No. _____

IN THE

Supreme Court of the United States

GERARD DENAULT,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

To prove a wire fraud charge, the government must show that the defendant intended to deprive the purported victim of "money or property." 18 U.S.C. § 1343. The Second Circuit affirmed Petitioner's wire fraud conviction and 20-year sentence on the theory that he made a misrepresentation that caused New York City to refrain from asking a prime contractor to rebid a subcontract. As a result, the Circuit reasoned, the City lost an opportunity to obtain a lower price if a less expensive subcontractor had been retained. But the City had no contractual right or other legal entitlement to require the prime contractor to rebid the subcontract, or to pass on any resulting cost savings to the City. The City had agreed to pay fixed-price rates, set without reference to the contractor's underlying costs or markups, and the City received the agreed-upon services at the agreed-upon price.

The questions presented are:

1. Whether the government fails to satisfy the "money or property" requirement of wire fraud when a misrepresentation deprives the purported victim of information about a potential economic benefit, but the purported victim has no contractual right or other legal entitlement to that benefit.

2. Whether the Court of Appeals must actually determine, and not merely presume, that a sentencing court has discharged its duty under 18 U.S.C. § 3553 and *Rita v. United States*, 551 U.S. 338 (2007), to state its reasons for imposing a particular sentence after having considered the defendant's arguments and the statutory factors.

PARTIES TO THE PROCEEDING

Petitioner Gerard Denault was a defendant in the District Court and an appellant in the Second Circuit. The respondent is the United States of America.

Additional defendants in the District Court were Padma Allen, Reddy Allen, Carl Bell, Dimitry Aronshtein, Anna Makovetskaya, Mark Mazer, Svetlana Mazer, Larisa Medzon, Technodyne LLC ("Technodyne"), and Science Applications International Corporation ("SAIC"). Additional parties in the Court of Appeals were Dimitry Aronshtein and Mark Mazer, who were co-defendants with Petitioner at trial.

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As this Court has emphasized, the mail and wire fraud statutes are limited to the protection of property rights. No conviction is proper without proof that the defendant intended to deprive the alleged victim of "money or property." The Court has elucidated the meaning of the money-or-property clause in a series of decisions involving the duties of public officials, the misuse of confidential business information, government licensing decisions, and a government's right to uncollected taxes. *See McNally v. United States*, 483 U.S. 350 (1987); *Carpenter v. United States*, 484 U.S. 19 (1987); *Cleveland v. United States*, 531 U.S. 12 (2000); *Pasquantino v. United States*, 544 U.S. 349 (2005).

The Court has never, however, addressed the "money or property" requirement in the context of commercial transactions. For decades, the lower courts have struggled with this issue, producing circuit conflicts and doctrinal disarray. The law in the Second Circuit, home to many major federal fraud prosecutions, is especially problematic. The Second Circuit held many years ago that a defendant must intend to deprive his or her counterparty of an "essential element of the bargain," and that where the counterparty received the benefit of its bargain, the requisite intent to harm property rights could not be found. Yet a series of later decisions has eroded that principle. Rather than requiring intended harm to property rights, the Second Circuit now holds it sufficient if a defendant has merely deprived a counterparty of "potentially valuable economic

information" that affected its "benefits" from the agreement.

This case highlights how far the Second Circuit has strayed off course, and why this Court's intervention is necessary. Petitioner's employer, SAIC, entered into a contract with the City of New York (the "City") to serve as the prime contractor on a project called "CityTime." The government did not allege that Petitioner fraudulently induced the City to enter into that contract, and Petitioner unquestionably intended for the City to receive the benefit of its bargain, *i.e.*, the agreed-upon services at the agreed-upon price. Nonetheless, the Court of Appeals affirmed Petitioner's conviction based on an alleged misrepresentation made years after the bargain was struck, reasoning that it deprived the City of the possibility that SAIC would have rebid a subcontractor's contract and passed on the cost savings to the City. But the City had no contractual right or other entitlement to force a rebid of the contract, and no contractual right or other entitlement to a price reduction. At most, Petitioner's alleged misrepresentation was intended to deprive the City of a potential economic benefit, not an existing property right.

Charting a different course more faithful to this Court's precedents, other circuit courts, including the Third and Sixth Circuits, have properly held that depriving a counterparty of information that could lead to an economic benefit does not violate the mail or wire fraud statutes. This Court should grant *certiorari* to resolve the disagreement within the circuits, reject the Second Circuit's overly expansive

view of "money or property," and affirm that business executives do not commit mail or wire fraud unless they intend to deprive their counterparty of the benefit of its bargain and thereby inflict harm to property rights.

The draconian sentences now faced by many fraud defendants, stemming from changes to the Sentencing Guidelines, make it all the more important that the Court provide this guidance. Deep injustice will otherwise result, as this case demonstrates. The crux of the case against Petitioner was his receipt of payments from a subcontractor, which the government argued constituted kickbacks, violating Petitioner's duty to his employer, SAIC. But the government sought to bootstrap Petitioner's alleged deception of his employer into a separate, and far more serious, scheme to defraud the City. As a result of his conviction on the City fraud charges, Petitioner's Guidelines range ballooned to 105 years' imprisonment, and he received a sentence of 20 years—despite being a first-time, non-violent offender who had not sought to inflict any injury to the City's property rights.

Petitioner's sentencing independently warrants review by this Court because it was procedurally unreasonable under 18 U.S.C. § 3553. The District Court imposed the same 20-year sentence on Petitioner and his two co-defendants at a joint sentencing hearing during which it never addressed Petitioner's arguments for a lower sentence and barely mentioned his name. The Second Circuit criticized the District Court for failing to provide

individualized consideration to Petitioner, but nonetheless found no reason to disturb his sentence, consistent with its caselaw *presuming* that a sentencing judge has considered a defendant's arguments and the § 3553(a) factors even when the record does not indicate that the judge has done so. That presumption is incompatible with *Rita v. United States*, 551 U.S. 338 (2007), and directly conflicts with the approach followed by several other Courts of Appeals, which require the sentencing judge to address a defendant's nonfrivolous arguments at sentencing. This Court should also grant *certiorari* to resolve this circuit split and to ensure that judges provide adequate reasons for the sentences they impose.

OPINION BELOW

The Second Circuit's opinion is reported at 631 F. App'x 57 (2015) and is reproduced at Pet.App.1-18.

JURISDICTION

The Second Circuit issued its opinion on November 30, 2015, and denied Petitioner's timely petition for panel rehearing or rehearing *en banc* on March 31, 2016. Pet.App.19-20. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal wire fraud statute, 18 U.S.C. § 1343, states that whoever devises a scheme "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," and uses certain means of interstate communication for

purposes of executing the scheme, is guilty of wire fraud. The statute is reproduced in full at Pet.App.21.

18 U.S.C. § 3553(c) provides that "[t]he court, at the time of sentencing, shall state in open court the reasons for its imposition of a particular sentence." The statute is reproduced in full at Pet.App.22-30.

STATEMENT OF THE CASE

A. The CityTime Project

In 1998, the City entered into a contract to develop CityTime, a massive effort to modernize the City's outdated payroll and labor management system. C.A.App.238-39, 1396-1400.[1] When the project began, the City's payroll was approximately $30 billion and included 120,000 employees. C.A.App.1140-1142. The project was originally envisioned as the straightforward implementation of an "off-the-shelf" software system with relatively little customization to meet the City's specific needs. But after years of failures by the first two prime contractors on the project, SAIC was retained to take over as prime contractor. C.A.App.238-41, 1406.

Petitioner joined the project for SAIC in 2002, after it had morphed into a fully customized software program capable of meeting the unique needs of dozens of City agencies. C.A.App.742, 1088 This change in approach was the result of numerous

[1] "C.A.App." refers to the Appendix filed in the Second Circuit. "Sp.App." refers to the Special Appendix filed in the Second Circuit.

evaluations by independent advisors retained by the City who concluded that an "architectural rebirth" of the project was necessary. C.A.App.451-52, 1449. The contemplated changes meant a significant expansion of the project's scope, requiring more time and more money, and the addition of teams of capable technical consultants. C.A.App.238, 284, 399-401,1085-87.

B. The Bargain Between SAIC and the City

From the outset, the City paid SAIC (and the prime contractors that preceded SAIC) on a "fixed-price" basis, *i.e.*, a set price that did not vary depending on the contractor's costs.[2] The City never inquired as to SAIC's underlying costs, or the markups SAIC earned on what it paid its subcontractors. Nor did SAIC make any representations to the City about its underlying costs or markups. C.A.App.321-22, 377, 601-02.

After it was determined that the project needed to be significantly expanded, SAIC and the City entered into Amendment Six to their contract in 2006. C.A.App.1085. The contractual terms incorporated into Amendment Six were extensively reviewed by the City and SAIC in a two-year negotiation process that involved the exchange of over 26 drafts of the amendment. C.A.App.278-79, 1394-95.

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[2] This would not have been the case had the City employed a "cost-plus" contract model for CityTime. In a cost-plus contract, the price paid by the purchaser is based on the contractor's costs, plus an agreed-upon rate of profit for the contractor, and thus fluctuates depending on the contractor's costs. But CityTime was not a cost-plus contract. C.A.App.321-22.

Amendment Six modified the structure of the CityTime contract so that SAIC's services going forward would be provided on a "fixed-price-level-of-effort" basis. SAIC would furnish the City with consultants to work on the project for an agreed-upon number of labor hours and at an agreed-upon hourly rate for those hours. C.A.App.252-53, 368-70. Even after Amendment Six, the parties' contract had no provisions relating to SAIC's (or its subcontractors') underlying costs or markups. Further, the contract did not give the City either a right to force SAIC to rebid the subcontract or a right to any costs savings that might result from the use of a cheaper subcontractor. C.A.App.321-22, 601-02.

The City determined that the prices charged on CityTime after Amendment Six—which were comparable to the rates set forth in the original contract, before SAIC or Petitioner were involved in the project—were fair and reasonable. C.A.App.366-67, 625-26, 690-93, 1460.

C. The Government's Theory at Trial

There is no dispute that Petitioner received payments from Technodyne, an SAIC subcontractor that provided IT consultants for CityTime. The government contended that the payments from Technodyne were illegal kickbacks that deprived SAIC of its intangible right to Petitioner's honest services. C.A.App.107. These payments amounted to

approximately $9 million over 8 years.[3] C.A.App.1977.

Not content to prosecute Petitioner on bribery-based charges alone, however, the government chose to dramatically raise the stakes, indicting him also for participating in what it described as a "massive and elaborate scheme to defraud New York City" in connection with CityTime. C.A.App.90.

The government charged that Petitioner and his co-defendants defrauded the City by overbilling for consulting services never actually provided and by overstaffing the project, and through his receipt of the alleged "kickbacks" from Technodyne. C.A.App.90-91. But at trial the government failed to produce evidence linking Petitioner to any overbilling or overstaffing scheme.[4] Nor did the government try to prove that SAIC or Technodyne's consultants were unqualified, that they failed to provide the contracted-for services, or that they provided defective services. In fact, the City and its independent advisors consistently expressed their satisfaction with SAIC's performance and the quality of its work. C.A.App.639-47, 1121, 1447, 1450-54.

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[3] Petitioner contended that the payments were attributable to a pre-existing ownership interest he held in Technodyne, and thus were not kickbacks.

[4] The government did allege that there were fraudulent invoices submitted by a subcontractor controlled by co-defendant Mark Mazer, but offered no evidence connecting Petitioner to those invoices and later conceded as much at sentencing.

Nor did the government argue that Petitioner violated a duty to the City to disclose his receipt of the payments from Technodyne (nor could it have made such an argument, inasmuch as Petitioner was not a City employee and owed no fiduciary duty to the City). The payments to Petitioner came out of the profits Technodyne earned from SAIC, and did not affect the prices paid by the City to SAIC (which were at the agreed-upon fixed-price-level-of-effort rates).

Nevertheless, the government argued that the rates the City paid SAIC for consulting services provided by Technodyne were "too high" (C.A.App.720), even though those were the rates the City had voluntarily agreed to pay in the parties' contract. But for Petitioner's receipt of the payments from Technodyne, the government contended, SAIC would have rebid the Technodyne subcontract, obtained the same services at lower cost, and then lowered the prices it charged the City (despite the lack of any contractual obligation to do so). In its rebuttal summation the government calculated the potential "savings" from a lower subcontract, and thus the loss to the City, at over $100 million. Sp.App.44.

The jury returned a verdict finding Petitioner guilty of wire fraud and conspiracy to commit wire fraud against the City, as well as honest services fraud against SAIC and conspiracy to commit money laundering. Petitioner was acquitted of conspiracy to commit federal program bribery.

D. Sentencing

Petitioner was sentenced alongside two other defendants on April 28, 2014. The District Court did not mention Petitioner's name except to declare the time he would serve. Nor did the District Court discuss his individual case. Instead, most of the court's remarks were devoted to the need to reform the City's contracting process. C.A.App.2124-27.

The only findings the District Court made on the record were to "accept the factual recitations in the presentence report as amended after objections," to adopt the government's Guidelines calculation, and to state, without explanation and without reference to Petitioner's arguments to the contrary, that "the evidence in this case fully supports the loss amount in this case." C.A.App.2124. The court then imposed identical prison sentences of 20 years on Petitioner and his two co-defendants. C.A.App.2126-27.

E. The Government's Theory on Appeal

On appeal, as below, Petitioner argued that the City received the exact consulting services for which it had contracted at the rates it had willingly agreed to pay and that the government had failed to prove a single material misrepresentation or omission made by Petitioner to the City. In response, the government pointed to a May 2009 letter from SAIC to the City as the principal proof supporting Petitioner's convictions for defrauding the City. The letter requested that the City's Office of Payroll Administration concur in SAIC's decision to extend the subcontracts of Technodyne and another

CityTime subcontractor. In support of that request, the letter stated:

> Recognizing that CityTime subcontractors TechnoDyne LLC and Ariel Partners have been integral to the CityTime development, operations and implementation effort over the past four years, SAIC believes that both TechnoDyne and Ariel possess unique combinations of technical capability and key personnel that substantially contributes to the effort to meet CityTime program objectives through the periods of peak development and implementation.

C.A.App.1213. SAIC did not provide this letter pursuant to any contractual requirement or request from the City; rather, SAIC's internal policies required SAIC to obtain its customer's consent to extend the subcontracts. Tr. 290-93.[5]

According to the government, the May 2009 letter was false because Technodyne had no unique qualifications, and that misrepresentation was tied to the City's "overpayment" because but for the statement, SAIC would have rebid the contract and passed on any cost savings to the City.

F. The Second Circuit's Decision

The Second Circuit endorsed the government's newly minted theory, concluding that the May 2009 letter misrepresented Technodyne's qualifications and that this misrepresentation "result[ed]" in the

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[5] "Tr." refers to the trial transcript, portions of which were not included in the Appendices filed in the Second Circuit.

City's consenting to SAIC's decision not to rebid its subcontract with Technodyne. Pet.App.7. Further, the court concluded that the City had suffered harm because rebidding the subcontract "in all likelihood [] would have resulted in lower subcontracting prices." Pet.App.7. Citing its decision in *United States v. Binday*, 804 F.3d 558 (2d Cir. 2015), *cert. denied*, — S. Ct.—, No. 15-1440, 2016 WL 1028835 (June 20, 2016), the Second Circuit reasoned that the City had not received "the full economic benefit" of its bargain because it had agreed to pay for "a uniquely capable subcontractor," yet received a "high-priced" subcontractor. Pet.App.6-7.

In other words, the Circuit concluded that the City had a property right, cognizable under the wire fraud statute, in the mere possibility of cost savings on the subcontract even though the CityTime contract did not give the City either a right to force SAIC to rebid its subcontract or a right to hypothetical costs savings that SAIC might have obtained if a rebidding had occurred.

REASONS FOR GRANTING CERTIORARI

I. The Court Should Resolve Whether the Mail or Wire Fraud Statutes Are Violated When a Defendant Deprives a Counterparty of a Potential Economic Benefit to Which the Counterparty Has No Contractual Right or Other Legal Entitlement

A. The Circuits Are Deeply Divided Over the Meaning of "Money or Property" in the Context of Commercial Transactions

The Courts of Appeals have diverged sharply over what intangible interests constitute "money or property" in the context of a commercial transaction. In the Third and Sixth Circuits, a misrepresentation that deprives a purported victim of accurate information that could lead to a potential economic benefit—a benefit to which the purported victim has no contractual right or other legal entitlement—is not sufficient to ground a mail or wire fraud conviction. But in the Second Circuit, as well as the Seventh, it is sufficient. As a result, Petitioner's question presented would be answered differently in different Circuits. The Court should grant certiorari to resolve this important circuit split, which has significant repercussions for participants in business transactions caught in the web of a federal investigation.

1. Second Circuit jurisprudence on this issue begins with—and remains heavily influenced by—an ill-considered dictum by Judge Learned Hand nearly 85 years ago. Long before this Court made clear that the mail fraud statute is "limited in scope to the protection of property rights," *McNally v. United*

States, 483 U.S. 350, 356 (1987), Judge Hand read the statute as extending to more intangible interests:

> A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him.

United States v. Rowe, 56 F.2d 747, 749 (2d Cir. 1932).[6]

Subsequently, in *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970), and *United States v. Starr*, 816 F.2d 94 (2d Cir. 1987), the Second Circuit all but disavowed the *Rowe* dictum. In *Regent Office*, the court squarely rejected the proposition that "fraud may exist in a commercial transaction even when the customer gets exactly what he expected and at the price he expected to pay." 421 F.2d at 1180. The court held that, to be actionable as mail fraud, a misrepresentation must

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[6] As has been noted, there is a close kinship between the *Rowe* dictum and the intangible right to honest services theory invalidated in *McNally*. *See United States v. Mandel*, 415 F. Supp. 997, 1013-15 (D. Md. 1976) (citing *Rowe* in holding that mail fraud occurs even where scheme's object is "less tangible than property"), *supplemented by* 415 F. Supp. 1025 (D. Md. 1976); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. LEGIS. 153, 163 & n.36 (1991) (noting that *Rowe*'s formulation of harm supported judicial creation of "intangible loss" doctrine that extended mail fraud statute beyond schemes designed to cause victim to lose money or property).

"go to the nature of the bargain itself," limiting *Rowe* to situations where "the absent facts are facts material to the bargain [the counterparty] is induced thereby to enter." *Id.* at 1181-82.

In *Starr*, the court similarly reversed a mail fraud conviction where the alleged victims had "received exactly what they paid for" and "there was no discrepancy between benefits reasonably anticipated and actual benefits received." 816 F.2d at 99 (internal quotation marks omitted). The defendants had clearly deceived their customers, representing that the customers' funds would be used only to pay for postage, when in fact the defendants only used a portion of the funds for postage and misappropriated the rest. But this was not enough to show the requisite intent to "cause direct pecuniary harm" where "the object of the contract" had been fulfilled. *Id.* at 100. *See United States v. Schwartz*, 924 F.2d 410, 420-21 (2d Cir. 1991) (under *Regent* and *Starr*, alleged deceit must go to "an essential element of the bargain").

Notably, *Starr* specifically rejected the government's argument that the customers had suffered harm because they should have received a refund of monies not paid to the postal service. The customers' economic interest in a refund was of no moment, the court held, because the customers could not "*legally claim a right* to the unspent postage fees." *Id.* (emphasis added). The *Rowe* dictum did not call for a different result because, after *Regent*, "there can be no doubt that *Rowe* has been deprived of much of its vitality." *Id.* at 101.

Yet just a few years later, in *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991), the Second Circuit resurrected *Rowe*. Quoting the *Rowe* dictum with unconditional approval, the Circuit held in *Wallach* that the mail and wire fraud statutes protect not only property rights, but "intangible property interest[s]," including the deprivation of "potentially valuable economic information." *Id.* at 462-63; *see also id.* at 463 ("the withholding or inaccurate reporting of information that could impact on economic decisions can provide the basis for a mail fraud prosecution"). So long as the information withheld is "'material,'" as where it "'bear[s] on the ultimate value of the transaction,'" that is deemed sufficient evidence of an intent to cause "loss" to "property." *United States v. Dinome*, 86 F.2d 277, 284 (2d Cir. 1996) (quoting *United States v. Mittelstaedt*, 31 F.2d 1208 (2d Cir. 1994)); *accord, e.g., United States v. Viloski*, 557 F. App'x 28, 32 (2d Cir. 2014); *United States v. Levis*, 488 F. App'x 481, 485-86 (2d Cir. 2012).

Summarizing Second Circuit law last year in *United States v. Binday*, 804 F.3d 558 (2d Cir. 2015), the court reaffirmed that a cognizable harm occurs under the mail and wire fraud statutes when the defendant deprives a counterparty "of information necessary to make discretionary economic decisions," *i.e.*, "of potentially valuable economic information." *Id.* at 570 (internal citations omitted). A counterparty has not "received the *full* economic benefit of its bargain," the court held, "where the deceit affected the victim's economic calculus or the benefits and burdens of the agreement." *Id.* (emphasis added); *see also United States v. Tagliaferri*, No. 15-536, 2016

WL 2342712, at *4 (2d Cir. May 4, 2016) ("[O]ur precedents do not require contemplation of actual financial loss in wire fraud – instead, we have sustained convictions where victims were deprived 'of potentially valuable economic information.'") (citation omitted).

In Petitioner's case, the Second Circuit carried these principles to their logical conclusion—deeming it sufficient that the May 2009 letter adversely affected the City's economic benefits from CityTime, even though the letter did not, and was not intended to, cause the City any financial injury or deprive it of the essential elements of its bargain.

2. Judge Hand's dictum has also found favor in the Seventh Circuit. In *United States v. George*, 477 F.2d 508 (7th Cir. 1974), the Seventh Circuit affirmed the conviction of a purchasing manager for receiving kickbacks, even though the purchase price was consistent with the employer's policy and the counterparty testified that he had not inflated his prices to cover the kickbacks, but, instead, had absorbed the cost. Citing the *Rowe* dictum with approval, the court held that the defendant's employer had suffered "very real and tangible harm" in "losing the opportunity to bargain with a most relevant fact before it," namely that its counterparty was willing to "accept less profit." *Id.* at 513. In effect, because the employer rather than the defendant could have received the benefit of the kickbacks (in the form of a lower purchase price), the Seventh Circuit deemed this a deprivation of property. *See also United States v. Bush*, 522 F.2d 641, 648 (7th Cir. 1975) (affirming fraud conviction

of city official who had undisclosed interest in contractor, even though contract was highly favorable to the city, because "if the city had known of Bush's interest it might have been able to obtain a better contract").

In *United States v. Ashman*, 979 F.2d 469 (7th Cir. 1992), the Seventh Circuit affirmed mail fraud convictions of commodity traders for using "matched trades" that denied their customers "the opportunity to obtain a better price." *Id.* at 479. The defendants argued that although matched trades violated the rules of the Chicago Board of Trade, the matched trades did not deprive anyone of "money or property" because the "customer's order was filled at a price within the relevant range" and thus "the customer received exactly what he asked for." *Id.* at 477. The Seventh Circuit rejected that argument, holding that "the deliberate deprivation of a clear financial opportunity violate[s] the mail fraud statute." It "does not matter," the Seventh Circuit held, if "customers were not harmed financially because of the scheme"; the matched trades still deprived customers "of a clear market opportunity to obtain the best price for their orders." *Id.* at 477-78. Notably, the Seventh Circuit reached this result even though the opportunity that they were deprived of was a "market" opportunity—not one provided by a negotiated contract or some other legal entitlement.

Thus, the Second and Seventh Circuits have held that the loss of an opportunity to obtain a future economic benefit *is* a deprivation of property even when the purported victim suffered no financial loss

and had no contractual right or entitlement to that opportunity.

3. By contrast, the Third Circuit has correctly concluded that the loss of an opportunity to obtain a future economic benefit is *not* a deprivation of property. In *United States v. Henry*, 29 F.3d 112 (3d Cir. 1994), officials of a toll bridge commission were indicted on mail, wire, and bank fraud charges in connection with a bid-rigging scheme. The defendants allegedly "corrupt[ed] … the process by which banks were chosen to be the depositories of the Commission's toll bridge revenues" and took kickbacks from the winning bidder. *Id.* at 113. The district court dismissed the indictment as "the scheme alleged in the indictment, although unethical, did not involve a deprivation of property as required by *McNally v. United States*, 483 U.S. 350 (1987), and therefore could not constitute mail, wire or bank fraud." *Id.* The Third Circuit affirmed the dismissal, holding that "the competing banks' interest in having a fair opportunity to bid for something that would become their property if and when it were received" was not, itself, a protected property right. *Id.* at 114.[7]

In *United States v. Zauber*, 857 F.2d 137 (3d Cir. 1988), the Third Circuit similarly overturned the mail and wire fraud convictions of pension fund

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[7] The conflict between *Henry* and the Seventh Circuit's opinion in *Ashman* is highlighted by the dissenting opinion in *Henry*, which cited *Ashman* in support of an argument that "the ability of the other bidding banks to profit" from the potential contract was itself a protected property right. *See Henry*, 29 F.3d at 116 (Weis, J., dissenting).

trustees who took kickbacks from an asset management firm in which they invested fund assets. The investment with the asset management firm "returned exactly what the investment agreement called for." *Id.* at 146. And the "alleged kickbacks were paid with [the asset management firm's] profits, not the pension fund's." *Id.* at 147. The Third Circuit thus concluded (contrary to the Seventh Circuit's reasoning in *George* and *Bush*) that the kickbacks did not constitute "a loss of property to the pension fund." *Id.* at 146.

4. Like the Third Circuit in *Henry*, the Sixth Circuit has taken a more limited view of which intangible interests count as property rights under the wire fraud statute, concluding that a commercial party is not deprived of "money or property" simply because a counterparty provides inaccurate information before the party decides to transact. In *United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014), the Sixth Circuit reversed the conviction of a defendant who purchased opiate pills from pharmaceutical distributors while falsely claiming that the pills would be provided to indigent patients, when in fact she illegally sold the drugs to addicts. Because the defendant paid the full asking price for the products, the court held, she could not be said to have acted with the purpose of injuring the distributors. *Id.* at 591.

The government argued that the distributors would not have sold the pills to Sadler had they known the truth, and that in this way she "deprived the companies of what might be called a right to accurate information before selling the pills." *Id.* 590-

91. The Sixth Circuit found the government's "right to accurate information" theory incompatible with this Court's pronouncement in *McNally* that the wire fraud statute is "'limited in scope to the protection of *property rights*.'" *Sadler*, 750 F.3d at 591 (quoting *McNally*, 483 U.S. at 360) (emphasis in *Sadler*). The Circuit also concluded that the government's theory strayed from traditional concepts of property. *Id.* ("Nor can it plausibly be said that the right to accurate information amounts to an interest that 'has long been recognized as property.'") (quoting *Cleveland*, 531 U.S. at 23). In a holding diametrically opposed to the *Rowe* dictum and current Second Circuit law, the court concluded that the federal fraud statutes cannot be "stretch[ed] . . . to cover the right to accurate information before making an otherwise fair exchange." *Id.*[8]

5. Under the reasoning of cases such as *Henry*, *Zauber* and *Sadler*—as well as the Second Circuit's earlier ruling in *Starr*—Petitioner could not have properly been convicted of defrauding the City of its "money or property."

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[8] To like effect is *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992). In *Bruchhausen*, the Ninth Circuit held legally insufficient an indictment charging the defendant with defrauding manufacturers of their "right to make business decisions based on truthful information and representations." The manufacturers were not defrauded of "money or property" because they received the full sale price for their products and suffered no monetary loss. *Id.* at 467-68. In so ruling, the Ninth Circuit expressly disagreed with the Second Circuit's decision in *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991). *See* 977 F.2d at 468 n.4.

The only misrepresentation identified in the Second Circuit's opinion was the May 2009 letter describing Technodyne's qualifications. Assuming, *arguendo*, that the letter inaccurately described those qualifications by failing to disclose that Technodyne was a "high-priced" subcontractor, the "right to accurate information" does not, itself, qualify as a cognizable property right. To be actionable, the alleged misrepresentation must have somehow deprived the City of the benefit of its bargain; and that cannot be said of the May 2009 letter because the price paid by the City was not based on SAIC's underlying costs. The payments that Petitioner received from Technodyne came out of Technodyne's profits, and did not affect the bargain between the City and SAIC. Therefore, those payments cannot be said to have deprived the City of any property right either.

Moreover, even assuming, as the Second Circuit found, that SAIC would have rebid Technodyne's contract but for the May 2009 letter and that this "like[ly]" would have resulted in lower subcontracting prices that would have been passed along to the City (*see* Pet.App.7), any such effects would have been solely the product of SAIC's own internal policies. The City had no contractual right to require that the Technodyne contract be rebid before it was renewed; the May 2009 letter seeking the City's consent to Technodyne's staying on CityTime was written pursuant to SAIC's own internal policy. *See* Tr. 290-93. Likewise, the City had no contractual right to any cost savings that SAIC might have obtained by rebidding the subcontract; that too would have resulted solely from an internal SAIC policy to pass

along such cost savings. C.A.App.322, 378. There was no evidence that the City was aware of SAIC's policies, let alone that they constituted any part of the parties' bargain. The City had agreed to pay the fixed-price-level-of-effort consultant rates set forth in its contract with SAIC irrespective of the identity of the consultants or the rates they charged SAIC.

Under the precedents cited above, the City's mere *economic interest* in a possible price reduction resulting from a possible rebid is not a cognizable *property right* under the wire fraud statute—just as the deceived customers in *Starr* had no property right in a possible refund, and the losing bidders in *Henry* had no property right in a possible contract. Yet under the Second Circuit's current highly elastic test, Petitioner's alleged misrepresentation is actionable because it deprived the City of "potentially valuable economic information" that "affected [its] benefits" from the agreement with SAIC. *Binday*, 804 F.3d at 570. As Petitioner's case shows, Second Circuit doctrine has become so unmoored from the "money or property" requirement as to capture misrepresentations that were not part of the parties' bargain at all and that merely affect a counterparty's economic interests, rather than inflict harm to its property rights.

B. The Second Circuit's Interpretation of "Money or Property" Conflicts with this Court's Precedents

This Court made plain in *McNally v. United States* that an intent to deprive a counterparty of a mere economic interest or potential benefit is not

enough; rather, the fraud statutes are "limited in scope to the protection of *property rights*." 483 U.S. at 360 (emphasis added). While *McNally*'s core holding was to reject the lower courts' expansion of the mail fraud statue to encompass honest-services fraud, the Court also strongly intimated that the facts in the case could not justify conviction on a money-or-property rationale. Although the defendant state official received undisclosed commissions in connection with the Commonwealth of Kentucky's purchase of insurance, the Court noted, those commissions were paid by insurance brokers and therefore "were not the Commonwealth's money." *Id.*

In *Cleveland v. United States*, the Court reiterated that the mail and wire fraud statutes "protect[] *property rights only*." 531 U.S. at 19 (emphasis added). The government argued that the defendant had committed money-or-property fraud by lying in an application for a Louisiana state-issued video poker license, thereby causing the state to issue a license it otherwise would have withheld. However, the alleged property was not revenues generated from use of the license; those revenues were properly paid and there was no allegation that Louisiana was defrauded "of any money to which the State was entitled by law." *Id.* at 22. Rather, the "property" of which the government argued the state was deprived was the intangible "right to control the issuance, renewal, and revocation of the state licenses." *Id.* at 23.

The Court flatly rejected this expansive interpretation of the money-or-property prong. It held that the fraud statutes only protect against

deprivations of interests that have "long been recognized as property." *Id.* at 22. Further, the "object of the fraud" must be property when it is in the victim's hands. *Id.* at 26. An unissued state license did not fall within that category of "traditional concepts of property." *Id.* at 24.

The intangible interest that the Second Circuit in this case believed was protected under the wire fraud statute has not traditionally been viewed as "property." *Cf. Carpenter v. United States*, 484 U.S. 19, 25-26 (1987) (holding that confidential business information is a protected property right because it has "long been recognized as property"). The province of the common law of fraud has long been to protect victims against *pecuniary losses*. *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 531; *see also Sadler*, 750 F.3d at 590 (citing Restatement). There is no common law right for a counterparty, who has received the agreed-upon services at the agreed-upon price, to claim a potential benefit outside the parties' bargain. *See Prosser and Keeton on Torts* § 110, at 765 (5th ed. 1984) ("there can be no recovery if the plaintiff is none the worse off for the misrepresentation, however flagrant it may have been, as where for example he receives all the value that he has been promised and has paid for").

Most recently, the Court in *Pasquantino v. United States* held that the Canadian government's right to uncollected taxes constitutes "property" under the fraud statutes. In so doing, the Court emphasized the defendants' "legal obligation" to pay, and Canada's "entitlement" to receive, the unpaid taxes, further noting that "fraud at common law included a scheme

to deprive a victim of his entitlement to money." 544 U.S. at 356-67. Because defendants' scheme "aimed at depriving Canada of money to which it was *entitled by law*," the Court concluded, "Canada's entitlement is 'property' as that word is used in the wire fraud statute." *Id.* at 357 (emphasis added).

Here, the City had no entitlement to consent to Technodyne's continuation on CityTime, to force a rebid of the subcontract, or to receive a price reduction if SAIC selected a lower-priced subcontractor. Any such entitlement would have to be rooted in the parties' bargain—but none is to be found there. The structure of the contract as negotiated by the parties provided the City no right (tangible or intangible) to potential savings that SAIC could achieve by rebidding the work performed by its subcontractors. The Second Circuit was able to conclude that the City was deprived of the benefit of its bargain only by ignoring the bargain actually struck by the parties.

The government effectively used the wire fraud statute in this case to convict Petitioner of fraud for charging what the government judged to be "excessive" markups that caused the City to "overpay" for CityTime. But the City only paid what it had agreed to pay in its contract with SAIC, which was reached following extensive arm's-length negotiations that were untainted by any fraud or deceit. It is not the government's role to police the perceived fairness of consensual commercial transactions, and certainly not through the blunt instrument of federal criminal law.

* * *

The Second Circuit's "in-all-likelihood-lower-prices" test effectively reads "money or property" out of the wire fraud statute. It means that deceit regarding a potential economic benefit that the purported victim is not legally entitled to—deceit regarding something that the purported victim does not own—is enough to establish wire fraud. Such an expansive interpretation of property allows prosecutors to stretch the boundaries of the federal fraud statutes beyond their intended scope. This case provides an excellent vehicle for this Court to reemphasize those boundaries and bring much-needed clarity to the now-divided lower courts that must interpret and apply those statutes on a daily basis.

II. The Court Should Resolve Whether a Sentence Can Be Presumed Procedurally Reasonable in the Absence of Evidence that the Sentencing Court Discharged Its Duty Under 18 U.S.C. § 3553(c)

In *Rita v. United States*, 551 U.S. 338 (2007), this Court addressed the obligation of a sentencing court under 18 U.S.C. § 3553(c) to provide a statement of reasons in support of its sentence. The Court upheld a relatively brief statement of reasons because the case was "conceptually simple" and "the record [made] clear that the sentencing judge considered the evidence and the arguments." *Id.* at 359. Following *Rita*, some Courts of Appeals—most notably the Sixth Circuit—require that judges acknowledge and address every colorable § 3553 argument advanced by a defendant. But the Second Circuit has stuck with the rule it applied before *Rita;* it "entertain[s] a strong presumption" that a sentencing judge has

complied with § 3553(c) unless there is record evidence "suggesting the contrary." *United States v. Fernandez*, 443 F.3d 19, 34-35 (2d Cir. 2006), *abrogated on other grounds by Rita v. United States*, 551 U.S. 338 (2007). As a result, even in a complex fraud case, a district court in the Second Circuit does not actually have to address a defendant's arguments at sentencing.

That is what happened in Petitioner's case. The sentencing judge imposed a one-size-fits-all, 20-year sentence on all of the defendants during a hearing in which he did not address *any* of Petitioner's § 3553(a) arguments. On appeal, the Second Circuit effectively conceded that no individualized assessment of the defendants' circumstances accompanied the sentence handed down by the District Court. Indeed, the panel admonished the District Court that it would have been better practice to have provided "a more thorough explanation of the reasons for the sentences imposed and to do so separately for each defendant." Pet.App.17. Nonetheless, based on its erroneous interpretation of *Rita*, the Second Circuit concluded that the District Court was "not *required* to say more" in order to satisfy § 3553(c). Pet.App.17 (emphasis in original). As a result, Petitioner has been condemned to spend what is likely the remainder of his natural life in prison, without ever learning why his meritorious arguments in support of a lower sentence were rejected. This Court should reject the Second Circuit's approach and hold that sentencing judges *are* "required to say more" than the bare-bones statement of reasons in this case.

A. The Circuits Are Divided Over What *Rita* Requires a Sentencing Judge to Address in the Statement of Reasons

1. In *Rita*, this Court upheld a relatively brief statement of reasons in support of a 33-month sentence, but the Court was careful to explain that such a terse statement would not suffice in all cases, and to establish a baseline for what a statement of reasons should contain. First, "the sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." 551 U.S. at 356. Second, "[w]here the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence … the judge will normally go further and explain why he has rejected those arguments." *Id.* at 357.

Most importantly, the Court in *Rita* also held that an "extensive[]" statement of reasons is not required when: (i) "[the] matter is…conceptually simple" and (ii) "*the record makes clear* that the sentencing judge considered the evidence and arguments." *Id.* at 359 (emphasis added).

What this Court meant by a "conceptually simple" matter is illustrated by the straightforward facts and legal issues in *Rita*. The case involved only one defendant; the defendant was convicted of perjuring himself in a single instance; and his arguments at sentencing were simply that his conduct was mitigated by his physical ailments, prior work as a civil servant, and history of military service. *Id.* at 341-42, 359.

Likewise, what this Court meant by a "record [that] makes clear that the sentencing judge considered the evidence and arguments" is illustrated by the Court's account of the sentencing judge's actions. The Court noted that the sentencing judge responded to the defendant's arguments by explicitly considering and "ask[ing] questions about" each of the three mitigating factors before him. *Id.* at 344-45.

Thus, the Court in *Rita* explicitly based its decision upon the clarity of the record created by the sentencing judge's affirmative statements. The Court did not rely on the mere *absence* of a record that the sentencing judge did not consider the evidence and arguments. Nor did it presume that the sentencing judge's statement of reasons was sufficient to discharge his duty under § 3553(c).

2. The Courts of Appeals have applied and interpreted *Rita* very differently. *See generally* Sherod Thaxton, *Determining "Reasonableness" Without a Reason? Federal Appellate Review Post-Rita v. United States*, 75 U. CHI. L. REV. 1885, 1897-98 (2008) ("Very shortly after the *Rita* ruling, the lower appellate courts were divided over the level of specificity required from the district courts with respect to § 3553(c) statements.").

After *Rita*, the Sixth Circuit has held that sentencing judges must acknowledge and address every colorable § 3553 argument advanced by a defendant. In *United States v. Thomas*, 498 F.3d 336, 341 (6th Cir. 2007), the Sixth Circuit held that while "the district court's statement of reasons…[bore] some resemblance to the statement of reasons sanctioned by the Supreme

Court in *Rita*," it was still procedurally unreasonable because, unlike in *Rita*, "the record…[was not] clear that the district court considered and rejected the defendant's arguments…and the district court [did not] summarize[] defendant's…arguments." To the contrary, the defendant's sentencing memorandum "raised a number of arguments regarding application of the § 3553(a) factors, but those arguments went unmentioned and unaddressed, save the general statement by the district court that it had received, read, and understood the sentencing memorandum." *Id.* "In such circumstances," the Sixth Circuit held, "we must conclude that the context and the record do not make clear the court's reasoning." *Id.* (quotation omitted).[9]

The Sixth Circuit has also held that § 3553 and *Rita* require the sentencing court to make clear that it is imposing an individualized sentence and taking account of the differences between co-defendants. *See United States v. Wallace*, 597 F.3d 794, 802 (6th Cir. 2010); *United States v. Buffington*, 310 F. App'x 757, 763 (6th Cir. 2009).

3. The Second Circuit, however, takes a very different approach. Prior to *Rita*, the Second Circuit held that, rather than require that sentencing judges address a defendant's "specific arguments bearing on the implementation of [the § 3553(a)] factors," it would "presume, in the absence of a record

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[9] Moreover, the Sixth Circuit has rejected the presumption of compliance with § 3553(c) employed by the Second Circuit. *See United States v. Simmons*, 587 F.3d 348, 360-61 (6th Cir. 2009) ("we have not adopted this position").

suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors." *United States v. Fernandez*, 443 F.3d at 29-30. The Circuit described this as a "strong presumption," which applies "unless the record clearly suggests otherwise," *id.* at 29, and specifically held that the sentencing judge "need not address . . . each argument that a defendant makes" in order to comply with § 3553, *id.* at 34; *see also id.* at 34-35.

The Second Circuit did not change its approach after this Court's decision in *Rita*. *See, e.g., United States v. Youmans*, 249 F. App'x 907, 908-09 (2d Cir. 2008) (continuing to apply *Fernandez*'s "strong presumption"); *United States v. Chervin*, 553 F. App'x 63, 64 (2d Cir. 2014) (same); *United States v. Velasquez-Argueta*, 637 F. App'x 40, 41 (2d Cir. 2016) (same). Rather than requiring a district court to affirmatively create a record that it discharged its § 3553(c) duty, the Second Circuit will uphold a sentence so long as it is not clear that the district court failed to meet its statutory obligation. In effect, the Second Circuit relieves a sentencing judge of his statutory duty to explain the reasons for a sentence and improperly places the burden on a defendant to disprove that a judge considered his arguments.

4. Other circuits have varied in their responses to *Rita*. The Third, Seventh, and Ninth Circuits' interpretations are in line with the Sixth Circuit's view; though they do not require a sentencing judge to "make explicit findings as to each of the § 3553(a) factors," they do require that the judge "must acknowledge and respond to any properly presented sentencing argument which has colorable legal merit

and a factual basis in the record." *United States v. Merced*, 603 F.3d 203, 215 (3d Cir. 2010) ("Demanding close adherence to *procedural* requirements – including the requirement that sentencing courts explain their reasoning with clarity – is, we think, more than fair in light of the deference we afford to district courts as a *substantive* matter."); *accord United States v. Miranda*, 505 F.3d 785, 796 (7th Cir. 2007) (vacating sentencing where it was unclear "from the district court's comments whether the court made [the required] individualized analysis of [defendant]'s factually and legally supported sentencing arguments under 3553(a)"); *United States v. Trujillo*, 713 F.3d 1003, 1011 (9th Cir. 2013) (vacating sentence because "[defendant] presented nonfrivolous arguments[] and the district court did not at all explain the reasons for rejecting them").

By contrast, consistent with the Second Circuit's view in Petitioner's case, the Tenth Circuit has held that even a cursory statement of reasons that fails to respond to particular arguments for a departure is adequate. *See United States v. Ceceres-Zavala*, 499 F.3d 1211, 1217 (10th Cir. 2007) ("Although the sentencing court provided no direct response to all [defendant]'s requests for departure,… citation of the PSR's calculation method and recitation of the suggested imprisonment range amply fulfilled § 3553(a) 's requirement.").

The First, Fifth, and Eleventh Circuits likewise have held that it is sufficient for a judge to adopt the presentence report ("PSR") and make conclusory statements that he or she considered the § 3553

factors and the parties' arguments. *See United States v. Hunter*, 536 F. App'x 955, 958 (11th Cir. 2013); *United States v. Harrison*, 428 F. App'x 267, 269 (5th Cir. 2011); *United States v. Davila-Gonzalez*, 595 F.3d 42, 48 (1st Cir. 2010) (quotation omitted).

B. Petitioner's Case Raised Complex Issues Regarding Loss and Other Matters that the Sentencing Judge Did Not Address

Compared to the defendant's case in *Rita*, Petitioner's case was far from simple. As befit its complexity, Petitioner made numerous arguments in two sentencing submissions totaling 60 pages and extended oral advocacy at sentencing. These arguments included detailed points concerning the nature and circumstances of the offense, its economic repercussions on the City, Petitioner's tragic family circumstances, health issues that substantially limit Petitioner's life expectancy, and challenges to the PSR's loss calculation and recommended enhancements under the Sentencing Guidelines. As calculated by Petitioner, the applicable Guidelines range was 97 to 121 months and he requested a sentence of 5 years, in contrast to the 1,260-month (105-year) sentence called for in the PSR. C.A.App.1855, 1864, 1981.

On loss, for example, Petitioner argued that the PSR's $109 million loss amount lacked a basis in the record and was beyond the scope of what Petitioner agreed to and could have reasonably foreseen given his role. The loss figure was based not on competent evidence but on a hypothetical posed by the government in its rebuttal summation. Specifically,

the government told the jury that if the percentage markups on the consultants supplied by Technodyne had been only 75%, rather than the 152% rate calculated by the government, the City would have saved over $100 million. Sp.App.44, C.A.App.1943. Petitioner noted that the argument was mere speculation; there was no evidence that the City paid excessive rates as compared to the rates that it typically pays on other comparable projects. In fact, other City contractors had charged markups as high as 178%. *See* C.A.App.1989. Nor was there any evidence of an industry standard. Petitioner further argued that the government's "loss" calculation overstated the gravity of his offense and that loss for purposes of the Guidelines should be calculated by reference to his gain, which was $9 million. C.A.App.1977.

The complexity of the case, and of the judge's task at sentencing, was therefore apparent. In fact, one of the few comments that the sentencing judge *did* make in his exceedingly brief statement of reasons was the singularity of the CityTime case, which he called an "unparalleled" conspiracy that was the "largest city corruption scandal in decades." C.A.App.2124. Such statements make clear that this was not a straightforward case, and required a more detailed statement of reasons under *Rita*.

But the sentencing judge did not address any of Petitioner's arguments. In fact, the judge mentioned Petitioner's name only once—when pronouncing the sentence. C.A.App.2126. The judge simply stated that he had "reviewed the presentence report...[and] the submission by the defendant and the

government" and "considered all the factors in 18[] U.S.C.[] 3553(a) relevant to the sentence," and that he had concluded that "the significant and notorious criminal conduct in this case warrants substantial sentences for each [defendant]." C.A.App.2124.

Accordingly, the sentencing judge's exceedingly brief statement of reasons gives serious cause to doubt that he satisfied *Rita*'s requirement to "listen[] to each argument [and]…consider[] the supporting evidence" put before him. *Rita*, 551 U.S. at 356. There was no "record…[of the] reasoning underl[ying]" Petitioner's particular sentence, let alone a "clear" one. *Id.* at 356, 359. And, as noted above, the Second Circuit agreed that the District Court should have provided "a more thorough explanation of the reasons for the sentences imposed and to [have] do[ne] so separately for each defendant." Pet.App.17. Nevertheless, evidently relying on the *Fernandez* presumption,[10] and viewing *Rita* as aspirational rather than as setting forth a legal requirement, the Circuit found "no reversible error" in Petitioner's 20-year sentence. Pet.App.16-17 (citing *Rita*, 551 U.S. at 357).

The Second Circuit's refusal to require an individualized consideration of Petitioner's circumstances and arguments is all the more inexplicable given that the Circuit's own ruling effectively limited the fraud to a time period different (and far shorter) than what the District Court

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[10] The government relied on the *Fernandez* presumption in its brief on appeal. Brief for the United States of America at 143, 152-53, *United States v. Mazer*, Nos. 14-1397(L), 14-1399(CON), 14-1401(CON) (2d Cir. May 8, 2015).

assumed at sentencing. The earliest misrepresentation that the Circuit was able to identify was in the May 2009 letter, yet Petitioner was sentenced for losses dating back to 2005. C.A.App.1976. A statement in the letter could not have caused the City to suffer a loss before the letter was sent. Accordingly, at the earliest, any losses would begin in 2009 and would be far lower than the $109 million amount assumed by the District Court. Although Petitioner pointed out this error in a petition for rehearing, that petition was denied, also without explanation.

* * *

In sum, the Courts of Appeals vary widely in how much explanation they require from sentencing judges. This in turn leads to varying levels of respect for a defendant's due process rights and divergent levels of "trust in the judicial institution" across circuits. *Rita*, 551 U.S. at 356. It is thus imperative that this Court clarify under what circumstances and in what degree of detail a sentencing judge is required to address "nonfrivolous [§ 3553] arguments" set forth by a defendant." *Id.* at 357.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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Dated: July 29, 2016

APPENDIX

Appendix A

14-1397-cr (L)
United States of America v. Mark Mazer

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at 40 Foley Square, in the City of New York, on the 30th day of November, two thousand fifteen.

Present:
ROBERT A. KATZMANN, *Chief Judge*,
DENNY CHIN, *Circuit Judge*,
P. KEVIN CASTEL, *District Judge*.

No. 14-1397-cr (L),
14-1399-cr (Con),
14-1404-cr (Con)

UNITED STATES OF AMERICA,

Appellee,

—v.—

SVETLANA MAZER, LARISA MEDZON, ANNA MAKOVETSKAYA, CARL BELL, PADMA ALLEN, REDDY ALLEN, TECHNODYNE LLC, SCIENCE APPLICATIONS INTERNATIONAL CORPORATION,

Defendants,

MARK MAZER, DIMITRY ARONSHTEIN, GERARD DENAULT,

Defendants-Appellants.

For Appellee:
HOWARD S. MASTER, Assistant United States Attorney (Andrew D. Goldstein, Brian A. Jacobs, Assistant United States Attorneys, *on the brief*), *for* Preet Bharara, United States Attorney for the Southern District of New York, New York, New York.

For Defendant-Appellant Mark Mazer:
HENRY E. MAZUREK, Clayman & Rosenberg LLP, New York, New York.

For Defendant-Appellant Dimitry Aronshtein:
SUSAN C. WOLFE, Blank Rome LLP, New York, New York (Marc Fernich, Jonathan Savella, Law Office of Marc Fernich, New York, New York, *on the brief*).

For Defendant-Appellant Gerard Denault:
BARRY A. BOHRER (Gary Stein, Michael L. Yaeger, Andrew D. Gladstein, *on the brief*), Schulte Roth & Zabel LLP, New York, New York.

Appeal from the United States District Court for the Southern District of New York (Daniels, *J.*).

ON CONSIDERATION WHEREOF, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that the judgment of the district court is **AFFIRMED**.

Defendants Mark Mazer, Dimitry Aronshtein, and Gerard Denault appeal from a judgment entered on April 29, 2014, by the United States District Court for the Southern District of New York (Daniels, *J.*) following a jury trial that resulted in the following convictions: all three defendants were found guilty of conspiring to violate the Travel Act, 18 U.S.C. § 1952, in violation of 18 U.S.C. § 371 and of conspiring to commit money laundering in violation of 18 U.S.C. § 1956(h); Mazer was found guilty of wire fraud and conspiring to commit wire fraud in violation of 18 U.S.C. §§ 1343 and 1349 and of receiving bribes and conspiring to commit federal programs bribery in violation of 18 U.S.C. §§ 371 and 666; Aronshtein was found guilty of paying bribes and

conspiring to commit federal programs bribery in violation of 18 U.S.C. §§ 371 and 666; and Denault was found guilty of wire fraud and conspiring to commit wire fraud in violation of 18 U.S.C. §§ 1343 and 1349 and of honest services fraud and conspiring to commit honest services wire fraud in violation of 18 U.S.C. §§ 1346 and 1349. The evidence at trial showed that defendants exploited their positions as managers and contractors on CityTime, a project of the City of New York designed to update the City's payroll systems, in order to profit from a long-running scheme against the City that involved fraud, kickbacks, and money laundering. On appeal, defendants raise a host of issues challenging, in one way or another, nearly every aspect of the judgment below. We assume the parties' familiarity with the relevant facts and the procedural history of the case.

I. Motion to Suppress

Aronshtein argues that the district court erred in denying his motion to suppress evidence obtained from his home pursuant to a search warrant that, according to Aronshtein, was overbroad and insufficiently particular in violation of the Fourth Amendment. "On appeal from a district court's ruling on a motion to suppress evidence, 'we review legal conclusions de novo and findings of fact for clear error.'" *United States v. Bershchansky*, 788 F.3d 102, 108 (2d Cir. 2015) (quoting *United States v. Freeman*, 735 F.3d 92, 95 (2d Cir. 2013)).

We need not resolve whether the warrant complied with the Fourth Amendment because, even if it did not, the good-faith exception to the exclusionary rule applies. *See generally United*

States v. Leon, 468 U.S. 897, 922 (1984). Aronshtein does not contend that the magistrate judge was misled or "wholly abandoned his judicial role" in issuing the warrant or that the application for the warrant was devoid of any "indicia of probable cause." *Id.* at 923. Thus, we will not apply the exclusionary rule unless the warrant at issue was "so facially deficient . . . that the executing officers cannot reasonably presume it to be valid." *Id.*

Here, the nature of the crimes under investigation demonstrates that the officers' reliance on the warrant was objectively reasonable. Courts routinely afford officers greater latitude in detailing the items to be searched when, as here, the criminal activity under investigation involves "complex financial transactions." *See, e.g.*, *United States v. Yusuf*, 461 F.3d 374, 395-96 (3d Cir. 2006). In light of this background rule, even if the warrant at issue may have been less detailed than is typical, the officers did not act unreasonably in executing it. Accordingly, we affirm the district court's denial of Aronshtein's motion to suppress.

II. Sufficiency of the Evidence

Defendants also challenge the sufficiency of the evidence underlying the wire fraud, federal programs bribery, and Travel Act convictions. "We review *de novo* a challenge to sufficiency of the evidence," viewing "the evidence presented at trial 'in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government.'" *United States v. Naiman*, 211 F.3d 40, 46 (2d Cir. 2000) (quoting *United States v. Walker*, 191 F.3d 326, 333 (2d Cir.

1999)). "We will not disturb a conviction on grounds of legal insufficiency of the evidence at trial if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (quoting *United States v. Burns*, 104 F.3d 529, 534 (2d Cir. 1997)).

A. *Wire Fraud Convictions*

A conviction under the wire fraud statute requires proof of fraudulent intent. *United States v. Autuori*, 212 F.3d 105, 116 (2d Cir. 2000). This "[i]ntent may be proven through circumstantial evidence, including by showing that [the] defendant made misrepresentations to the victim(s) with knowledge that the statements were false." *United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999). To ensure that the requisite fraudulent intent exists, however, "we have repeatedly rejected application of the mail and wire fraud statutes where," notwithstanding the existence of "'[m]isrepresentations amounting . . . to a deceit,'" "the purported victim received the full economic benefit of its bargain." *United States v. Binday*, --- F.3d --- , 2015 WL 6444932, at *6, *13 (2d Cir. Oct. 26, 2015) (quoting *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987)). As a result, "[o]ur cases have drawn a fine line between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid—which do not violate the mail or wire fraud statutes—and schemes that depend for their completion on a misrepresentation of an essential element of the bargain—which do violate the mail and wire fraud statutes." *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007). Mazer and Denault argue that the City received precisely

what it bargained for and that their cases therefore fall into the former category.

We disagree. For instance, the jury heard evidence that Mazer, in his role as a manager of the CityTime project, signed a series of timesheets that authorized payments for consultants for hours never worked. Although Mazer now tries to characterize those payments as nothing but an informal severance package, the jury rejected that argument. And for good reason, as it heard testimony that Mazer had no authorization to provide such severance and that, when City officials learned of the payments, they ordered them stopped. Denault, for his part, directed a subordinate to issue a letter to the City that described Technodyne, a subcontractor, as a firm possessing "unique combinations of technical capability and key personnel." As a result, the City consented to Science Applications International Corporation ("SAIC") renewing Technodyne's contract without rebidding it, a process that, in all likelihood, would have resulted in lower subcontracting prices. The jury heard testimony, however, that, notwithstanding the representation in the letter, Technodyne's capabilities were actually run of the mill. In each instance, therefore, the City agreed to pay for one thing—two weeks of hours worked and a uniquely capable subcontractor—but received another—no hours worked and an average, but high-priced, subcontractor. In light of this and other evidence presented at trial, we conclude that there was sufficient evidence that the City did not receive the benefit of its bargain and, accordingly, that defendants have not met their "heavy burden" of establishing that no rational juror "'could have

found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Chavez*, 549 F.3d 119, 124-25 (2d Cir. 2008) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

B. *Federal Programs Bribery Convictions*

In pertinent part, 18 U.S.C. § 666 makes it unlawful to "corruptly" give anything of value to an "agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof" or for such an agent to "corruptly" accept anything of value where the relevant organization or government entity receives federal "benefits in excess of $10,000." 18 U.S.C. § 666(a)(1)(B), (a)(2), (b). At trial, the Government introduced evidence to show that the City received more than $10,000 in federal assistance and that Mazer was acting as a City agent when he "corruptly" accepted, and Aronshtein "corruptly" paid, bribes. Mazer and Aronshtein now challenge the sufficiency of the evidence supporting the jury's determination that Mazer was an agent of the City. Aronshtein additionally challenges the sufficiency of the evidence establishing that he had knowledge of Mazer's status as an agent of the City.

Neither argument persuades us. First, the evidence was more than sufficient for the jury to find that Mazer was an agent of the City. 18 U.S.C. § 666(d)(1) defines an "agent" as, among other things, "a person authorized to act on behalf of another person or a government," and the evidence amply supports the jury's determination that Mazer had authority to act on behalf of the City. Contrary to defendants' arguments, the mere fact that Mazer was hired to work on the CityTime project

by the City's Office of Payroll Administration ("OPA") does not mean that he lacked authority to act on behalf of the City. CityTime was not an OPA-specific project, but a City-wide one, initiated to update the payroll system of 80 City agencies and accounted for in the City's capital budget. Consistent with this, the CityTime contract and each amendment thereto was entered into "by . . . the City of New York, *acting through* its Office of Payroll Administration." *E.g.*, App. 1088 (emphasis added); *see United States v. Moeller*, 987 F.2d 1134, 1137-38 (5th Cir. 1993) (holding that employees of the Texas Federal Inspection Service were agents of the Texas Department of Agriculture, in part, because "TFIS performed discretionary functions on behalf of TDA"). Further, the evidence was clear that Mazer *personally* had authority to act on behalf of and bind the City in connection with his work on CityTime.

Second, we also reject Aronshtein's contention that the jury lacked a sufficient basis to find that he had knowledge of Mazer's status as an agent of the City. The Government introduced evidence at trial showing that Aronshtein knew of Mazer's role in the hiring process for CityTime, and Aronshtein testified on direct examination that Mazer had described his work as involving a "project *for the city*." Trial Tr. 4556:3-4 (emphasis added).

C. *Travel Act Conspiracy Conviction*

Both Mazer and Aronshtein challenge the sufficiency of the evidence supporting their convictions for conspiring to violate the Travel Act. We begin with Mazer's appeal. The Travel Act

prohibits the use of interstate wires to distribute the proceeds of unlawful activity or to further that activity. *See* 18 U.S.C. § 1952(a). The unlawful activity charged here was bribery under New York law, which requires that the person receiving a bribe do so "without the consent of his employer or principal." *See* N.Y. Penal Law § 180.05. Mazer contends that the testimony of Elaine Doria, OPA's administrative director, establishes that OPA had knowledge that Mazer received "fees" from D.A. Solutions, Aronshtein's company and the source of some of the bribe money. Even if we were to accept Mazer's characterization of the evidence, we would have no reason to reverse his conviction. Mazer's theory on appeal ignores the significant difference between "knowledge," which he claims Doria had, and "consent," which the statute requires. Accordingly, we reject Mazer's challenge to the sufficiency of the evidence supporting his conviction for conspiring to violate the Travel Act.

We likewise reject Aronshtein's challenge. The object of the Travel Act conspiracy charged was the overarching scheme that involved kickbacks to Mazer and Denault paid by, among others, Aronshtein and Prime View's principal, Victor Natanzon. Aronshtein contends that the Government failed to prove that he entered into anything more than an agreement to send money to Mazer (for, according to Aronshtein, legitimate purposes) and that the evidence failed to show he was aware that Natanzon was paying kickbacks to Mazer or that Denault was receiving kickbacks. A review of the record, however, demonstrates that there was ample evidence from which the jury could infer that

Aronshtein knowingly entered the larger conspiracy, and that is all that is required. *See United States v. Gleason*, 616 F.2d 2, 16 (2d Cir. 1979) ("To be convicted as a member of a conspiracy, a defendant need not know every objective of the conspiracy, every detail of its operation or means employed to achieve the agreed-upon criminal objective, or even the identity of every co-conspirator." (citations omitted)).

III. The Jury Instructions

"A defendant challenging a jury instruction as erroneous must show 'both error and ensuing prejudice.'" *United States v. Sabhnani*, 599 F.3d 215, 237 (2d Cir. 2010) (quoting *United States v. Quinones*, 511 F.3d 289, 313-14 (2d Cir. 2007)). We will find error "if we conclude that a charge either fails to adequately inform the jury of the law, or misleads the jury as to a correct legal standard." *United States v. Doyle*, 130 F.3d 523, 535 (2d Cir. 1997).

A. *Federal Programs Bribery Instructions*

Mazer argues that the district court erred in not including in its charge Mazer's proposed defense instruction that he "contends he was not an agent of the City because he was not authorized to act on behalf of the City." App. 1772. "While a defendant is entitled to any legally accurate jury instruction for which there is a foundation in the evidence, he does not have a right to dictate the precise language of the instruction." *United States v. Banki*, 685 F.3d 99, 105 (2d Cir. 2012). Here, the district court instructed the jury that Mazer "contends that, with regard to the bribery charge, he was not

an agent of the city," Trial Tr. 5337:17-18, and that "[a]n 'agent' is a person authorized to act on behalf of another person, organization, or government," *id.* 5352:9-10. "[W]e examine the charge[] as a whole," *United States v. Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006), and together, these two instructions satisfied the district court's obligation to include Mazer's defense theory.

B. *Travel Act Conspiracy Instructions*

We likewise reject Mazer's objection to the district court's instruction on the charge of conspiracy to violate the Travel Act. According to Mazer, the district court erred in not clarifying that, unlike federal programs bribery under 18 U.S.C. § 666, for which proof of an unlawful gratuity is sufficient, bribery under New York law (the predicate "unlawful activity" for the Travel Act charge) requires proof of a *quid pro quo*. Mazer did not raise this objection below, and we therefore review only for plain error.

We conclude that, even if the instructions were flawed, Mazer has failed to carry his burden to establish prejudice. *See United States v. Olano*, 507 U.S. 725, 734 (1993). In an attempt to show prejudice, Mazer argues that he "presented evidence at trial that his interests in [D.A. Solutions] and Prime View were more akin to joint ventures than the result of any *quid pro quo* agreement." Mazer Br. 86. But this defense theory, if accepted, would have resulted in an acquittal on the federal programs bribery charges—whether grounded in a *quid pro quo* or a gratuity theory—as well, and the jury necessarily rejected Mazer's theory (and related interpretation

of this evidence) when it convicted him of those charges. We see no reason why a different jury instruction would have led the jury to accept the joint-venture defense only with respect to the Travel Act conspiracy charge, and so we find that the district court's error, if any, was harmless.

C. *Honest Services Fraud Instructions*

Denault's challenge to the district court's instructions for the honest services fraud charges is also unpersuasive. The Government stated in its rebuttal summation that a *quid pro quo* exists when a person "takes any favorable action or provides any benefit to the payor . . . in exchange for the payments." Trial Tr. 5250:14-17. Denault argues that a supplemental instruction was needed to correct the Government's "erroneous implication that an action taken in furtherance of undisclosed self-dealing constitutes the requisite *quid pro quo* under the honest services fraud statute." Denault Br. 76. We do not accept the premise of Denault's argument, that is, that the Government made any improper suggestion. The Government was correct that the defining feature of a *quid pro quo* is the existence of an "exchange." *See United States v. Bahel*, 662 F.3d 610, 635 (2d Cir. 2011).

IV. Evidentiary Objections

Denault also appeals the district court's decision to admit into evidence a summary chart created by the Government and to exclude testimony from Denault's sole defense witness. We review the district court's evidentiary rulings for abuse of

discretion. *See United States v. Han*, 230 F.3d 560, 564 (2d Cir. 2000).

A. *The Summary Chart*

The summary chart reflected the markups that various contractors, subcontractors, and sub-subcontractors charged the City on a $2.5 million invoice issued to the City. Denault argues that the chart should have been excluded under Federal of Evidence Rule 403 as substantially more prejudicial than probative primarily because, according to Denault, the extent of the markups was not relevant to City's bargain. In other words, Denault contends that the markups were not probative of *anything* relevant to the trial.

We cannot agree. Whatever the relevancy of the precise extent of the markups to the City, it is common sense that the overall price factored into the City's bargain, and the extent of the markups shows that the pricing was abnormally high for the services rendered. Relatedly, the summary chart was probative of Mazer's and Denault's motives for lobbying for Amendment 6 and Work Order 67—which, together, set the pricing structure on CityTime after 2006—because the extent of the markups (1) demonstrates how the kickbacks, which were a cut of the subcontractor's and sub-subcontractors' earnings, were funded and (2) helps explain why Mazer in particular endeavored to keep the scheme going, as his kickback was a percentage of the sub-subcontractors' profits, not a flat fee, such that the greater the markup, the greater the kickback. Accordingly, we find that the district court did not abuse its discretion in admitting the summary chart.

B. *Exclusion of Defense Witness*

After the close of the Government's case, Denault sought to introduce testimony from his former lawyer, Raymond Lubus. According to Denault's counsel's proffer, Lubus would have testified about a 2003 conversation in which Denault allegedly (1) stated that he was in a partnership to provide staffing services on CityTime with a fellow SAIC employee and Reddy Allen, an owner of Technodyne (one of the subcontractors that the jury found paid Denault kickbacks) and (2) inquired into the legality of receiving "money pursuant to an hourly formula" as part of this partnership. Denault Special App. 28. The district court excluded the testimony as inadmissible hearsay.

Denault argues that Lubus's testimony as to Denault's statements was admissible under Federal Rule of Evidence 803(3) as "statement[s] of the declarant's then-existing state of mind (such as motive, intent, or plan)" and that Lubus's testimony as to his own statements was admissible non-hearsay. To the former, Denault's attempt to shoehorn Lubus's testimony into the state of mind exception is betrayed by his own briefing, which demonstrates that Denault sought Lubus's testimony not to prove any belief then held by Denault, but to establish his alleged ownership interest in Technodyne in order to show he engaged only in self-dealing. *See, e.g.*, Denault Br. 71 ("If Lubus had been permitted to testify, the jury would have heard a plausible non-criminal basis for Denault's conduct: his pre-existing partnership interest in Technodyne."); *see also Skilling v. United States*, 561 U.S. 358, 409

(2010). This puts Lubus's testimony squarely within the "exception to the exception" contained in Rule 803(3), which excludes "a statement of memory or belief [offered] to prove the fact remembered or believed." *See generally United States v. Ledford*, 443 F.3d 702, 709 (10th Cir. 2005). To Denault's latter argument—that Lubus's testimony could have been admitted as non-hearsay for its effect on Denault—we conclude that the exclusion of Lubus's testimony for that purpose was harmless. Denault claims that Lubus's opinion that Denault's receipt of an hourly fee was not criminal would have allowed the jury to conclude that Denault only wired money through India to avoid detection from his employer, SAIC. Simply put, we fail to see, and Denault has not explained, why SAIC would have had access to or would have been monitoring his bank records. We therefore reject Denault's claim that Lubus's testimony could have persuaded the jury that Denault's decision to route the money through India lacked any connection to criminal activity. *See United States v. Rea*, 958 F.2d 1206, 1220 (2d Cir. 1992) ("[E]rror is harmless if we can conclude that that testimony was 'unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.'" (quoting *Yates v. Evatt*, 500 U.S. 391, 403 (1991))).

V. Defendants' Sentences

Defendants each challenge the district court's Guidelines calculations and the sufficiency of the record of the district court's sentencing determination. We find no reversible error in either.

Although nothing in the record below warrants resentencing, we remind the district court that it is best practice to provide a more thorough explanation of the reasons for the sentences imposed and to do so separately for each defendant. *Cf. United States v. Corsey*, 723 F.3d 366, 377 (2d Cir. 2013). Even when, as here, a judge is not *required* to say more, doing so still serves a "salutary purpose." *See Rita v. United States*, 551 U.S. 338, 357 (2007). "Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust." *Id.* at 356. It also benefits the defendant. An individualized and non-cursory explanation ensures the defendant in a multi-defendant case that the district court considered his arguments, which at least partially quells the concern (that would otherwise linger during the defendant's term of incarceration) that his sentence was imposed for the wrong reasons and, in that way, helps to secure his "trust in the judicial institution." Additionally, a more tailored explanation informs the defendant of precisely what it is about his conduct, as distinct from the conduct of his co-defendants, that prompted the sentence, thereby advancing the aims of specific deterrence. In sum, while we have no reason to reverse the district court in this instance, we encourage it to provide more robust and individualized explanations even when our case law does not mandate it.

VI. Conclusion

We have considered all of defendants' remaining arguments, and find them to be without merit. Accordingly, for the foregoing reasons, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe,
Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ORDER

Docket Nos.: 14-1397 (Lead)
14-1399 (Con)
14-1404 (Con)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at 40 Foley Square, in the City of New York, on the 31st day of March, two thousand sixteen.

UNITED STATES OF AMERICA,

Appellee,

—v.—

SVETLANA MAZER, LARISA MEDZON, ANNA MAKOVETSKAYA, CARL BELL, PADMA ALLEN, REDDY ALLEN, TECHNODYNE LLC, SCIENCE APPLICATIONS INTERNATIONAL CORPORATION,

Defendants,

MARK MAZER, DIMITRY ARONSHTEIN, GERARD DENAULT,

Defendants-Appellants.

Appellant, Gerard Denault, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc.* The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe,
Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

Appendix C

18 U.S.C. § 1343

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Appendix D

18 U.S.C. § 3553

(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 education 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 944(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by an act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 944(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 944(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 944(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 944(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.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE. —

(1) IN GENERAL. —

Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) CHILD CRIMES AND SEXUAL OFFENSES.—

(A) Sentencing.—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such

sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines;

and

(III) should result in a sentence different from that described; or

(iii) the Court finds, on a motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

> In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(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 a statement of reasons form issued under section 944(w)(1)(B) of title 28, except that to the extent 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 only orders 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.

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

> **(1)** permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of an order;
>
> **(2)** afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and
>
> **(3)** include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.
>
> Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes

will not unduly complicate or prolong the sentencing process.

(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.—
Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by a statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.—
Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 944 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.