

# 10-1527(L)

*To Be Argued By:*  
ERIC J. GLOVER

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## United States Court of Appeals

**FOR THE SECOND CIRCUIT**

**Docket Nos. 10-1527(L)  
10-4682(CON)**

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UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

MICHAEL MASSEY and DEVON PATTERSON,  
*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

This is a consolidated appeal from judgments entered in the United States District Court for the District of Connecticut (Robert N. Chatigny, J.), which had subject matter jurisdiction over these criminal cases under 18 U.S.C. § 3231.

On December 16, 2009, a jury found the defendant-appellant Michael Massey guilty of Counts One and Two of the Indictment, which charged him with bank robbery, in violation of 18 U.S.C. §§ 2113(a) & (d), and possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A), respectively. Massey's Appendix ("A")14, A29-A30. On April 15, 2010, the district court sentenced Massey principally to a term of 152 months' imprisonment. A592-A593. Judgment entered on April 16, 2010. A15, A592-A593. On April 23, 2010, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A15, A595. This Court has appellate jurisdiction over the defendant's challenge to his judgment of conviction pursuant to 28 U.S.C. § 1291.

On December 14, 2009, the defendant-appellant Devon Patterson pleaded guilty to Count One of the Indictment, which charged him with bank robbery, in violation of 18 U.S.C. §§ 2113(a) & (d). Patterson's Appendix ("PA")60. On November 3, 2010, the district court sentenced Patterson principally to a term of 135 months' imprisonment. PA135. Judgment entered on November 8, 2010. PA13. On November 9, 2010, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b).

PA13, PA138. This Court has appellate jurisdiction over the defendant's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

**Statement of Issues  
Presented for Review**

**Michael Massey**

1. Whether the district court clearly erred in concluding that Massey made certain incriminating statements to the police before he invoked his right to counsel.
2. Whether the government violated the defendant's due process rights when it took reasonable steps to attempt to restore videotape evidence that was not destroyed by the government and that the defense never sought to take additional steps to restore.

**Devon Patterson**

1. Whether the district court imposed a procedurally unreasonable sentence because it did not specifically respond at the sentencing hearing to Patterson's arguments concerning incremental punishment or his mental and emotional condition.

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

Docket Nos. 10-1527(L)  
10-4682(CON)

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UNITED STATES OF AMERICA,  
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-vs-

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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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### **Preliminary Statement**

Michael Massey and Devon Patterson were convicted of committing an armed bank robbery in Naugatuck, Connecticut in September 2008. The evidence at trial showed that Massey and Patterson entered the Naugatuck Valley Savings and Loan (“NVS&L”) and that, while Massey stood watch with a firearm trained on the

customers and employees of the bank, Patterson vaulted the teller desk and stuffed a bag with \$24,137. Massey and Patterson fled the scene and led the police on a high-speed chase, which ended when they crashed. The police arrested both men and recovered from their vehicle a handgun, \$24,307 in cash, money bands from the bank, and various items of clothing worn during the robbery. The money seized from the vehicle included “bait money,” bills whose serial numbers are periodically recorded by the bank so it can be identified in the event of a robbery.

Massey, who was convicted by a jury of bank robbery and possession of a firearm in furtherance of a crime of violence, makes two arguments on appeal. First, he challenges the district court’s denial of his pretrial motion to suppress and specifically claims that the court clearly erred in concluding that he had not yet invoked his right to counsel when he made incriminating post-arrest statements to the police. But the district court’s careful and searching determination – which turned on credibility findings after two evidentiary hearings and multiple rounds of briefing and oral argument – was not erroneous, much less clearly erroneous. Moreover, any error in the admission of the statements was harmless in light of the overwhelming evidence of Massey’s guilt and, specifically, the fact that he was caught with a gun and the bank’s money after engaging the police in a high-speed chase immediately after the bank robbery.

Second, Massey alleges in a *pro se* supplemental brief that the government violated *Brady v. Maryland*, 373 U. S. 83 (1963), when it declined to make further attempts to

repair hard drives that contained video evidence from the booking area where Massey was detained after his arrest. This argument fails because Massey has failed to show that the government acted in bad faith or that the evidence at issue was exculpatory. Furthermore, Massey knew about the damaged hard drives and the government's unsuccessful attempts to repair them, but never moved to send the drives to an outside vendor for further analysis.

Patterson, who pleaded guilty during trial, argues for the first time on appeal that his sentence was procedurally unreasonable because the district court did not respond adequately to his two arguments for a downward departure: (1) that he did not receive incremental punishment for a series of earlier crimes, and (2) that his mental and emotional conditions were unusual enough to distinguish his crime from the typical guidelines case. The record shows, however, that the district court considered all of Patterson's sentencing arguments and articulated a reasonable basis for the sentence it imposed.

### **Statement of the Case**

On November 24, 2008, a grand jury returned a three-count indictment charging Michael Massey and Devon Patterson in Count One with bank robbery, in violation of 18 U.S.C. §§ 2113(a) and (d), Massey in Count Two with possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A), and Massey in Count Three with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) and § 924(a)(2). A29-A30.

On February 16, 2009, Massey moved to suppress statements he made to law enforcement on the date of his arrest. A6, A32. The district court held evidentiary hearings on March 12, 2009, and November 23, 2009. A7, A12. On November 23, 2009, the court denied Massey's motion in an oral ruling. A284-A296. On December 11, 2009, the court granted a motion for reconsideration, but adhered to its previous decision denying the motion to suppress. A327-A331.

On December 14, 2009, the case proceeded to trial. A13. That same day, Patterson changed his plea to guilty as to Count One. PA8, PA18. On December 16, 2009, the jury returned guilty verdicts as to Massey on Counts One and Two, and the government subsequently dismissed Count Three. A14-A15. On November 3, 2010, the district court sentenced Patterson to a prison term of 135 months and a five-year term of supervised release, and on November 4, 2010, he timely filed a notice of appeal. PA135-PA136, PA138. On April 15, 2010, the district court sentenced Massey to a prison term of 152 months and a five-year term of supervised release, and on April 23, 2010, he timely filed a notice of appeal. A592-A593, A595.

Both defendants are currently serving their prison sentences.

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

**A. The Trial Evidence**

The trial began on December 14, 2009 and lasted three days. The government introduced an array of evidence that cumulatively linked Massey to the bank robbery. This evidence came in three forms: testimony from bank employees, images from the bank's video surveillance equipment, and physical evidence recovered from the defendants' car following the high-speed chase. The government also introduced Massey's post-arrest confession.

**1. Eyewitness and bank video surveillance evidence**

Four bank employees who were working on September 22, 2008, testified about the circumstances surrounding the robbery. They described how the door opened with a loud noise and two masked black men ran into the lobby of the bank. A334, A421. One ("the gunman") displayed a black handgun and said something along the lines of "Don't move" or "Stay calm." A334, A382, A421. The other ("the vaulter") leapt over the counter separating the tellers from the customers and began demanding money. A334, A387, A408. Kay Scarpati, one of the NVS&L tellers, testified that the vaulter took the bills and shoved them into "a blue plastic type of bag." A351.

The employees all testified that the gunman was taller and thinner than the vaulter, and although estimates of their heights varied, they were all within a reasonable range. Ms. Scarpati thought the gunman was about 5'11" and 30 years old, and "to me was taller than the vaulter." A336-37. Another teller, Laura Barrett, described the gunman as a "tall, thin, black male" – in particular, he was taller and thinner than the vaulter, who she believed was about 5'6". A407-A409, A416. Jeffrey Chipokas, NVS&L vice president, stated that the gunman was "much taller" than the vaulter. A388. David Chopak, the NVS&L assistant manager, believed that the gunman was about 6'2" and that the vaulter was about 5'9". A425. The witnesses also generally testified that the thinner, taller individual was the one who carried the gun, which he aimed at several employees. A334, A386, A407-A408, A422.<sup>1</sup>

The employees also testified about the clothing worn by the bank robbers. Several said that the gunman wore some combination of jeans, white shoes, a baseball cap, a dark shirt, and a white mask. A336, A340, A348, A386, A407-A408, 424. Laura Barrett, a teller, testified that the "vaulter" was wearing a black Cardinals hat. A409. Three witnesses testified that the vaulter wore some form of striped shirt or jersey. A337, A388, A409. Two testified

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<sup>1</sup> Mr. Chopak admitted that he told police both men had guns, but in retrospect, admitted that he only saw one man with a gun and assumed the other had a weapon as well. Government's Supplemental Appendix ("GSA")10-11.

that he wore tan work boots.<sup>2</sup> A388, A409. After the robbery, Mr. Chipokas reported to police that the vaulter wore khaki shorts, but in retrospect he felt he might have been mistaken. A401-A402.

Mr. Chopak explained to the jury how NVS&L used “bait money” – ten-dollar bills in each teller’s register whose serial numbers are periodically recorded – to link cash back to the bank in the event of a robbery. A426. Ms. Scarpati and Ms. Barrett testified that their registers contained bait money on the day of the robbery. A355, A414. Mr. Chopak reviewed the bait logs on September 18, 2008, four days before the robbery. A427-A429. After the robbers fled the bank, he conducted an audit of the registers and determined that approximately \$24,000, including the bait money, was missing.<sup>3</sup> GSA2-GSA6. In addition, he noted the bank’s practice of putting money straps stamped with the teller number, an “NVS&L” mark, and the date around each stack of bills. A429-A430. He then identified money bands that were recovered from Massey’s and Patterson’s car, along with other items such as NVS&L withdrawal slips and teller totals. GSA6-GSA9.

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<sup>2</sup> Mr. Chipokas later testified to seeing those same boots at the crash scene, where the defendants were arrested. A395.

<sup>3</sup> Similarly, Lee Schlesinger, the NSV&L chief financial officer, testified that the bank was short \$24,178.50 following the robbery. A436.

Thomas O'Neill, the security manager for NVS&L, corroborated the eyewitness testimony. He described the bank's camera system and then walked the jury through video footage of the robbery. In particular, he pointed out that the gunman wore a white mask, white shoes and white gloves, and a hat with a red rim and design in the center. A372-A375.

## **2. Police testimony and physical evidence recovered from the defendants' vehicle**

NPD Officer Carmine Fianza testified that he was on his way to NVS&L to respond to the robbery when he saw a silver Dodge Stratus approaching him on South Main Street. A439. This encounter occurred approximately one to one-and-a-half miles from NVS&L. A440. There were two black men in the car. A439. The driver gave a surprised look. A439. The Stratus stopped abruptly and made a left turn, so that Fianza had to stop as well to avoid a collision, after which he turned right to follow the car. GSA13-GSA14. As Fianza called in the car's temporary license plate, the Stratus made a three-point turn and pulled up alongside Fianza, giving Fianza the chance to look closely at the occupants. A441-A442. Fianza later identified the passenger as Massey and the driver as Patterson. A449. The Stratus then merged onto Route 8 heading south. Fianza followed and was soon informed by dispatch that there was no information on the license plate in their database. A438-A444.

At this point, Fianza decided to stop the vehicle. The car pulled over, but when Fianza announced over a

loudspeaker that the occupants should show their hands, the car sped away. A444-A445. The Stratus drove so quickly and erratically that Fidanza could not keep up even at speeds of 80-85 m.p.h., but he saw a pickup truck driver pointing towards Exit 20 and concluded that the Stratus had left the highway there. A444-A445. Another unit soon radioed that the Stratus was heading back in Fidanza's direction, and Fidanza then observed the Stratus shear a telephone pole, strike the rear of another car, and come to a stop between a chain link fence and another pole. A447-A448. Massey and Patterson were arrested and transported to the Naugatuck police station. A452-A453.

While examining the crash scene, Fidanza noticed that the Stratus's rear license plate had been altered. A449. Like the NVS&L employees, he observed that Patterson was shorter and heavier while Massey was taller and thinner. A450. He also noted that Massey was wearing jeans and white sneakers when he was removed from the car; Patterson had on jeans and work boots. A452.

Detective Bart Deeley of the NVS&L had the responsibility of processing the crash scene and logging any evidence. A460-A466. He began by showing the jury pictures of the scene. A469. He then described photos of the front interior of the car, one of which depicted a stack of 20-dollar bills held together by a band. A471-A472. He then turned his attention to a light blue bag found on the floor of the front passenger compartment. It contained a large amount of cash, NVS&L money bands and deposit slips, a loaded Beretta handgun, Massey's wallet and

Connecticut driver's license, and an orange and black screwdriver. A472-A473; GSA15-GSA21.

Deeley collected other items from the car, as well. He found a latex glove on the passenger-side floorboard, a "white type of cloth material" on the driver's-side floorboard, and a black and red St. Louis Cardinals baseball cap underneath the driver's-side seat. A488-A490. Laura Barrett, a teller, had testified that the "vaulter" was wearing a black Cardinals hat. A409. Deeley also found a pair of Nike sneakers and another black and red cap on the passenger rear floorboard and a black short-sleeved shirt in the passenger right rear compartment. A491-A492. Finally, the center console held a green garbage bag containing more cash, a black hooded sweatshirt, a red-and-white striped shirt, and another latex glove. A493-A495. In total, Deeley recovered approximately \$24,307 in cash from the interior of the car. A477. Twenty of these bills recovered from the car had the same serial numbers as the NVS&L bait money. A478-A479.

Thomas Conway, the NPD evidence officer, gathered additional evidence from the Massey and Patterson at the police station. He recovered a tan shirt, blue jeans, and white sneakers from Massey. A512-A516. He also collected a pair of tan work boots, jeans, and a brown tank top from Patterson. A517-A518. As part of his duties as evidence officer, Conway sent the recovered handgun to the Connecticut State Police for forensic analysis. A511-A512. Gerard Petillo from the State Forensic Laboratory

testified that he examined the handgun and determined that it was operable. A574-A575.

Over the course of the afternoon and evening, law enforcement met with both suspects. It is undisputed that at 6:00 p.m., Massey made a written statement to the Naugatuck Police Department (“NPD”) Detective Sean Simpson in which he confessed to the bank robbery and described the details of the crime. He also orally confessed to possession of a firearm. A533-A534, A542-A546.

## Summary of Argument

1. The district court correctly decided not to suppress Massey's confession after carefully weighing and considering the conflicting testimony and the parties' arguments. It concluded (twice) that Massey's version of events, though perhaps not *per se* unreasonable, was not probable, and that the government had carried its burden of persuasion in establishing that Massey had not requested counsel or otherwise invoked his right to counsel prior to providing the police with incriminating oral and written statements about his involvement in the bank robbery. Its fact-intensive ruling, which turned largely on credibility determinations that are the particular province of the district court, was not erroneous, much less clearly erroneous.

Moreover, any conceivable error in the admission of the post-arrest statements at trial was harmless. Massey was caught red-handed after fleeing from police with the fruits and instrumentalities of the bank robbery in his possession, including \$24,307 in cash, some of which was directly traceable as "bait money" from the bank. Massey also matched the physical description of the gunman given by multiple witnesses. Given the overwhelming evidence, the post-arrest statements, even if erroneously admitted, did not substantially influence the jury's verdict.

2. Contrary to Massey's *pro se* claim, the government's inability to restore videotape evidence that had been inadvertently and mistakenly destroyed did not violate his constitutional rights because the government

made every conceivable effort to restore the evidence, there is no evidence that the government acted in bad faith, and the evidence itself was not exculpatory.

3. The district court did not need to respond specifically at sentencing to Patterson's incremental punishment and mental and emotional condition arguments. Because the court considered and rejected Patterson's grounds for a downward departure when calculating the guidelines range and gave a reasonable explanation for the sentence it imposed, the sentence was procedurally reasonable. To the extent that Patterson is also suggesting that his sentence was substantively unreasonable, his argument lacks merit because the district court's sentence at the bottom of the guideline range properly reflected the seriousness of the offense conduct and the other factors set forth under 18 U.S.C. § 3553(a).

### **Argument**

#### **I. The district court did not clearly err when it found that Massey made incriminating statements to the police before he invoked his right to counsel.**

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

On February 16, 2009, Massey submitted a pre-trial motion to suppress his post-arrest statements to police, alleging that they were obtained in violation of the Fifth

Amendment because he had invoked his right to counsel prior to confessing.<sup>4</sup> A32-A33.

As described in detail below, the district court held two evidentiary hearings on the suppression question, on March 12 and November 23, 2009. It also held oral argument on July 23, 2009. The court denied Massey's motion to suppress. The district court reopened the suppression hearing on December 8, 2009. On December 11, the court gave both sides the opportunity for oral argument before again denying Massey's motion.

### **1. The March 12, 2009 evidentiary hearing**

At the first hearing, the court heard testimony from five individuals about the events of September 22: Officer Carmine Fianza (NPD), Detective Shawn Sequiera (Connecticut State Police), Detective Sean Simpson (NPD), Detective Ron Onofrio (North Brandford Police), and Massey. The police consistently testified that Massey never requested an attorney or said that he wanted to speak to, or consult with, a lawyer until after he confessed, while Massey asserted that he had made frequent requests for an attorney as soon as he arrived at the station.

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<sup>4</sup> Patterson also filed a motion to suppress statements, but he waived the suppression issue when he pled guilty on December 14, 2009. PA21-PA23. The proceedings concerning Patterson's motion are not detailed below except where directly relevant to Massey's claim.

The hearing began with testimony from Officer Carmen Fidanza, who outlined his encounter with the Massey and Patterson and the ensuing car chase. A34-A48. He stated that he transported Patterson back to the NPD following the crash, arriving at approximately 2:00 pm. A36-A37. He spoke to Patterson to gather basic pedigree information at around 4:00p.m. A46-A47. Fidanza did not speak to Massey.

Detective Shawn Sequiera testified next. Sequiera was investigating another bank robbery for the Connecticut State Police in which Patterson was a suspect. A48-49. He stated that he interviewed Patterson at around 2:30 pm. A50. He did not speak to Massey until “some hours” later; his estimate was that he spoke to Massey at 8:00 pm. A55. According to Sequiera, Detective Ron Onofrio accompanied him at this interview, which lasted about ten minutes. A55. On cross-examination, Sequiera clarified that he first saw Detective Onofrio at 5:00 pm and was with him a “couple of hours” before the pair spoke to Massey. A57-A58. At the end of this interview, Sequiera said that Massey made statements about planning to speak to an attorney. A59.

Detective Sean Simpson of the NPD testified that he and Detective Bart Deeley interviewed Patterson late in the afternoon, after Sequiera had spoken to him. A63. Simpson later explained that, after the interview with Patterson, the NPD gave the instruction that nobody from other law enforcement agencies was to speak to the suspects until the NPD’s investigation was complete. A87. Simpson estimated that he then spoke with Massey, again

accompanied by Bart Deeley, “between 6:00 and 6:30.” A65. Simpson believed that, to the best of his knowledge, no one else had spoken to Massey before him. A65. According to Simpson, at no point during the interview did Massey ask for a lawyer. A70. Simpson was also sure that “I didn’t ask [Massey] if he wanted to make a statement prior to the time I took the statement [at 6:00 pm].” A71.

At the 6:00 pm meeting, Simpson gave a verbal and written explanation of Massey’s rights, and Massey signed a Notice of Rights Waiver form.<sup>5</sup> A66. According to Simpson, Massey then expressed his desire to give a statement, which he insisted on writing himself.<sup>6</sup> A66-A67.

In his statement, Massey confessed to the robbery and described the basic details of the crime:

My name is Michael Massey. My back is against the wall[.] I had several job taken from me because Im a felon. I have two kids and one on the way. I have about ten days to get out of my apartment. I cant have my family thrown out on the street.

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<sup>5</sup> A copy of the signed form – which was misdated September 21 instead of September 22 – is available at A22.

<sup>6</sup> A copy of the statement is included at A23-A24.

I tryed selling drug but prices are too high to make any money. I tried to go the army but I have too many felonies.

This was my only alternative. Im sorry and except the punishment. My family means the world to me if I cant be a man for them I rather not even be in the picture.

I robbed the bank. We came in a red car and changed cars down the street. Cop got behind us and we got caught.

The bank was in Naugatuck[.]

A23-A24. Massey signed and initialed both pages. The form shows that he began writing the statement at 6:10 pm and concluded at 6:30 pm. A23-A24. Afterwards, Massey verbally confessed to carrying a gun during the robbery. A69. He said he got the gun in New Haven, but when asked precisely where, replied, “Not in a gun store, I’m a convicted felon.” A69-A70. He declined to say more because he did not want to get anyone else in trouble. A70.

The final officer to testify was Detective Ron Onofrio, a member of the North Branford Police. Detective Onofrio arrived at the Naugatuck police station at around 4:00 pm. A85. He testified that he and Detective Sequiera spoke with Massey. A85-A86. Onofrio recalled that the interview took place “hours after I arrived” – his best guess was “7:00, 8:00” – and he was under the impression that Massey had already met with the NPD. A85-A86.

Onofrio wanted to know what information Massey had on Patterson, who was a suspect in another bank robbery that Onofrio was investigating. A84. Massey admitted that he knew a great deal, but declined to go into specifics, stating that “he’d rather share it with his attorney.” A87. Onofrio then ended the interview, which lasted only five or ten minutes. A87. He and Sequiera, observed by Detective Simpson, later talked with Patterson at around 9:00 or 10:00 pm. A88.

On cross-examination, Onofrio affirmed that his interview with Massey took “in the neighborhood of ten minutes.” A90-A92. He was also asked to examine a defense exhibit, which he identified as his report of his actions at the NPD that night. A92-A93. The report read, in pertinent part:

Upon my arrival at Naugatuck Police Department I was brought to the detective division. I was informed that Devon Patterson was accompanied by Michael Massey when they were apprehended after the bank robbery. This detective along with Trooper Sequiera went into the holding area where Massey was being held and spoke to him regarding his knowledge of Patterson’s association with [another suspect in Onofrio’s investigation].

Michael Massey stated that he knows a lot about what Patterson had been up to but would not provide us with any information. He said that he would speak to his attorney about it.

When the Naugatuck Detectives were done speaking with Patterson, this detective, along with Trooper Sequiera and a Naugatuck Detective entered the interview room. I asked Patterson if he remembered that Trooper Sequiera informed him of his rights and he nodded his head in agreement.

A25.

Massey then took the stand and offered a very different narrative of the day's events. He stated that several police officers approached him in his holding cell to ask if he wanted to make a statement, and that he replied "[a]t least three times" that he wanted to speak to an attorney. A101. Massey admitted, however, that he was "not good with names" and had difficulty recalling details, including who initially put him in the holding cell; whether that person wore a uniform; who the officers were who approached him to ask for a statement; and whether any of these officers were the same individual that brought him to the cell. A98-A100. When pressed further on direct examination, Massey suddenly recalled that he spoke to Detective Simpson before the 6:00 pm meeting and said that he had asked Simpson for a lawyer. A101.

That evening, Massey said he spoke to his sister on the phone and "got a little emotional." A102. He claimed that Simpson had gotten on the phone and repeated that Massey could help himself with a confession. A102. Although Massey claimed he again asked Simpson for a lawyer, he then agreed to make a written statement; he

claimed that he did not sign the waiver of rights form until later in the evening. A102-A103.

In addition to these interactions with Simpson, Massey also claimed that he asked Detective Onofrio for a lawyer, and that he was “pretty sure” he did so before the interview with Simpson. A103.

On cross-examination, Massey explained that rather than the three times he had testified to earlier, he asked for a lawyer “numerous times” – “everybody that came to talk to me I asked for a lawyer.” A104-A105. He increased the estimate of the number of officers who spoke to him to four or five. A105. He also stated it was his “clear recollection” that he had asked Simpson for a lawyer before speaking to his sister on the phone. A110.

## **2. The July 23, 2009 oral argument**

Massey’s attorney argued that the government had failed to show that Massey did not ask for a lawyer prior to confessing. He emphasized that no member of law enforcement had been able to state unequivocally that nobody spoke to Massey before his interview with Simpson. A111-A112. He expressed skepticism that police would allow Massey to sit for hours without interviewing him. A112. And he argued that Onofrio’s report seemed to suggest that he had spoken to Massey shortly after he had arrived at the police station. A113-A114.

He further noted that the NPD’s video system, which would have been helpful in resolving the timing dispute,

had unfortunately crashed, rendering the data unuseable. Although “not suggesting there’s anything nefarious going on,” he felt this went to the government’s ability to satisfy its burden. A115. He concluded by suggesting that what really happened on September 22 was that Massey asked both Sequiera and Simpson for a lawyer, only to have Simpson later “[take] advantage” of Massey’s emotional state while talking to his sister by “extract[ing] a Miranda waiver and statement.” A116-A117.

The government replied that Simpson had unequivocally testified that Massey never asked him for an attorney, that there was nothing in the record to suggest that any officers had tried to extract any statements from Massey, and that Onofrio’s report had to be evaluated in light of his testimony and the corroborating testimony by Simpson and Sequiera, all of which established that Onofrio’s interview of Massey occurred *after* Massey had confessed to Simpson; the government pointed out that Onofrio’s delay in interviewing Massey resulted from the NPD’s order prohibiting outside officers from accessing the suspects until the NPD had concluded its investigation. A120-A125.

Following additional argument by both sides, the court deferred a ruling on the suppression motion and requested supplemental briefing on whether Massey’s statements to Simpson should be suppressed if it was determined that Massey had only invoked his right to counsel to Onofrio, and on the significance of the NPD’s video recording system. A137-A138.

### **3. The November 23, 2009 evidentiary hearing**

At the second evidentiary hearing, the court heard testimony from Lieutenant Todd Brouillete (NPD), Detective Shawn Sequiera (NPD), and Detective Bart Deeley (NPD). It gave both parties the opportunity for oral argument before ultimately denying Massey's motion to suppress.

Lieutenant Brouillete was the first to testify. He explained that, upon his arrival at the station on September 22, he learned that a state police detective (Sequiera) had been allowed to interview one of the suspects (Patterson). As a result, he ordered his sergeant to stop the interview and inform non-NPD officers that they were not to speak to either suspect until the NPD had concluded its investigation. A151-53. He later testified that he had "no evidence to show that my instructions were not followed." A172.

Brouillete additionally described the NPD's video recording system, which recorded video of the internal and external areas of the NPD, including the holding cells. A157-A158. The recording system was operational on September 22, but subsequently malfunctioned. A157-A158, A139-A140. Brouillete was also asked to testify about a Prisoner Log kept by the NPD that contained a partial record of Massey's movements within the NPD on September 22. A161-A169.<sup>7</sup> Brouillete explained that the log would not necessarily show every time a prisoner was

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<sup>7</sup> A copy of the log is available at A26-A28.

led to and from his cell, because different dispatchers had different recording practices. A178.

Before Brouillette left the stand, the district court personally questioned him. A179. In response to these questions, Brouillette estimated that he gave the order that outside agencies should wait until the NPD completing its investigation at around 2:30 pm. A184.

Detective Simpson returned to testify about the circumstances of Brouillette's order, which he estimated took place at 4:00 pm. A193. He also allowed that he might have spoken to Massey prior to 6:00 pm, but only in order to collect pedigree information for a State Police Record Check. A194, A199. And he explained that it was not unusual for Massey to have sat for several hours before being interviewed because the NPD was a small department and would rather do a job properly than quickly. A195. On cross-examination, Simpson was asked about the Prisoner Log, and in particular an entry at 4:30 pm that indicated Massey was "out of cell speaking w/ DB." He suggested that the entry might refer to the collection of Massey's pedigree information. A202-A203.

As with Brouillette, the court directly examined Simpson. In an extensive discussion, Simpson detailed the layout of the police station, described the circumstances surrounding Brouillette's order, gave his best estimate of the day's chronology, and described his interactions with and impressions of Onofrio. A204-A250, A254-A257. Simpson estimated that he returned to the police station from the crime scene at around 3:30 pm. A225. Simpson

estimated that he interviewed Patterson around 4:00 pm. A215-A216, A230. In the interim, he gathered information about the crime to prepare for his interview of Patterson. A213, A229-A230. He spoke to Patterson for about an hour and a half. A231. Upon learning that a state trooper had spoken with Patterson before him, Simpson went to his lieutenant to get him to order law enforcement officers from other departments not to speak with the suspects until the NPD had spoken with them first. A231-A232. Simpson then continued his interview of Patterson. A232. After completing his interview of Patterson, Simpson then spoke to Massey at 6:00 pm and finished this interview at around 7:00 pm. A231, A248.

Finally, Detective Brad Deeley, Simpson's partner on September 22, took the stand. He described how the two officers arrived at the police station at approximately 3:30 pm and saw Brouillette giving his order. A261-A262. He then identified the waiver of rights and written statement completed by Massey in the 6:00 pm interview. A263-A265. Like Simpson, Deeley felt a delay of three or four hours in interviewing Massey was not unusual given the size of department. A266.

The court directly questioned Deeley about the Prisoner Log. Deeley concluded that the 4:30 pm entry in the log likely referred to his and Simpson's attempts to get biographical information from Massey. A273-A274.

The government summarized its case by arguing that Brouillette, Deeley, and Simpson's testimony was broadly consistent with Onofrio's, in that it established that Deeley

and Simpson first interviewed Massey at around 6:00 pm, and Onofrio first interviewed him at around 8:00 pm. A280-A281. In response, Massey's attorney argued that Deeley's testimony and Simpson's testimony conflicted as to timing, and reiterated his belief that Onofrio spoke to Massey before Brouillette gave his order. A281-A283.

#### **4. The Court's Ruling**

Following a recess, the court concluded that, although the officers' testimonies did not agree in every single respect, they were consistent on the major points, particularly as to the timing of the Onofrio/Massey interview. A288. The court also decided not to credit Massey's unreliable testimony about the precise timing of his interactions with the police. A289. Finally, it considered Onofrio's report, but found it did not outweigh the government's evidence. A290. Therefore, the court determined that "Mr. Massey's invocation of his right to counsel in his discussion with Detective Onofrio and Detective Sequeira does not itself provide a basis for suppressing the statement made to Detective Simpson." A292. The court then found that the government had met its burden to show that Massey had waived his rights before the interview with Simpson. A292-A294.

In making its factual finding that Simpson interviewed Massey before Onofrio, the court placed particular emphasis on the reliability of Onofrio's testimony:

Detective Onofrio has testified that he arrived at the department at about 4:00, went directly to speak

to the lieutenant in charge of the detectives, informed the lieutenant of his purpose and was informed in turn by the lieutenant that he would not be permitted to speak with either Mr. Patterson or Mr. Massey until the Naugatuck detectives were done interviewing them both. According to Detective Onofrio's testimony, he waited a period of hours before he spoke with Mr. Massey in the holding area in the presence of Detective Sequeira. . . . He was emphatic in stating that he did not speak with Mr. Massey until hours had passed and he testified that he had dinner before speaking with Mr. Massey.

His testimony with regard to the timing of these events is corroborated by the testimony of Detective Sequeira . . . .

Looking at their testimony in the context of the evidence as a whole, it appears that it is reliable.

A286.

The district court noted that the only evidence opposed to the sequence of events in Detective Onofrio's testimony was Massey's own testimony, "who testified that he was pretty sure he spoke with Onofrio before he was interviewed by Simpson." A289. But the court noted that Massey's testimony "on that point is not emphatic, as he himself said he was pretty sure in his testimony, allowing for doubt about its accuracy and reliability." A289. The court therefore concluded that "Massey's invocation of his

right to counsel in his discussion with Detective Onofrio and Detective Sequeira does not itself provide a basis for suppressing the statement made to Detective Simpson.” A292.

The court found further that the government satisfied its burden of proving that Massey did not invoke his right to counsel before giving the interview to Simpson even apart from the issue of whether Onofrio interviewed Massey before or after Simpson. The court stated:

Detective Simpson has flatly denied that Mr. Massey invoked his right to silence or his right to counsel at any time before giving this statement. In these circumstances, in the absence of any suggestion that Mr. Massey was coerced, recognizing that he’s an intelligent person, that he does have experience in the criminal justice system, that he well understood his right to remain silent and his right to decline to speak outside the presence of counsel, and recognizing that there was not an intervening delay of any consequence, I conclude that the government has sustained its burden.

A293. The court further stated:

So I conclude that I should credit the testimony of Detective Onofrio and Detective Sequeira with regard to the timing of their interview of Mr. Massey and I conclude that Mr. Massey’s statement at approximately 10 after 6:00 is the best evidence

of his state of mind and what was going on that day. Accordingly, I deny his motion to suppress his statements to Detective Simpson in the interview that occurred that evening.

A294.

### **5. Reopening the suppression motion**

On December 8, 2009, Massey moved *pro se* to reconsider the suppression question in light of the Prisoner Log, which he claimed was not fully considered at the initial hearing. Specifically, he claimed the 4:30 entry that read “out of cell speaking with DB” referred to his meeting with Onofrio, and that the log did not show him speaking to Onofrio at 7:00 or 8:00 pm, as the police had testified. A298-A299, A303. Both the government and the defense reminded the court that the log had already been introduced. A311, A313. The district court nevertheless requested supplemental briefing to address Massey’s *pro se* claim. A312-A313.

The court held a hearing on December 11, 2009. A13, A316. The government summarized its argument, noting again that the officers all agreed on the timing of the Onofrio/Massey interview. A316-A319. It argued first that the “out of cell speaking with DB” entry at 4:30 pm did not refer to Onofrio and Sequiera because (1) NPD employees would not refer to agents from an outside department as “DB,” (2) Lieutenant Brouillette had forbidden outside officers from speaking to the suspects by 4:30 pm, at the very latest, and (3) only an NPD officer

could let Massey “out of cell,” so if the entry referred to the interview with Onofrio and Sequiera, the NPD would have known about it. A317. It also explained that the log would not necessarily record the interview between Massey and Onofrio after 7:00 pm, since the interview only took ten minutes, and the log did not reflect the “constant observations of the dispatch unit.” A318-A319.

Massey’s counsel replied that the evidence, including Onofrio’s report, supported his contention that Onofrio spoke to Massey shortly after 4:00 pm, and that the government lacked contemporaneous evidence to support its argument. A319-A321. The government replied that Onofrio’s report was primarily concerned with Patterson, not Massey, so that it was not surprising that the report did not refer to any delay before Massey’s interview. A324. Massey’s counsel noted that the witnesses were not lay people, but were trained police officers who should have better recall of specific facts and times. A325.

The court parsed Onofrio’s report and concluded that it was “generally consistent” with his earlier testimony and that “the inconsistency that has troubled us is really not of great concern.” A329. The court explained that, according to the report, Onofrio had arrived at the NPD after Sequiera had already interviewed Patterson, which caused the NPD to prohibit any additional interviews by outside police officers until it had completed its investigation, so that, although the report was not “entirely clear” as to the timing of Onofrio’s interview with Massey, it was not reasonable to conclude that it had occurred when Onofrio had arrived at the police station. A330. The court also

noted that the log entries were “helpful but not dispositive” and that the government’s view that “we can’t rely on the log itself to determine what happened” was “reasonable.” A331. Therefore, the court denied the suppression motion a second time. A331. The court explained, “[W]hile I acknowledge that the [defense’s] hypothesis is not unreasonable, I think that at the end of the analysis the government prevails.” A331.

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

### **1. Fifth Amendment right to counsel**

“[T]he prosecution may not use statements made by a suspect under custodial interrogation unless: (1) the suspect has been apprised of his Fifth Amendment rights; and (2) the suspect knowingly, intelligently, and voluntarily waived those rights.” *United States v. Plugh*, 576 F.3d 135, 140 (2d Cir. 2009) (citing *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966)). In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Supreme Court crafted a prophylactic rule to protect suspects from being pressured into waiving *Miranda* rights after invoking them. Noting that “additional safeguards are necessary when the accused asks for counsel,” the Court held that “an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.” *Edwards*, 451 U.S. at 484-85.

As the *Miranda* Court indicated, however, a suspect may knowingly and voluntarily waive his rights to silence and counsel. *See id.*, 384 U.S. at 444. To prove a valid waiver, the government must show two facts: “(1) that the relinquishment of the defendant’s rights was voluntary, and (2) that the defendant had a full awareness of the right being waived and of the consequences of waiving that right.” *United States v. Jaswal*, 47 F.3d 539, 542 (2d Cir. 1995). This showing must be made by a preponderance of the evidence. *See Plugh*, 576 F.3d at 140. Where a suspect validly waives his rights (and, per *Edwards*, has not invoked his right to counsel), the police may question him without a lawyer present. Any statements he makes are admissible in court. *See Davis v. United States*, 512 U.S. 452, 458 (1994).<sup>8</sup>

## 2. Standard of review

This Court reviews factual determinations in connection with a motion to suppress for clear error, viewing the evidence in the light most favorable to the government. *See United States v. Whitten*, 610 F.3d 168, 193 (2d Cir. 2010). It reviews a denial of a motion to suppress *de novo* for legal conclusions. *Id.* This Court has stated that “credibility determinations are the province of the trial judges, and should not be overruled on appeal

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<sup>8</sup> The statement must also be voluntary to be admitted into evidence, 18 U.S.C. § 3501(a), but Massey did not challenge the voluntariness of the statement in the district court and does not challenge it on appeal. A540-A541.

unless clearly erroneous.” *United States v. Yousef*, 327 F.3d 56, 124 (2d Cir. 2003).

A factual finding is clearly erroneous only when “the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); *see also United States v. Iodice*, 525 F.3d 179, 185 (2d Cir. 2008). There is no clear error when the reviewing court is simply “convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.” *Anderson*, 470 U.S. at 573-74. Additionally, “where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *Id.* at 574.

### **3. Harmless error**

For a lower court’s error to merit reversal, that error must not be harmless. In *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), the Supreme Court held that even the erroneous admission of coerced statements or confessions can be harmless. *Fulminante* also established the broader rule that harmless error analysis is generally applicable to instances of “‘trial error’ – error which occurred during the presentation of the case to the jury and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.” *Id.* at 307-308. *See also United States v. Yakobowicz*, 427 F.3d 144, 153 (2d Cir. 2005) (explaining that such errors do not automatically require reversal).

This Court has explained the harmless error test as follows:

A district court's erroneous admission of evidence is harmless if the appellate court can conclude with fair assurance that the evidence did not substantially influence the jury. In conducting harmless error review, we consider the following factors: (1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted evidence; and (4) whether such evidence was cumulative of other properly admitted evidence.

*United States v. Ramirez*, 609 F.3d 495, 501 (2d Cir. 2010) (internal quotations and citations omitted). Although this is a multi-part test, this Court has “frequently stated that the strength of the government's case is the most critical factor in assessing whether error was harmless.” *Id.*

This Court has not explicitly extended *Fulminante*'s harmless error rule to *Edwards*'s prophylactic context, but it has applied harmless error analysis to statements obtained without any *Miranda* warning at all. See *Tankleff v. Senkowski*, 135 F.3d 235, 245 (2d Cir. 1998); *Rollins v. Leonardo*, 938 F.2d 380, 382 (2d Cir. 1991). Moreover, all seven circuits that have considered the question have uniformly concluded that an *Edwards* violation is subject to harmless error analysis. See *United States v. Lee*, 413 F.3d 622, 627 (7th Cir. 2005); *Ghent v. Woodford*, 279 F.3d 1121, 1126 (9th Cir. 2002); *United States v. Morris*, 42 Fed. Appx. 223, 229 (10th Cir. 2002) (unpublished

decision); *Goodwin v. Johnson*, 132 F.3d 162, 181 (5th Cir. 1997); *Correll v. Thompson*, 63 F.3d 1279, 1291 (4th Cir. 1995); *United States v. Wolf*, 879 F.2d 1320, 1323 (6th Cir. 1989); *United States v. Valdez*, 880 F.2d 1230, 1234 (11th Cir. 1989). *See also* *Shea v. Louisiana*, 470 U.S. 51, 59 n.4 (1985) (noting, in passing, that *Edwards* has retroactive effect “subject, of course, to established principles of waiver, *harmless error*, and the like”) (emphasis added).

### **C. Discussion**

#### **1. The district court did not clearly err in concluding that Massey did not invoke his right to counsel before he confessed.**

Massey’s argument is based on the second part of the *Edwards* suppression analysis: whether he invoked his right to counsel before or after he confessed.<sup>9</sup> Although Massey may disagree with the court’s ultimate conclusion that the Government had established by a preponderance of the evidence that he had not invoked his right to counsel prior to confessing, the evidence shows the court decided the matter carefully and correctly and based on the evidence presented at the multiple suppression hearings,

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<sup>9</sup> Massey also argues that the district court “failed to consider, as it should have, whether he ‘had knowingly and intelligently relinquished his right to counsel.’” Massey’s Brief at 70 (citing *Edwards*). In fact, the district court addressed these factors in its original suppression decision. A293.

and certainly does not show that it clearly erred in its factual determination.

Indeed, as discussed above, the district court was exceptionally diligent in resolving this factual question. It held two evidentiary hearings with witnesses subject to full cross-examination; heard numerous oral arguments by counsel; and even reopened the matter upon Massey's *pro se* motion. He received a total of eight separate memoranda totaling 71 pages on the question.<sup>10</sup> He personally questioned several witnesses in order to reconstruct the day's timeline and evaluate both parties' accounts. In sum, there can be no doubt that the court gave the matter "careful review." A296. This meticulous appraisal that lead to the court's determination that the evidence should not be suppressed hardly gives rise to a "definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. at 573.

Massey is correct that the district court thought the issue was a "close question," Massey's Brief at 33, but that hardly lends support to the claim that the court committed clear error. Even if Massey's version of events was not totally implausible, the court carefully weighed the evidence, including the witness testimony, and evaluated both parties' view of the evidence before choosing to credit the government's witnesses. As a matter of law, "where there are two permissible views of the evidence, the factfinder's choice between them *cannot* be clearly

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<sup>10</sup> See A7-A13, Docket #65, #79, #80, #83, #96, #98, #132, and #133.

erroneous.” *Anderson v. Bessemer City*, 470 U.S. at 574 (emphasis added).

Nor is the district court’s determination merely supportable under the clear error standard. It is the most reasonable view of the evidence. Three different officers (Sequiera, Onofrio, and Simpson) from three different jurisdictions (Connecticut State Police, North Branford Police, and Naugatuck Police) all consistently testified to the same general chronology, in which Massey confessed to Simpson before meeting with Onofrio.<sup>11</sup> To credit Massey, one would have to believe that all three officers were not credible witnesses. As the court noted, “While it is conceivable that law enforcement officers would perjure themselves, it does not appear to be the case here in my opinion.” A328. Furthermore, Massey lacked credibility on the timing issue, as the court itself found. A289. Indeed, Massey could not remember basic details about the day’s events other than his persistent claim that he repeatedly asked for a lawyer. The court’s credibility determinations deserve strong deference on appeal. *Yousef*, 327 F.3d at 124.

Massey focuses on Onofrio’s report, arguing it “clear[ly]” shows that Onofrio spoke with Massey

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<sup>11</sup> Massey argues that Sequeira’s corroborating testimony is suspect because he did not mention interviewing Massey in his own report. *See* Massey’s Brief at 72-73. This is hardly surprising, however, since Sequeira was present “just as a witness” (like Onofrio, Sequeira was investigating Patterson, not Massey). A55.

“[s]hortly after arriving at the station.” Massey’s Brief at 72. The district court was right to reject this argument for several reasons. First, Onofrio’s direct testimony and the testimony of two other officers all established that his interview of Massey occurred at around 8:00 pm. Second, there was no reason for Onofrio to include the time he interviewed Massey in his report, because it was not relevant to his investigation of Patterson. A324. And, as the court noted at the second hearing, it is undisputed that Onofrio did not speak to Patterson until late in the evening, yet Onofrio’s report never indicated that there was a delay of four hours between speaking to Massey and speaking to Patterson, which would have been the case if Onofrio had indeed spoken to Massey shortly after arriving at the NPD. A331. The district court’s factual findings, already convincing, become more so when this evidence is viewed, as it must be, in the light most favorable to the government. *See Whitten*, 610 F.3d at 193.

Massey also alleges two specific sources of clear error. First, he argues that the government “fail[ed]” to address supposed inconsistencies between the Prison Log and the government’s chronology that were raised at the second hearing. *See* Massey’s Brief at 79. Second, he argues that the court erred because it did not seem to remember that it had already seen the Prisoner Log when it decided to reopen the suppression hearing. *Id.*

The first point is simply incorrect. During the telephone conference on December 11, 2009, the Government directly responded to the alleged

discrepancies between the Prisoner Log and the officers' testimony, arguing that Naugatuck employees would not characterize Onofrio and Sequeira as "DB" and that it was not surprising, given the purpose and practice of the log, that a ten-minute interview with Onofrio would not be recorded on it. A317-A319. GSA39-GSA40. The district court accepted these contentions, prefacing its order by explaining that "Log entries are helpful but not dispositive. I do think the government has a reasonable view that . . . we can't rely on the [L]og itself to determine what happened when, particularly since it's undisputed that Onofrio's encounter with Massey was brief." A331.

As for the second point, the government's opposition to the defendant's motion argued that the court should not reopen the suppression hearing because the court had already considered the Prisoner Log. GSA39. Moreover, even if the court did not recall that the log had already been introduced during the first suppression hearing, the court was certainly aware of its contents when it reaffirmed its initial order.

**2. Any conceivable error was harmless given the overwhelming evidence against Massey.**

Even if this Court were to find that the district court clearly erred in concluding that Massey had not invoked his right to counsel before confessing, any resulting error in admitting Massey's post-arrest statements at trial was harmless. Massey and Patterson were caught red-handed with the fruits and instrumentalities of the crime; they matched the eyewitness and video descriptions; and they

fled from police shortly after they were located near NVS&L. Even apart from the evidence of Massey's post-arrest statements, therefore, the remaining evidence before the jury was overwhelming. Given the strength of the government's case, these statements, even if erroneously admitted, did not substantially sway the jury.

The most important factor in the harmless error analysis is the strength of the prosecution's case. *See Ramirez*, 609 F.3d at 501. Here, the testimonial and physical evidence was overwhelming. Massey and Patterson engaged the police in a high speed chase after being pulled over by Fianza. A444-A448. After Massey and Patterson crashed, law enforcement recovered a bag in front of Massey's seat containing his wallet, a gun, and cash. A472-A473. There was also cash scattered about the vehicle. The amount of cash in the car, \$24,307, essentially matched the amount of stolen cash, and it included the bait money that was taken from the bank. A477-A479. In addition, the police recovered various other items like money bands and deposit slips from NSV&L. A472-A473. In some cases, the items could be traced to the individual tellers who were working the day the bank was robbed.

This evidence, overwhelming in itself, was even further corroborated by the physical descriptions of the robbers. Both the bank surveillance video and eyewitness accounts indicated that the gunman wore white shoes, and Massey was apprehended with white shoes. A512-A516. Kay Scarpati testified that the vaulter stuffed cash into a blue plastic bag (A351), and Massey had a blue bag full of

cash in front of his seat in the Stratus (A472-A473). The bag also contained a gun matching the one used in the robbery. A472-A473. Other items of clothing that matched the gunman's description, such as a red and black baseball cap, a black hooded sweatshirt, a white mask, and latex gloves, were found in or around Massey's seat. A488-A495. In fact, a black and red St. Louis Cardinal's cap was recovered underneath the driver's seat (A488-A490), and one of the tellers testified that the "vaulter" was wearing a black Cardinals cap (A409). The eye-witnesses uniformly testified that the gunman had a taller and thinner build than the vaulter, and Massey was apprehended with Patterson, who was smaller and bulkier. A450. Moreover, several pieces of evidence – such as the tan work boots and the striped shirt – tied Patterson to the robbery as well. A452.

As the district court rightfully noted at the suppression hearing, "It's important to bear in mind that these men were caught red-handed. This is not a case where they could reasonably think that they could somehow escape conviction by refusing to give statements." A295-A296. Indeed, he stated, "It seems to me the evidence is fairly characterized as strong, if not overwhelming, wholly apart from the admissibility of the oral statements." A296.

Massey's misleading discussion of the evidence cannot defeat this conclusion.<sup>12</sup> It selectively quotes government

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<sup>12</sup> Massey's brief styles this point as a sufficiency of the evidence argument, and accordingly applies a different legal (continued...)

witnesses in an attempt to discredit them. For example, it argues that, although Kay Scarpati observed that the gunman was 5'11" while the vaulter was 6'10", she later "claimed the gunman somehow was taller than the vaulter." Massey's Brief at 83. However, the transcript reveals that Scarpati merely misspoke when she said the vaulter was almost seven feet tall; when the Government pointed out the apparent incongruity between those two pieces of information, she corrected herself. A337-A338. The other alleged inconsistencies, such as Ms. Barrett's estimate that the vaulter was 5'6" versus Mr. Chopak's estimate of 5'9", simply reflect ordinary variation among multiple witnesses who nevertheless agree on the broad points such as relative heights, types of clothing and footwear.

Two of the other three factors in the harmless error analysis – the prosecutor's conduct and the importance of the wrongly admitted evidence – also weigh in favor of the government. The government did employ Massey's confession in its closing argument. GSA23-GSA24, GSA37. And courts have recognized that confessions are somewhat unique in terms of their impact on a jury. *See, e.g., Arizona v. Fulminante*, 499 U.S. at 296 (noting that "[a] confession is like no other evidence"). But most of the government's closing argument was spent marshaling the extensive physical evidence that tied Massey to the crime. Moreover, the confession was simply not important to the

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<sup>12</sup> (...continued)  
standard. *See* Massey's Brief at 80-86. The proper mode of analysis is harmless error.

government's case given the fact that Massey was caught red-handed after a high-speed chase with bait money in his car. As to the last factor, while the confession was clearly not cumulative, that factor alone is relatively less significant given the strength of the government's case, the "most critical factor" in the analysis. *See Ramirez*, 609 F.3d at 501.

**II. The government did not violate the defendant's constitutional rights by failing to restore videotape data that was not exculpatory and was inadvertently destroyed.**

**A. Relevant facts**

The NPD had 16 video cameras in operation on September 22 that recorded the interior and exterior of the police department. A139. They did not record sound. A139. The computer system that stored the videos malfunctioned on November 8, 2008 and had to be sent out for repairs. A139. As Lieutenant Bernegger testified at trial, "the digital video recorder . . . had a technical malfunction, made some very disturbing noises, at which time I had to unplug the unit, and our contracted company came to remove it and put a new one in for us." A585. Two hard drives that may have contained recording data from the 22nd were sent to the FBI, which forwarded them to an outside vendor, Master Security Systems, to see if any files could be recovered. A139-A140.

On February 19, 2009, Master Security Systems informed the Government that it was unable to retrieve any

data from the drives. A140. Master Security Systems could not state with total certainty that the information was completely lost. It suggested a Minnesota company, ESS Data Recovery, that might be able to apply additional recovery techniques. A140. However, neither of the defendants subsequently sought to examine the drives or recover any data.<sup>13</sup> A141.

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

The government must disclose materially exculpatory evidence to a criminal defendant. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). However, this Court has noted that claims that involve a loss of information, like Massey’s claim, should be treated as a claim for loss or destruction of evidence rather than as a *Brady* claim. *See United States v. Bakhtiar*, 994 F.2d 270, 275 (2d Cir. 1993)). Similarly, the Supreme Court has distinguished between *Brady* claims and claims that the government “fail[ed] . . . to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.” *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988). Noting that “[w]henver potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed,” the *Youngblood* court held that “unless a criminal defendant can show bad faith

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<sup>13</sup> The government informed Massey about the technical error in January 2009, and in May reported that the attempts to recover data were unsuccessful. A140 n.1.

on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” *Id.* at 57-58 (internal quotations omitted).

Applying these precedents, destruction of evidence by the government only rises to a constitutional violation where the government acted in bad faith in destroying the evidence, *see Youngblood*, 488 U.S. at 56-58; (2) the evidence possesses exculpatory value that was apparent when it was destroyed, *California v. Trombetta*, 467 U.S. 479, 489 (1984); and (3) the defendant must be “unable to obtain comparable evidence by other reasonably available means.” *Id.*

### **C. Discussion**

Throughout his *pro se* brief, Massey invokes *Brady* and claims that the video evidence, if recovered, would contradict the government’s version of the September 22 interviews. *See Massey’s Pro Se Br.* at 1-9. This claim does not satisfy the second *Bakhtiar* requirement because the hard drive had no apparent exculpatory value at the time the computer system crashed. The failure occurred on November 8, 2008, well before Massey filed his motion to suppress on February 16, 2009. A6, A139. But even assuming *arguendo* that the video possessed exculpatory value that was apparent before it was lost, Massey has not presented any evidence that the government acted in bad faith. Therefore, there was no constitutional violation.

Massey insinuates in passing that the video system crash was suspicious. *See Massey’s Brief* at 71 (terming

the “alleged” crash “incredulous”). Similarly, his *pro se* brief expresses his “suspicion about the hard drive crashing.” Massey’s *Pro Se* Brief at 7. But there is no evidence that bad faith, rather than inadvertent technical error, caused the computer failure. A285 (statement by district court that “[i]t’s of course unfortunate that the video surveillance system crashed. I credit the government’s evidence that it crashed, and as a result we do not have the best evidence of what occurred.”). Massey’s attorney even disclaimed this argument below. A115.

Furthermore, the government has consistently acted in good faith on this issue, sending the hard drives to Master Security Systems, which confirmed that the data was not recoverable. It disclosed the technical difficulties with the hard drives early on in the proceedings, yet Massey never moved to send the hard drives to ESS Data Recovery or to any other recovery service.<sup>14</sup> *Cf. Youngblood*, 488 U.S. at 58 (noting that “[n]one of [the lost and allegedly exculpatory] information was concealed from respondent at trial, and the evidence – such as it was – was made available to respondent’s expert who declined to perform any tests on the samples”).

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<sup>14</sup> Massey explains: “All I can do while sitting in jail is ask my lawyers to push the issue. Which I did on several occasions, verbally as well as written.” Massey’s *Pro Se* Brief at 4. The fact is, however, that neither Massey nor his lawyers pursued submitting the hard drive for additional analysis by another vendor.

Put simply, a violation under *Brady* requires that there be evidence to suppress. Here, there was no evidence to suppress because the hard drive crash rendered the evidence inaccessible. Where, as here, the evidence shows that the government acted in good faith in connection with the hard drive crash, and there is no evidence that it acted in bad faith, there was no violation of due process under *Youngblood*.

### **III. The district court's sentence of Patterson was procedurally and substantively reasonable.**

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

The Pre-Sentence Report (“PSR”) set forth the defendant’s sentencing guidelines imprisonment range as 135 to 168 months. *See* PSR ¶ 67. Although the PSR found no factors or circumstances which would warrant a departure or non-guideline sentence, the defendant argued two grounds for a departure or non-guidelines sentence. First, the defendant argued that “the seriousness of his criminal history is overstated.” GSA46, GSA48-GSA50. Second, the defendant argued that he “suffered childhood physical abuse which has impaired his judgment.” GSA46, GSA50-GSA51. The Government opposed both departures. GSA63-GSA65.

Sentencing was scheduled for July 26, 2010, but the court postponed it so that Patterson could obtain a psychiatric evaluation. PA64-PA69. The hearing resumed on November 3, 2010. PA70. The court began by calculating Patterson’s guideline range as follows:

- A base offense level of 20 pursuant to U.S.S.G. § 2B3.1(a)
- 2 additional levels pursuant to § 2B3.1(b)(1) (property of bank stolen)
- 5 additional levels pursuant to § 2B3.1(b)(2)(C) (brandishing a gun)
- 1 additional level pursuant to § 2B3.1(b)(7)(B) (total loss amount between \$10,000 and \$50,000)
- 2 additional levels pursuant to § 3C1.2 (reckless endangerment during high speed pursuit)
- A 2 level adjustment pursuant to § 3E1.1(a) (acceptance of responsibility)

PA75. This resulted in a total offense level of 28.

The court heard argument and ultimately found that Patterson deserved a two-level enhancement for obstruction of justice (U.S.S.G. § 3C1.1) for testifying at the pre-trial suppression hearing that he had asked for a lawyer prior to confessing to the crime. PA76-PA83. It next determined that Patterson had a criminal history category IV, not III, in light of *United States v. Bouknight*, 639 F.3d 26 (2d Cir. 2010) (holding that the district court properly considered Bouknight’s conditional discharge to be a “criminal justice sentence” under U.S.S.G. § 4A1.1). PA84-PA85.

The district court declined to find that Category IV overstated the seriousness of Patterson’s criminal history. PA87-PA90. In doing so, the court squarely addressed the issue presented by Patterson:

Does Criminal History Category IV substantially over represent the seriousness of his criminal history? I suppose one could argue that it over represents the seriousness of the criminal history, but I don't think it substantially over represents the seriousness of the defendant's criminal history. Accordingly, I conclude that the downward departure permitted by Section 4A1.3 does not apply because Criminal History Category IV does not substantially over represent the seriousness of the defendant's criminal history.

PA89.

At this point, the court turned to Patterson's requested departure on the basis of emotional and physical condition. It explained that Section 5K2.13 (Diminished Capacity) allowed the court to depart downward where "(1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense." U.S.S.G. § 5K2.13; PA95. Patterson's attorney, however, decided not to argue for a departure on that basis because "I'm not sure the findings of the [presentence] report gave me the kind of factual basis to push forward on my hoped departure grounds." PA96. He therefore reserved the claim to support a request "for a non-guideline sentence." *Id.* The court then expressly rejected the Section 5K2.13 departure, although it invited Patterson's counsel to make a more general Section 5H1.3 argument (permitting departure based on mental and emotional conditions that

are present to an unusual degree) if he desired. PA98-PA99.

Patterson's counsel then argued for a non-guidelines sentence based on his client's emotional difficulties, just as he had argued in his sentencing memorandum. PA101-PA103. Patterson himself expressed regret for his crimes and stated that he was not a violent person. PA104-PA107. The government made its final presentation, arguing that the bank robbery was a dangerous crime, that Patterson had a violent past, and that his emotional difficulties were not a ground for downward departure or a sentence reduction. PA113-PA118. Finally, a bank employee described the impact of the robbery for the court. PA118-PA120.

After a recess, the court pronounced its sentence. It began by explaining the 18 U.S.C. § 3553(a) factors. PA121-PA123. It then determined that the two-level obstruction enhancement was in fact merited, giving Patterson an offense level of 30. PA123-PA126. Combined with the offense level of 30, this enhancement produced a guideline range of 135 months to 168 months. PA126. Next, it considered whether it should give Patterson "a lesser sentence because of your history and your mental and emotional condition." PA126. It asked "whether these factors are present to an unusual degree such that alone or in combination with other factors they would justify a lesser sentence." PA127. Ultimately, it concluded that Patterson could not "expect leniency based on a mental or emotional condition traceable to the tragic

circumstances of his youth, at least not without psychiatric testimony that I don't have." PA129.

Given the seriousness of the crime, Patterson's record, and the need for punishment and deterrence, the court imposed a sentence of 135 months, which was at the bottom of the guideline range. PA115, PA130. The court discussed the "seriousness of the crime" that Patterson committed, including the fact that he risked "the lives of other people," and concluded that the "offense cries out for a lengthy sentence. PA127-28.

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

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court declared the United States Sentencing Guidelines "effectively advisory." *Booker*, 543 U.S. at 245. After *Booker*, 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). "The Guidelines provide the 'starting point and the initial benchmark' for sentencing, and district courts must 'remain cognizant of them throughout the sentencing process.'" *Id.* (internal citations omitted) (quoting *Gall v. United States*, 552 U.S. 38, 49, 50 & n.6 (2007)). 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*, 552 U.S. at 49-50. 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 Booker*, 543 U.S. at 260-62. 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)). For a sentence to be procedurally reasonable, the sentencing court must calculate the guideline range, treat the guideline range as advisory, and consider the range along with the other § 3553(a) factors. *See Cavera*, 550 F.3d at 189. Where a defendant fails to object at the time of sentencing to the district court’s alleged procedural error in not fully considering the § 3553(a) factors or in making a mistake in the guideline calculation, this Court reviews the claim for plain error. *See United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir. 2007).

Nonetheless, a district court need not specifically respond to all arguments made by a defendant at sentencing. The Second Circuit has “never required a District Court to make specific responses to points argued

by counsel in connection with sentencing.” *United States v. Bonilla*, 618 F.3d 102, 111 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1698 (2011). “The District Court must satisfy us only that it has considered the party’s arguments and has articulated a reasonable basis for exercising its decision-making authority.” *Id.* (citing *Cavera*).

Additionally, “a refusal to downwardly depart is generally not appealable, and . . . review of such a denial will be available only when a sentencing court misapprehended the scope of its authority to depart or the sentence was otherwise illegal.” *United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006) (internal quotations and citation omitted).

The Supreme Court has reaffirmed that the reasonableness standard requires review of sentencing challenges under an abuse-of-discretion standard. *See Gall*, 552 U.S. at 46. Although this Court has declined to adopt a formal presumption that a within-guidelines sentence is reasonable, it has “recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances.” *Fernandez*, 443 F.3d at 27; *see also Rita v. United States*, 551 U.S. 338, 347-51 (2007) (holding that courts of appeals may apply presumption of reasonableness to a sentence within the applicable Sentencing Guidelines range); *United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006) (“In calibrating our review for reasonableness, we will continue to seek guidance from the considered

judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.”).

Further, the Court has recognized that “[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge ‘exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.’” *Fernandez*, 443 F.3d at 27 (citations omitted). A sentence is substantively unreasonable only in the “rare case” where the sentence would “damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law.” *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 140 (2010). This Court recently likened its substantive review to “the consideration of a motion for a new criminal jury trial, which should be granted only when the jury’s verdict was ‘manifestly unjust,’ and to the determination of intentional torts by state actors, which should be found only if the alleged tort ‘shocks the conscience.’” *United States v. Dorvee*, 616 F.3d 174, 183 (2d Cir. 2010) (quoting *Rigas*, 583 F.3d at 122-23). On review, this Court will set aside only “those outlier sentences that reflect actual abuse of a district court’s considerable sentencing discretion.” *United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008).

In some cases, a “significant procedural error,” may require a remand to allow the district court to correct its mistake or explain its decision, *see Cavera*, 550 F.3d at 190, but when this Court “identif[ies] procedural error in a sentence, [and] the record indicates clearly that ‘the district court would have imposed the same sentence’ in any event, the error may be deemed harmless, avoiding the need to vacate the sentence and to remand the case for resentencing.” *United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009) (quoting *Cavera*, 550 F.3d at 197), *cert. denied*, 130 S. Ct. 1149 (2010) and *cert. denied*, 130 S. Ct. 2128 (2010).

### **C. Discussion**

Patterson does not allege that the district court failed to calculate the guideline range. Nor does he allege that it failed to consider the section 3553(a) factors or that it relied on an erroneous finding of fact. He claims only that the court “fail[ed] to consider, make factual findings, or resolve” two specific issues when calculating the guideline range. *See* Patterson’s Brief at 12. First, Patterson argues that the district court “completely ignored . . . whether his failure to obtain ‘incremental punishment’ resulted in a criminal history category that seriously over-represented his conduct,” an argument he advanced in his written submissions (although not at the sentencing hearing). *See* Patterson’s Brief at 12. Second, he argues that the district court did not address his emotional and mental conditions argument under U.S.S.G. § 5H1.3. *See* Patterson’s Brief at 15.

As an initial matter, to comply with the requirements of § 3553(a) and *Cavera*, the district court did not need to respond to each and every one of Patterson’s points so long as it considered them and “articulated a reasonable basis for exercising its [sentencing] authority.” *Bonilla*, 618 F.3d at 111. *Bonilla* squarely rejected the argument that a sentence was procedurally unreasonable simply because “the District Court failed to respond *specifically* in some way to [the defendant’s] argument.” *Id.* Moreover, the district judge in *Bonilla* stated that he had “reviewed and considered all the pertinent information” in making his decision. *Id.* So too here – the district court indicated that it had considered the arguments Patterson raised in his written submissions. *See* PA101.

In connection with his first claim about incremental punishment, Patterson relies on *United States v. Mishoe*, 241 F.3d 214 (2d Cir. 2001). But *Mishoe* held only that such a consideration was permissible, not that it was mandatory:

The Commission’s sensible recognition that a [criminal history category] may over represent a defendant’s likelihood of recidivism *permits* a sentencing court, in appropriate cases, to include in its individualized consideration of a section 4A1.3 departure the relationship between the punishment described by a career offender [criminal history category] and the degree of punishment imposed for prior offenses.

*Id.* at 220 (emphasis added).

Furthermore, the district court expressly rejected Patterson’s claim that he deserved a § 4A1.3 departure. PA86-PA90. The court also expressed familiarity with Patterson’s sentencing memo, which contained the incremental punishment argument that Patterson states was completely ignored. PA85-PA86 (“The defendant has urged in his memorandum that Criminal History Category IV overstates the seriousness of his criminal record and that a departure to category III is warranted.”). As the Court in *Stinson* indicated, “a refusal to downwardly depart is generally not appealable . . . [unless] a sentencing court misapprehended the scope of its authority to depart or the sentence was otherwise illegal.” 465 F.3d at 114. The district court was clearly aware of its authority to depart under § 4A1.3, and Patterson points to no illegal aspect of the sentence.

Patterson’s second argument is that the district court made findings only concerning his mental and emotional conditions with respect to § 5K2.13 (Diminished Capacity) and § 3553(a) (history and characteristics of the defendant). It did not, he claims, address whether his emotional difficulties warranted a downward departure under § 5H1.3. *See* Patterson’s Brief at 15.

The record shows the opposite. The district court invited Patterson’s counsel to argue for a § 5H1.3 departure. PA99. It then indicated that it had considered the argument. *Compare* PA127 (“I have asked whether these [emotional and mental] factors are *present to an unusual degree such that alone or in combination with other factors* they would justify a lesser sentence. . . . I

don't think that they can.") *with* U.S.S.G. § 5H1.3. ("Mental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, *individually or in combination with other offender characteristics, are present to an unusual degree* and distinguish the case from the typical cases covered by the guidelines.") (emphasis added). The Sentencing Guidelines do not require "robotic incantations by district judges." *Crosby*, 397 F.3d at 113 (internal quotations omitted). Accordingly, the court did not need to mechanically utter the words "Section 5H1.3" when it explained the reasons for its sentence.

Finally, a sentence of 135 months was clearly a reasonable one for an armed bank robbery by a defendant with Patterson's criminal record. Patterson, both in participating in an armed robbery and in the high-speed chase that ensued, put the "lives of other people at risk." PA128 (court's comments in imposing sentencing). As Judge Chatigny stated, "This was an extremely serious crime. You're lucky that the gun didn't go off and somebody wasn't killed. . . . The gun was loaded. There was a bullet in the chamber." PA128. Accordingly, "[t]his offense crie[d] out for a lengthy sentence." PA127. A sentence of 135 months in prison is a lengthy and appropriate sentence, and one that was at the bottom of the guidelines range. It was clearly a reasonable sentence.

**Conclusion**

For the foregoing reasons, the judgments of the district court at to both Massey and Patterson should be affirmed.

Dated: October 4, 2011

Respectfully submitted,

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**Certification per Fed. R. App. P. 32(a)(7)(c)**

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,710 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 "Eric J. Glover".

ERIC J. GLOVER  
ASSISTANT U.S. ATTORNEY

## **ADDENDUM**

**§ 3553. Imposition of a sentence**

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

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

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed --
  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;

- (4) the kinds of sentence and the sentencing range established for --
  - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines --
    - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
    - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
  - (B) in the case of a violation of probation, or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into

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

- (5) any pertinent policy statement–
  - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
  - (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

\* \* \*

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

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

- (1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or
- (2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

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

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