

# 09-3524-cr(L)

To Be Argued By:  
MICHAEL S. MCGARRY

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## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-3524-cr (L)  
09-3531-cr(CON), 09-5064-cr(CON)

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UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

SHORELINE MOTORS, ANGEL HERNANDEZ, BRUCE  
VETRE, JAMES CLANTON, JOSE CONCEPCION,  
RICHARD DOMINGUEZ, DARIEL PEREZ TORRES,  
MICHAEL RIVERA,  
*Defendants,*

RICHARD BROWN, NELSON DATIL, DAVID BROWN,  
*Defendants-Appellants.*

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

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## Statement of Jurisdiction

The district court (Ellen Bree Burns, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The district court entered a final judgment as to Datil on August 12, 2009, (Datil Appendix (“Datil A”) 27), as to Richard Brown on August 13, 2009, (Richard Brown Appendix (“R. Brown A”) 27), and as to David Brown on January 6, 2010, (David Brown Appendix (“D. Brown A”) 37). Pursuant to Fed. R. App. P. 4(b), Richard Brown filed a timely notice of appeal on August 14, 2009, (R. Brown A27), Datil filed a timely notice of appeal on August 17, 2009, (Datil A27, 47-48), and David Brown filed a timely notice of appeal on December 8, 2009, (D. Brown A37, 381-82). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

**Statement of Issues  
Presented for Review**

**Nelson Datil**

1. Whether the prosecutor's remark during rebuttal summation that defense counsel did not deny that the handwriting on certain forms was Datil's, made after defense counsel argued in closing that the government presented no eyewitness testimony that Datil filled out the forms, was plain error and caused Datil substantial prejudice?

**David Brown**

1. Did the district court abuse its discretion in precluding David Brown from calling a witness to contradict testimony on a collateral issue given by a government witness on cross-examination?

2. Did the district court commit prejudicial error in instructing the jury on conscious avoidance of guilty knowledge?

3. Did sufficient evidence support David Brown's convictions for wire fraud and conspiracy to commit mail fraud and wire fraud?

**Richard Brown**

1. Did the district court fail to address Richard Brown's sentencing arguments, fail to consider the

§ 3553(a) factors, and fail to articulate its consideration of the § 3553(a) factors?

2. Was there an unwarranted disparity between Richard Brown's 60-month sentence, which was 32 months below the applicable Guidelines range, and the sentences of his co-defendants, who had significantly lesser criminal histories?

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

Docket No. 09-3524-cr (L)

09-3531-cr(CON), 09-5064-cr(CON)

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UNITED STATES OF AMERICA,

*Appellee,*

-vs-

SHORELINE MOTORS, ANGEL HERNANDEZ, BRUCE VETRE, JAMES CLANTON, JOSE CONCEPCION, RICHARD DOMINGUEZ, DARIEL PEREZ TORRES, MICHAEL RIVERA,

*Defendants,*

RICHARD BROWN, NELSON DATIL, DAVID BROWN,

*Defendants-Appellants.*

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### **Preliminary Statement**

This is a consolidated appeal of three defendants, Nelson Datil, David Brown, and Richard Brown.

#### **Nelson Datil**

The defendant Nelson Datil was convicted by a jury of one count of conspiracy to commit mail fraud and wire fraud, one count of mail fraud, and four counts of wire fraud. Datil's sole argument on appeal is that the government's remark during rebuttal summation that

defense counsel did not deny that the handwriting on certain forms was Datil's, made after defense counsel argued in closing that the government presented no eyewitness testimony that Datil filled out the forms, was so prejudicial that his conviction should be reversed.

Datil's claim is subject to plain error review because he did not object to the prosecutor's comments during the summation. Datil has failed to establish "substantial prejudice" from the prosecutorial comments because: (1) the prosecutor's remark was in direct response to defense counsel's closing argument and not in response to Datil's decision to exercise his right not testify; (2) the district court's instructions were emphatic and curative; and (3) the evidence adduced at trial was strong. Accordingly, the jury's verdict and the judgment in the case against Datil should be affirmed.

### **David Brown**

The defendant David Brown was convicted of one count of conspiracy and six counts of wire fraud. On appeal, he argues that: (1) the district court abused its discretion in precluding David Brown from calling a witness to contradict testimony on a collateral issue given by a government witness on cross-examination; (2) the district court erred in instructing the jury on conscious avoidance of guilty knowledge; and (3) there was insufficient evidence to support his conviction. These arguments are all without merit.

First, the district court acted within its discretion in precluding David Brown from calling a witness to establish that a government witness lied on cross examination. The testimony related to a collateral issue with no bearing on the charges for which David Brown was tried and convicted. The only purpose of the testimony would have been to attack the government witness's credibility, and, as the district court correctly ruled, the use of this type of extrinsic evidence to impeach a witness's character for truthfulness is prohibited by Rule 608(b). David Brown also argues for the first time on appeal that he should have been able to introduce the evidence under the doctrine of impeachment by contradiction. There is no plain error, however, because this doctrine has not been extended to the impeachment of testimony solicited on cross-examination.

As to the conscious avoidance instruction: the instruction employed by the district court was an accurate statement of the law and there was an adequate factual basis in the record to support the instruction. Moreover, even if the factual basis were inadequate, David Brown has not shown prejudice.

Finally, the evidence presented at trial was sufficient to support David Brown's conviction. Numerous credible witnesses presented strong evidence of David Brown's knowing participation in the fraud. Accordingly, the jury's verdict and the judgment in the case against David Brown should therefore be affirmed.

## **Richard Brown**

The defendant Richard Brown was convicted of one count of conspiracy, one count of mail fraud, and one count of wire fraud. On appeal, Richard Brown argues that his sentence is procedurally and substantively unreasonable, claiming: (1) the district court failed to address his sentencing arguments as to role and criminal history; (2) the district court failed to consider the § 3553(a) factors; (3) the district court failed to articulate its consideration of the § 3553(a) factors; and (4) there is an unwarranted disparity between his sentence and those of his co-defendants.

These arguments are all without merit. The district court properly considered the § 3553(a) factors and Richard Brown's sentencing arguments. Additionally, its articulation of its analysis under § 3553(a) was adequate. Furthermore, Richard Brown's extensive criminal history rendered him not similarly situated to his co-defendants. Accordingly, the district court's sound sentencing decision should not be disturbed.

## **Statement of the Case**

On May 18, 2005, a federal grand jury returned a twenty-two count Fourth Superseding Indictment charging four defendants, including the defendant-appellants Nelson Datil, David Brown, and Richard Brown, with mail fraud, wire fraud, and conspiracy to commit mail fraud and wire fraud. (Datil A15, 29-43). Datil was charged in six counts: in Count One with conspiracy to commit mail

fraud and wire fraud in violation of 18 U.S.C. § 371, in Counts Nine, Fourteen, Nineteen, and Twenty with wire fraud in violation of 18 U.S.C. § 1343, and in Count Twenty-Two with mail fraud in violation of 18 U.S.C. § 1341. (Datil A29-43). David Brown was charged in seven counts: in Count One with conspiracy to commit mail fraud and wire fraud in violation of 18 U.S.C. § 371, and in Counts Three, Four, Five, Ten, Fifteen, and Twenty-One with wire fraud in violation of 18 U.S.C. § 1343. (Datil A29-43). Richard Brown was charged in six counts: in Count One with conspiracy to commit mail fraud and wire fraud in violation of 18 U.S.C. § 371, in Counts Eight, Eleven, Twelve, and Seventeen with wire fraud in violation of 18 U.S.C. § 1343, and in Count Eighteen with mail fraud in violation of 18 U.S.C. § 1341. (Datil A29-43).

On September 7, 2005, following a three-week jury trial in the United States District Court for the District of Connecticut before the Honorable Ellen Bree Burns, United States District Judge, Datil was found guilty on all six counts in which he was charged, (Datil A21, 44), David Brown was found guilty on all seven counts in which he was charged, (D. Brown A376-77), and Richard Brown was found guilty of conspiracy (Count 1), wire fraud (Count 17), and mail fraud (Count 18), and was acquitted of the remaining counts against him, (Datil A21, R. Brown A53).

On August 6, 2009, Datil was sentenced to one day of imprisonment to be followed by three years of supervised release. (Datil A44-46). Judgment was entered on August

7, 2009, and an Amended Judgment was entered on August 12, 2009. (Datil A27). On August 17, 2009, Datil filed a timely notice of appeal. (Datil A37, 47-48). Datil is currently serving the supervised release portion of his sentence.

On August 6, 2009, Richard Brown was sentenced to 60 months of imprisonment, to be followed by three years of supervised release. (R. Brown A53-55). Judgment was entered on August 7, 2009, and an Amended Judgment was filed on August 13, 2009. (R. Brown A27). Richard Brown filed a timely notice of appeal on August 14, 2009. (R. Brown A27). He is in custody serving the sentence imposed by the district court.

On December 3, 2009, David Brown was sentenced to 36 months of imprisonment, to be followed by three years of supervised release. (D. Brown A378-80). Judgment was entered on December 4, 2009, and an Amended Judgment was entered on January 6, 2010, (D. Brown A37). On December 8, 2009, David Brown filed a timely notice of appeal. (D. Brown A37, 381-82). David Brown is in custody serving the sentence imposed by the district court.

**Statement of Facts and Proceedings  
Relevant to this Appeal**

**A. The Scheme<sup>1</sup>**

The defendant-appellants Nelson Datil, David Brown, and Richard Brown were employed by Shoreline Motors Corporation (“Shoreline”), a Mitsubishi car dealership located in Branford, Connecticut. While employed there, they took part in a scheme designed to increase profits by providing false information to automobile customers and the company that financed the automobiles, Mitsubishi Motors Credit of America (“MMCA”). As part of the scheme, the defendants included false information about the automobile customers’ salaries and employment in their credit applications, so that MMCA would extend credit to customers it would not have deemed creditworthy if the information had been truthful. Shoreline advertised on the radio that it could provide cars to people with bad credit or no credit at all.

The Shoreline employees instructed customers to complete credit applications by providing certain personal information such as names, addresses, sources of income, amounts of income, and rental expenses. In other circumstances, customers provided this information orally and a salesperson completed the application. The employees then falsified certain of the information to

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<sup>1</sup> The facts are taken from the trial transcript, parts of which have been submitted in the proposed Government Supplemental Appendix (“GSA”).

make the customers appear more creditworthy. The information was then provided from the dealership in Branford to MMCA in California, using either interstate mail, via the United States mails and/or private or commercial interstate carriers, or by wire, via facsimile transmission or over the internet using a software program called Daybreak Lending Software. Upon approval, MMCA extended financing to Shoreline customers by wiring the funds to Shoreline. The customers were then required to pay MMCA.

The defendants also misled customers about the amount of their monthly payments and other hidden charges and failed to disclose the existence of balloon payments due at the end of their loans. These actions increased the amount financed by MMCA, thereby increasing the defendants' profits. The defendants also, on certain deals, stole all or a part of cash down payments paid by customers and then required the customers to finance those amounts in order to make up the difference.

## **B. The offense conduct proven at trial**

### **1. Nelson Datil**

Datil was employed as a salesman at Shoreline from November 2001 to July 2002, approximately eleven months, during which time he earned approximately \$70,000 in salary and commissions. (GSA 1372C-1, 1373, 1381, 1477-48). According to the testimony of a former detective who testified at trial, Datil admitted that he was aware of the practice at Shoreline to falsify customers'

incomes and employment status on credit applications in order to obtain financing from MMCA that would not otherwise have been granted. (GSA 67). As a salesman, Datil was required to attend weekly sales meetings; at those meetings, the workings of the fraud were openly discussed. (D. Brown A99, 104-07; GSA 890-91). Datil also admitted that he knew that customer information had been changed on credit applications involving his customers, although he stated that others had done the falsifying. (GSA 72-73). For example, Datil admitted that the credit application of Royce Sullivan submitted to MMCA falsely indicated that Sullivan was employed. (GSA 70-72).

One customer, Melissa Bailey, testified that Datil traveled to her house in Hartford to have documents signed by Bailey and her co-signer, her grandmother Maria Ramos. (GSA 1965-68). Bailey testified that the credit application filed with MMCA falsely indicated that Ramos received \$3,000 per month from social security. (GSA 1970). Further, Bailey testified that she did not complete the application herself, and the government offered evidence that the handwriting on the application matched that of Datil's. (GSA 1969-74).

Datil also sold a car to Carmen Montalvo. At trial, Montalvo testified that she was unemployed when she purchased her car from Datil, but her credit application listed her previous employer – albeit misspelled – as her current employer. (GSA 333-35, 352). A co-conspirator and cooperating witness, James Clanton, testified that it was a common practice at Shoreline to list a previous

employer as the current employer on the credit applications of unemployed customers. (GSA 1842-44). Montalvo also testified that the automobile she purchased from Datil was missing the manufacturer's sticker listing the suggested retail price ("Monroney sticker") and that Datil failed to disclose information about an extended service contract for which she was charged and a balloon payment that was due at the end of her loan. (GSA 349).

Another customer, Mary Jane Best, testified that she told Datil she was unemployed and collecting a death benefit in the amount of \$2,000 per month following the loss of her husband. (GSA 596). Her credit application sent to MMCA, however, falsely indicated that she was receiving \$3,200 per month in addition to the death benefit. (GSA 595-96). She also testified that Datil told her that she was required to purchase an additional life insurance policy because she was buying a new car, but, in fact she was under no obligation to purchase life insurance. (GSA 600-01). Best also testified that Datil did not disclose to her a balloon payment due at the end of her repayment schedule and that he charged her for CD changers and spoilers that she did not agree to purchase. (GSA 599, 610-11).

Another customer, Lisa Eng, testified that she provided Datil with truthful information about her rent, but that information was falsely stated on her credit application sent to MMCA. (GSA 1736-37). Eng also testified that she expressly rejected an offer from Datil to sell her an extended service contract, but it was included in her purchase agreement nonetheless. (GSA 1742-43). Eng also

testified that she was not informed about a balloon payment due at the end of her loan. (GSA 1743-44).

Another customer, Juanita Binns, testified that she truthfully disclosed her income to Datil on her credit application, but it was falsely reported on the application sent to MMCA. (GSA 1676-80). She also testified that she did not know about the balloon payment in the amount of \$7,300 due at the end of her loan. (GSA 1686-87).

The government also introduced samples of Datil's handwriting, for the jury to compare with the handwriting contained on falsified credit applications. (GSA 1371, 1378, 1380, 1401).

## **2. David Brown**

David Brown was employed as a salesman at Shoreline from approximately November 2000 to July 2002, during which time he earned approximately \$113,000 in salary and commissions. (GSA 1372A-1, 1372C, 1373, 1477-78). Government witnesses testified that David Brown was present at mandatory "Saturday Sales Meetings," at which the fraud at Shoreline was discussed. (D. Brown A99, 104-07; GSA 890-91).

Several customers of David Brown's testified that truthful employment and salary information they gave to David Brown was falsely reported on their credit applications sent to MMCA. (GSA 112-22, 168-69, 264-72). For example, Wesley Witcher testified that Brown was the salesperson with whom he completed a credit

application. (GSA 111-20). Witcher and his mother and co-signer, Shirley, testified that they both told David Brown that Shirley was unemployed, but the application sent to MMCA falsely stated that Shirley was working for Pratt & Whitney and earning \$41,000 per year. (GSA 120). Further, Wesley testified that he told David Brown that he was earning \$22,000 per year, but his credit application sent to MMCA stated that he was earning \$29,000. (GSA 112).

The jury also heard evidence that David Brown instructed Bruce Vetre, a co-conspirator and cooperating witness, to allege false incomes for customers that would match the monthly payments due on the loans. (D. Brown A145-46, 162). For example, Vetre testified that David Brown instructed him to fill in false employment information for customer Marie Bozzuto, who served as a co-signer on Pamela Bozzuto's transaction, and that David Brown was sitting next to Vetre as Vetre used an internet-based loan approval software system to send the false information to MMCA. (D. Brown A170-73, 223-24).

Another customer, Andrea Williams, testified that she gave accurate information about her salary to David Brown, who was the salesman on her automobile purchase, but that false information about her income and rent appeared on the credit applications sent to MMCA for her car purchase and for the car purchase of Willard Hyman, for whom she was a co-signer. (GSA 192-97, 221-24). In addition, Vetre testified that falsified postal money orders were used to make it appear that Shoreline had paid off a loan for Williams's Nissan Maxima, so that she could

obtain financing from MMCA, and that Brown was aware of this fraud. (D. Brown A220-22).

In addition, David Brown's customers provided testimony that established that he misled them about the amount of their monthly payments and failed to disclose the existence of balloon payments at the end of their loans, (GSA 159-60), as well as hidden charges for CD changers and other features, some of which were not provided on the cars, (GSA 127, 198-99).

### **3. Richard Brown**

Richard Brown was employed as a salesman at Shoreline from approximately November 2001 to May 2002. (GSA 1371, 1477). Richard Brown made \$25,935 in 2001 and \$26,854 in 2002, for a total of \$52,789 in salary and commission. (GSA 1372C-1, 1373, 1478). Government witnesses testified that Richard Brown, as a salesman, was necessarily present at the mandatory "Saturday Sales Meetings," during which the fraud at Shoreline was discussed. (D. Brown A99, 104-07; GSA 890-91).

Numerous false credit applications were submitted to MMCA involving customers of Richard Brown's on which he earned commissions. (GSA 418-20, 544-46, 1400). Several former customers of Richard Brown's testified that truthful employment and salary information that they gave to Richard Brown was falsely reported in their credit applications sent to MMCA.

For example, Danielle Fowler's application contained false information indicating that her unemployed co-signer, Ana Burgos, was employed at Hartford Hospital. (GSA 418-20). Richard Brown knew Danielle Fowler personally, and, as established by the evidence, he knew that Burgos was unemployed at the time of Fowler's application. (GSA 418-19). Moreover, Richard Brown's handwriting appeared on the Fowler credit application. (GSA 1399).

Another customer, Rosa Santana, testified that her credit application sent to MMCA contained false information about her co-signer, Maria Agosto. (GSA 544-46). Santana's credit application falsely stated that Agosto was receiving a pension; in reality, however, Agosto received only social security income. *Id.* Santana testified that she did not tell Richard Brown, or any other Shoreline employee, that Agosto was receiving pension income. *Id.* Santana also testified that her credit application contained false information about her rent. *Id.*

Santana also testified that her automobile contract, drafted by Richard Brown, included a CD changer and an additional service agreement that she had not requested nor agreed to purchase. (GSA 547). She also testified that Richard Brown failed to inform her about a large balloon payment due at the end of her payment schedule. (GSA 548).

### **C. The trial and post-trial motions**

On September 7, 2005, following a three-week jury trial, Datil was found guilty on all six counts in which he was charged, (Datil A21, 44), David Brown was found guilty on all seven counts in which he was charged, (D. Brown A376-77), and Richard Brown was found guilty of conspiracy (Count 1), wire fraud (Count 17), and mail fraud (Count 18), (Datil A21, R. Brown A53).

On March 31, 2006, the district court denied the defendants' Rule 29 and 33 motions. (Datil A144). The court found that there was ample evidence to support the jury's verdict.

Specifically, in rejecting the Rule 29 motions, the district court found that there was sufficient evidence that Datil, Richard Brown, and David Brown were aware of and knowingly participated in the conspiracy to defraud MMCA and the Shoreline customers and that the government had offered sufficient evidence that one or more of the overt acts charged in the indictment were committed by one or more members of the conspiracy. (Datil A158-67). The district court also found that the government had offered sufficient evidence to support the defendants' convictions on the substantive counts of mail fraud and wire fraud. (Datil A167-85).

The district court also denied the defendants' Rule 33 motions for a new trial. The district court rejected Datil's argument that a remark made by the prosecutor during his rebuttal summation was prejudicial to Datil. The district

court stated that the remark was a response to defense counsel's closing argument and found that the court's curative instructions were sufficient to counteract any misimpressions about the burden of proof that may have resulted from the remark. (Datil A186-89). The district court also noted the volume of the evidence of Datil's guilt presented by the government and concluded that the jury would have reached the same result absent the remark. (Datil A188-89).

The district court also rejected David Brown's argument that extrinsic impeachment evidence regarding Bruce Vetre's character had been improperly excluded. The district court reiterated its earlier ruling that Fed. R. Evid. 608(b) prohibited the testimony. (Datil A90-91).

## **Summary of Argument**

### **I. Nelson Datil**

Datil's claim of prosecutorial misconduct is subject to plain error review because he did not object until after the government's summation. Viewed in context, it is not clear or obvious that the prosecutor was commenting on Datil's failure to testify because the prosecutor referred to defense counsel by name and was responding to defense counsel's closing argument. Furthermore, the prosecutor's remark was made once; there was no pattern of improper comments. Additionally, the district court's curative instructions, provided to the jury the morning after the remark and again during the jury charge, eliminated any possibility of prejudice by explaining to the jury that the

government bore the burden of proof and that the jury was to ignore any suggestion to the contrary. Finally, the strong evidence of Datil's guilt rendered harmless any error that could have arisen from this remark. Accordingly, Datil's conviction should be affirmed.

## **II. David Brown**

The district court properly precluded David Brown from calling a witness to impeach testimony by the cooperating witness Bruce Vetre, because the only purpose for calling the witness would have been to impeach Vetre's character for truthfulness, and this kind of collateral testimony is prohibited by Federal Rule of Evidence 608(b). Furthermore, David Brown's argument, advanced for the first time on appeal, that the witness should have been allowed to testify under the doctrine of impeachment by contradiction, is unavailing because the statement in question was elicited on cross-examination and this doctrine has not been extended to such situations.

The district court properly charged the jury on conscious avoidance because there was a factual basis for the charge. The government presented sufficient evidence that David Brown was aware of a high probability that false information was being submitted to the victims of the fraud and deliberately avoided confirming it. Additionally, it was proper for the government to argue conscious avoidance while alternatively arguing actual knowledge. Furthermore, the instruction employed by the district court was an accurate statement of the law. Finally, there was no possibility of prejudicial error from the instruction because

the jury was properly instructed on actual knowledge and the evidence of David Brown's knowledge of the fraud was overwhelming.

Finally, the evidence presented at trial was sufficient to support David Brown's conspiracy and wire fraud convictions. David Brown's co-conspirators testified that David Brown not only knew of the fraud but also actively participated in it. Additionally, several customers of David Brown's testified that truthful employment and salary information that they gave to David Brown was falsely reported in their credit applications submitted to MMCA. Accordingly, David Brown's convictions should be affirmed.

### **III. Richard Brown**

Richard Brown's claim that his sentence is procedurally and substantively unreasonable has no merit. First, the district court properly considered the § 3553(a) factors and the arguments made by Richard Brown, and its reasoning on the record was sufficient. Second, Richard Brown's assertion that his sentence represents an unwarranted disparity in comparison to his co-defendants' sentences is without merit. Section 3553(a)(6) is intended to eliminate nationwide disparities, not simply those between co-defendants. Moreover, Richard Brown's significantly more extensive criminal history justifies any disparity in sentence. Accordingly, Richard Brown's sentence should be affirmed.

## **Argument**

### **I. Nelson Datil's Fifth Amendment right against self-incrimination was not violated by the prosecutor's remark.**

#### **A. Relevant facts**

During the course of the trial, the government introduced credit applications that it claimed Datil had falsified, (GSA 1385, 1402), as well as documents containing undisputed examples of Datil's handwriting, (GSA 1379, 1381-82). For example, the government introduced the application of Melissa Bailey, which contained false social security income of her co-signer and grandmother, Maria Ramos. (GSA 1402). The government argued during its summation that the jury could compare the Bailey credit application with the undisputed examples of Datil's handwriting and conclude that Datil had written the false social security income on the Bailey credit application. Specifically, the government noted that the manner in which Datil wrote the numbers 3 and 7 was distinctive and that the 3's and 7's on both the undisputed examples of his handwriting and the falsified Bailey credit application matched. (GSA 1185-86).

In his closing argument, Datil's counsel argued that the jury should reject the government's claim that Datil wrote the falsified Bailey credit application because Bailey and Ramos had not testified that they personally saw Datil write the application. (GSA 1290). In the government's

rebuttal summation, the prosecutor responded to this argument, stating:

Now, you saw the documents that the [the first prosecutor] put in front of you that show that it appears as Mr. Datil's handwriting. And Mr. Einhorn did not deny that it was his handwriting; he simply said Maria Ramos didn't say she saw it, or that Melissa Bailey didn't say she saw him write it. Well, he could have written it at the dealership before he drove up to Hartford.

(GSA 1354).

Defense counsel did not object to the prosecutor's remark during the course of the government's rebuttal, despite having previously interrupted the government's initial closing argument to object regarding an entirely separate issue. (GSA 1204-05, 1335-69). Instead, counsel waited until after the government's rebuttal summation was concluded, at which time he informed the court he had a motion to make which was addressed at a sidebar conference. (GSA 1369-70).

At sidebar, Datil's counsel argued that the prosecutor's statement that counsel failed to deny something impermissibly shifted the burden to Datil. (GSA 1369A-69G). At that time, the district court deferred ruling on the issue and sent the jury home. (GSA 1369D-69I).

The next morning, prior to any other activity before the jury, the district court issued curative oral instructions.

(Datil A54). These instructions stated that the government, not Datil, bore the burden of proof. Specifically, the court stated: “[I]n a criminal case, the Defendant has no burden to produce or to explain away any evidence. To the extent that the argument of government counsel called upon any defendant to explain away any evidence, such argument was improper, illegal, and should be ignored by you.” *Id.* Finally, the district court repeated this instruction in the jury charge, emphasizing again that the defendant in a criminal case bears no burden of calling any witnesses or producing any evidence. (Datil A65-66).

**B. Datil cannot meet the “substantial prejudice” test for reversal.**

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

A defendant is required to make an “immediate objection” to improper prosecutorial remarks during a summation and not wait until the conclusion of the summation and ask for a mistrial, as the defendant did in the instant case. *See United States v. Nasta*, 398 F.2d 283, 285 (2d Cir. 1968). When a party fails to object at trial and that failure is not deemed to be a waiver, this Court engages in “plain error” review. Under “plain error” review, this Court must determine whether:

- (1) there is an “error”;
- (2) the error is “clear or obvious, rather than subject to reasonable dispute”;
- (3) the error “affected the appellant’s substantial rights, which in the ordinary case means” it “affected the

outcome of the district court proceedings”; and (4) “the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.”

*United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 129 S. Ct. 1423 (2009)).

“A defendant bears a substantial burden in arguing for reversal on the basis of prosecutorial misconduct in the summation.” *United States v. Caracappa*, 614 F.3d 30, 41 (2d Cir. 2010). “Flaws in the government’s summation will require a new trial only in the *rare* case in which improper statements—viewed against the entire argument to the jury—can be said to have deprived the defendant of a fair trial.” *Id.* (emphasis added).

This Court looks at three factors when considering whether an improper comment caused substantial prejudice: “1) the severity of the misconduct; 2) the measures the district court adopted to cure the misconduct; and 3) the certainty of conviction absent the improper statements.” *United States v. Burden*, 600 F.3d 204, 222 (2d Cir.), *cert. denied*, 2010 WL 2679068 (Oct. 4, 2010) (No. 10-5153).

## **2. Discussion**

Datil’s claim lacks merit and should be rejected. Given his failure to object during the summation to the statement at issue, his claim is subject to review on appeal only for “plain error.” Datil cannot establish plain error. It is not

clear or obvious that the prosecutor was commenting on Datil's failure to testify. Furthermore, the district court's curative instructions were highly effective, and the evidence of Datil's guilt was very strong. Accordingly, the Court should affirm Datil's conviction.

**a. The prosecutor's statement was not clearly or obviously improper.**

The prosecutor's remark in the instant case was not clearly or obviously an improper comment on Datil's exercise of his Fifth Amendment privilege. Rather, the remark was a response to defense counsel's argument that the government needed to produce an eyewitness in order to prove that Datil wrote the fraudulent credit application. Remarks about the defense's failure to rebut elements of the prosecution's case or failure to support elements of the defense with witnesses, especially when made in response to a defense counsel's closing argument, are not necessarily commentary on a defendant's failure to testify. *See United States v. Bubar*, 567 F.2d 192, 199-200 & n.8 (2d Cir. 1977) (finding no violation where prosecutor commented on defendants' failure to rebut government's case, including one defendant's failure to refute fingerprint evidence); *United States v. Walker*, 835 F.2d 983, 988-90 (2d Cir. 1987) (remarks suggesting defendant had some obligation to make a case were less harmful because they were a response to the defense's argument); *United States v. Leak ex rel. Follette*, 418 F.2d 1266, 1268-70 (2d Cir. 1969) (Fifth Amendment does not prohibit prosecution from pointing out uncontradicted elements of its case during closing argument).

As an additional matter, because the remark explicitly named defense counsel, rather than Datil, the jury could not “naturally and necessarily” have interpreted it as a comment on Datil’s decision not to testify. *Leak*, 418 F.2d at 1269. Remarks referring to the defense counsel are to be distinguished from those referring to a defendant. *See United States v. Wasserteil*, 641 F.2d 704, 709-10 (9th Cir. 1981) (holding that a “comment on the failure of the defense as opposed to the defendant to counter or explain the testimony presented or evidence introduced is not an infringement of the defendant’s Fifth Amendment privilege”) (internal quotation marks omitted).

Finally, the prosecutor’s remark was a single isolated statement. As this Court has stated, “[e]ven where the prosecutor’s argument was clearly impermissible, we have been reluctant to reverse where the transgression was isolated.” *United States v. Parker*, 903 F.2d 91, 98 (2d Cir. 1990). Datil cites *Floyd v. Meachum*, 907 F.2d 347 (2d Cir. 1990), for the proposition that prejudicial remarks during closing argument may provide stronger grounds for reversal because the timing of the remarks denies a defendant the opportunity to respond. However, *Meachum* specifically distinguishes situations (such as this one) involving “one, or a few isolated, brief episodes,” from the “repeated and escalating prosecutorial misconduct from initial to closing summation.” *Id.* at 353.

**b. The district court's instructions cured any possibility of prejudice.**

The second factor for determining whether an improper comment caused substantial prejudice is the measure the court took to cure the misconduct. *Burden*, 600 F.3d at 222. Here, the district court's curative instruction following the rebuttal and again during the jury charge negated any possibility of prejudice. This Court has held that even a clearly improper statement claiming outright that a defendant has the burden of proof is curable by proper instructions. *Walker*, 835 F.2d at 988 (“[P]roper instructions by the trial court may suffice to prevent undue prejudice and make the misconduct harmless.”).

In the instant case, the curative instruction given was nearly identical to that given by the district court in *Bubar*. *Compare* *Datil* A54 (“[I]n a criminal case, the Defendant has no burden to produce or to explain away any evidence. To the extent that the argument of government counsel called upon any defendant to explain away any evidence, such argument was improper, illegal, and should be ignored by you.”), *with Bubar*, 567 F.2d at 200 n.10 (“(T)o whatever extent the argument of government counsel called upon any defendant to testify or to explain away any evidence, to whatever extent that may have occurred, such argument was improper, uncalled for and illegal.”). This Court described the charge in *Bubar* as an “emphatic” curative instruction that “nipped in the bud” “any conceivable misunderstanding on the part of the jury.” 567 F.2d at 200.

**c. The evidence against Datil was strong.**

Finally, Datil's conviction was certain even absent the alleged statement. *Burden*, 600 F.3d at 222. Strong evidence of a defendant's guilt can render harmless a possibly prejudicial remark. *Id.*

As presented at trial, Datil admitted that he knew that customers' incomes and employment status were falsified in order to obtain financing from Mitsubishi. (GSA 71-73). Additionally, according to cooperating witnesses, as a salesman, Datil necessarily attended "Saturday Sales Meetings" where the workings of the fraud were openly discussed. (D. Brown A99, 104-07; GSA 890-91). Furthermore, a number of customers testified that they provided truthful employment and income information to Datil and that the information was falsified on their loan applications submitted electronically to MMCA. (*See, e.g.*, GSA 327-57, 595-96, 1965-74). Finally, several customers testified that Datil failed to inform them about balloon payments, (*see, e.g.*, GSA 279-80), and included hidden charges in their contracts, (*see, e.g.*, GSA 274-78). Thus, even disregarding the prosecutor's remark during the rebuttal summation, the evidence was more than sufficient to convict Datil and therefore any error was harmless.

## **II. David Brown's claims are without merit.**

David Brown argues that: (1) the district court abused its discretion in precluding him from calling a witness to contradict testimony on a collateral issue given by a government witness on cross-examination; (2) the district court erred in instructing the jury on conscious avoidance of guilty knowledge; and (3) there was insufficient evidence to support his conviction. These arguments are all without merit.

### **A. The district court did not abuse its discretion in excluding extrinsic impeachment evidence.**

#### **1. Relevant Facts**

At trial, Bruce Vetre, a co-conspirator and government cooperator, testified on direct examination that he submitted a false credit application when leasing a Lexus vehicle for his own personal use. (D. Brown A173-75). On cross-examination, defense counsel for Brown inquired about the Lexus lease, and the following exchange took place:

Q: Was there a time when you wanted to get rid of that vehicle?

A: Yes.

Q: Did you speak to anyone about having it brought to a chop shop?

A: No.

(D. Brown A225-26). The defense later sought to call

James Jarmon, who apparently would have testified that Vetre did ask him and others to help dispose of the Lexus. (GSA 1107-13).

On August 26, 2005, the government filed a motion in limine to preclude the testimony of Jarmon, as extrinsic evidence on a collateral matter. (D. Brown A284-85). The government argued that Jarmon's testimony should be excluded under Fed. R. Evid. 608(b) because the only purpose of the testimony would be to attack Vetre's credibility. The district court agreed, granting the government's motion on August 29, 2005. (GSA 1107-13).

## **2. Governing law and standard of review**

This Court reviews for abuse of discretion the district court's decision to admit or reject evidence offered to impeach a witness. *See United States v. Ramirez*, 609 F.3d 495, 499 (2d Cir. 2010). The district court's rulings in this regard are subject to reversal only where manifestly erroneous or wholly arbitrary and irrational. *See United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003) (manifestly erroneous); *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001) (arbitrary and irrational).

A witness's testimony regarding past conduct generally cannot be impeached by the introduction of extrinsic evidence. Rule 608(b) of the Federal Rule of Evidence states, in relevant part:

Specific instances of the conduct of  
a witness, for the purpose of

attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.

Fed. R. Evid. 608(b). The witness may be cross-examined regarding alleged untruthful misconduct, but if on cross-examination the witness denies engaging in such conduct, the cross-examiner may not introduce extrinsic evidence to contradict the witness's denial through the testimony of other witnesses, or indeed through any evidence other than the cross-examination itself. *See United States v. Purdy*, 144 F.3d 241, 245-46 (2d Cir. 1998) (defense correctly precluded from calling agent to impeach government witness regarding exact number of kickback-procured contracts); *Ricketts v. Hartford*, 74 F.3d 1397, 1413 (2d Cir. 1996) (offer of hospital records to impeach testimony that excessive force not used); *United States v. Dorfinan*, 470 F.2d 246, 248 (2d Cir. 1973) (no error in excluding extrinsic evidence showing witness had made inconsistent statements).

Finally, a district court's erroneous decision with regard to the exclusion of evidence will be harmless and the judgment should stand "[i]f, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect." *Kotteakos v. United States*, 328 U.S. 750, 764 (1946). Similarly, in the related context of the admission of evidence, this Court has held that a district court's error is harmless where it "had no substantial and injurious effect or influence on the jury

verdict,” judged in relation to the total evidence on the issue. *United States v. Garcia*, 413 F.3d 201, 217 (2d Cir. 2005) (internal quotation marks omitted).

The law concerning plain error review is set forth in part I.B.1, above.

### **3. Discussion**

#### **a. The evidence was inadmissible under Rule 608(b).**

The district court acted within its discretion to exclude the testimony of Jarmon regarding his alleged conversation with Vetre about disposing Vetre’s Lexus. This was a collateral issue with no bearing on the charges for which Brown was tried and convicted. The only purpose of the proposed testimony was to attack Vetre’s credibility; as the district court correctly ruled, the use of this type of extrinsic evidence to impeach a witness’s character for truthfulness is prohibited by Rule 608(b).

#### **b. The district court did not plainly err in refusing to admit the evidence under impeachment by contradiction principles.**

For the first time on appeal, David Brown argues that the district court should have allowed him to admit the proposed extrinsic evidence under the doctrine of impeachment by contradiction. (D. Brown Br. at 28). Because he did not raise this argument below, this claim is reviewed for plain error.

There was no plain error here. *Puckett*, 129 S. Ct. at 1429. Evidence introduced to impeach by contradiction is not governed by Rule 608(b), because Rule 608(b) only prohibits the introduction of extrinsic evidence where the theory of relevance is impeachment by prior misconduct. 4 Weinstein’s Federal Evidence § 608.20[3][a] (2010). The principle of impeachment by contradiction provides that when a defendant testifies at trial and makes a false or misleading statement, the government is entitled to introduce extrinsic evidence that proves the testimony is false. *See, e.g., Ramirez*, 609 F.3d at 499-501; *United States v. Beverly*, 5 F.3d 633, 639-40 (2d Cir. 1993); *United States v. Garcia*, 900 F.2d 571, 575-76 (2d Cir. 1990).

The principle of impeachment by contradiction, however, has so far been limited to situations “[w]here a defendant testifies on *direct* about a specific fact.” *Beverly*, 5 F.3d at 639 (emphasis added). Courts have not extended this rule to the impeachment of testimony given on cross-examination. Indeed, this Court recently noted that: “[i]t is an open question in our Court whether the government can present extrinsic evidence to impeach by contradiction a statement made by the defendant on *cross-examination*, where such evidence would otherwise be barred by the Federal Rules of Evidence.” *Ramirez*, 609 F.3d at 499-500. The Court noted further that although it has previously held that “a defendant’s statements on cross-examination may be impeached by evidence otherwise suppressed under the *exclusionary rule* . . . [the Court has] been reluctant to extend this principle to evidence prohibited by the Federal Rules of Evidence,

which often serve different policy goals.” *Id.* at 500 n.1 (emphasis added).

Indeed, even the case cited by David Brown, *United States v. Castillo*, 181 F.3d 1129 (9th Cir. 1999), notes that, while there may be *some* circumstances where testimony given during cross-examination may be impeached by contradiction, generally,

extrinsic evidence may not be admitted to impeach testimony invited by questions posed during cross-examination. This is a significant distinction recognized by many authorities. Courts are more willing to permit, and commentators more willing to endorse, impeachment by contradiction where, as occurred in this case, testimony is volunteered on direct examination. The distinction between direct and cross-examination recognizes that opposing counsel may manipulate questions to trap an unwary witness into “volunteering” statements on cross-examination.

181 F.3d at 1133 (internal citation omitted). Accordingly, because this doctrine has not been applied to situations such as the case at hand, the district court committed no *plain* error in precluding David Brown from introducing extrinsic evidence in response to a question posed to a witness on cross-examination, and, thus, David Brown’s claim must be rejected.

**c. In the alternative, any error by the district court in granting the government's motion to preclude was harmless.**

Finally, even if the exclusion of Jarmon's testimony were to be found to have exceeded the district court's discretion, any error would be harmless. The strength of the prosecution's case is the "single most critical factor" in assessing whether an evidentiary error is harmless. *United States v. Lombardozzi*, 491 F.3d 61, 76 (2d Cir. 2007) (internal quotation marks omitted). Here, it is implausible that the jury would have disregarded the testimony of Vetre based on Jarmon's testimony, since the jury apparently credited Vetre's testimony even after he admitted he was a co-conspirator, participated in the fraud, purchased postal money orders to lie to MMCA, and committed fraud on the Lexus purchase. (D. Brown A174-75). Indeed, David Brown admits that Vetre was "vigorously cross-examined by all counsel and especially by counsel for the defendant [David] Brown." (D. Brown Br. at 5). Furthermore, the evidence against David Brown was very strong. *See* Parts II.B.3.c. and II.C., below. Accordingly, any error was harmless and David Brown's convictions should not be disturbed.

**B. The district court properly instructed the jury on the issue of conscious avoidance.**

**1. Relevant Facts**

As part of the jury charge, the district court charged the jury that the government must prove that David Brown “participated in the scheme to defraud knowingly, willfully and with specific intent to defraud.” (D. Brown A347-48). The district court stated further:

The Government can also meet [its] burden [of proving knowledge] by showing that the Defendant had knowledge of the falsity of his statements if it in fact showed beyond a reasonable doubt that he acted with deliberate disregard of whether the witness’s statements were true or false, or with a conscious purpose to avoid learning the truth. If the Government establishes that the Defendant acted with deliberate disregard for the truth, the knowledge requirement would be satisfied unless the Defendant actually believed his statements to be true. This guilty knowledge, however, cannot be established by demonstrating that the Defendant was merely negligent or foolish.

(D. Brown A350-51).

## 2. Governing law and standard of review

This Court reviews challenges to jury instructions *de novo*. *United States v. Amato*, 540 F.3d 153, 164 (2d Cir. 2008). Reversal is appropriate only where, “viewing the charge as a whole, there was a prejudicial error.” *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003).

A jury instruction on conscious avoidance is appropriate when “(a) the element of knowledge is in dispute, and (b) the evidence would permit a rational juror to conclude beyond a reasonable doubt ‘that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.’” *United States v. Hopkins*, 53 F.3d 533, 542 (2d Cir. 1995) (quoting *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993)).

“[T]he same evidence that will raise an inference that the defendant had actual knowledge of the illegal conduct ordinarily will also raise the inference that the defendant was subjectively aware of a high probability of the existence of illegal conduct.” *United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003) (internal quotation marks omitted). Additionally, a defendant can be found to have consciously avoided confirming a fact in dispute where a defendant’s “involvement in the criminal offense may have been *so overwhelmingly suspicious* that the defendant’s failure to question the suspicious circumstances establishes the defendant’s purposeful contrivance to avoid guilty knowledge.” *Id.* (internal quotation marks omitted) (emphasis in original).

Furthermore, the government may rely primarily on evidence of actual knowledge while alternatively arguing conscious avoidance. *See United States v. Jacobs*, 117 F.3d 82, 98 (2d Cir. 1997) (“Even when the government attempts to prove actual knowledge, an instruction on conscious avoidance can still be appropriate.”).

Finally, even if there had been insufficient evidence to justify an instruction on conscious avoidance, reversal would not be warranted if the jury was instructed on actual knowledge and there was substantial evidence of actual knowledge. *See United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000).

### **3. Discussion**

#### **a. There was factual basis for the charge.**

David Brown does not dispute that he denied knowing about the fraudulent scheme at Shoreline, indeed, that was the gravamen of his defense. In his brief, he argues that “the only evidence by the government was that [he] engaged in deliberate acts and there was no proof that [he] decided not to learn the key facts in the case.” (D. Brown Br. at 23). Even in opening statements at trial, counsel for David Brown stated that David Brown’s theory was that “the fraud . . . may or may not have been committed, but the question you have to resolve [is]: was David Brown involved in the commission.” (GSA 15). During the trial, through questions by counsel, David Brown and the other defendants sought to establish their theory that the fraud was perpetrated by members of the

finance department, not the salesmen. (GSA 149-50, 234, 241, 739, 773, 868). In his closing, counsel for David Brown again advanced the theory that it was the individuals in finance department who committed the fraud. (GSA 1245-26).

However, the government introduced evidence that any asserted lack of knowledge by David Brown could only have been through “conscious avoidance.” For instance, the testimony of Detective Kevin Potter of the Branford Police Department revealed that when David Brown spoke to Potter, Brown himself “indicated that there were some corrupt things going there on but he had no part of it.” (GSA 62-63, 80). The record also reveals that, on certain deals, David Brown drafted credit applications for customers who did not qualify for credit and left certain fields blank so that his managers could fill in those fields in a way that would make MMCA grant the credit application. (D. Brown A162-63). Furthermore, the record also reveals that David Brown was required to be and was at the Saturday Sales meetings at which inflating customers income was openly discussed. (GSA 964-66; D. Brown A99, A105-06).

Accordingly, based on counsel’s theory that David Brown was not involved and had no knowledge of the fraud and David Brown own asserted a lack of involvement and asserted lack of knowledge, it was appropriate for the government to argue that the only way David Brown could not have known the details of the fraud would have been through an effort to consciously avoid learning the truth. Furthermore, based on Brown’s

assertion that he was not aware that the blank forms he was passing along would be used to commit fraud, it was also appropriate for the government to argue that the only way David Brown could not have been aware of this fact would have been through conscious avoidance. Furthermore, it was appropriate for the government to argue conscious avoidance as an alternative argument to actual knowledge. *Jacobs*, 117 F.3d at 98.

**b. The wording of the instruction was proper.**

In his appellate brief, David Brown does not argue that the wording of the conscious avoidance instruction was improper. He raised it only in his motion for bail pending appeal before this Court, citing *United States v. Kaiser*, 609 F.3d 556 (2d Cir. 2010), and in a letter submitted pursuant to Federal Rules of Appellate Procedure 28(j).<sup>2</sup> Accordingly, the claim is waived. *See United States v. Pereira*, 465 F.3d 515, 520 n.5 (2d Cir. 2006). In any event, even if reviewed for plain error, the defendant's argument is meritless.

In *Kaiser*, this Court vacated the defendant's conviction finding there was error because the Court's conscious avoidance instruction did not communicate two essential points, and because the failure to do so seriously affected the fairness, integrity or public reputation of the

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<sup>2</sup> *But see* Fed. R. App. P. 28(j); *United States v. Bartnovsky*, 820 F.2d 572, 75 (2d Cir. 1987) (providing that a defendant cannot raise a new argument in a 28(j) letter).

judicial proceedings. *Kaiser*, 609 F.3d at 567. In *Kaiser*, the trial court failed to instruct the jury that knowledge of the existence of a particular fact could be established if the defendant was aware of a “high probability” of its existence, unless the defendant “actually believed” that it did not exist. *Id.* at 566. The *Kaiser* Court noted that it has long required those two elements under *United States v. Shultz*, 333 F.3d 393, 413 (2d Cir. 2003), and other cases. *Id.*

The *Kaiser* Court was concerned that in the absence of the “high probability” language, there was some risk that the jury could have convicted the defendant if it found he were merely negligent. *Id.* The Court was also concerned that in the absence of the “actual belief” language, the jury could have convicted *Kaiser* even if it concluded he had an “actual belief” that the particular facts were correct. Neither of those potential risks is present here.

As to the “actually believes” language, the district court explicitly instructed the jury on actual belief and even employed the precise words. In that regard, the district court instructed that “[i]f the Government establishes that the defendant acted with deliberate disregard for the truth, the knowledge requirement would be satisfied unless the Defendant actually believed his statements to be true.” (D. Brown A350-51). Therefore, this error present in *Kaiser* is not present here.

As to the “high probability” language, the charge given by the district court below did not include the precisely quote the language “high probability.” However,

the instruction given by the district court explicitly instructed the jury that conscious avoidance “cannot be established by demonstrating that the Defendant was merely negligent or foolish.” (D. Brown A350-51). Accordingly, this Court’s concern about the lack of the “high probability” language as articulated in *Kaiser* namely, the risk the jury could convict based on negligence, was eliminated by the whole of the district court’s charge. Thus, there was no error.

Moreover, as this Court explained in *Kaiser*, the “high probability” language does not have “talismanic weight,” but the idea should be conveyed. *Kaiser*, 609 F.3d at 566. Moreover, in *Shultz*, the Court stated that “no jury charge is perfect” and that this Court does not review a jury instruction to determine whether it precisely quotes language suggested by appellate precedent, but whether considered as a whole it adequately communicated the essential ideas to the jury. *Shultz*, 333 F.3d at 413 (citing *United States v. Joyner*, 313 F.3d 40, 47 (2d Cir. 2002) and *United States v. Velez-Vasquez*, 116 F.3d 58, 61 (2d Cir. 1997)). By this measure, the two necessary elements were adequately conveyed and the risks sought to be avoided were obviated. Accordingly, there was no error.

**c. Any error in the charge was harmless.**

Finally, even assuming, *arguendo*, that there was insufficient evidence to warrant an instruction on conscious avoidance or that the wording of the instruction was improper, David Brown has failed to demonstrate prejudice. Ample evidence was presented to the jury that

Brown had actual knowledge of the fraud. *See Ferrarini*, 219 F.3d at 154; *Kaiser*, 609 F.3d at 566-67.

Two government witnesses testified that an unlawful agreement to falsify credit applications was discussed during “Saturday Sales Meetings” mandatorily attended by all managers and salespersons, including David Brown. (D. Brown A99, 104-07; GSA 890-91). Additionally, Vetre testified that Brown instructed him to include false information on credit applications. (D. Brown A145-46, A170-73, 223-24). Vetre also testified that David Brown was aware of, and profited from, the provision of falsified money orders to MMCA to give the appearance that a customer’s outstanding debt had been paid so that the customer could obtain a loan from MMCA. (GSA 218-21). Furthermore, several former customers of David Brown’s testified that truthful employment and salary information that they gave to David Brown was falsely reported in their credit applications submitted to MMCA, (GSA 112-22, 168-69, 264-72), and a reasonable juror could therefore infer that David Brown submitted the false information. In sum, because the government introduced ample evidence of Brown’s actual knowledge of the fraudulent scheme, there is no reasonable probability that the jury convicted David Brown on a conscious avoidance charge and that the jury would not have done so but for the claimed instructional error. Accordingly, any error in the charge was harmless.

**C. The evidence presented at trial was sufficient to support David Brown’s convictions on the conspiracy and wire fraud charges.**

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

**a. Sufficiency of the evidence**

An appellant arguing that there was insufficient evidence to support a conviction bears “a very heavy burden.” *United States v. Losada*, 674 F.2d 167, 173 (2d Cir. 1982). This Court reviews challenges to the sufficiency of the evidence *de novo*, *United States v. Yannotti*, 541 F.3d 112, 120 (2d Cir. 2008), and on review the Court “must view the evidence in the light most favorable to the government” and “must draw all permissible inferences in its favor,” *United States v. Pedroza*, 750 F.2d 187, 198 (2d Cir. 1984). A reviewing court applies this sufficiency test “to the totality of the government’s case and not to each element, as each fact may gain color from others.” *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999). “The ultimate question is not whether *we believe* the evidence adduced at trial established defendant’s guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find.*” *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998).

**b. Elements of the conspiracy and wire fraud offenses**

To prove a conspiracy, the government must prove that (1) an agreement exists between two or more persons to

commit an unlawful act; (2) the defendants knowingly engaged in the conspiracy intending to commit those offenses that were the objects of the conspiracy; and (3) one or more members of the conspiracy committed an “overt act” in furtherance of the conspiracy. *United States v. Reyes*, 302 F.3d 48, 53 (2d Cir. 2002).

In this case, the government alleged that the defendants, and others, conspired to violate the mail fraud and wire fraud statutes found at 18 U.S.C. § 1341 and 18 U.S.C. § 1343, respectively. Those statutes require the government to prove (1) a scheme to defraud, (2) to obtain money or property, that is (3) furthered by the use of interstate mail or wires. *United States v. Autuori*, 212 F.3d 105, 115 (2d Cir. 2000).

## **2. Discussion**

### **a. There was sufficient evidence to convict David Brown on Count One, charging conspiracy to commit mail fraud and wire fraud.**

As to Count One, charging David Brown with conspiracy to commit mail fraud and wire fraud, David Brown challenges the credibility of Bruce Vetre, the government witness who testified extensively about David Brown’s involvement in the fraud at Shoreline. (D. Brown Br. at 18-20). David Brown argues that Vetre’s testimony that David Brown was present at a meeting where the fraud was discussed, (D.Brown A99, 104-07, 219), is incredible because Vetre could not remember all of the

attendees of the meeting, (D. Brown Br. at 19).

Contrary to David Brown's claim on appeal, Vetre's testimony was not incredible on its face and was properly accepted by the jury. *See United States v. Hamilton*, 334 F.3d 170, 179 (2d Cir. 2003) ("The 'testimony of a single accomplice' is sufficient to sustain a conviction 'so long as that testimony is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt.'") (quoting *United States v. Gordon*, 987 F.2d 902, 906 (2d Cir. 1993)). Only in "exceptional circumstances," such as when a witness's testimony "defies physical realities," may a trial judge "intrude upon the jury function of credibility assessment." *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992).

Vetre's testimony that David Brown was present at the meeting where the fraud was discussed is consistent with Vetre's other testimony that *all* Shoreline salesmen were required to attend the Saturday morning meetings or they would be fired. (D. Brown A105). Additionally, Vetre's testimony is consistent with and corroborated by that of Shoreline employee Jose Concepcion, who testified that all salesmen, and thus, David Brown, were present at a Saturday meeting where the policy of inflating customers' income was openly discussed. (GSA 890-91).

Furthermore, the defense aggressively cross-examined Vetre on his criminal conduct and the benefits he hoped to receive from the government as a result of his cooperation. (D. Brown A211-15). David Brown's counsel also argued extensively in summation that Vetre should not be

believed. (GSA 1237-38, 1250-51, 1256-57). The jury, therefore, had the opportunity to weigh the factors in favor of and against Vetre's credibility, and by its verdict it clearly accepted Vetre's testimony. "To the extent [the defendant] challenges the accomplice[']s credibility based on [his] plea agreement[] with the government and [his] long histor[y] of criminal and dishonest behavior, he simply repeats facts and arguments already presented to the jury." *United States v. Florez*, 447 F.3d 145, 156 (2d Cir. 2006). In such a circumstance, this Court "will not attempt to second-guess a jury's credibility determination on a sufficiency challenge." *Id.* Accordingly, David Brown's challenge as to Count One fails.

**b. There was sufficient evidence to convict David Brown on Count Three of the Indictment, charging wire fraud.**

David Brown also challenges his conviction for wire fraud on Count Three of the indictment, which relates to the fraud involved in the automobile purchase by Wesley and Shirley Witcher. David Brown argues that the Witchers' testimony concerning this deal was "patently incredible" and no reasonable jury could have believed it. (D. Brown Br. at 10).

In support of his assertion that the Witchers could not be believed, David Brown cites the following: (1) Wesley Witcher testified that he did not realize that the credit application would be sent to a finance company; (2) Wesley Witcher failed to identify David Brown in court; (3) Wesley Witcher's testimony conflicted with that of

Shirley Witcher as to whether her foster child was with her at the time of the loan signing; and (4) Shirley Witcher's testimony as to the foster child issue conflicted with her own previous statements during an interview with an agent of the Federal Bureau of Investigation. (D. Brown Br. at 10).

Again, the Court "simply cannot replace the jury's credibility determinations with [its] own." *United States v. James*, 239 F.3d 120, 124 (2d Cir. 2000) (internal quotation marks omitted). The points noted above do not render the Witchers' testimony incredible on its face. Moreover, David Brown is incorrect that the Witcher's testimony that they provided truthful employment and income information to him, but that the information was falsified on their loan applications submitted electronically to MMCA, is insufficient to support his conviction. The jury could infer David Brown either changed financial information or knew a manager would do so in order to gain credit approval.

The jury also credited the testimony of Vetre, who testified that David Brown "quite often" would leave the income blank on customers' credit applications and that David Brown instructed Vetre to fill in a figure for the income that would "match" the monthly payment for the loan on occasion. (D. Brown A145-46, 162). Another government witness, Jose Concepcion, corroborated the testimony of Vetre and testified that David Brown gave Concepcion at least one blank credit application. (GSA 899-01). The customers' testimony, coupled with that of the co-conspirators, was sufficient for the jury to convict

David Brown on this count.

**c. There was sufficient evidence to convict David Brown on Counts Four and Five of the Indictment, charging wire fraud.**

David Brown also challenges his conviction for wire fraud on Counts Four and Five, which relate to the fraudulent credit applications connected to Andrea Williams. Again, while David Brown does not challenge that he assisted Williams with her car purchases, he challenges Vetre's testimony, (D. Brown A220-22), that David Brown was involved in the false representation to MMCA that Williams's prior loan had been paid off. (D. Brown Br. at 12). However, Andrea Williams testified that she gave the credit application information to David Brown and that David Brown was her salesman on the deal. (GSA 192-97, 221-24). The jury could infer, therefore, that, as the salesman on the deal, David Brown was the person who informed Vetre and that Williams's loan needed to be paid off in order for her credit application to be granted.

In light of the foregoing, together with Vetre's testimony that David Brown was aware of and involved in the fraud at Shoreline, as evidenced by his attendance at Saturday sales meetings at which the fraud was discussed, (D. Brown A99, 104-07; GSA 890-91), and his instruction to Vetre to include false information in other customers' applications, (D. Brown A145-46, 162), the jury could have reasonably found that David Brown was involved in

the fraudulent Williams credit application and convicted David Brown of Counts Four and Five.

**d. There was sufficient evidence to convict David Brown on Counts Ten, Fifteen and Twenty One of the Indictment, charging wire fraud.**

David Brown also challenges his conviction for wire fraud on Count Ten of the indictment, which relates to the automobile purchase of Gwendolyn Morgan and Lisa Browdy, Count Fifteen, which relates to the purchase by Pamela and Marie Bozzuto, and Count Twenty-One, which relates to Paul and Genevieve DiMauro. (D. Brown Br. at 14-18).

Each of these customers testified that they provided truthful employment and income information to David Brown and that the information was falsified on their loan applications submitted electronically to MMCA. (Morgan/Browdy: GSA 851-53, 869; Bozzuto: GSA 1063-64; DiMauros: GSA 719-22, 758-59, 763). As the salesman on the deals, David Brown was responsible for collecting the customers' financial information. (GSA 893-94). Moreover, as to the Bozzutos, Vetre testified that David Brown instructed him to fill in false employment information in the Bozzutos' credit application and that David Brown was sitting next to Vetre as Vetre used the internet software system to send the false information to MMCA. (D. Brown A170-73, 223-24).

This evidence, together with Vetre's testimony that David Brown was aware of and involved in the fraud at Shoreline, as evidenced by his attendance at Saturday sales meetings at which the fraud was discussed, (D. Brown A99, 104-07; GSA 890-91), and his instruction to Vetre to include false information in other customers' applications, (D. Brown A145-46, 162), was a sufficient basis for the jury to convict David Brown on these counts.

### **III. Richard Brown's sentence was procedurally and substantively reasonable.**

Richard Brown argues that his sentence is procedurally and substantively unreasonable, claiming: (1) the district court failed to address his sentencing arguments as to role and criminal history; (2) the district court failed to consider the § 3553(a) factors; (3) the district court failed to articulate its consideration of the § 3553(a) factors; and (4) there is an unwarranted disparity between his sentence and the sentences of his co-defendants.

#### **A. Relevant facts**

On August 2, 2009, the government filed a seventy-one-page sentencing memorandum addressing all of the trial defendants, including Richard Brown. (GSA 1460-1535). The sentencing memorandum set forth the § 3553(a) factors and a detailed discussion of the nature and circumstances of the offense and the history and characteristics of the defendants. The memorandum also included detailed charts that compared the various

defendants and provided information regarding the defendants and their co-conspirators and their involvement in the conspiracy. (R. Brown A26). (GSA 1460, 1476-78). The memorandum addressed the guideline calculation of Richard Brown (and the other defendants), the government's position that there were no applicable departures for Richard Brown, and Richard Brown's extensive criminal history. (GSA 1484-85).

Richard Brown's extensive criminal history included one conviction for larceny of a motor vehicle, one conviction for larceny in the sixth degree, one conviction for larceny in the third degree, one conviction for possession of burglarious implements, five separate convictions for failure to appear, one conviction for breach of the peace, two convictions for assault in the third degree, one conviction for interfering with/resisting a law officer, one conviction for possession of a pistol without a permit, two violations of a protective order taken out against him by his estranged wife, and one conviction for making threats against the same woman. (R. Brown PSR ¶¶ 71-86). These violations occurred from approximately January of 1983 until approximately August of 1999, less than two years from the beginning of the conspiracy for which Richard Brown was convicted. Richard Brown's criminal history placed him in Criminal History Category V of the Sentencing Guidelines. (*Id.* at ¶ 87).

On August 5, 2009, Richard Brown filed a sentencing memorandum that requested a departure from the Guidelines range calculated in the PSR based on his minor role in the offense and on the ground that his Criminal

History Category V overstated the seriousness of his criminal history. (R. Brown A46-47). For example, the defense argued that Richard Brown's history of domestic abuse, which included multiple convictions for assault, as well as death threats, and which defense counsel described as "a relationship that went sour," should be given less weight. *Id.* at 47. On August 6, 2009, the government filed a reply memorandum rebutting Richard Brown's arguments and urging the court to reject his requests for departure. (GSA 1560-69).

On August 6, 2009, the district court conducted a sentencing hearing. At the hearing, the district court acknowledged Richard Brown's memorandum challenging the PSR, (R. Brown A69), and heard oral arguments from the government and defense counsel on the issues of Richard Brown's criminal history, (R. Brown A70-73, 83-92, and his relative culpability and role in the offense compared against the other defendants, (R. Brown A73-80). Richard Brown also personally addressed the district court. (R. Brown A80).

The district court adopted the PSR and determined Richard Brown's Guidelines calculations accepting the calculations in the PSR. (R. Brown A94). The district court imposed a sentence of 60 months, stating:

He was found guilty of Count One,  
Seventeen and Eighteen.

The maximum sentence under Count One statutorily is 5 years, 60 months, and the Court imposes 60 months.

With respect to Counts Seventeen and Eighteen, the maximum sentence is 30 years, but I think concurrent sentences of 60 months on each of those counts is appropriate, given the trial that I sat through, my knowledge of the case, and Mr. Brown's participation in this conspiracy. I think a total sentence of 60 months incarceration is appropriate.

(R. Brown A94).

Immediately following this imposition of sentence, the Probation Officer noted that its recommendation to the district court noted an incorrect adjusted offense level of 28 and that the PSR contained an incorrect adjusted offense level of 26. (R. Brown A98-102). The parties then determined that the correct offense level, using the 2001 version of the Guidelines, was 24, and with a Criminal History Category of V, resulted in a range of imprisonment of 92 to 115 months. (R. Brown A103). The district court stated three times that because it gave a "non-guideline sentence," the correction was academic and did not affect the district court's decision. (R. Brown A99, 102, 103).

## **B. Governing law and standard of review**

At sentencing, a district court must begin by calculating the applicable Guidelines range. *See United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc), *cert. denied*, 129 S. Ct. 2735 (2009). After giving both parties an opportunity to be heard, the district court should then consider all of the factors under 18 U.S.C. § 3553(a). *See Gall v. United States*, 552 U.S. 38, 49-50 (2007). In determining the length of a term of supervised release, a district court must consider the specific factors enumerated at 18 U.S.C. § 3553(a) applicable to supervised release. *See* 18 U.S.C. § 3583(c) (listing the § 3553(a) factors to be considered). This Court “presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the [§ 3553(a)] factors.” *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006).

Because the Guidelines are only advisory, district courts are “generally free to impose sentences outside the recommended range.” *Cavera*, 550 F.3d at 189. “When they do so, however, they ‘must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.’” *Id.* (quoting *Gall*, 552 U.S. at 50).

On appeal, a district court’s sentencing decision is reviewed for reasonableness. *See United States v. Booker*, 543 U.S. 220, 260-62 (2005). In this context, reasonableness has both procedural and substantive dimensions. *See United States v. Avello-Alvarez*, 430 F.3d

543, 545 (2d Cir. 2005) (citing *United States v. Crosby*, 397 F.3d 103, 114-15 (2d Cir. 2005)). “A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory.” *Cavera*, 550 F.3d at 190 (citations omitted). A district court also commits procedural error “if it does not consider the § 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact.” *Id.* Finally, a district court “errs if it fails adequately to explain its chosen sentence, and must include ‘an explanation for any deviation from the Guidelines range.’” *Id.* (quoting *Gall*, 552 U.S. at 51).

After reviewing for procedural error, this Court reviews the sentence for substantive reasonableness under a “deferential abuse-of-discretion standard.” *Cavera*, 550 F.3d at 189. The Court “will not substitute [its] own judgment for the district court’s”; rather, a district court’s sentence may be set aside “only in exceptional cases where [its] decision cannot be located within the range of permissible decisions.” *Id.* (internal quotation marks omitted); *see also United States v. Verkhoglyad*, 516 F.3d 122, 134 (2d Cir. 2008) (“Our review of sentences for reasonableness thus exhibits restraint, not micromanagement.”) (internal quotation marks omitted).

A sentence is substantively unreasonable only in the “rare case” where the sentence would “damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law.” *United States v. Rigas*,

583 F.3d 108, 123 (2d Cir. 2009), *cert. denied*, 2010 WL 2191203 (Oct. 04, 2010) (No. 09-1456). Finally, no one fact or statutory factor may dictate a particular sentence; rather “a district judge must contemplate the interplay among the many facts in the record and the statutory guideposts.” *Id.* at 29.

When a defendant fails to preserve an objection to the procedural reasonableness of a sentence, this Court reviews for plain error. *See Verkhoglyad*, 516 F.3d at 128; *United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir. 2007). To show plain error, a defendant must demonstrate “(1) error (2) that is plain and (3) affects substantial rights.” *Villafuerte*, 502 F.3d at 209. Even then, the Court will exercise its discretion to correct the error “only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.” *Id.* (internal quotation marks omitted). The Court has not yet decided whether the plain error standard applies when a defendant fails to preserve an objection to the substantive reasonableness of a sentence. *See Verkhoglyad*, 516 F.3d at 134.

### **C. Discussion**

#### **1. The district court adequately considered, and articulated its consideration of, Richard Brown’s sentencing arguments and the factors set forth in 18 U.S.C. § 3553(a).**

Richard Brown claims that the district court failed to address his sentencing arguments as to role and criminal

history, failed to consider the § 3553(a) factors, and failed to articulate its consideration of the § 3553(a) factors. None of these arguments were raised below. (R. Brown A94-97). Therefore, these claims are reviewed only for plain error. *See Verkhoglyad*, 516 F.3d at 128. Richard Brown cannot show any error, much less plain error, with respect to these claims.

First, the district court explicitly discussed Richard Brown's role and criminal history at the sentencing hearing. The district court indicated that it had received Richard Brown's memorandum challenging the PSR. (R. Brown A69). Then, after the defense counsel's remarks about role, and Richard Brown's statement to the court that he was "just in the wrong place . . . at the wrong time," the district court asked Richard Brown about a specific allegations in the PSR that he personally made false statements in a credit application. (R. Brown A80-81). The district court stated, specifically in the context of Richard Brown's request for a role reduction: "This would appear to suggest that Mr. Brown not only was aware of what was going on, but actually, at least in this one instance, that he was a one who filed the – or prepared the false credit application." (R. Brown A80). The district court went on to ask Richard Brown about allegations in the PSR that he personally stole a customer's down payment. (R. Brown A81). Accordingly, the district court's questions fully demonstrate that she considered Richard Brown's arguments as to role.

The district court also explicitly discussed Richard Brown's criminal history in the context of his request for a criminal history departure, stating:

[Defense counsel] comment[s] on the fact that [the defendant's] prior criminal history did not include any extensive periods of incarceration. You mentioned altogether it was a modest amount of time. That suggests to me that it would've been more appropriate for the state court to sentence higher to deter the Defendant.

(R. Brown A89).

Finally, the district court stated that Richard Brown's sentence was based on "the trial that I sat through, my knowledge of the case, and Mr. Brown's participation in the conspiracy." (R. Brown A94). Accordingly, the record makes clear that the district court considered the defendant's sentencing arguments as to role and criminal history.

Although the district court did not expressly mention the other § 3553(a) factors in imposing sentence, a district court need not "expressly parse or address every argument relating to those [§ 3553(a)] factors that the defendant advanced." *Fernandez*, 443 F.3d at 30. As this Court stated in *Fernandez*, the Court entertains "a strong presumption that the sentencing judge has considered all arguments presented to her, unless the record clearly suggests otherwise." *Id.* at 29. "This presumption is

especially forceful when, as was the case here, the sentencing judge makes abundantly clear that she has read the relevant submissions and that she has considered the § 3553(a) factors.” *Id.*

Richard Brown also challenges the adequacy of the district court’s articulation of its reasoning. As this Court has held repeatedly, however, a district court is under no obligation to recite each of the factors or explain its reasoning regarding them. “No ‘robotic incantations’ are required to prove the fact of consideration.” *Fernandez*, 443 F.3d at 30 (quoting *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005)). Where the arguments presented to the court are “straightforward [and] conceptually simple,” a brief statement by the sentencing court will suffice. *Rita v. United States*, 551 U.S. 338, 356 (2007). As the defense acknowledged, the district court was intimately familiar with the circumstances, details, and histories of the defendants and the offenses in question after presiding over a three-week trial and multiple sentencing hearings. (R. Brown A70). Additionally, the sentence was well below the Guidelines range, and this Court has stated that where “[t]he district court imposed a sentence at the bottom of the Guidelines range . . . such sentences often will not require lengthy explanation.” *Villafuerte*, 502 F.3d at 212. In light of the foregoing, the district court’s consideration of Richard Brown’s arguments and the § 3553(a) factors, and the district court’s articulation of its reasoning, were sufficient and do not amount to plain error.

**2. There is no unwarranted disparity between Richard Brown’s sentence and that of his co-defendants.**

Richard Brown argues that there is an unwarranted disparity between his 60-month sentence and that of his co-defendants, namely, Angel Hernandez, who received a sentence of 60 months (R. Brown A59), Nelson Datil, who received a sentence of 1 day (R. Brown A62), and David Brown, who received a sentence of 36 months (R. Brown A56). Richard Brown does not argue that his sentence is disparate from similarly-situated defendants nationally.

First, while a sentencing court is not precluded from considering sentencing disparities between co-defendants, the disparity that must be considered pursuant to 18 U.S.C. § 3553(a)(6) is that arising “nationwide” among similarly situated defendants. *See United States v. Frias*, 521 F.3d 229, 236 & n.8 (2d Cir. 2008).

In any event, Richard Brown’s claim fails because he is not similarly situated to his co-defendants because of his extensive criminal history. As this Court stated in *Fernandez*, “a disparity between *non-similarly situated* co-defendants is not a valid basis for a claim of error.” 443 F.3d at 28. Criminal history is “one of the two main variables in sentencing . . . . No valid comparison of sentences could be made without that information.” *United States v. Saez*, 444 F.3d 15, 18 (1st Cir. 2006).

Richard Brown’s criminal history is extensive. Prior to the instant case, Richard Brown had fifteen prior

convictions in addition to two violations of a protective order taken out against him by his estranged wife. (R. Brown PSR ¶¶ 71-86). This extensive criminal record placed him in Criminal History Category V, (R. Brown PSR ¶ 87), a much higher Criminal History Category than his co-defendants. Angel Hernandez, the leader of the conspiracy, was in Criminal History Category I. (R. Brown A147). Nelson Datil was in Criminal History Category III. (R. Brown A147; Datil PSR ¶75). David Brown was in Criminal History Category II. (R. Brown A204; D. Brown PSR ¶74).

In light of these Criminal History Categories and their respective offense levels, Richard Brown's co-defendants' ranges were as follows: Angel Hernandez: 121 to 151 months, (R. Brown A147), Nelson Datil: 63 to 78 months, (*id.*), and David Brown: 70 to 87 months, (R. Brown A220). As noted above, Angel Hernandez received a sentence of 60 months (R. Brown A59, A147); Nelson Datil received a sentence of 1 day, (R. Brown A62); and David Brown received a sentence of 36 months, (R. Brown A56).

Against this backdrop, Richard Brown's 60-month sentence is not disproportionate. Rather, it logically flows from his total offense level of 24 and his significantly higher criminal history which yielded a higher Guidelines range (92 to 115 months) than the other salesmen who went to trial, *i.e.*, Datil (63 to 78 months) and David Brown (70 to 87 months) and similar to that of Angel Hernandez (121 to 151 months) who was the leader and organizer and for whom additional sentencing

adjustments and enhancements applied. (GSA 1492-1501).

As noted above, in sentencing Richard Brown, the district court was specifically concerned about his extensive criminal history and noted that his previous lenient sentences had not promoted deterrence. (R. Brown A89). Thus it was entirely reasonable to sentence Richard Brown more severely than the other salesmen and to the same term of imprisonment as Angel Hernandez. In fact, all the defendants received sentences well below their respective Guidelines ranges. The district court's explicit reference to the lack of specific deterrence that apparently resulted from Richard Brown's earlier sentences (R. Brown A89) clearly established the basis for the Court's decision to sentence Richard Brown to 60 months. In light of the foregoing, there is no unwarranted disparity between Richard Brown's sentence and those co-defendants. Accordingly, the district court's sound judgment should not be disturbed.

**Conclusion**

For the foregoing reasons, the judgments of conviction and sentences of the district court should be affirmed.

Dated: October 28, 2010

Respectfully submitted,

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

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,971 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

A handwritten signature in black ink, appearing to read "Michael S. McGarry". The signature is fluid and cursive, with a large, sweeping flourish at the end.

MICHAEL S. MCGARRY  
ASSISTANT U.S. ATTORNEY

## **ADDENDUM**

**18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States**

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

**18 U.S.C. § 1341. Frauds and swindles**

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

**18 U.S.C. § 1343. Fraud by wire, radio, or television.**

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be

transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

**18 U.S.C. § 3553. Imposition of a sentence**

**(a) Factors to be considered in imposing a sentence.**

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

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed --
  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;

- (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for --
  - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines --
    - (I) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and



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

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

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

\* \* \*

**(C) Statement of reasons for imposing a sentence.**

The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence --

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

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent

that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

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

**Fed. R. Crim. P. 52. Harmless and Plain Error.**

**(a) Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

**(b) Plain Error.** A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

**Fed. R. Evid. 608(b). Evidence of Character and Conduct of Witness**

**(b) Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

## ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Datil

Docket Number: 09-3524-cr(L)

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 10/28/2010) and found to be VIRUS FREE.

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Louis Bracco  
*Record Press, Inc.*

Dated: October 28, 2010

**CERTIFICATE OF SERVICE**

2009-3524-cr      United States of America v. Datil

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on this 28th day of October 2010.

Notary Public:

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**Sworn to me this**

October 28, 2010

NADIA R. OSWALD HAMIDL  
Notary Public, State of New York  
No. 01OS6101366  
Qualified in Kings County  
Commission Expires November 10, 2011

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