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To be argued by
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12547

New York Supreme Court

Appellate Division - First Department

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

JERRY CAMIOLA,

Defendant-Appellant.

BRIEF FOR RESPONDENT

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INTRODUCTION

Jerry Camiola appeals from a January 15, 1993, judgment of the Supreme Court, New York County (Zweibel, J.), convicting him, after a jury trial, of Grand Larceny in the Second Degree (Penal Law §155.40 [1]), and two counts of Offering a False Instrument for Filing in the First Degree (Penal Law § 175.35). Defendant was sentenced to concurrent terms of from one and one-half to four and one-half years of imprisonment for the larceny, and from one to three years of imprisonment for each false instrument count. He is presently out on bail pending appeal.

In November of 1984, 76-year old Margaret Szabol was hit by a van; her fractured hip necessitated hospitalization and lengthy recuperation. Then, in January of 1986, she underwent lung surgery for cancer. In this period, her mental condition deteriorated severely: Margaret became extremely forgetful, paranoid about her neighbors, and began to see imaginary people in her apartment. Too, despite small living expenses, she withdrew large sums of cash and left it lying around her apartment.

In January of 1986, Margaret received a \$233,000 lump sum settlement award of her personal injury claim from the 1984 accident. Her first contact with defendant was at a tax preparer's office in Manhattan in March of 1986. Defendant, who was 40-years old and employed there as a tax preparer, completed Margaret's 1985 state and federal tax returns; she paid the firm \$110 for that work. Despite that payment, on March 31, 1986, defendant wrote himself, and had Margaret sign, a check for \$5,000 for the same service. And, at the end of April, defendant wrote himself a second \$5,000 check on her account, which she signed for his preparation of her amended 1985 tax return and/or for a 1986 estimated tax return. These checks were the first of 58 checks which defendant filled out and Margaret signed from April of 1986 to March of 1988; through them defendant transferred over \$233,700 from Margaret's bank accounts to his own.

Meanwhile, Margaret's mental condition steadily declined. In late 1986, a tenant and the superintendent of her building both advised defendant of her behavior and underlying mental state; defendant acknowledged his awareness of the situation and his concern for her. When defendant's wife complained about Margaret's 2:00 a.m. telephone calls, noting her obvious inability to tell time, defendant acknowledged that Margaret was confused. In early November of 1986, a geriatric social worker visited Margaret, and met and discussed her condition with defendant. In the last eight months of 1986, defendant deposited \$44,153 in checks drawn by him on her personal checks and signed by Margaret.

In 1987, Margaret could no longer recognize her neighbors, wandered the halls and streets at all hours in her nightgown, lost her keys and/or forgot how to use them, continually went for her mail, and frequently reported intrusions into her apartment by an imaginary woman and her children. And, one evening in early 1987, Margaret admitted

strangers to her apartment, but their search for valuables was interrupted by the superintendent. That summer, Margaret reported imaginary people in her bed, such as a crying baby and a sick woman. In late June, she was taken to Roosevelt Emergency Room, and learned that Margaret was suffering from dementia. And, in late July, Margaret became more confused, refusing to stay in her brother's home and being removed from a hotel by the police. At the end of the summer, her family found three checks, one for \$10,000, payable to defendant.

When her brother and nephew tried to discuss her financial affairs with him in October of 1987, defendant refused, claiming it was on Margaret's instructions. Also that month, Margaret was distraught because she could not find her long-dead sister. In November, she was inappropriately dressed for the weather; once she had a bag filled with \$100-bills, using one to pay for a 50¢ lunch at a senior center. Realizing that Margaret was unable to care for herself, the center sought psychiatric help. During 1987, defendant deposited an additional \$119,650 in checks from Margaret into his own accounts.

In 1988, geriatric psychiatrists interviewed Margaret and concluded that she was suffering from a "dementia syndrome" with "delusions." In March, center staff members discovered three cancelled checks, payable to defendant, totalling \$22,500. Shortly after the court appointed her nephew and an attorney as co-conservators, Margaret died. From January to March of 1988, defendant deposited \$59,905 in checks from Margaret. In all, defendant received at least \$233,708 from her from 1986 to 1988, which he did not report on his own state tax returns in 1986 or 1987.

By New York County Indictment No. 7452/91, filed on July 1, 1991, defendant was charged with two counts of Grand Larceny in the Second Degree, fourteen counts of

Grand Larceny in the Third Degree (Penal Law §155.35), nine counts of Grand Larceny in the Fourth Degree (Penal Law §155.30[1]), two counts of Filing a False Tax Return (Tax Law §1804[b]), and two counts of Offering A False Instrument for Filing in the First Degree (see defendant's Appendix at A3a to A13a). On November 12, 1991, Justice Budd G. Goodman denied defendant's motion to dismiss the indictment. Trial commenced before Justice Ronald A. Zweibel and a jury on April 29, 1992. On May 20th, the jury convicted defendant of the counts submitted for deliberations: one count of second degree grand larceny and two counts of first degree filing a false instrument. On November 18th, Justice Zweibel denied defendant's CPL Section 330.30(1) motion to set aside the verdict. On January 15, 1993, defendant was sentenced as noted above.

On appeal, defendant contends that the evidence was insufficient to prove his guilt of larceny by trespassory taking. He next claims that the proof was insufficient to establish proper venue in the New York County court on the filing a false instrument counts. Finally, defendant argues that his sentence is harsh and excessive.

THE EVIDENCE AT TRIAL

The People's Case

A. From Late 1984 Through Early 1986, An Accident And Cancer Surgery Cause A Rapid Decline In The Mental Health of Margaret Szabol.

In 1984, 76 year-old Margaret Szabol resided in a second floor apartment at 448 West 50th Street, near Tenth Avenue in Manhattan; it had been her family home since the 1940's (K. Szabol: A788-89, 791-92, 814; J. Szabol: A853-57; J. Szabol, Jr.: A958-60).¹ Her mother and sister Emily both died in early 1972, and in 1981 after Margaret had

¹ Parenthetical references are to defendant's Appendix.

retired, her sister Ethel died (K. Szabol: A789-90; J. Szabol: A855, 865, 945; J. Szabol, Jr.: A959-60). Her only relatives were her younger brother JOHN SZABOL and his family, including his daughter KATHLEEN SZABOL and son JOHN SZABOL, Jr. The John Szabols lived in Queens (K. Szabol: A786-89, 792; J. Szabol: A850-51, 854; J. Szabol, Jr.: A957-58). Margaret lived on about \$1,000 per month (Senior Accountant Investigator ELODIA MARCO: A1217-18). Aside from Easter baskets each year, Margaret gave her family birthday and Christmas checks for amounts between \$25 and \$100 (K. Szabol: A813; J. Szabol, Jr.: A1015-16).

Meanwhile, in 1978 CECILIA HUERTAS met Margaret, and she became a close friend in 1981 (Huertas: A295-97, 300, 303). Huertas and their minister, Sister EILEEN McDONNELL, saw Margaret every day at Mass (Huertas: A295, 297; McDonnell: A651-54). Margaret was also well-known to her neighbors, among them WILLIAM SANCHEZ, the superintendent, who lived on the fifth floor (Sanchez: A332-37); KENNETH SIMPSON, president of the tenants' association (Simpson: A398-400, 401-03); EILEEN FORKIN, who lived on the fourth floor (Forkin: A467-70); and GAIL ELIZABETH PEPPER, who lived in the next building (Pepper: A483-84).

Margaret was in fine physical health; she seemed very young and strong (Sanchez: A338; Forkin: A470; K. Szabol: A791; J. Szabol, Jr.: A962). But, in November of 1984, Margaret was hit by a van and fractured her hip; she was hospitalized for about a month, and then apartment-bound for five or six months (Huertas: A297-300; Sanchez: A338-39; Simpson: A405; Forkin: A470; K. Szabol: A791; J. Szabol: A856, 858-59, 861, 907, 945; J. Szabol, Jr.: A960-62). After the accident, Margaret was physically fragile; as she recuperated, her brother visited daily, did the shopping, and brought the newspapers; her

nephew came every few weeks (Sanchez: A357; Pepper: A484; J. Szabol: A858-60, 907; J. Szabol, Jr.: A965).

In June of 1985, however, Margaret announced that she no longer needed her brother's help with the shopping, and refused to go to the doctor (J. Szabol: A860-62, 907-08). Gradually, too, her attitude toward her family changed, and she no longer visited on holidays or telephoned on week-ends (Huertas: A303, 327; K. Szabol: A793-94, 816; J. Szabol: A905-06; J. Szabol, Jr.: A963-64, 965). In December of 1985, she promised to call if she needed anything, but never did. However, her nephew telephoned her about four times in the following year (J. Szabol: A864, 908; J. Szabol, Jr.: A964-65). Then, in January of 1986, she telephoned to ask if her brother had taken any of her blank checks; he said that he had not, and let it go (J. Szabol: A864-65, 906-07, 909).

Before the accident, Margaret had been "vibrant," active, intelligent, "always on top of things," "up on current affairs," very alert, and involved with friends and neighbors (K. Szabol: A791; J. Szabol: A857; J. Szabol, Jr.: A962-63). She could do the New York Times crossword in one sitting without a dictionary (Huertas: A298), was a voracious reader (J. Szabol: A857-58), and filed her own tax returns (J. Szabol, Jr.: A962). She also was neat and orderly about her bills and belongings (Sanchez: A339-40; K. Szabol: A791; J. Szabol: A857, 865).¹ After the accident, however, Margaret's mental condition "deteriorated"; she was not as mentally alert and became extremely forgetful. She was also incoherent, and would halt in mid-sentence and forget words (Huertas: A301-02; Sanchez: A339-40, 357-58; Forkin: A470; J. Szabol: A861; J. Szabol, Jr.: A963).

¹ Margaret was a very private person: she did not want Huertas present when she did her taxes (Huertas: A327), nor did she tell her family about the accident settlement or her 1982 will (K. Szabol: A811; J. Szabol: A905, 945, 949-50; J. Szabol: A1003).

In early 1986, Margaret learned that she had lung cancer (Dr. PATRICIA McCORMACK: A170-71; Huertas: A300-01). After a biopsy on January 13th, surgery followed on January 31st at Memorial Sloan-Kettering Cancer Center (McCormack: A170-74; Huertas: A301). Margaret signed "informed consent" forms for these procedures, and, at the time, reported accurately that her brother was alive and her sisters were dead (McCormack: A180-81). During a three-week stay in the hospital, the nurses noticed that at times Margaret was confused, disoriented as to place and time, or thinking she had seen friends who were not really there; she also was suspicious of the staff. The nurses expected that her mental state would improve once she was back in her own home (McCormack: A173, 174-76, 183-86).

On the contrary, her mental condition deteriorated still further. Seventy-eight year-old Margaret was often confused, was not sure who the neighbors were, and could no longer recognize residents who had lived with her in the building for decades (Pepper: A484-85; Forkin: A470, 473, 477). Also, although previously Margaret had spoken to Simpson often about the tenants' association, she suddenly didn't always recognize him or know what was happening (Simpson: A403-05, 407-08, 414-16; Pepper: A484-85). Her close friend Huertas and the superintendent Sanchez noticed that instead of being friendly with everyone, Margaret became withdrawn, suspicious, nervous, and afraid, querying everything that was said to her. A daily visitor, Sanchez noticed that her belongings were scattered and disorganized (Huertas: A306-07; Sanchez: A338-40, 341-42, 349, 353, 358, 376, 378). For the first time, she looked disheveled and carried at least two, sometimes three, "bulging" purses when she visited Sister Eileen at church. At times, Margaret was "totally disoriented" (McDonnell: A654).

Further, even though she had already picked up the mail, Margaret continually checked her mail, sometimes as often as five times a day, returning over and over to the mail box (Sanchez: A351-52; Simpson: A410-12). She lost her keys repeatedly, requiring that the building door and apartment locks be changed several times (Sanchez: A352; Simpson: A409). Margaret often went to the store for food and came back with "ten other things that she didn't need any more than a hole in the head," and would still have nothing to eat for supper. Huertas began visiting her every day to ensure that she was eating properly (Huertas: A301-02).

Margaret also started saying things that simply didn't make any sense (Huertas: A302). For example, she began telling people that her downstairs neighbors, the Colbys, were "against her" and "sending people up through the wall" or "through the floors" to bother her. She later accused others in the building of conspiring to evict her, when they just voiced concern about her safety (Sanchez: A341-43, 349-50, 358; Simpson: A408). At times, she said there was "a little trap door somewhere" or a crack in the wall through which people were "sneaking in" (Sanchez: A341-42, 350). She complained that Mr. Colby was appearing suddenly in her apartment at two in the morning (Pepper: A485, 488). Often, Margaret claimed that "two little girls" came into her apartment and sat on the counter top; she also reported seeing their mother (Sanchez: A342-43, 350).

Too, Margaret complained that a little girl was there "all the time just brushing her hair," and blamed her for stopping up the sink with hair. She even called the superintendent to fix the clogged sink, although it was working properly most of the time. At other times, it was actually blocked by a brush and newspapers which Margaret had dropped into it. She also claimed "the girls" were taking her clothes and laughing at her

(Sanchez: A342-43, 350-51, 387). Several times, Margaret called the superintendent in the middle of the night to say people were in her apartment. But when he arrived, the apartment was locked up tight; when Margaret admitted him in the apartment, no one else was there (Sanchez: A342-43, 351).

B. Margaret Receives A \$233,000 Settlement, And Meets Defendant, Who Helps Prepare Her 1985 Tax Returns; Defendant Quits His Job And Becomes Margaret's Tax Adviser And Friend; As Margaret's Mental Health Continues To Deteriorate, Defendant Starts To Raid Her Accounts, Taking \$44,153.09 During 1986.

In January of 1986, Margaret received a \$232,782.46 settlement as a result of the 1984 accident (Huertas: A303; J. Szabol: A862-63, 903-04, 930, 950; J. Szabol, Jr.: A1011-12; Exhibit 26-A). At that point, when added to bequests from her mother and sisters, Margaret's assets totalled about \$614,000 (PETER ALPI, Esq.: A237, 246, 253-54; J. Szabol: A865, 902-03). Once, when he entered her apartment, Sanchez saw new \$10-and \$20-dollar bills scattered on the floor; he picked them up, counted \$200 or \$250, and gave the money to her. Margaret explained that "little girls" had thrown the money on the floor and were playing with it (Sanchez: A352-54). In fact, at that time, Margaret often kept large amounts of cash, even thousands of dollars in large-denomination bills, lying on her table (Simpson: A413). Beginning in March of 1986, Margaret made trips to her bank as often as once or twice a week to withdraw \$1,000 or \$2,000 in cash (Bank Manager WALTER J. MERTZ: A564-65, 568). Alerted by Sister Eileen, the bank manager tried to dissuade her from withdrawing so much money (Mertz: A565, 567-68). Sometimes, he was able to convince her to take less, but, at others, he was not successful

(Mertz: A568). On some of these visits, she filled out deposit slips herself;¹ at other times, someone in the bank would help her with them, just as they helped her fill out withdrawal slips (Mertz: A573). In March, Margaret confided in Huertas that she was worried about her taxes, which "totally confused" her because she did not know how to handle the recent settlement check (Huertas: A303-04). Because Margaret was so anxious, Huertas persuaded her to see defendant, the "young man" who had helped Huertas prepare her taxes (Huertas: A303-04, 320, 327, 330).

Defendant was married to MIRIAM SCHNEIDER (M. Schneider: A682-83).² He had been unemployed throughout 1985, except for a brief stint as a cab-driver at the end of the year (M. Schneider: A682). In January of 1986, he began work as a tax preparer for R & G Brenner Income Tax Centers (Manager KEVIN SHEEHAN: A147, 151-54, 159-60; M. Schneider: A682-83; Exhibit 2-A). On March 22, 1986, defendant met Margaret on 46th Street, between Seventh and Eighth Avenues, and began to prepare her 1985 state and federal taxes (Sheehan: A154-57; Huertas: A303-05; Tax Auditor ALICIA FERRER: A1233-36; Exhibits 2-B, 31).

On March 31, 1986, Margaret signed the tax returns, which defendant had signed as preparer (Ferrer: A1236-37, 1251-52; Exhibits 31, 31-A). Defendant also recorded three checks in the check register of Margaret's American Savings Bank (ASB) account: the first for \$16,255 to the Internal Revenue Service, a second for \$6,481 to "NYS Income," and the third for \$5,000 payable to defendant (J. Szabol, Jr.: A1112-14; Ferrer:

¹ Mertz did not "think" Margaret had trouble writing out the deposit slips she did herself (Mertz: A573).

² Separated in August of 1988, defendant and his wife were divorced in February of 1989 (M. Schneider: A714, 725).

A1237; Exhibit 26-A [Nos. 122-24]).¹ The IRS check, dated April 1st, cleared Margaret's account six days later; except for Margaret's signature,² defendant had written everything else on the check, including the date, payee, and amount, just as he had recorded the information in the check register (Handwriting Expert JOSEPH McNALLY: A1139-49, 1173; Exhibits 33 and 34 [specimens], 35 [report] and 36 [slides]). The \$5,000 check payable personally to defendant was also dated April 1st, although he was still employed by the tax preparer's office (Marco: A1198-99).

A few days later, on April 9, 1986, defendant accompanied Margaret to her bank. He told the manager that they were depositing \$30,000 (from her Apple Bank savings account), and wanted to be sure it would clear, because they would be drawing a check on it (Mertz: A563-64, 569-70, 572; Exhibit 10). Defendant added that he was helping her with a "tax problem," and that the check was a payment to solve it (Mertz: A570). As noted, the check to the IRS had by then already cleared Margaret's account, while the check to the State Tax Department was never received by the state. Thus, the only check that the \$30,000 deposit covered was the \$5,000 check for defendant himself, which cleared the bank that very day (Exhibit 14).

This \$5,000 check was, in fact, the first of 58 checks drawn on Margaret's accounts which transferred mostly large sums to defendant; 54 of those checks were drawn to

¹ Oddly, defendant overreported Margaret's interest income, making her liable for an additional \$6,481 in state taxes -- an amount that insured that she would receive a notice of delinquency (Sheehan: A149; Ferrer: A1237-38; Exhibit 31). Defendant's strange practice in doing her taxes continued: while he recorded a check to the state for \$6,481 in her check register, it was never sent (Exhibits 14, 31). Thus, almost \$6,500 was available in her account, of which Margaret was never aware.

² A handwriting expert concluded that Margaret's signature on this and subsequent checks was "written very poorly, ... [showed] a lack of writing control ... [and was] marked by tremor, hesitancy and uncertainty" (McNally: A1151-52).

defendant, and four others were made out to "cash" and endorsed by him (Marco: A1196-97). Over the next two years, through these checks, defendant transferred over \$233,700 from Margaret's accounts to his own; at least \$92,000, and perhaps as much as \$155,000 were sent to an offshore bank (Marco: A1193-94; Exhibits 22A, 38, 41).¹ A week after defendant and Margaret visited the bank and his \$5,000 check cleared, defendant stopped working for R & G Brenner, and set up three businesses of his own: a computer business, a tax news letter with a Wall Street office, and "Personal Tax Systems" on West 24th Street in Manhattan (M. Schneider: A708-10; Exhibit 2-A). Defendant told his wife that Margaret was one of his tax clients, although the rules of R & G Brenner precluded any employee from signing up any client they met while working for the company (Sheehan: A150-51, 163; M. Schneider: A709). Defendant added that Margaret's family was not interested in her (M. Schneider: A709).

On April 29, 1986, three weeks after their visit to the bank, defendant filed an amended 1985 tax return for Margaret, signing as preparer, but not mentioning R & G Brenner (Ferrer: A1237-38; Exhibit 31-B). Nor did he inform R & G Brenner of this service (Sheehan: A157-58). On the form, defendant stated that Margaret's earlier return had "overreported" her interest income by \$47,517, and that she was, thus, entitled to a refund of over \$7,000 (Ferrer: A1238). But, according to R & G Brenner's rules, if a preparer was responsible for an error, there should be no extra charge to the client for filing an amended return. Even if the client was responsible for the error, the charge

¹ See Exhibit 38 at 12A and 12B for specific information about each check, and Exhibit 41 at 12C for the flow of money from Margaret to defendant.

would be half the original fee -- \$110 in Margaret's case (Sheehan: A149-50, 157, 159). That fee had given Margaret "a fit" (Huertas: A304-05).

However, that same day, April 29, 1986, defendant wrote himself a second check on Margaret's ASB account for \$5,000, which Margaret signed and defendant recorded in the check register as "Jerry Camiola/1986 Tax" (J. Szabol, Jr.: A1112-14; Marco: A1200; Exhibits 2D1A, 26-D [No. 131]).¹ Within a month of meeting Margaret, defendant had obtained \$10,000 from her ASB account (Exhibit 38). The day after receiving this second \$5,000 check, defendant left for a three-week trip to New Zealand, the Fiji Islands, and Vanuatu, an island between Australia and Fiji (M. Schneider: A716-17, 721-25; Westpac Officer LEWIS E. LOVE, Jr.: A541-42; J. Szabol: A896):

In the late spring of 1986, her neighbor Simpson noticed that when Margaret did recognize him, she complained that Sanchez was having an affair with her at her "office," although she had been retired for many years (Simpson: A403-05, 407-08, 414-16). Other times, Margaret said that "strange people" were "coming up through the floor of her apartment," "out of the TV," or "through the walls" (Simpson: A408). Simpson also found her checking the mailboxes several times a day, even at two in the morning; she clearly had no idea what time it was (Simpson: A410-12). Moreover, Margaret continued to believe that people were conspiring against her, telling a neighbor that Sanchez had stolen her pots and pans, and calling her nephew in June to accuse his father of stealing her pots, pans, silverware, and \$40,000 (Sanchez: A342, 358; Pepper: A486-88, 494-96; J. Szabol, Jr.: A965-66, 1078, 1094-95). In fact, her pots and pans were in the apartment,

¹ Only the first two checks to defendant were recorded in her check register; all the subsequent checks had not been not recorded or her register for that period was missing.

and her brother had not been there since January (J. Szabol: A866-67, 909; J. Szabol, Jr.: A1096).

Sometime in the middle of 1986, Sanchez met defendant in her apartment. Defendant introduced himself as Margaret's accountant, who was there to help with her taxes, and asked Sanchez to leave because it was "private" (Sanchez: A358-62). Defendant also began visiting Margaret's apartment as often as once or twice a week (Sanchez: A361-63, 390). Toward the end of the summer, Margaret received a tax refund check from the IRS for \$16,102.06 (Marco: A1200-01), which was deposited into her Chase checking account on August 25, 1986 (A827-28; Exhibits 21-A, 21-C).¹ That same day, defendant wrote himself a check on Margaret's Chase account for \$8,051.03, exactly half the amount of the refund. A day later, defendant drew another Chase check to himself for \$16,102.06, the precise amount of that refund (Marco: A1200-01; Exhibits 21-C, 38 [Nos. 110, 111]). Thus, within only five months after they met, defendant had transferred almost \$35,000 from Margaret's accounts into his own (Exhibit 38).

Too, during the summer of 1986, Margaret began making calls to defendant's Woodside home in the middle of the night, complaining because defendant had not taken her to a two o'clock doctor's appointment, but not realizing that she was calling at two in the morning, rather than in the afternoon (M. Schneider: A710-11, 726). Another time, Margaret was distraught because she could not understand why the bank was not open in the middle of the night (M. Schneider: A711). When defendant's wife mentioned these calls to him, defendant said Margaret was "a little confused" (M. Schneider: A711-12).

¹ By this refund, the IRS returned all but about \$150 of the \$16,255 Margaret had paid in late March (Exhibit 2D1A).

Also that summer, Simpson met defendant, who was leaving Margaret's apartment (Simpson: A416-17, 422, 448-49, 460). Defendant introduced himself as Margaret's accountant, proffering his business card (Simpson: A419-21; Exhibit 8). Defendant added he had become very friendly with Margaret because his mother had passed away recently and Margaret reminded him of her (Simpson: A419-20).¹ Simpson told defendant that the tenants were all extremely concerned about Margaret, and feared that, because of her mental problems, she might be a danger to herself, or other tenants, because she was letting strangers into the building and into her own apartment (Simpson: A418, 422, 449, 451-52; see Pepper: A487). Defendant replied that he was aware of her mental problems and was trying to help, adding that he had contacted a nursing home in Queens so that she would have a place to stay during renovations (Simpson: A418-20, 449-51). Simpson also told defendant that Margaret had been keeping large amounts of cash visible in her apartment or offering exorbitant tips to people -- \$100 or \$150 for a \$100 service (Simpson: A421, 460). Defendant expressed surprise, claiming that he had "never seen anything like that," and in fact, had even given Margaret small amounts of money (Simpson: A422, 453, 460-61). After a ten-minute discussion with defendant, Simpson went into Margaret's apartment and found her at the table with a large "roll" of cash (Simpson: A422-23, 454-55, 460-61, 452, 463).

After their meeting, Simpson called defendant a few times to see if he had in fact found Margaret a place to stay during renovations; defendant reported that the Queens nursing home had not worked out, but that he was still seeking a temporary residence

¹ Defendant's mother and father had died in January and August of 1986, respectively (M. Schneider: A723).

(Simpson: A425). Defendant reiterated that her mental problems "concerned" him (Simpson: A426-27). A few months after their meeting, Simpson met defendant on the stoop, and they again discussed Margaret. Finally, Simpson stopped calling defendant: he was not getting any results and was having second thoughts about defendant's role in Margaret's life (Simpson: A424-25, 427-28).

Huertas, meanwhile, tried to warn Margaret not to get "cozy" with defendant, saying that he would "wipe [her] out." Her advice simply made Margaret furious, and Margaret called Huertas "jealous." Huertas believed that Margaret was flattered by all the attention from defendant, who became "her world" with his telephone calls and visits, lunch and dinner dates, and trips to a zoo or park (Huertas: A305-06, 313-15, 325-26, 330). From that point on, little by little Huertas was pushed out of the picture as Margaret's friend (Huertas: A306). But, Huertas continued to visit and call Margaret, and sent Sister Eileen to check on Margaret when she could not go herself (Huertas: A306). On an unannounced visit in early October of 1986, Sister Eileen met defendant at Margaret's home. Defendant and Margaret were looking over an "enormous" paper with all kinds of figures on it, and Margaret explained that defendant was helping with her taxes, despite the fact that it was October (McDonnell: A655-59, 662-63).

Shortly after that encounter, defendant and his wife left for a two-week trip to Europe (M. Schneider: A716-17). The tenants were very concerned about Margaret, who was frightened of losing her apartment if she left during remodeling; nor did she understand that she would have no electricity or water if she stayed (Sanchez: A387; Simpson: A455-56; Pepper: A487-88, 497-98; J. Szabol: A890, 912, 913). On election day, Margaret went to vote, carrying several hundred dollars and grumbling that there

were "people coming into her apartment through the wall" and "young people" dancing and playing with dolls in her apartment. Margaret seemed really confused and did not know what was happening (Forkin: A470-71).¹ Because of incidents like these, the tenants decided to get in touch with Margaret's family or someone who could keep an eye on her (Forkin: A471-72; Pepper: A488-89). Thus, they contacted Roosevelt Hospital's mobile geriatric outreach team and sought guidance from organizations serving the elderly (Simpson: A426-29, 461-62; Pepper: A489-90).

As a result, on November 5, 1986, hospital social worker NANCY AMER-LAKE, her colleague, and Sanchez went to Margaret's apartment (Amer-Lake: A503, 505, 506-07, 509, 511, 527). Defendant was there when they arrived, introduced himself as Margaret's "friend" or "tax consultant," and said he was there to do her taxes (Amer-Lake: A507-09, 510-11, 527; Exhibits 8, 12-B). Amer-Lake performed a mental status examination of Margaret, who was confused and disoriented about the time and day. She did not understand the reasons for Amer-Lake's visit; her mental status, short-term memory, and recent memory were impaired. Amer-Lake doubted Margaret's ability to manage on her own in her apartment, and was concerned about whether she was eating properly (Amer-Lake: A510-13, 520). Amer-Lake discussed these findings with defendant, who expressed concern about Margaret; they set up a meeting with Margaret for the following week. When the social workers and Sanchez left, defendant remained (Amer-Lake: A510, 513-15, 528). That same day, Margaret closed her Apple Bank savings account, withdrawing \$32,880 (Exhibit 10). The next week, Margaret called to cancel the meeting with Amer-

¹ Also that fall, Margaret complained that a bag of Treasury Bonds had been stolen from her apartment (Pepper: A486, 490-91, 496).

Lake, stating that she did not have any problems or need assistance. She was equally adamant about not needing aid in a telephone conversation on November 18th (Amer-Lake: A515, 522-24, 525, 531-32). Amer-Lake called defendant to enlist his aid. While he agreed that Margaret should see a doctor and promised to arrange an appointment, he never did so (Amer-Lake: A516, 528-30).

Meanwhile, in mid-November of 1986, the State Tax Department sent Margaret a notice that she still owed over \$7,000 on her 1985 taxes (Ferrer: A1239; Exhibit 31). On November 19th, defendant sent a response which he signed as "Accountant to Margaret Sabol," misspelling her name. He asked them to "refer" to the amended return, which showed that there was an "overpayment," rather than a "balance due" (Ferrer: A1239-40; Exhibit 31).¹ That same day, defendant wrote an ASB check to himself for \$1,000; it cleared his account on November 24th, and Margaret's the next day (Marco: A1201; McNally: A1145-47, 1173; Exhibits 14, 35 [No. 146]).²

Once, near the end of 1986, Forkin found Margaret wandering in the hallway carrying three purses. Margaret could not find her keys in those purses and was very confused. Forkin and Sanchez eventually found the keys in one of the purses and opened the door for her (Forkin: A472-74, 477-78). Although Margaret had known Forkin for many years, she asked Forkin where she lived. When Forkin replied that she lived upstairs, Margaret said it would be "nice to know somebody in the building" (Forkin:

¹ In his letter to the tax department, defendant, aware that he had not sent the \$6,481 check indicated in Margaret's check register, never referred to a discrepancy between the \$7,500 the return said was paid and the \$825 actually paid (J. Szabol, Jr.: A1112-14; Ferrer: A1237; Exhibits 14, 26-A, 31).

² It was not recorded in her check register, although Margaret had recorded other checks written in the same period (Exhibit 26-1a).

A472-73). In the meantime, twice in this period defendant went to Rhode Island to look at real estate (M. Schneider: A716-17). From November 27 to November 30, 1986, defendant and his wife also visited her parents in Utah (M. Schneider: A716-17). After his return from Utah, defendant wrote himself a check for \$2,000 on Margaret's Chase account (Marco: A1201; Exhibit 38 [No. 151]).

In early December of 1986, social workers from Roosevelt Hospital continued to receive reports about Margaret from her neighbors. Amer-Lake referred Margaret's case to the Human Resource Administration's (HRA) Protective Services for Adults (PSA), which had authority to pursue involuntary measures to assess her mental capacity (Amer-Lake: A506, 517-18, 521, 530). On December 4th, after speaking with Amer-Lake, PSA Case Worker SHARON JORDAN went to visit Margaret (Jordan: A767-72). Margaret only let her come a little way into the apartment, but Jordan noticed that the kitchen table was cluttered with papers, money, and 20 dollar bills, which Margaret said was to pay bills (Jordan: A773-74). Margaret was clean, but her hair was ungroomed; she gave the wrong month, year, and time of day (Jordan: A773-74). She also was hostile, evasive, and suspicious. She refused all offers of help and made Jordan leave (Jordan: A776-77). When Jordan returned to her office, there was a message waiting for her, saying that Margaret did not want Jordan to visit her. Jordan's agency concluded that she had not gathered enough information to seek a further psychiatric evaluation (Jordan: A776-78).

Shortly after, on December 11, 1986, defendant took a four-day trip to Florida (M. Schneider: A717-18). Two days after his return, on December 17th, a \$10,000 Treasury Bond issued in Margaret's name was deposited into her ASB account; the deposit ticket appears to be in defendant's handwriting (Exhibit 14). That same day, defendant wrote

himself an ASB check for \$2,500; two days later, he made himself payee on another \$2,500 check on the ASB account (Marco: A1201; Exhibits 2D1A, 14 [Nos. 149, 179]). On December 19th, \$1,000 in cash was withdrawn from Margaret's account (Exhibit 14). One week later, defendant wrote a check to himself on Margaret's Chase account, this time for \$2,000 (Marco: A1201 [No. 115]). The total amount transferred from Margaret's accounts into defendant's for the eight months of 1986 was \$44,153.09 (Marco: A1198, 1201, 1228-31; Exhibit 38).

C. 1987: As Margaret's Mental Condition Deteriorates Further, Defendant Continues To Transfer Her Money To Finance His Own Travel Expenses; A Typewritten Check For \$50,000 On Margaret's Account Is Deposited In A Secret Account On A South Pacific Island, After Defendant Travels There; Defendant Takes \$119,650 From Margaret In 1987.

In late 1986 or early 1987, about four months after their introduction, Sanchez met defendant outside Margaret's door. Sanchez, who had a degree and experience in accounting, said that he did not understand why defendant was coming so often, since Margaret was not a company with financial records that needed constant attention. Sanchez told defendant that he was going to find out what defendant was doing. Defendant just looked at Sanchez and entered Margaret's apartment (Sanchez: A337, 363-65, 373-75, 379-80, 390). About three weeks later, Sanchez encountered defendant outside her apartment, said, "I know you are stealing from Margaret," and warned defendant that he would be caught. Defendant did not reply and simply walked away (Sanchez: A353, 365-66, 375-76, 393-94). Between these two meetings, Sanchez had also passed defendant in the hall on at least five or six other occasions (Sanchez: A375).

In fact, Margaret's mental condition was going "down hill consistently." While she had some lucid periods, they were very brief (Huertas: A307, 324). Although she had

once been articulate and bright, Margaret was now stuttering badly (Sanchez: A369). She got lost in the street, and even lost her way in the hallway of her building. She sometimes wandered the streets in her nightgown (Sanchez: A369-70; Simpson: A408-09; Pepper: A485). One day during this period, Margaret complained to Sister Eileen about "people" who were getting into her apartment at night. As she left Margaret's apartment, Sister Eileen met defendant, who was bringing Margaret flowers (McDonnell: A656-57).

Within the first few days of 1987, defendant wrote three more checks to himself, one on each of three different accounts Margaret had (Marco: A1202-03; Exhibit 38). A Chase check dated January 1, 1987, was for \$500 (Exhibits 21c, 38 [No. 118]); dated January 5th, a Citibank check was for \$2,000 (Officer WILLIAM SHEA: A270-72, 274-77; Exhibits 5-A, 5-B, 38 [No. 102]); and, dated January 8th, an ASB check was also for \$5,000 (Marco: A1202-03; Exhibits 14, 38 [No. 152]). These three checks, totalling \$7,500, cleared defendant's accounts by January 9th, the same day he left for a seventeen-day trip to New Zealand and Vanuatu (M. Schneider: A718, 727; Love: A541-42). Margaret's 79th birthday was January 14, 1987 (K. Szabol: A792; J. Szabol: A857; J. Szabol, Jr.: A960).

Once while defendant was away, Margaret called his home after midnight (M. Schneider: A712, 727). When defendant's wife Miriam explained that he was out of town, Margaret became furious, insisting, "I know he is there," that somebody had seen him back in town, and that Miriam was lying and hiding defendant (M. Schneider: A712-13, 727-29). She accused, "He has stolen all my money. He has taken all my money. You're hiding him from me. I am going to call the cops" (M. Schneider: A713, 730). Miriam gave Margaret defendant's hotel phone number in Fiji, and suggested that she call him

there (M. Schneider: A713, 728). Nonetheless, Margaret continued to accuse Miriam of lying, called her a bitch, and concluded, "I curse you. I curse your children and I curse your children's children" (M. Schneider: A713, 730).¹ A few days after his return from the South Pacific, defendant and his wife traveled to Florida, returning on February 3, 1987 (M. Schneider: A718). Shortly thereafter, defendant deposited a \$4,000 check, dated February 4th and drawn on Margaret's Citibank account, into one of his own accounts (Marco: A1203-04; Exhibits 5-B, 38 [No. 101]).

One night in early 1987, Margaret admitted two strange men into her apartment after buzzing them into the building. When Sanchez arrived, one was talking to her in the living room, while the other was ransacking the back rooms; one ran out the front door, while the other fled through the back (Sanchez: A390-91). Margaret claimed that she thought they had said they were there to do construction work. However, since the building had no intercom, they could not have told her anything before she let them in (Sanchez: A391-92). On February 12th, Margaret returned to see Dr. McCormack for a follow-up examination of her lungs (McCormack: A177). She told the doctor she had been robbed three days earlier: more specifically, a six-year old boy had been keeping her busy at one end of the hall, while a man went into her apartment, ransacked it, and took \$75,000 (McCormack: A169, 177). On February 19th, PSA Case Worker Jordan tried to see Margaret, who would not let her in the building (Jordan: A778-79). Jordan came once a month for the next four months, but could not persuade Margaret to speak to her (Jordan: A779-82).

¹ Miriam told defendant about this conversation upon his return, and requested that he have Margaret call him at his office, rather than at home (M. Schneider: A710, 713).

In early March of 1987, defendant wrote four more checks to himself on Margaret's accounts, for a total of \$7,550 (Marco: A1203-04; Exhibit 38). Three of these checks were drawn on Margaret's Citibank account. Dated February 26th, March 2nd, and March 18th, respectively, the checks were for \$500, \$2,000, and \$5,000 (Exhibit 5-B [Nos. 110, 103, 114]). On March 18th, defendant had also written an ASB check for \$50 (Exhibits 14, 38 [No. 160]).¹ Shortly after these transactions, defendant left New York for two short periods, from March 20th to March 22nd, and from March 26th to March 30th, but his wife had no idea where he had gone (M. Schneider: A718).

Two days after his return, on April 1, 1987, defendant deposited a check for \$500 drawn on Margaret's Chase account into one of his accounts (Marco: A1204; Exhibits 21-C, 38 [No. 120]). On April 10th, defendant wrote out to himself and deposited two more checks drawn on Margaret's ASB account for a total of \$560 (Exhibit 14 [Nos. 164-65]). From April 10th to April 12th, defendant and his wife vacationed in Canada (M. Schneider: A718). A few days after his return, defendant wrote out a \$5,000 check to himself dated April 20th and drawn on Margaret's Citibank account (Exhibits 5-B, 38 [No. 116]). Shortly after this check cleared, on April 23rd, defendant went to Florida for a week (M. Schneider: A718-719). He returned to New York for a few days, then left for Brussels with his wife on May 1st (M. Schneider: A718-19).

Defendant returned from Europe nine days later-- May 10, 1987. Within two days of his return, he began depositing a series of seven checks drawn on Margaret's accounts into his own accounts, totalling \$11,950 (M. Schneider: A719; Marco: A1204; Exhibit

¹ March 18, 1987, was also the date on the 1986 state income tax return which defendant filed for Margaret from his business, Personal Tax System, 200 West 24th Street (Alpi: A240; Marco: A1244; Ferrer: A1240, 1244; Exhibit 31-C).

38). Three consecutive ASB checks were dated May 12th and cleared her account on May 13th; two were for \$500 and the third was for \$300 (Exhibits 14, 38 [Nos. 188, 189, 190]). A fourth ASB check was for \$50 (Exhibits 14, 38 [No. 171]). Three other checks were drawn on Margaret's Chase account: dated May 18th, 19th, and 22nd, the checks were for \$100, \$500, and \$10,000 (Exhibits 21-C, 38 [Nos. 121, 81, 123]). The \$10,000 check was written only days after another of Margaret's \$10,000 Treasury bills had been deposited into her Chase account; the deposit ticket appears to be in defendant's writing (Exhibits 21-C, 38).

On May 28, 1987, \$50,000 had been deposited into Margaret's Chase account (Exhibit 21-C), and, in early June, defendant wrote himself another ASB check for \$5,000, which cleared his account on June 5th (Marco: A1205; Exhibits 14, 38 [No. 254]).¹ Meanwhile, that spring and summer, Margaret's mental state continued to get progressively worse, and the tenants contacted the Encore Senior Center for assistance (McNamara: A74-75, 86-87; Sanchez: A369). Often incoherent, she constantly lost her keys, and, even when she had them, could not remember which key unlocked her door (Sanchez: A369; Simpson: A409). While before she was extremely modest in her dress, Margaret began to wander the hallways in her nightgown at all hours (Sanchez: A369-70; Simpson: A409-10). Sometimes Margaret did not know where she was, and she even got lost in her own apartment. When she wandered the streets, her neighbors had to direct her to their building; once, the police had to bring her home (Sanchez: A342, 370; Pepper: A485). Convinced that defendant was stealing from her, Sanchez reported his suspicions to the

¹ A Chase check, dated June 4, 1987, was made out to "General Industries, Ltd" for \$50,000, but was not presented for payment until July 31st (Love: A544, 544-47; Exhibits 13-A, 21-C, 38 [No. 80]).

corporation; in turn, various agencies for the elderly began to investigate (Sanchez: A370-71, 392-96; Simpson: A453).

Defendant, meanwhile, was in Florida for most of June, 1987 (M. Schneider: A719). On Thursday, June 11th, Margaret spoke to her brother, niece, and nephew by telephone. She was frantically upset about a baby who was "crying" and would not "shut up" and begged her family to help. Unable to calm her down, they went to Margaret's apartment (K.Szabol: A794-96; J. Szabol, Jr.: A968). When they arrived, a disheveled Margaret began "rambling on and on about this baby crying." She pointed to the bed, saying, "He is crying in that bed," but there was no baby in her apartment. But, when they explained that there was no baby, Margaret insisted that there was a crying baby who "wouldn't shut up" (K. Szabol: A796-97; J. Szabol, Jr.: A969). The apartment was disorganized and dirty (K. Szabol: A797; J. Szabol, Jr.: A989-90). Margaret was very disoriented and confused (J. Szabol, Jr.: A969). Two days later, her relatives returned to make sure she was all right and to bring food, but Margaret was still very disoriented. She did not even seem to know them (K. Szabol: A798).

On Thursday, June 25, 1987, two days after defendant's return to New York City, her brother got a call that Margaret had been taken to Roosevelt Hospital (J. Szabol: A867-69; J. Szabol, Jr.: A971, 1078-80; A952-53 [Exhibit 25, Hospital Record]). Margaret had been standing on her stoop, telling people that there was a "very sick lady" upstairs in bed; she took emergency medical personnel upstairs and pointed to her own bed, which was empty (A953 [Hospital Record]). She also complained that people were stealing from her. Margaret was diagnosed with "dementia" (A954-55 [Hospital Record]).

That night defendant appeared at the emergency room (A954 [Hospital Record]). Margaret's nephew called the hospital to learn of her condition, and eventually spoke to defendant (J. Szabol, Jr.: A970, 971-72, 1079). Defendant explained that her neighbors had called for an ambulance, and that Margaret was disoriented and confused; he promised to take Margaret to her apartment (J. Szabol, Jr.: A973, 1079-81). The men spoke again that weekend to arrange for John, Jr. to collect papers for her doctor's appointment the following Monday (J. Szabol: A868, 1081). The Szabols visited Margaret on Sunday, and met defendant the next morning outside of her building. He turned over the papers, and said that Margaret had been diagnosed with "senile dementia" (J. Szabol: A869-71, 913; J. Szabol, Jr.: A974-75, 1081-83).

That day, June 29, 1987, Margaret was interviewed at the hospital by doctors and social workers (J. Szabol: A869-71, 910-11, 913-14; J. Szabol, Jr.: A975-76). She could not answer most questions, and could not give the date or year, or name the president (J. Szabol, Jr.: A976-77). Margaret told the doctor that her neighbors, the Colbys, were "causing her problems" (J. Szabol, Jr.: A976). When the doctor tried to tell her not to worry about the Colbys, Margaret turned to her nephew and asked how the doctor knew about them. John, Jr. replied that she had mentioned the Colbys, but Margaret insisted she had not. Afterwards, she repeatedly said that the doctor must be "getting money under the table from the Colbys to declare her insane" (J. Szabol, Jr.: A977-78).

Sometime in July of 1987, Margaret complained that she could not get into the house because her keys were lost. The Szabols searched the apartment -- which was a mess -- and eventually found her keys (K. Szabol: A798, 800, 818; J. Szabol, Jr.: A989-90). During that search, her relatives also found postcards defendant had sent to Margaret

(M. Schneider: A720; K. Szabol: A799; J. Szabol, Jr.: A991-92; McNally: A1148, 1174; Exhibits 19, 35), and three cancelled checks defendant had written to himself on her accounts, including one for \$10,000; they took the checks (K. Szabol: A799, 817-18; J. Szabol: A880-81, 897-98, 899-900; J. Szabol, Jr.: A989-91, 1051-52). After that, one of the Szabols visited Margaret every weekend (K. Szabol: A800; J. Szabol, Jr.: A971).

Meanwhile, on July 1, 1987, defendant made himself payee on an ASB check for \$70 (Exhibit 38 [No. 277]), then spent the next four days in Florida (M. Schneider: A718-19). Margaret's second appointment with the doctors at Roosevelt Hospital was scheduled for a few days after his return (J. Szabol: A872). However, when her family came to take her to the hospital, she refused to go, claiming that the Roosevelt doctors were "in cahoots with" the Colbys, who wanted to evict her (J. Szabol: A872-73; J. Szabol, Jr.: A978, 1097-98, 1115; see Jordan: A781). The next day, her family sought advice from a lawyer, who said that a psychiatric evaluation would be necessary to arrange for a conservatorship or any other involuntary measure (J. Szabol: A882-83, 943; J. Szabol, Jr.: A994, 1052-53, 1096-97). Unfortunately, after the Roosevelt appointment, the Szabols could not persuade Margaret to see doctors, even her previous physicians (J. Szabol, Jr.: A994-95, 1115).¹

During that summer, Margaret had been leaving messages on her nephew's answering machine (J. Szabol, Jr.: A995). After talking to the lawyer, Margaret's nephew began to save the taped messages for possible psychiatric use (J. Szabol, Jr.: A995-97, 1053, 1115; Exhibit 27 [Tapes 1 - 8A]). In an early July, 1987 message, Margaret spoke about "what's his name, um, uh, Jerry," her "tax man" who was "very good" -- "an

¹ After speaking to the priests in her parish, John, Jr. contacted Catholic charities on the east side of Manhattan and a nursing home in Bayside, Queens (J. Szabol, Jr.: A993).

expert" (J. Szabol, Jr.: 1034-35, 1038-39, 1048, 1098, 1111; A1553 [Exhibit 27, Tape 8A]). If it was "okay" with her nephew, Margaret wanted "to keep [defendant] on doing that work," since she had "depended on him" for "those things." She thought that she had "really made a mistake by just cutting him off altogether" (A1553). Margaret called later to add that she thought she "would like to have what's his name, Jerry, at the meeting tomorrow," because he had "so much of the information on [her] taxes and things" (A1553). However, the only "meeting" Margaret had scheduled in this period, to which she may have been referring, was a follow-up visit to Roosevelt Hospital (J. Szabol, Jr.: A1034-36, 1041-47, 1057).

A short time later, also in July of 1987 (J. Szabol, Jr.: A1024-25, 1055, 1057-58), Margaret called to complain that she was having "a terrible time," could not "see the numbers" or dial the phone, and was "spending a lot of money on phone calls" (A1530 [Exhibit 27, Tape 1A]). "All confused right now," Margaret thought her nephew was "supposed to have something to do with the stove" in her apartment, and asked if it was "okay for me to just go out and leave this whole thing blank?" (A1530). She believed someone was "taking over" the "heating," but "did not know who's right and who's wrong," asking, "Are you going into this, uh, office uh, this apartment, or are you dropping it?" She did not want to "get involved into some kind of mess" that was "costing her a fortune" -- she was "too old to be spending money needlessly" (A1530-31). Wrongly saying that she was "85 years old," Margaret found that things "are really a hopeless" and "people are talking raving things about them" (A1531). Often in this call Margaret interrupted herself to leave her telephone number or address or to say that she was "in New York" (A1530-31). While Margaret's apartment building was scheduled to be

renovated to convert it into a co-operative, Margaret's nephew was not involved (Sanchez: A336-37, 367-68, 386; Simpson: A399-400; J. Szabol, Jr.: A979, 1025).

In another call, at about the same time, Margaret complained that she did not "understand what [was] going on here" or why her nephew would be "in on this deal" (A1532 [Exhibit 27, Tape 1B]). Margaret also said that "people" had been "telling [her] some pretty weird, weird stories and if they're true I don't like you" (A1532). She finished by asking, "Let me know where I am and what I can do to get rid of you and anything that I have in my possession" (A1532-33). John, Jr. assumed that she was referring to his efforts to keep apprised of construction dates, so that she could move out during it (J. Szabol, Jr.: A1025-26, 1069).

Around the second or third week of July of 1987, Margaret left seven messages on her nephew's machine, wanting to cancel "my appointment for Monday" at the hospital, suggesting that he cancel it or tell her how to do so (J. Szabol, Jr.: A1028-29, 1060, 1066, 1098; A1539-41 [Exhibit 27, Tape 4A]). At one point, in one of these messages, she also said she did not have "the freedom to talk," because she was "here at the, uh, uh, the, the office now"; but Margaret had retired in 1981 (A1539; J. Szabol, Jr.: A1061-65). At times, she seemed to think that she was leaving these messages with "operators," rather than an answering machine, and was angry because they "don't understand." Sometimes, she spoke directly to the "operator" and complained that she had "told him what it is a million and one times," and yet "he keeps saying, call me, or call me, and call me" (A1541).

At other times, Margaret complained that "somebody" was "supposed to come in and feed the children," but there was "nobody here" and "nothing in the house to eat."

Margaret added that she had "knocked" at the neighbors' doors, but there was no one anywhere to take care of the children (J. Szabol, Jr.: A969-70, 1026-27, 1055; A1534 [Exhibit 27, Tape 2A]; see J. Szabol: A881). When her nephew came to her apartment and asked for an explanation, she responded with a blank expression and a shoulder shrug (J. Szabol, Jr.: A969-70). While Margaret had some good days, most of the time her nephew had a problem communicating with her. She could not answer questions about her finances or her bills (J. Szabol, Jr.: A998-99). Her niece did not think that Margaret even knew who she was (K. Szabol: A808).

During this same period, Margaret falsely reported that the Colbys used a trap door in her apartment (which did not exist) to spy on her and steal her money; she variously accused Sanchez of stealing her flashlight batteries (she had a full bag) and her radio (found under a pillow), and of changing the locks to keep her out of her apartment (she lost her keys or forgot how to use them) (J. Szabol: A890, 912, 943-44; J. Szabol, Jr.: A997, 1031, 0992; A1541-43 [Exhibit 27, Tape 4B]). In June and July of 1987, Margaret's family had to help her write two small checks for her expenses (a \$25 birthday check for her niece and the cost of replacement locks for her apartment), which Margaret then signed (J. Szabol, Jr.: A997, 1031-32, 1070-73, 1092).

Margaret's family had arranged for her to stay with them during building renovations (K. Szabol: A800-01; J. Szabol: A873-74; J. Szabol, Jr.: A979-80). They picked her up on a Thursday, probably in the third week in July of 1986 (K. Szabol: A801; J. Szabol: A874, 916-20; J. Szabol, Jr.: A980). At 6:00 a.m. the next morning, she got dressed and announced she was going out (J. Szabol: A874, 920-21). When they tried to dissuade her, she screamed and asked, "Are you holding me hostage?" (J. Szabol:

A874, 922). Very agitated, Margaret wanted to go back to her apartment, and they agreed to take her (K. Szabol: A802; J. Szabol: A874, 922-23; J. Szabol, Jr.: A981-82). However, when she looked at her partly demolished apartment, she announced she could not live there, and asked to return to Queens (K. Szabol: A802; J. Szabol: A874, 924; J. Szabol, Jr.: A982). On the drive back to Queens, Margaret suddenly announced, "Isn't it amazing how I'm the last one alive in my family?" (K. Szabol: A803; J. Szabol: A889, 923-26; J. Szabol, Jr.: A983).

The next morning, a Saturday, Margaret again woke up very early, and wanted to go shopping (J. Szabol: A874, 926-27; J. Szabol, Jr.: A984). They explained that the stores would not be open yet, but she would not listen (J. Szabol, Jr.: A984). Margaret got into a shouting and shoving match with her sister-in-law, and became very abusive. She again asked if they were holding her hostage or "keeping her in jail," even though she had "committed no crime" (J. Szabol: A874, 927; J. Szabol, Jr.: A984-85, 1083). She demanded to see her "lawyer"; when asked who he was, Margaret "hemmed and hawed for a few minutes" and then named defendant (J. Szabol: A874-75, 927, 931; J. Szabol, Jr.: A984-85, 1084).

The Szabols called defendant, even though they thought he was simply her tax adviser. Defendant promised to come over (J. Szabol: A874-75, 931, 950-51; J. Szabol, Jr.: A985, 993, 1084). He stayed a short time, then volunteered to take Margaret for a short drive to calm her down (J. Szabol: A875, 932, 937; J. Szabol, Jr.: A985-86, 1084). However, defendant actually took her to the Skyline Hotel on Tenth Avenue, around the corner from her building (J. Szabol: A875-76, 933-35; J. Szabol, Jr.: A986, 1086). The Szabols took Margaret's things to the hotel, and her niece gave them to defendant (K.

Szabol: A803-04). At about midnight on Sunday, the police called the Szabols to the hotel. Margaret was sitting in a police car when they arrived; John, Jr. took her home, while his father paid the hotel bill (J. Szabol: A876-77, 886, 936-37; J. Szabol, Jr.: A986-87). Margaret seemed just lifeless, like a zombie, and unaware that her brother stayed with her that night in her apartment (J. Szabol: A877-78, 937-39; J. Szabol, Jr.: A987). The next day, the Szabols took Margaret to stay with Huertas (Huertas: A307-08; Sanchez: 385-86; K. Szabol: A804-05; J. Szabol: A878-80). But Margaret returned to the motel in her bedroom slippers because she thought that she had left her purse and other things there. Huertas later found those items in Margaret's apartment; Margaret's purse contained about \$970 (Huertas: A308-09).

During the ten days or two weeks Margaret stayed in Huertas's apartment at 54th Street and Eleventh Avenue, she did not know day from night (Huertas: A309-10, 321).¹ Each night she woke up at two or three in the morning and, thinking it was daytime, tried to go for walks or out for a meal; she wanted to play bingo at the church daily, although it only was held on Fridays. She would collect her mail and bring it to Huertas's apartment, and then, an hour later, leave to get the mail again (Huertas: A310-11, 327-28). One day, Margaret was gone for more than six hours getting the mail, although Huertas's home was only four blocks away from Margaret's building (Huertas: A321-22). Huertas finally called John Szabol, reported that Margaret was making a scene, and requested that she be taken to her own apartment (J. Szabol: 879-80, 939-40, 945). After this,

¹ Meanwhile, the Szabols put Margaret's papers in order, finding more cancelled checks payable to defendant; several checks and bank statements were missing (K. Szabol: A804-07, 819; J. Szabol: A879-81, 899, 941-42; J. Szabol, Jr.: A988-89, 991-92, 1008-09, 1051-52, 1086).

Margaret's relationship with Huertas became progressively more distant (Huertas: A312-13).

Margaret returned to her apartment with her family's help (Huertas: A312, 318; J. Szabol: A879-80, 940; J. Szabol, Jr.: A988). The Szabols continued to visit a few times each week, bringing food which they stored in a small refrigerator they had just bought (K. Szabol: A806; J. Szabol: A940-41, 947-48; J. Szabol, Jr.: A998, 1086-87). Margaret constantly complained that two strange women were always coming into her apartment at all hours, eating her food, sleeping in her bed, and ripping her clothes (K. Szabol: A807; J. Szabol: A881-82; J. Szabol, Jr.: A882, 941, 1002). She sometimes wandered her apartment, or even the halls, in her underwear (J. Szabol, Jr.: A1002). One day, she walked into a room, and said to an imaginary person, "What are you wearing my dress for? And it is no use for you to pray" (J. Szabol: A881).

Meanwhile, on July 31, 1987, a typewritten check for \$50,000 to "General Industries, Ltd," drawn on Margaret's Chase account and dated June 4th, was deposited and presented for payment by the Westpac Bank branch in Vanuatu (Love: A544-47; J. Szabol: A895-97; Marco: A1221, 1224 [No. 80]).¹ Whoever presented it had an account in Vanuatu (Love: A548-49), but the Westpac records produced at trial did not identify the account owner.² Chase credited the money in U.S. dollars to the account in Vanuatu, and Westpac transferred that amount to a New York City account owned by the same

¹ Vanuatu, where defendant had travelled in May of 1986 (after getting \$10,00 from Margaret) and in January of 1987, is an independent republic in the southwest Pacific, west of Fiji, with a population of 136,000. Webster's New World Dictionary (3rd coll. ed. 1988) at 1475.

² It was stipulated that other Westpac records which would have shed light on this transaction were not produced for reasons not attributable to either party (Stipulation: A555-556).

undisclosed account holder (Love: A549, 557-58; Exhibit 13-A). Also in late July, another \$10,000 Treasury bill was deposited into Margaret's Chase account (Exhibit 21-C).

Defendant made a trip to Maine from August 7 to August 16, 1987 (M. Schneider: A718-19). On August 28th, after returning from Maine, defendant wrote himself a check for \$10,000, which cleared Margaret's Chase account on August 31st (Marco: A1205; Exhibits 21-C, 38 [No. 312]). A short time later, from September 10th to 14th, several deposits were made to Margaret's Chase account: two ASB cashier's checks payable to Margaret for \$1,000 and \$1,500, and another of her \$10,000 Treasury bills (Exhibit 21-C). In the week that followed these deposits, defendant wrote himself three checks on that Chase account for a total of \$2,700 (Marco: A1206; Exhibits 21-C, 38 [Nos. 315-16, 318]). Shortly after these checks cleared his account, on September 29th, defendant left to visit his cousins in Sicily, remaining until October 19, 1987 (M. Schneider: A718-19).

Meanwhile, on October 11, 1987, Margaret left another long message on her nephew's answering machine, vaguely referring to past discussions about temporary quarters during renovations, and complaining about building superintendent Sanchez (J. Szabol, Jr.: A1027-28, 1058-60, 1096; A1535-37 [Exhibit 27, Tape 3A]). She blamed Sanchez for interfering with her efforts to do "all of uh, things I have left uh, to uh, notify doctors and dentists" and telling her that "nobody calls the doctors or anybody," that "Willy does that himself" (A1536). Then, she commented that the police had been there, and "they" did not like "a woman living alone like E-- Ethel and I living together" (A1536). On the reverse side of that tape was a second message from Margaret (J. Szabol, Jr.: A1028; A1537-38 [Exhibit 27, Tape 3B]). In it, she told her nephew that she had been "trying to get, uh, uh, Jerry," because she wanted to know "when he's going to pick

up this, uh, uh, thing, you know, the uh, heater" (A1537). Then she commented, "you know, you sounded just like, uh, uh, not my nephew, but, uh, like, uh, uh, my -- the one that takes care of my taxes and stuff. You know, what's his name?" (A1537-38).

After his return from Sicily, defendant wrote himself two Citibank checks for a total of \$660 (Exhibits 21-C, 38 [Nos. 245-46]). Meanwhile, after they had collected checks drawn on Margaret's accounts totalling about \$50,000 payable to defendant, Margaret's brother and nephew met defendant in his office on West 24th Street (J. Szabol: A883, 900-01; J. Szabol, Jr.: A999-1001, 1087). Defendant refused to tell them anything about her finances on the ground that Margaret had "asked him not to divulge" anything to them; they did not ask about the checks payable to defendant (J. Szabol: A884-85, 949-50; J. Szabol, Jr.: A1000-01). Defendant added that he "only went to Margaret's apartment in January" to collect information for her tax returns (J. Szabol, Jr.: A1001).

Shortly thereafter, on November 5, 1987, another \$10,000 Treasury bill was deposited into Margaret's Chase account (Exhibit 21-C). That same day, "a nervous wreck," Margaret called her nephew and left a long message on his answering machine out of concern that her sister Ethel, who had actually died in 1981, was missing. She hoped that Ethel "maybe got in touch with you or, uh, uh, whatchamacallit, um, uh, you know, your, your, uh, your brother's wife, wha-- wha--, your aunt? Who is it at, uh, that, uh, that, uh, that has the thing, there, and then you have, uh, uh, uh, uh, brother or somebody?" (J. Szabol, Jr.: A1032, 1066; A1544-47 [Exhibit 27, Tape 5B]). Margaret did not know where Ethel could have gone, since "she doesn't have very many friends here" (A1545). She wanted to be called if "one of your nieces or your nephew or somebody that you know" had any information, other-wise, she might have to "ask the

police to come in on it and help" her (A1545-46). Suddenly, Margaret did not "know where Momma would, uh, go," and asked for any "addresses or any people that Momma knows" (A1546). Margaret repeated that she should be called, even if there was no information to be had, and left her number for the third time (A1547).

Margaret also explained that she was "almost blind," and could not remember where her nephew's home was (A1544, 1545). She then read out her brother John's phone number, but did not recognize it or know who John was (J. Szabol, Jr.: A1032-33; A1544). Immediately after this call, on November 8, 1987, defendant wrote himself another three checks on Margaret's Chase account for a total of \$3,060; they cleared his account the next day (Marco: A1206; Exhibits 21-C, 38 [Nos. 152-53, 323]). Also at that time, defendant wrote and deposited to his own account a check to "cash" for \$500 drawn on her Citibank account (Exhibits 5-B, 38 [No. 246]).

Meanwhile, in November of 1987, Margaret came to lunch one day at the Encore Senior Center,¹ in the basement of St. Malachy's Church on West 49th Street, where Sister LILLIAN McNAMARA was director and STEPHEN P. HERTZ served as a social worker (McNamara: A36-37, 40, 43, 46, 56, 79; KRISTINA SCHNEIDER: A92-94, 97-98; Hertz: A129-32; Alpi: A216-21). Margaret was disheveled, and dressed only in a light-weight house dress and sweater, although it was a very chilly day. Her shoes were mismatched or worn on the wrong feet (McNamara: A47-48; Hertz: A133). Very upset and agitated, Margaret carried a clear plastic shopping bag filled with \$100 bills, and tried to use a \$100-bill to pay for a 50¢ lunch ticket; Sister Lillian gave back the bill and told

¹ The tenants had sought the Center's help for Margaret as early as May of 1987 (McNamara: A74, 86).

her just to eat her lunch (McNamara: A47-48, 50-52, 71, 76-77; Hertz: A132-34).¹ At that time, Margaret was not sure how old she was, but claimed to be "in her 60s or 70s" (Hertz: A134). She complained that there were men climbing down ropes from her ceiling into her apartment and asked for help (McNamara: A52-54, 59, 73-74). Worried, Sister Lillian arranged to have someone escort Margaret home (McNamara: A53; Hertz: A214). Asked if there was someone they could contact, Margaret first just kept talking about "the people," but then mentioned defendant (McNamara: A53, 75).

After her first visit to the Encore Senior Center, Margaret returned every day to eat. Since she was not aware of time, they arranged to call her or pick her up at lunchtime (McNamara: A56-57, 78; Hertz: A135, 138). During these visits, never placid, Margaret was always "very scattered, agitated, and not able to cope" (McNamara: A89). She could answer short questions like "How do you feel," but on anything else she "started 'riveting' up very quickly" (McNamara: A58-59, 78). Margaret had problems with her eyes, and they tried to get help for that problem as well as for other medical matters (McNamara: A56, 66-67, 72, 85; Huertas: A318, 322-23). In the middle of winter, Margaret went outside in just a house dress, and they gave her a warmer coat; she often wore two different shoes or had them on the wrong feet (McNamara: A58; Hertz: A138, 215).

Sister Lillian found it very difficult to talk to Margaret, who was unable to remember the topic; her attention span was extremely limited -- sometimes only thirty seconds (McNamara: A50-52, 58, 71; Hertz: A137). Very confused about money, Margaret often talked about "what she was going to do and her checks," noting difficulty

¹ Hertz asked if Margaret would like to keep the eighteen bills (\$1,800) in the church safe; she agreed. A week later, Margaret asked for the money, and Hertz returned it to her (Hertz: A133-35, 214).

with her payments. She kept her checkbook, bank book, and other important papers in two shopping bags (McNamara: A61, 67; Hertz: A138, 190). In Sister Lillian's opinion, Margaret could not handle basic activities of daily living that were more complicated than "just getting up, putting the mere minimum dress on her, and getting herself ... over to our center.... She could not take care of herself without somebody intervening and somebody being a part of that care giving package" (McNamara: A61). In fact, Margaret would cross the street in the middle of the block and walk into traffic as if "she had blinders on" (McNamara: A58, 73).

Meanwhile, from the middle of November of 1987, defendant wrote himself a series of checks on Margaret's Chase and Citibank accounts (Marco: A1206; Exhibits 21-C, 38). A Citibank check for \$160 was payable to "cash," endorsed by defendant, and cleared his account on November 24th (Marco: A1206; Exhibits 5-B, 38 [No. 245]). Defendant wrote himself four Chase checks from November 13th to 18th: one for \$50, two for \$500, and one for \$10,000 (Marco: A1206; Exhibits 21-C, 38 [Nos. 155, 157-58, 163]). Defendant and his wife spent four days in Utah from November 26th to November 30th (M. Schneider: A718-19). On December 3rd, defendant wrote himself another Chase check for \$50; it cleared his account that same day, as did the previous four checks (Marco: A1206; Exhibits 21-C, 38 [No. 166]).

On December 7, 1987, Margaret returned to see Dr. McCormack, who had operated on her lung cancer (McCormack: A178). She was very upset, erroneously reporting that she was living in a nursing home, and that a small child kept coming into her room (McCormack: A178). The next day, on December 8th, \$50,000 was withdrawn from Margaret's Chase Money Market account and re-deposited into her Chase checking

account (Marco: A1206; Exhibit 21-C). The following day defendant deposited a \$50,000 check written on Margaret's Chase account payable to himself; it was dated December 3rd (Marco: A1206-07; Exhibit 21-C, 38 [No. 168]). In all, during the calendar year 1987, \$119,650 in checks from Margaret's accounts was transferred into defendant's accounts. The \$50,000 deposited in the bank in Vanuatu, one of defendant's favorite vacation spots, and then transferred to an unidentifiable account of the same bank in New York, brings the total amount of funds diverted from Margaret's accounts to \$169,650 for that year (Marco: A1202, 1229-31; Exhibit 38).

Meanwhile, on December 18, 1987, newly-assigned PSA Case Worker FELIX DEAN called Margaret, who said "nobody [was] allowed to visit her" (Dean: A665-71; Jordan: A782). Margaret did not have any idea of the date, denied knowing defendant, could not recognize his name, and knew only that a man whom she could not identify was helping with her finances (Dean: A670-71). Dean asked about her health, but Margaret hung up without answering (Dean: A671-72).

- D. Until Margaret Szabol's Death In July 1988, As Her Mental And Physical Health Rapidly Deteriorate, Defendant Transfers To Himself \$59,905 And Effects Another \$90,000 Withdrawal From One Of Her Banks To Another; Defendant Stops Writing Checks To Himself On Margaret's Accounts After A Police Visit At The End Of March 1988.

Meanwhile, on January 9, 1988, Margaret left three messages on her nephew's machine, five days before her eightieth birthday (J. Szabol, Jr.: A1033-34, 1056; A1550-51 [Exhibit 27, Tape 7A]). In these messages, she said that she was trying to "get out of this apartment and look for another one" or looking for "information about moving my furniture." She wanted to "get rid of all the, uh, uh, paper work and stuff" that she had in her apartment, whatever she did not "have to carry on to a new account." She was

"very anxious" about "something that I am going into" and wanted "an idea of how to get started" (A1550-51). While, at one point Margaret had agreed to move, she later changed her mind (J. Szabol, Jr.: A1034, 1066-69).

By this point, the Encore Senior Center had enlisted the Manhattan Psychiatric Center to help with Margaret (McNamara: A59-61, 89; Hertz: A138-39, 142-43, 188).¹ On January 13, 1988, a doctor and a psychiatric social worker from the Manhattan Psychiatric Center's Mobile Geriatric Team visited Margaret in her apartment (Schneider: A118-19; Dr. EDWARD FARKAS: A579-83, 599; ALEXANDRA HERZAN: A831-33, 836-38). She was dressed only in a light housecoat despite the cold weather (Farkas: A599-600; Herzan: A838). Her apartment was dingy, sparsely furnished, and disheveled (Herzan: A838). Margaret was "significantly confused"; disoriented as to time, she was unable to approximate even the month or year. She had "global memory deficit," could not remember three objects after five minutes, and, although she had been a statistician, manifested "poor calculation" (Herzan: A839; Farkas: A585). Nor could Margaret recall anything about her finances, how much money she had, or what her social security status was (Herzan: A839). She could give "very little history" about her life or her more recent experiences (Farkas: A585).

Margaret also reported that "some young women with children" were spending the night with her and eating her food (Herzan: A838-39, 841, 847). She also told the doctor that people were "jealous" of her "employment" (Farkas: A604). While she related well

¹ In early January, 1988, when PSA Case Worker Dean went to visit Margaret, she did not remember talking to him, said defendant was not there, and refused to let Dean inside, slamming the door (Dean: A672-74). Nor would she see him in March and May (Dean: A675-76, 679-81).

to the doctor as a person, she was "not necessarily [well-related] to her environment" (Farkas: A589-90). After this fifteen-minute interview, Dr. Farkas and Herzan concluded that Margaret was the victim of a "dementia syndrome," accompanied by "delusions," and had very poor insight and judgment (Farkas: A584-85, 593, 604; Herzan: A839-41, 844, 846). In Dr. Farkas's opinion, she was in the late stages of a slow, but progressively worsening illness, and was unable to manage her financial affairs (Farkas: A587-88).¹ A conservatorship was recommended (Hertz: A142-43; Herzan: A882).

A week or so later, about 9:00 a.m. on January 21, 1988, a neighbor accompanied a geriatric psychiatrist from HRA to Margaret's apartment and introduced him (Forkin: A475-76, 478-79; Dr. RALPH SPEKEN: A605-09, 617; Dean: A673; Exhibits 16, 38). Unkempt and wearing a robe, Margaret was very adamant that she was too busy to talk (Forkin: A475-76, 479-80), and became quite hostile and uncooperative (Speken: A618, 621). She could not recall her own birth date, or state the year, month, date, or day of the week (Speken: A618-19). Although Margaret had retired in 1981, she added that she could not talk because she had to get ready to go to work, and slammed the door (Forkin: A474-76, 480-81; Speken: A618-19). Based on this observation, Dr. Speken's provisional diagnosis was Alzheimer's disease and dementia; he recommended that HRA begin guardianship proceedings (Speken: A617-20, 623, 625; Dean: A674-75).

Meanwhile, defendant had "disappeared" from December 13 to December 16, 1987; nor did his wife know where he was from December 18th to December 24th, when she was away on business. He joined her in Rome for another European vacation on

¹ Dr. Farkas thought it was clinically insignificant that Margaret correctly signed her surname on checks, since she could have copied it; similarly, it was "relatively useless" that she could fill out a bank deposit slip (Farkas: A591-93).

Christmas Eve; they returned on January 5, 1988 (M. Schneider: A719). From January 10 to January 20, 1988, defendant was in Florida (M. Schneider: A719-20). Approximately ten days later, immediately after defendant's return from Europe, Margaret's Chase checking account was closed, and a new "investment checking" account was opened for her in a different branch (Marco: A1207-08; Exhibits 21-A, 21-C).

The day after Dr. Speken met Margaret, January 22, 1988, defendant wrote himself a \$10,000 check on Margaret's Chase account; it was deposited in defendant's Hong Kong-Shanghai Bank account on January 25th (A829; Marco: A1207; Exhibit 21-A [No. 230]). That same day, a \$20,000 check to defendant was drawn on Margaret's account, but it was returned as post-dated February 24, 1988 (A829-30; Marco: A1207-08; Exhibit 21-A [No. 233]). On January 29th and February 6th, defendant also wrote himself two more checks on the Chase account for \$5,000 and \$20,000 (Marco: A1208; Exhibits 21-A, 38 [Nos. 77, 83]). He then wrote an additional two checks against that account on February 1st and 5th: one to "cash" for \$100 which he cashed, and another to himself for \$10,000; both cleared his account on February 24th (McNally: A1147; Marco: A1208; Exhibits 21-A, 38 [Nos. 78, 85]). Defendant also endorsed and deposited a Citibank check of Margaret's for \$80 payable to "cash" (Exhibit 38 [No. 254]). In fact, from February 9th to February 22nd, defendant was on another trip to the South Pacific (M. Schneider: A720; Marco: 1210-11; Exhibit 40). Two days after his return, a Chase check for \$10,500 dated February 26th was made payable to defendant; it cleared his account three days later -- only five days after the \$10,000 check noted above was credited to his account (Marco: A1208; Exhibits 21-A, 38 [No. 178]). In January and February of 1988 defendant

transferred a total of \$55,680 from Margaret's accounts to his own, and on February 5th he transferred over \$70,000 to his account in Auckland (see Exhibit 22A).

Meanwhile, KRISTINA SCHNEIDER, a student intern for Encore, met Margaret in February of 1988 (McNamara: A38-39, 56, 79; Schneider: A96-99; Hertz: 131). Margaret came to the Center each day, usually wearing a short-sleeved dress that was inappropriate to the weather and with her shoes on the wrong feet (Schneider: A100-02; Herzan: A843; see Sanchez: A370). Her conversations were "disjointed" and she had trouble "staying on to a topic." Margaret did not interact with other senior citizens in the Center, and could not relate to people sitting at her table (Schneider: A102, 119). Schneider touched base with Margaret on a daily basis, trying to give her some idea of the date, even though she could not recall the day of the week. Often, Margaret could not tell the time of day and would come to eat after the lunch hour (Schneider: A110). Each time they met, Margaret told Schneider that there were "two young girls dressed in white" "living in the apartment with her that she didn't want there." These girls came in through the ceiling, through the door, and from the roof on an escalator that went from her apartment to the roof; they "bothered" her and stole her "papers" (Schneider: A102-03, 110-11; Hertz: A136-37).¹

Margaret's apartment at this point was very sparsely furnished (Schneider: A103, 109; Hertz: A135; Alpi: A241). The bathroom and the kitchen were a total wreck, and the toilet was stopped up (Hertz: A135-36; Schneider: A103). She had no gas, the electricity was off in parts of the apartment, and, although there were some appliances,

¹ At some point, American Savings Bank contacted Encore about Margaret's lost bonds; Schneider took her to the bank to fill out a trace form (Schneider: A107-08).

they were not working, because they had not been plugged in (Schneider: A103; Hertz: A136; Alpi: A241). Two names and telephone numbers were written on her wall large enough for her to read: the superintendent's and defendant's; the Encore social worker added his own number (Hertz: A189-90). At one point, she mentioned her nephew John, but at other times, Margaret told Encore personnel that all of her family was dead. Sometimes she knew that her mother and sister had died, but, at other times, she spoke of them as if they were still living (Schneider: A103-04, 110; Hertz: A144). At times, Margaret also spoke about defendant, whom she called variously her friend, her accountant, and "a little boy" she knew (Schneider: A104, 111-12, 114-15).

In early March of 1988, Schneider called defendant to set up a meeting about Margaret. While defendant agreed to attend a March 27th meeting, but he did not appear (McNamara: A63-64, 75; Schneider: A104-07, 113, 126-28). On March 11th, Dr. RICHARD BRACCO, a psychiatrist with the Mobile Geriatric Team, met Margaret at the Encore Center (Bracco: A739-43, 744-45, 753; Herzan: A843). She was very confused, disheveled, and dressed inappropriately; dropped money she held in her hand, which she was unable to retrieve or count; forgot who Dr. Bracco was at times; and complained about children coming into her apartment on a secret elevator that no one else knew about (Bracco: A746-48, 751-53, 759-61). Margaret had no idea of the date or month, and did not even come close to the season, much less the day or year (Bracco: A747, 750). She could not name anyone in the Center, although she had been seeing them all several times a week for months; she also could not say how she had gotten to the Center (Bracco: A748). Dr. Bracco's presumptive diagnosis was "primary degenerative dementia, senile

onset," and he concluded that Margaret was definitely not capable of managing her financial affairs (Bracco: A748-51, 762-64).

Around this same time, defendant continued to write checks to himself on Margaret's accounts (Exhibit 38). Between March 5 and March 12, 1988, he wrote five separate checks on two different accounts for a total of \$4,225 (Marco: A1208-09; Exhibits 5-B, 21-A, 38 [Chase Nos. 86-87, 103, 105, Citibank No. 257]). With these new checks, the funds transferred from Margaret to defendant from January through mid-March of 1988 rose to \$59,905, excluding the \$20,000 post-dated check (Marco: A1207-08). In late March, while helping Margaret organize the array of personal papers she had begun to carry around in two paper shopping bags, Encore workers discovered three cancelled checks to defendant for \$2,000, \$10,000, and \$10,500, all dated February or March of 1988 (Hertz: A190, 200-05, 214; Exhibits 4-A, 4-B, 4-C). They also found some empty envelopes for treasury bonds (Schneider: A108; Hertz: A138, 143-44, 190; Huertas: A318, 322-23). Based on these finds, they called her banker and Detective PASQUALE MOSERA (Hertz: A202, 204, 205; Mosera: A1126-27). The staff decided to file suit to have a conservator appointed (McNamara: A60-62, 66-68; Hertz: A204, 205-06). The Szabols were notified, and met with the Encore staff and psychiatrists (J. Szabol: A887; J. Szabol, Jr.: A1004, 1006-07, 1115-17).

Meanwhile, on March 22, 1988, Margaret turned down the Center's offer to take her to a dentist, claiming that defendant had taken her the day before and would be taking her again later (Schneider: A114-16). In fact, the day before, defendant had taken Margaret to the bank, where they withdrew \$90,000 from her ASB account. Defendant

told the manager that they were taking it to Chase, which had better rates; it was deposited into her new Chase account the following day (Mertz: A570-72; Exhibit 21-A).

On March 23, 1988 -- the day after the \$90,000 was deposited -- Detective Mosera tried to talk to Margaret, but she "would drift off into different things" and could not focus on the topic (Mosera: A1127-29). The detective arranged to see defendant in his West 24th Street office the following day. Defendant said he was Margaret's "accountant and friend," and, that the checks the Center had found, payable to him totalling \$22,500, were gifts (Mosera: A1130-31, 1134; Exhibits 4-A to 4-C). Defendant added that he had received other checks as gifts from her, and had also charged Margaret for tax work (Mosera: A1131, 1134-35).

Defendant never mentioned the gifts from Margaret to his wife (M. Schneider: A714). Nor had he filed a gift tax return on Margaret's behalf for the \$44,153.09 he had received from her in 1986, as required by law (MYRON P. LEVIN: 1119-24; Ferrer: A1240, 1244-45; Exhibit 32). Also, when he filed his own returns for 1986 and 1987, defendant did not report any of that money or the \$119,650 he had gotten from Margaret in 1986 (Ferrer: A1241-44).¹ When those monies were included, and his taxes recomputed, it was revealed that he had underreported his income and owed the state money in both 1986 and 1987 (Ferrer: A1245-48).²

In fact, defendant received more money from Margaret's accounts during this period than from any other source. In particular, defendant obtained at least \$233,708

¹ On those returns defendant listed two business addresses: 82 Wall Street and 200 West 24th Street; the latter address was written below his signature (Ferrer: A1243, 1244; A1556, 1565-66 [1986]; A1562, 1576, 1580 [1987]).

² New York State collects taxes for New York City, which has its seat of government in Manhattan (Ferrer: A1235).

from her accounts, \$155,845 of which he funnelled into his bank account in the South Pacific (Marco: A1219-21; see 58A). During the 24 months Margaret's funds were transferred to defendant, he was receiving an average of almost \$10,000 a month from her accounts, while only about \$1,000 a month was going out of Margaret's accounts to cover her own expenses (Marco: A1217-18, 1221-22; Exhibits 38, 41).

Attorney PETER ALPI and Margaret's family undertook to establish a conservatorship, with Alpi and her nephew as co-conservators. When Alpi met Margaret at the end of March of 1988, she was disheveled and preoccupied with the little girls in her apartment who ripped up her clothes and disappeared. She could not understand the danger of carrying large bills in her Hell's Kitchen neighborhood or even what a conservatorship was (McNamara: A62-63; Hertz: A206; Alpi: A216-22, 224-27, 242; J. Szabol, Jr.: A1007). A conservatorship proceeding was initiated in April of 1988, and when interviewed by her appointed guardian ad litem, Margaret "drifted in and out" of the conversation (Hertz: A206; Alpi: A226; Dean: A678-79; ROBERT D. SOMMERFIELD, Esq.: A638-41, 644-45, 648-49). She had no idea how much money she had, where her accounts were, or where her bank statements might be. Margaret denied having a safety deposit box, although she actually had one that contained her savings bonds, stock certificates, and insurance policies (Sommerfield: A641-43; J. Szabol, Jr.: A1037, 1093-94). At one point, she said she did not have any family alive; at another, she recalled that she had a brother, but she did not know what he looked like and had not seen him (Sommerfield: A642, 648-49). Margaret also said she knew defendant, but had not seen him recently, and had no idea when or where she had met him (Sommerfield: A643)..

Alpi, meanwhile, wrote both to defendant and his attorneys asking for any of Margaret's financial records they had. A Ms. Sammarco promised to provide the records, but did not do so (Alpi: A232-33, 235-36, 246; J. Szabol, Jr.: A1007-09). In May of 1988, during the conservatorship proceedings (J. Szabol: A887, 891; J. Szabol, Jr.: A1007), Margaret repeatedly looked straight at her brother and asked who he was. She did not know him, and once thought her nephew was her brother (K. Szabol: A808-10). She also asked the judge to help her deal with the "two young girls in white" who came down through her ceiling on an escalator from the roof (Hertz: A207, 211).

One day in July of 1988, Margaret's superintendent found her door open, entered, and found her lying in a chair. Pale and short of breath, she was taken to St. Clare's hospital in an ambulance (Sanchez: A372). Margaret died on July 26, 1988, of a malignant tumor in her neck (K. Szabol: A811-12; J. Szabol: A891; J. Szabol, Jr.: A1007). In her will, she left all of her money to her brother, except for \$1,000 each to five charities and \$2,000 each to her brother's children (Alpi: A235; J. Szabol: A891-94, 930; J. Szabol, Jr.: A1007; Exhibit 24). Alpi determined that at her death Margaret's estate was worth \$314,000. He concluded that \$300,000 was missing, primarily \$250,000 in checks payable to defendant (Alpi: A237-39, 246, 249, 250-51; J. Szabol: A894-95).¹ Since transferring the \$90,000 on March 22, 1988, and speaking to Detective Mosera two days later, defendant had not transferred any more funds from Margaret's accounts (Marco: A1208-09).

¹ As attorney for her estate, Alpi instituted a civil suit to compel defendant to return Margaret's money (Alpi: A234, 243, 251-52, 254).

The Defendant's Case

CHARLES JOHNSTONE, defendant's friend for 20 years, testified that defendant's reputation for honesty in the community was "impeccable" (Johnstone: A1278-81). MARIA-ROSE SAMMARCO, a lawyer with the firm representing defendant, told Alpi that their firm had no records relevant to Margaret's affairs, and later reported to Alpi that defendant also did not possess such records (Sammarco: A1283-84).

POINT I

DEFENDANT'S GUILT OF GRAND LARCENY IN THE SECOND DEGREE WAS PROVEN BEYOND A REASONABLE DOUBT
(Answering Defendant's Brief, Point I at 50-67).

Defendant was convicted of second degree grand larceny for stealing over \$50,000 from the bank accounts of Margaret Szabol at a time when she lacked the capacity to consent to that taking. Penal Law § 155.40(1). As defendant does not dispute, the proof showed that between April of 1986 and mid-March of 1988, defendant wrote 58 checks on her accounts payable to himself, which he had Margaret sign, and thereby converted over \$233,700 of her money to himself. On appeal, defendant launches a two-pronged attack on that verdict. First, he claims that common law larceny premised on a taking from a victim incapable of consent is merely a civil wrong, and not a crime in New York, and that his prosecution on that theory is unprecedented and should not be condoned. Second, he argues that, in any event, his intent and Margaret's inability to consent were not proved by legally sufficient evidence, and that the verdict was against the weight of the proof educed at trial. Defendant's arguments disregard established law and the facts of this case.

A.

Defendant insists that stealing from a person incapable of consent -- essentially taking candy from a baby -- is not a criminal offense, and that his prosecution is the result of an overzealous prosecutor championing the civil claims of Margaret's relatives. He could not be more mistaken. At common law, larceny was defined as a trespassory taking and carrying away of the property of another with intent to steal it. Narrowly circumscribed, most trespassory takings entailed some threat to the public peace. See People v. Olivo, 52 N.Y.2d 309, 315 (1981); People v. Norman, 85 N.Y.2d 609, 617 (1995); 2 La Fave & Scott, Substantive Criminal Law, §8.1(a) at 328-30 (1986); 4 Blackstone's Commentaries, at 229-50 (1809). With the expansion of trade and business, however, the legal system became more sensitive to a property owner's interests and thus began treating certain types of takings as "trespassory" even though the owner had voluntarily surrendered the property. Concomitantly, the intent element of the crime became increasingly important, while the requirement of a trespassory taking became less significant. People v. Norman, 85 N.Y.2d at 617-19; People v. Olivo, 52 N.Y.2d at 316-17; see People v. Alamo, 34 N.Y.2d 453, 458 (1974) (larceny of automobile); Harrison v. People, 50 N.Y. 518 (1872) (temporary possession of wallet by pickpocket).

In short, a trespassory taking evolved into "the violation of individual property rights without the consent of the owner" (People v. Mills, 178 N.Y. 274, 288 [1904]; People v. Frank, 176 Misc. 416, 418 [Utica City Ct. 1941]); "the intention of the owner to part with his property is the gist and essence of the crime of larceny, and the vital point upon which the crime hinges, and is to be determined." Thorne v. Turck, 94 N.Y. 90, 96 (1883), quoting Loomis v. People, 67 N.Y. 322, 329 (1876); People v. Laurence, 137

N.Y. 517, 522 (1893); Hildebrand v. People, 56 N.Y. 394, 396 (1874); Bassett v. Spofford, 45 N.Y. 387, 391 (1871). Thus, if a defendant obtains property by trick, device, artifice, fraud, or false pretenses, intending to appropriate it to his own use, and not to the special purpose for which he received it, he is guilty of larceny and there was no valid agreement on the part of the owner to that taking.¹ Thorne v. Turck, 94 N.Y. at 96; Loomis v. People, 67 N.Y. at 327-28, 329; Smith v. People, 53 N.Y. 111 (1873); Bassett v. Spofford, 45 N.Y. at 391; People v. Hughes, 91 Hun 354 (1st Dept. 1895).

Of course, under the current New York statute, adopted in 1965, the Legislature has expressly included all common law forms of larceny, see Penal Law §155.05(2)(a), and in doing so has criminalized several forms of larceny not previously contemplated at common law, where a victim has not consented to the unconditional transfer of full ownership of property. See People v. Norman, 85 N.Y.2d at 617; People v. Olivo, 52 N.Y.2d at 316-17. For example, in larceny by false promise, the victim is induced to transfer her property by a false promise of future action by a defendant who has no intent to engage in such conduct. People v. Norman, 85 N.Y.2d at 619. And, in a larceny by false pretenses, the victim is persuaded to part with her property through the defendant's false statements about some prior or existing fact. People v. King, 85 N.Y.2d 609, 618-19, 624-25 (1995); People v. Karp, 298 N.Y. 213, 217 (1948). This latter crime is a variant of common law larceny by trick, where possession of, but not title to, property is

¹ Indeed, the fundamental importance of consent to the obtaining or taking of property pervades the law of larceny-related crimes, such as the unauthorized use of a vehicle, robbery, extortion, and, implicitly, blackmail. See People v. Rollino, 37 Misc.2d at 14, 21 n.1 (Queens Co. Sup. Ct. 1962); Penal Law §§155.05(2)(e), 160.00, 165.05, 165.06, 165.08; cf. Defendant's Brief at 55, 57, 58.

obtained by the wrongdoer's false statements. See People v. Noblett, 244 N.Y. 355 (1927); People v. Miller, 169 N.Y. 339 (1902).

In each of these cases, of course, the victim has voluntarily relinquished her property, but the theft still is a trespass against the owner's property rights because the defendant's fraudulent inducement deprived the owner of the ability to give full consent to transfer ownership. See Penal Law §155.05(2). Here, by submitting the larceny count, the trial court implicitly found that a trespassory taking from an elderly woman incapable of consenting to transfer her assets was also encompassed by New York's expansive legislative definition of larceny.¹ And, in denying defendant's motion to set aside that count as legally insufficient, the court held that "consent cannot, by its nature, be unknowing," and that the evidence was sufficient as a matter of law (A96a-97a). Defendant is certainly hard-pressed to explain why the Legislature would make the crime of larceny available to protect the interests of fully knowledgeable parties who enter into commercial contracts under the larceny statute (see People v. Norman, 85 N.Y.2d at 609), but did not intend it to protect a vulnerable victim like Margaret who lacked the ability to consent from the outset.

¹ The court charged that the People had to prove beyond a reasonable doubt that from April 1, 1986, through March 19, 1988, defendant wrongfully took checks from Margaret Szabol with the intent to deprive her of property valued in excess of \$50,000 (A1431-32); that Margaret lacked the mental capacity to choose whether to give or withhold permission to defendant to take her property; and that defendant "was aware at the time of the transfer of the property that Margaret Szabol lacked the mental capacity" so to choose (A1433). Consent was defined as "permission to take the property in question given by a person who is capable of choosing whether to give or withhold permission. A person gives consent when he or she is aware of and appreciates the significance of the fact that he or she wishes a particular person to take possession of certain property" (A1432-33).

Defendant's claim that his case is entirely an aberration in New York, with not a single precedent to support the People's theory, is likewise devoid of merit. In People v. Spiegel, 48 N.Y.2d 647, 648 (1979), aff'g, 60 A.D.2d 210 (1st Dept. 1977), an owner and case worker in a nursing home were prosecuted for stealing large sums of money from two elderly nursing home patients. While one of the victims was defrauded, the other was "in the advanced stages of senility," and simply signed checks over to the defendants. On review, the Court of Appeals found that the evidence as to the victim suffering from "advanced ... senility" plainly was legally sufficient to establish second degree grand larceny. Implicit in Spiegel is the notion that a trespassory taking with criminal intent from someone incapable of consent is a viable form of larceny available in New York.

Indeed, in People v. Antilla, 156 A.D.2d 189 (1st Dept. 1989), aff'd, 77 N.Y.2d 853 (1991), and People v. Cray, 195 A.D.2d 303 (1st Dept. 1993), aff'd, 84 N.Y.2d 874 (1994), this Court affirmed larceny convictions for trespassory takings from elderly as well as senile victims. And, although fraudulent inducement played a role in the transfer of assets in Antilla and of some of the victims of Cray, this Court, by referring to the incapacity of other victims to consent to the taking in its opinion affirming the convictions, clearly recognized that the mental incapacity of those victims to consent was an important component of the trespassory taking. Moreover, although defendant de-emphasizes the relevance of out-of-state cases (Defendant's Brief at 59, n.38), other jurisdictions have recognized the fundamental principle that a mentally incompetent person cannot consent to a taking of her property. See Gainer v. State, 553 So.2d 673 (Ala. Cr. App. 1989) (incompetent victim); Lucas v. State, 360 S.E.2d 12 (Ga. App. 1987) (senile victim); Bowles v. State, 14 So.2d 269 (Fla. Sup. Ct. 1943) (mentally handicapped victim);

Urdiales v. State, 751 S.W.2d 269 (Tex. App. 1988) (statute criminalizing knowing theft from an incompetent). Courts both in and out of New York have recognized that the trespassory taking of property from another who lacks the capacity to consent, with criminal intent is the crime of larceny and defendant's claim that the People have created a "new crime" is plainly without merit.

Relying on People v. Zinke, 76 N.Y.2d 8 (1990), and People v. Foster, 73 N.Y.2d 596 (1989), defendant also argues that the availability of civil remedies to Margaret's estate, either in civil or surrogate's court, is evidence that this type of larceny is not contemplated by Section 155.05 (Defendant's Brief at 50-52, 55-57). This theory, too, is easily refuted. After all, virtually all crime victims have a parallel civil remedy which can be pursued at their option; but that fact does not preclude criminal prosecution of wrongs committed with criminal intent which satisfy the conduct required under criminal law. For example, robbery and burglary victims can sue for conversion of their property; the family of a murder victim can always sue for wrongful death; and the availability of forfeiture proceedings or a civil action for nuisance does not foreclose the prosecution of drug dealers who use a brownstone for drug trafficking.

The same analysis applies to larceny prosecutions. In Norman, the defendant breached contract when he took the victims' money with no intention of delivering the log cabin kit he had promised. Nevertheless, the Court of Appeals concluded that the defendant's conduct also constituted a larceny once his criminal intent was established. 85 N.Y.2d at 622-24. And, similarly in King, that Court found the same result was warranted regarding a contract to buy a used car, where the defendant, with criminal intent, took money representing the purchase price for a jeep which he actually had no

right to sell. 85 N.Y.2d at 624-25. And, in People v. Janoff, 84 N.Y.2d 912 (1994), the Court of Appeals rejected the same argument that defendant makes here. It found that a personal injury attorney's filing of a false insurance claim on behalf of his client was an attempted larceny where the evidence established the defendant's fraudulent criminal intent. In short, the victims in Norman, King, and Janoff each had a civil remedy readily available, but that did not foreclose a criminal prosecution based on sufficient evidence of the defendant's criminal intent.

As these cases demonstrate, defendant clearly reads Foster and Zinke too broadly. At best, those cases stand simply for the proposition that no criminal prosecution will be upheld absent legally sufficient proof of a defendant's criminal intent (People v. Foster, 73 N.Y.2d at 596), or where, by business arrangement, a victim essentially gives another a license to steal from him. People v. Zinke, 76 N.Y.2d at 8. On the other hand, where a trespassory taking of property amounts to a civil wrong and criminal intent may be established, it also constitutes the crime of larceny. Compare People v. Ohrenstein, 77 N.Y.2d 38, 43, 53 (1990) (defendant may be prosecuted for knowing placement of "no-show" employees on the senate payroll who had no duties and did nothing), with People v. Ryan, 41 N.Y.2d 634, 640 (1977) (a reputable businessman facing unforeseen financial difficulties and unable to keep promise was not guilty of larceny); People v. Churchill, 47 N.Y.2d 151, 157, 158 (1979) (an inexperienced contractor with no ability to manage a business did not have requisite criminal intent). In short, it is generally the felonious intent of the defendant which distinguishes a criminal larceny from mere civil trespass upon property. People ex rel. Perkins v. Moss, 187 N.Y. 410, 419-20 (1907); McCourt v. People, 64 N.Y. 583, 586 (1876).

Finally, defendant's suggestion that there is no public policy justification for criminalizing such a "civil" wrong is simply astounding. The incidence of this type of elder abuse, despite problems of reporting and law enforcement priority elsewhere, is reportedly on the rise. See Harris, "Elder Fraud," Money, Nov. 1995, at 145. In fact, these victims are frequently too infirm to realize that their property is being stolen, but the National Center on Elder Abuse estimates that there were more than 29,000 such cases in 1994. Id. at 146. As a result, task forces have been created in California, Florida, Pennsylvania, and New Jersey, to name a few, to deal with scams perpetrated on the elderly. Id. at 152. And one would think that the general ineffectiveness of civil remedies for such vulnerable people presents all the more reason for law enforcement and the criminal justice system to protect them. Presumably, under defendant's theory, so long as a savvy defendant finds a victim who is sufficiently mentally ill, mentally handicapped, or senile, he need not fear criminal prosecution if he steals his victim's life savings. The larceny statutes, after all, are meant to protect purchasers of log homes (Norman, supra), or large insurance companies (Janoff, supra), not those totally incapable of protecting themselves. Defendant's position is obviously untenable.

Simply put, larceny by trespassory taking from one incapable of consent is a crime in New York, and has long been recognized as such. People v. Spiegel, 48 N.Y.2d at 647; People v. Cray, 195 A.D.2d at 303; cf. People v. Antilla, 156 A.D.2d at 189. The only question remaining here is if the People proved that defendant committed a larceny. As shown below, proof of defendant's criminal intent and Margaret's inability to consent was overwhelming.

B.

Defendant does not contest the proof that by 58 checks drawn on Margaret's accounts, which he drafted and had Margaret sign, he transferred over \$233,700 of her assets to his own use.¹ Nor does defendant claim that he used that money for Margaret's benefit. See Exhibits 40A-40C, 41 (reproduced at 12C). Defendant does argue that these acts were not a crime, but rather that he was simply accepting generous gifts from this septuagenarian after he befriended her while preparing her taxes. And, in any event, defendant says that there was no proof that Margaret lacked capacity to consent at the time she signed each of these checks. Notably, in challenging the evidence as legally insufficient and the verdict as against the weight of the evidence, defendant does not discuss his own conduct (Defendant's Brief at 61-67). Perhaps that is because, by any view, the proof of his intent to plunder Margaret's bank accounts and assets is overwhelming.

At the outset, the standard for appellate review of a sufficiency claim is whether, taken in a light most favorable to the People and drawing all permissible inferences in the People's favor, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original); People v. Acosta, 80 N.Y.2d 665, 671-72 (1993); People v. Tejada, 73 N.Y.2d 958, 960 (1989); People v. Allah, 71 N.Y.2d 830 (1988); People v. Carter, 63 N.Y.2d 530, 536-37 n.1 (1984); People v. Malizia, 62 N.Y.2d 755, 757, cert. denied, 469 U.S. 932 (1984); People v. Contes, 60 N.Y.2d 620, 621 (1983). Of course,

¹ Defendant amassed \$44,153 in the last eight months of 1986, \$119,650 in 1987, and \$59,905 in the first three months of 1988.

it is the jury's job to determine the credibility of witnesses. People v. Montanez, 41 N.Y.2d 53, 57 (1976); People v. Benzinger, 36 N.Y.2d 29, 32 (1974). Moreover, a verdict should be found to be against the weight of evidence only where it is plain that "the trier of fact has failed to give the evidence the weight it should be accorded." And, in this context as well, credibility is an issue entrusted primarily to the trier of fact, who saw and heard the witnesses. That determination is entitled to great weight on appeal and should not be disturbed except, under extraordinary circumstances, when it is clearly unsupported by the record. People v. Bleakley, 69 N.Y.2d 490, 495 (1987); People v. Concepcion, 38 N.Y.2d 211 (1975).

Evaluated within these guidelines, the evidence of defendant's guilt was unquestionably sufficient to sustain the verdict. Indeed, first and foremost, defendant had strong motive to take advantage of Margaret Szabol and steal her property. At the time Margaret walked in his office to have her taxes done in March of 1986, defendant was 32-years old and a part-time tax preparer just ending a year of unemployment. However, from the moment 78 year-old Margaret, and her \$230,000 accident settlement check, sought defendant's assistance in filing her tax returns, his life was transformed; defendant was immediately able to quit his job, open his own Manhattan tax office, publish a tax newsletter from a second office, and take frequent pleasure trips to the Fiji Islands, Europe, Sicily, New Zealand, Canada, Utah, and Maine, inter alia. Indubitably, the timing of that transformation in defendant's financial well-being, Margaret's ever-deteriorating mental health, and the fact that he never took his benefactress along on these trips, all plainly rebut defendant's suggestion that these funds were just gifts occasioned by his close friendship with Margaret.

Moreover, the manner in which defendant transferred these funds to his own use clearly belies his contention that the checks were simply gifts. In fact, his efforts to conceal these banking transactions from Margaret and others overwhelmingly proved his consciousness of guilt. First, defendant wrote out all of the 58 checks, payable to himself, and had Margaret sign them; and after the first two checks, defendant never again bothered to record these "gifts" in her check registers. This was certainly a curious way of acting, particularly since Margaret had sometimes been able to write checks herself before she met defendant. Obviously, these measures were a way to ensure that, in her lucid moments, Margaret did not suspect anything. After all, if, as defendant argues, Margaret was aware of what was happening and was simply bestowing gifts on defendant, there was no reason for her not to write the checks, or for them not to be recorded in her bank registers.

In addition, defendant did not deposit these "gifts" in just one bank, but rather, juggled them in his five separate accounts, including two "business" accounts. And, at the end of this two-year period at least \$92,000, and perhaps as much as \$155,000, of her money had been transferred to his identified account the South Pacific (see Exhibit 38); tellingly, on February 5, 1988, he transferred over \$70,000 to his account in Auckland (see Exhibit 22A). Once again, the use of multiple accounts, and even foreign accounts, was surely a peculiar way to deposit what defendant claims were legitimate presents from an admiring friend. For tax purposes, of course, the funds were as traceable to all these accounts as they would have been to one or two banks in New York. So the only explanation for all of these accounts is defendant's desire to conceal and divert attention from what he now says were simply bona fide gifts.

In equally curious fashion, rather than writing one large check to himself as a "gift" from Margaret, defendant would often write two smaller checks on her accounts, wait for them to clear, and then write a check for a much larger sum. For example, in early 1987, defendant wrote checks on January 1st, 5th, and 8th for \$500, \$2,000, and \$5,000, respectively, on Margaret's ASB, Chase, and Citibank accounts. Then, on February 26th, and March 2nd and 18th, defendant again drew \$500, \$2,000, and \$5,000 from her Citibank account; again on May 18th, 19th, and 22nd, defendant wrote himself Chase checks for \$100, \$500, and \$10,000. And, at the end of 1987, as her friends and relatives began to monitor Margaret's behavior and defendant learned that conservatorship proceedings were contemplated, on November 13th, 17th, and 18th, defendant wrote Chase checks for \$50, \$500, \$500, and \$10,000, respectively. Of course, if these were all heartfelt gifts from Margaret, there was no reason to write a series of little checks and then a large one. On the other hand, if defendant was concerned about whether the checks would clear or whether someone was monitoring Margaret's accounts, it was prudent to test the waters with smaller checks before stealing a great amount. After all, the penalties for unauthorized taking of a small amount on a check that she had signed was much less severe than a nonconsensual taking of several thousand dollars.

The same consciousness of guilt is demonstrated by the manner in which defendant would transfer funds between her banks or open new accounts. For example, the first ASB check payable to defendant was dated April 1, 1986. Then, a week later, on April 9th, defendant escorted Margaret to the bank to deposit \$30,000 (taken from her Apple savings account) and he told the ASB manager that he hoped the amount would clear quickly so he could deal with Margaret's "tax problem" -- an obvious falsehood (A569-70).

However, once it became apparent that the ASB manager was watching her withdrawals, defendant switched his activity to her other banks. For instance, in May of 1987, defendant only drew ASB checks for \$50, \$300, or \$500, while at the same time writing \$5,000 and \$10,000 checks on her Chase and Citibank accounts. Of course, had these checks represented gifts, there was no need so carefully to orchestrate on which bank account they were drawn. Similarly, in late January of 1988, defendant created a new Chase investment checking account in a different branch, closing her old account, and on March 21, 1988, transferred \$90,000 from her ASB account to the presumably less risky new Chase account for no apparent reason except to avoid scrutiny. Tellingly, Margaret's condition had worsened and defendant had become aware of the pending conservatorship proceedings. However, once he was interviewed by Detective Mosera on March 24th, defendant realized that the police were investigating these "gifts" and never converted any of that \$90,000 to his own use. This conduct, too, bespeaks defendant's consciousness of guilt. After all, had these been gifts, there was no reason not to write checks on that sum as well.

Even the manner in which defendant manipulated Margaret's 1985 tax returns at the outset, although more subtle, provided compelling evidence of defendant's guilt. For example, defendant obviously used these tax returns as a means to make funds available to himself without drawing Margaret's attention to his theft, presumably out of concern that she might still be capable of tracking her finances. Defendant filed a state tax return overreporting her interest income (A149, 1237-38), which created a false tax liability of over \$6,000, but then he never transmitted the check she had signed for payment of state taxes. By these acts, defendant made almost \$6,500 available in her account without her

even knowing it, and then drew on those funds for his own use. Similarly, defendant manufactured a false 1985 federal tax liability in excess of \$16,000; in this case, however, defendant sent her check to the IRS. Within a month, defendant filed amended returns which resulted in a late August federal refund of over \$16,000, immediately deposited that refund in Margaret's Chase account, and just as quickly withdrew that exact amount, plus an additional \$8,000. A short time later, defendant travelled in Europe for 17 days.

The fair inference to be drawn in both these cases is that defendant took these measures early on in their relationship because, in the event that Margaret was aware of defendant's actions at all, she would believe that the checks to the state and federal governments had satisfied her tax liability, rather than having been diverted to defendant. Thus, defendant's diversion of these funds from her attention was to insure that she did not suspect his ongoing larcenies. In similar fashion, as a tax preparer, defendant unquestionably knew that a donor must report gifts over \$10,000 to each donee, yet he did not file a gift tax return for Margaret on the \$44,153 he received in 1986. It is obvious that he neglected to do so because that return might have alerted Margaret or her family to the large sums he was draining from her estate, which he obviously wished to hide. Of course, once it later became clear that Margaret had no grasp of her finances, defendant abandoned the use of such pretexts as he obtained even greater amounts.

In the same vein, once it was apparent that Margaret was unaware of what was happening with her finances, and that her relatives and friends were not yet watching her accounts closely, defendant abandoned all pretense of using a number of smaller checks and different bank accounts, and began looting in earnest. On November 5, 1986, after a social worker told defendant that it was doubtful that Margaret could handle her own

affairs (A510, 513-15, 528), he immediately had Margaret close her Apple Bank savings account and withdraw \$32,880 (Exhibit 10). Next, on April 20, May 22, and June 5, 1987, defendant wrote \$5,000 checks on each of Margaret's accounts. In July, a typewritten check for \$50,000 drawn to "General Industries Ltd" was deposited in a secret account in Vanuatu, where defendant coincidentally had travelled in May of 1986 and January of 1987 (as well as in February, 1988).

Not surprisingly in late 1987, after defendant learned that Margaret was diagnosed as suffering from senile dementia with delusions (A105-07), and that conservatorship proceedings were contemplated, the gifts defendant wrote himself from Margaret became even larger per check. For example, another \$50,000 check was made payable to defendant on December 3, 1987. Substantial checks were also written in early 1988: one for \$5,000 on January 29th, two for \$10,000 on January 22nd and February 5th, one for \$10,500 on February 26th, and one for \$20,000 on February 6th, for a total of \$55,500. Also on February 24th, defendant wrote a second \$20,000, which did not clear because it was post-dated; as noted, he also transferred \$90,000 from ASB to the Chase account. Given that chronology of events, it appears that defendant sensed that his easy access to Margaret's accounts was coming to an end and that he had to withdraw what he could before his window of opportunity vanished. Indeed, not only was \$92,000, and even perhaps as much as \$155,000, transferred to his accounts in the South Pacific during these two years, but defendant wired \$70,000 to his Auckland account on February 5th. Defendant clearly was trying to avoid recovery of these "gifts."

Indeed, even his treatment of Margaret betrays defendant's attempt to isolate her so that he could exclusively control her finances. Defendant appeared in the hospital in

late June of 1987, when she was first diagnosed as senile, presenting himself as her friend and promising to bring her in for a psychiatric evaluation (A869-71, 974-75, 1081-83). A month later defendant pretended to take her for a ride, but then cosseted her in a hotel in Manhattan, rather than returning her to her family in Queens or seeking medical help (A874-75, 931-32, 937, 950-51, 985-86, 993, 1084). Obviously, so long as Margaret remained isolated from her family or elder care workers, defendant's access to her money was not threatened. Indeed, from the record, it can be inferred that defendant used Margaret's paranoia to discourage her from accepting aid from those who were trying to help (A178, 306, 522-24, 531-32, 576-77, 665-71, 672-76, 782, 977-78) -- and could discover defendant's larceny. At one point Margaret even said that she was not allowed to see anyone alone (A665-71, 782; see A1536). In addition, throughout this two-year period, defendant himself often used her supposed desire for privacy to fend off any inquiries about her finances (Sanchez: A363-66, 373-76; J. Szabol: A884-85, 949-50; J. Szabol, Jr.: A1000-01; Mosera: A1130-35). In October of 1987, when her brother and nephew sought information about her finances, defendant claimed on her instructions that he could not answer any questions, untruthfully adding that he had only visited Margaret in January to do her taxes (A884-85, 949-50, 1000-01). The only logical explanations for this conduct are defendant's desire to isolate Margaret from those who might assist her in seeking treatment for her deteriorating mental condition, in order to more effectively conceal these transactions, and his consciousness of guilt that he was pillaging Margaret's assets. In short, the evidence overwhelmingly established that defendant, with larcenous intent, took over \$233,700 of Margaret's funds for his own use.

The second aspect of this crime -- defendant's awareness of Margaret's incapacity to consent to his taking -- was likewise shown beyond any doubt. From 1985 until her death, Margaret's mental condition inexorably deteriorated, and she clearly "suffered from episodes of delusion and dementia," as defendant concedes (Defendant's Brief at 63-64). And, contrary to defendant's claim (*id.* at 64-67), the evidence overwhelmingly showed that Margaret was unable to formulate the consent to give him over \$233,700 he took from her accounts.¹ Before she met defendant and decided to bestow "gifts" upon him, Margaret had lived very frugally in a 50th Street apartment which had been her family home since the 1940s; she spent less than \$1,000 per month for living expenses (A1217-18). While she attended mass daily, Margaret donated only \$5 to her church each Sunday. And, she sometimes afforded gifts from \$25 to \$100 to her brother, nieces, and nephew (A813, 1015-16; Exhibits 2D1A, 2D2A [ASB and Citibank registers]).²

Indeed, there was evidence that Margaret's competence was in doubt already in early 1986. From the time she met defendant in March of 1986, this frugal woman, who had previously handled all of her own affairs, suddenly put her entire life savings and finances in defendant's control, even though she had just met him at a tax preparer's office. In fact, defendant filled out all the tax checks, only had her sign them, and wrote the relevant information about the tax payments in her check register. Moreover, although she was enraged by the \$110 fee she had paid defendant's employer nine days before on her first visit, Margaret still signed a check for \$5,000 payable to defendant purportedly

¹ Not surprisingly, while professing concern about Margaret, defendant effectively delayed the psychiatric evaluation which would first conclude that she was in fact incompetent (A516, 528-30).

² Margaret's parsimony is underscored by her will, which left her estate to her brother, after minor bequests of \$1,000 to charities and \$2,000 to her nieces and nephew.

for the exact same services when she signed the completed tax returns. Surely a payment of \$5,000 for filing a return that only cost \$110 to prepare days before would have outraged a rational person, although it never bothered Margaret at the time. Indeed, when defendant filed an amended return for her within a month of the original return (to correct his deliberate mistakes), Margaret again signed a second check drawn to him for \$5,000; presumably defendant used this \$10,000 to finance a May trip to the South Pacific. Given these impressive tax preparation fees that Margaret suddenly shouldered without a second thought, it is also not surprising that, at this time, her neighbors noted that Margaret often did not recognize them; she was extremely forgetful, easily confused, frequently paranoid, and sometimes subject to delusions.

The only inference to be drawn is that defendant already knew that Margaret could no longer write checks herself or manage her own finances. In the ensuing two years, defendant wrote 54 checks payable to himself and four payable to cash, as well as all deposit and withdrawal slips for her bank accounts or \$10,000 treasury bills, just as bank personnel had assisted her in completing withdrawal slips and sometimes even deposit tickets (A573). Indeed, she had increasing difficulty understanding denominations or counting money (A47-48, 50-52, 76-77, 132-34, 746-48, 751-53, 759-61). From the outset Margaret could no longer handle her own finances (cf. Defendant's Brief at 66), and in her last year was totally confused about them (A641-43, 670-71, 998-99, 1037, 1093-94). Of course, his twice-weekly visits alerted defendant that Margaret lived penuriously and that any large gift was highly uncharacteristic (A361-63, 390).

In fact, defendant readily admitted he knew she was "confused" in the summer of 1986, after Margaret querulously telephoned at 2:00 a.m. (A710-13, 727-30), and

discussed Margaret's mental problems with her neighbor (A418-22). But when the federal tax refund check (\$16,000+) arrived in late August of 1986, defendant had Margaret sign two checks payable to him, for \$8,000 and \$16,000. After withdrawing other money from her accounts, defendant spent 17 days in Europe with his wife in October. Certainly, Margaret's confusion, delusions, and obvious inability to tell time, or name the day, date, month, season, or year emphasized her increasing senility; a social worker told defendant, upon his return, that Margaret was unable to manage on her own and was mentally impaired (A510-13). Moreover, her periods of lucidity became the exception and not the norm of her behavior (A307, 324; cf. Defendant's Brief at 51, 64-67). Margaret got lost in her building and on the street, wandered outside in night-clothes, and suffered further delusional episodes.

Nonetheless, in January of 1987, defendant had Margaret sign three checks for \$7,500 which he drafted, just before he left on a February trip to New Zealand and Vanuatu. While defendant was away, Margaret admitted strangers in her apartment. Indeed, defendant's extensive transfers from Margaret's account in the first quarter of 1987, approximately three checks for each month, then seven transfers in May and June, for a total \$42,060, demonstrates his presentiment of her extreme incompetence. Defendant used those funds to vacation in Canada and Brussels with his wife in May, while the police had to bring Margaret home, and she was admitted for delusional behavior and diagnosed as senile. In late July, after defendant put Margaret in a hotel, the police asked that she be removed from the premises (A876-78, 936-39, 986-87). Yet, on August 28th and September 17th, 21th, and 24st, defendant had Margaret sign four checks for \$12,700. and left for Sicily.

By the end of 1987, Margaret was unable to focus on a topic, was often confused, even reported her dead sister missing, and was no longer able to recognize anyone. And, psychiatric personnel had provisionally diagnosed Margaret as senile and in need of a conservator, as defendant well knew. Taking advantage of the situation, from November 6th to December 3rd, defendant wrote himself six checks for \$61,100, including one for \$50,000. And in 1988, defendant wrote checks for \$59,905 of her funds -- three checks in January for \$15,000, five checks in February for \$40,680, and five checks by March 12th for \$4,225. He even submitted a post-dated check for \$20,000, which was returned. Obviously, defendant would write several checks immediately after Margaret had acted bizarrely or others voiced concern about her mental state. This mountain of evidence indubitably showed Margaret's mental incompetence and defendant's awareness of her inability to consent to any gifts.

Defendant acknowledges that the record is "replete with evidence" that Margaret's mental health was in decline in the last three years of her life and that her "mental problems, unquestionably, became apparent to all who dealt with her, including defendant" (Defendant's Brief at 63-64). Yet, defendant seems to argue that absent a legal finding of incompetence, the People did not establish Margaret's lack of consent (*id.* at 51). Of course, Dr. Farkas testified that on January 13, 1988, Margaret was in the late stages of a slow, but progressively worsening illness marked by severe and significant confusion and delusion, and that it had been going on for a lengthy period, "probably years" (A587-88). Not only had she been diagnosed as senile as early as June of 1986, virtually every People's witness testified that Margaret was substantially impaired and unable to conduct her daily affairs during this entire period. Moreover, Margaret's payment to defendant of

\$10,000 for preparing her tax returns, after paying the firm's nominal fee, when they were virtual strangers provided a compelling gauge for the jury of at least when her severe mental difficulties became apparent. In the face of evidence as that adduced here, a legal finding of incompetence is not required; nor was it necessary to show that she was "fully disabled from functioning in her daily life" or "lost touch with reality in its entirety." See People v. Spiegel, 48 N.Y.2d 647 (1979); People v. Antilla, 77 N.Y.2d 853 (1991); People v. Cray, 195 A.D.2d 303 (1st Dept: 1993), aff'd, 84 N.Y.2d 874 (1994); cf. Defendant's Brief at 51, 64. Not surprisingly defendant cannot cite authority for his contrary proposition.

Nor is a different result warranted simply because there were no witnesses present when defendant wrote and Margaret signed these checks (Defendant's Brief at 63, 64-65). That circumstance is hardly surprising here. Indeed, as noted, defendant was very careful to ensure that there were no witnesses, repeatedly asking possible witnesses to leave because her "taxes" were "private" (A358-62), and stonewalling her family by claiming that she had asked that he not divulge any information (A884-85, 9449-50, 1000-01).¹ Moreover, the scrutiny of the police did not commence until late March of 1988, when Margaret could no longer answer any questions about her finances (A641-43, 670-71, 998-99, 1037, 1093-94, 1127-29); she died in late July of 1988. And, defendant's check-writing activity escaped the scrutiny of her friends and family for the same reason that the

¹ Thus, it is not surprising that the People could not specify larceny by fraud, trickery, or coercion; nor did they attempt to prove any of those theories. Rather, they proceeded with the oldest form of larceny -- a trespassory taking. As defendant backhandedly concedes (Defendant's Brief at 51 n.35), the People did not have to specify the type of larceny, and could simply charge that defendant wrongfully took property; it is then up to the jury to decide whether the evidence proves precisely that. See Penal Law §155.45.

investigation into defendant's conduct took almost three years to complete -- because generally her bank registers, statements, and cancelled checks had mysteriously disappeared;¹ nor did defendant record any checks written to himself after the first two \$5,000 checks in the existing registers.

In any event, even without testimony from eyewitnesses or Margaret, defendant's larcenous intent and her lack of consent is painfully obvious from the plethora of circumstantial evidence educed. See People v. Steinberg, 79 N.Y.2d 673 (1992); People v. Bracey, 41 N.Y.2d 296, 309 (1977). It is well-settled that a reviewing court must give the People the full benefit of every reasonable inference to be drawn from the facts. People v. Lewis, 64 N.Y.2d 1111, 1112 (1985); People v. Kennedy, 47 N.Y.2d 196, 203 (1979); People v. Benzinger, 36 N.Y.2d 29, 32 (1974). The only question is "whether there is a valid line of reasoning and permissible inferences" that could have led the jury to find that the elements of the crime were proven beyond a reasonable doubt. People v. Acosta, 80 N.Y.2d at 672, quoting People v. Steinberg, 79 N.Y.2d 673, 681-82 (1992). Here, with good reason, the jury credited the testifying witnesses, drew reasonable inferences that Margaret was incompetent during the last two years of her life, and disbelieved the transparently self-serving excuses proffered by defendant.

Finally, cognizant of Margaret's inability to consent, with felonious intent defendant took \$44,153 in the last eight months of 1986 and \$119,650 in 1987. While aware that his ill-gotten gains were taxable, defendant did not report this money on his income tax returns for 1986 and 1987; he owed the state \$6,029.28 for 1986 and \$13,573.32 for 1987.

¹ Since Margaret did not throw anything out, it was a fair inference that defendant had removed or destroyed records which could incriminate him.

The larcenous intent which caused defendant to hide these transfers of funds also established beyond a reasonable doubt his knowledge and intent to defraud the state of the taxes owing on those monies by filing false tax returns.¹

In short, the evidence at trial overwhelmingly proved that from the outset of her dealings with defendant Margaret lacked competence; that defendant had ongoing knowledge of her deteriorating mental condition; that defendant had felonious intent to take and convert her money to his own use; and that defendant wrote and cashed 58 checks, signed by Margaret Szabol, for more than \$233,708 and did not use that money for her benefit. Beyond peradventure, consent of an owner is essential to the crime of larceny under the common-law and statutory definitions. The jury's verdict was fully supported by the evidence, and should not be disturbed on appeal.

POINT II

THERE WAS AMPLE PROOF OF NEW YORK COUNTY'S JURISDICTION OF DEFENDANT'S CRIMES OF FILING A FALSE INSTRUMENT IN THE FIRST DEGREE (Answering Defendant's Brief, Point II at 67-73).

Defendant was convicted of two counts of Offering a False Instrument for Filing in the First Degree (Penal Law §170.35), based on his failure to report the money he had taken from Margaret on his 1986 and 1987 state income tax returns. By not reporting that money, defendant avoided an additional tax liability in New York State alone of \$6,029.28 in 1986 and \$13,573.32 in 1987 (A1247-48; Exhibits 42D-E). On appeal, he challenges that part of the judgment on the ground that the People had not proven venue in New York

¹ Perhaps for consistency's sake, defendant does not contest the sufficiency of the evidence proving his guilt of first degree offering a false instrument for filing.

County beyond a reasonable doubt, the higher than usual burden of proof which defendant alleges was imposed by the trial court's charge. Defendant's claim is unpreserved and devoid of merit.

At no time before trial did defendant argue that the jurisdiction of the New York County court had to be proven beyond a reasonable doubt. Indeed, during the charge conferences, he did not even ask the court to instruct the jury on venue; not surprisingly, the trial court did not give any specific instruction (see 1 CJI [NY] § 8.10; cf. also Defendant's Brief at 68, 72-73). Nor did defendant object to the court's failure to do so or request an additional charge. Thus, it can hardly be said that defendant specifically preserved the claim that the People had to prove venue beyond a reasonable doubt (cf. Defendant's Brief at 68). See People v. Moore, 46 N.Y.2d 1, 7 (1978). On the contrary, he has waived this claim for appellate review. CPL § 470.05(2); People v. McLaughlin, 80 N.Y.2d 466, 471, 472 (1992); People v. Lowen, 100 A.D.2d 518, 519 (2nd Dept. 1984); cf. People v. Cullen, 50 N.Y.2d 168, 173-74 (1980).

Moreover, there is no compelling reason for this Court to reach this specific claim in the interest of justice. Notably, venue in the proper county need only be established by a simple preponderance of the evidence. People v. McLaughlin, 80 N.Y.2d at 472; People v. Moore, 46 N.Y.2d at 6-7. And, defendant's claim that the court's charge on this crime created a burden on the People to prove venue beyond a reasonable doubt is meritless (Defendant's Brief at 70). In that charge, the trial court said:

Therefore, in order for you to find the defendant guilty of this crime the People are required to prove from all of the evidence in the case beyond a reasonable doubt each of the following six elements.

One. That on or about April 15, 1987, in the County of New York, the defendant offered or presented to a public office, in this case the New York State Department of Taxation and Finance, a certain IT-201 tax

return, state tax return, which was introduced into evidence as People's Exhibit Number 42-A.

(A1438) (emphasis added). Identical language was given with respect to the second false instrument count, specifying the crime date as April 15, 1988 (A1440; Exhibit 42-B).

Contrary to defendant's claim (Defendant's Brief at 69, 72), this simple allegation of venue in the averments portion of the count hardly made it incumbent on the People to prove venue beyond a reasonable doubt. After all, venue is not an element of the crime, so the court's direction that "all of the elements" of the crime had to be proven beyond a reasonable doubt plainly did not apply to venue. See 1 CJI [NY] § 8.10 at 385; People v. Hetenyi, 304 N.Y. 80, 84 (1952). Moreover, if defendant thought that that higher burden of proof should apply, it was incumbent upon him to ask for an instruction that it did. Since he did not, the burden of proof on the issue of venue is simply by a preponderance of the evidence, not beyond a reasonable doubt. 1 CJI [NY] § 8.10 at 385, 393, citing People v. Moore, 46 N.Y.2d at 6; People v. Tullo, 34 N.Y.2d at 714; People v. Hetenyi, 304 N.Y. at 84. Nor could defendant have succeeded had he made such a request. Indeed, even a specific instruction on venue would have charged only that the "People have the burden to prove the fact of geographical jurisdiction [of the County] to your satisfaction by a preponderance of the evidence." 1 CJI [NY] §§ 8.11-8.23 at 395-431. So defendant's claim that the People faced some higher, inflated burden to prove venue is simply meritless.

While defendant did move to dismiss the counts at issue on the ground that the People had not proven that the crimes were committed in New York County (A1310-11), to the extent that he challenges the proof on that issue, there can be no doubt that the proper burden was met here. Of course, implicit in any guilty verdict on a substantive

count is a jury finding that the People had proven that the county of prosecution does have geographical jurisdiction. 1 CJI [NY] § 8.10 at 394; see People v. Ribowsky, 77 N.Y.2d 284, 292, 294 (1991). There was ample evidence supporting the jury's conclusion that there was proper venue in New York County under several different theories (cf. Defendant's Brief at 69, 71, 72). The relevant law is straightforward.

First, a county has jurisdiction over an offense when conduct occurred within it sufficient to establish an element of the offense charged. CPL § 20.40(1)(a); People v. Tullo, 34 N.Y.2d 712, 714 (1974), aff'g, 41 A.D.2d 957 (2nd Dept. 1973). The place where an element of the crime occurred is a question of fact for the jury, People v. Chaitin, 94 A.D.2d 705 (2nd Dept. 1983), aff'd, 61 N.Y.2d 683 (1984), which is permitted to find that an offense occurred in that county by a simple preponderance of the evidence. People v. McLaughlin, 80 N.Y.2d at 472; People v. Moore, 46 N.Y.2d at 6-7; see CPL § 20.40(4)(k). Moreover, in the case of filing a false instrument, a person may be prosecuted in the county where the false instrument was executed. See Sharpton v. Turner, 169 A.D.2d 947, 949-50 (3rd Dept. 1991).

Here, there was compelling evidence that conduct establishing both the intent and execution elements of the crime of filing a false instrument occurred in New York County. It was undisputed that the unreported income which was the basis for the charge was generated in New York County. Specifically, defendant wrote 58 checks on Margaret's accounts in Manhattan, worked and had his own tax office in that county, and deposited most of the money in two of his own accounts in that county. Moreover, that was the county where Margaret, who rarely strayed far from her 50th Street apartment, signed all the checks, and defendant not surprisingly deposited the lion's share of the checks at New

York County banks. As a result, in 1986 and 1987 alone, defendant amassed \$44,153.09 and \$119,650 of this New York County resident's funds by drawing checks on her New York County checking accounts, as well as by cashing her Treasury bills in New York County. Thus, where the taking of her funds and defendant's intent to steal them were so plainly established in Manhattan, it is not surprising that defendant does not challenge the finding of venue over the larceny count in the New York County court.

Of course, it is also inferable from the record that defendant's plan to file false state tax returns on his own behalf was also formulated in Manhattan. Indeed, it would be absurd to conclude that while defendant formed the criminal intent and orchestrated the thefts in New York County, he never thought about he would conceal that money on his taxes until he left New York County. Certainly, if defendant formed the intent to commit these thefts in the county when he transferred all the money, it reasonably follows that he also formed his plan for how he would hide his new-found wealth on his taxes in that county. Put simply, even though his taking of Margaret's property was not a specific element of offering a false instrument for filing, it is reasonable to assume that defendant's larcenous intent to steal was formed simultaneously with his culpable intent to commit the false filing crimes. As a trained tax preparer, defendant knew that gains unlawfully obtained constitute taxable income, United States v. Sullivan, 274 U.S. 259 (1927); James v. United States, 366 U.S. 213, 219 (1961); United States v. Bruswitz, 219 F.2d 59 (2d Cir. 1954), cert. denied, 349 U.S. 913 (1955), and that New York State expected him to pay taxes on money stolen from Margaret (see A1245-47).¹ It is clear that throughout this

¹ Defendant's intentional larceny and filing of false tax returns on his own income are underscored by his failure to file gift tax returns for Margaret, which obviously would have notified the state tax department of the unreported gift income (A1119-24).

period, in New York County defendant formed the intent both not to pay taxes on these "gifts" and to file false tax returns omitting them. Beyond a doubt, by his actions defendant demonstrated his intent to underreport his 1986 and 1987 income (A1119-24, 1245; Exhibit 32). This, too, was sufficient to establish venue in New York County. See, e.g., People v. Tullo, 34 N.Y.2d at 714; People v. Lovacco, 147 A.D.2d 592 (2nd Dept. 1989); People v. Iwaszkiewicz, 120 A.D.2d 746, 747 (2nd Dept. 1986); People v. Chaitin, 94 A.D.2d at 705.

Even beyond defendant's intent to underreport his taxable state income, the jury also could have concluded by a preponderance of the evidence that defendant had executed his false returns in New York County, then "filed" them in Albany (A1250, 1251). Although a Queens resident, defendant had worked as a tax preparer in Manhattan until, shortly after meeting Margaret, he opened his own tax preparer's office on West 24th Street in Manhattan. Moreover, he certainly prepared the tax returns for Margaret, who rarely left her neighborhood, in Manhattan. Indeed, since Margaret's and his own 1986 tax returns listed his business -- Personal Tax Service, 200 West 24th Street -- as the preparer's address, and that was where he kept the necessary forms and tax codes (A1556, 1562), the jury could have found that it was more likely than not that defendant did his own taxes there as well. After all, where defendant's entire financial world -- including his transfers of Margaret's assets, his tax preparer's business, and his clients' assets -- was conducted in New York County, it simply would not make sense for him to store his own tax documents in his Queens home without explanation.

In any event, that "element" theory is not the only one under which the People successfully established venue. A county has jurisdiction when the "offense committed was

one of omission to perform a duty imposed by law, which duty either was required to be or could properly have been performed in such county. In such case, it is immaterial whether such person was within or outside such county at the time of the omission...."

CPL §20.40(3); see Murtagh v. Leibowitz, 303 N.Y. 311 (1951). Instructive is the example given in the Practice Commentary:

If all state income tax returns were to be filed in Albany, a Westchester resident who failed to do so could be prosecuted for such an offense only in Albany County. If he were authorized to file it either in Westchester or Albany, however, he may be prosecuted in either county; and if he were authorized to file in New York County too, he could instead be prosecuted there.

Preiser, Practice Commentaries, CPL §20.40 at 108 (1992); In re Du Rose v. Merrell, 186 A.D.2d 1046, 1047 (4th Dept. 1992). Surely, the deliberate failure to report all income as required by law -- the omission here -- is comparable to the absolute failure to file a return.¹

And there is no dispute on appeal that defendant deliberately underreported his taxable state income. The only question then is whether New York County is a venue where defendant "could properly have ... performed" that duty to report his income. And the jury unquestionably could have found that it was. The New York State Legislature has empowered the City of New York to levy and collect taxes on residents, which are then distributed from the central office in New York County (A1235). See N.Y. Tax Law Arts. 29-30; 11 N.Y.C. Admin. Code, Chap. 17. Moreover, defendant could have filed his tax

¹ Defendant cites no authority in support of his contention that filing an inaccurate return is not an omission offense (Defendant's Brief at 71, n.41). After all, "words of ordinary import are to be construed according to their ordinary and popular significance, and are to be given their ordinary and usual meaning." McKinney's Statutes §232 (1971). "Omission" is "an omitting or being omitted; specif., failure to do as one should." Webster's New World Dictionary at 945.

returns in New York County where his businesses were situated (id.), in Queens County where his residence was located, or in Albany, the State capital. As noted, defendant listed his business address at 24th Street under his signature on his 1986 return. Put simply, defendant omitted to perform a duty imposed by law -- to report all income fully and accurately -- which he could properly have performed in New York County. Thus, the jurisdiction of the New York County court over the false filing counts was fully established. CPL §20.40(3).

Furthermore, jurisdiction under the false instrument counts also fell to the New York County court because of the impact that conduct had in the county. CPL §20.40(2)(c). Under that subsection, even if none of the conduct constituting the charged offense occurred within the prosecuting county, it has jurisdiction over any out-of-county offense which had, or was likely to have, "a materially harmful impact upon the ... community welfare of a particular county, and was performed with intent that it would, or with knowledge that it was likely to, have such an effect." CPL § 20.40(2)(c); People v. Fea, 47 N.Y.2d 70, 76-77 (1979); Matter Of Steingut v. Gold, 42 N.Y.2d 311 (1977). Here defendant's failure to report and to pay taxes on the "gift" income had a foreseeable and materially harmful effect on New York County, in that it lessened the coffers of the county from which defendant stole the money. See 11 N.Y.C. Admin. Code §§ 11-1701 to 11-1801. Thus, New York County was entitled to assert "its protective jurisdiction" over defendant's false tax returns. See People v. Fea, 47 N.Y.2d at 77.

In the end, there was ample evidence which supported the jury's finding that defendant's plan to evade state taxes on the proceeds of his theft of Margaret Szabol's asserts more than likely arose in New York County. See People v. Cullen, 50 N.Y.2d at

173. In fact, the evidence showed beyond a preponderance that defendant took and obtained money from Margaret in Manhattan; that during the 24-month period of his theft, he formed the intent not to pay taxes on it in Manhattan; that the majority of his financial dealings and all of his tax preparation efforts took place in Manhattan; that he deliberately failed to file a tax return accurately reporting his income which he could appropriately have filed in Manhattan; and that the county of New York was harmed by these acts, as defendant well knew. Thus, the venue of the New York County court was established by more than a preponderance of the evidence, and was not against the weight of the evidence (cf. Defendant's Brief at 67).

In sum, New York County court's jurisdiction over defendant's crimes was amply established under these separate statutory provisions, and provides no reason to question the judgment.

POINT III

DEFENDANT'S SENTENCE WAS APPROPRIATE TO HIS CRIME AND HIS BACKGROUND (Answering Defendant's Brief, Point III at 73-75).

On appeal defendant also complains that his sentence is "overly harsh and excessive" and "truly punitive" (Defendant's Brief at 73, 75). He reasons that "gifts voluntarily given to him by an old, dying woman, who may have lacked the mental competence to make" them should have been handled as a civil matter by a surrogate court, not a criminal court (id. at 73, 74-75). He therefore urges this Court, in the interest of justice, to reduce his sentence to, at most, a split sentence of six months incarceration and probation in accordance with the recommendation of the probation officer (id. at 74,

75; PSR: Recommendation).¹ On the contrary, this Court should affirm the sentences imposed.

Here, defendant was convicted of a single count of Grand Larceny in the Second Degree and two counts of Offering a False Instrument for Filing. Second degree larceny is a class C felony which carries a maximum prison sentence of fifteen years; the minimum term is from one to three years. Defendant's sentence of from one and one-half to four and one-half years of imprisonment was substantially less than the maximum possible sentence that the court could legally have imposed. Indeed, the sentencing court exercised great leniency in sentencing defendant to a minimum prison term only one-half year greater than the legally permissible minimum sentence. Penal Law §§ 70.00(2)(c), (3)(b). Defendant's sentences for the false filing counts -- concurrent terms of from one to three years of imprisonment -- were also less than the maximum. In fact, defendant could have been sentenced to consecutive terms of imprisonment for these three crimes (larceny and two false filing counts), since each is a discrete criminal act. Yet the trial court showed additional leniency in making all the sentences concurrent to one another.

At trial, defendant was proven to have systematically duped an increasingly senile, septuagenarian Margaret Szabol into signing checks worth hundreds of thousands of dollars and made payable to defendant, when she was unable to understand what she was signing. Nonetheless, defendant alleges on appeal that "he spent two years of his life giving beautiful moments" to Margaret, "looked out for her and attended to her in so many nice and different ways," and did not give her "a moment's sadness," while her family had little to do with Margaret (Defendant's Brief at 73-74). On the contrary, besides a brief

¹ Parenthetical references with the prefix "PSR" are to the presentence report.

comment in the testimony of Cecilia Huertas (A305-06), there is no proof that defendant had in fact made her remaining years pleasant. Indeed, even the postcards which defendant sent Margaret, and which he champions on appeal, are brief and impersonal, not "friendly." In retrospect, defendant's token gestures to Margaret were a small price to pay to insure unfettered access to her considerable assets. In fact, given defendant's efforts to isolate Margaret and her financial affairs from her family and friends, and his obvious indifference to her increasing senility and ever more tattered lifestyle as he pillaged her bank accounts, defendant plainly made the last years of her life much worse.

And, contrary to defendant's claim (Defendant's Brief at 74), Margaret's comments made a month before her death, which defendant taped over the telephone and played for the court at the sentencing proceeding, hardly alter that sad truth. After commenting that the District Attorney's Office was still investigating him for the checks she had signed for him, defendant asked if Margaret felt "coerced," "forced," or "abused," eliciting a negative response. He then urged her to tell investigators that it was "always [her] idea to give [him] the checks" (see A1527-28). Margaret's agreement with defendant's leading questions was, given its context, still one more pathetic attempt by defendant to cover his tracks, not evidence that this poor woman had voluntarily bestowed these "gifts" on him. At the time, Margaret had just been adjudicated incompetent (finally), defendant had been sued civilly to regain the money taken, and the police had begun a criminal investigation. The tape, simply put, was a contrived attempt by defendant to defend himself from future allegations that he stole a fortune from this senile, defenseless victim, and the sentencing court properly saw through it.

And, the mountain of remaining evidence resoundingly undermines defendant's suggestion that there was some prolonged effort on defendant's part to make her life better. Suffice it to say, whenever defendant voiced concern to relatives, friends, or elder care workers about her confused mental state and promised to help Margaret in various ways, he did nothing. Rather, Margaret continued to live in squalid conditions, and more money was siphoned from her accounts into his own. The simple truth is that defendant's larceny from Margaret was like taking candy from a baby, except he got much richer than that, and her life was destroyed.¹

Moreover, the manipulative character defendant demonstrated with Margaret, her friends, her relatives, and her health care and elder care workers continues up to today, even after he was caught with his hand in the till. Despite the overwhelming evidence of his guilt, defendant has refused to take responsibility for his larceny, or show the slightest remorse for his crimes. In his presentence interview, the probation officer concluded that defendant "generally related in an offhanded manner. He failed to provide many requested biographical documents, and was often vague concerning biographical details" (PSR: 9). Defendant displayed "no remorse whatsoever" for defrauding Margaret, and showed "no insight or regret for his actions." The interviewer concluded, accordingly, that he "impresses as an individual not deserving of any consideration from this Court" (*id.*).

¹ Defendant's suggestion that he was unaware that he was committing a crime is absurd (*cf.* Defendant's Brief at 74-75). Defendant's practices of: cashing small checks to insure that large ones would clear later; of not recording checks in her check register; of using a secret fund on a South Pacific Island; of transferring her funds to another bank after the ASB manager began to monitor her account; of deliberately creating a false liability for her state taxes for 1985 to make funds available to himself; and of ceasing withdrawals after Detective Mosera interviewed him, to name a few, all betray defendant's knowledge that he was stealing from Margaret.

Indeed, the department's presentence recommendation is a scathing summary of defendant's conduct as the "predatory, ongoing, remorseless exploitation and looting of an elderly, infirm, and vulnerable individual" (id.).

Defendant's manipulative nature also did not escape the trial court, which noted at sentencing that "in a calculated effort on his part to obtain rather substantial sums of money from [Margaret] over a long period of time," defendant "took advantage of an elderly lady suffering from dementia, who was unable to understand what was taking place," and did so while clearly aware of her impaired mental state (A1517-18). After careful consideration of all the evidence, Justice Zweibel believed "that state jail time is ... the necessary punishment in this case as well as assurance that [defendant] will be deterred from committing similar acts in the future upon his release from prison" (A1518-19).

Nor does defendant's background warrant a reduced sentence. Defendant notes that he had no prior record, is a graduate of Colgate University, and, according to defendant's character witness, had earned a good reputation for honesty in the financial community of New York City (Defendant's Brief at 73). Of course, defendant's character witness was unaware that defendant had preyed upon Margaret (see A1278-79); defendant's work record before he met Margaret was sporadic and unverified (PSR: 7; see A682-83); and he was not even registered as an accountant, despite what he told Margaret, her family, and neighbors. In the end, far from being the pillar of the community he purports to be on appeal, defendant was just an oft-unemployed, part-time tax preparer who saw the opportunity of a lifetime when a lonely, increasingly senile older woman, with a \$230,000 settlement check and substantial life savings, walked up to his cubicle to have her taxes

done. According to defendant, it was just coincidence that soon thereafter he quit his job, opened two Manhattan offices of his own, and began jet-setting around the world in this astounding rags to riches story. What is astounding, and makes the court's sentence so appropriate, is that defendant refuses to acknowledge having done anything wrong. Indeed, for filing false tax returns for 1986 and 1987 alone, defendant deserved the sentence imposed.

In sum, defendant's background and criminal history more than justified the sentence imposed. The sentencing court took into account the crimes charged, the particulars of defendant's history, and the purposes of penal sanction, and given those factors, cannot be said to have abused its discretion in imposing sentence. See People v. Farrar, 52 N.Y.2d 302, 305 (1981); People v. Junco, 43 A.D.2d 266 (1st Dept.), aff'd, 35 N.Y.2d 419 (1974), cert. denied, 421 U.S. 951 (1975).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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