

# 10-3580

*To Be Argued By:*  
PAUL A. MURPHY

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-3580

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UNITED STATES OF AMERICA,

*Appellee,*

-vs-

STEVEN DECECCO,

*Defendant-Appellant.*

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

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## **Statement of Jurisdiction**

The district court (Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on March 29, 2010. Appellant's Appendix 10 ("AA\_\_."). On April 5, 2010, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). AA 11. This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).

**Statement of Issues  
Presented for Review**

- I. Was the district court's decision to deny the defendant credit for acceptance of responsibility without foundation in light of the defendant's obstructive conduct?
  
- II. Did the district court abuse its discretion and impose a substantively unreasonable sentence when it correctly applied the Sentencing Guidelines and sentenced the defendant to a term of imprisonment within the applicable guideline range?
  
- III. (A) Should this Court decide on direct appeal whether defense counsel's conduct was constitutionally ineffective?  
  
(B) Was defense counsel's representation at the trial level constitutionally ineffective?

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
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**BRIEF FOR THE UNITED STATES OF AMERICA**

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### **Preliminary Statement**

The defendant, Steven DeCecco, and a co-conspirator looted his company of over \$2.5 million while serving as its controller and used the money to fuel his expensive lifestyle, complete with a collection of high-end vintage automobiles. The money he stole was the very money he was charged with protecting as the controller of the victim company. When he was eventually caught, he admitted to the theft of funds and identified certain assets he

possessed. But it quickly became clear that he was lying to federal investigators about the extent of his assets. He hid assets with substantial value from investigators, repeatedly violated court orders, supplied false information to U.S. Probation, and even participated in submitting false documents to the Connecticut Department of Motor Vehicles, thereby evading the district court's order regarding two motorcycles.

After a lengthy sentencing hearing, the district court sentenced the defendant principally to 96 months in prison. In this appeal, the defendant principally challenges his sentence, but as set forth below, the sentence imposed was reasonable given the nature and extent of the defendant's crimes and the defendant's conduct during the investigation and prosecution.

### **Statement of the Case**

On April 7, 2009, the defendant appeared in district court in Bridgeport, Connecticut, and was arrested on a complaint. Appellant's Appendix 3 ("AA \_\_."). At that time, Magistrate Judge William I. Garfinkel entered an order setting conditions of release, which, among other things, prohibited the defendant from dissipating his assets unnecessarily. AA 4; Government Appendix 105-07 ("GA \_\_."). He also entered a stipulated restraining order governing certain bank accounts of the defendant. AA 3-4, GA 108-11.

On August 31, 2009, Magistrate Judge Holly B. Fitzsimmons conducted a hearing into the defendant's

violation of his conditions of release based on his unauthorized sale of a vehicle. AA 6; GA 1-28. On September 21, 2009, Magistrate Judge Fitzsimmons held a further hearing on this same issue and imposed further restrictions on the defendant. AA 6; GA 29-58.

On September 29, 2009, a grand jury sitting in Hartford, Connecticut, returned a six-count indictment charging the defendant with one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349, three counts of wire fraud, in violation of 18 U.S.C. § 1343, and two counts of interstate transportation of stolen property, in violation of 18 U.S.C. § 2314. AA 6, 14-23. The defendant was arraigned on the indictment on September 30, 2009, at which time he entered a not guilty plea. AA 6.

On September 30, 2009, Magistrate Judge Fitzsimmons held another hearing to determine what sanction to impose on the defendant for his violation of his conditions of release. AA 6; GA 59-85.

On November 5, 2009, the defendant changed his plea and entered a guilty plea to all six counts of the indictment. AA 7, 32-89. There was no plea agreement.

On March 9, 2010, the government filed a motion to revoke the defendant's bond and for immediate remand. AA 8-9. After a brief hearing on the motion held before Magistrate Judge Fitzsimmons on March 16, 2010, the district court revoked the defendant's bond and he was remanded to custody. AA 9; GA 174, 178-79.

Sentencing took place over two days, beginning on March 23, 2010 and ending on March 24, 2010. AA 10. The district court sentenced the defendant principally to 96 months of imprisonment, to be followed by three years of supervised release. AA 10. The district court also ordered the defendant to pay restitution in the amount of \$2,556,288. AA 10, 248-251, 253.

Judgment entered on March 29, 2010, and the defendant filed a timely notice of appeal on April 5, 2010. AA 10-11.

The defendant is currently serving his sentence.

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

#### **I. The offense conduct**

From 2006 until February 2009, the defendant served as the Corporate Controller of a company in Connecticut known as Expand International of America, Inc. (“Expand”). He was fired in February 2009 when the company discovered that he and another former employee, Jaime Hoff, had embezzled money from the company for more than two years. Hoff worked for the defendant in the accounting department and was responsible for the company’s accounts payable and bank reconciliations. Presentence Report (“PSR”) ¶ 6.

The essence of the scheme to defraud was that the defendant and Hoff regularly made unauthorized transfers

of funds from Expand's bank account in New York to their own bank accounts. PSR ¶ 7. On a number of occasions, they also wired large sums of money to third parties for the benefit of the defendant, who became an avid collector of vintage and high-end cars such as Chevy Corvettes, mostly from the 1960s. PSR ¶ 7.

The defendant and Hoff made hundreds of fraudulent transfers of Expand's money to themselves, often several times per week in various amounts usually in the thousands of dollars. PSR ¶ 8. Lists showing the disbursement of money to the defendant and Hoff on a regular basis were presented to the district court at sentencing and are included in the Government's Appendix.<sup>1</sup> GA 120-155. The amounts stolen ranged as high as one \$52,000 transfer on May 20, 2008 to fund the defendant's purchase of a 1965 Chevy Corvette, and another for \$55,000 on October 21, 2008 to fund his purchase of a 1959 Corvette. PSR ¶ 8; GA 134, 138.

By the time the scheme was detected in February 2009, DeCecco and Hoff had collectively stolen approximately

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<sup>1</sup> The exhibits submitted to the district court at sentencing are included in the government's appendix, with the exception of Government Exhibit 7, which is a disk containing the recordings played for the district court, and Government Exhibits 18A and 19A. These latter documents are largely duplicative of Government Exhibits 18 and 19, although they contain some additional information. These documents were submitted to the district court under seal because they were unredacted. These exhibits remain available for the Court's review.

\$2,516,288 of Expand's money, with DeCecco receiving the lion's share of that amount. PSR ¶ 9. Records show that about \$2,122,549 was sent either directly to DeCecco or to third parties for his benefit. PSR ¶ 9. Of that amount, about \$1,291,865 can be directly attributed to his funding the purchase of cars and car parts. PSR ¶ 9.

As part of the scheme, the defendant and Hoff caused false entries to be made in Expand's books and records in an effort to make it appear as though these fraudulent transfers were actually payments of legitimate business expenses to vendors of the victim. PSR ¶ 10. The defendant and Hoff were able to avoid detection for over two years because they were responsible for the company's accounts payable and bank reconciliations. PSR ¶ 11.

The defendant met with government investigators twice early in the investigation. PSR ¶ 12. During his interviews, the defendant described the fraudulent scheme and admitted that one of the things he purchased with the stolen money was various classic cars, principally vintage Chevy Corvettes. PSR ¶ 12. He estimated that over the course of the fraud scheme, he may have purchased approximately 20 (and possibly more) cars. PSR ¶ 12. He also estimated that he had spent approximately \$200,000 on landscaping for his house. PSR ¶ 12. He identified various accounts, including the 401(k) and CHET accounts discussed below, as well as a number of vehicles he had in storage around Connecticut. As a result, the government obtained seizure warrants and seized five vehicles. PSR ¶ 15.

## **II. The Arrest, Indictment and Guilty Plea**

On April 7, 2009, the defendant was arrested and presented before Magistrate Judge William I. Garfinkel, at which time he consented to the entry of a restraining order freezing certain bank accounts. PSR ¶ 17; AA 3; GA 108-11. At that time, the court also entered an order setting conditions of release, which prohibited the defendant from dissipating his assets unnecessarily. AA 3-4; GA 105-06.

A grand jury indicted the defendant on six counts on September 29, 2009. The indictment charged the defendant with one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349, three counts of wire fraud, in violation of 18 U.S.C. § 1343, and two counts of interstate transportation of stolen property, in violation of 18 U.S.C. § 2314. AA 6, 14-23.

On November 5, 2009, the defendant pled guilty without a plea agreement to all counts of the indictment. AA 32-89. At the plea hearing, the defendant acknowledged his guilt on each count of the indictment, AA 81-82, and agreed with the government's recitation of the facts of the offenses, except for the amount of loss. AA 67-73.

## **III. Obstruction of the investigation into the defendant's assets**

Throughout the course of the investigation, from the time the scheme was uncovered through the sentencing

process, the defendant took numerous steps to hide and dissipate his assets.

A consensually monitored call between a cooperating witness and the defendant's paramour shortly after the defendant's fraud scheme was discovered captured the paramour saying words to the effect that she and the defendant were hiding assets. PSR ¶ 13. This was confirmed when the Secret Service executed a search warrant on separate safe deposit boxes she and the defendant had opened shortly after the fraud scheme fell apart. PSR ¶ 13. The contents of the paramour's safe deposit box included about \$6,002 in cash and assorted jewelry. The defendant's safe deposit box was empty. PSR ¶13.

**A. False statements concerning the source of funds**

At his first meeting with the government in February 2009, the defendant was asked about a recent deposit of four checks into his bank account. He claimed that he had sold several vehicles and some car parts he had bought with his ill-gotten gains so that he could begin building a restitution fund. PSR ¶ 16; GA 103-04. But when the Secret Service later contacted the individual who had drafted the checks, it learned that all the checks corresponded to the sale of only one vehicle. PSR ¶ 16. The buyer said that it was the defendant's idea that he write out four separate checks for the purchase of one car. PSR ¶ 16. This suggested that he was attempting to hide the existence of yet other cars he might have stored

somewhere. In a second interview, the defendant admitted to lying to investigators, but denied that his purpose was to hide assets. PSR ¶ 16. At sentencing, the district court concluded that the defendant had lied in order to impede the recapture of the fraud proceeds. AA 160-62.

### **B. The undisclosed 1967 Corvette on Long Island**

During the week of April 20, 2009, shortly after Magistrate Judge Garfinkel ordered the defendant not to dissipate his assets unnecessarily, the Secret Service received a tip claiming that the defendant had yet another Corvette stored on Long Island. PSR ¶ 17. Further investigation confirmed that the information was accurate. PSR ¶ 17. The car in question was a 1967 Corvette which the defendant had purchased in 2008 for approximately \$120,000. PSR ¶ 17. Like the other vehicles, this car had been bought with funds embezzled from the victim. PSR ¶ 17. The investigation revealed that the defendant was in the process of having a substantial amount of work done on this Corvette, which was being stored in a garage in Smithtown, New York. PSR ¶ 17. Witnesses advised the Secret Service that the defendant had paid approximately \$2,850 for repairs to the car, and that he had recently called and said he planned to pick up the car on April 25, 2009 because it had been sold. Before he could do so, the Secret Service seized the vehicle pursuant to a seizure warrant signed by the court on April 24, 2009. PSR ¶ 17.

During his interviews with the Secret Service, the defendant never acknowledged owning the 1967 Corvette he had stored on Long Island. PSR ¶ 18. This was despite

repeated requests in those interviews for him to identify all of his assets. PSR ¶ 18. After it was seized, the defendant claimed that the car had previously been sold. The evidence clearly indicated otherwise, as the district court found at sentencing. AA 162-63. The court concluded that the defendant had once again lied to government investigators and had violated the order restricting his disposition of assets in an attempt to hide the vehicle so that the government could not execute against it and restore assets to the victim. AA 162-63.

### **C. The unauthorized sale of another Corvette**

On June 30, 2009, the defendant filed an application with the district court for authorization to sell the Corvette he used for daily transportation. AA 5; GA 181-82. On July 2, 2009, the government objected to the sale of the vehicle. AA 6; GA 183-90. The district court denied the application on July 30, 2009 without prejudice to the defendant's supplying additional information about his financial status that might support the sale. AA 6.

On July 29, 2009, before the district court denied the pending application to sell the car, U.S. Probation conducted an unannounced home visit and saw that the defendant's Corvette was not at the house. PSR ¶ 20. Upon learning the next day that the district court had denied the application, Probation contacted the defendant again and learned that he had simply gone ahead and sold the car before the court ruled on his application. PSR ¶ 20. The bill of sale he eventually presented reflected a sale price of \$30,000. GA 11. The defendant promptly spent

the vast majority of the \$30,000, also without authorization from the court. PSR ¶ 20; GA 17.

Magistrate Judge Holly B. Fitzsimmons thereafter held hearings into the defendant's violation of the district court's order setting conditions of release. During the first hearing, on August 21, 2009, the defendant represented to the court that he needed the \$30,000 from the sale of the car to get his house out of foreclosure and to pay other bills. GA 5, 17-18. He was ordered to supply documents showing what he had done with the proceeds. GA 18. The documents he ultimately submitted at a subsequent hearing on September 21, 2009, showed that only a relatively small portion of the money went to pay his mortgage arrears and that his total outstanding debt at the time of the sale was approximately \$10,886. GA 32-33. The accounting he submitted to the district court showed that he spent large sums on other things, like applying \$8,000 of the proceeds to pay back money he claimed to owe to family and friends, and using another \$2,000 of the sale proceeds for what the defendant described as "money to keep on hand." GA 33; *see* PSR ¶21.

At the hearing on September 21, 2009, Magistrate Judge Fitzsimmons expressed her strong concerns with the defendant's actions, remarking:

This is a very, very serious violation of Judge Garfinkel's order of the responsibility, I guess you would say, that Judge Garfinkel put on you to try to make amends with respect to this fraud, by at least preserving some portion of the money for the

victim in the long run, and it's shocking. It is shocking to look at these expenditures and to see, as I said before, that you seem to have no appreciation whatsoever, of the seriousness of the dissipation of assets.

GA 50. Magistrate Judge Fitzsimmons thereafter formally found that the defendant had violated his conditions of release by selling the car and then disposing of the proceeds of the sale. GA 52.

At the conclusion of this hearing, Magistrate Judge Fitzsimmons clearly set forth the broad scope of the restriction imposed on the defendant, ordering as follows: "If it isn't clear, Mr. DeCecco, you're not to buy any asset without the Court's permission, and *you're not to sell or dispose of any assets without the Court's permission . . .*." GA 57 (emphasis added).

At sentencing, the district court concluded that the defendant's actions in selling this car amounted to a knowing violation of the order restraining his dissipation of assets, and amounted to obstruction. AA 163.

#### **D. The transfer of the CHET Funds**

On January 5, 2010, the government moved for a supplemental restraining order relating to the accounts the defendant maintained with the Connecticut Higher Education Trust ("CHET") 529 College Savings Plan for

his child.<sup>2</sup> AA 7-8; GA 191. According to information the government had previously obtained during its investigation, the CHET accounts were for the benefit of the defendant's minor child and were funded with approximately \$32,500 between June 2007 and March 2009. GA 193. The defendant transferred these funds into the CHET accounts from two Wachovia bank accounts he used to commit the fraud at issue in this case. GA 193. The district court granted the motion for a restraining order without objection on January 11, 2010. AA 8; GA 234-36.

Upon serving the order, the government learned that the defendant had drained the CHET accounts months earlier. PSR ¶ 3. The defendant submitted a withdrawal request form to CHET, dated September 29, 2009, seeking to withdraw those funds and certifying that the withdrawal was for qualified higher education expenses. GA 86-87. On October 2, 2009, CHET issued two checks made payable to the defendant, one for \$16,430.12 and the other for \$15,773.24. GA 88-89. Those funds were deposited into the defendant's mother's account on October 13, 2009 and removed on November 12, 2009. GA 172-73.

This transfer from the CHET accounts occurred after Magistrate Judge Fitzsimmons had admonished the defendant not to sell or dispose of any assets, and while she was considering what sanction to impose for his prior

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<sup>2</sup> During the September 30, 2009 hearing before Magistrate Judge Fitzsimmons, the government inadvertently failed to identify the CHET accounts or a 401(k) plan as other assets of the defendant.

violation of the court's order as a result of the unauthorized sale of the Corvette. GA 57, 59-84.

The defendant also concealed these transfers from Probation by filing financial statements omitting any mention of the transfer of the CHET funds. *See* Financial Statements attached to PSR dated December 2, 2009 and January 28, 2010. The net worth statements the defendant signed under penalties of perjury requested the following information: "Include below all assets transferred or sold since your arrest with a cost or fair market value of more than \$500.00, or assets that someone else is holding on your behalf." The defendant did not list the CHET funds. *Id.*

At sentencing, the district court concluded that the defendant again obstructed justice with respect to the CHET funds. AA 164.

#### **E. The transfer of the Harley Davidson motorcycles**

During a search of the two safe deposit boxes mentioned above, government agents found in the one maintained by the defendant's paramour the titles to two Harley Davidson motorcycles. GA 96-97. The titles were in the name of the defendant, not his paramour. GA 96-97. Those motorcycles were located at the defendant's residence in Stratford.

At the hearing on September 30, 2009, the government asked the district court to confirm that the defendant

understood that the motorcycles were subject to the order setting conditions of release. GA 73-74. Magistrate Judge Fitzsimmons then had the following colloquy with the defendant and his counsel:

THE COURT: And can you shed any light on the motorcycles?

MR. RICCIO: Oh, right.

Well, as far as I know, they're on the property, as far as I know. Last I – I haven't spoken about the motorcycles recently, but as far as I know they're there, and I was aware that the Government seized titles to them. I don't know much more than that, sort of in a historical context.

THE COURT: Well, can you confirm with Mr. DeCecco, that they're still there?

(Mr. Riccio and the Defendant confer.)

MR. RICCIO: Mr. DeCecco confirms that they're still on the premises.

THE COURT: And is there any doubt in Mr. DeCecco's mind, that those motorcycles are covered by the

asset freeze that was a condition of the bond?

MR. RICCIO: There's no doubt. As he just stated, there's no doubt that that's covered by the asset freeze.

THE COURT: Okay. So he may not dispose of those motorcycles. Mr. – You may not dispose of those motorcycles, Mr. DeCecco, without the Court's permission.

THE DEFENDANT: Yes.

GA 76-77.

Months later, during a home visit Probation conducted after learning that the defendant's paramour had moved out of their residence, Probation discovered that the Harley Davidsons were gone. GA 246. Connecticut motor vehicle registration records revealed that, in late May 2009, the defendant had "gifted" the registrations to these motorcycles to his paramour. GA 90, 112-19. The documents he and his paramour signed claimed that the titles had been lost. GA 113, 117. At the time, the titles were in the possession of the Secret Service. GA 16.

At sentencing, the district court focused on the defendant's colloquy with Magistrate Judge Fitzsimmons, and found that he had provided false information to the magistrate judge about the motorcycles.

## **F. False financial statements filed with U.S. Probation**

As noted, the defendant concealed a number of asset transfers from Probation and the district court through the filing of materially false financial statements as part of the sentencing process. For instance, he failed to disclose the fraudulent transfer of the Harley Davidson motorcycles when he submitted the net worth statement he signed under penalties of perjury on December 2, 2009 or in the subsequent statement he submitted dated January 28, 2010. These net worth statements were submitted to Probation and attached to the presentence report in this case.

Similarly, the defendant did not include in the net worth statements he submitted to Probation other asset transfers of over \$500 that had occurred after his arrest. He concealed the transfer of the approximately \$32,000 in CHET funds and did not include it in the net worth statements. And he did not include in the net worth statements the fact that he had transferred over \$22,000 from his 401(k) account sometime after his arrest. AA 144, 150-53. He admitted at sentencing that he had transferred all the funds from his 401(k) account. AA 152. Probation also concluded that the defendant had made misrepresentations by not including his house as an asset in the financial statement he filed with Probation dated December 2, 2009. PSR ¶¶ 22, 25, 32. He eventually included the house in his January 28, 2010 financial statement.

At sentencing, the district court concluded that the defendant's false financial statements further supported the obstruction of justice enhancement. AA 167-68.

#### **IV. Revocation of the defendant's bond**

On March 9, 2010, the government moved to revoke the defendant's bond and for him to be remanded to custody based on its learning that he had transferred the CHET funds. AA 8; GA 237-43. It thereafter supplemented that motion on March 15, 2010, after learning of the fraudulent transfer of the Harley Davidson motorcycles. AA 9; GA 244-49. Magistrate Judge Fitzsimmons thereafter held a brief hearing on the motion. GA 174. At the hearing, the defendant stipulated to immediate remand, which Magistrate Judge Fitzsimmons thereafter ordered. GA 177-78. Magistrate Judge Fitzsimmons remarked that "[o]bviously, I regard this as a very, very serious violation of the Court's order and I hope that you're going to have an explanation for Judge Hall because it's going to require some explaining." GA 178-79.

#### **V. The sentencing**

The district court held sentencing hearings over the course of two days on March 23, 2010 and March 24, 2010 lasting a total of about five hours. AA 90, 170, 171, 247. Prior to the sentencing, the government and the defendant filed sentencing memoranda. AA 9. The district court also had the benefit of a thorough presentence report, which adopted the government's version of the offense

conduct, included a complete review of the defendant's background, and annexed the various financial statements the defendant had submitted to Probation. Also attached to the presentence report was a lengthy written statement by the defendant purporting to be his version of the offense conduct, as well as a shorter one that he subsequently filed. Based on its investigation, Probation recommended that the defendant receive a two-point enhancement for obstruction of justice and that the district court deny the defendant credit for acceptance of responsibility. PSR ¶¶ 23-25, 32, 34.

At sentencing, the district court first addressed the issues relating to the applicable Sentencing Guidelines, then proceeded to the parties' respective presentations relating to sentencing and the applicable factors under 18 U.S.C. § 3553(a). The district court heard from the defendant. AA 214-15. The district court also heard from the Chief Executive Officer of the U.S. operations of the victim company. AA 157, 217-222.

The district court first focused on a question of loss, concluding that the defendant was responsible for the entire loss of \$2,516,288, despite his claim that he did not know about one of the personal bank accounts his co-conspirator was using and thus was unaware of approximately \$93,000 of losses that went to her. AA 108-112.

The district court then focused the balance of the first day of sentencing on the question of obstruction of justice. AA 112-169. The government submitted a number of

exhibits in addition to those annexed to its sentencing memorandum. After hearing evidence and argument from counsel, the district court made detailed findings supporting its conclusion that the defendant had engaged in obstruction of justice. AA 158-69.

The court found that the obstruction related to the defendant's conduct during the course of the investigation, including (a) his lies to the investigating agent, AA 160-62; (b) his failure to disclose the vintage Corvette on Long Island, AA 162-63; (c) his unauthorized sale of another Corvette in violation of the order restricting his dissipation of assets, AA163; (d) his transfer of the CHET funds in violation of court orders and his failure to disclose those funds to Probation in financial statements he supplied to Probation in August 2009,<sup>3</sup> AA 163-64, *see* GA 160-171; (e) his supplying materially false information to Magistrate Judge Fitzsimmons about the Harley Davidson motorcycles, AA 164-67; and (f) his supplying false information to Probation when he filed financial statements and omitted material information concerning assets, such as a 401(k) plan that he had drained and the CHET accounts. AA 167-68. In sum, the district court found that these incidents amounted to multiple acts of

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<sup>3</sup> The district court also noted that the defendant had not disclosed these accounts to law enforcement. AA 164. The district court was mistaken on this point. While the defendant had disclosed to law enforcement the existence of the CHET accounts, he did not reference them in the financial statements or disclose to law enforcement or Probation the transfer of the CHET funds.

obstruction and clearly supported the application of an enhancement under U.S.S.G. § 3E1.1. AA 169.

On the second day of sentencing, the district court considered whether the defendant was entitled to a two-point reduction in his Guidelines range for acceptance of responsibility. The district court heard argument and gave a thorough explanation of why the defendant was not entitled to credit for accepting responsibility. AA 179-84. The court noted that “[i]n this instance, there’s nothing extraordinary that would explain why the various conduct and statements and actions of Mr. DeCecco that I outlined yesterday in connection with the obstruction why those don’t bar a finding of acceptance.” AA 183. The court noted that the defendant’s actions showed that he recognized he had committed the crime, but that his attitude reflected a belief that the gains from his crimes nevertheless belonged to him. AA 183. “His conduct doesn’t equal acceptance of responsibility because responsibility here is a recognition that he stole what is not his.” AA 183. The court then reviewed all the information it had examined and held: “All of that says to me that Mr. DeCecco accepts responsibility but to himself and his family, while it is admirable to want to support your family, it isn’t to do it with somebody else’s money. He hasn’t in this court’s view, accepted responsibility to the victim.” AA 184. Accordingly, the district court denied the defendant credit for acceptance of responsibility. AA 184.

The district court then calculated the guideline range, finding that the total offense level was 29. The court also concluded that the defendant was in criminal history

category I, resulting in an applicable guideline range of 87 to 108 months in prison. AA 185-86.

The district court next entertained and rejected the defendant's request for a downward departure on the theory that the loss amount overstated the seriousness of the offense. AA 186-92. The court found that the loss amount did not overstate the seriousness of the harm here because the defendant actually received the benefit of most of the loss, and there was an actual victim that sustained that loss. AA 191-92.

After hearing from defense counsel and the defendant, as well as government counsel and the victim, the district court set forth in detail its rationale for its sentence. AA 229-39. The court first noted its obligation to consider the sentencing factors in 18 U.S.C. § 3553(a). AA 192, 207. The district court examined the pertinent § 3553(a) factors in sentencing the defendant, focusing first on the seriousness of the offense and the need to promote respect for the law. In that regard, the court considered the amount of the loss and the effect on the victim company, as well as the defendant's abuse of his position of trust and the conduct he displayed during the course of the case that amounted to obstruction of justice. AA 230-32. The court also considered the need for deterrence, both specific deterrence and general deterrence, as well as the need to protect the public. AA 232-34. The court addressed the need to provide care or treatment to the defendant while incarcerated. AA 234. And the court further focused on the nature and circumstances of the offense and the characteristics of the defendant. AA 235-38.

After considering all the relevant factors, the district court sentenced the defendant principally to 96 months in prison to be followed by three years of supervised release. AA 239. The court also ordered the defendant to pay restitution in the amount of \$2,556,288.

### **Summary of Argument**

I. The district court's determination that the defendant did not accept responsibility was consistent with the record and was not without foundation. It was, instead, the product of an exhaustive examination of the defendant's actions since his scheme was uncovered. This included a thorough review of all of his various attempts to hide assets by lying to the government, violating court orders, and supplying materially false information to the court and Probation in connection with the prosecution and his sentencing. The district court correctly concluded that it was not sufficient for the defendant to say that he accepted responsibility, while at the same time taking steps to retain his ill-gotten gains. The district court's assessment is entitled to great deference on appeal, and the defendant has supplied no basis for concluding that its determination should be reversed.

II. The defendant's sentence was substantively reasonable. The sentence was in the middle of the applicable guideline range and was the product of the district court's thorough review of the record and the pertinent sentencing factors in 18 U.S.C. § 3553(a). The sentence reflected the seriousness of the offense, namely, a significant fraud that occurred over more than two years

by a defendant who was in a position of trust within the victim company. Over the course of a two-day sentencing hearing, the district court heard from a representative of the victim company as to serious effect the defendant's scheme had on the company's finances.

The district court correctly concluded that the loss amount of over \$2.5 million properly measured the defendant's culpability, as the offenses caused the loss of real dollars to a real victim. The district court noted that the loss amounted to approximately 10% of the victim company's revenues. The district court also properly weighed the need for deterrence, both specific and general, and rejected the contention that the defendant should receive a more lenient sentence because of his age. The court correctly pointed out that the defendant commenced his offenses at a relatively advanced age and then persisted in his obstruction of justice throughout the case, which, in turn, showed a lack of acceptance of responsibility. The defendant's argument that he should have been granted leniency so that he could pay his restitution also is unpersuasive, given the express wishes of the victim here that the defendant receive the longest sentence permissible. In the end, the sentence was the product of a thoughtful and complete review of the all the evidence and pertinent sentencing factors. Under no circumstances could the district court's careful consideration of this sentence be properly characterized as an abuse of discretion.

III. This Court should not consider the defendant's arguments, raised for the first time on appeal, that he

received ineffective assistance of counsel. Such claims are better considered on a more complete record on collateral review – which is the preferred procedure and will furnish defense counsel with an opportunity to explain the challenged actions. Even if the Court were to examine those actions at this time, the defendant would not be entitled to any relief. He cannot show that his counsel’s representation was constitutionally deficient, as counsel’s actions were neither substandard, nor was the defendant prejudiced by them.

### **Argument**

The defendant makes three principal arguments in his brief: (1) the district court erred in refusing to grant him credit for acceptance of responsibility, Appellant’s Brief 28-33 (“App. Br. \_\_\_.”); (2) his sentence was substantively unreasonable, App. Br. 14-27; and (3) his counsel in the district court provided ineffective assistance, App. Br. 34-42. For the reasons set forth below, none of these arguments has merit.

**I. The district court’s decision to deny the defendant credit for acceptance of responsibility was well founded and not clearly erroneous.**

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

**1. Sentencing law generally**

On appeal, a district court’s sentencing decision is reviewed for reasonableness. *See United States v. Booker*, 543 U.S. 220, 260-62 (2005). The Supreme Court has reaffirmed that the reasonableness standard for sentencing challenges is essentially an abuse-of-discretion standard. *See Gall v. United States*, 552 U.S. 38, 51 (2007). This Court has recognized that “[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. . . . 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.’” *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006) (citations omitted). “The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.” *Gall*, 552 U.S. at 51; *see United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009) (“Of course, an ‘intuitive’ review cannot be an invitation to mischief by tinkering with any sentence that appellate judges simply do not like.”), *cert. denied*, 131 S. Ct. 140 (2010); *United States v. Florez*, 447 F.3d 145, 157 (2d Cir. 2006); *Fernandez*, 443 F.3d at 27.

In this context, reasonableness has both procedural and substantive dimensions. *See Gall*, 552 U.S. at 51; *United States v. Jones*, 531 F.3d 163, 170 (2d Cir. 2008). “A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory.” *United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc) (citations omitted). A district court also commits procedural error “if it does not consider the § 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact.” *Id.* Finally, a district court “errs if it fails adequately to explain its chosen sentence, and must include ‘an explanation for any deviation from the Guidelines range.’” *Id.* (quoting *Gall*, 552 U.S. at 51).

## **2. Acceptance of responsibility**

Section 3E1.1 of the Sentencing Guidelines provides that a defendant may receive a two-level reduction to the applicable offense level where the defendant “clearly demonstrate[s] acceptance of responsibility for his offense.” U.S.S.G. § 3E1.1(a); *see United States v. Volpe*, 224 F.3d 72, 75 (2d Cir. 2000). The burden is on the defendant to establish that he deserves a reduction under this provision. *See generally United States v. Smith*, 174 F.3d 52, 55-56 (2d Cir. 1999) (holding that the party who seeks to take advantage of an adjustment in the guidelines bears the burden of proof; dealing with safety-valve provision of U.S.S.G. § 5C1.2).

“Because the ‘sentencing judge is in a unique position to evaluate a defendant’s acceptance of responsibility,’ his determination is given great deference on review.” *United States v. Savoca*, 596 F.3d 154, 159 (2d Cir.) (quoting U.S.S.G. § 3E1.1, comment (n.5)), *cert. denied*, 130 S. Ct. 3528 (2010); *see also United States v. Reyes*, 9 F.3d 275, 280 (2d Cir. 1993) (“[T]he sentencing judge is unquestionably in a better position to assess contrition and candor than is an appellate court.”) (internal quotation marks omitted). “Whether there has been an acceptance of responsibility is a fact-question and the circuit court will not reverse the district court’s finding on this issue unless it is ‘without foundation.’” *United States v. Giwah*, 84 F.3d 109, 112 (2d Cir. 1996)<sup>4</sup> (quoting *United States v. Harris*, 13 F.3d 555, 557 (2d Cir. 1994)); *see United States v. Brennan*, 395 F.3d 59, 75 (2d Cir. 2005); *United States v. Hirsch*, 239 F.3d 221, 226 (2d Cir. 2001); *Volpe*, 224 F.3d at 75. This Court reviews factual determinations concerning a defendant’s acceptance of responsibility under the clearly erroneous standard. *See United States v. Champion*, 234 F.3d 106, 110-11 (2d Cir. 2000) (*per curiam*).

“The Guidelines make clear that a guilty plea does not entitle the defendant to an acceptance reduction and that the defendant must prove to the court that he or she has accepted responsibility.” *Giwah*, 84 F.3d at 113; *see*

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<sup>4</sup> An unrelated part of the *Giwah* case concerning restitution was abrogated by the enactment of the Mandatory Victim Restitution Act, 18 U.S.C. § 3663A. *See United States v. Walker*, 353 F.3d 130, 131-33 (2d Cir. 2003).

*Hirsch*, 239 F.3d at 226. “Merely pleading guilty to an offense does not ensure the application of the reduction.” *Savoca*, 596 F.3d at 159; *see* U.S.S.G. § 3E1.1, comment (n.3) (“A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.”). This Court has recognized that failure to pay restitution as promised may constitute a refusal to accept responsibility. *See United States v. Zichettello*, 208 F.3d 72, 107 (2d Cir. 2000); *United States v. Wells*, 154 F.3d 412, 413-14 (7th Cir. 1998) (defendant’s failure to return proceeds of robbery and his obstruction of the investigation into the whereabouts of those proceeds supported denial of acceptance of responsibility credit and obstruction of justice enhancement, despite the fact that the defendant pled guilty). Moreover, a district court may deny credit for acceptance of responsibility if, for example, the defendant “has engaged in continued criminal conduct that bespeaks ‘a lack of sincere remorse.’” *United States v. Defeo*, 36 F.3d 272, 277 (2d Cir. 1994) (quoting *United States v. Cooper*, 912 F.2d 344, 346 (9th Cir. 1990)).

The commentary to § 3E1.1 provides that “[c]onduct resulting in an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct.” U.S.S.G. § 3E1.1, comment (n.4). “There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply.” *Id.*; *see Savoca*, 596 F.3d at 159 (“Except in extraordinary cases, the application of an enhancement for obstruction of justice ordinarily indicates that the defendant has not accepted responsibility to warrant a

reduction in his guidelines calculation.”). In this regard, this Court has recognized that “it is rare that a defendant should be granted a reduction in offense level for acceptance of responsibility when the court has deemed it appropriate to increase her offense level for obstruction of justice.” *Defeo*, 36 F.3d at 277 (denying acceptance reduction because defendant continued to use drugs while on release, failed to report to probation office, and tried to cheat on drug test).

This Court has held on numerous occasions that a defendant’s acts of obstruction justify a district court in denying credit for acceptance of responsibility. *See Savoca*, 596 F.3d at 159 (defendant’s perjury in the closely related case of his brother in which the defendant falsely testified that a third party, not his brother, had assisted him, supported an obstruction enhancement and the denial of credit for acceptance of responsibility); *Giwah*, 84 F.3d at 112-13 (defendant’s perjury during evidentiary hearing and his bail jumping justified obstruction enhancement and denial of credit for acceptance of responsibility); *United States v. Malki*, 609 F.3d 503, 511-12 (2d Cir. 2010) (“The validity of the obstruction enhancement adequately supports the District Court’s decision not to accord [the defendant] a reduction in the adjusted offense level for acceptance of responsibility despite his guilty pleas.”); *Champion*, 234 F.3d at 110-11 (defendant’s false statements at time of arrest, submission of perjured affidavit and subornation of perjury, combined with the defendant’s conviction after trial, provided adequate basis to deny acceptance credit); *United States v. Case*, 180 F.3d 464, 468 (2d Cir. 1999) (per curiam) (affirming imposition

of obstruction enhancement and denial of acceptance adjustment absent extraordinary circumstances).

## **B. Discussion**

There was more than adequate support in the record for the district court's decision denying the defendant credit for acceptance of responsibility. And the defendant does not challenge any of the district court's factual findings as having been clearly erroneous. Accordingly, it remains uncontested that the defendant provided materially false information about his assets and the proceeds of the fraud to the U.S. Secret Service, to Magistrate Judge Fitzsimmons, and to the district court, through materially false and misleading financial statements filed in connection with his sentencing. He also persistently violated court orders restraining his disposition of his assets. The common thread among these acts was the defendant's attempt to hide assets or otherwise prevent them from being available for restitution to be paid to the victim.

On appeal, the defendant does not challenge the finding that he obstructed justice and thus deserved a two-level enhancement under the Guidelines. Given this concession, the defendant is left to contend that this case is one of the "extraordinary cases" contemplated by the Guidelines where he nevertheless should be entitled to credit for acceptance of responsibility. This position is contrary to the one he took before the district court. AA 174. And he has failed to carry his burden on appeal of

demonstrating that there was no foundation for the district court's decision that this was not an "extraordinary case."

The Seventh Circuit's decision in *Wells* is highly instructive. There, the defendant had pled guilty to a robbery, but had obstructed the police investigation into the whereabouts of the proceeds of the crime. *See* 154 F.3d at 413-14. The district court denied the defendant credit for acceptance of responsibility and applied a two-level enhancement for obstruction of justice. *Id.* at 413. The Seventh Circuit rejected the defendant's contention that his guilty plea was sufficient to show that he had accepted responsibility. *Id.* That Court noted the importance of voluntary restitution to the process of accepting responsibility:

Where it is feasible, its refusal, demonstrating as it does a desire to retain the fruits of the crime, blocks any inference of remorse or repentance. The remorseful or repentant criminal would want to do everything possible to rectify the harmful consequences of his crime, and so if he still has any of the loot he will return it. Thus Application Note 1(c) counts voluntary restitution as a favorable circumstance for the granting of the acceptance of responsibility discount.

*Id.* at 414 (also holding that lies to police about whereabouts of proceeds of the crime amounted to obstruction of justice); *see Zichettello*, 208 F.3d at 107 (failure to make promised restitution supported finding of absence of acceptance of responsibility).

This case also is similar to *United States v. Merritt*, 792 F. Supp. 206 (S.D.N.Y. 1991), *aff'd*, 988 F.2d 1298 (2d Cir. 1993). There, the defendant pled guilty to conspiracy to commit fraud in connection with his receipt of \$936,000 for shipping a product that was supposed to be powdered milk to the Sudan. *Id.* at 207. The district court found that the defendant had obstructed justice by submitting false documents to the government, attempting to retain the proceeds of the fraud, and lying to U.S. Probation by denying that he had any connection to a company that had owned his house and had received the proceeds of the sale when the house was sold. *Id.* at 209-210. The district court held that this conduct amounted to obstruction of justice and justified it in withholding credit for acceptance of responsibility. *Id.* at 210.

Here, the essence of the defendant's obstructive conduct was to retain a portion of the fruits of his crime and thereby avoid making complete restitution. The district court correctly concluded that, on multiple occasions, the defendant violated court orders in disposing of assets, lied to Probation about his assets, and lied to Magistrate Judge Fitzsimmons in connection with his transfer of assets. Like the situations in *Merritt* and *Wells*, these plainly were assets that otherwise would have been available to pay restitution.

The defendant suggests that this is an extraordinary case because, in his view, his obstruction of justice "did not extend to or overlap with his plea allocution." App. Br. 33. This argument is legally untenable and, in any event, is not consistent with the facts of this case.

In *United States v. Honken*, 184 F.3d 961 (8th Cir. 1999), the Eighth Circuit rejected the district court's conclusion that the case before it was "extraordinary" because the defendant did not engage in any obstruction after the date of his guilty plea. *Id.* at 968. The court found that such a legal standard was "inconsistent with the plain language of the guideline commentary and the prior decisions of this court and other courts of appeals." *Id.* at 968. Rather, the circuit court held as follows:

To determine whether a case is "extraordinary," the district court should have taken into account the totality of the circumstances, including the nature of the appellee's obstructive conduct and the degree of appellee's acceptance of responsibility. Among other things, the district court should have considered whether, for example, the obstruction of justice was an isolated incident early in the investigation or an on-going effort to obstruct the prosecution. It should have considered whether appellee voluntarily terminated his obstructive conduct, or whether the conduct was stopped involuntarily by law enforcement. The district court should have noted whether appellee admitted and recanted his obstructive conduct, or whether he denied obstruction of justice at sentencing. Moreover, in our opinion the district court should have also weighed not only whether the defendant pleaded guilty to the underlying offense but also whether he assisted in the investigation of his offense and the offenses of others.

*Id.* at 968 (internal citations omitted) (distinguishing *United States v. Hopper*, 27 F.3d 378 (9th Cir. 1994)); *see United States v. Hawley*, 93 F.3d 682 (10th Cir. 1996).

These factors support the district court's conclusion here that this was not an extraordinary case. Contrary to the defendant's argument on appeal, the record shows that his obstructive conduct began at the outset of the investigation, continued through his indictment and guilty plea, and went right through sentencing. So there is no basis for suggesting that the obstruction ceased at the time of his plea. Moreover, this was not an isolated incident of obstruction, but rather was a course of conduct that permeated the case. At no time did the defendant voluntarily discontinue his obstruction. To the contrary, he continued to press ahead in the face of (a) an ongoing criminal investigation, (b) several court orders, (c) the prospect of having his bail revoked, (d) and a full presentence investigation by U.S. Probation. Additionally, he continued to fight through sentencing and denied that he had engaged in obstruction.<sup>5</sup>

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<sup>5</sup> The facts of this case distinguish it from *United States v. Restrepo*, 936 F.2d 661 (2d Cir. 1991), on which the defendant relies. *See* App. Br. 29. The facts of *Restrepo* did not involve the persistent obstruction, continuing through the sentencing process, as is the case here. Moreover, *Restrepo* is pertinent here solely because it recognizes the fact that a district court's conclusion with respect to acceptance of responsibility is entitled to deference by this Court. *See* 936 F.2d at 669 (applying clearly erroneous standard of review). This Court has noted in dicta that a defendant may engage in obstruction and  
(continued...)

As a result of this constant drumbeat of obstruction, the district court was more than adequately justified in discounting the defendant's confession and subsequent guilty plea, and instead finding that the defendant did not accept responsibility.

The district court made clear its rationale that the defendant could not obtain credit for acceptance of responsibility while at the same time attempting to retain and use proceeds of his crimes. AA 183. As the district court held: "In this instance, there's nothing extraordinary that would explain why the various conduct and statements and actions of Mr. DeCecco that I outlined yesterday in connection with the obstruction why those don't bar a

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<sup>5</sup> (...continued)

later come to accept responsibility fully. *United States v. Enriquez*, 42 F.3d 769, 773 (2d Cir. 1994). The Court, of course also noted that the defendant would need to accept responsibility for both the underlying crime and the obstruction – something that plainly did not happen here. *Id.* The facts of *United States v. Weeks*, 2003 WL 22671543 (S.D.N.Y., Nov. 12, 2003), also relied on by the defendant, are dramatically different from this case. In *Weeks*, the defendant lied to the SEC in December 1995, which the district court held qualified for an obstruction enhancement. *Id.* at \*15. Seven and a half years later, in August 2003, the defendant gave a full admission of his crime, including his lies to the SEC. *Id.* The district court in *Weeks*, concluded that this statement in August 2003 reflected an acceptance of responsibility. *Id.* Here, in contrast, the defendant's obstruction continued through the sentencing process, where he submitted false financial statements to Probation.

finding of acceptance.” AA 183. The district court’s thorough review of the evidence resulted in its holding as follows: “All of that says to me that Mr. DeCecco accepts responsibility but to himself and his family, while it is admirable to want to support your family, it isn’t to do it with somebody else’s money. He hasn’t in this court’s view, accepted responsibility to the victim.” AA 184.

In sum, the district court’s finding was fully supported by the record and was not based on any clearly erroneous factual findings. As such, it cannot be said to have been “without foundation.” Accordingly, this Court should not disturb the district court’s decision denying the defendant a reduction for acceptance of responsibility.

## **II. The district court’s sentence was substantively reasonable and not an abuse of discretion.**

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

As set forth above, this Court reviews a sentence not only for procedural reasonableness, but also for substantive reasonableness. When reviewing a sentence for substantive reasonableness, an appellate court “take[s] into account the totality of the circumstances.” *Gall*, 552 U.S. at 51. This Court will “set aside a district court’s substantive determination only in exceptional cases where the trial court’s decision ‘cannot be located within the range of permissible decisions.’” *Cavera*, 550 F.3d at 189 (quoting *Rigas*, 490 F.3d at 238). 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.” *Rigas*, 583 F.3d at 123. 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).

### **B. Discussion**

After thorough consideration and analysis, the district court sentenced the defendant to 96 months’ imprisonment, a sentence in the middle of the applicable guideline range.

The defendant contends, however, that the 96-month sentence is substantively unreasonable. He focuses on several sentencing factors he claims were not adequately considered by the district court. First, he attacks the loss table in U.S.S.G. § 2B1.1(b) and contends that it is irrational and overstates the seriousness of the offense. App. Br. 15-21. He then contends that the goal of deterrence was not served because the sentence was disproportionately long given that he has not previously been sentenced to prison, App. Br. 21-23, and given his age and the lower rate of recidivism for older persons,

App. Br. 23-25. Finally, the defendant contends that his lengthy sentence fails to serve the goal of providing restitution because he will not be able to pay restitution while in prison. App. Br. 25-27.

None of these arguments carries the day. Not only does the defendant's dissection of the relevant sentencing factors miss the mark in each individual case, as set forth below, but it fails to appreciate the importance of a sentencing court's view of the totality of the circumstances. This Court has made clear that the "requirement that a sentencing judge consider an 18 U.S.C. § 3553(a) factor is *not* synonymous with a requirement that the factor be given determinative or dispositive weight in the particular case, inasmuch as it is only one of several factors that must be weighted and balanced by the sentencing judge." *Fernandez*, 443 F.3d at 32; *see Florez*, 447 F.3d at 157.

**1. The loss does not overstate the seriousness of the offense.**

In support of his contention that the loss table in U.S.S.G. § 2B1.1(b) is inherently flawed and overstates the seriousness of the harm, the defendant relies principally on two district court cases involving securities fraud convictions. *See* App. Br. 16-21. These cases, *United States v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006), *aff'd*, 301 Fed. Appx. 93 (2d Cir. 2008), and *United States v. Parris*, 573 F. Supp. 2d 744 (E.D.N.Y. 2008), are inapposite. Both cases involved defendants who had been convicted of securities fraud and related violations. *See*

*Adelson*, 441 F. Supp. 2d at 507 (defendant convicted of conspiracy, securities fraud and false filings with the SEC); *Parris*, 573 F. Supp. 2d at 746 (defendants convicted of conspiracy to commit securities fraud, securities fraud, conspiracy to commit witness tampering and witness tampering).

In these cases, the sentencing courts were faced with guideline ranges based on substantial loss numbers, which often escalate rapidly in securities fraud cases. The pertinent guideline ranges also were increased by the numerous enhancements applicable in such cases, especially where the defendants were officers or directors of a publicly-traded company. *See Adelson*, 441 F. Supp. 2d at 509-10 (describing the “multiplier effect that may lead to guideline offense levels that are, quite literally, off the chart”); *Parris*, 573 F. Supp. 2d at 754 (noting that officers and directors convicted of securities fraud likely will face sentencing ranges “calling for or approaching lifetime imprisonment”). In *Parris*, the Guidelines calculation led to a sentencing range of 360 months to life in prison. *See 573 F. Supp. 2d at 750* (defendant was offense level 42 and criminal history category I). And in *Adelson*, the district court found that the defendant’s guideline range would have been life in prison (bounded by an 85-year statutory maximum), even with a substantial reduction in the loss amount based on the fact that he joined the conspiracy late. *See 441 F. Supp. 2d at 510-11*. Both sentencing courts concluded that these guideline ranges did not correctly reflect the sentencing factors in § 3553(a) in those particular circumstances, and so they

imposed non-Guidelines sentences well below the applicable guideline ranges.

The concerns expressed in *Parris* and *Adelson* are not present here. The defendant's guideline range did not escalate exponentially based on sentencing enhancements applicable most often in securities fraud cases against officers and directors of publicly traded companies. Moreover, unlike a securities fraud case, where a district court is required to make complex loss determinations based on the extent to which the stock-price drop is attributable to the fraud, *see United States v. Rutkoske*, 506 F.3d 170, 178-80 (2d Cir. 2007), the loss here was clearly defined by the precise amount of money the defendant stole from the victim.

Indeed, the district court rejected the defendant's contention that the loss overstated the seriousness of the offense here. The district court recognized that there may well be cases where the loss overstates the harm, and even referred to a particular case in which it had accepted such an argument. AA 190-91. But it went on to reject the claim here, holding:

[L]oss is a very heavy contributor to Mr. DeCecco's guidelines but it strikes me that the loss table doesn't overstate the seriousness of his offense. He indeed while he didn't actually put 2.5 plus million into his pocket, he put almost all of that in. He participated in a scheme that permitted all of it to be taken from the victim. There is a victim and that victim did suffer that loss so again

while I recognize that I have the discretion to depart[,] I don't find that the facts presented to me that would justify a departure.

AA 191-92. Thereafter, the district court examined the § 3553(a) factors and specifically noted that this was a serious offense, in part because the amount of loss had “a significant impact” on the victim company. AA 230-31. The court found that the defendant's theft amounted to approximately 10% of the victim's annualized revenues. AA 231.

Moreover, even though several district courts have criticized the Guidelines in the securities fraud context, it is worth pointing out that this Court has upheld substantial sentences for first-time white collar criminals who had served as the leaders of major public companies. *See United States v. Ebbers*, 458 F.3d 110, 129-30 (2d Cir. 2006) (25-year sentence for CEO of WorldCom was reasonable); *Rigas*, 583 F.3d at 121-24 (12-year and 17-year sentences for top officers at Adelphia were substantively reasonable).

More to the point, other cases involving loss amounts in the neighborhood of those caused by the defendant have resulted in sentences greater than that imposed here. *See United States v. Naranjo*, 634 F.3d 1198, 1206 (11th Cir. 2011) (affirming 120-month sentence of imprisonment for conspiracy, fraud and money laundering relating to Ponzi scheme resulting in losses of approximately \$2,747,137.47; district court also applied victim and leadership enhancements); *United States v. Romero*, 410

Fed. Appx. 460, 462 (3d Cir. 2010) (unpublished) (affirming 150-month sentence for fraud convictions involving loss of approximately \$1,884,874; enhancements included abuse of position of trust, number of victims, vulnerable victim, and an upward departure for causing extreme psychological injury); *United States v. Garcia-Pastrana*, 584 F.3d 351, 393-94 (1st Cir. 2009) (sentences of 210 months and 108 months for defendants convicted of embezzling approximately \$6.6 million from health care benefit program and of money laundering were not substantively unreasonable; sentencing enhancements applied), *cert. denied*, 130 S. Ct. 1724 (2010), and *cert. denied*, 130 S. Ct. 3303 (2010); *Arakelian v. United States*, 2009 WL 211486 (S.D.N.Y. 2009) (defendant sentenced to 108 months in prison based on guilty plea to fraud scheme resulting in approximately \$4 million in loss; other enhancements included more than 50 victims, obstruction of justice and leadership role; defendant received acceptance credit).

**2. The district court correctly weighed the need for deterrence.**

The defendant next argues that the district court failed to weigh properly the need for deterrence. App. Br. 21-25. This claim also is meritless.

The defendant relies heavily on *United States v. Mishoe*, 241 F.3d 214 (2d Cir. 2001), a case that does not help his cause. *Mishoe* dealt with the situation where a defendant's criminal history category was VI, based on his criminal history points and on the application of the career

offender provisions. *See id.* at 216-17 (citing U.S.S.G. § 4B1.1). This Court recognized that while certain persons may fall within the scope of the career offender provisions, they may nevertheless merit a lesser sentence than called for by those Guidelines because, in part, they had not previously served substantial time in prison on their predicate convictions. *See Mishoe*, 241 F.3d at 219-20. The Court focused on the fact that “[o]bviously, a major reason for imposing an especially long sentence upon those who have committed prior offenses is to achieve a deterrent effect that the prior punishments failed to achieve.” *Id.* at 220. Thus, in the Court’s view, if the prior sentences had not been particularly lengthy, then the district court could find in a particular case that a sentence within the career offender range might exceed what was necessary to achieve the goal of deterrence. *See id.*

None of these concerns is present here. The defendant was in criminal history category I, the lowest possible category. So the applicable guideline range took into account the very fact that he had not previously spent time in prison. The defendant’s guideline range was not driven by any issue of recidivism, but instead by the nature of the offense conduct, coupled with the defendant’s persistent obstruction of justice and failure to accept responsibility. Moreover, the defendant argued this very point to the district court, AA 210, and the court clearly weighed the argument in reaching its ultimate sentence. AA 233-34.

The cases cited by the defendant on this issue also do not suggest that the district court here abused its discretion. In *United States v. Qualls*, 373 F. Supp. 2d 873

(E.D. Wis. 2005), the district court imposed a sentence below the applicable career offender guideline range for reasons similar to those identified in *Mishoe*, including that the defendant's prior convictions would have resulted in a "colossal increment" relative to the defendant's prior prison terms. *Id.* at 877.

The defendant's citation to *United States v. Baker*, 445 F.3d 987 (7th Cir. 2006), App. Br. 22-23, also is misplaced. There, the Seventh Circuit recognized the district court there had concluded that an 87-month sentence was reasonable, in part, because it "would mean more" to the defendant than to others who had previously been imprisoned. *Id.* at 992. While a legitimate consideration, the Seventh Circuit's holding in no way means that a district court *must* reduce a defendant's sentence if he has never been imprisoned before. *See Fernandez*, 443 F.3d at 32; *Florez*, 447 F.3d at 157. Indeed, such a general rule would violate the need for a district court to make particularized findings at sentencing. *See Mishoe*, 241 F.3d at 218 (district court must make particularized findings for departure) (citing *Koon v. United States*, 518 U.S. 81, 100 (1996)).

The case of *United States v. Paul*, 239 Fed. Appx. 353 (9th Cir. 2007) (unpublished), also does not help the defendant because there the court of appeals held that the sentence was unreasonable due to the fact that the district court "did not adequately consider" the mitigating evidence. Here, in contrast, the district court gave ample consideration to all the pertinent sentencing factors, AA

229-38, including the fact that the defendant was in criminal history category I. AA 233-34.

Nor was the defendant's age of sufficient relevance to suggest that the district court abused its discretion. The district court certainly considered the fact that the defendant was 52 years old at the time of sentencing, as the defendant pressed this very argument at sentencing. AA 210-11. The district court rejected the argument, acknowledging the age-recidivism studies referenced by the defendant, but finding that the argument faltered in this case given that the defendant committed these offenses when he was in his 50s. AA 210, 233-34. The district court also distinguished the cases relied on by the defendant by noting that none of them involved "a defendant who conducted himself after his plea of guilty as Mr. DeCecco did." AA 211; *see* AA 233-34.

This Court has previously recognized that, like here, such an argument is significantly undermined where a defendant began his criminal "escapades" at age 54 and continued with his criminal activities thereafter. *See United States v. Trupin*, 475 F.3d 71, 75-76 (2d Cir. 2007), *vacated on other grounds*, 552 U.S. 1089 (2008). And as the district court pointed out, the defendant's continued obstruction during the case plainly suggested he differed from the average defendant of his age. In the end, the defendant has identified no way in which the district court erred in rejecting this argument, and this Court will not vacate a sentence in such circumstances. *See United States v. Tran*, 519 F.3d 98, 107 (2d Cir. 2008) (affirming sentence despite defendant's arguments that the district

court failed to properly evaluate, among other things, his age and decreased likelihood of recidivism, given that the district court had considered his arguments at sentencing and defendant failed to show basis to vacate sentence).<sup>6</sup>

**3. The district court considered the need to make restitution.**

The defendant also argues that the district court's lengthy sentence frustrated the goal of providing restitution to the victim. App. Br. 25-27. While the question of restitution is a permissible factor to consider, none of the cases the defendant cites compels the conclusion that a defendant *must* be granted leniency so he

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<sup>6</sup> This Court has recognized that a district court may consider a defendant's age as a factor in reaching an appropriate sentence. *See Cavera*, 550 F.3d at 197 (defendant over age 70). Other cases cited by the defendant have reached this conclusion. *See* App. Br. at 24-25. But this does not equate with a requirement that a district court discount a sentence for this reason, as the sentencing court must consider the totality of the circumstances. *See Gall*, 550 U.S. at 51; *Fernandez*, 443 F.3d at 32 (sentencing judge not required to give any particular § 3553(a) factor determinative or dispositive weight). Here, the district court appropriately weighed this consideration when sentencing the defendant. AA 211, 233-34.

can begin paying his restitution obligation.<sup>7</sup> See *Fernandez*, 443 F.3d at 32; *Florez*, 447 F.3d at 157.

Here, this very argument was presented to the district court, AA 211-13, and the defendant cites no reason why the district court abused its discretion by not reducing his sentence as a result of this argument. Indeed, the record supports the opposite conclusion. It would have been truly odd for the district court to have reduced the defendant's sentence so he could work to make restitution, when the victim company's representative advised the court that the victim – to which the vast majority of the restitution was owed (AA 251, 253) – “hope[d] that the court w[ould] impose *the longest jail time possible [sic] permissible under the law.*” AA 219 (emphasis added).

Accordingly, the district court did not abuse its discretion in sentencing the defendant. While the 96-month sentence is substantial, the circumstances of the fraud and the defendant's subsequent conduct do not make it a “rare case” that would harm the administration of justice because the sentence is “shockingly high, shockingly low, or otherwise unsupportable as a matter of law.” *Rigas*, 583 F.3d at 123.

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<sup>7</sup> In *United States v. Menyweather*, 447 F.3d 625 (9th Cir. 2006), the Ninth Circuit offered that a sentence of non-incarceration would permit a defendant to make restitution. *Id.* at 634, 636. The case in no way suggested that the need for restitution *compels* leniency.

**III. The Court should not address the defendant’s ineffective assistance of counsel claims, but, if it does, those claims should be rejected.**

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

To establish that defense counsel provided ineffective assistance, a defendant must satisfy the Supreme Court’s well-established test of showing (1) “that counsel’s performance was deficient” and (2) that counsel’s “deficient performance prejudiced the defense.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As to the first requirement, a “defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. In determining whether counsel’s performance was objectively reasonable, this Court “must ‘indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound [legal] strategy.’” *United States v. Gaskin*, 364 F.3d 438, 468 (2d Cir. 2004) (alteration in original) (quoting *Strickland*, 466 U.S. at 689). As for the second requirement that the defendant show prejudice, the *Strickland* test requires that “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694.

This Court has expressed its reluctance to decide ineffective assistance of counsel claims on direct review,

but it has also held that “direct appellate review is not foreclosed.” *Gaskin*, 364 F.3d at 467-68. Accordingly, when a criminal defendant on direct appeal asserts trial counsel’s ineffective assistance, this Court may ““(1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent [28 U.S.C.] § 2255 petition; (2) remand the claim to the district court for necessary fact-finding; or (3) decide the claim on the record before [it].” *United States v. Hasan*, 586 F.3d 161, 170 (2d Cir. 2009) (quoting *United States v. Leone*, 215 F.3d 253, 256 (2d Cir. 2000)), *cert. denied*, 131 S. Ct. 317 (2010); *see also United States v. Doe*, 365 F.3d 150, 152 (2d Cir. 2004).

In choosing among the available options, this Court has been mindful of the Supreme Court’s direction that “in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective-assistance,” *Massaro v. United States*, 538 U.S. 500, 504 (2003); *see Gaskin*, 364 F.3d at 467-68. But this direction, as interpreted by this Court, is not an injunction against reviewing new ineffective assistance claims on direct appeal, but rather an expression of the Supreme Court’s view that, “the district court [is] the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial.” *Doe*, 365 F.3d at 153 (alteration in original) (quoting *Massaro*, 538 U.S. at 501). As the Supreme Court cautioned, “[w]hen an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often

incomplete or inadequate for this purpose.” *Massaro*, 538 U.S. at 504-505. For this reason, this Court resolves ineffective assistance claims on direct appeal “when the factual record is fully developed and resolution of the Sixth Amendment claim on direct appeal is ‘beyond any doubt’ or ‘in the interest of justice.’” *Gaskin*, 364 F.3d at 468 (quoting *United States v. Khedr*, 343 F.3d 96, 100 (2d Cir. 2003)).

In a variety of circumstances, this Court has opted to dismiss claims of ineffective assistance of counsel in favor of their presentation in subsequent § 2255 motions, rather than remand those claims for further fact-finding. For example, in *United States v. Morris*, 350 F.3d 32 (2d Cir. 2003), the defendant claimed that she had received ineffective assistance of counsel at sentencing. Like DeCecco, Morris raised her ineffective assistance of counsel claims for the first time on direct appeal. This Court determined that in light of its “baseline aversion to resolving ineffectiveness claims on direct review, and the Supreme Court’s recent[ly]” stated preference for resolving such claims in the context of § 2255 motions, it would not consider the defendant’s claim. *Id.* at 39 (internal quotations and citations omitted); see *United States v. Morgan*, 386 F.3d 376, 383 (2d Cir. 2004) (declining to hear defendant’s claim of ineffective assistance of counsel on direct review, noting that the defendant was free to pursue the claims in a subsequent § 2255 petition); *United States v. Venturella*, 391 F.3d 120, 134-35 (2d Cir. 2004) (this Court declined to review defendant’s ineffective-assistance claims asserted for the first time on appeal based upon her counsel’s performance

at trial). *See also United States v. Oladimeji*, 463 F.3d 152, 154 (2d Cir. 2006) (declining to review the defendant’s ineffective-assistance claims on direct appeal, noting that “[w]here the record on appeal does not include the facts necessary to adjudicate a claim of ineffective assistance of counsel, our usual practice is not to consider the claim on the direct appeal, but to leave it to the defendant to raise the claims on a petition for habeas corpus under 28 U.S.C. § 2255”).

In addition, this Court has also dismissed direct appeals where the factual record did not include trial counsel’s explanation of the strategic decision-making process. As this Court has repeatedly instructed, “except in highly unusual circumstances,” the attorney whose performance in challenged should be afforded an “opportunity to be heard and to present evidence, in the form of live testimony, affidavits, or briefs” to explain the decision-making process. *Sparman v. Edwards*, 154 F.3d 51, 52 (2d Cir. 1998) (per curiam); *see Khedr*, 343 F.3d at 100 (“[T]he allegedly ineffective attorney should generally be given the opportunity to explain the conduct at issue.”); *United States v. Williams*, 205 F.3d 23, 35-36 (2d Cir. 2000).

## **B. Discussion**

The defendant raises his ineffective-assistance claims for the first time on appeal, focusing on three contentions: (1) defense counsel failed to argue properly for acceptance of responsibility credit by conceding that this was not an “extraordinary” case; (2) defense counsel did not

challenge the administrative seizures; and (3) defense counsel should not have argued that the defendant was addicted to stealing. App. Br. 35-42.

This Court should refrain from adjudicating these issues at this time because the record on appeal is incomplete. Among other things, it is bereft of any explanation from defense counsel whose actions are in question as to why he did what he did. Counsel certainly should be given the opportunity to present evidence and explain why he chose a particular path before his decisions are labeled “ineffective.” *See Khedr*, 343 F.3d at 100.

For example, the contention that defense counsel “surrender[ed] the sword” by conceding that this was not an “extraordinary” case entitling the defendant to credit for acceptance of responsibility, App. Br. 36, is susceptible of numerous potential explanations. First, while counsel did make the statements appellate counsel attributes to him, he went on to argue all the reasons why, in his view, the defendant should nevertheless be given credit for accepting responsibility, despite the Guidelines commentary. AA 174-75. Moreover, whether counsel made a Guidelines concession to maintain credibility with the sentencing court remains to be seen. Such a course of conduct would have been reasonable in the circumstances, given that counsel was, after all, left with a client who did just about everything he could to undermine his claim for credit for acceptance of responsibility. *See supra, passim*.

Even if this Court were to address this particular argument, it should reject the claim. As set forth in detail

above, there is no basis for concluding that the district court erred in refusing to credit the defendant for acceptance of responsibility. Defense counsel's actions cannot be considered ineffective if the result would not have changed. *See Strickland*, 466 U.S. at 694; *United States v. Habbas*, 527 F.3d 266, 273-74 (2d Cir. 2008) (failure to object to a Guidelines enhancement that was "academic" to the district court did not prejudice the defendant).

The resolution of the defendant's other ineffectiveness claims also should not be decided on direct review for the same reasons. But even if the Court were to review these arguments, they too should be rejected because the defendant cannot show that he was prejudiced by the allegedly substandard representation. The claim that counsel should have objected to the forfeitures has no place in this case, as the forfeitures about which the defendant complains were done administratively. Because this was an administrative issue, the forfeitures were not part of the judgment in the criminal case. Thus, counsel's actions on this front had no effect on his criminal case.

Likewise, trial counsel's argument that the defendant was addicted to stealing was not, as appellate counsel suggests, substandard representation, nor did it prejudice the defendant. This defendant engaged in a pattern of embezzlement over more than two years through which he personally obtained over \$2 million. As the district court noted, the defendant's conduct was in pursuit of "a lifestyle that was totally unnecessary, wasteful, and to really no purpose other than to live a lifestyle that

exceeded [his] honest income by multiples of about 10 to 15 times.” AA 236. The district court noted the “frivolity” of the defendant’s various personal expenditures, from antique cars, to \$200,000 in landscaping for his house. AA 236.

In this light, defense counsel’s argument is properly characterized as an effort to humanize the defendant and mitigate the pure venality of his crimes by attempting to put them into the context of a person who was unable to control his impulses. This type of sentencing argument is a quintessential question of trial strategy and hence is “virtually unchallengeable.” *Gaskin*, 364 F.3d at 468.

In sum, the defendant simply cannot show that counsel’s challenged actions resulted in constitutionally substandard representation or that he suffered any prejudice as a result.

**Conclusion**

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

Dated: September 2, 2011

Respectfully submitted,

DEIRDRE M. DALY  
ACTING UNITED STATES ATTORNEY  
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read "Paul A. Murphy". The signature is fluid and cursive, with a large initial "P" and "M".

PAUL A. MURPHY  
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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 13,307 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 "Paul A. Murphy". The signature is fluid and cursive, with a large initial "P" and "M".

PAUL A. MURPHY  
ASSISTANT U.S. ATTORNEY

## **ADDENDUM**

### **§3E1.1. Acceptance of Responsibility**

- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.
  
- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by **1** additional level.

#### *Commentary*

#### *Application Notes:*

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

- (a) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under*

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

- (b) voluntary termination or withdrawal from criminal conduct or associations;*
- (c) voluntary payment of restitution prior to adjudication of guilt;*
- (d) voluntary surrender to authorities promptly after commission of the offense;*
- (e) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;*
- (f) voluntary resignation from the office or position held during the commission of the offense;*
- (g) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and*

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

- 2. This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.*
- 3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(a)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such*

*acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.*

- 4. Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.*
- 5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.*
- 6. Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b) will occur*

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

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