ¶¶ 240-52. It paid $20,000 so that Fumo could surreptitiously sponsor a lawsuit against a Senate rival, Robert Jubelirer. Fumo PSR ¶¶ 272-78. It paid for expenses of the private investigator Fumo used in relation to the 2002 gubernatorial campaign he supported. It paid over $68,000 to support the efforts of a grassroots group which endeavored to stop the government's construction of dunes at the Jersey shore, because Fumo feared the new dunes would ultimately block his ocean view from his Margate home and reduce the value of his property. Fumo PSR ¶¶ 279-91, 315.

Citizens Alliance paid $39,000 to permit Fumo and five of his friends to travel to Cuba. And even though Citizens Alliance's incorporation documents limited its activities to Philadelphia, it paid for other programs outside Philadelphia, such as $50,000 for the construction of a "war dog" memorial in Bucks County, because those endeavors stood to reflect positively on candidates whom Fumo supported in those areas. Fumo PSR ¶ 292-309.

In total, the government conservatively estimated that Fumo and Arnao stole $1,770,852.35 from Citizens Alliance, most of it for Fumo's benefit.

To accomplish these thefts, despite the clear prohibitions in state and federal law regarding such misappropriations from a nonprofit organization, Fumo and Arnao made numerous misrepresentations to others in order to evade the rules and accomplish their ends. For instance, Arnao never disclosed to Citizens Alliance's accountants (one of whom also prepared Fumo's personal tax returns) the benefits given to Fumo. When asked about compensation, she directly lied. For example, accountant Arthur Amelio testified: "I asked if he -- if the organization provided

services to Senator Fumo. And Ruth had told us that at times that they had shoveled his driveway for him, if he needed to get -- needed to go somewhere that they may have done that. And that he compensated the organization for that, and that at times he used some of the -- I think it was for some storage and he had compensated the organization for storage." App. 3303. As a result, as the jury found, Citizens Alliance's tax returns were riddled with false statements which concealed its actual payments for Fumo's benefit.

Fumo and Arnao lied to other government overseers as well. For instance, when the defendants spent close to $70,000 to oppose the dune construction project which threatened to block Fumo's ocean view in New Jersey, they first endeavored to create separate entities through which the true purpose of the expenditures could be concealed. First, Fumo directed his Senate counsel to create a separate nonprofit organization through which the funds could be passed. The attorney loyally created an entity called "Riparian Defense Fund, Inc.," after rejecting the name of "Save Our Beaches" suggested by one of the dune opponents.

**The attorney sagely pointed out that there are no beaches in Pennsylvania, where Fumo and Arnao would be providing the financing from Citizens Alliance. App. 5483. Instead, they chose the more obscure "Riparian" name, and then submitted a completely false description of its purpose both to the Pennsylvania Secretary of State and to the IRS. See App. 5482 (the stated purpose did not reveal the organization's sole goal of stopping dune construction near Fumo's home, instead providing, "The Riparian Defense Fund, Inc. is organized and established for the purpose of educating and informing the public of the environmental responsibilities and concerns associated with property that has access to, or use of natural watercourses -- such as rivers, lakes, tidewaters and oceans within the Delaware Valley, Chesapeake Bay Estuary, and the Mid-Atlantic States Tidal Basin.").**

**Fumo and Arnao also repeatedly lied to journalists and anyone else who endeavored to learn the truth about Citizens Alliance's affairs. For instance, quite telling was a summary prepared by a publicist in 2000, based on totally false information provided to her by Arnao, which the publicist then used to respond to press inquiries**

**regarding how Citizens Alliance spent its funds and what was the extent of Fumo's role. See App. 5277-83 (summary riddled with false information, such as a statement that Fumo helped obtain grants, but otherwise had no formal affiliation with the entity); App. 2946-52.**

**The lies to tax authorities produced the charges in Counts 99 through 103 that Fumo and Arnao caused the filing of a false Form 990 (the standard annual form for a tax-exempt nonprofit organization) for Citizens Alliance for 2002, and a false Form 1120 corporate return for the same year for CA Holdings, Inc., a subsidiary of Citizens Alliance. Those returns falsely described impermissible political polling and other campaign expenses as permissible "community development consulting" expenses, and provided other false information which concealed extensive expenditures made by Citizens Alliance during 2002 which benefitted Fumo and Arnao personally and politically. Fumo PSR ¶¶ 253-68.**

**IV. Fraud on the Independence Seaport Museum.**

**In Counts 104 through 108, Fumo was convicted of defrauding the Independence Seaport Museum ("ISM"), by repeatedly using its historic yachts, *Enticer* and *Principia*, for pleasure cruises for which he did not pay. In addition, Fumo took other benefits from the museum, including expensive ship models he used as decorations in his offices and home. Fumo served on the museum's board of directors, and took all of these benefits, totaling more than $125,000, without disclosing to his fellow directors the material fact that he did not intend to and did not pay for any of them, in violation of the museum's operating rules.**

**During most of the relevant time between 1996 and 2003, Fumo was a member of the board of directors of ISM, known as the "Board of Port Wardens." Members of the board served without compensation. As several testified, they did not receive any benefits from the museum (other than the occasional calendar or a gift pack one year of holiday cards), but rather were expected to themselves donate to the museum and to solicit others to do so (a process known as "development"). See, e.g., App. 3192-93; see generally Fumo**

PSR ¶¶ 331-42. Fumo, the evidence unambiguously showed, gave none of his own money to the museum, and almost none of his associates whom he could have solicited did, either. See App. 5488-91 (graph showing almost nonexistent contribution history of Fumo and others whom the defense claimed Fumo spoke to about the museum). What Fumo did provide for the museum was substantial grants, both from the state and from other public or quasi-public entities he influenced. Id.[13]

It is undisputed that throughout this period Fumo received lavish benefits from the museum. At least once a year, for eight years, he vacationed for free on a luxury yacht owned by the museum. The museum owned historic yachts which it chartered in order to raise funds, but Fumo

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[13] Witnesses explained that the board would not conceivably approve benefits for Fumo to reward him for bringing in public funds. For example, Peter McCausland, a longtime board member and the current chairman, testified: "that would be bribery I think, or some -- I mean, he was a member of the board, he had a responsibility to help the board raise money or help the museum raise money. And he just happened to be in the state legislature and that was -- his job in the state legislature was to provide funding to organizations in Pennsylvania. So I think -- I'm not sure, but I know the board was not certainly paying Senator Fumo in any way to raise money." App. 3155-56.

**insisted on a free trip every summer, whatever the cost to the museum. For example, in 2000, the museum was required to cancel weeks of bookings for its yacht *Enticer* in order to move it from the Maryland area to Massachusetts, so that Fumo could take his preferred three-day trip at his preferred time. Fumo PSR ¶ 342(e). Another time, in 2001, when no museum-owned yacht was available, museum president John Carter authorized the payment of $13,375 to charter another yacht, *Sweet Distraction*, so that Fumo could have his annual New England trip. Fumo PSR ¶ 342(f). During all of these cruises, the museum not only paid for the use of the vessels, but for all incidentals, which included lavish catered meals, other groceries and supplies, and occasionally ground transportation. In all, as listed in a government summary of all of the trips, Fumo received goods and services worth $115,306.88 in connection with 12 yacht voyages. See App. 5485-87.**

**In addition, Fumo took more valuables. Notably, the museum paid thousands of dollars for ship models of its yachts, *Enticer* and *Principia*, which were given to Fumo. It even paid $10,000 to give Fumo two models of Fumo's personal**

recreational boat (the "888"). See App. 5492 (artist's summary list of models he created).

A board member's taking of this largesse was prohibited by the museum's policies. At trial, the defense at first suggested that Fumo's use of the yachts was appropriate because he used the ships for developing potential contributors. The government agreed that that would be a permissible use. However, the government offered consistent testimony from a number of Fumo's guests on the trips, as well as the boats' captains and stewards, that no development of any kind took place on Fumo's trips, which were all pleasure cruises with friends. Fumo PSR ¶¶ 331-42.

The ultimate defense was that Fumo was entitled under the museum's rules to take everything he received simply because museum president Carter authorized it. However, the bylaws and ethics policy of the museum specifically refuted that claim. Further, the government introduced evidence which proved Fumo's (and Carter's) knowledge of the impropriety of his conduct.

For example, when Fumo sought to have ISM pay $10,000 for models of his personal recreational boat, the

"888," he needed to obtain for Carter the "lines" of the boat from the manufacturer to help in the process. Toward this end, on March 22, 2001, Fumo wrote an e-mail to the manufacturer's representative, with a copy to Carter, stating, "John is the Executive Director of the Independence Seaport Museum in Philadelphia and would like to have a model there for exhibition. He is a friend of mine and I took him for a ride on the 888 and he loved it." App. 5494. This was a lie. As Craig Bruns, the curator of ISM, testified, ISM never had any interest in a model of a recreational picnic boat, manufactured in Connecticut, which had nothing to do with ISM's mission to display the nautical history of the Delaware River and Bay region. Indeed, no model ever showed up at the museum; one went to Fumo's home, and the other to his patron, Stephen Marcus. App. 3174, 5493.

Similarly, when publicity about Fumo's use of the museum yachts began to emerge in March 2004, Fumo gave a radio interview, and again lied. The interviewer suggested, "when I use it sometimes I am using it asso-, related to the board to raise money. Is that what you're telling me?"

Fumo falsely answered, "I think it's a fair characterization." The interviewer then asked, "Do you, do you pay for it when you use it?" and Fumo said, "It depends on, on circumstances," concealing the fact that he never paid for anything. See App. 5273-74.[14]

V. Obstruction of Justice.

Both Fumo and Arnao were convicted of conspiracy to obstruct justice, and numerous substantive counts of obstruction of justice, in violation of various statutes (Counts 109 through 141).

The government's investigation of Fumo's conduct commenced in early 2003, focused on the substantive matters charged in the indictment as well as whether Fumo engaged in attempted extortion in demanding payments from PECO and Verizon to Citizens Alliance. The government proved that,

[14] Museum president Carter, who abetted the fraud on the museum by giving Fumo anything he asked for, without the board's knowledge, did not testify at trial. In an unrelated matter, Carter was convicted of defrauding the museum for his own personal benefit, and was sentenced to a term of imprisonment of 15 years. The Third Circuit affirmed the conviction and sentence in No. 07-4326. The disparity of Carter's and Fumo's sentences is addressed later.

**anticipating and then learning of the investigation, Fumo, Arnao, and other aides engaged in a persistent effort to destroy all e-mail communications involving Fumo in general and Citizens Alliance in particular, as well as other evidence.**

**The obstructive effort began in earnest on December 1, 2003, just a week after the publication of a series of articles in the *Philadelphia Inquirer* questioning the propriety of Citizens Alliance's expenditures, its sources of funds, and its relationship with Fumo. On that day, Fumo summoned Leonard Luchko, a computer technician on Fumo's Senate staff in Philadelphia, and directed him to assure that no e-mail between Fumo and others was retained. Fumo PSR ¶¶ 349-50; App. 5528. Next, on January 25, 2004, when the *Inquirer* published a front-page story with the headline, "FBI Probes Fumo Deal," Fumo dramatically expanded the scope and intensity of the efforts to delete e-mail, and enlisted the assistance of a number of additional Senate computer aides, including Mark Eister, Daniel Coyne, and Donald Wilson. Fumo PSR ¶¶ 352-57; App. 5536.**

**Throughout 2004, at Fumo's direction, the computer aides (Luchko and Eister were the most active) endeavored to destroy Fumo e-mail on scores of computers and other communications devices used by Fumo, Arnao, and dozens of Senate employees. They not only deleted copious information, but then "wiped" numerous computers using sophisticated programs to assure that forensic examiners could not retrieve the deleted data. The effort, along with Fumo's determination, peaked whenever Fumo perceived from publicity or other developments that the federal investigation was broadening or intensifying. The government was able to recreate much of what occurred because Luchko and Eister, while faithfully following Fumo's direction to delete all e-mail to or from Fumo, kept all other e-mail, including messages to each other in which they described what Fumo told them to do.**

**For instance, when Citizens Alliance received a grand jury subpoena on April 28, 2004, Fumo immediately learned of the existence of the subpoena, and Fumo and his staff promptly acted to ensure that all of the Citizens Alliance computers were cleared of e-mail to or from Fumo,**

**and wiped to ensure the completeness of the destruction. Fumo PSR ¶¶ 373-77. When the *Inquirer* published a story on May 21, 2004, titled, "Fumo Probe Moves to Harrisburg," Fumo immediately ordered his staff to implement a plan to ensure that all of his e-mail in Harrisburg was deleted as well, and the Senate staff's computers wiped. Fumo PSR ¶¶ 381-400. Then, in January 2005, when Fumo learned that the FBI, having become suspicious that almost no e-mail was produced in response to the earlier subpoena, planned to copy the hard drives of the Citizens Alliance computers to try to recover deleted e-mail, Fumo put his staff back to work, tirelessly deleting e-mail and wiping more computers in anticipation of a more intensive FBI investigation. Fumo PSR ¶¶ 422-50.**

**Arnao was an active participant. On June 14, 2004, she permitted her Citizens Alliance office computer to be wiped clean. App. 5511. On August 6, 2004, at the same time that federal investigators were sifting through records Arnao provided in response to the grand jury subpoena, Arnao allowed her Citizens Alliance computer to be wiped once again. App. 5512. On December 9, 2004, Arnao once again**

permitted the wiping of her Citizens Alliance computer, yet had failed to provide the FBI with any e-mail from her computer in response to the April 28, 2004, subpoena. App. 5515.

In February 2005, after being directly informed that the government was concerned about the absence of e-mail produced by Citizens Alliance in response to subpoenas, Arnao provided Luchko with access to her New Jersey shore home, so that he could wipe the Senate computer she kept there and assure that any evidence on it was also obliterated. Fumo PSR ¶¶ 424, 445, 448-49. As a result of these crimes, the government recovered almost no electronic evidence from Citizens Alliance; when it finally imaged Citizens Alliance's computers in February 2005, it found approximately 129 e-mails remaining, almost none more than a month old, and none about any issue of substance. App. 3551. In other words, at Fumo's behest, Arnao allowed the complete destruction of the electronic records of her own organization in an effort to protect her and Fumo from prosecution.

Because the government's investigation of Fumo's dealings with PECO and Verizon on Citizens Alliance's behalf was the first publicly reported subject of the inquiry, the purge regarding those matters was particularly thorough. App. 3553. Ultimately, the government concluded that no extortion charges could be presented regarding those matters, in part because the defendants had succeeded in wiping out all contemporaneous correspondence in the Senate and Citizens Alliance offices regarding PECO and Verizon.

VI. The Sentencing of Fumo.

As stated in the Statement of the Case, Fumo was convicted at trial of all 137 counts of fraud, tax offenses, and obstruction of justice submitted to the jury, while Arnao was convicted of all 45 charges presented against her.[15] On July 8, 2009, the district court held a day-long

[15] Fumo testified at trial, while Arnao did not. In six days of testimony, Fumo admitted many of the acts alleged in the indictment, but asserted they were not criminal, or simply expressed disdain for the charges. For example, in one of many striking passages, when asked on cross-examination whether Fumo should have directed his staff not to use public resources when engaged in campaign activity, "[b]ecause it's a violation of state law for you (continued...)

proceeding to hear argument regarding the sentencing guideline calculations concerning both Fumo and Arnao. The next day, it issued a brief order, stating (but not explaining) most of its guideline rulings.

The government had advocated, and the Probation Office had agreed, that Fumo's total offense level was 39, and his criminal history category was I, providing an advisory guideline range of imprisonment of 262 to 327 months. The calculation was as follows.

With respect to the convictions of Fumo for fraud (regarding the Senate, Citizens Alliance, and ISM), the base offense level was 7. The government asserted that the collective loss exceeded $2.5 million but was less than $7 million, requiring that 18 levels be added. USSG § 2B1.1. The government advocated a 2-level enhancement, under Section 2B1.1(b)(8)(A), because the defendant misrepresented that he was acting on behalf of a charitable organization; and an additional 2-level enhancement because the offenses

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[15](...continued)
to have your employees using state facilities, state equipment to work on campaigns," Fumo replied, "It is also a violation to spit on the sidewalk but I don't know that it's enforced." App. 4115.

involved sophisticated means, § 2B1.1(b)(9)(C). Fumo also received a 4-level enhancement, under Section 3B1.1(a), for his leadership role, and a 2-level enhancement, under Section 3B1.3, for his abuse of a position of trust. The government proposed two 2-level enhancements for obstruction of justice, the first under Section 3C1.1 for the obstruction crimes of conviction, and the second a departure based on his extensive perjury at trial. In sum, the recommended total offense level for the fraud offenses was 39.

The tax offenses in this case comprise a separate group. Because the tax loss was between $2.5 million and $7 million (specifically, $4,624,300), the PSR stated, the offense level wais 24, under Sections 2T1.1(a)(1) and 2T4.1(J). There should be a 2-level increase for sophisticated means, under Section 2T1.1(b)(2), leading to a total offense level of 26. Because this is more than 8 levels below the recommended offense level for the fraud group, it did not add to the final advocated offense level of 39 based on the fraud group. See § 3D1.4.

The district court, however, sustained a number of objections to this calculation. Specifically, it denied the fraud enhancements for charitable misrepresentation and sophisticated means, and also declined to impose a second obstruction enhancement based on perjury at trial. It also found that the fraud loss was $2,379,914.66, close to $2 million below the government's estimate, resulting in an offense level 2 levels below the loss range stated in the PSR.[16]

These rulings reduced the offense level to 31, and now the tax offenses came into play. The tax offense level was now 24 (excluding the sophisticated means enhancement

[16] In its July 9 ruling, the court withheld judgment regarding whether to add $150,000 to the loss based on the no-show Senate contract Fumo gave his friend, Mitchell Rubin, after the defense, at the last minute, stated a desire to produce evidence showing that Rubin actually performed legislative work. App. 1524-26. At the commencement of the July 14 sentencing hearing, the court stated that it would not resolve the Rubin issue, or include the $150,000 contract as loss, because deciding the issue would delay sentencing. App. 1568. This left the loss figure below the $2.5 million threshold at which the offense level would change.

which the court precluded),[17] and under the multiple count adjustments set forth in U.S.S.G. § 3D1.4 this caused a one-level increase to the fraud offense level. Thus, the combined offense level was 32, which translated into an advisory guideline range of imprisonment of 121-151 months.

The defense sought downward departures on two grounds: (1) based on Fumo's purported medical condition, and (2) based on his "extraordinary" public service. The court stated that it denied the first,[18] but granted the second. Later, however, when pressed to state whether the sentencing reduction rested on a departure or a variance, the court refused to answer the question.

At the sentencing hearing, Fumo called four witnesses to attest to the quality of his public service. App. 1603-10. He also presented testimonials from his

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[17] The court denied the defendants' objection to the calculation of the tax loss. App. 1567.

[18] At the sentencing hearing on July 14, 2009, the government presented the testimony of a medical official of the Bureau of Prisons (BOP), who explained that there were no impediments to treatment in prison of Fumo's medical condition, and that in fact based on the current records Fumo did not qualify as a particularly ill person requiring the special care which BOP also offers. App. 1569-78.

daughter and fiancée, and his own allocution, in which he essentially stated no remorse for the bulk of his crimes. App. 1610-21. The defense sought a below-guideline sentence.

For its part, the government had originally suggested a sentence within or a modest degree below the guideline range of 262-327 months. When, however, the court decreed that the guideline range was 121-151 months, the government sought an upward variance, on five grounds: (1) the court's guideline calculation did not account for substantial losses inflicted on the Senate; (2) the guideline range did not account at all for the fact that Fumo's offenses involved public funds and the abuse of state workers, and undermined public confidence in the integrity of elected public office; (3) the guideline range did not account for the loss of reputation and other substantial, non-economic harm suffered by the Independence Seaport Museum and Citizens Alliance; (4) the guideline calculation did not account for Fumo's egregious perjury at trial; and (5) the guideline range did not account for the exceptionally serious nature of the obstruction offenses

**that Fumo committed. App. 998-1010. At the sentencing hearing, the government also asserted that there was a gross disparity between Fumo's sentence and that imposed on Luchko, and on others convicted of comparable offenses; and that Fumo expressed disdain for the law and an entire absence of remorse.**

**The district court never ruled on the government's motion for an upward variance, nor made any statement with regard to any of these arguments, when it sentenced Fumo to a term of 55 months, well below even the range of 121-151 months it calculated.**

**The court did, however, minimize the offenses. In sentencing Fumo, it began:**

> **The first factor I consider is the nature and circumstances of the offense and the history and characteristics of the defendant. Now, I ask myself in regard to this, what is the crime we're talking about here? It's not murder, it's not robbery, it's not even assault. It's nothing violent. It's not the selling of a political office. In fact, in this case, not a dime went directly to the defendant, although there is no question that he benefitted from what he was able to get from the budget of the Senate. The scheme that the defendant adopted to secure the use of taxpayer's money and Citizens Alliance money was so simple that reporters on the staff of the *Philadelphia Inquirer* could discover it, presumably, without the use of the sophisticated investigation techniques of law enforcement.**

App. 1621.[19]

The court also stated that the public bore some responsibility for Fumo's crimes. It said:

> What is regrettable is that the citizens of the defendant's district didn't seem to care enough to inquire about what to me were some obvious things that should have stood out. Here was an office with a big staff and all kinds of things being distributed, and you wonder why a voter might say what the heck, where's all this money coming from? It didn't happen. There was never any competition for -- really meaningful competition as the senator stood for reelection every year. And I'm afraid, really, that the voters succumbed to that totally repugnant political adage which goes something like this: "Well, our senator may be a crook, but he's our crook."
> So this failure on the part of the voters coupled with, in a small part with whatever he calls the media's role

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[19] These statements not only grossly understated the severity of offenses, but were factually incorrect. The notion that "not a dime went directly to the defendant" is inexplicable, given the proof that Fumo used over $4 million of funds of the Senate, Citizens Alliance, and ISM for his personal benefit. The statement that the schemes were so simple that newspaper reporters discovered them is also erroneous. The *Philadelphia Inquirer*'s pre-indictment reporting focused on Fumo's fundraising for Citizens Alliance, which was discerned from public records, and to a lesser extent on his use of Independence Seaport Museum resources. While its efforts were commendable, the media never discovered the vast bulk of the charged offenses, regarding use of Senate and Citizens Alliance staff and resources for personal and political ends, and the destruction of evidence, until indictments were returned describing those offenses. That was because, as discussed later in this brief, the offenses were very carefully concealed.

> in earlier years at least of promoting the mystique of the defendant as a powerhouse politician, together with and singularly most importantly the defendant's own conduct, has led us to where we are today.

App. 1622.[20]

The court also belittled the notion that the public cares about the honesty of its elected officials. It characterized Internet postings by members of the public, which suggested otherwise, as "crap," and highlighted the fact that "they were also entitled to write to the Court and express their views and I got five letters who are against Senator Fumo. I mean, I'm not beginning to suggest that those numbers mean anything, because they probably don't. But the fact is that those people were entitled to write as well." App. 1587-88.[21] At the conclusion of the hearing,

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[20] As will be seen, the evidence showed that it was impossible for anyone but law enforcement to uncover the crimes which took place, and in that context the suggestion that the voters somehow bore some responsibility for the years-long crime spree in the Senate office was inexplicable.

[21] One columnist aptly summed up the proceedings, after attending Fumo's sentencing, stating: "Before cutting Vincent Fumo a massive break, [the judge] discounted almost everyone else involved: the federal agents, the prosecutors, the voters and taxpayers, the press, the probation officer and, most egregious of all, the jury. Everyone, it seems,

(continued...)

**the court did not otherwise comment on the government's specific arguments regarding grounds for an upward variance and a higher sentence. It stated that it reduced Fumo's sentence based on his "extraordinary" public service, as described in 259 letters received by the court.**

**VII. The Sentencing of Arnao.**

**Arnao's sentencing was scheduled to be held a week after Fumo's, on July 21, 2009. During the interregnum, there was a firestorm of public reaction to and criticism of the Fumo sentence, of an intensity not remotely seen in any other case in this district. Much of the reaction focused not only on the 55-month sentence, but on the comments made by the court during the Fumo sentencing which appeared to minimize the offenses and disparage the prosecution, the press, and the public.**

**At the sentencing hearing for Fumo, the government had made no effort to marshal the public revulsion toward Fumo's criminal acts, instead making an ordinary**

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[21](...continued)
**except the defendant." Heller, "Fumo's best defense: Judge Buckwalter," Philadelphia Inquirer, July 18, 2009.**

**presentation that referred to public interest in the prosecution of a prominent public official and stressed the need for the sentence to promote deterrence and respect for the law. The district court, however, questioned the government's representations regarding the public view of the offenses, and highlighted the fact that it received 259 letters from Fumo's friends and family members in his support, and only five letters urging a stiff sentence.**

**In the avalanche of articles, letters, Internet postings, and phone calls which followed, many commentators and citizens expressed shock that the judge appeared to consider it necessary to receive letters from the public asking for an appropriate sentence.[22] Because of the judge's comments, the government, in its sentencing memorandum regarding Arnao filed on July 17, 2009, reported**

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[22] **For instance, the *Inquirer*, which had covered the case exhaustively, including through a live blog from the courtroom followed daily by tens of thousands of readers, termed the sentencing proceeding a "charade," stating in part, "The judge's logic was both flawed and insulting. Buckwalter cited the hundreds of letters he had received praising Fumo. But he ignored the fact that the majority of folks singing Fumo's praises had benefitted financially and/or professionally from their relationship with the powerful legislator." "Appeal Fumo's sentence," Philadelphia Inquirer, July 20, 2009.**

at some length on the events of the preceding three days, summarizing and quoting from communications from the public. App. 1760-66.

At Arnao's sentencing, on July 21, 2009, the court emphasized that it would consider but not be swayed by public opinion.[23] It did not grant a departure based on public service, unlike in Fumo's case. But nevertheless, it granted another enormous downward variance.

Arnao was convicted of the Citizens Alliance fraud and obstruction of justice, not the Senate fraud or the Independence Seaport Museum fraud for which Fumo was solely

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[23] The court did address the media's role in criticizing the Fumo sentence, stating, "I mean, the reason the media has such a low reputation in the community, take some polls on the reputation of the media and, you know, they aren't thought of very highly." App. 1823. The court suggested that the *Philadelphia Inquirer* had turned the case "into a daily spectacle, and by its coverage and editorials, has led the public to expect that long prison terms are the only just outcome." App. 1835-36. The court compared the situation to that addressed in a book, "Public Enemies," which discussed alleged press misstatements during the crime spree of Charles Arthur "Pretty Boy" Floyd 75 years ago. Id. The court did not address the government's statements rejecting the conclusion that the press coverage in this case was anything but fair and balanced, and that to the extent the stories were sensational, and ultimately led to a call for substantial punishment of the defendants, that only reflected the fact that the crimes themselves were sensational.

liable. The government recommended, and the Probation Office agreed, that the applicable fraud loss was between $1 million and $2.5 million, leading to an offense level under Section 2B1.1 of 23. The government and the PSR asserted that she was subject to the enhancements for sophisticated means, misrepresentation on behalf of a charitable organization, and obstruction of justice. Her total offense level for fraud should be 29.[24]

The guideline for Arnao's tax offense should be the same as for Fumo's, that is, an offense level of 26. Under the grouping rules, 2 levels are added to the higher offense level, producing a final offense level of 31. At

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[24] The government initially stated that she, like Fumo, should receive the enhancement for abuse of trust. However, it later recognized that that enhancement does not apply where the pertinent conduct is also the only conduct on which an enhancement for misrepresentation on behalf of a charitable organization is based. See § 2B1.1 app. note 7(E)(I) ("[i]f the conduct that forms the basis for an enhancement under subsection (b)(8)(A) [misrepresentation on behalf of a charitable organization] is the only conduct that forms the basis for an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill), do not apply that adjustment under § 3B1.3."). This limitation did not apply to Fumo, because his abuse-of-trust enhancement was imposed for separate conduct involved in the Senate fraud, apart from his misrepresentations related to the Citizens Alliance charity fraud.

criminal history category I, the advisory sentencing range is 108-135 months.

The district court, however, rejected the sophisticated means enhancement, and determined that the Citizens Alliance loss was slightly below $1 million (approximately $800,000 less than the government's total). These determinations reduced the fraud offense level to 25, and the tax offense level to 24. Following application of the grouping rules, the final offense level was 27, and the guideline range was 70-87 months.[25]

The court then imposed a sentence of one year and one day, to run concurrently on all counts, far below the guideline range. In the judgment and commitment order, the court reaffirmed that it had not granted a downward departure. Rather, the judgment states that the final sentence was solely a variance from the advisory guideline range, adding, "The reasons are those set forth in the record of the Sentencing hearing of July 21, 2009." Sealed App. 286.

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[25] The court denied defense objections to the abuse of trust/misrepresentation enhancement, App. 1815, and to the tax loss calculation, id. at 1817.

However, the court never explained how it arrived at a sentence so markedly different from the recommended guideline sentence. The one positive comment it made regarding Arnao at sentencing afforded that the court found Arnao "remarkable" for rising from a troubled childhood and early motherhood to make positive contributions to society. App. 1836. In another notable comment at sentencing, the court, citing a handful of other prosecutions of Philadelphia-area officeholders for corruption, expressed doubt that sentencing in this area has any deterrent effect on others. App. 1836-37. It otherwise stated no justification for the variance.

VIII. Forfeiture.

The indictment also sought forfeiture from the defendants of assets equivalent to the sum of the value of the goods and services which they fraudulently obtained. After the jury returned its verdict, the parties briefed the pertinent issues; the defense objected to the legal basis of the government's claim. Rather than grapple with these issues, the court instead issued a brief order which stated

in conclusory fashion, "the government has not met its burden of proof by a preponderance of the evidence of showing what property Vincent J. Fumo himself received which constituted or was derived from proceeds traceable to the mail or wire fraud counts on which he was convicted . . . ." App. 465. The court therefore summarily rejected forfeiture, but added, "This verdict deals with forfeiture only and has no bearing on the issue of restitution, the amount of which will be determined at a hearing which will be held, if necessary, prior to sentencing." Id. These statements were inconsistent, with each other and with the jury's findings, but the government has elected not to appeal the forfeiture ruling.

## STATEMENT OF RELATED CASES

The prosecution of a number of other defendants related to this matter is described in the statement of the case. There are no related appeals pending before this Court.

## SUMMARY OF ARGUMENT

The district court made numerous errors in the course of imposing unduly lenient sentences on the defendants.

The corruption exposed in this case was breathtaking. Defendant Fumo, a 30-year member of the Pennsylvania Senate, used his control of a well-funded Senate committee and of a nonprofit organization he created and supported (Citizens Alliance), as well as his influence over another nonprofit institution, to support a lavish lifestyle and illegally amass political power. In part, he used funds and resources of the Senate and of the nonprofit organizations to provide him with staffers who served his every whim, from running political campaigns, to aiding his personal business ventures, to attending to his needs at the five homes he maintained. He used the funds of the Citizens Alliance charity for political purposes, and to acquire over $1 million of luxury vehicles, merchandise, farm equipment, and myriad other items. The court found a loss to the various entities in excess of $2 million; in actuality, the loss was at least double that. Just as strikingly, once the

**federal investigation began, Fumo embarked on a determined effort to obstruct justice, directing his public employees to destroy extensive computer evidence of his crimes. Defendant Arnao, who had been installed by Fumo as the executive director of Citizens Alliance, participated in the fraud on that entity as well as the obstruction which followed. Yet despite the evidence of such egregious, years-long misconduct, the district court imposed sentences far below those imposed for similar offenses and offenders.**

**While the sentences were indisputably unreasonable, the court's sentencing determinations are marked by numerous procedural errors, which we must recognize, under the precedent of this Court, make appellate review of the substantive reasonableness of the sentences impossible at this time. This appeal therefore focuses on the manifold procedural errors, and seeks a remand for resentencing.**

**1. <u>The court miscalculated the guideline ranges</u>.**

**At the first stage of the sentencing process, the court incorrectly calculated the guideline ranges, in a**

**manner which significantly reduced the offense levels applicable to each defendant.**

**a. The loss calculation for each defendant was artificially lowered, resulting in an insufficient assessment of loss regarding the Senate fraud scheme (with which Fumo was charged) and the Citizens Alliance fraud scheme (with which both Fumo and Arnao were charged).**

**With regard to the Senate fraud, the court excluded entirely $996,355.07 in loss which was assigned to eight Senate employees, whom Fumo wildly overpaid with public money to do personal and political work on his behalf. The government's estimate was exceedingly conservative, and was described by the Probation Office as "a logical and reasonable method to determine a loss figure for this portion of the fraud in this case." Fumo PSR at 166. Significantly, the method advocated by the government and the Probation Office only estimated the amount by which the eight employees were overpaid as a result of fraudulent job classifications; it assigned no loss at all based on the abundant proof that these same employees spent a great deal of their Senate work time engaged in non-Senate tasks for**

Fumo's benefit. Yet despite the jury's determination that Fumo committed fraud by directing Senate staff to perform personal tasks, and substantially overpaying these eight employees to compensate their fealty, the court's ruling assessed no loss at all for this element of Fumo's fraud upon the Senate.

Similarly, the court improperly excluded $150,000 in loss suffered by the Senate on a no-work contract which Fumo awarded to a friend, Mitchell Rubin. Even though the jury convicted Fumo of this fraud, the court assessed no loss at all, after the defense at the eleventh hour stated that it had evidence that Rubin actually did work under the contract, and the court stated that resolution of the issue would unduly delay sentencing. This was an abuse of discretion, as Federal Rule of Criminal Procedure 32(i)(3)(B) required that the court resolve the issue, and the evidence put forward at the last minute by the defense was wholly unreliable.

With regard to the Citizens Alliance fraud, the court improperly reduced the loss for three categories of the theft; correction of any one of these calculations would

change both defendants' offense levels. First, the court omitted $50,380 in the value of tools and consumer goods stolen by Fumo and Arnao using Citizens Alliance's money, even though the jury specifically rejected Fumo's testimony on this issue, and even Fumo never refuted the dispositive fact that Citizens Alliance did not receive these items. In fact, the government's estimate of $134,104.20 as the total value of the tools and consumer goods stolen by the defendants was quite conservative, as it gave the defendants the benefit of the doubt regarding many purchases, and omitted entirely the value of goods for which no receipts existed (even though the purchases plainly matched the pattern of the other thefts).

Second, addressing the loss caused by Fumo's use of Citizens Alliance's funds to lavishly appoint and maintain office space for Fumo, the court improperly gave a $661,391.64 credit against the loss, based on the current market value of the property. This calculation was based on numerous legal and logical errors, and had the effect of not only eliminating all loss caused by the office expenditures,

but actually reducing the loss suffered by Citizens Alliance on unrelated parts of the fraudulent scheme.

Third, the court erred in granting a $100,000 credit against the Citizens Alliance loss based on the purported value of a painting which Citizens Alliance paid for on Fumo's behalf. The "credit" afforded by the court is not supported by any of the available evidence.

In sum, the court incorrectly reduced the loss caused by Fumo on all the fraudulent schemes by close to $2 million, including a reduction of approximately $800,000 in the Citizens Alliance loss for which Arnao was also responsible. These determinations reduced the loss totals to just slightly below the thresholds at which both Fumo and Arnao would be subject to the imposition of two additional offense levels, as advocated by the government and the Probation Office.

b. Further, the court erroneously declined to impose a two-level increase in Fumo's offense level under U.S.S.G. § 2B1.1(b)(8)(A), which applies where the defendant misrepresented that he was acting on behalf of a charitable organization. Fumo raised money for Citizens Alliance on

the pretense that he was furthering its charitable work, when in fact he intended to skim part of the collections. Those facts are identical to those described in the guideline provision as warranting the enhancement, but the court refused to apply it, providing virtually no explanation.

c. The court also erroneously declined to impose a two-level increase in the offense levels of both Fumo and Arnao for use of sophisticated means, U.S.S.G. § 2B1.1(b)(9)(C). Again, the enhancement is squarely supported by the guideline and case law, but the court rejected it without explanation. For example, the evidence established that Fumo and Arnao set up sham subsidiaries of Citizens Alliance, for the sole purpose of acquiring goods and services for the defendants without needing to disclose them on Citizens Alliance's public tax filings. Such conduct is expressly addressed in the guidelines as amounting to sophisticated means.

2. The court refused to specify or consider a final guideline range for Fumo.

After announcing a guideline range for Fumo, the court stated that it would reduce his sentence on the basis

of "extraordinary" public service. However, in a post-sentencing ruling, it refused to specify the guideline range at issue for Fumo. In stark violation of the applicable statute and Supreme Court and Third Circuit direction, the court declared in its post-trial memorandum, "the court never enunciated the guideline level to which it departed, and, in fact, never reached the sentence it did by consulting any specific level on the guideline chart." App. 1653. That manifest error demands a remand for resentencing.

3. The court failed to resolve whether its sentencing reduction for Fumo was based on a variance or a departure.

The district court also violated the clear directions of this Court in declining to resolve whether its sentencing reduction based on "extraordinary" public service rested on a variance or a departure. The distinction is particularly significant in this case because, pursuant to Third Circuit precedent which the district court never addressed, the facts in this case did not permit a departure on the grounds cited by the district court. The Third Circuit has explained that such a departure should be

applied only where an official gave of his personal time and funds, in an extraordinary manner, and the evidence in this case irrefutably showed that Fumo (who spent about half of every year on vacation) did neither.

4. The court did not address the numerous grounds presented by the government which justified a more substantial sentence for Fumo.

The government sought an upward variance for Fumo on five compelling grounds: (1) inadequacy of the loss determination to account for significant losses which clearly occurred but which the court did not include in the guideline calculation; (2) the loss of public confidence in the integrity of elected public officers; (3) the loss of reputation and other intangible, non-economic harm suffered by the Independence Seaport Museum and Citizens Alliance; (4) Fumo's astonishing perjury at trial; and (5) the egregious nature of the obstruction offenses that Fumo committed. App. 998-1010.

The government's presentation regarding Fumo's perjury was particularly detailed. Fumo testified at trial for over a week, and presented false information regarding every subject he addressed. All of his exculpatory claims

were rejected by the jury, which convicted him on every count. The government identified 27 specific areas of false testimony, but the district court failed to address this matter at all. The court likewise did not rule on any of the other grounds for an upward variance, nor address any of these aggravating factors, in violation of the requirement that the court at sentencing address any claim of possible merit. The court also did not sufficiently address the government's assertions that the lenient sentence created a disparity with sentences imposed on similarly situated offenders, and that its sentence undermined deterrence and respect for the law.

5. The court did not provide justification for the huge sentencing variance afforded to Arnao.

The court stated insufficient reasons for the huge variance it granted to Arnao, which produced a sentence extremely disparate to those imposed on similarly situated offenders. The only positive factor the court cited was that Arnao rose from an impoverished childhood and teen pregnancy to maintain a career as a legislative aide and nonprofit director. But the history the court cited was 30 years old, and could not justify the minuscule sentence for

**Arnao's conduct, as a grown adult, in defrauding a charity of more than $1 million and extensively endeavoring to obstruct justice. The court offered no other justification for its leniency, and thus committed procedural error. And once again, the court did not address the aggravating factors cited by the government.**

## ARGUMENT

## I. THE DISTRICT COURT MISCALCULATED THE GUIDELINE RANGES APPLICABLE TO THE DEFENDANTS.

### Standard of Review

The district court determines the application of a guideline factor under the preponderance of the evidence standard. This Court exercises plenary review of an interpretation of the Sentencing Guidelines, and reviews factual findings for clear error. United States v. Grier, 475 F.3d 556, 570 (3d Cir. 2007) (en banc).

### Discussion

A. Introduction.

In United States v. Gunter, 462 F.3d 237 (3d Cir. 2006), the Third Circuit stated that sentencing requires a three-step process:

> (1) Courts must continue to calculate a defendant's Guidelines sentence precisely as they would have before Booker.
>
> (2) In doing so, they must formally rule on the motions of both parties and state on the record whether they are granting a departure and how that departure affects the Guidelines calculation, and take into account our Circuit's pre-Booker case law, which continues to have advisory force.

> **(3) Finally, they are required to exercise their discretion by considering the relevant § 3553(a) factors in setting the sentence they impose regardless whether it varies from the sentence calculated under the Guidelines.**

**Id. at 247 (internal quotation marks, citations, and alterations omitted). In this case, during the sentencing proceedings, the government described the required Gunter process in detail, App. 1558, and the defense agreed with this explanation of the requirements, App. 1561. Yet the district court did not comply.**

**The result was the imposition of sentences on Fumo and Arnao which were grossly unreasonable. Fumo stole millions of dollars, over a period of many years; he was an elected official who abused positions of public trust as well as charitable institutions; he committed tax fraud to hide one of his fraudulent schemes; and when he was caught, he engaged in an exhaustive effort to destroy records of public institutions, and then spent a week on the witness stand committing perjury. For these crimes, the guidelines suggested incarceration of Fumo for 21-27 years. His sentence of 55 months was no more than that imposed on some**

common thieves.[26] Likewise, Arnao's sentence of one year in prison (about 10% of the proper guideline range) cannot be sensibly reconciled with her conduct in defrauding a nonprofit charitable organization, of which she was the executive director, of more than $1 million, and then helping to obstruct justice.

But while the government preserves the argument that the sentences were substantively unreasonable, we must

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[26] The Probation Office acknowledged that some variance may be warranted based on Fumo's public service and his age -- the government did not dispute that at sentencing, either -- but that comment was made in relation to the Sentencing Guidelines' appropriate assessment of the onerous punishment which applied.

The actual 55-month sentence here represented an enormous reduction for Fumo, based solely on his work as an elected legislator (which, as explained later, was not even a full-time job). What became striking, in letter after letter submitted by Fumo, is how Fumo gained credit for securing state funds and grants to support worthwhile programs, and deploying his employees, also paid with state funds, to do the same. Thus, if the court's judgment ultimately prevails, it provides that an official with control over public money has the ability to gain leniency for criminal acts, based on his eleemosynary use of the money, which is not available to an ordinary citizen. In essence, just as Fumo, to use his phrase, used "other people's money" to support his lifestyle, he then used "other people's money" to gain sentencing lenity. It takes little thought to appreciate why his sentence was so widely seen as offensive and provoked such a storm of public revulsion.

**be faithful to unambiguous Third Circuit precedent holding that the substantive reasonableness of the sentences cannot be reached in light of the extensive procedural errors made by the district court. The remainder of this brief therefore focuses on those procedural errors. This Court has explained:**

> **Our reasonableness review relies on a district court's reasoning from the starting point of the correctly calculated Guidelines through the § 3553(a) factors. Our Court, our sister courts of appeals, and the Supreme Court agree that a district court's use of the incorrect Guidelines range impedes our ability to conduct review of the ultimate sentence.**
>
> **. . . .**
>
> **In sum, while "the district court is free to make its own reasonable application of the § 3553(a) factors, and to reject (after due consideration) the advice of the Guidelines," Kimbrough, 128 S.Ct. at 577 (Scalia, J., concurring), it must first duly consider the correct Guidelines. Thus, a district court's incorrect Guidelines calculation will thwart not only its ability to accomplish the analysis it is to undertake, but our reasonableness review as well.**

**United States v. Langford, 516 F.3d 205, 213, 215 (3d Cir. 2008). See also id. at 211-15 (extensive discussion of the necessity of an accurate guideline determination as a prerequisite for reasonableness review); United States v. Ali, 508 F.3d 136, 154 (3d Cir. 2007) (remanding for**

**resentencing in light of errors in calculating guideline ranges).**

**More recently, the Court reaffirmed:**

> **In the post-Booker era, very few procedural errors by a District Court will fail to be prejudicial, even when the Court might reasonably have imposed the same sentence under the correct procedure.**
>
> **. . . .**
>
> **The lesson of our post-Booker jurisprudence is that different procedures may lead to different sentences, and thus an error of procedure is seldom harmless. It is difficult to conclude that a District Court *would* have reached the same result in a given case merely because it *could* have reasonably imposed the same sentence on a defendant.**

**United States v. Vazquez-Lebron, 582 F.3d 443, 446-47 (3d Cir. 2009) (emphasis in original).**

**In this case, specifically, the district court incorrectly calculated the guideline ranges; refused to state whether it was granting a departure or a variance to Fumo, and declined to state his final guideline range; failed to address the government's detailed requests for an upward variance and longer sentence with regard to Fumo; did not address the impact of the sentence imposed by a different judge on another defendant in the case; and did not provide any justification for the substantial variance**

it granted to Arnao. These numerous errors must be corrected and the case should be remanded for resentencing.

We begin with the court's miscalculation of the guideline ranges. The court improperly reduced the guideline offense levels, by rejecting plainly applicable enhancements without explanation, and reducing the loss calculations to sums just below the cut-offs in Section 2B1.1 for higher offense levels. These actions had the effect of slicing Fumo's guideline range in half (and also substantially reducing Arnao's), and making the variances which followed look less extreme than they actually were.

B. The Court Committed Clear Error in its Calculation of the Loss Caused by Fumo's Fraud on the Senate.

The total fraud loss advocated by the government for Fumo was $4,339,041.72, consisting of $2,440,282.49 for the Senate fraud, $1,770,852.35 for the Citizens Alliance fraud, and $127,906.88 for the ISM fraud. App. 877-78. A portion of this amount had been repaid prior to sentencing (for example, Fumo raised money from political allies to repay the polling expenditures paid by Citizens Alliance, after that conduct was exposed). Thus, the total

restitution which the government sought (prior to prejudgment interest) was $4,034,106.34. Id.

The district court's guideline rulings lowered the offense level for both Fumo and Arnao, and reduced their restitution obligation as well.[27] The court found a total loss for Fumo of $2,379,914.66, close to $2 million below the government's sum, and falling just below the $2.5 million threshold at which Fumo's offense level would be two levels higher. The court found that the Citizens Alliance portion of the loss, for which Arnao was also responsible, was $958,080.36, over $800,000 below the government's estimate, and falling just below the $1 million threshold at which Arnao's offense level would be two levels higher.[28]

Focusing on the Senate loss first, the pertinent background of the loss calculation is that Fumo's scheme to defraud the Senate consisted of several components:

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[27] Thus, through this appeal, the government seeks reversal of the restitution orders along with the other parts of the judgments.

[28] Section 2B1.1(b) calls for an increase of 14 levels if the loss is more than $400,000; an increase of 16 levels if the loss is more than $1 million; and an increase of 18 levels if the loss is more than $2.5 million (up to $7 million).

1. Senate employees performed personal or political work for Fumo during time compensated by the Senate. The government identified seven employees in this category (Costello, Coyne, Marrone, Novelli, Sabol, Spagna, Wilson), and calculated the amount of state pay they received for the time periods during which they illicitly served Fumo. Those losses totaled $316,514.42, and the district court accepted that estimate.

2. Fumo caused other loyal employees who regularly performed personal and political work for him to be overpaid, by categorizing them in higher-pay jobs than their actual duties justified. The government estimated a total overpayment of $996,355.07 for eight such employees. The district court rejected this loss assessment in its entirety.

3. Fumo used Senate money to pay independent contractors (Wallace, Cain, Press, Palermo, Rubin) for personal or political services. The government estimated a loss of $1,117,413 on these contracts; the court accepted all of that loss except $150,000 assigned to the Rubin contracts.

4. The government nominally estimated a loss of $10,000 for Fumo's disbursal of Senate computer equipment to friends, family members, and personal aides. The court accepted this loss estimate.

See App. 877. The government disputes the court's rejection of the loss for overpaid employees, and for the Rubin contracts.

1. Overpaid employees.

In an attachment to the judgment and commitment order for Fumo, the court stated:

> With respect to Senate restitution, I accepted all of the government's calculations except those based on the government's assessment of the difference between what the employees' classification should have been and what it actually was. These employees are shown in the presentence report as overpayment. With regard to these 8 employees, I agree with the defendant's objections.

Sealed App. 185. This ruling is clearly erroneous; indeed, it rejects findings which the jury made beyond a reasonable doubt.

The evidence clearly established that the eight employees were misclassified and grossly overpaid for their loyalty. The indictment presented charges concerning the payments to each of these employees, and the government presented its case to the jury regarding those charges based on exactly the same overpayment theory which it advanced at sentencing. The jury convicted on every charge. Yet the effect of the sentencing ruling is to find no loss at all for this substantial part of the fraud.

The government's estimation method was, in fact, quite conservative. This is best explained by focusing

initially on the first of the employees in this group of 8, Ruth Arnao.

The government calculated the overpayments by identifying, in the pay manuals approved by the Senate's Committee on Management Operations (COMO), the most generous category applicable to the actual Senate job performed by the employee, as described by witnesses at trial, and then assuming that the employee could receive the highest salary authorized for that category. The loss amount, in each year, is the difference between that salary and the amount Fumo actually paid the employee. This method employed the COMO "pay plan" in effect at the pertinent times -- Exhibit 101 (in effect through 2003), App. 4784-5004; and Exhibit 102 (in effect beginning in 2004), App. 5005-33.[29]

[29] The summary of loss for the eight employees, using this method, appears in Exhibit 144, which was displayed to the jury for demonstrative purposes during closing argument. App. 5084-86. While Fumo criticized this exhibit as "speculative," he never challenged a single conclusion on the chart regarding the appropriate classification of the employees. That is because administration of the pay plans is not rocket science -- the plans set forth clear categories for the actual jobs performed by Senate employees, and it is a simple task to find the right matches based on the trial evidence.

With regard to Senate employee Arnao, her fellow employees testified that, besides serving Fumo's political and personal needs, and overseeing Citizens Alliance (for which she was separately compensated during all of the years in question),[30] she did nothing other than occasional constituent service on behalf of the Senate office. See, e.g., App. 2002, 2476-77, 2926-27. Even Gina Novelli, a witness friendly to the defense who served as Arnao's aide for three years, and agreed to a leading question that Arnao worked more than the required 37.5 hours per week for the Senate, could not (or would not) specify anything Arnao did for the Senate. App. 2714. Similarly, Fumo's secretary, Lillian Cozzo, who worked roughly 10 feet from Arnao for

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[30] The defense tried to suggest that Arnao's work on behalf of Citizens Alliance, in providing services to area residents, was a form of constituent service as part of her Senate job. However, she received separate pay beginning in 1999 for serving as the executive director of Citizens Alliance, and more significantly, Senate Chief Clerk W. Russell Faber testified that the Senate will not pay an employee to run a separate nonprofit organization outside of Senate auspices. App. 1850. See also App. 2253-54 (the executive director of the State Ethics Commission testified that it is a violation of the Ethics Act for an elected official to use state employees to run a nonprofit organization which provides gifts or other compensation to the elected official).

almost 20 years, could not specify anything Arnao did for the Senate, other than constituent service and matters related to Citizens Alliance (such as the development of charter schools). App. 2736-37.

Yet the government proposed to give the benefit of the doubt, and accept the defense position that Arnao was involved full-time in constituent relations in the Senate district office. In that case, her most favorable classification under the old pay plan was as "Field Representative," which was the Senate's highest designation for a district office constituent relations position (the job description included supervising operations, handling complex inquiries, attending meetings, and drafting legislation). App. 4930. The highest authorized salary for the position was $34,449, App. 4786 (the highest salary for pay range 6, in which Field Representative was placed); when compared to Arnao's actual salaries from 1998 through 2003, App. 5066-72, she was overpaid at least $245,044.89 during that time.[31] Fumo accomplished this by fraudulently

[31] In determining the amounts paid to employees, the government used the amount of total wages stated on W-2s (continued...)

classifying Arnao in the position of "Executive Assistant IV," which the pay plan defined as the primary ranking administrator of the office. Interestingly, as part of this fraud, Fumo's district office, which consisted of 10-15 people, had no fewer than four "primary administrators" -- Arnao, secretary Lillian Cozzo, and long-time Fumo friend Roseann Pauciello, all of whom were rewarded for their personal loyalty, along with Charles Hoffman, who actually did run the office as chief of staff and therefore was not referenced in the government's proposed loss calculation. See App. 2910, 5084-86.

The government's estimate was exceedingly conservative in numerous respects. First, it assumed that Arnao actually put in a full workweek on Senate business as a constituent relations expert, when that was not so. The loss estimate of $245,044.89 for Arnao's pay does not include any loss at all from the fact that Arnao actually devoted only a very small portion of her compensated state time, if any, to actual Senate work. In truth, the actual

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[31](...continued)
introduced into evidence, before tax deductions, which comports with the methodology of the pay plan.

loss exceeded $400,000, comprising everything she was paid with tax dollars from 1998 through 2003, but the government conservatively determined not to press that point. Second, the estimate assumed that Arnao would be classified in the very highest available position, and third, that she would be paid at the highest pay level within the range of levels authorized by that position.[32]

In objecting to this method, Fumo first relied, App. 1505, as he had at trial, on the testimony of his Harrisburg chief of staff, Paul Dlugolecki, who testified as a defense witness that the categorizations of employees were permissible. Dlugolecki initially testified that the original pay plan was too rigid, and that it was incumbent on him to find creative ways to classify people in a manner that allowed them to be paid the amount Fumo desired to give them. App. 3770-73. But on cross-examination, he admitted

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[32] At the sentencing hearing, the prosecutor stated, "we have consistently, over and over, and over again -- and I'll go through it when we go through the people -- gone for the lowest possible estimate, such that we can confidently say that this was actual loss." App. 1513. The court responded, "I understand that you've done that, and I read throughout your submissions, you have suggested that." App. 1514.

that Fumo's office was required to follow the pay plans, that they could not lie to the Chief Clerk, App. 3792-94, and confronted with his grand jury testimony, he admitted that he sometimes had to "overstate or exaggerate what these employees do in order to get the clerk's office to approve it[,]" App. 3798. The Chief Clerk himself, W. Russell Faber, was more unequivocal, testifying that the pay plans were mandatory and he expected that no one would lie to him. App. 1858, 1917. The jury necessarily sided with Faber's view in convicting Fumo on every count related to the eight misclassified employees.

Secondarily, Fumo argued at sentencing that the government was not qualified to suggest proper classifications, stating that the manuals were complex, and that Faber himself had not endorsed the government's work.[33] In truth, in a victim impact statement on behalf of the Senate, Faber supported the government's approach, stating:

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[33] It appears that the court accepted this rationale for denying the loss finding, as it orally stated at the outset of the Fumo sentencing hearing: "There were eight people that I felt I couldn't determine they were the ones that had the suggestion that one thing should have been another, and I just felt I couldn't make that determination. The rest of them were all credited as a loss." App. 1568.

> I do not have access to the extensive information, testimony, and records acquired by the United States through investigation and subpoena. Therefore, I cannot opine on the accuracy of the dollar amount calculated by the United States. However, relying on the jury's verdict, I have reviewed the methodology used by the United States in their calculations of the loss to the Senate. After reviewing the *Government's Memorandum Regarding Forfeiture*, dated March 18, 2009, I believe the methodology used by the United States is reasonable with respect to the losses sustained by the Senate of Pennsylvania. Again, I cannot opine on the accuracy of the actual dollar amount of the calculations of the United States for reasons noted above.

See App. 879. Understandably, Faber could not opine on the final loss estimates because he was not privy to the trial evidence regarding what each particular employee actually did (as opposed to what Fumo and Dlugolecki falsely told Faber the employees did). But the trial evidence was clear. Indeed, in earlier denying Fumo's post-trial motion for acquittal, the district court stated, "the Government presented substantial evidence that Fumo, with the assistance of his chief aide, Paul Dlugolecki, submitted multiple false job descriptions to the Clerk of the Senate to justify the employees' salaries, even though those jobs were not actually performed by them." App. 479; see also id. at 545 ("Once the jury found the pay plans to be

mandatory, there was more than sufficient evidence, as set forth in detail above, that Fumo intentionally violated the Senate rules by submitting improper classifications for employees in order to obtain salaries for them that were not merited by their actual job duties.").[34]

Further, as the government stated to the district court, finding the right classification based on the trial evidence may have been laborious, but it was not difficult. The pay manuals clearly set forth positions held in a legislative body. A prosecutor explained: "We read through the manuals, and what we were trying to do was look for the most generous category that the person could be put in, given what their personal descriptions were, or the descriptions of other witnesses, as to what they did." App. 1517. "We looked for the most generous category. I would submit, Your Honor, that if a clerk who is not subject to any influence from anyone, sat down and properly classified these people, the loss would be far greater, because of the

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[34] As will be seen, this is just one of many instances in which the court's statements in its June 2009 opinion denying Fumo's motion for acquittal were entirely inconsistent with its sentencing determinations a month later.

way we did this. We did not pigeonhole. We said, and we invite Your Honor to do the same thing, read through the manual and look for anywhere else these people can go." Id.

The prosecutor later repeated: "So again, if someone can show us where there's something else in the manual that describes what these witnesses testified they did, that would be a legitimate argument, but there's not." Id. at 1521. Indeed, the defense never suggested any error in the government's classifications, or any alternative classification for any employee based on the evidence. That is why the district court's statement that it could not classify the employees is so clearly erroneous.

In the case of Arnao, for instance, the task is simple: she was, by her claim, a constituent relations aide, and the highest such position for such an employee during the years of her employment was "Field Representative." Anything she was paid over the sum allotted for that position was fraudulent, as the jury found.[35]

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[35] Specifically, Counts 11, 12, 15, 25, and 26 dealt, in whole or in part, with Senate compensation to Arnao, (continued...)

The clarity of the government's approach, which the Probation Office itself had described as "a logical and reasonable method to determine a loss figure for this portion of the fraud in this case," Fumo PSR at 166, and which Faber also endorsed, is apparent when reviewing the facts concerning the remainder of the eight employees at issue.[36]

Lillian Cozzo. Cozzo provides another excellent example. She was Fumo's secretary in Philadelphia, who loyally supervised all of his personal, political, and legislative needs. She was, by her own account, a secretary, and the pay plans explicitly covered that position. App. 2722. Yet Fumo and Dlugolecki classified her as a high-ranking executive administrator, in order to pay her more. When read the descriptions of those

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[35](...continued)
which the government argued to the jury was fraudulent based on the same calculation theory presented at sentencing. App. 198-99. Likewise, other counts of conviction addressed pay to the other seven employees discussed in this section.

[36] The propriety of the government's estimate is also clear when one considers that, under the guidelines, "[t]he court need only make a reasonable estimate of the loss." § 2B1.1 app. note 3.

positions, she testified at trial that she did not do the work described, and that the job classifications provided to the Clerk by Dlugolecki in her name were false. App. 2723-26. The correct classification is simple: under the old plan, she would most generously be classified as Executive Secretary II, the highest secretarial position in the Senate, App. 4926; and under the new plan, as Administrative A5, the very highest administrative level, App. 5011, 5014. When the highest possible salaries for those classifications are compared to Cozzo's actual earnings, App. 5155-61, it emerges that she was overpaid a total of at least $122,152.80 from 1999 through 2005 to reward her for serving Fumo's personal needs.

Susan Swett Skotnicki. Skotnicki was Fumo's secretary in Harrisburg, App. 2736-37, and was misclassified in exactly the same manner as her Philadelphia counterpart, Cozzo. Based on the evidence, like Cozzo, she would most generously be classified as Executive Secretary II under the old plan, App. 4926; and Administrative A5 (the highest administrative level, App. 5011, 5014) under the new plan. When the highest possible salaries for those classifications

are compared to Skotnicki's actual earnings, App. 5078-83, it emerges that she was overpaid a total of $159,344.89 from 2000 through 2005 to reward her for serving Fumo's personal needs.[37]

Lou Leonetti. The evidence established that Leonetti did virtually no work for the Senate; his main function apparently was to be available for any personal tasks Fumo required. The government asked every Senate employee who testified what work Leonetti did, and none identified anything other than drive Fumo in Philadelphia, and run occasional office errands. App. 1969-70, 2003-04, 2563, 2585, 2589-94, 2684-85, 2929, 3094, 3411. But Fumo

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[37] Once again, this estimate does not account for any personal tasks Swett performed on Senate time. In fact, scores of recovered e-mails showed that she spent part of two years acting as the coordinator of tasks related to development of the farm. See, e.g., App. 5140 (on September 13, 2003, Fumo wrote to Swett, with a copy to Senate employees Sholders, Arnao, Pauciello, and Cozzo, "We have to send Lou [Leonetti] to Paulsboro, NJ to pay the balance of $5,200 (including delivery) for the horses, this week. However, we have to coordinate this with Charlie Shoulders since he has to get the barn ready as well as buy straw, oats, bridles, etc. so he can receive them properly this week."); App. 5139 (Swett coordinates execution of sales agreement for farm property, arranging for Sholders to pick up the agreement and Senate aide Jamie Spagna to prepare Fumo's personal check).

was not in Philadelphia for half the year, and had another principal driver, David Nelson, available when he was, so it was clear that Leonetti was retained principally for personal tasks (or for no work at all).[38] Even Nelson and Fumo, in their testimony as defense witnesses, made no effort to justify Leonetti's employment.

Nevertheless, stretching all reason and giving every benefit of the doubt, the government posited that Leonetti acted as a driver-messenger, as some witnesses assumed, and put in 37.5 hours per week of state work as required. Based on these incredibly generous assumptions, the government only calculated the amount by which he was overpaid above the relevant classifications, using the method explained earlier. The highest classifications conceivable for Leonetti are Legislative Clerk-Messenger under the old plan, App. 4950, and Administrative A4 under the new plan, App. 5013 (it is the highest administrative

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[38] The extensive evidence showing that Fumo spent six months or more of each year outside Philadelphia, most of it on vacation, is described in a later section of this brief criticizing the district court's conclusion that Fumo provided "extraordinary" public service. During those months, Leonetti and Nelson had virtually nothing to do.

position without the requirement of overseeing others). Even assuming these exceedingly generous designations, Leonetti, through bogus classifications, was overpaid at least $21,536.16 from 2000 through 2005. See App. 5220-25 (Leonetti's pay records). Again, this does not include any loss from the fact that Leonetti did not devote much, if any, of his compensated state time to actual Senate work.

David Nelson. Nelson, like Leonetti, was a driver and messenger in Philadelphia, who had vast periods of unused time (while Fumo was away from Philadelphia) and did extensive personal tasks for Fumo.[39] Nevertheless, for purposes of the loss calculation, the government assumed that Nelson, too, consistently worked a full 37.5-hour week on Senate matters. As with Leonetti, Nelson's highest conceivable classifications are Legislative Clerk-Messenger under the old plan, App. 4950, and Administrative A4 under the new plan, App. 5013. Through fraudulent submissions to

[39] A January 22, 2004, e-mail typified the tasks assigned to Nelson and Leonetti; on that occasion, Fumo, at his mansion, wrote to his girlfriend, Dorothy Egrie, "David & Lou just bought a box of candles here at Green Street. However, they are 3" in diameter and 6" high. The ones we currently have in the fireplaces are 3" in diameter and 3" HIGH!!!" App. 5227.

the Chief Clerk, Nelson was paid a total of $116,135.70 above these ranges from 1999 through 2005. See App. 5205-11 (Nelson's pay records).[40] Again, this does not include any loss from the fact that Nelson did not devote all of his compensated state time to actual Senate work.

Roseann Pauciello. According to consistent testimony from all Senate witnesses, Pauciello was a political ward leader who was intimately involved in all aspects of Fumo's campaigns and personal financial matters. The evidence proved that she oversaw Fumo's personal investments, directed the preparation of his personal tax returns, was a partner with Fumo in a privately held real estate venture, and actively participated in political campaigns, all of which occurred in the Senate office during the course of the workday and at other times. As a political ward leader with responsibilities to committee persons and to her ward in general, she also assisted constituents in the Tasker Street district office, when she

[40] Nelson testified that, because he drove the Senator to events and occasionally took down names of constituents, he actually engaged in constituent service. App. 3875. That testimony was absurd, and plainly rejected by the jury.

was not handling Fumo's personal affairs, and when she was not spending nearly the entire summer at the New Jersey shore. App. 1920, 1997-98, 2317-19, 2563, 2920.[41] Consistent with the unanimous testimony, the most charitable classifications for her are Field Representative under the old plan, App. 4930 (the highest constituent relations position in a district office), and Constituency Relations CR5, the highest level under the new plan, App. 5018. Because she was one of Fumo's oldest and closest friends and a devoted and loyal helper, however, Fumo fraudulently paid her absurdly high sums as a "chief of staff," App. 5175-78,

[41] Maryann Quartullo, who served as Pauciello's aide for 13 years, testified that she could not identify any Senate work that Pauciello did other than serve connected constituents. App. 2910, 2920. Pauciello's cousin, John Sfrisi, testified that he visited Pauciello's office only because she was his ward leader, and he knew Fumo's office building at 1208 Tasker Street only as the "ward headquarters," confirming that all Pauciello did was constituent service. Indeed, Sfrisi (a high school social studies teacher) did not even know that his cousin worked for the Senate, even as he visited her repeatedly to address ward politics. App. 3005-06. Likewise, Howard Cain, as savvy a political operator who testified at trial, who served as Fumo's principal campaign aide for 20 years, said that Pauciello provided personal and political services to Fumo, and he never had any idea that she worked for or was compensated by the Senate. App. 2317-19.

**resulting in an overpayment of at least $248,223.19 from 1999 through 2005.**

**When the district court denied Fumo's post-trial motion for acquittal, it highlighted this blatant part of the fraud, writing: "For example, Roseann Pauciello was classified as 'chief of staff,' despite the fact that Fumo already had a chief of staff. Working in that purported position in 2005, she earned a salary of over $106,000. (Govt. Ex. 144 [App. 5085].) Several witnesses indicated that while Ms. Pauciello would assist certain influential constituents who came to the senator's district office, her primary duties involved handling many of Fumo's personal affairs." App. 479. Yet at sentencing, the court assessed no loss at all for this part of the fraud, seemingly rejecting the very same theory on which the jury had convicted and for which the court, in denying post-trial relief, had found sufficient evidence to support a verdict beyond a reasonable doubt.**

**Maryann Quartullo. Quartullo was Pauciello's aide in the Tasker office, and, as she admitted at trial, handled numerous personal matters for both Fumo and Pauciello. App.**

2911-18, 2921-22. For example, Quartullo was given the task of handling Fumo's bank account and expenditures with regard to the operation of his farm. App. 2924-26. When not engaged in such matters, she aided Pauciello in assisting politically connected constituents. App. 2909-10. She testified that the descriptions of her work provided to the Senate Clerk were false. App. 2918-19. When her actual income from 2000 to 2005, App. 5186-93, is compared to the most generous possible classifications for actual constituent service work, in which direct input to the Senator is not required -- Field Representative under the old plan, App. 4930, and Constituency Relations CR2 under the new plan, App. 5015-16 -- the overpayment was at least $14,101.48. Again, this does not include any loss from the fact that Quartullo did not devote all of her compensated state time to actual Senate work.

Charles Sholders. Sholders acted as a driver and clerk, App. 2760, 2821-26, but was grossly overpaid as a result of fraudulent submissions to the Chief Clerk placing him in higher administrative positions in order to give him more money for doing personal work for Fumo. Sholders

himself testified that he did not do the things described in the classification forms submitted in his name, or in the relevant parts of the pay management plans. App. 2827-29. If Sholders were generously classified as Clerk II under the old plan (the highest clerk position not requiring leadership of others, App. 4860), and Administrative A4 under the new plan, App. 5013 (the highest administrative position without the requirement of overseeing others), the overpayment was at least $69,815.96 from 2000 through 2005. See App. 5108-13 (Sholders' pay records). This sum does not include any loss from the fact that, from mid-2003 through the end of 2004, Sholders devoted considerable work hours, compensated by the state, to tasks on Fumo's farm. See App. 2590, 2835-37, 3095-96, 3561-62.[42]

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[42] Sholders and his family moved to Fumo's farm, and Sholders' duties there were evident from many e-mails which Fumo kept on a personal PC card, and were therefore not destroyed. In one, on October 6, 2003, Fumo's Senate secretary, Sue Skotnicki, wrote to Fumo, "I am going to leave here at 3 and go up to check on the horses. I am going to tell Charlie [Sholders] that we are going and to tell his children to have the stalls cleaned, the horses groomed, and their hooves picked. I left a message for the vet asking him to call me back regarding the horses. I'm also going to tell Charlie that we will e going up daily to check on their condition and make sure that everything is in

(continued...)

In sum, through blatant fraud, carried out over a period of many years, Fumo overpaid employees with state money to reward them for their personal loyalty and willingness to perform personal and campaign work for him. These fraudulent overpayments caused a loss to the state of at least $1 million by the most conservative estimate imaginable. Yet the court assessed no loss at all (and thus no restitution to the taxpayers) for this part of the crime. That ruling was not just clearly erroneous, given the trial evidence and the jury's verdict, but essentially arbitrary.

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[42](...continued)
order. Bunch of lazy asses." Fumo replied, "Great! TY." App. 5885. Three days later, Fumo's chief of staff, Paul Dlugolecki, chimed in, writing to Fumo, "Sue said there is a list of chores that need to be done on a daily basis. That is your list and we need to tell Charlie that that is what you want done and that Sue and MIke [Senate contractor Mike Palermo] and me if necessary, will inspect. They should maintain a checklist and understand that until you are satisfied that they are properly executing the routine, and are confidtnt that they will follow though they will be supervised. He must agree to do that or we find someone else." App. 5141. See also App. 5142 (Senate aide Allison Pinto, one of the Senate staffers dispatched to check up on Sholders at the farm, reported to Fumo on her research of goat prices, and also stated that at a Monday sale Sholders sold nine goats). Despite such blatant and overwhelming evidence, the court assigned no loss at all to the Senate payments to Sholders.

**As will be explained later, the district court compounded this error by later ignoring the government's request that the court, at minimum, consider this part of the fraud to justify an upward variance at sentencing from the unduly low guideline range which resulted from the loss calculation.**

**2. Mitchell Rubin.**

**In the indictment and at trial, the government alleged that Fumo gave a no-work Senate contract to his friend, Mitchell Rubin (Arnao's husband), which paid Rubin a total of $150,000 ($30,000 per year for a five-year period). In actuality, Rubin ran an attorney service firm, B&R Services; served as a member and later chairman of the Pennsylvania Turnpike Commission (a position Fumo secured for him); and was active in political races. App. 2943-45. The government presented the testimony of numerous Senate employees and contractors, who attested that they had no idea that Rubin had a Senate contract, and no knowledge of any work he did for the Senate.[43] The government also**

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[43] **The government presented such testimony from no fewer than a dozen witnesses, who were in a position to (continued...)**

showed that neither the Senate nor Rubin's company, B&R Services (in whose name the Senate contract was entered), had any written record whatsoever of any work performed. App. 2941-42, 3600.

At trial, Fumo alone testified that Rubin was a key adviser to him, who also served as a liaison for Fumo with other public officials and business leaders.[44]

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[43](...continued)
observe any Senate work if Rubin did any, and saw none. App. 2004-05, 2201, 2562-63, 2581, 2639-40, 2684, 2738-39, 2928, 2316-17, 2320, 2757, 2825, 2865, 3394.

[44] At trial, the defense also called three witnesses who stated that, on scattered occasions, they discussed issues with Rubin which they believe were also of interest to Fumo. For example, one said that he discussed issues with Rubin when he happened to run into him in the corridors of the State Capitol; another recounted a single meeting in 2000. And none ever knew that Rubin had a Senate contract. App. 3889-3900. The government ridiculed the testimony, suggesting that if Rubin really acted as a liaison for Fumo the defense would have produced far more than this sparse testimony. App. 4403.

Rubin, though he attended the trial almost daily, did not testify. After sentencing in this case, Rubin agreed to plead guilty to an information charging that he endeavored to obstruct the FBI's investigation of this matter. In the plea agreement, he did not admit to committing a fraud on the Senate, but did agree to repay to the Senate all $150,000 he received under the contracts. That repayment has been made.

**The jury rejected this testimony and convicted Fumo of Counts 4 and 5, which stated fraud charges with regard to the Rubin contract. The Probation Office then correctly included $150,000 in the fraud loss total on the basis of the Rubin contracts.**

**At the eleventh hour, at the first sentencing hearing on July 8, 2009, Fumo's counsel announced to the court that they had gathered evidence demonstrating that Rubin in fact performed legislative work under the contract, and asked to present it before the final sentencing hearing on July 14.[45] The materials were submitted to the court on July 13. The next day, the court stated that it would not resolve the issue, and would not assess any loss at all for the Rubin contracts. In an attachment to the judgment and commitment order for Fumo, the court stated: "The long established day of sentencing was July 14, 2009, and because of the complexity of the Rubin loss argument in light of the defense submissions, I felt I could not properly resolve it**

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[45] **None of this evidence was presented in the defense case at trial, despite the fact that, as a prosecutor observed to the jury during closing arguments, Rubin himself attended the trial almost every day. App. 4403.**

before sentencing. Rather than postpone the sentencing, I declined to rule on it." Sealed App. 184-85.

This decision was an abuse of discretion, and improperly resulted in a lower offense level.

The government had already been presented by Rubin's counsel with the new materials, and in its sentencing memorandum filed on July 10, 2009, advised the court of its position that the evidence did not contradict the jury's verdict. App. 993-98. The government explained that the new materials, largely consisting of credit card bills and calendar entries, documented only that Rubin met with people, but provided no explanation of the purpose of those meetings. The defense also provided what they described as reports of interviews with people with whom Rubin met. Those second-hand reports were inconclusive, and the defense did not purport to call any actual witness to testify. The government advised the court: "In sum, it remains the case that there is no document which evidences in any way that Rubin performed any work on behalf of the Senate. Rather, in the government's view, Rubin's counsel are expanding the effort which the Fumo defense began at

trial, to retroactively examine meetings which Rubin had in the course of his varied affairs and recast them as meetings regarding subjects of interest to Fumo." App. 995.

The government also highlighted that Rubin himself was not prepared to testify in support of the latest defense position, undoubtedly because Rubin had earlier testified before the grand jury and (in an effort to shift attention at that time from Fumo) presented an entirely different explanation of the payments from the one that Fumo presented at trial and at sentencing. Rubin testified that the Senate contract was with his company, B&R Services, for ordinary court retrieval and other services, and he suggested that all of his interaction in carrying out the contract was with Fumo's constituent services staff and not with Fumo. App. 996-97. When the government established that B&R provided no such services, Fumo tried a new tack at trial, claiming that Rubin was compensated for directly providing him with essential advice. See App. 3996-97.

The government concluded:

> So this is what happened here -- Fumo created a bogus contract with B&R Services in order to give his friend $30,000 per year. When the government began to investigate, Rubin appeared before the grand jury and

> loyally parroted the prepared story, that this was a legitimate B&R contract which had nothing to do with Fumo. But then the government investigated, and found that no Senate employee used B&R for anything, or even knew that Rubin had a Senate contract (the evidence which the government presented at trial). So Fumo, in his testimony, tried a new and equally false tack, claiming that Rubin was an essential aide who reported only to him. This shifting of defenses and invention of tales was repeated over and over in this case, leading to the jury's decisive verdict rejecting everything Fumo said.
>
> Plainly, the defendant and his cohorts have not been honest -- not with the grand jury, not with the trial jury, and not with this Court. The new defense claims that Rubin did work for Fumo as an adviser and liaison are worthless in the absence of reliable evidence contradicting the jury's verdict. There is none, and the entire $150,000 loss must be assessed.

App. 997-98.

On this record, the district court's task was simple -- to enforce the jury's verdict and assess the loss caused by the contract. Certainly the court could have at least ruled on the issue. The defense was not offering to call any witnesses (for obvious reasons), and resolving the issue would not delay the sentencing proceeding at all. The court should have resolved the issue and assessed the loss.

Indeed, Federal Rule of Criminal Procedure 32(i)(3)(B) provides that, at sentencing, the court "must -- for any disputed portion of the presentence report or other

controverted matter -- rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing . . . ." Accord U.S.S.G. § 6A1.3. The Third Circuit has repeatedly and strictly followed this rule, and its materially identical predecessor. "Where a district court has failed to follow the mandate of Rule 32(c)(3)(D), we have consistently vacated the defendant's sentence and remanded the matter to the district court." United States v. Furst, 918 F.2d 400, 408 (3d Cir. 1990).[46] See also United States v. Gricco, 277 F.3d 339, 355 (3d Cir. 2002); United States v. Electrodyne Systems Corp., 147 F.3d 250, 255 (3d Cir. 1998); United States v. Maurello, 76 F.3d 1304, 1317 (3d Cir. 1996); United States v. Blanco, 884 F.2d

[46] At the time of Furst, the provision was codified at Rule 32(c)(3)(D), which provided: "If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentencing investigation report, or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing." The present version of the rule, which encompasses objections by both the government and the defense, was adopted in 2002.

1577, 1580-83 (3d Cir. 1989) (holding the rule "should be applied literally"); United States v. Gomez, 831 F.2d 453, 455 (3d Cir. 1987) (describing rule as "mandatory").

The rule does not allow any exception for involved or time-consuming issues, nor permit a sentencing windfall for a defendant who belatedly raises a complex issue. Here, the district court clearly violated the rule. The refusal to resolve the Rubin loss issue directly impacted the sentencing calculation, marking the difference for Fumo, according to the court, between a loss above the guideline threshold level of $2.5 million and a loss below that figure.[47]

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[47] The court found a total fraud loss of $2,379,914.66. The $150,000 Rubin loss would put Fumo over the $2.5 million threshold, but then so would assessment of additional loss based on overpayment of employees, or based on the Citizens Alliance fraud, as advocated elsewhere in this brief. Exceeding the $2.5 million level causes a 2-level increase under § 2B1.1, though in this case, due to the grouping rules, Fumo's actual final offense level would be 1 level higher unless the government also succeeds in prevailing on our other guideline calculation claims.

With regard to the error under Fed. R. Crim. P. 32(i)(3)(B), the defendant could credibly assert that a plain error standard applies, in that the government did not cite this rule to the district court. However, the government did oppose the defendant's last-minute effort to

(continued...)

The court's determination of the fraud loss with regard to the Senate, with respect to Rubin's contract as well as the overpaid employees, should be vacated and remanded for reconsideration.

### C. The Court Committed Clear Error in its Calculation of the Loss Caused by the Fraud on Citizens Alliance.

The court's action in reducing the Citizens Alliance loss was equally infirm.

The government advocated, and the Probation Office found, that the Citizens Alliance fraud caused a loss of $1,770,852.35. That loss was the sum of the funds which Citizens Alliance unlawfully spent on behalf of Fumo and Arnao for goods, personal services, luxury vehicles, office furnishings, farm equipment, political campaigns, and various other benefits.

The district court reduced this loss to $958,080.36 -- just below the $1 million threshold at which

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[47](...continued)
erase the Rubin loss. App. 993-98, 1527-29. And our position is unassailable even under a plain error test, in that the rule and Third Circuit precedent unambiguously required a ruling, and that ruling directly affected the sentencing calculation.

Arnao's offense level would be increased by two levels, and also causing Fumo's loss calculation (when combined with the losses based on the Senate and ISM frauds) to fall just below the $2.5 million threshold on the Section 2B1.1 loss table.

In an attachment to the judgment and commitment order for Fumo, the court explained:

> With respect to the Citizens Alliance loss, I accepted all of the government's calculations except purchases from vendors which I reduced by $50,380 out of a total claim (with purchase of other consumer goods) of approximately $133,000. I then gave credits against loss for the fair market value of the Gazella paintings less what Citizens Alliance paid for them (credit of $100,000) and the fair market value of the Tasker Street property ($1,235,000), less the government's calculation of $573,608 for furnishings and improvements, etc. for a credit of $661,391.64. The net credit came to $761,391.64. This figure, plus the $50,380 figure previously referred to were subtracted from the government's computed loss of $1,770,852.35 to arrive at the loss of $958,080.36.[48]

Sealed App. 185. These determinations, as will be explained, are entirely unsupported by the record and also present a variety of legal and mathematical errors.

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[48] This last sentence includes a slight math error, in that the final total, assuming the credits granted by the court, should be $959,080.71.

1. Tools and consumer goods.

At Fumo and Arnao's direction, Citizens Alliance purchased for them a staggering array of merchandise. The defendants did this in a surreptitious manner. Many of the goods were ordered by Arnao or another Senate aide, using credit cards paid by Citizen Alliance, and shipped to Citizens Alliance's headquarters on Wharton Street in Philadelphia, and then workers transported the goods to Fumo's homes and elsewhere. See, e.g., App. 2540-41, 2992. Mostly, the defendants consciously limited these purchases to items that Citizens Alliance might logically buy (like tools and other equipment), and then kept no record of the purchases. On other occasions earlier in the scheme, Fumo and Arnao simply went on shopping sprees near their New Jersey shore homes, using credit cards paid by Citizens Alliance for the bounty. App. 2032-33, 2617.

The manner in which the fraud was carried out -- thefts ranging from a few dollars each to many thousands of dollars, involving thousands of transactions, buried in all the transactions of Citizens Alliance -- necessitated an extraordinary investigative effort by the FBI. Over the

course of a year, agents retrieved and documented every available receipt for goods bought by Citizens Alliance, working with representatives of companies like Home Depot and Sam's Club to identify the purchases. Special Agent Vicki Humphreys then met with Tracy Burris, the supervisor of the Citizens Alliance work crew, to review every item and determine whether or not Citizens Alliance used each item in question for its legitimate work. App. 3611-15, 3617-18.

This effort produced two lengthy charts. Exhibit 1015, referred to at trial as the "tool chart," listed 3,800 purchases of tools and other home improvement equipment and supplies bought by Citizens Alliance, divided per Burris' account into items belonging to Citizens Alliance and those purchased for the defendants and their cohorts. App. 5284-5395. The final estimated total on this chart of benefits to the defendants was $93,409.52.[49]

A second chart, Exhibit 1016, listed hundreds of other consumer goods bought by Citizens Alliance for Fumo

[49] The chart introduced by the government at trial contained a mathematical error, discovered by the defense at trial, which overstated the final total by approximately $22,000. This was corrected before closing arguments, App. 4439-40, and the correct sum was offered at sentencing.

and Arnao during the years in question, ranging from a TV set to kitchen supplies, and including such purchases as equipment for Fumo's boat dock, tiki torches, $1,300 mosquito magnets, and the 19 Oreck vacuum cleaners for Fumo's homes. These purchases totaled $40,694.68. App. 5400-15.

While the consumer goods chart (Exh. 1016) offered a precise list, and Burris attested to the obvious proposition that Citizens Alliance did not receive anything on that list, App. 3330-31, a certain bit of estimation in the tool chart (Exh. 1015) was necessarily involved. That was the inescapable result of a scheme in which the defendants intentionally commingled legitimate and illegitimate purchases, and kept no records. For example, if Citizens Alliance bought 15 screwdrivers, and Burris attested that there were three screwdrivers in his shop, Humphreys credited Citizens Alliance with three screwdrivers on the list of purchases (even though the screwdrivers in the Citizens Alliance shop may have been bought much earlier). App. 3617-18. In lengthy cross-examination at trial, the defense questioned this method, highlighting how

it resulted in items from the same shopping trip being attributed partially to the defendants and partially to Citizens Alliance. But the defense highlighted only about $1,500 in questionable designations on the government's charts. See, e.g., App. 3677-92.

The government's estimate was actually quite conservative, in that it repeatedly, by design, gave the defendants the benefit of the doubt. Giving Citizens Alliance credit for a tool which may have been bought years earlier is one example. Additionally, if Burris was unsure whether a particular purchase was legitimately intended for Citizens Alliance's use, it was placed in the Citizens Alliance column. App. 3618. Even more significantly, the government presented another list (Exh. 1016b), which listed purchases totaling another $73,493.65, for which receipts could not be obtained. These purchases occurred at the same stores from which Citizens Alliance bought the goods for the defendants listed on Exhibits 1015 and 1016 (like Amazon, Best Buy, Tool Crib, and stores in New Jersey). App. 5416-28. The government assigned no loss to these purchases,

even though all were obviously part of the same fraud and for the benefit of Fumo and Arnao.

For his part, at the outset of the investigation, Fumo simply denied receiving anything from Citizens Alliance, no doubt confident that no one ever would undertake the painstaking investigation necessary to prove otherwise. App. 3459-60 (in January 2004 radio interview, Fumo falsely said, "I don't get any money from [Citizens Alliance]. I don't get any benefits from it. In fact, I -- I think that they, once in a while, have picked up trash from my house, and I said oh, God, I'm paying you a hundred dollars a month in case you do anything for me. I pay them."). By the time of trial, when the FBI had in fact proven what happened, the defense team entirely changed direction, admitting that Fumo had in fact received goods, but asserting that he was entitled to them as "gifts" for his assistance to the entity. App. 4034 (Fumo testified at trial, "I never got a salary, but I did get perks and gifts.").[50] However, Fumo, when testifying to this new

[50] This nomenclature was necessary in the defense effort to then explain why Fumo did not report the bounty on (continued...)

claim, asserted that he reviewed the charts line-by-line and saw that he did not receive everything that was attributed to him. According to Fumo, he received $43,029.17 of the items listed on Exhibit 1015 (below the government's estimate of $93,409.52) and "about half" of the $40,694.68 of the goods listed on Exhibit 1016 (i.e., approximately $20,347.34). App. 4034-38. In other words, Fumo claimed that the total he received in tools and other consumer goods was approximately $70,727.69, which is $63,376.51 less than the government's total.

On this issue, the district court stated that it reduced the tools and consumer goods estimates "by $50,380 out of a total claim . . . of approximately $133,000."[51] It

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[50](...continued)
his personal tax returns, in financial disclosure forms of the Senate, and in other contexts. The verbal gymnastics became quite bizarre, as discussed further in the later section of this brief regarding Fumo's perjury at trial.

[51] This statement was made for the first time in an attachment to Fumo's judgment and commitment order issued after the sentencing proceedings had ended. Earlier, the government at the outset of the Fumo sentencing hearing on July 14 had asked for an explanation of the loss determination announced on July 9, but the court stated that it did not have its notes available at the time. App. 1567-68. Thus, the court's particular finding was issued after
(continued...)

appears that the district court, although it never articulated this, accepted some but not all of Fumo's testimony. The sum of $50,380 is equal (rounding the totals) to the difference between the government's estimate of $93,409.52 on the tools chart, and the sum of $43,029.17 which Fumo claimed he received. Inexplicably, the court did not credit Fumo's identical assertion that he only received half of the goods listed on Exhibit 1016, the consumer goods chart.

The court's calculation was clearly erroneous for two reasons.

1. The credit given by the district court relies exclusively on Fumo's testimony, which, as explained later, was grossly perjurious in all respects. The government had argued that this was true with regard to Fumo's particular testimony concerning the tools chart, and the jury expressly agreed. The court's ruling eliminates findings made by the jury beyond a reasonable doubt.

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[51](...continued)
the government could specifically address it.

In his redacted version of the tools chart, Defense Exhibit 733, Fumo incredibly attested that he received some but not all of the numerous purchases from high-end online purveyors like Amazon, McMaster Carr, Tool Crib of the North, and Jensen Tools, despite Burris' uncontradicted testimony that Citizens Alliance's men bought whatever they needed at local hardware stores and never bought anything from these vendors. App. 3332, 3336. Likewise, Burris stated, with unassailable truth, that the South Philadelphia-based Citizens Alliance never bought anything for its legitimate work from stores at the New Jersey shore, where Fumo and Arnao maintained residences. App. 3328. Yet Fumo disclaimed responsibility for some of the shore purchases as well. And Fumo entirely denied responsibility for any purchases made at Home Depot in Philadelphia, despite the testimony of Charles Palumbo, a Citizens employee who was regularly dispatched to serve Fumo and Arnao at the shore, that Citizens Alliance workers were often sent to that Home Depot in Philadelphia to pick up orders and deliver them to Fumo and Arnao's locations at the shore. App. 2992.

In reviewing the matter, it is important to keep in mind what Citizens Alliance did in its legitimate pursuits. Citizens Alliance workers were street laborers; they cleaned streets, picked up trash, cleared lots, and removed graffiti. They used rakes, shovels, industrial paint, and brooms. They did not undertake construction, as Fumo did at his numerous residences; and they were not skilled craftsmen. App. 3326-27.[52] Thus, while the necessary analysis was quite laborious, it was not challenging; in hundreds of instances, one could tell at a glance that the item purchased was part of a fraud on Citizens Alliance.

Yet Fumo's redacted chart excluded numerous items which could not have been for Citizens Alliance's benefit, and which matched the pattern and type of purchases for which Fumo did take responsibility. Neither the defense nor the court addressed any of these facts. For its part, the court did not issue its factual findings until after the

[52] Citizens did pay to rehabilitate a number of properties it purchased in the Passyunk Avenue area, but one of the contractors who did that rehabilitation work testified that the contractors provided all of their own supplies. App. 3110-11, 3114.

sentencing hearings were over, and thus the government never had an opportunity to explain to the court the clearly erroneous findings it made.

Significantly, the government would have advised the court, the jury specifically rejected Fumo's testimony regarding items which the district court nevertheless arbitrarily removed from the loss total. A notable example concerns Count 73, which was an order from Grainger on August 11, 2003. App. 285.[53] Earlier, on July 28, 2003, Fumo sent an e-mail to Michael Palermo, and forwarded it to Sue Swett (later Sue Skotnicki) and Charles Sholders, each of them a Senate contractor or employee who managed Fumo's farm for him, stating: "Tell Keith [i.e., Keith Jack, a worker on the farm] to look at the Granger catalog and let me know what Air Compressor he wants." App. 5138. Two weeks later, another Senate employee, Jamie Spagna, placed an order with Grainger totaling $1,001.25, paid for by

[53] The indictment set forth in individual mail or wire fraud counts selected, typical transactions in which Citizens Alliance bought goods for Fumo and/or Arnao. Count 73 was one such count. The indictment did not present separate counts for each purchase ultimately listed in Exhibits 1015 and 1016; if it had, there would have been thousands of additional counts.

Citizens Alliance, which included an air compressor costing $642.50, as well as a steel creeper, a service jack, and a tire inflator/gauge. App. 5886. On his chart, Fumo denied responsibility for every one of these items. See App. 5810 (steel creeper and service jack on lines 1211-12), 5823 (air compressor on line 1699), and 5824 (tire inflator on line 1725). The jury convicted beyond a reasonable doubt on Count 73. And then the district court excluded it from the loss without explanation.

An identical example is Count 74, which alleged fraud in connection with order no. 75852632 from McMaster-Carr on August 27, 2003, totaling $470.26 paid by Citizens Alliance. App. 285. Fumo testified that he did not receive any of the items in the order. See App. 5781 (hammer drill bits on lines 72-73, 75-76), 5789 (light-duty manual rewind reel on line 433), 5793 (three indoor/outdoor extension cords on line 556), 5796 (high visibility bench vise on line 703), 5803 (rubber-coated U-bolts on lines 933-34), and 5808 (concrete screws on lines 1148-50, 1152-55). The jury rejected Fumo's testimony and convicted him on this count.

Yet the court again excluded it from the loss calculation with no explanation.

Next is Count 75, concerning a September 5, 2003, shipment from Amazon.com of a DeWalt right angle drill for $189.99, paid by Citizens Alliance. App. 285. Fumo said he was not responsible for it. See App. 5827 (line 1793). The jury did not believe him, and convicted on this count. The court, without explanation, essentially erased the jury's finding.[54]

Just a casual glance at Fumo's redaction reveals scores of other items which could not conceivably be for Citizens Alliance's benefit (and which Burris surely would have remembered if Citizens used), yet the court credited

[54] With regard to another example, Count 68, App. 284, Fumo took responsibility for numerous items in the pertinent order from Jensen Tools, see App. 5791 (line 485) (order no. 7014556-00), but denied that he was responsible for the most expensive item in the order, a $199 notebook computer case, see App. 5816 (line 1478). Similarly, in the Duluth Trading order at issue in Count 69 (order no. 10141210), Fumo claimed credit for the obviously fraudulent items in the order, the "Encyclopedia of Country Living" and some clothing, but denied responsibility for numerous storage items in the same order. See App. 5812 (line 1322), 5813 (lines 1347-48), 5834 (lines 2083-86), 5836 (lines 2143-44). The jury convicted on these and all other counts.

Fumo's risible testimony that he was not responsible for the goods. They included:

-- a $106.50 marine sump pump from Grainger, see App. 5822 (line 1644);

-- several multi-piece drill sets bought for $321.50 from Jensen Tools, see id. at 5781 (lines 58-60);

-- a $159 digital multimeter electrical tool bought from Grainger, see id. at 5791 (line 491);

-- $716.98 for three augers from McFeely's, see id. at 5808 (lines 1144-45);

-- over $2,000 in heating and air conditioning equipment bought from Grainger and Home Depot, see id. at 5809 (lines 1186, 1188-91, 1193-94, 1196-97);

-- a $334.44 megaphone from McMaster Carr, see id. at 5817 (line 1487);

-- a $549.99 hammer drill kit from Tool Crib of the North, see id. at 5825 (line 1756);

-- a $299.99 miter saw workstation from Tool Crib of the North, see id. at 5828 (line 1809);

-- yet another right angle drill, this one for $449.25, from Grainger, see id. at 5827 (line 1794); and

-- a $129 DeWalt radio from Amazon, see id. (line 1792).

The court, in making its post-sentencing announcement, never addressed any of these facts. It simply lopped $50,380 off

the loss total, without any explanation, and in obvious contradiction to the evidence and the jury's findings.

2. The district court's judgment is clearly erroneous for another fundamental reason: even if Fumo's testimony is accepted as completely true (despite the jury's verdict), it does not alter the loss calculation in any respect. The evidence was unrefuted that, as Burris and other Citizens Alliance employees testified, Citizens Alliance itself did not receive the items listed on the first half of the tools chart, Exhibit 1015. See, e.g., App. 3331-37. The evidence further established that others besides Fumo, as a prosecutor said, "helped [themselves] at the buffet," App. 1532, including Ruth Arnao, who shared in the New Jersey shopping sprees,[55] and another Citizens Alliance employee and Fumo acolyte, Christian DiCicco. The

[55] For example, one receipt showed that when materials bought by Citizens Alliance on one occasion in Egg Harbor, New Jersey, were returned to the store, it was Mitchell Rubin, Arnao's husband, who made the return, making it clear that Arnao was an active participant in the fraud at the shore. See App. 5396-99 (documents from Home Depot in Egg Harbor showing Rubin's return of closet shelving brackets). The government highlighted this evidence to the jury. See App. 3631-32. The government also presented the eyewitness testimony of Marrone and Egrie, who accompanied Fumo and Arnao on the shopping excursions. App. 2032-33, 2617.

defense at trial itself highlighted DiCicco's receipts. App. 3661-62, 4538.[56] The government had charged, and the jury convicted the defendants of a conspiracy to defraud Citizens Alliance, and the fact that Fumo himself may have only received a portion of the loot is irrelevant. What matters is that the defense never put forward any basis to dispute the government's calculation of the value of goods for which Citizens Alliance paid but never received, and certainly nothing approaching a challenge justifying a $50,380 reduction in the loss amount. The court's diminution of the loss amount was clear error.

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[56] DiCicco was refurbishing his own investment property at the time, and Fumo and Arnao clearly allowed him to help himself. See, e.g., App. 2969. DiCicco was the son of a Philadelphia City Councilman who was a close ally of Fumo, and later succeeded Arnao as Fumo's hand-picked executive director of Citizens Alliance. App. 2326, 2330, 2981, 2985-86. The evidence showed that Arnao kept a close eye on Citizens' expenditures, and acted instantly to stop personal expenses by those who were not among the favored few. See, e.g., App. 2985 (testimony of Citizens Alliance employee Charles Palumbo that after he put a motel charge on a Citizens Alliance card, Arnao immediately summoned him and compelled him to repay the charge).

2. Tasker Street property.

The court next erred in granting the defendants an enormous decrease in the loss total related to the office building Fumo used for his myriad endeavors.

For many years, Fumo maintained his Senate district office at 1208 Tasker Street in South Philadelphia. The building consisted of basement offices, and two above-ground stories. Fumo's bank long occupied the top two floors, while the Senate leased the basement for Fumo's use as a district office. Then, in 1999, the bank vacated the premises, and at Fumo's direction, Citizens Alliance bought the building. App. 1870-71. This allowed Fumo to use the entire building for his personal, political, and legislative affairs.

Moreover, over subsequent years, Fumo caused Citizens Alliance to spend approximately $1 million to maintain, improve, and lavishly furnish the space. He also caused Citizens Alliance to acquire and develop a nearby parcel as a parking lot which he and his closest associates used (a considerable perk in the crowded South Philadelphia neighborhood). In the meantime, the Senate continued to pay

rent at the rate of only $18,000 per year, not much more than it had paid for the basement alone. App. 1871. Further, the Chief Clerk testified that it would not pay the lavish furnishing expenses for any district office which Fumo caused Citizens Alliance to expend. App. 1872-74. Fumo himself paid a total of only $4,580 over the years to Citizens Alliance for storage space, and his campaign committee paid a total of only $1,905 in rent, most of it after the criminal acts were exposed. See App. 5260-64, 5474. In short, Fumo shifted to Citizens Alliance, a nonprofit charity, the cost of providing him with office space for all his affairs, furnished in the extravagant manner he desired.

The government estimated, and the Probation Office agreed, that the loss from this part of the fraud on Citizens Alliance was $573,608.36. The defense objected that Fumo and Arnao should be given credit for the market value of the property, which considerably increased over the years, as determined by a defense expert who did an appraisal and testified at trial. App. 711. The government responded that that would be inappropriate, as the

government's loss estimate rested solely on expenditures for Fumo's benefit which had nothing to do with the increased market value of the building. App. 1535.

The government's very conservative loss estimate of $573,608.36 rested exclusively on unrecoverable expenses incurred by Citizens Alliance at Fumo's behest to allow Fumo to enjoy the property. That sum consists of the following:

-- Citizens Alliance paid $104,933.96 to lavishly appoint two rooms -- Fumo's personal office and conference room in the building's basement -- with things like mahogany paneling and expensive furniture. As documented in Exhibit 1092 and related exhibits, this sum includes items such as $60,000 for office furniture ($1,800 for Fumo's conference room chair alone), $6,600 for mahogany doors, $5,100 for a gun cabinet, and $1,400 for a subzero refrigerator. App. 5458-61. None of that is reflected in the appraisal of the property obtained later by Citizens Alliance, as such expenses have no impact on the market value of the real estate.

-- To allow Fumo to have use of the entire building despite the Senate's policy of spending only reasonable amounts on necessary district office space, Citizens Alliance paid sums which, according to the lease, the Senate tenant was obligated to pay: $19,318 for cleaning, $37,745.81 for maintenance, and $61,610.59 for utilities. Again, none of this is recoverable from a sale of the building.

-- Most significantly, Fumo caused Citizens Alliance to provide him with rent-free space for all of his affairs. The Senate paid only $18,000 per year

> for rental of district office space, and Fumo himself paid virtually nothing. Yet the defense appraiser testified that the entire building could command rents, in 2007, of over $100,000 per year. App. 3856-57, 3860. Likewise, Fumo caused Citizens Alliance to create a parking lot for Fumo and his closest allies, at a cost of $285,000, for which Citizens received no rent at all. App. 3860. An extremely conservative estimate is that Fumo caused Citizens Alliance to lose rents of $50,000 per year from 2000 through 2006. The fact that Citizens Alliance owned a property which appreciated in value has nothing to do with this huge amount of lost income.

When the estimated sum of lost rent of $350,000 is added to the cost of furnishings, cleaning, maintenance, and utilities stated above, the total estimated loss is $573,608.36, entirely separate of the cost of the building. App. 768-69.

The district court accepted all of these estimates, but appeared in its post-sentencing statement to agree with the defense argument that the defendants should be given a credit of $1,235,000 for the full market value of the building and parking lot.[57] The court's calculation,

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[57] This value was found by George Hoez, an expert retained by the defense, who testified at trial. He determined that the building was worth $950,000 as of May 13, 2007, and the parking lot was worth $285,000. See App. 5641-5761 (defense appraisals marked as government

(continued...)

however, was extremely odd, and cannot be logically explained. The government had suggested a total Citizens Alliance loss of $1,770,852.35, which included $573,608.36 in losses attributed to the Tasker Street property. App. 878. The court stated in the judgment that it gave credit for "the fair market value of the Tasker Street property ($1,235,000), less the government's calculation of $573,608 for furnishings and improvements, etc. for a credit of $661,391.64." It then reduced the government's total of $1,770,852.35 by $661,391.64 (and by additional credits as well).

Given that the expenses of $573,608.36 remained in the total of $1,770,852.35 from which the court subtracted, the court actually gave credit for only $661,391.64 of market value, not the full amount of $1,235,000. In

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[57](...continued)
exhibits for display at trial). The government challenged his testimony at trial, pointing out, for example, that even though his testimony occurred on February 3, 2009, he chose to value the properties at the very peak of the market, in May 2007, before a profound real estate recession began. App. 3850-51. But for purposes of sentencing the government did not quibble with reference to these numbers, asserting instead, as explained above, that the market value of the properties was irrelevant to the loss calculation.

**essence, what the court did, if its final loss total is accepted, is erase the $573,608.36 in Tasker Street expenses, plus an additional $87,783.28, an entirely arbitrary sum. In short, this decision not only wiped out the entire loss caused by the Tasker Street expenditures identified by the government, but had the remarkable effect of negating $87,783.28 in losses caused by other parts of the Citizens Alliance fraud, which was enough in the final calculations to significantly reduce the offense levels applicable to both Arnao and Fumo.**

**Not even the defense had suggested this calculation, and the court did not announce it until after the sentencing proceedings were over, depriving the government of a chance to explain how unsupportable it is. The court's ruling was manifestly wrong, for a number of reasons.**

**1. As a matter of law and logic, there should be no credit against loss at all for the value of the Tasker Street properties. As an entity, Citizens Alliance had every right to buy these properties (even if it was Fumo who ordered it), and to enjoy their increase in value. The**

fraud was that Fumo caused Citizens Alliance not to let the building for fair market rents, and caused Citizens Alliance to make expenditures for which it was not liable, and which did not add to market value in any way. The district court never addressed this argument, and its final determination is clearly erroneous.

Even the defense appraiser agreed at trial that the losses highlighted by the government, such as for furnishings, utility payments, etc., had no relation to the property value whatsoever. App. 3852, 3856. The district court entirely ignored this undisputed testimony.

The result here is akin to a case in which a banker develops new business for the bank, then steals money from the cash drawer on the way home, and is given a credit against the loss for the legitimate work he did. That is clearly wrong. See, e.g., United States v. Bissell, 954 F. Supp. 841, 887-88 (D.N.J. 1996) (describing as "nonsense" the defendant's argument that the amount of money she skimmed from a business she served as bookkeeper should be reduced by credit for the value of her work; "As a dishonest employee who stole from the business, Barbara Bissell was

not entitled to compensation based upon the 'value' of her work."), aff'd mem., 142 F.3d 429 (3d Cir. 1998). The government's original loss estimate should be applied, without any credit for fair market value.

2. The ruling also confuses actual loss with intended loss; the guideline provides that the latter is used if higher. In that context, the court should not give the defendants credit for the fortuitous run-up in value of the properties, which largely occurred (if at all) after the fraudulent scheme ended. When they were spending with abandon on things like mahogany furniture and a subzero refrigerator, and providing Fumo with expensive, rent-free space, the defendants clearly intended simply to spend the money and impose a loss on Citizens Alliance. They could not conceivably have intended that the expenditures increase the value of the property and were therefore justified, as such expenditures do not affect the value of the property.

As Judge Posner wrote:

> Likewise an embezzler might not intend to impose a loss on his employer, might instead intend to use the money to gamble and win and thus be able to replace every penny he had taken. Suppose that he is caught before he has a chance to gamble with any of the money, and every cent is recovered. He is nevertheless an

> embezzler to the full extent of the amount he took, no matter how golden his intentions or happy the consequences.
>
> We may put it this way: the amount of the intended loss, for purposes of sentencing, is the amount that the defendant placed at risk by misappropriating money or other property. That amount measures the gravity of his crime; that he may have hoped or even expected a miracle that would deliver his intended victim from harm is both impossible to verify and peripheral to the danger that the crime poses to the community.

United States v. Lauer, 148 F.3d 766, 767-68 (7th Cir. 1998) (citations omitted).

3. The ruling is wrong for yet another legal reason. As noted, the calculation makes no sense in logical terms, erasing the losses calculated by the government and further reducing the loss by the arbitrary sum of $87,783.28. The effective result is a holding that Citizens Alliance had a gain of $87,783.28 through the Tasker Street transactions, which reduces by that amount the loss suffered by Citizens Alliance on entirely separate aspects of the defendants' fraud (such as for the purchase of luxury vehicles, or the payment of campaign expenses). This is plainly erroneous (and it is another of the district court's rulings to which the government never had an opportunity to respond, as the court did not set forth its loss calculation

**until after the sentencing hearings had ended and sentence was imposed).**

**While the guidelines provide for credit against loss in certain circumstances (i.e., where the defendant returns property before the offense is detected, or the defendant provided collateral for a fraudulent loan, see § 2B1.1 app. note 3(E)), the guidelines do not allow for a credit which reduces the loss calculation for separate aspects of a fraud. In a telling example, application note 3(F)(iv) addresses the calculation of loss from a Ponzi scheme. The note provides that the amount of loss as to a particular investor is reduced by the value of any property returned to the investor in excess of that investor's investment, but "the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme." See also United States v. Alfonso, 479 F.3d 570, 572 (8th Cir. 2007) ("The considerations that underlie the application note's prohibition against offsetting one investor's losses by another investor's gains also counsel against allowing a**

defendant to use a victim's gains on an earlier investment to offset losses on that same victim's later investment.").

Fumo and Arnao did not post any collateral, nor did they return any money or property to Citizens Alliance before the offense was detected. They simply aim to benefit from the fortuity that the property which they fraudulently used and furnished increased in value over time, to accomplish a significant reduction in other losses they caused and intended to cause. That should not occur. At best, putting aside the legal errors described above, application of the value of the property should only negate the $573,608.36 in expenses which the PSR assessed. If that is the result, both Fumo and Arnao would be in a higher offense level.

4. There remains yet another profound problem. Even if the district court is correct that all or part of the alleged $1,235,000 value of the properties should be credited, the court did not consider all relevant evidence, and its math is grossly wrong. As noted, the government carefully did not seek any loss based on the cost of acquiring or improving the properties, which actually

relates to market value. Thus, if the defendants are to receive credit for the current market value of the properties they caused Citizens Alliance to buy, that must be offset against everything they caused Citizens Alliance to spend to buy and improve the properties, not just the fraudulent expenditures listed by the government.

The defendants' original argument and the court's approach presupposes that the Tasker Street property materialized out of thin air, producing for Citizens Alliance an asset worth $1,235,000, which could then be offset against loss. But that is false.

At trial, the government meticulously documented every expenditure by Citizens Alliance related to the Tasker properties, whether illicit or not. As described in Exhibit 1092 and other trial exhibits, Citizens Alliance spent $235,847.18 to buy 1208 Tasker Street; it spent $185,000 to acquire the land for the parking lot, and $100,000 to build the parking lot; and it spent $213,363.24 for improvements to the building. App. 5458.[58] When those totals are added

[58] All of these expenditures were listed on government exhibit 1092, with the exception of the $185,000 land cost (continued...)

to the $573,608.36 in additional expenditures and lost income listed above, the total expenditures by Citizens Alliance amount to $1,357,818.78. If the current market value is $1,235,000, that means that Citizens Alliance incurred a loss of $122,818.78 on the entire affair.

If this method is used (despite the wrongfulness of even considering market value), it means that the Citizens Alliance loss should be $1,320,062.77, instead of $1,770,852.35 as originally advocated by the government, or $959,080.71 as found by the court. The loss amount of $1,320,062.77 puts Arnao firmly into a higher offense level, and increases Fumo's offense level as well. No matter how one approaches this issue, it is clear that the court gave the defendants an excess credit, which reduced their offense levels.

3. *Gazela* painting.

In late 2003, Fumo arranged for a noted maritime artist, John Stobart, to create a painting of the *Gazela*, a

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[58](...continued)
for the parking lot. That was cited in the defense appraisal, App. 5713, and discussed by the government in its closing argument, App. 4453.

historic vessel maintained in Philadelphia. Fumo was a buff of maritime paintings, and had dozens in his home. App. 3098, 5505 (picture of the painting). This was planned as yet another theft from Citizens Alliance, which committed to pay Stobart's $150,000 price. However, at virtually the same time, publicity regarding Fumo's relationship with Citizens Alliance began in the *Philadelphia Inquirer*, and Fumo and Arnao scrambled to change numerous fraudulent practices in which they had engaged. In part, Fumo never accepted the painting. Instead, Arnao declared on behalf of Citizens Alliance that it would be lent to the Independence Seaport Museum, and the painting indeed was delivered to ISM when it was completed. But ISM never had any interest in it; its curator, Craig Bruns, testified that it has been hanging in storage ever since. App. 3170-72.

As part of the contract which Citizens Alliance entered with Stobart after Fumo realized he could no longer take the painting, it was agreed that 1,000 prints of the painting would be created, which could be sold. App. 5496-5503. Those prints, too, are not wanted by anyone. They have sat for years gathering dust in the Citizens Alliance

warehouse, where the supervisor, Tracy Burris, found them just before trial, lying among the street cleaning equipment, and moved them to a shelf. App. 3342-43.

The government suggested, and the Probation Office agreed, that the loss amounted to the entire $150,000 cost of the painting no one but Fumo ever wanted. The defense at sentencing, however, relied on an appraisal obtained by Citizens Alliance which stated that the painting was worth $22,500, and that the 1,000 poster prints were collectively worth an additional $200,000. App. 1537. The government derided this appraisal, questioning how prints which no one has bought in five years, which were tossed into a dusty warehouse and forgotten, could be worth $200,000. App. 774-75, 1537.

The court, nevertheless, stated in the judgment that it gave credit "for the fair market value of the Gazela paintings less what Citizens Alliance paid for them (credit of $100,000)." Once again, this statement was not made until after the sentencing hearings ended. We understand this to mean that the court assigned a fair market value of

**$250,000 to the painting and prints, reduced by the $150,000 cost, leading to a credit of $100,000.**

**The first error here is that the defense appraisal stated a fair market value of $222,500 for the painting and prints, not $250,000. The value of "$250,000" was stated by the defense several times at the sentencing hearing, see, e.g., App. 1531, until the government pointed out that the appraisal on which it relied provided a value of $222,500, id. App. 1537.[59] Thus, at minimum, the court's credit is excessive by $27,500.**

**But more fundamentally, the court's statement regarding the *Gazela* loss is as inexplicable as its statement regarding the Tasker Street properties. With regard to the *Gazela*, the court stated that "I then gave credits against loss for the fair market value of the Gazella paintings less what Citizens Alliance paid for them (credit of $100,000) . . . ." This is backwards; if one is giving credit against the amount Citizens Alliance spent,**

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[59] **Arnao's counsel then explained, "The reason I said that [i.e., the $250,000 figure], that was based on hearsay, my source was Mr. Cogan [Fumo's attorney]. His source was somebody at Citizens. After this was prepared we received the appraisal." App. 1537.**

then the current value ($250,000 according to the court) would be subtracted from the amount spent ($150,000), leaving a gain. The court instead apparently reversed the formula, finding a credit of $100,000 (which it subtracted from the government's total suggested loss of $1,770,852.35, which included $150,000 in losses attributed to the *Gazela* painting). The number applied by the court therefore does not rest on logic, or on any number advanced by either party. If, as the appraisal stated, the current value was $222,500, then Citizens Alliance had no loss at all and the government's advocated loss of $150,000 should be eliminated entirely. The court, instead, essentially found that Citizens Alliance had a loss of $50,000, meaning that the current value of the paintings and prints must be $100,000. But there is no basis in the record for that figure.

In short, there really is no saying what the court meant to do with respect to the *Gazela* loss, and there should be a remand for clarification. The government continues to maintain that it is specious to give any credit for "value" of prints for which there plainly is no market, but that question cannot even be reached without an

**explanation of what loss calculation the court intended to apply.**[60]

**Because of the errors regarding the loss calculations concerning the stolen tools and other goods, the misuse of the Tasker Street property, and the illicit acquisition of the *Gazela* painting, the determination of the Citizens Alliance loss must be vacated.**

### D. The Court Erroneously Declined to Impose a Two-Level Increase in Fumo's Offense Level Under U.S.S.G. § 2B1.1(b)(8)(A), Based on Fumo's Misrepresentation That He Was Acting on Behalf of a Charitable Organization.

**In the calculation of Fumo's fraud guidelines, the government advocated (and the Probation Office endorsed) a**

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[60] **Indeed, in a current state action regarding control of Citizens Alliance, Commonwealth of Pennsylvania v. Citizens Alliance for Better Neighborhoods, et al., No. 186 MD 2009 (Pa. Commw. Ct.), Paul R. Levy, the interim conservator of Citizens Alliance appointed by the court, reported in a court filing on June 2, 2010, that he has arranged for the painting to be auctioned in August 2010 by an auction house which specializes in maritime art, and that that specialist estimates that the painting will sell in the range of $25,000 to $40,000. Levy further advised that both the auction house and another expert concurred "that the prints had minimal value apart from the cache that might have been created at a celebrity event" which never occurred. This information, which is entirely consistent with the government's position at sentencing, may be provided to the district court on remand.**

two-level enhancement, under Section 2B1.1(b)(8)(A), because the defendant misrepresented that he was acting on behalf of a charitable organization. In the district court's brief ruling regarding the guideline calculations, issued on July 9, 2009, the court simply stated: "With regard to three objections of defendant regarding action on behalf of a charitable organization, sophisticated means and perjury, these objections are sustained and a total of six (6) points is deducted from the guidelines." App. 1565. The court provided no explanation at that time of the ruling. Later, in an attachment to the judgment and commitment order for Fumo, the court merely added that it denied the three enhancements "for reasons substantially based upon defense arguments." Sealed App. 184.

This decision, to the extent it may even be characterized as a factual ruling, was clearly erroneous.

Section 2B1.1(b)(8) provides: "If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency . . . increase by 2 levels." See § 2B1.1 background note

(explaining that those who use false pretenses involving charitable causes "create particular social harm").

In response to the PSR's recommendation that the enhancement be applied, Fumo objected: "The PSR fails to identify what statements or activities constituted a misrepresentation and to whom such misrepresentation was made. Without this information it is essentially impossible to respond in any meaningful way. The facts presented at trial did not demonstrate that Mr. Fumo misrepresented that he was acting on behalf of a charitable organization." App. 713. The Probation Office then obliged and responded:

> Defense counsel is correct to point out that the draft presentence report fails to identify what statements or activities constituted a misrepresentation that the defendant was acting on behalf of a charitable organization or a government agency and to whom such misrepresentation was made. Therefore, the probation officer will now set forth the basis for providing this enhancement here and will amend paragraph no: 504 of the presentence accordingly. Specifically, the defendant persuaded Philadelphia Electric Company (PECO) to "donate" $17,000,000 to Citizens Alliance for Better Neighborhoods, supposedly so those monies would be used to promote the purpose of the non-profit, charitable organization such as street and sidewalk sweeping, graffiti removal, tree planting, bulk trash pick-up, vacant lot abatement, alley cleaning, and other such services. The defendant then used these monies for his own personal and political benefit and to purchase a plethora of items for himself and to lease vehicles for the personal benefit of himself and

> that of codefendant Ruth Arnao. In addition, the defendant used codefendant Ruth Arnao to make false representations that she was acting on behalf of Citizens Alliance in signing state grant applications and grant applications certifying that she was acting on behalf of Citizens Alliance, when in reality, those funds were diverted for Fumo's personal and political benefit. For these reasons, it is the position of the probation officer that this enhancement has been properly applied.

Fumo PSR at 170.

The probation officer was exactly correct. The pertinent application note provides: "Subsection (b)(8)(A) applies in any case in which the defendant represented that the defendant was acting to obtain a benefit on behalf of a charitable educational, religious, or political organization, or a government agency (regardless of whether the defendant actually was associated with the organization or government agency) when, in fact, the defendant intended to divert all or part of that benefit (e.g., for the defendant's personal gain)." § 2B1.1 app. note 7. Moreover, as an example of the proper application of the enhancement, the application note describes:

> A defendant, chief of a local fire department, who conducted a public fundraiser representing that the purpose of the fundraiser was to procure sufficient funds for a new fire engine when, in fact, the

defendant intended to divert some of the funds for the defendant's personal benefit.

Id. at note 7(iii). See, e.g., United States v. Marcum, 16 F.3d 599, 603-04 (4th Cir. 1994) (enhancement properly applied where defendant skimmed part of the proceeds of bingo games operated for charity).

In this case, the government presented evidence related to the Citizens Alliance fraud which unambiguously matched the circumstances described in the guideline and in its application note.[61] Specifically, Thomas Hill, a PECO executive, testified that between 1997 and 2002, at Fumo's behest, he authorized $17 million in contributions to

[61] While Arnao was also convicted of the Citizens Alliance fraud, the district court's refusal to apply this enhancement did not affect her guideline calculation. That is because she was also subject to an enhancement for abuse of trust, under § 3B1.3, and the guidelines provide that an enhancement under both provisions for the same conduct should not be applied. See § 2B1.1 app. note 7(E)(I) ("[i]f the conduct that forms the basis for an enhancement under subsection (b)(8)(A) is the only conduct that forms the basis for an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill), do not apply that adjustment under § 3B1.3."). The issue was relevant in Fumo's case, however, since he received an abuse-of-trust enhancement (which he did not challenge) for the separate Senate fraud, and thus an enhancement based on misrepresentation regarding a charitable purpose was permissible and warranted for the Citizens Alliance fraud. See Fumo PSR at 171.

Citizens Alliance, and never would have done so if he knew that Fumo was to receive a portion of the funds. App. 3269, 3273. Likewise, Arnao's grant applications would never have been approved had she truthfully revealed in the applications or the organization's tax returns that a portion of the charity's receipts was being diverted to her and Fumo's personal use. This is exactly the situation addressed by the pertinent guideline enhancement.

In addition to the circumstances identified by the probation officer, the government pointed out to the district court in a sentencing pleading that Fumo repeatedly directed and caused Arnao to make false representations that she was acting on behalf of this charitable organization when, in fact, Arnao was acting for the purpose of providing unlawful and undisclosed financial benefits to Fumo. For example, when Citizens Alliance's auditors questioned tens of thousands of dollars in payments for polling, Arnao, at the direction of Fumo, lied to the auditors, telling them that the expenses were incurred for the purpose of benefitting Citizens Alliance by conducting community development surveys. App. 3299. Additionally, the evidence

at trial proved that Arnao used the Citizens Alliance credit cards to make purchases well in excess of $100,000 for consumer goods, tools, and other personal items for her own private benefit and that of Fumo as well. She directed that Citizens Alliance pay for these items and they were recorded in the books and records of the nonprofit as business expenses. When the auditors reviewed the records and the ledger entries each year, Arnao misrepresented to the auditors that these were expenses incurred for the benefit of Citizens Alliance. App. 3295, 3300-01, 3303-04. The enhancement unquestionably applied in this case.

In United States v. Bennett, 161 F.3d 171 (3d Cir. 1998), the Third Circuit affirmed the district court's application of the two-level enhancement for making misrepresentations on behalf of a charitable organization.[62] In Bennett, the defendant created a nonprofit corporation and solicited donations, falsely claiming that he was in contact with "anonymous donors" who would match their

[62] In Bennett, the court considered the application under § 2F1.1(b)(3), which is the predecessor to the current § 2B1.1(b)(8)(A). The pertinent language of both versions is identical, and the analysis of the application of this enhancement to the facts of this case is the same.

donations to charitable organizations. In truth, Bennett operated a traditional Ponzi scheme, using funds donated by later contributors to make good on the promises to earlier contributors that their donations would be matched. In concluding that application of this enhancement was intended to apply to a wide variety of fraud cases, the Court rejected the defendant's attempt to narrow the scope of conduct covered by the enhancement, and concluded that the district court properly increased the defendant's total offense level based on the enhancement:

> Assuming the Foundation for New Era Philanthropy constituted a genuine charitable organization in some respects, it is clear Bennett used his position there to ensnare donors with falsehoods designed to generate contributions. He exploited his victims' altruism to reap personal, pecuniary gain. We find no authority for the proposition that the enhancement applies only if the 'charitable' organization is fraudulent from its inception and in every facet of its operations. Nor does it matter that many of Bennett's victims acted at least partially out of self interest. Regardless of their motivation in giving money to New Era, donors had a right to expect that their contributions would be used in the manner that Bennett promised.

Bennett, 161 F.3d at 191 (internal citations omitted). See also United States v. Treadwell, 593 F.3d 990, 1006-08 (9th Cir. 2010) (in an exhaustive discussion of application of the enhancement, the court affirms the increase for

misrepresentation on behalf of a charitable organization to operators of a fraudulent investment scheme who told participants that a portion of the invested funds would be used to aid unspecified humanitarian projects around the world; the court holds in part that "[o]ne can act to 'obtain a benefit' for a charitable organization without being that organization's representative or agent."); United States v. Sloan, 492 F.3d 884, 893-94 (7th Cir. 2007).

The arguments of defense counsel, on which the district court said it relied, are wholly unpersuasive. They were presented orally at the July 8 hearing. First, counsel asserted:

> There was no misrepresentation that he was acting in his capacity as a state senator. He had sued PECO in his official and personal capacities. He was negotiating a settlement of the lawsuit. I think the evidence is undisputed as to that. He never tried to fool someone into thinking that he was a state senator. He was [a] state senator, and he was speaking in that capacity as well as in his personal capacity, and he didn't try to fool anyone as to speaking in his personal capacity.

App. 1549. This argument, of course, is a non sequitur. The enhancement has nothing to do with whether Fumo was impersonating a state senator; it concerns whether Fumo

claimed that he was raising funds for a charity when in fact he intended to pilfer some of the proceeds for himself.

Focusing on one of the misrepresentations identified by the probation officer, the defense also disputed whether Fumo embezzled any of the state grant money he arranged. Id. This was a hotly debated point at trial,[63] but the resolution is unimportant. The primary

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[63] Counsel for Arnao made the same argument, declaring that the defense had "conclusively" shown that all state grant money was properly spent and accounted for. App. 1550. The truth was far different.

When Citizens Alliance obtained state grants (arranged by Fumo), it was required to create a separate bank account with the proceeds of each grant and use the funds only for the designated purpose. The government listed over $63,000 in transactions in grant accounts which illegally paid for items for Fumo. Those specific items were then falsely characterized in Citizens Alliance's books as permissible business expenses. App. 5431-45. At the same time, Arnao constantly transferred money in and out of the grant accounts, because she treated all of Citizens' money as one large pot and essentially ignored the restrictions of the grants. See, e.g., App. 3728. At trial, a defense accountant added up transfers over a period of years to and from the grant accounts, to suggest that whatever was misspent was later reimbursed, often in different years, from non-grant accounts. But the records actually did not support this theory, and the accountant's numbers roughly added up only because she elected to arbitrarily exclude $499,000 in transfers which left the grant accounts and never came back. Further, she herself acknowledged that she, like the government examiners, was unable to come up

(continued...)

basis for the enhancement is Fumo's embezzlement of significant portions of PECO donations, and that fact is undisputed. At trial, Fumo repeatedly insisted that whatever he took from Citizens Alliance was only derived from "private money from PECO," as if that somehow made the thefts permissible. See, e.g., App. 4033. Such conduct squarely demanded the application of the enhancement. Defense counsel acknowledged that the enhancement applies where "the misrepresentation induces someone to give that wouldn't otherwise give," but declared, "it's not that kind of case." App. 1550. But Hill's testimony, and common sense, demonstrated that it was exactly that kind of case; there was no way any rational corporation was going to give money it knew would go into the pocket of a state senator, and PECO made the contributions only because it was assured otherwise. In a rebuttal argument at the sentencing hearing, the prosecution made this explicitly clear. App. 1551.

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[63](...continued)
with any permissible explanation for the regular transfers into and out of the grant accounts. App. 3945-46.

Finally, defense counsel objected to the enhancement on the grounds that "there is no evidence, and I heard -- you know, we've heard of none, that Mr. Fumo had an intent in 1998, when negotiating the settlement with PECO, to divert any of that money to himself." App. 1552. But the government responded that PECO's $17 million did not come in all at once. Indeed, Fumo asked for the biggest portion, a lump sum of $10 million, in 2002, long after he had begun stealing from the PECO largesse, and he continued to steal thereafter. App. 1552-23; see App. 3276-79, 5265.[64]

In sum, the defense arguments were frivolous, and there was no ground for failing to impose the explicitly applicable enhancement. The defense never addressed the dispositive point that Fumo raised money from PECO on the assurance that it would be used by Citizens Alliance, at the same time that he was skimming for himself a significant portion. The district court never articulated any reason for ignoring this fact, and its decision should be reversed.

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[64] The defense then objected that the government was raising a new ground for the enhancement, even though it was merely responding to the new argument raised by the defense.

**E. The Court Erroneously Declined to Impose a Two-Level Increase in the Offense Levels of Both Fumo and Arnao for Use of Sophisticated Means.**

**The district court declined in similar fashion to impose a two-level enhancement, advocated by the government and the Probation Office with respect to both Fumo and Arnao, based on the assertion that the defendants' frauds involved sophisticated means as defined in Section 2B1.1(b)(9)(C). Once again, the court never explicitly ruled on the issue, vaguely stating instead that it denied the enhancement, along with those for charitable misrepresentation and perjury, "for reasons substantially based upon defense arguments." Sealed App. 184. In this fashion, the court eliminated another two offense levels which unquestionably apply to both defendants under the terms of the guideline.**

**Section 2B1.1(b)(9)(C) provides for a two-level upward adjustment in the fraud guideline if "the offense otherwise involved sophisticated means." Application note 8(B) explains what the Sentencing Commission intended by this adjustment:**

> **For purposes of subsection (b)(9)(C), "sophisticated means" means especially complex or especially intricate**

> offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.

The sophisticated means adjustment does not look at the special skills of the perpetrator. Instead, it looks to the execution of the crime, for it refers to the use of "especially complex or especially intricate offense conduct pertaining to the execution or the concealment of an offense." The examples that the drafters of the guidelines provide do not describe extremely complex conduct.

Not surprisingly, a review of cases considering application of Section 2B1.1(b)(9)(C) reveals that they typically feature such hallmarks of sophisticated financial crimes as fictitious entities, corporate shells, and offshore accounts. However, in other cases that did not contain these features, courts of appeals have upheld the application of Section 2B1.1(b)(9)(C) to fraud crimes, particularly if they involved repetitive and coordinated – albeit individually uncomplicated – acts. See, e.g., United

States v. Finck, 407 F.3d 908 (8th Cir. 2005) (affirming application of enhancement to defendant who, in obtaining cars from victim dealership, sent fraudulent fax and telephone confirmations that victim had received funds wired to it); United States v. Kostakis, 364 F.3d 45, 48-52 (2d Cir. 2004) (reversing district court's finding that ship engineer's criminal conduct – falsifying entries in ship's records to conceal from Coast Guard the prohibited dumping of oil-contaminated water – did not involve sophisticated means); United States v. Rettenberger, 344 F.3d 702, 708-09 (7th Cir. 2003) (affirming application of enhancement to defendant who filed false disability claims by pretending to be mentally impaired); United States v. Calderon, 2006 WL 3624990 (5th Cir. 2006) (unpublished) (affirming application of enhancement to defendant who printed counterfeit checks using widely available computer program and then used checks for purchases and to open a bank account).

This Court has applied the analogous enhancement for sophisticated means set forth in Section 2T1.1(b)(2) to tax offenses that, like the cases above, do not necessarily feature fictitious entities, corporate shells, or offshore

accounts. United States v. Gricco, 277 F.3d 339, 359-61 (3d Cir. 2002) (affirming application of enhancement to defendant who concealed income through use of cash and wife's account to purchase property). See also United States v. King, 128 Fed. Appx. 275 (3d Cir. 2005) (not precedential) (affirming application of enhancement to defendant who failed to declare income he received for computer consulting services under name of fictitious company), citing United States v. Furkin, 119 F.3d 1276, 1285 (7th Cir. 1997) (failing to keep records concerning income and using cash transactions are indicia of sophisticated means).

In the present case, the evidence is clear that defendant Fumo, and his coconspirator, Ruth Arnao, employed a wide variety of sophisticated means to enable their fraudulent schemes to succeed and also to evade detection for so many years. The PSR correctly observes that, in two respects with regard to the crimes against Citizens Alliance, Fumo and Arnao used other entities to conceal thefts. First, they created a number of for-profit subsidiaries of Citizens Alliance, and used one of them,

Eastern Leasing Corp., to purchase luxury vehicles for Fumo's and his associates' personal use. Second, with respect to the payment of $17,000 in legal fees related to a spite suit by Fumo against a legislative rival (Robert Jubelirer), Fumo and Arnao diverted Citizens Alliance's payment through a corporate account controlled by a Fumo aide.

The evidence regarding Eastern Leasing was particularly compelling in this regard. In 2000, Fumo directed Arnao to establish a number of for-profit subsidiaries of Citizens Alliance. Experts testified at trial that such subsidiaries are permitted under federal law for tax-exempt organizations, but strict rules must be followed: most significantly, the subsidiary must operate at arm's length from the parent, in order to separate the profit-making activities from the parent's tax-exempt purpose. App. 3064-67. The Citizens Alliance subsidiaries, however, were shams; they conducted no separate business at all, and instead simply received money from the nonprofit parent and spent it, often for Fumo and Arnao's benefit. See, e.g., App. 3366. There was a clever reason for this

laborious effort: while Citizens Alliance, the parent, was required as a nonprofit to file a publicly available tax return listing its expenditures, the allegedly for-profit entities' returns, like those of any ordinary corporation, were nonpublic. The defendants thus endeavored to establish and use the for-profit entities to conceal their fraudulent expenditures. This was sophisticated conduct by any measure.[65]

In the case of Eastern Leasing, it is not disputed that this subsidiary never operated as an independent

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[65] To carry out this plan, the defendants necessarily obtained legal assistance in creating the entities. See, e.g., App. 2527-28, 2685-86 (testimony of Fumo employees who became officers of the new entities, without knowledge of their purpose, by signing documents presented to them by Arnao and an attorney). It is unfathomable that such an effort does not fall within the sophisticated means enhancement.

One trial exhibit, Exh. 1330, showed why Fumo went to this trouble. App. 5887. In this e-mail, written shortly before the creation of the for-profit subsidiaries, Fumo expressed his concern with public disclosure of a nonprofit entity's tax return, and directed his Senate counsel to "take a close look" at the form and assess what information could be kept private. He wrote, "With the newspapers all over our asses I do not think we should give them the slightest bit of information if we don't strictly have to . . . . Please take a careful look at this and try desperately, if you have to, to get us to where we want to be."

company. It had no employees. It did not conduct any business. It had no revenues and engaged in no leasing activities. All it had was a bank account, and beginning in 2000, each time Fumo and Arnao set out to buy a luxury vehicle for their benefit, they had Citizens Alliance transfer the funds to a for-profit subsidiary, which in turn transferred the funds on the same day to Eastern Leasing, which in turn paid the car dealer on the same day. This three-step dance was repeated four times over a three-year period, involving $149,751.90 in vehicle purchases. App. 3462-63, 5446-47. The district court, in denying post-trial motions for acquittal, explicitly agreed with this view of the evidence, writing: "Citizens Alliance created for-profit subsidiaries in 2000, which the Government established were nothing more than sham corporations designed to hide the activities of Citizens Alliance that were not in conformity with its status as a 501(c)(3) corporation, such as the purchase of the cars for the personal use of Fumo and his staff." App. 507.

Thus, when addressing the enhancement for sophisticated means, the Probation Office was correct in

concluding, "This 'layering' of payments for the leasing of the vehicles was, in the opinion of the probation officer, to make detection of the vehicle's true purpose much more difficult, if not impossible, to detect. This type of 'layering' is precisely the type of sophistication that this enhancement is meant to address." Fumo PSR at 172.[66]

Further, as the government wrote in a sentencing pleading, there are other examples that would further support the application of a sophisticated means enhancement, including, but not limited to, the following:

-- Fumo concealed the Senate fraud scheme and made it difficult to detect by (1) submitting false employee reclassification requests to the Chief Clerk of the Senate in order to classify employees performing personal tasks for Fumo into higher paying positions, and (2) deliberately not keeping track of employee hours and leave slips that would identify how Fumo and his staff spent their time.

-- Fumo and Arnao used Citizens Alliance credit cards to purchase personal items for themselves, disguised

[66] The report bears one slight error, in that Eastern Leasing did not "lease" the vehicles for Fumo and Arnao, but bought them outright using Citizens Alliance's money.

as purchases for the benefit of Citizens Alliance, which were then shipped to Citizens Alliance to further that illusion, and then transported by its workers to Fumo and Arnao without leaving behind any sales receipts or records of the deliveries to the defendants. In addition, virtually all of these transactions were booked as "Supplies" in the Citizens Alliance general ledger. None of this concealed criminal conduct would ever have been discovered but for an absolutely herculean effort by the FBI and an IRS revenue agent, who collectively spent years of man-hours researching and cataloguing thousands of transactions.

-- Fumo and Arnao created an elaborate for-profit corporate structure of dummy companies with nominee officers and no actual corporate purpose, and then funneled Citizens Alliance money through those entities to conceal the defendants' use of Citizens Alliance funds for personal and other improper expenditures. In addition to the tens of thousands of dollars spent on luxury vehicles referenced in the presentence investigation report that were financed through transfers of funds from Citizens Alliance to Eastern Leasing, there were many other personal expenses that were

paid for by Citizens Alliance through a subsidiary and then falsely characterized in its books and records. For example, most of the more than $250,000 in political polls were paid for by transferring funds from the nonprofit to a for-profit holding company, CA Holdings, which in turn wrote checks to the polling companies. App. 5475-78.

For all of these reasons, the government asserted, a sophisticated means enhancement was required. In rebuttal, defense counsel at a hearing simply belittled the evidence. He presented this half-hearted argument:

> The only one that really is worth discussing is the one that's in the pre-sentence report. . . . And that's for you to determine whether you understand the facts to and proven to your satisfaction that Eastern Leasing was a fraudulent entity designed to hide improper activities of Citizens Alliance, or was it a for-profit separate entity of the kind that nonprofits typically set up to separate their 501(c)(3) activities from their nonqualified activities or for other proper purposes?
>
> We have suggested, for example, that an entity that would own or lease motor vehicles would be an appropriate entity for limiting liability in the case of an accident. The government pooh-poohs that and says ah, the relationship was so close that anybody could pierce the corporate veil. Well, if this relationship was so close anyone could pierce the veil, I don't see how sophisticated the setup could have been.

> But it's -- you know, if you view that as a shell corporation having no legitimate purpose and not the kind of thing that a nonprofit commonly does and would do, then it might qualify. It's not especially sophisticated or complex. It does exist; it's in the form of a separate corporation that had no business other than the owning of these vehicles. That's really what it comes down to. Is that especially sophisticated and complex? As federal fraud cases go, it's a judgment call that nobody is going to tell you you're wrong either way.

App. 1554. In response, a prosecutor reminded the district court of its finding that Eastern Leasing was a sham corporation set up to conceal assets, and that such an endeavor is squarely described in the application note as amounting to sophisticated means. App. 1554-55. The prosecutor concluded: "I mean, look at the Gricco case, the Third Circuit case where the defendant simply concealed income by using his wife's bank account. That's not very sophisticated. But clearly what we have here far exceeds that. So, Your Honor, we respectfully submit that this is not a close call. It clearly is sophisticated means and it should be applied." App. 1555.

The district court never addressed this matter, other than to say that it adopted the defense argument; in particular, it never acknowledged that the defense argument

was directly contradictory to a finding the court already made in denying post-trial motions. The evidence of sophisticated means was unassailable, and the court clearly erred in failing to explain its ruling, and failing to apply the enhancement.

F. Conclusion.

The district court made significant errors in its calculation of the Senate and Citizens Alliance losses, and in declining to impose enhancements for misrepresentations regarding a charitable purpose, and sophisticated means. The errors are clear, and the absence of explanation for all of the rulings is glaring. In combination, the errors resulted in guideline ranges for each defendant which were markedly below the correct ranges. In addition, the erroneous loss calculations resulted in an order for restitution for the victims which was approximately $2 million less than it should have been. Remand for resentencing is therefore required.[67]

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[67] On remand, the correct offense level for Arnao should be 29, producing an advisory range of 108-135 months. As for Fumo, the government had advocated an offense level of 39, and a guideline range of 262-327 months. That (continued...)

## II. THE DISTRICT COURT ERRED IN SENTENCING FUMO IN DECLINING TO STATE OR CONSIDER A FINAL GUIDELINE RANGE.

### Standard of Review

A sentence of the district court, including its procedural reasonableness, is reviewed under the abuse of discretion standard. United States v. Cooper, 437 F.3d 324, 330 (3d Cir. 2006).

### Discussion

The misapplication of the guideline ranges did not end with the actions described above. In sentencing Fumo, the district court, for all intents and purposes, ignored step two of the Third Circuit's required sentencing process, which demands that the court resolve and specify the final guideline range. The court expressly stated that, in conflict with the governing statute, it did not consider any

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[67](...continued)
included a proposed 2-level upward departure for perjury at trial, which the district court denied. As explained in part IV of this brief, the government does not challenge the court's denial of the upward departure, but asserts that the perjury should be considered in the final assessment of the sentence (and that the court failed to do so). This puts Fumo's proper offense level at 37, and the advisory range at 210-262 months.

particular guideline range in selecting the final sentence. This section of the government's brief addresses that fundamental error.[68]

During the sentencing hearing on July 14, 2009, over the government's objection, the court repeatedly stated that it granted a "departure" from the range of 121-151 months it calculated, on the basis of Fumo's public service. At the outset, in its ruling issued on July 9 regarding the guideline calculation, the court stated, "The court has already indicated that no departure will be granted based upon health, but a decision on a departure based upon good works will be reserved until time of sentencing on July 14, 2009." App. 1566. At the beginning of the sentencing hearing on July 14, 2009, the court stated, in response to a request for clarification from defense counsel, "I denied your request for a downward departure on a physical

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[68] This section of the government's brief applies only to Fumo, for whom the court declined to specify or consider a guideline range. In contrast, in sentencing Arnao, the court calculated a specific guideline range, and did not grant a departure. As explained in other parts of this brief, Arnao's sentence is appealed because the guideline calculation in her case was incorrect, as explained earlier, and because the court did not state any justification for the huge variance it granted her.

condition. I did not deny with regards to the good works. That's specifically in my order." App. 1568. Then, at the conclusion of the arguments regarding sentencing, the court stated:

> And in my opinion, you were a serious public servant. You worked hard for the public and you worked extraordinarily hard and I'm therefore going to grant a departure from the guidelines.
>
> I base that departure principally upon my consideration of the letters that I've read in your support. . . . So on that basis I'm going to grant a departure from the guidelines.

App. 1622-23. Later, the court repeated: "So I have considered what the guidelines have said here and I did make a finding as to what the guidelines are, but I've also added a finding that I'm going to depart from them." App. 1623. The court never stated the term "variance," and it also never stated the final guideline range.

Days after the hearing ended, Fumo's attorneys, realizing the precariousness of the court's ruling, in light of the fact that a departure requires greater justification than a variance, and that Third Circuit precedent demands specification and consideration of the guideline range, presented a motion, under the guise of a Rule 35(a) motion

to correct clear error, asking the court to decree that the sentencing reduction was a variance rather than a departure. App. 1626-32. They presented this motion even though Fumo had specifically moved for a downward departure. The government responded that the defense gambit was disingenuous, and, given that the court had repeatedly stated it granted a departure, sought a substantive alteration of the sentencing proceedings not allowed by Rule 35(a). App. 1633-41. The court responded by inserting an attachment to the judgment, which read in part as follows:

> I next determined whether there should be a departure from the guidelines and announced at the sentencing hearing that there should be based on my finding extraordinary good works by the defendant. I did not announce what specific guideline level the offense fell into; that is to say, the precise number of levels by which I intended to depart because until I considered all other sentencing factors, I could not determine in precise months the extent that I would vary from the guidelines.
>
> Having advised counsel of the offense level that I found and my intent to depart downward, I then proceeded to hear from counsel their respective analyses of what an appropriate sentence should be. The procedure I followed was perhaps more akin to that associated with a variance than a downward departure because I never announced nor have I ever determined to what guideline level I had departed. Ultimately, the argument over which it was elevates form over substance.

Sealed App. 185-86. In a brief memorandum issued on the same day as the final judgment, the court added: "The government correctly states that the court announced it was granting a departure. Thereafter, the court never enunciated the guideline level to which it departed, and, in fact, never reached the sentence it did by consulting any specific level on the guideline chart." App. 1653.

Perpetuating the confusion, the formal "statement of reasons" in the judgment and commitment order for Fumo states that the court departed from the guideline range; the only reason checked off on the long list on the form of potential departures is "5H1.11 -- Military Record, Charitable Service, Good Works." The "statement of reasons" also advised that the court granted a variance; here, it checked off each of the 3553(a) factors as supporting the variance. Sealed App. 182-83. The judgment and commitment order as well did not specify a final guideline range following the departure it professed to grant.

This ruling is in manifest contradiction to the direction of 18 U.S.C. § 3553(a)(4), that the court must consider the guideline range. By the court's admission, it

paid no consideration to the guideline range, in violation of the requirement stated in the statute and by numerous recent decisions of the Supreme Court and the Third Circuit. For instance, in Gall, the Supreme Court stated:

> As we explained in Rita, a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.

Gall v. United States, 552 U.S. 38, 49-50 (2007).

> The fact that § 3553(a) explicitly directs sentencing courts to consider the Guidelines supports the premise that district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.

Id. at 50 n.6.

Therefore, in United States v. Lofink, 564 F.3d 232 (3d Cir. 2009), the Court reversed a sentence where the district court refused to resolve a departure motion. In that fraud matter, facing a guideline range of 63-78 months, the defendant sought a downward departure on the basis of his mental state, under Section 5K2.13. The district court summarily denied the motion, stating "that its general practice was to consider arguments for a Guidelines departure as part of its evaluation of the sentencing

**factors set forth in 18 U.S.C. § 3553(a)." Id. at 235. The court imposed a sentence of 60 months, three months below the guideline range.**

**The Third Circuit reversed, because its precedent "clearly requires that district courts engage in the second step-ruling on departure motions - '[a]s a part of calculating the applicable range.'" Id. at 238, quoting United States v. Wise, 515 F.3d 207, 216 (3d Cir. 2008). The Court explained at length that a court has less leeway to grant a departure, and that the propriety of a departure and of the final sentence cannot be assessed without knowing the sentencing court's reasoning. Lofink, 564 F.3d at 240. "Of course, Lofink might well have received the same sentence even had the District Court decided the merits of his departure motion at Step Two. But we cannot tell, and thus, despite our respect for the thoughtful consideration the District Court invested in this case, we cannot endorse the procedure it adopted." Id. at 242. The present matter is indistinguishable.**

**In United States v. Smalley, 517 F.3d 208 (3d Cir. 2008), the Court reaffirmed: "in accordance with the**

dictates of the Supreme Court and this Court, a district court errs when it fails to calculate the Guidelines range correctly or begins from an improper Guidelines range in determining the appropriate sentence." Id. at 211-12. The Court held that even a one-level error in the guideline calculation is not harmless, unless the court expressly states that it would impose the same sentence under either guideline range, and in doing so, applies the Gunter three-step approach using each of the alternative ranges, and affords the parties an opportunity to comment. Id. at 213-15 & 214 n.6.

"The failure to correctly apply the Guidelines was specifically listed by the Supreme Court in Gall as a 'significant procedural error.' A correct calculation, therefore, is crucial to the sentencing process and result." United States v. Langford, 516 F.3d 205, 212 (3d Cir. 2008) (citation omitted). Accordingly, the district court was required to define the final guideline range. It was also required to give the guideline range due consideration. By its own admission, it did neither. Fumo's sentence must be reversed for this reason alone.

## III. THE DISTRICT COURT ERRED IN FUMO'S SENTENCING IN REFUSING TO DISTINGUISH BETWEEN A DEPARTURE AND A VARIANCE BASED ON "EXTRAORDINARY" PUBLIC SERVICE.

### Standard of Review

Same as part II.

### Discussion

In a procedural error related to that discussed in the preceding section, the district court refused to clarify whether its sentencing reduction for Fumo was a departure or a variance, or both.[69] This approach was in direct violation of Third Circuit precedent, and was vitally significant. That is because the court granted a lower sentence to Fumo solely on the basis of "extraordinary" public service, and a departure on that ground (as opposed to a variance) is legally impermissible in this case. Had the court granted such a departure (or, more precisely, had

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[69] As noted, in a post-sentencing order, after the parties could further address the matter, the court stated: "The procedure I followed was perhaps more akin to that associated with a variance than a downward departure because I never announced nor have I ever determined to what guideline level I had departed. Ultimately, the argument over which it was elevates form over substance." Sealed App. 186.

it not retracted its statements that it gave such a departure), the government could appeal the determination as legal error. Alternatively, if the court granted the sentencing reduction in whole or in part as a variance, the government could appeal the determination as unreasonable. But the legal standards applicable to these types of sentencing reductions are materially different, and by leaving the matter entirely vague, the district court made substantive review of its significant sentencing reduction impossible.

The requirement that a sentencing court distinguish between a departure and a variance is clear. In United States v. Brown, 578 F.3d 221 (3d Cir. 2009), the guideline range was 97-121 months, and the court imposed a sentence of 180 months. The trial court stated that it granted the government's motion for a five-level increase, which produced a range which included 180 months; but the appellate court found it unclear whether the court was referring to a departure or a variance. The Third Circuit stated:

> Whether a district court has imposed a departure or, instead, a variance has real consequences for an

> **appellate court's review. . . . An appellate court reviewing a variance for reasonableness does so by evaluating the district court's analysis of the § 3553(a) factors, whereas an appellate court reviewing a departure must consult the relevant guidelines provision in order to determine whether the departure was appropriate. Accordingly, when a sentencing court engages in either a departure or a variance from the guidelines, it is imperative that the judge make clear which of these is being applied.**
>
> **. . . . Because the District Court explicitly discussed both U.S.S.G. § 2G2.2 Application Note 4 and the § 3553(a) factors when explaining its sentence, we cannot conclude with any certainty that its failure to distinguish between a departure and a variance did not affect the selection of the sentence imposed. Had the court considered the § 3553(a) factors in isolation from (rather than conflation with) the Application Note, it is entirely possible that the court would not have viewed the § 3553(a) factors as independently able to provide sufficient support for imposing a sentence within a range five levels higher than the range the parties agreed had been properly calculated by the PSR.**

**Id. at 226-27. The Court found particular concern in the fact that an upward departure of five levels based on the application note was impermissible. "[I]n view of the possibility that the court intended to formulate a departure, rather than a variance, from the guidelines, and given the court's invocation of its erroneous interpretation of U.S.S.G. § 2G2.2 Application Note 4, we cannot be confident that the court would have arrived at the same**

conclusion had it properly construed the Application Note." Id. at 228.

That situation is identical to that presented here, where the court expressly refused to articulate whether it granted a departure or a variance, or both. Further, as in Brown, a departure in this case on the grounds proffered was impermissible as a matter of law (as will be discussed below), leaving it impossible to determine whether the same sentence would have been imposed (or justified) based on a variance alone.

Along the same lines, in United States v. Vazquez-Lebron, 582 F.3d 443 (3d Cir. 2009), the Court held that the district court committed plain error by imposing a sentence within the initial guideline range after stating that it would grant a motion for a downward departure. The Court stated that in that context, it could not tell whether a departure was granted or not, and thus meaningfully review the sentence. "[T]he error was prejudicial because we cannot be sure that the district court would have imposed the same sentence if not for the error." Id. at 446.

That result surely must apply here, where the final sentence was not remotely within the original sentencing range, but, in Fumo's case, was approximately 17 years less than the guideline range advocated by the government and the Probation Office, and over five years below even the wrongly reduced guideline range initially found by the court. See also United States v. Floyd, 499 F.3d 308 (3d Cir. 2007) (after the original sentence was vacated on appeal, the court reduced the sentence by six months, stating that it was granting a departure motion by the government, but the new sentence remained within the original guideline range; the Court reversed, finding that the district court did not employ the three-step process, and thus it was not sufficiently clear what the guideline range was and whether the court granted a departure or a variance).

Two earlier Third Circuit decisions may suggest a different result. In one, United States v. Flores, 454 F.3d 149 (3d Cir. 2006), after calculating an advisory guideline range of 70 to 87 months' imprisonment, the district court sentenced Flores to 32 months' imprisonment, without

granting a formal departure. In an appeal, Flores contended that the court made three guideline calculation errors, which should have significantly reduced the guideline range. But the Court of Appeals deemed it unnecessary to resolve these objections, given that the district court considered all of the 3553(a) factors, and the final sentence fell within the lowest guideline range advocated by the defendant. Id. at 162.

Second, in United States v. King, 454 F.3d 187 (3d Cir. 2006), the government moved for a five-level upward departure based on severe non-economic harm to the victim under U.S.S.G. § 2F1.1. The district court, stating that it was not sure that motions for upward departure remained relevant following Booker, did not resolve the motion, but rather addressed the pertinent facts in deciding the final sentence (which was above the guideline range). The Third Circuit affirmed, determining that the district court would have granted the motion to depart upward had it known that a ruling was required. Id. at 196.

To the extent that Flores and King suggest that a court may dispense with a final departure ruling and

guideline calculation, they are abrogated by the Third Circuit's en banc decision in United States v. Tomko, 562 F.3d 558 (3d Cir. 2009) (en banc), which explicitly mandated the Gunter three-step process. Id. at 567. Indeed, in Lofink, the Third Circuit declined to follow King, stating:

> Most basically, we were careful to note in King that we were reviewing the sentence under a plain error standard. Id. at 193. That is simply not the posture of this case. More importantly, King was decided at a time when sentencing practices were, in the wake of Booker, unavoidably in flux. King does not permit district courts to establish sentencing practices that conflict with our now well-established sentencing precedents.

Lofink, 564 F.3d at 240.

The decisions are inapposite in any event. As Lofink observed, in King there was no dispute that the government presented a permissible basis for an upward departure. Here, in contrast, the requested downward departure was impermissible on the facts presented, as will be explained. As for Flores, it was the defendant in that case who was challenging his below-guideline sentence, yet the final sentence fell within even the guideline range he advocated. In contrast, in the present case, the government is challenging the sentence, which fell far below the

guideline range advocated by the government. It cannot conceivably be said in this case that it is certain that a guideline calculation error did not affect the final sentence, particularly where the district court itself explicitly and unlawfully stated that it was not considering any particular guideline range at all.

Most significantly, the procedural uncertainty is unacceptable in this case, given that the standards for a variance and a departure are different, and a much more precise explanation by the district court of what it did is necessary to permit substantive review by this Court. While a court conceivably could grant some variance based on Fumo's public service (albeit one which, the government contends, must consider all 3553(a) factors and cannot remotely justify the low, final sentence imposed), no departure on that basis was allowed at all. It is accordingly essential for the court to evaluate the request for a sentencing reduction under the correct standards, in a manner consistent with this Court's guidance.

As stated, a downward departure based on Fumo's public service was impermissible (which is why Fumo's savvy

counsel, having first moved for a downward departure, scrambled after sentencing in an effort to have the court recast as a variance the large reduction it granted). We turn to that issue, in order to illustrate the significance of the district court's error in refusing to explain whether the reduction was based on a variance or a departure.

Third Circuit law is explicit with respect to the requirements for a downward departure based on public service or charitable activities.[70] Yet although the government repeatedly cited this law and urged the district court to follow it, the court never acknowledged or applied the relevant case law.

The Sentencing Guidelines provide:

> Military, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.

U.S.S.G. § 5H1.11.

This provision comports with similar sections which generally decline departures based on employment or

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[70] In evaluating the permissibility of the departure, pre-Booker law remains pertinent. United States v. Jackson, 467 F.3d 834, 838 (3d Cir. 2006).

economic factors. See, e.g., § 5H1.2 (education and vocational skills); § 5H1.5 (employment record); § 5H1.6 (family ties and responsibilities and community ties); § 5H1.10 (socioeconomic status). The Supreme Court has defined these bases for departures as "discouraged factors," and stated that they may be applied only in "exceptional" cases, bearing in mind the Sentencing Commission's statement that such departures will be "highly infrequent." Koon v. United States, 518 U.S. 81, 95-96 (1996). Further, it is the defendant's "heavy burden" to establish the existence of such exceptional conditions. United States v. Higgins, 967 F.2d 841, 845 & 846 n.2 (3d Cir. 1992).

With regard to a departure for community service, the key applicable case is United States v. Serafini, 233 F.3d 758 (3d Cir. 2000), which also involved the prosecution of a Pennsylvania state legislator. The defendant, as here, attempted to support a downward departure based on community and charitable service. The Court stated:

> As to Serafini's activities as a state legislator, they are work-related and political in character. For example, a letter from the Fire Chief of Greenfield Township Volunteer Fire Company stated that he "had worked tirelessly to obtain grant monies to help the community afford the lifesaving equipment they need."

> **The same letter also referred to Serafini's guidance "on several projects, including writing bid specifications for a new engine . . . and in pushing through legislation which allows smaller fire companies to purchase equipment through state funding." Other letters of this nature attest to Serafini's character and quality of legislative service. Others are from grateful constituents who were helped by Serafini or his staff. Conceptually, if a public servant performs civic and charitable work as part of his daily functions, these should not be considered in his sentencing because we expect such work from our public servants.**

**Id. at 773 (citations omitted). As will be seen, this holding eliminated as a ground for a departure every testimonial on which Fumo relied, yet the district court never acknowledged this.**

**In Serafini, the Court did find a modest downward departure justifiable based on evidence that the defendant was an "exceptionally giving person," who spent his own money and time on commendable acts apart from his public duties, including: providing a $300,000 guarantee to a friend to aid in the treatment of the friend's brother's brain cancer, without any arrangement for repayment; employing an injured person, lending him money, and encouraging him to attend college; giving $750 of his own money to a widow to avoid foreclosure of her house;**

forgiving a substantial debt out of concern for a divorced mother's financial situation; volunteering at a church and schools; helping to establish a fund to defray the cost of a bone marrow transplant for a man suffering from leukemia; and contributing to numerous other charitable causes. Id. at 773-74. "Additionally, there was significant testimony at the sentencing hearing regarding Serafini's charitable activities, including: giving a man several hundred dollars so his electricity would not be turned off; paying mortgages, car payments, and the cost of dentures for those could not afford them; and helping a young man start his construction business." Id. at 774-75 (record citations omitted).

Based on this record, the district judge in Serafini concluded: "Those weren't acts of just giving money, they were acts of giving time, of giving one's self. That distinguishes Mr. Serafini, I think, from the ordinary public servant, from the ordinary elected official, and I had ample testimony, today, that says that Mr. Serafini distinguishes himself, that these are acts not just

undertaken to assure his re-election, but are taken because of the type of person he is. . . ." Id. at 775. See also United States v. Ali, 508 F.3d 136, 149, 153 (3d Cir. 2007) (a defendant should receive a departure only for good works that are both "substantial" and "personal" in nature; reversing a downward departure granted by a district court to a defendant who had embezzled from the school she operated, based in part on evidence that she had engaged in charitable acts, as attested by 123 letters of support and commendations from various public officials and entities, as there was no record that these actions by a person in the defendant's position were in any way exceptional); United States v. Cooper, 394 F.3d 172, 174-77 (3d Cir. 2005) (a modest departure was allowed where the court cited numerous examples of personal sacrifice of time and money by a businessman, which were "in a very real way, hands-on personal sacrifices, which have had a dramatic and positive impact on the lives of others."); cf. United States v. Tomko, 562 F.3d 558, 563, 572 (3d Cir. 2009) (en banc) (modest variance was permissible based in part on the

defendant's "extensive charitable work," "that involved not only money, but also his personal time.").

Thus, as then-Judge Alito wrote in United States v. Wright, 363 F.3d 237, 248 (3d Cir. 2004), "This is a hard standard to meet." In Wright, the Court affirmed the denial of a downward departure based on good works to a pastor who was convicted of federal offenses based on thefts from the church.

> We do not understand the discussion in Serafini to mean that a person whose occupation involves charitable or civic work can never qualify for a downward departure based on extraordinary good works that relate to that occupation. Such a rule would lead to anomalous results. For example, a physician who earns a high income in private practice while also making extraordinary contributions in providing health care to the poor might qualify for a downward departure, while a physician who gives up the possibility of a career in private practice to work full time in a low paying job devoted to helping the poor would not. Rather than endorsing such a regime, the discussion in Serafini stands for the proposition that "the political duties ordinarily performed by public servants" - the sort of duties that are generally needed to stay in office - cannot qualify. It is, rather, only when an individual goes well beyond the call of duty and sacrifices for the community that a downward departure may be appropriate. . . .

Id. at 249.

Guided by Serafini, the government in this case persistently focused on the fact that Fumo never devoted any

significant measure of his own time or considerable fortune to help others.[71] Fumo never "sacrificed;" to the contrary, he worked less than a full-time public job, reaped staggering financial rewards from his public success, and then elected to steal millions more. In the face of this evidence, Fumo lined up hundreds of friends, family members, and supporters merely to attest to his success as a legislator, exactly the type of activity which the Third Circuit held may not support a departure. The government stressed the Serafini decision over and over again, see, e.g., App. 1558-60, 1594, 1618, but the district court never mentioned it, or reconciled its sentencing decision with the

[71] It is also notable that in the cases in which the Third Circuit has affirmed downward departures based on community service and charitable acts, the offenses of conviction were far less serious than those committed by Fumo, and the departures were quite modest, not remotely comparing to the sentencing result in this case. In Serafini, for example, the defendant was convicted of one count of perjury before a grand jury investigating campaign finance violations. The court granted a 3-level downward departure, from a range of 18-24 months, and imposed a sentence of five months' imprisonment and five months' house arrest.

**teaching of that case or of the many consistent Third Circuit cases.[72]**

**The government demonstrated that Fumo, successful as he was in motivating his staff and furthering legislation, did so with great efficiency, allowing him, incredibly, to spend half of every year or more on vacation, and to devote himself to many non-legislative pursuits. These facts were meticulously proven at trial, in order to defeat one of Fumo's defenses. In the opening statements, defense counsel suggested a theory that Fumo's use of his**

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[72] **The law in other jurisdictions is the same. Most recently, in United States v. Vrdolyak, 593 F.3d 676 (7th Cir. 2010), the appellate court, citing the Third Circuit's decisions in Wright and Serafini, held that a district court erred in giving weight to letters attesting to the defendant's good deeds, in part because "the judge ignored the fact that the defendant was for many years an influential Chicago alderman." Id. at 683. Judge Posner wrote: "Politicians are in the business of dispensing favors; and while gratitude like charity is a virtue, expressions of gratitude by beneficiaries of politicians' largesse should not weigh in sentencing." Id. See also United States v. Haversat, 22 F.3d 790, 795 (8th Cir. 1994) (declining departure to businessman who engaged in acts which were ordinary for his profession). Cf. United States v. Stewart, 590 F.3d 93, 147 (2d Cir. 2009) (district court extended leniency based on the defendant's career of providing legal representation to the poor, the disadvantaged, and the unpopular, which had left her financially destitute at the end of her career), rehearing en banc denied, 597 F.3d 514 (2d Cir. 2010).**

Senate staff for personal tasks was justified because he was a "workaholic" senator, devoted to legislative tasks "24/7," and therefore he permissibly used staff assistance for personal tasks to free his time for more Senate work. App. 1838-40. The government set out to prove this was a canard, and succeeded to the point that the defense was entirely dropped by the time of closing argument. By the end of the trial, the defense shifted to the claim that all of Fumo's employees put in a full week on Senate activities and assisted Fumo personally and politically only on their own time, thus causing no loss to the Senate. (The jury rejected that defense as well.)

To debunk Fumo's claim of "24/7" devotion, the government prepared an analysis (Exhibit 894), based on a painstaking review of financial and travel records, which showed that Fumo spent approximately four months of every year at his home in Florida, at his vacation rental in Massachusetts, and elsewhere outside Pennsylvania and New Jersey on vacation. App. 5245. Dorothy Egrie, who was Fumo's girlfriend during most of the pertinent time, stated that she could not stay with Fumo on vacation in Florida

during all the time he wanted her to, because she, for one, had a job. App. 2583-84.

This assessment did not even account for the time Fumo spent at his shore home in Margate, New Jersey, or at the condominiums/dock he owned in Ventnor, New Jersey. Witnesses testified that Fumo went to the Jersey shore on numerous weekends, often leaving the Philadelphia area on Thursday and returning on Tuesday. App. 2583, 3882. Before the sentencing hearing, when denying the defendant's post-trial motion for acquittal, the district court agreed with the thrust of this evidence, stating: "Nor does Fumo currently claim, as he did at trial, that these expenditures [for personal assistance by Senate employees] were justified because they allowed him to spend more time being an effective Senator - an argument properly rejected by the jury upon becoming privy to evidence that Fumo spent more than four months a year on vacation during which time he continued to seek services from his Senate employees." App. 480.[73]

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[73] Fumo's recreation was possible because, while Fumo's large staff was on the job every day of the year, and (continued...)

**The government also endeavored to prove what Fumo did while he was away from Philadelphia and Harrisburg, and the evidence was clear on that point as well. Without question, Fumo took a cell phone, Blackberry, and computer equipment with him, and was available to answer calls and e-mails regardless of where he was. But numerous witnesses, including friends loyal to Fumo, gave a consistent account of how he spent his copious vacation time. They attested that Fumo usually spent the morning hours working on his computer, then spent the afternoons relaxing or devoting himself to his numerous hobbies and extracurricular interests. In the evening, he would spend a couple more hours catching up on e-mails and other computer work. The witnesses who provided this account included Fumo's close friend, Ann Catania, who traveled with Fumo on vacation, as well as girlfriend Egrie, his personal butler, and the captains and stewards of the yachts on which Fumo took**

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[73](...continued)
worked particularly long hours during state budget negotiations (usually in June), the Senator himself was only required to be present on session days, which were few in number. During the years at issue, the number of Senate days in session ranged from 45 (2000) to 87 (2003) per year. App. 1843-44, 3563, 5244.

annual trips. App. 2583-84, 3090, 3118, 3139-40, 3145, 3203, 3212, 3255. Egrie's testimony was typical: "He would work in the morning on the computer and then he'd go to the docks and, you know, mess around with the boats and play in his garage and then do some work on the computer at the end of the day and then we'd go out to dinner." App. 2583. Fumo himself, during his testimony, did not dispute their observations.[74]

Further, the evidence showed, Fumo engaged in a good deal of non-legislative work. He was the chairman of the bank started by his grandfather; Fumo testified that during his stewardship, the bank's assets increased from $1.5 million to more than half a billion dollars. App. 3961. He was an attorney, who earned close to $1 million

[74] Also telling in this regard was Exh. 858, in which the government presented a list of the daily Federal Express packages which Senate employees sent to Fumo while he was on vacation in Florida for months at a time. App. 5238-43. For a time, the employees kept a precise record of what they were asked to gather and send. The government presented this exhibit as an example of the myriad personal tasks which Fumo assigned the state workers, but it was also probative in illumining what Fumo did with his vacation time. The shipments included very few items of work materials, and a vast quantity of goods reflecting Fumo's many interests and pursuits, regarding drafting, electronics, boating, aircraft, and farming.

every year for soliciting business for a prominent law firm, App. 2020; and he ran political campaigns, see, e.g., App. 2302-03. Thus, even the time which Fumo spent while on vacation on his phone and computer was not all devoted to his legislative work, but rather concerned his many other affairs. In sum, the evidence clearly showed that Fumo did not devote an inordinate amount of personal time to Senate work, which for him was a part-time job.

The evidence likewise revealed that Fumo gave very little of his personal wealth to charity, and certainly nothing extraordinary. Fumo's tax returns tell the story. These highly detailed, carefully prepared documents year after year listed scant charitable contributions. For example, the 2003 return, which was introduced at trial as Exhibit 1716, reported adjusted gross income of $629,195, and a mere $5,275 in charitable contributions. App. 5542, 5548, 5632. That is a rate of giving of 0.84% of income. And the true percentage is actually far lower, given that most of Fumo's wealth consisted not of annual income but tens of millions of dollars in long-term interests. Fumo did not use his public position to advance personal charity;

to the contrary, Fumo reaped enormous financial rewards from his Senate service, most notably the nearly $1 million annual fee from a law firm for directing business to it, and the entire purpose of his fraudulent schemes was to amass more bounty.[75] In sum, Fumo obviously did not meet the

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[75] As noted, the Court held in Serafini that the legislator could receive a downward departure based on his extraordinary charitable activities. The letters submitted by Fumo put forward a scanty set of alleged charitable work, and the district court did not rely on that factor in granting a downward departure or variance. Specifically, two florists, Ana Catania and Rebecca Pritchard, wrote that Fumo had gifts anonymously delivered at Christmas-time to needy families. App. 1101-02, 1240. However, Fumo's financial records showed that all of his payments to Catania's florist shop were made from his political action committee, consistent with his aim to spend "other people's money." Fumo insisted at sentencing that he made the expenditures in cash, App. 1621, but had no credibility based on his trial testimony. Separately, a number of letter-writers referred to a period when Fumo volunteered at a homeless shelter one night a week. Tellingly, the director of the program specified that this occurred from 1989 to 1993. App. 1075-76; see also id. at 1063, 1163, 1203, 1233. In addition, two writers said that Fumo assisted two Jews in emigrating from the Soviet Union in the 1980s, though it is unclear whether this was at Fumo's personal expense. App. 1375, 1383.

Even if all of the instances described by the letter-writers did occur -- making contributions to the poor (at a rate which was a tiny fraction of Fumo's considerable income), serving weekly meals at a homeless shelter for a few years more than 15 years ago, and responding to the needs of friends and family members -- they collectively

(continued...)

Serafini test of personal devotion of time and money permitting a downward departure.

The evidence presented by Fumo at sentencing, both in testimony and through 259 letters submitted to the court, did not refute the trial record, or remotely carry Fumo's burden to establish an extraordinary level of personal sacrifice. Rather, the letters focused almost exclusively on Fumo's success in various legislative initiatives and public accomplishments, exactly the type of evidence deemed insufficient by the Third Circuit in Serafini to warrant a departure. App. 1051-1497.

Revealingly, this was the initial statement made by defense counsel at the sentencing hearing when addressing the issue of Fumo's public service:

> Let's start at the political, Your Honor. And I'm not going to try to come up with a figure and tell you that Mr. Fumo was responsible for bringing X dollars into the district or for the people of Philadelphia, but let

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[75](...continued)
amount to nothing more than the routine conduct of any citizen and family member, other than the most extremely miserly. These acts cannot conceivably justify leniency at sentencing, and the district court did not purport to depart or vary on this ground. We therefore focus on the basis of the court's decision, which was the quality of Fumo's legislative service.

me just cite two examples. There was a cap of five million dollars placed upon the amount of state funding that could go to children in youth programs in Philadelphia for troubled youth. That, in Mr. Fumo's view, was unfortunate because Philadelphia had more of that problem and the money was spread across the state in ways that didn't make sense. He took that on as a project, legislated, got the cap abolished, and was responsible for large amounts; hundreds of millions of dollars of youth funding coming into the City of Philadelphia. Now, that was something that would be expected, as Mr. Pease mentioned, of a public official. To be an advocate for those in his community. To produce for them. But this was an extraordinary production.

Your Honor has several letters from people who comment on what Mr. Fumo did for SEPTA. That he was responsible for passing at least five separate pieces of legislation that provided funding for things as simple as permitting students to ride for free. And as complex as providing major funding so that public transportation should continue.

As an outsider, and I readily admit that I am, the most impressive thing to me was Mr. Fumo's commitment to communities and neighborhoods. And, again, whatever else we say the arc of those letters demonstrates that there are people who can walk into their neighborhoods and say, this is better. There are businesses open, there is graffiti off of the walls, there's trash out of the alleys. And whether Citizens Alliance lost money because of Mr. Fumo's criminality, let's not detract from the fact that it was not as the government posits; a political operation set up solely to benefit Mr. Fumo. It had real lasting and tangible effects on the people of South Philadelphia.

App. 1602. Obviously, these are precisely the types of achievements which the Third Circuit explicitly held may not

justify a sentencing departure. Yet consistently, the defense stressed such accomplishments by Fumo, which, after 30 years in office, were numerous. However, the defense determinedly avoided the issue presented by Serafini and persistently stressed by the government, which was whether any of these achievements involved an extraordinary devotion of Fumo's own time or money, which they did not.

The witnesses at the sentencing hearing shed no light whatsoever on the issue, and did nothing to meet Fumo's burden with regard to a departure. First, Malcolm Lazin testified. The district court later stated that it relied on this testimony in granting a departure. App. 1622. Lazin testified that (a) in the early 1970s, when Lazin was an assistant United States attorney investigating mortgage fraud, Fumo, as state Commissioner of Occupational and Professional Affairs, promised him complete cooperation and no interference; (b) later, when Lazin was chairman of the Pennsylvania Crime Commission, Fumo contacted him to express the opinion that the Commission should not focus solely on Italian-Americans; (c) when Lazin was president of a real estate development firm, Fumo advocated on behalf of

his association for ramps on I-95, and arranged a meeting for him with the state Secretary of Transportation to further a plan to beautify Delaware Avenue; (d) Fumo assisted Lazin in arranging for lighting of the Ben Franklin Bridge; (e) when Lazin was president of the Society Hill Civic Association, he received extraordinary constituent services from Fumo's office; and (f) Lazin appreciated Fumo's advocacy of equal rights for gays. App. 1604-05. Lazin concluded:

> I have observed Vincent Fumo for the last thirty-five years. He is among the most exceptional of public officials in terms of getting things done. Whether it's our sports stadiums, whether it's the convention center, whether it's the fireworks, whatever it is Vincent Fumo had the remarkable ability to do what others couldn't possibly begin to think about doing. And to say -- and I understand Your Honor's concerns about overstatement, it is no overstatement whatsoever to say that over at least my lifetime here in Philadelphia which began in 1969, after service in the U.S. Army, there had been few, if any, who have done more for Philadelphia in terms of our state legislature than Vincent Fumo. He has literally brought billions of dollars and helped all kinds of people, including those who have been the most marginalized in society. That's my experience with Vincent Fumo.

App. 1605. Lazin said nothing about the time or money Fumo personally devoted beyond normal work hours; indeed, he said he was not a social friend, id. at 1606, and thus plainly

was not in any position to know. Therefore, this testimony could not conceivably support a departure under Serafini, but the district court held that it did allow a huge sentencing reduction.

Similarly, the entire testimony of the next witness, Senator Christine M. Tartaglione, was as follows:

> In the last fifteen years the City of Philadelphia has received more money than any other part of the state. With Senator Fumo not there it's going to be a hardship for the City of Philadelphia. He brought billions of dollars back. Worked tirelessly. He was always on the phone, always doing something. And I have some fellow colleagues that couldn't even touch Vince in a second, because he worked so hard. He really has.

Id. at 1606. On cross-examination, she added that her concern is that "we no longer have someone in Harrisburg that knows the system and knows how to bring the money back to Philadelphia." Id. She offered no testimony to contradict the personal observations of the friends who actually accompanied Fumo and saw his work habits.

Next, Judge Eugene Maier, a state judge and a board member of St. Joseph's Hospital, credited Fumo with arranging grants and pressing others to develop the North Philadelphia Health System. Fumo, he said, also facilitated the creation of St. Joseph's nursing school, by arranging a

state grant, and giving him the names of people to call. App. 1607.

Along the same lines, the next witness, Sonny DiCrecchio, the Executive Director of the Philadelphia Regional Produce Center (PRPC) and a friend of Fumo, credited Fumo with encouraging the PRPC to start a program to donate distressed produce to Philabundance, and explained that over the course of seven years, Fumo assisted in assuring that the center obtained land and developed a new produce center, keeping 1,500 jobs in Philadelphia instead of seeing them migrate to New Jersey. App. 1608-10.

All of this evidence, clearly, was a testament to Fumo's success as a legislator, which by itself could not warrant a departure. Yet the court, without any evidence of any investment of Fumo's personal time and money (and with overwhelming evidence showing that Fumo devoted much less than full time to Senate work), said that it granted a departure, despite the Third Circuit's statement that "if a public servant performs civic and charitable work as part of his daily functions, these should not be considered in his sentencing because we expect such work from our public

servants." Serafini, 233 F.3d at 773.[76] Then, after sentencing, the court backtracked and left completely vague whether it granted a departure or a variance.

The tenor and substance of the testimony was consistent with the hundreds of letters submitted on Fumo's behalf, which likewise attested to Fumo's legislative acumen while offering no reliable evidence whatsoever to contradict the explicit trial evidence regarding Fumo's work habits. The letters revealed, to be sure, that Fumo had many friends and supporters, ranging from the powerful public figures he aided to ordinary constituents. The letters further make clear that many people thought well of Fumo, and saw him as caring of and attentive to his friends and relatives.[77] But

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[76] The government repeatedly made this point, see, e.g., App. 1596-97, but the district court never addressed it.

[77] Fumo had a large and close-knit family, and many of his relatives wrote laudatory letters to the court. In truth, it is difficult to reconcile the conflicting pictures of Fumo presented to the district court -- his friends and relatives' portrayal of him as caring, compassionate, and devoted drastically conflicted with the profane, vindictive, and frequently petty person regularly on display in the hundreds of e-mails introduced at trial. Among countless examples, see, for instance, App. 5090-92 (Fumo directed his staff to expend public resources to investigate a person he

(continued...)

the district court, properly, did not grant leniency based on Fumo's strong friendships and close family relationships, which did not distinguish him from many defendants. The court, rather, explicitly rested its sentencing reduction on a single consideration -- its conclusion that Fumo's public service had been "extraordinary." But the letters did not support that conclusion in light of this Court's precedent.

The letters followed the same pattern as the testimony in court, listing numerous public programs which Fumo supported and political positions he took, which the

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[77](...continued)
believed was dating Fumo's ex-girlfriend, concluding, "NAIL this mother fucker!!!"); App. 5275 (when a local property owner declined to sell a property in which Citizens Alliance was interested, Fumo developed a plan to, in Fumo's words, "really fuck him over," by using Fumo's control of officials at the Board of Revision and Taxes (which set property tax rates in the city) to significantly increase the citizen's taxes). Along the same lines, while letter after letter at sentencing spoke of Fumo's devotion to family, the trial evidence showed how Fumo used his Senate computer aides to intercept and disclose to him his adult daughter's e-mail, and how he used a Senate-paid political consultant, Howard Cain, to work to defeat that daughter when she ran for election to a township position in Montgomery County. App. 2382. The conflict between the trial evidence and the writers' benign view of Fumo's character need not be resolved, however, in that the district court did not rely on any of this information in its departure/variance decision, but rather focused solely on Fumo's purported legislative accomplishments.

writers appreciated, but saying nothing at all to contradict the evidence that Fumo accomplished his public work in less than a full-time job. The letter of former Congressman Robert Borski was typical:

> He is one of the most effective public servants I have ever known.
>
> His work in the Pennsylvania Senate over the past three decades produced enormous benefits for the citizens of his district, our City and the Commonwealth of Pennsylvania. For many of those years we shared a sizable number of constituents. Without fail, we worked together to resolve concerns small and large that came before us in the best interests of those we represented. I found him tireless in his goal to make government effectively represent the people. The benefits of his industrious efforts have been incalculable to the Commonwealth.

App. 1308.[78]

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[78] Among many similar letters, see the letters of David L. Cohen, former chief of staff to Mayor Rendell and longtime Fumo friend, describing Fumo's "enormous" effectiveness in bringing state money to Philadelphia, App. 1310-11; Vincent J. Borrelli, the Director of Community Affairs for the Citizens Crime Commission, praising Fumo for numerous community projects such as libraries, swimming pools, and schools, obtained through state grants, App. 1061-62; and Meryl Levitz, the president of the Greater Philadelphia Tourism Marketing Corp., describing Fumo as the "father of Philadelphia tourism," citing his support of festivals, the development of the Philadelphia Convention Center, and other historical and cultural events, and his advocacy of a permanent state funding source for Levitz's organization, App. 1386-88.

But almost all of the letters were vague, or, more often, completely silent with regard to exactly what Fumo personally did or how much time he personally spent on the matters at issue. Many of the tasks writers praised could be accomplished (and surely were) with a meeting or a phone call or two. Many simply consisted of Fumo's arranging the expenditure of public money or the use of one of his public employees to advocate on behalf of a constituent. See, e.g., App. 1243 (Louis A. Cicalese, a real estate developer, states that Fumo provided valuable advice at a meeting); id. at 1193 (Lorraine G. Daliessio, an employee laid off upon the closing of the naval shipyard, credits Fumo's office for forwarding her resume to a state official, leading to her being placed on a hiring list and obtaining her current position); id. at 1247 (retired physician Robert Davidson states that Fumo once made a call to help him get an appointment with a cardiologist).

In fact, it is clear that an enormous amount of the good Fumo accomplished, for which the writers praised him, was performed not by him but by his staff. He had more than two dozen aides in Philadelphia and Harrisburg, who

were skilled in constituent service and the ways of state government. Such a team can, and did, accomplish a lot, and even allow their boss to spend half the year on vacation. See, e.g., App. 1120 (Michael Blichasz, the president of the Polish American Congress, praises Fumo's constituent service); id. at 1126-27 (Laurada Byers, the founder of a charter school, states that Fumo provided advice and the assistance of his staff); id. at 1081 (Anthony A. Greco, Jr., the president of the South Philadelphia Communities Civic Association, praises Fumo for assistance on community issues, specifying Fumo's action in directing his chief of staff to assist a single parent in an issue with the carpenters' union); id. at 1157 (Nancy Melchiore, a South Philadelphia business owner, compliments Fumo's staff for assistance with business issues over the years).

This is not to disparage Fumo's success in motivating and deploying staff members to help others; it is to question whether this use of state funds, to pay state employees, to do their appropriate work effectively, entitles a senator to special dispensation to enrich himself through criminal conduct. With regard to a departure, the

Court in Serafini answered the question unambiguously in the negative.

In a prominent example, which defense counsel highlighted in the passage quoted earlier, many writers commended Fumo for cleaning and improving the South Philadelphia neighborhood, particularly the Passyunk Avenue business district. See, e.g., App. 1079-80, 1094, 1106, 1128, 1158, 1194, 1290, 1337, 1473-74. But while Fumo instigated many of Citizens Alliance's programs in this regard, and made overarching decisions regarding what projects to undertake and what properties to rehabilitate, the actual work was done by his staff, most notably by the low-paid Citizens Alliance workers who took to the streets and cleared the trash, swept the lots, and tidied the area (when they were not being dispatched to Fumo's homes to do personal work for him). These tasks evidenced no extraordinary personal investment of Fumo's time.

Fumo also sought leniency simply based on his ability to disburse state grant money, which rested on his senior position in the Senate and key role in the budget process as Democratic appropriations chairman. His largesse

fostered a legion of admirers, but said nothing about the Serafini factors. See, e.g., App. 1170 (David S. Rasner, board member of the Atwater Kent Museum, credits Fumo for securing funds for the museum and other cultural institutions); id. at 1287-88 (Gerald S. Segal, a benefactor of Magee Rehabilitation Hospital, credits Fumo for "pointing me in the appropriate direction in order to obtain funding from the Commonwealth of Pennsylvania."); id. at 1132 (Edward Coryell, business manager of carpenters' union, states that Fumo arranged grants for the union, and recommended several carpenters to join the organization).

Only a handful of letters even addressed Fumo's work habits. For the most part, they did so with the casual hyperbole often appended to public work, stating that Fumo's efforts were "tireless," as in Rep. Borski's letter quoted earlier. See Serafini, 233 F.3d at 773 (citing a letter regarding the defendant which used that term but described ordinary legislative work insufficient to justify a departure). See, e.g., App. 1176-77, 1257, 1477-78, 1485.

The gap between hyperbole and reality was evident in the testimony of Paul Dlugolecki, Fumo's chief of staff

in Harrisburg, whose false testimony at trial as a defense witness was roundly rejected by the jury, and who, in his letter to the court at sentencing, compared Fumo to Thomas Jefferson. App. 1251-52. In his letter, Dlugolecki wrote that Fumo "was on the job 24/7. As you have heard in court, he made round the clock use of email to staff and friends in order to secure objectives." But when questioned about this at trial, Dlugolecki's testimony did not match the casual exaggeration of his letter. At trial, he acknowledged that Fumo spent a couple months of the year in Florida, two weeks in Nantucket, and an unspecified amount of time at the Jersey shore. He said that he exchanged e-mails and phone calls with Fumo when necessary, and that others on the staff did as well, but there could be days without communications. He affirmed that, apart from the e-mail exchanges, he had no idea what Fumo did during his extensive vacations. App. 3791-92.

In short, the defense at sentencing presented no evidence whatsoever to rebut the consistent trial testimony regarding Fumo's travel and vacation habits. The trial evidence demonstrated not only that Fumo did not invest his

personal time to an extraordinary degree, but the opposite -- that he was able to spend an amazing amount of time vacationing, while staying in touch with the office when necessary. Again, this is not to say that Fumo did not do his job as a senator; he certainly did, and arguably did it effectively (while at the same time defrauding the citizenry for his personal benefit). But according to the Third Circuit, a departure on that ground is impermissible. The question, according to Serafini and a number of other cases, is whether Fumo devoted his own time to further good causes, and did so in an extraordinary manner. There was no evidence at all of such conduct.

The district court, in sentencing Fumo, stated:

> That's the next factor I have to consider is your character. And in my opinion, you were a serious public servant. You worked hard for the public and you worked extraordinarily hard and I'm therefore going to grant a departure from the guidelines.
> I base that departure principally upon my consideration of the letters that I've read in your support. I consider it upon the testimony of Mr. Lazin today -- I probably pronounced his name wrong -- who gave a moving testimonial to what you did and what you could and were capable of doing. I base it on the testimony of Mr. Maier who told me what you did with regard to the hospital and the nurse's hospital. And I base it on my overall assessment that most politicians just don't do as much as you do. They don't spend the time that you do and devote their entire life to politics that I

> think and found that you did. So on that basis I'm going to grant a departure from the guidelines.

App. 1622-23. These statements rested on no evidence, but rather contradicted the trial evidence and the court's own post-trial findings.[79]

Thus, based on this record, a departure was impermissible as a matter of law. If the court granted such a departure, the government could appeal and seek reversal. The record also did not support a substantial variance based on public service; to hold that a person who devoted less than full time to an elected position may receive a huge break at sentencing based on legislative success is plainly offensive. But the government is unable to appeal either determination in this case, as the court left its decision entirely unclear, refusing to state whether its action was a departure or a variance. It stated: "Ultimately, the

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[79] By all appearances, the court did not consider the Serafini test at all. The statement that "most politicians just don't do as much as you do," and "don't spend the time that you do and devote their entire life to politics," could just be a reflection of the cynicism expressed by some during the sentencing proceedings that many officeholders put in a lackluster effort. The court never actually addressed the question whether Fumo invested extraordinary hours beyond the workweek, despite the government's persistent requests that it do so.

**argument over which it was elevates form over substance." Sealed App. 186. Under the clear precedent of this Court, that statement is wrong, and the matter must be remanded for resentencing.**

## IV. THE DISTRICT COURT FAILED TO ADDRESS NUMEROUS COMPELLING REASONS SET FORTH BY THE GOVERNMENT WHICH ARGUED FOR A FAR MORE SUBSTANTIAL SENTENCE FOR FUMO.

### Standard of Review

In this part of the government's brief, the government asserts that the district court committed procedural error when sentencing Fumo in failing to rule on motions for an upward variance presented by the government, or to address other aggravating factors pressed by the government. (The government makes a similar argument in the next part of its brief with regard to the Arnao sentencing proceeding.)

This Court has held that a sentencing court is required as part of a sentencing proceeding, when weighing the 18 U.S.C. § 3553(a) factors, to address any factual or legal issue of potential merit raised by a party. The Court has further stated that where a party raises such an issue during the sentencing proceeding, the party is not required to repeat it at the conclusion of the hearing in order to preserve an objection to the district court's failure to consider the issue. Specifically, in United States v. Sevilla, 541 F.3d 226 (3d Cir. 2008), the defendant raised

mitigating arguments relating to his childhood and the crack/powder cocaine sentencing disparity, but the court did not address those matters in its statements at sentencing. This Court stated: "The Government argues that, because Sevilla failed to object to the District Court's omissions at close of sentencing, we must review those omissions for plain error. We disagree. Our Court's en banc decision in United States v. Grier precludes this argument. See 475 F.3d 556 (2007) (en banc)." Id. at 230-31.

In this case, the government repeatedly asserted specific grounds for a greater sentence on Fumo, during a day-long sentencing proceeding, and as will be discussed, the district court did not address those arguments. At the conclusion of the hearing, mindful of this Court's decision in Sevilla, the government did not present any further objection.

Since that time, the Department of Justice has held to the view that a plain error standard of review should apply where a party does not object, at the conclusion of the court's sentencing explanation, to the failure to address an issue. As this Court noted in

Sevilla, the circuits are split on this point. Accordingly, while recognizing that this Court may apply ordinary review consistent with its precedent, the government advocates the application of plain error review to the argument presented in this part of the government's brief, and the next part regarding Arnao.

That is of no consequence, as will be seen, given that the issue presented here clearly involves plain error, in that the government exhaustively and repeatedly presented compelling arguments for a more substantial sentence, the court did not address them at all, and those issues concerned fundamental matters which are essential considerations in any sentencing for offenses of the type prosecuted here (such as the amount of loss, the defendant's abuse of public office, the extent of the egregious preindictment obstruction of justice, and the defendant's exhaustive perjury at trial). It is apparent that, if the district court is required to consider and articulate its assessment of these matters, there is a reasonable probability that it will impose a sentence greater than the substantially below-guideline sentence decreed in this case.

See United States v. Olano, 507 U.S. 725, 734-35 (1993) (relief is warranted for an unpreserved error if (1) the court erred; (2) the error was obvious under the law at the time of review; and (3) the error affected substantial rights, that is, the error affected the outcome of the proceedings); United States v. Marcus, 130 S. Ct. 2159, 2164 (2010) (to gain relief on plain error review, the proponent must show a "reasonable probability" that the error affected the outcome of the proceedings). Moreover, correction of plain error is warranted in this case, given the nature of this prosecution of public corruption; it is apparent that the court's failure to address and account for all aggravating factors in this case "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" Olano, 507 U.S. at 736, quoting United States v. Atkinson, 297 U.S. 157, 160 (1936). Finally, given that vacation of the sentence and a remand is warranted based on the preserved claims addressed in the preceding sections of this brief, it is appropriate for this Court to direct that the district court on remand consider and address the government's positions described here.

**Discussion**

**The district court not only committed procedural error in miscalculating Fumo's guideline range, in failing to specify or consider Fumo's final guideline range, and in failing to specify whether it granted a downward variance or departure, but it also erred in failing to rule on detailed and specific requests for a greater sentence presented by the government.**

**The Third Circuit has repeatedly held that "the court must acknowledge and respond to any properly presented sentencing argument which has colorable legal merit and a factual basis." United States v. Ausburn, 502 F.3d 313, 329 (3d Cir. 2007).[80] Here, the government advanced numerous**

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[80] See also Gall v. United States, 552 U.S. 38, 50 (2007) ("After settling on the appropriate sentence, [the judge] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing."); United States v. Tomko, 562 F.3d 558, 567 (3d Cir. 2009) (en banc); United States v. Sevilla, 541 F.3d 226, 232 (3d Cir. 2008) (vacating a sentence because the court did not address the defendant's arguments regarding his childhood and sentencing disparity); United States v. Gunter, 462 F.3d 237, 247 (3d Cir. 2006) (stating as part of the second of the three required sentencing steps that a court "must formally rule on the motions of both parties"); United States v. Cooper, 437 F.3d 324, 329 (3d Cir. 2006) ("a rote statement of the § 3553(a)

(continued...)

compelling grounds for a longer sentence, which the court simply ignored. This was an additional procedural error, which like those discussed earlier, makes substantive review of the sentence impossible and requires remand for resentencing.

At the outset, as explained earlier, the government agreed with the Probation Office that Fumo's guideline range was 262-327 months, resting on an offense level of 39. That included a recommended 2-level upward departure on the basis of egregious perjury by Fumo as a defense witness at trial.[81] In its July 9, 2009, order, the district court summarily rejected the upward departure

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[80](...continued)
factors should not suffice if at sentencing either the defendant or the prosecution properly raises 'a ground of recognized legal merit (provided it has a factual basis)' and the court fails to address it.").

[81] The Probation Office advocated a 2-level enhancement for perjury at trial under U.S.S.G. § 3C1.1. At the sentencing hearing, the government agreed with the defense that this could not be an enhancement under Section 3C1.1, given that Fumo already received an enhancement under that section based on his substantive convictions for obstruction of justice during the investigation of the case, but the government defended the increase as an upward departure. App. 1555. The issue was argued on that basis at the sentencing hearing. App. 1555-58.

request, as well as other sentencing enhancements discussed earlier, simply stating, "With regard to three objections of defendant regarding action on behalf of a charitable organization, sophisticated means and perjury, these objections are sustained and a total of six (6) points is deducted from the guidelines." App. 1565. No further explanation was given.

The court's July 9 ruling, as we have explained, meant that Fumo's guideline range dropped from 262-327 months, to 121-151 months. The government then promptly, as part of its final sentencing memorandum, presented a motion for an upward variance from the new range, arguing that the new range did not account for extremely aggravating factors in the case. The government proceeded to articulate its position at great length, both in writing and at the July 14 sentencing hearing. App. 1586-89. The district court addressed none of it, when imposing its final 55-month sentence far below even the reduced guideline range it calculated. The court's error is plain, not simply in failing to rule on specific motions for an upward variance,

but in failing to address the government's powerful arguments at all in determining the final sentence.

Specifically, the grounds suggested for an upward variance and a greater sentence were five in number: (1) the court's guideline calculation did not address substantial losses inflicted on the Senate; (2) the guideline range did not account at all for the fact that Fumo's offenses involved public funds and the abuse of state workers, and undermined public confidence in the integrity of elected public office; (3) the guideline range did not account for the loss of reputation and other substantial, non-economic harm suffered by the Independence Seaport Museum and Citizens Alliance; (4) the guideline calculation did not account for Fumo's egregious perjury at trial; and (5) the guideline range did not account for the exceptionally serious nature of the obstruction offenses that Fumo committed. App. 998-1010. In addition to these assertions, the government at the sentencing hearing objected that the court intended to create a gross disparity between Fumo's sentence and that imposed on co-defendant Leonard Luchko, and on others convicted of comparable

offenses; and observed that Fumo expressed disdain for the law and an entire absence of remorse.

The district court did not address any of these aggravating factors, even though the government presented a lengthy and meritorious argument regarding each, as follows:

1. The loss determination was inadequate to measure the actual harm caused by Fumo's conduct. As explained earlier, the court eliminated from its loss calculation what the government suggested was approximately $1 million in overpayments to Senate employees who illicitly served Fumo's personal and political needs, reasoning that a precise calculation was too difficult. Yet these crimes unquestionably happened -- the jury so found, beyond a reasonable doubt -- and the only reason that a precise assessment is not possible is because of the defendants' determined efforts to conceal their crimes. Accordingly, the government advocated, it is obvious that the loss assessment understates the actual loss suffered by the victims. The government concluded: "To the extent that the Court has cut the loss in this case because of these difficulties of measurement, it is clear that there should

be an upward variance to reflect the fact that the final guideline range significantly understates the applicable loss in this case." App. 1002. A prosecutor repeated this point at the hearing. App. 1585-86. The court did not address the matter.

2. The guideline range did not account for the loss of public confidence in the integrity of elected public office. The government next observed that nothing in the guideline calculation accounted for the fact that Fumo's offenses involved public funds and the abuse of state workers, and his desecration of his position as an elected official. App. 1002-04, App. 1587. The ordinary fraud and tax guidelines applied, and the same range applied to Fumo as would apply to any person who, in a position of trust, led a $2 million fraud and endeavored to obstruct justice.

In United States v. Ganim, 2006 WL 1210984 (D. Conn. May 5, 2006), the court stated:

> Government corruption breeds cynicism and mistrust of elected officials. It causes the public to disengage from the democratic process because, as the Court stated at sentencing, the public begins to think of politics as "only for the insiders." Thus corruption has the potential to shred the delicate fabric of democracy by making the average citizen lose respect and trust in elected officials and give up any hope of

> participating in government through legitimate channels.

Id. at *5. Therefore, courts have recognized that the harm to the public's confidence in its elected officials may not be adequately considered by the Sentencing Guidelines. See, e.g., United States v. Saxton, 53 Fed. Appx. 610, 613 (3d Cir. 2002) (not precedential) (affirming three-level upward departure where fraud caused non-monetary harm of "loss of public confidence and trust in elected officials").

This consideration went directly to the sentencing factor, stated in Section 3553(a), requiring that a sentence promote respect for the law. Yet regarding that sentencing factor, the court simply said this:

> I would like to think that the judicial proceedings which were carried out in the open throughout this entire trial from its beginning up until today would, if one were to seriously look at them and seriously consider what takes place in imposing sentence, would promote respect for the law.

App. 1623. But the government explained at length how a sentence consistent with the Sentencing Guidelines was essential to maintain respect for the law, and that a downward reduction would have the opposite effect. In the particular circumstances of this case, where a privileged,

elected official has been found guilty of abusing the public trust and enriching himself at the expense of the public, an award of sentencing leniency -- based solely on the fact that the defendant held the elected position which provided him with the means to steal -- promotes not respect for the law, but disgust and outrage, and fosters the belief of many that the system of justice is different for lawmakers than it is for everyone else to whom the law applies. It was imperative that the court address this issue and take it into account in sentencing. See Gall, 552 U.S. at 54 (recognizing "[t]he Government's legitimate concern that a lenient sentence for a serious offense threatens to promote disrespect for the law"); H. Rep. 98-1017, 98th Cong. 2d Sess., Judiciary Committee Report on Sentencing Revision Act of 1984, at 39 (explaining that this sentencing factor "provides that a criminal sentence must not cause disrespect for the law. This purpose is avoided when excessively lenient sentences are avoided.").

More particularly in this case, as the government reminded the court, Fumo himself expressed no respect for the law whatsoever. The government quoted at length from

Fumo's trial testimony, when he avowed that he had no obligation to inform himself of Pennsylvania law regarding officeholders' conduct, stating, "I have no obligation as a senator except to go to Harrisburg and vote. I don't have to go to work. I don't have to have a district office. I don't have to do anything . . . ." App. 1020, quoting App. 4110. Consistently, when asked on cross-examination whether Fumo should have directed his staff not to use public resources when engaged in campaign activity, "[b]ecause it's a violation of state law for you to have your employees using state facilities, state equipment to work on campaigns," Fumo replied, "It is also a violation to spit on the sidewalk but I don't know that it's enforced." App. 1022, quoting App. 4115.

The prosecutors wrote:

> Defendant Fumo's testimony is a clear example of why the sentence in this case must take into account in a meaningful way the importance of promoting respect for the law. In order to promote respect for the law, the sentence imposed must clearly demonstrate that there are severe penalties associated with the type of conduct in which Fumo engaged and the arrogance he displayed during the course of his fraud schemes, the criminal investigation of his conduct, and the trial itself.

App. 1022. A prosecutor repeated these points at the hearing. App. 1586-88. The district court never addressed this vital subject.

3. The guideline range did not account for the loss of reputation and other intangible, non-economic harm suffered by the Independence Seaport Museum and Citizens Alliance. In advocating a more substantial sentence, the government next pointed to the significant but intangible harm inflicted on ISM and Citizens Alliance. In its victim impact statement to the court, ISM represented that the criminal fraud that Fumo committed with respect to the museum occurred at a time when the museum suffered many financial difficulties, and needed all revenue produced by its historic yachts that were available for public charter. The loss figures attributed to Fumo in connection with the museum fraud did not include the loss of charter income that resulted from the fact that the yachts were moved to distant ports to accommodate his vacation plans. More importantly, according to the museum, following adverse publicity regarding Fumo's actions, "[i]t will take years for the Museum to recover its reputation and its standing in the

Philadelphia museum community and among national maritime museums." App. 881-82. Fumo's criminal actions brought embarrassment and disgrace upon the museum, which was targeted in a series of unfavorable articles appearing in the *Philadelphia Inquirer* beginning in March 2004 which identified Fumo's relationship with the museum and his abuse of museum yachts.

Similarly, Citizens Alliance, in its victim impact statement, also asserted that it suffered severe harm to its reputation and its ability to perform its mission of providing services to residents of Philadelphia:

> Notwithstanding its valuable contribution to maintaining and improving the quality of life in South Philadelphia, CABN's reputation in the South Philadelphia communities it serves as well as throughout the region has suffered and been damaged irreparably as a result of its constant association with the illegal activities of the Defendants. In turn, the irreparable damage to its reputation has put at serious risk CABN's ability to attract grants and other financial support as well as to continue to serve the residents of the community.

App. 897. In addition, Citizens Alliance reported in its victim statement that it was forced to discharge 15 of its employees who had, for many years, provided much needed community services such as street cleaning and trash and

graffiti removal to many thousands of residents of Philadelphia. Id.

The government asserted that these injuries to the Independence Seaport Museum and Citizens Alliance are intangible harms that are not taken into consideration by the Sentencing Guidelines, and are a matter worthy of an upward variance, as courts have found. For example, in United States v. Dennis, 2002 WL 1397090 (5th Cir. 2002) (not precedential), the court affirmed an upward departure under circumstances similar to those presented here. In Dennis, the defendant was convicted of stealing from a nonprofit organization that administered grants from various federal agencies. On appeal, the court affirmed the district court's decision to grant a motion for a two-level upward departure based on the harm to the nonprofit institution's reputation that resulted from the defendant's crimes. The upward departure was based on the fact that the nonprofit organization's reputation and fundraising efforts

suffered as a result of media reports of the defendant's criminal conduct.[82]

Finally, the government reported that, in the case of Citizens Alliance, in addition to the injury to its reputation and ability to attract state grants or private donations, and the loss of its entire workforce, it was forced to advance over $2 million in legal fees to defendant Ruth Arnao, and it will likely never see those funds again. Citizens Alliance spent countless additional amounts on legal fees in responding to grand jury subpoenas and government inquiries. None of these amounts were included in or accounted for by the Sentencing Guidelines calculation. App. 1004-07. A prosecutor repeated these

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[82] See also United States v. McCoy, 272 Fed. Appx. 212, 215 (3d Cir. 2008) (not precedential) (where defendant stole identities from individuals who donated blood to the Red Cross, affirming upward departure because of non-monetary harm to reputation to Red Cross); United States v. Robie, 166 F.3d 444, 455-56 (2d Cir. 1999) (affirming upward departure where fraud caused non-monetary harm of embarrassment and the appearance of incompetence inflicted on the Postal Service); United States v. Dvorak, 115 F.3d 1339, 1341-42 (7th Cir. 1997) (affirming upward departure where fraud caused non-monetary harm of hiring unqualified individuals in sheriff's department and also damaged reputation of an "important institution").

points at the hearing. App. 1588-89. The court made no mention of this issue.

4. The guideline calculation did not account for Fumo's egregious perjury at trial. Next, the government presented a powerful discussion of Fumo's egregious perjury at trial, asserting that if the court elected not to impose an upward departure on that basis, an upward variance was certainly warranted, lest this further effort at obstruction of justice go entirely unpunished. The government stated:

> Given the fact that Fumo has already received an enhancement for the egregious obstruction which preceded his indictment, it is essential to impose an upward variance based on his perjury at trial. To conclude otherwise would be to give a free pass to anyone accused of obstruction of justice, leaving the defendant free to attempt to pervert justice by giving any measure of false information to a trial court and a trial jury. An upward variance is necessary to address and punish Fumo's effort to fraudulently affect the process of justice in this case.

App. 1008. Yet the district court, remarkably, never addressed this subject at all, despite the fact that the government pressed this significant point almost incessantly.

In part, in its first sentencing filing regarding the guideline calculation, the government submitted an

exhaustive 42-page description of Fumo's false testimony, presenting specific quotations and explanations documenting 27 separate, material areas of perjury offered by Fumo during his close to six days on the witness stand at trial. App. 789-832. The false testimony related to every significant issue in the case, and was rejected in its entirety by the jury in finding Fumo guilty of all 137 counts. At sentencing, the defense did not even attempt to rebut this presentation. For the sake of brevity, we will not repeat the summary here, only sketching it briefly, while urging the Court to review the lengthy statement in the appendix to observe what the district court failed to address.[83]

Here is just a sampling of the areas of material, documented false testimony by Fumo:

-- Fumo testified that all of his employees put in a full, 37.5-hour workweek for the Senate, and that any personal or political tasks they performed on his behalf were in the nature of favors offered by devoted friends. These claims were defeated by

[83] As the government explained to the district court, even this list, which concerned all the issues central to the charges in the case, was not comprehensive. The simple and unfortunate fact was that Fumo lied about any subject of consequence he was asked about.

overwhelming evidence of personal and political work during Senate time, and were decisively rejected by the jury. See App. 4114-17, 4120 (Fumo testimony); App. 789-90 (perjury example no. 1 in sentencing memorandum); Fumo PSR ¶¶ 23-26, 31-39, 63-150.

-- Fumo offered the false testimony that private investigator Frank Wallace did extensive personal and political work for Fumo for free, including spying for many hours on Fumo's former girlfriend. Wallace testified otherwise, and his account -- that he was compensated with Senate funds -- was supported by common sense and voluminous records showing that Wallace did not do enough Senate-related work to justify his substantial Senate contracts.[84] The jury rejected Fumo's false testimony in convicting Fumo on Counts 2, 3, 6, and 62, regarding the Wallace contracts. See App. 4000-01 (Fumo testimony); App. 795-96 (perjury example no. 5 in sentencing memorandum); see, e.g., App. 2157-62 (Wallace testimony).

-- Fumo likewise testified that political consultant Howard Cain was compensated for extensive political work for Fumo with commissions from printing companies, not the Senate contract. Cain testified that this claim is absurd, and the jury credited Cain's testimony, and rejected Fumo's false account, in convicting Fumo on Counts 62 and 63 regarding the Cain contracts. See App. 4121-22 (Fumo testimony); App. 796-97 (perjury example no. 6 in sentencing memorandum); see, e.g., App. 2467 (Cain testimony).

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[84] See, e.g., App. 5087-89 (Wallace reports to Fumo on a night-long surveillance of Egrie, and Fumo encourages Wallace to arrange Egrie's apprehension for drunk driving, stating, "reasonable costs are no object").

-- Despite abundant evidence to the contrary, Fumo denied that Senate employees, including Gerald Sabol, Sue Swett, and Charles Sholders, provided assistance in the development of Fumo's farm during time compensated by the state. The jury found Fumo's testimony to be false and convicted him on all of the many fraud counts related to these employees (Counts 39, 41-44, 46, and 50-56). See App. 3986-90 (Fumo testimony); App. 802 (perjury example no. 10 in sentencing memorandum); see, e.g., App. 2829-47 (Sholders testimony).

-- In typically risible testimony, Fumo denied that he gave Senate computer equipment to his young daughter and butler, saying that his home was a sort of computer test lab for the Senate and they happened to use computers which were at the home for that reason. E-mail evidence showed differently. See App. 4014 (Fumo testimony); App. 802-03 (perjury example no. 11 in sentencing memorandum); see, e.g., App. 5231-35, 5236-37 (e-mails in which Senate aides arrange to deliver and retrieve computer equipment specifically for Fumo's butler).

-- Fumo, in an effort to justify the numerous expenditures of Citizens Alliance to serve his interests outside the Philadelphia area, testified that Citizens Alliance did not have geographical boundaries. Citizens Alliance's own incorporation documents, which explicitly limited its tax-exempt mission to Philadelphia, flatly contradicted his testimony. See App. 4074 (Fumo testimony); App. 803-04 (perjury example no. 12 in sentencing memorandum).

-- In some of his more astonishing false testimony, Fumo endeavored to explain why his statements about Citizens Alliance in a 2004 radio interview -- when he denied receiving anything from Citizens Alliance -- were not false, even though he had entirely altered his position at trial after the

government amassed overwhelming evidence of his receipts. App. 4169. The full account of this striking sequence (which became a centerpiece of the government's closing arguments) appears at App. 804-07 (perjury example no. 13 in sentencing memorandum).

-- Fumo's trial testimony, that he received only "perks and gifts" (as opposed to compensation or stolen goods) from Citizens Alliance, then led him into further mendacious verbal gymnastics as he tried to justify his failure to report any such "perks and gifts" on his required annual financial disclosure forms in the Senate. App. 4169, 4182-85. The explanation of this clear perjury appears at App. 807-09 (perjury example no. 14 in sentencing memorandum).

-- Fumo testified that a $38,000 Town and Country minivan, one of the valuable items Fumo stole from Citizens Alliance, which he used as his vehicle at the Jersey shore, belonged to Arnao, and he merely borrowed it on occasion. Numerous witnesses contradicted that. See App. 4190-91 (Fumo testimony); App. 812-14 (perjury example no. 17 in sentencing memorandum); App. 1970, 2032, 2617, 2619-20, 3097, 3206-07, 3883-84 (witness testimony).

-- In rebuttal to the government's allegation that Fumo misspent close to $70,000 of Citizens Alliance's money in order to oppose the construction of unsightly dunes near his New Jersey beach home, Fumo insisted that he acted only because many of his constituents vacationed in the area, saying that he himself did not care about the view from his beach block home. Several witnesses contradicted that inane claim, and the jury rejected Fumo's false testimony in convicting him of fraud in Counts 71 and 94, which concerned the use of Citizens Alliance money to oppose the dunes project. See App. 4027-28 (Fumo testimony);

App. 814-15 (perjury example no. 18 in sentencing memorandum); see, e.g., App. 2623, 3073 (witness testimony).

-- Fumo testified that a bulldozer for which Citizens Alliance spent $43,000 to purchase and repair was not purchased for him, even though it was used exclusively at his farm, and never left his farm. Abundant evidence disproved this testimony, and the jury rejected it, convicting him of Count 98, regarding the fraudulent acquisition of the bulldozer. See App. 3991 (Fumo testimony); App. 816-18 (perjury example no. 20 in sentencing memorandum); see, e.g., App. 3038-41, 3055-57 (witness testimony).

-- Fumo testified that computer aide Leonard Luchko acted on his own in deleting computer evidence which had been subpoenaed by the government. For example, despite explicit e-mail evidence showing that Fumo directed Luchko to wipe computers after subpoenas were issued, Fumo presented this false tale:

> The only thing that I remember regarding that was that Ruth -- I believe, Lenny sent Ruth an e-mail saying that he wanted to wipe her computer. It was after she had gotten a subpoena. She ran right over to the office and told him no, you can't touch my computer, I have a subpoena for it.

App. 4230. In truth, the evidence showed that after Luchko notified Fumo and Arnao that he would wipe Arnao's computer at the shore, she gave him access to her condominium and he did just that. Yet trying to shift the blame to his employee, Fumo added: "As I said, Lenny is very paranoid, and if he wants to do that, he can do it." App. 4231. The jury found this pernicious testimony to be false, as is evident by its convictions of Fumo on numerous counts related to the acts Luchko

performed at Fumo's direction. See also App. 4062-63, 4247 (Fumo testimony); App. 822-25 (perjury example no. 23 in sentencing memorandum); see, e.g., Exhs. App. 5537-41 (e-mails from the pertinent time in which Luchko reports to Fumo on Luchko's execution of Fumo's instructions to wipe computers).[85]

-- As the centerpiece of his defense to the obstruction charges, Fumo testified that he destroyed Senate records because his attorney at the time, veteran counsel Richard Sprague, told him he did not need to keep any documents which could be the subject of an investigation but were not under subpoena. Sprague testified as a rebuttal witness that he never gave such advice, which even a novice attorney would know to be wrong. The jury rejected Fumo's testimony in convicting him of all obstruction charges. See App. 4060 (Fumo testimony); App. 826 (perjury example no. 24 in sentencing memorandum); App. 4263 (Sprague testimony).

In sum, the government asserted to the district court, any one of the 27 substantial areas of false testimony discussed by the government warrants greater

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[85] At the sentencing hearing, when (as discussed later) the district court advised the government that it was not necessary to review all 27 of the instances of perjury set forth in the government's memorandum, a prosecutor chose to highlight this one in his argument, given how repulsive it was that Fumo, who had entirely exploited the submissive Luchko and exposed Luchko to criminal liability, in an effort which aimed to obstruct the investigation of crimes which had solely benefitted Fumo, then endeavored at trial to shift all responsibility to Luchko. This testimony was highly emblematic of Fumo's character, as the prosecutor explained. See App. 1557.

punishment. In this light, the full body of false testimony is simply staggering. Fumo spent close to six days on the witness stand, lying to the jury, hour after hour, on every material issue in the case. That fact is powerfully relevant to sentencing, as the Supreme Court declared:

> It is rational for a sentencing authority to conclude that a defendant who commits a crime and then perjures herself in an unlawful attempt to avoid responsibility is more threatening to society and less deserving of leniency than a defendant who does not so defy the trial process. The perjuring defendant's willingness to frustrate judicial proceedings to avoid criminal liability suggests that the need for incapacitation and retribution is heightened as compared with the defendant charged with the same crime who allows judicial proceedings to progress without resorting to perjury.

United States v. Dunnigan, 507 U.S. 87, 97-98 (1993).

The district court, however, never addressed the issue at all. It declined an upward departure on these grounds without explanation (later simply stating that it did so "for reasons substantially based upon defense arguments," Sealed App. 184), and when the government presented the matter as the basis for an upward variance, the court said nothing at all. Indeed, the defense, on which the court purported to rely in denying a departure, barely responded to the perjury issue, and never even tried

to rebut almost all of the government's unassailable factual aversions.

At the first hearing, on July 8, which focused on the departure request, the defense primarily insisted that no perjury enhancement under Section 3C1.1 should be applied in light of the fact that Fumo was already subject to a 3C1.1 enhancement based on the counts of conviction. As far as the merits of the allegation that Fumo committed perjury, defense counsel argued:

> If Your Honor's going to accept the government's argument for a departure, then I think there has to be proof of each of the perjuries. And the government would have to demonstrate to the satisfaction of the Court that it has met the quite high standard of Dunnigan and Bronston in demonstrating the existence of perjury for each and every one of the incremental perjuries that they believe warrant an upward departure.

App. 1556. And that was the sum of the defense argument.

In response, a prosecutor stated: "what happened here was Mr. Fumo, not Ms. Arnao, perjured himself at trial extensively, repeatedly, hour after hour. And I will spend as long as Your Honor wants me to going into that." Id. All of the supporting evidence had been presented at trial,

**and the district court specifically stated that no further proof or argument was necessary. This was the colloquy:**

> **MR. ZAUZMER: . . . . [T]here is no way in this case to look at the verdict other than a rejection of everything that Mr. Fumo testified on every material matter. He said that employees only volunteered to do things for him. He said that the employees were properly classified. He said that he only took perks from Citizens Alliance and that he didn't receive anything inappropriately. He said the tax filings were accurate. He said he didn't defraud the Independence Seaport Museum because he thought he was entitled to take these trips. He said he had no intent to obstruct the investigation or to direct the obstruction -- the deletion of evidence. It went on and on and on and on.**
>
> **And so you don't just have one instance of perjury or ten or fifteen. It's really almost uncountable as you go through Mr. Fumo's testimony.**
>
> **We, in our submission to the probation office, and then again in our memorandum that we've presented to Your Honor, we recognize our obligation to identify specific matters and specific questions and specific material false testimony. We identify twenty-seven different areas. If they want to dispute them, I will address the twenty-seven areas. The probation office saw fit to only highlight four of those in the probation report. We've submitted all of them to Your Honor in our memorandum, beginning on page 56.**
>
> **There's just no question here that what happened was perjurious and it warrants additional punishment. It is exceptional to any degree that would warrant an upward departure to have someone like Mr. Fumo, who clearly believes on a continual basis, starting during the investigation and now, that he has the impunity to say whatever he wants and do whatever he wants in order to avoid conviction for the offense. It's exactly what the Supreme Court said in Dunnigan, that a defendant**

like that deserves additional punishment. And that's the reason for these enhancements.

Your Honor, I am not going to talk about all twenty-seven areas unless Your Honor asks me to.

THE COURT: No, that'd be totally unnecessary.

MR. ZAUZMER: Yeah, let me -- if I could --

THE COURT: They're set forth in your --

MR. ZAUZMER: They are.

THE COURT: -- in your memorandum on --

MR. ZAUZMER: In great detail. Let me just highlight one, the first one.

THE COURT: Go ahead, highlight one you think you --

MR. ZAUZMER: Sure. I think it was number 23 in our list.

THE COURT: Okay.

App. 1557. The prosecutor then proceeded to highlight Fumo's egregious and perjurious effort to shift responsibility for the obstruction of justice to the loyal and hapless Luchko. The colloquy then resumed:

MR. ZAUZMER: . . . . And I could say similar things about the other twenty-six but I will not do that unless I'm specifically asked to.

THE COURT: No, you don't have to. Thank you.

App. 1558. The defense never offered a rebuttal (as none exists). Yet the topic came up again, as the government continued to press the point:

> MR. ZAUZMER: . . . . If Your Honor wants to stay here for the rest of the evening or come back tomorrow and address the specific instances of perjury, we're prepared to do it. There were four in the pre-sentence report, and we responded to them in our objections, and we're happy to submit that to the Court.
>
> THE COURT: I don't really think that any more argument on these issues will be helpful to me. I've tried to let counsel argue here today as much as possible, but these are decisions I have to make, and I have to review them; they're quicker to make. They're matters that I'm very, very familiar with based upon my too many years on the bench. And I'm going to make the decision.

App. 1561.

But the district court never announced or explained the decision in any way, let alone addressed how the showing of perjury fit into the sentencing calculus. The district court's refusal to address or account for the avalanche of perjurious testimony by Fumo stands as a major error in this case, in violation of the Third Circuit's direction that a "court must acknowledge and respond to any properly presented sentencing argument which has colorable

legal merit and a factual basis." United States v. Ausburn, 502 F.3d 313, 329 (3d Cir. 2007).

In United States v. Stewart, 590 F.3d 93 (2d Cir. 2009), rehearing en banc denied, 597 F.3d 514 (2d Cir. 2010), the Second Circuit recently addressed an identical situation. In that case, an attorney who unlawfully aided a client in a terrorism case in passing messages to supporters had a recommended guideline sentence of 360 months, which matched the statutory maximum, but was sentenced to a term of imprisonment of only 28 months. The district court granted the downward variance on numerous bases, including the fact that the guideline terrorism enhancement which applied was disproportionate to the offense; the fact that defendant Stewart would have no further opportunity to commit the same offenses; and the fact that the defendant was 67 years old and in poor health. The Court of Appeals reversed, however, because "[t]he government, supported by substantial evidence, argued that Stewart committed perjury at trial," but the district court declined to address the issue. Id. at 149. The appellate court stated:

> Section 3553(a) requires the district court to impose a sentence "sufficient, but not greater than necessary"

> to, among other things, promote respect for the law. See 18 U.S.C. § 3553(a)(2). Whether Stewart lied to the jury under oath or upon affirmation at her trial is relevant to whether her sentence was "sufficient" under the circumstances. . . . Any cover-up or attempt to evade responsibility by a failure to tell the truth upon oath or affirmation at her trial would compound the gravity of her crime.
>
> We conclude that by declining to decide whether Stewart committed perjury or otherwise obstructed justice, the district court procedurally erred.

Id. at 149-50. The same result applies here.

5. The guideline range did not account for the exceptionally egregious nature of the obstruction offenses that Fumo committed. Finally, in its motion for an upward variance, the government stressed the flagrant and extensive nature of the obstruction of justice of which Fumo was convicted. In its sentencing memorandum, it quoted United States District Judge William H. Yohn, Jr., who, in sentencing co-defendant Leonard Luchko for his role in the same conspiracy to obstruct justice,[86] stated:

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[86] This case was originally assigned to Judge Yohn, who took the guilty pleas of computer technicians Leonard Luchko and Mark Eister in August 2008. The trial of Fumo and Arnao was reassigned to Judge Buckwalter after Judge Yohn suffered an illness, while Judge Yohn retained the cases of Luchko and Eister. Eister, who cooperated with the government and testified at the Fumo-Arnao trial, received a (continued...)

**The obstruction occurred both in Philadelphia and at the homes on the Jersey Shore and also in Harrisburg. It involved computer information with reference to Senator Fumo, Mrs. Arnao, Citizens Alliance and other Senate employees. It is fair to say in reading the allegations of the superseding indictment and the pre-sentence report and the government's sentencing memorandum that he [Luchko] was tireless in his efforts to basically delete the electronic information in order to cover up the crimes that were being committed and he was tenacious in pursuing those efforts for a long period of time. It was an effort that was largely successful with reference to e-mails and other electronic communications that occurred prior to 2005 and which, in particular, prevented the government from doing a full investigation with reference to allegations concerning PECO and Verizon, efforts to obtain payments from PECO and payments from Verizon. And it occurred both before and after the search warrants and subpoenas were issued and involving, at the end, securing some files in his own home.**
**So the nature and circumstances of the offenses are particularly egregious, and, in my mind, that aspect of the case which would - would justify a variance from the guideline application of twenty-four to thirty months.**

**. . . .**

**It seems to me that these offenses were very serious, occurred over a long period of time, involved almost a daily effort, involved his leadership role in conducting the technical effort pursuant - to conceal the e-mails that were the subject of his efforts, all of which was done at the senator's request. And as I've indicated, the seriousness of the offenses suggest a sentence above the guideline range.**

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[86](...continued)
5K1.1 departure and was sentenced to probation.

App. 467.

While Judge Yohn stated that the obstruction offenses in this case were more serious than those to which the obstruction guidelines ordinarily apply, in Luchko's case he ultimately decided not to vary upwards, upon taking into account that Luchko was a dependent person who acted in subservience to Fumo. The court instead decided a within-guideline sentence would suffice. The government asserted that Fumo, of course, did not have this excuse. To the contrary, he was far more culpable, for exploiting Luchko and all the other public employees who did his criminal bidding. The government asserted:

> The obstruction of justice that Fumo personally directed is, as Judge Yohn stated, "particularly egregious," and of a kind and duration that is far beyond the typical offense conduct contemplated by the sentencing guidelines. Thus, in the interests of justice and in order to adequately take into consideration the full measure of this extraordinary obstructive conduct, this Court should impose an upward variance and sentence Fumo accordingly.

App. 1009-10. A prosecutor repeated this argument at sentencing. App. 1556-58, 1589. The court did not discuss obstruction of justice at all in its sentencing decision.

Relatedly, the government repeatedly referred to the sentence imposed on Luchko, highlighting how disparate the sentences imposed by a different judge on Fumo and Arnao were. App. 1008-10, 1589. More broadly, the government described sentences imposed on other defendants in this district for corrupt and fraudulent conduct, which were consistent with the Sentencing Guidelines. At Fumo's sentencing hearing, the court only spoke of sentencing disparity in general terms. See United States v. Parker, 462 F.3d 273, 276-78 (3d Cir. 2006) (under § 3553(a)(6), a district court at sentencing must focus on sentencing disparity among similarly situated defendants nationally, not sentencing disparities among co-defendants).

The court stated:

> The next consideration is another very important one, and that is the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. That kind of goes hand in glove with what the guidelines were designed to do, but they set this forth as a separate consideration here.
>
> And I have considered some of the other people who were mentioned by the government and some that I brought up, the sentences they've got. But you're differently situated than they are, just like each of them was differently situated from the other. And I've considered that and this sentence takes into effect

> that prohibition, that is to say, the prohibition of my giving a disparate sentence that doesn't really make any sense because of what other defendants similarly situated have gotten.

App. 1623-24.

This statement cannot be explained. Fumo's sentence was far below even the unduly reduced guideline range found by the court, guaranteeing that he would receive a sentence significantly less than that imposed on many similarly situated offenders. Further, the government cited specific examples of recent sentences in this district in which courts imposed tough sentences for offenses involving public or charitable funds -- and all of these offenses clearly paled in relation to that of Fumo's crimes.

Specifically, the government cited (1) John Carter, the former president of the Independence Seaport Museum, who (unlike Fumo) entered a guilty plea, and was sentenced to a 15-year term of imprisonment in connection with his efforts to defraud the museum out of approximately $2.6 million; (2) Corey Kemp, the former treasurer of the City of Philadelphia, who received an above-guideline sentence of 10 years' imprisonment for receiving a fraction of the loot taken by Fumo in exchange for favorable

governmental actions, and also participated in a separate scheme to defraud his church (which was also modest in size); and (3) former Philadelphia City Councilman Richard Mariano, who received approximately $23,000 in corrupt benefits in order to aid constituents, and was sentenced to 78 months in prison. App. 1031-35, 1598-1600.

Clearly, as the government argued, Fumo's actions, in using his position as a powerful state official to steal millions of dollars for years on end and corrupt the political process, and then engage in extensive obstruction of justice, can barely be compared to the circumstances of Carter, Kemp, and Mariano. Yet Fumo received a sentence significantly below the terms imposed on each of them, without any substantive discussion by the district court of the resulting disparity.

In addition, the court never addressed the disparity with Luchko's sentence of 30 months' imprisonment for following Fumo's directions to destroy computer evidence in the Senate and Citizens Alliance offices, a sentence merely 25 months below the total sentence imposed on Fumo

for ordering that obstruction plus committing millions of dollars in fraud.

The government also noted the general disparity with sentencing of less fortunate offenders, pointing out that in the federal system, defendants are routinely sentenced to much longer terms than Fumo's, for thefts, for selling a few bags of narcotics, and for myriad other misdeeds. It is likely impossible to identify a defendant in recent years who stole over $2 million, abused a position of public trust, and obstructed justice in the process, who received a sentence anything like Fumo's. The court did not explain or justify this. See United States v. Merced, 603 F.3d 203, 222-24 (3d Cir. 2010) (a court commits procedural error where it fails to address arguments about sentencing disparity).

Finally, the court never addressed Fumo's lack of remorse, which the government had also highlighted. See App. 1019-22, 1593. His testimony at trial, quoted earlier, consistently minimized the offenses and the prosecution. This continued during his allocution at sentencing, when he said:

> I swear to God, Judge, I'm still an officer of this court, I guess, until you pronounce sentence. I'm not going to lie to you. I don't lie to people. That's one way I got to where I got is by not lying. . . . I swear to your God, Your Honor, I never intended to steal anything from anybody.

App. 1621.

The court then granted a substantial sentencing reduction despite the defendant's almost complete denial of responsibility, and without addressing it.

In sum, the government cited and exhaustively documented a remarkable number of aggravating factors which the court was required to consider and address under Section 3553(a), but the court failed to address any of them. A sentencing discussion which omitted any reference to each of these aggravating factors is clearly insufficient under this Court's precedent, and warrants a remand for resentencing. This Court's rule, that "the court must acknowledge and respond to any properly presented sentencing argument which has colorable legal merit and a factual basis," Ausburn, 502 F.3d at 329, is designed to prevent exactly what occurred in this case -- for a district court to avoid inconvenient truths while imposing a poorly justified sentence, and to

**frustrate meaningful appellate review. The sentence must be vacated and remanded.**

## V. THE DISTRICT COURT FAILED TO STATE JUSTIFICATION FOR THE LARGE VARIANCE IT GRANTED TO ARNAO.

### Standard of Review

Same as part IV.[87]

### Discussion

The district court likewise failed in its obligation to justify the large downward variance it granted to Ruth Arnao, or address the government's countervailing arguments.

The court, after determining that the guideline range was 70-87 months (below the appropriate range of 108-135 months), imposed a sentence on Arnao of 12 months and a day. The government recommended a within-guideline sentence

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[87] As occurred at Fumo's sentencing, the government, relying on this Court's precedent, fully stated its views regarding Arnao's sentence throughout the hearing, and did not make a final objection at the conclusion of the hearing to the adequacy of the district court's statement. This Court has held that no further objection was required. The government takes a different view, that absent a final objection, the adequacy of the court's explanation should be reviewed for plain error. But as will be seen, there clearly was plain error, in that the law unambiguously required a full statement of justification for the substantial variance granted to Arnao, as well as a response to the factors argued by the government, and the district court did not provide either.

for Arnao. In its sentencing memorandum, it stated that her case presented both mitigating and aggravating factors. On the mitigating side, the government acknowledged, Arnao committed the crimes she did because she was directed to do so by someone else, and that person, Fumo, was the primary beneficiary of the criminal conduct. On the aggravating side, the government cited Arnao's misuse of public funds, and the fact that Arnao stole from a charitable organization; neither of these facts was addressed in the guideline calculation. The government also cited the nonfinancial harm the offenses caused to Citizens Alliance, destroying its reputation, causing 15 employees to be laid off, and crippling its ability to raise funds and continue to serve the public. The government also cited the egregious nature of the obstruction of justice in which Arnao participated. The government concluded:

> These competing considerations leave us in the middle, advocating that a within-guideline sentence should be imposed in order to account for all sentencing considerations, to reflect the substantial seriousness of the crimes, to restore and promote respect for the law, and to assure uniformity to the extent possible with the sentences imposed on like offenders throughout the country.

App. 1771. The district court did not address any of these arguments.

Likewise, the prosecutors stressed a number of compelling factors at the sentencing hearing, which the court did not address. For example, a prosecutor stressed the need for the sentence to promote respect for the law, in light of the particular fact that Arnao's thefts involved embezzlement of public and charitable funds. App. 1817, 1824. Yet with regard to this factor, as many others, the court's statement was essentially conclusory:

> The next one is, I have to consider the need for the sentence imposed to promote respect for the law. And I think the sentence I'm going to give here will, as well as I said in the Fumo proceedings, the entire proceedings that have taken place here out in the open before everybody, everybody getting a chance to hear, will promote respect for the law. It should.

App. 1836. The prosecutor also repeated the egregious nature of the repetitive acts of obstruction of justice of which Arnao was convicted, App. 1825, and as at Fumo's proceeding, the court left the matter unaddressed. Thus, once again, the substantive unreasonableness of the sentence cannot be addressed until this improper procedure is corrected.

Indeed, the court did not articulate any justification for the considerable variance it granted to the defendant, making the substantive reasonableness of the sentence unreviewable for this reason as well. The court made one positive statement about Arnao, that she had led a productive life after an impoverished childhood, which included a teenage pregnancy. In explaining the sentence, the court said:

> I also have to consider the characteristics of the defendant. And your story can maybe be the basis of a book. I know there are other people who've had hard lives and so forth, but you've had one in your early life. At least that's the way I look at it. I believe what you told me about it, and my gosh, to have gone through all that and pulled yourself up to what you did is really, really remarkable in my opinion. Because, you see, although it has been stated here that other defendants come before me with similar backgrounds, I'm always left with a question when I have them before me. What good did you do in the world? And invariably, nothing. They didn't do anything. All they did was sell drugs, rob banks, and there's no -- they've done nothing good.
>
> So the fact that you, Ms. Arnao, at least did something in your lifetime to help other people, to help other charities, it's not enough for me to depart from the guidelines, but it's certainly enough for me to consider to vary in some way from what the guidelines suggest here.

App. 1836.[88]

Otherwise, the court simply presented a rote listing of the 3553(a) sentencing factors, largely without adding any considerations unique to the defendant or the case. The court concluded:

> I next have to consider the kind of sentences available, and I have considered that. And I think that to accomplish all of the goals of the sentencing factors, some type of incarceration has to be imposed. And in determining range, I have looked at the guidelines, but I think that the guidelines here reflect much greater than is necessary under the

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[88] The defense went further in its sentencing submissions, portraying Arnao as a meek and subservient wallflower who was helpless to avoid Fumo's illegal directions. The government responded that the evidence did not support this depiction. For instance, the government cited Exh. 1466 (App. 5530-32). In that e-mail exchange, on January 14, 2004, newspaper reporter Craig McCoy sent legitimate questions to Ken Snyder, the spokesperson for Citizens Alliance, asking about Citizens Alliance's compensation to Arnao and others. When the message was forwarded to Fumo, he reacted with customary disdain and rage, stating, "Enough is ENOUGH!!!! We are through giving these mother fuckers ANY more information! Look they are out to kill us! The last thing you do for your enemy is give him the fucking ammunition to blow your head off!!! FUCK THIS SHIT!!! NO MORE ANSWERS AT ALL!!!!" Arnao then chimed in: "i agree with the senator what do these guys want. they have all the info they already know all about jefferson square and there is other stuff they know even though they are asking questions about it. fuck them[.]" Far from being a cowed naif, Arnao was fully and enthusiastically devoted to Fumo's criminal actions. The court did not credit the defense characterization.

> circumstances, and would also result in a tremendous disparity, if I were to give you a sentence that the government is suggesting here. Finally, I have to the need to provide restitution, and that will be part of the order.

App. 1837.

The court never explained its statement that a guideline sentence "would also result in a tremendous disparity," and that statement is inexplicable. The true disparity arises because Arnao was not sentenced in accordance with the Sentencing Guidelines, and thus received a sentence far below that imposed on similarly situated offenders. The guidelines call for a range of 70-87 months for any person who stole just shy of $1 million (the loss found by the court), filed false tax returns, abused a position of trust, and obstructed justice. That range applies to any citizen, without the aggravating factors at issue in this case, where the defendant was a public employee who stole from a nonprofit charity she was charged with supervising. The court's statement is simply incongruent with the facts and provides no basis for the variance.

Further, the court never addressed the gross disparity, cited often by the government, when Arnao's co-defendant, Leonard Luchko, is considered. See App. 1742-43 & n.1, 1824-25. To be sure, as stated earlier, Section 3553(a)(6) requires that the court aim to avoid disparity among similarly situated defendants nationally (something the court's sentence failed to do), and does not demand that the court avoid disparity among co-defendants. But the particular sentences in this case surely informed the assessment of appropriate punishment, yet the court ignored the subject, while imposing a sentence that was stunningly disparate from Luchko's.[89]

As explained earlier, Judge Yohn imposed a sentence of 30 months' imprisonment on Luchko. That was the top of Luchko's applicable guideline range of 24-30 months. The court explained that the obstruction of justice -- the only offense for which Luchko was convicted -- was particularly egregious, and would ordinarily warrant an upward variance, but the court found a within-guideline

[89] The prosecution argued this point in its sentencing memorandum and at the hearing. See App. 1824.

sentence sufficient given the mitigating facts. Luchko was a somewhat hapless person, who, in his early 40s, lived at home with his mother, and had found his only worth as a loyal servant to Fumo, believing he was part of a "family" at the Fumo office.

The contrast with Arnao is striking. Luchko, unlike Arnao, did not proceed to trial, and instead entered a guilty plea. Luchko, unlike Arnao, did not participate in any fraud. It was Arnao who joined Fumo on thousand-dollar shopping binges, stocking her shore residence with goods paid for by Citizens Alliance. It was Arnao who took Senate computer equipment for herself and her children, to use at her multiple homes (all of which was loyally serviced by Luchko). It was Arnao who took a new $25,000 Jeep from Citizens Alliance, to complement the vehicles she acquired and handed away to Fumo. And yet Arnao, whose crimes essentially ruined Citizens Alliance, and who was convicted of dozens of counts of mail fraud, wire fraud, and tax fraud with which Luchko was not charged, in addition to obstruction of justice, was given a sentence less than half as long as that imposed on Luchko. Yet the district court

that sentenced her never mentioned Luchko or discussed any of these facts. See, e.g., United States v. Lychock, 578 F.3d 214, 219 (3d Cir. 2009) (holding that the district court erred in not addressing the government's argument regarding sentencing disparity, and that such a discussion was particularly necessary where the final sentence is significantly below those imposed on similar offenders).

All the court stated was that Arnao's life history was "remarkable." Yet whether or not that is so (a disputable point), her history, see Arnao PSR ¶¶ 340-350, certainly did not justify the enormous variance, and the court did not say that it did. The circumstances which the court addressed took place three decades earlier. The defendant before the court was 52 years old. She had been employed by the State Senate for 20 years. Over a number of years, she earned a bachelor's degree in organizational management. Arnao PSR ¶ 355. For a number of years, she had earned considerable salaries, as Fumo rewarded her for her devotion. From 1999 through 2006, during the criminal conduct, she earned close to or more than $100,000 in each year. Arnao PSR ¶¶ 364, 366; App. 1819-20, 3013. She was

married to an equally successful person, Rubin, such that the couple at the time of sentencing had a net worth of over $1.4 million. Arnao PSR ¶ 365. She had grown children and grandchildren. In short, she was a mature, accomplished person who knew exactly what she was doing in carrying out Fumo's criminal schemes in part for her personal benefit. In this light, the court's mere reference to Arnao's childhood years was a grossly incomplete and insufficient explanation of the variance.

As in United States v. Lychock, 578 F.3d 214, 220 (3d Cir. 2009), the district court failed "to offer a reasoned explanation for its departure from the Guidelines . . . ."

> [B]y imposing a sentence so far below the range suggested by the Guidelines and stipulated to by the parties, the District Court did not adequately take account of "the seriousness of the offense," the need to "promote respect for the law," the need to "provide just punishment," or the considered view of Congress as reflected in the Sentencing Guidelines. See 18 U.S.C. § 3553(a).

Id. at 220-21. See also United States v. Levinson, 543 F.3d 190, 201-02 (3d Cir. 2008) (vacating large variance because the court did not provide a sufficient explanation for it); United States v. Langford, 516 F.3d 205, 213 (3d Cir. 2008)

("Imposing a sentence outside the correctly calculated Guidelines range without explanation would fly in the face of the Supreme Court's and our precedent.").

The error was particularly significant here because of the large degree of the variance. See United States v. Levinson, 543 F.3d 190, 197 (3d Cir. 2008) ("while we eschew any requirement of direct proportionality, we may look for a more complete explanation to support a sentence that varies from the Guidelines than we will look for when reviewing a sentence that falls within a properly calculated Guidelines range"). The Supreme Court directed that when reviewing the substantive reasonableness of a sentence, an appellate court "will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range." Gall v. United States, 552 U.S. 38, 51 (2007). See also United States v. Abu Ali, 528 F.3d 210, 261 (4th Cir. 2008) (explaining the relevance in appellate review of the degree of variance). In Arnao's case, appellate review of the reasonableness of such a marked variance is frustrated by the absence of an explanation supporting the degree of the variance.

**The Court's recent decision in United States v. Merced, 603 F.3d 203 (3d Cir. 2010), confirms this. The procedural errors found in Merced were much narrower than those viewed here. In that case, the district court correctly determined the guideline range, stated clear reasons for its 128-month downward variance, and provided a lengthy explanation for its final decision and assessment of the 3553(a) factors. (Almost none of that occurred in this case.) Yet this Court remanded for resentencing, because the district court did not adequately explain its apparent policy disagreement with the career offender guideline, and it did not address how the significant variance it granted would not contribute to unwarranted sentencing disparities. The Court stated:**

> **Lychock, Goff, and Ausburn demonstrate that a district court's failure to analyze § 3553(a)(6) may constitute reversible procedural error, even where (as here) the court engages in thorough and thoughtful analysis of several other sentencing factors. In other words, meaningful consideration of the nature of the offense, the characteristics of the defendant, the need to protect the public, the need to promote deterrence, etc., may not save a sentence *if* the sentence is imposed without considering the risk of creating unwarranted disparities, and the sentence in fact creates such a risk. . . . This is especially true if the sentence falls outside of the Guidelines, or where, as in Lychock and Ausburn, a party specifically raises**

> a concern about disparities with the district court and that argument is ignored.

Id. at 224 (emphasis in original). That reasoning requires resentencing in Arnao's case (as well as Fumo's).

The court stated no justifiable basis for imposing on Arnao a sentence which was a fraction of that applicable to similarly situated offenders, and was far below even the sentence imposed on a co-defendant who pled guilty to some but not all of the offenses for which Arnao went to trial. The procedural error in failing to justify the sentencing variance, or address the aggravating factors described by the government, demands that Arnao's sentence be vacated and reconsidered.[90]

[90] To the extent it is relevant, the public reaction to Arnao's sentence was the same as its reaction to Fumo's sentence. On the day after Arnao's sentencing, for example, an *Inquirer* editorial lamented, "Justice must have left the city to spend the summer down the Shore." "Justice goes on vacation," Philadelphia Inquirer, July 22, 2009.

## CONCLUSION

For the reasons stated above, the government respectfully requests that the Court vacate the sentences imposed on Vincent J. Fumo and Ruth Arnao, including the orders of restitution, and remand the case for resentencing.

Respectfully submitted,

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**CERTIFICATION**

1. The undersigned certifies that this brief contains 53,543 words, exclusive of the table of contents, table of authorities, and certifications, and therefore exceeds the limitation on length of a brief stated in Federal Rule of Appellate Procedure 32(a)(7)(B). The government is filing a motion for permission to file a brief of this length.

2. I hereby certify that the electronic version of this brief filed with the Court was automatically scanned by ScanMail Real-Time Scan Monitor, version 3.82, by Trendmirco, and found to contain no known viruses. I further certify that the text in the electronic copy of the brief is identical to the text in the paper copies of the brief filed with the Court.

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