06-0714-cr

To Be Argued By:
JAMES J. FINNERTY

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-0714-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

ERNEST E. NEWTON,
Defendant-Appellant.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The defendant-appellant, Ernest E. Newton II, appeals from the sentence he received after pleading guilty to a three-count information on February 2, 2006. The United States District Court for the District of Connecticut (Alan H. Nevas, S.U.S.D.J.) had subject matter jurisdiction pursuant to 18 U.S.C. § 3231.

The judgment of conviction entered on February 13, 2006. (Appellant's Appendix ("AA") 7, 294-96.) On February 6, 2006, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). (AA 7, 297-98.)

This Court has jurisdiction to consider this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court violated the *Ex Post Facto* Clause by imposing a non-Guidelines sentence of 60 months after deciding that the defendant's advisory sentencing range was 70-87 months under the 2005 Guidelines Manual, (a) where the court said it would have imposed the same sentence even if the 2003 Guidelines Manual applied; and (b) where application of the 2005 Guidelines Manual was appropriate pursuant to the "one book" rule endorsed by a majority of circuit courts of appeals, and in light of the fact that the defendant committed a portion of the mail fraud offense charged in the information after the Guidelines were amended to reflect a higher offense level for bribery.

2. Whether the district court correctly held that the defendant's undisputed attempts to induce a witness to provide false information to government investigators justified an obstruction-of-justice enhancement under U.S.S.G. § 3C1.1.

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Preliminary Statement

The defendant, Ernest E. Newton II, was a long-time member of the General Assembly of the State of Connecticut, first winning election to the House of Representatives in 1989 and then to the Senate in 2003. While a state elected official, he sold his public office for private financial benefit and, as the district court noted at

sentencing, engaged in a long and pervasive pattern of corrupt conduct:

> You turned your service in the General Assembly into a business, and when constituents came to you on matters of interest to them, you didn't serve them, they bought you. You were for sale.

(AA 274.)

Recognizing that the criminal conduct to which the defendant pleaded guilty represented only some of the many corrupt ways the defendant used his legislative office to financially benefit himself and others close to him, the district court sentenced him to a non-Guidelines sentence of 60 months of imprisonment. That sentence was less than the advisory range of 70-87 months which the district court found to be applicable using the 2005 Guidelines Manual, which was in effect at the time of sentencing.

The defendant now appeals his sentence, principally on the grounds that the district court violated the *Ex Post Facto* Clause by applying the 2005 Manual instead of the 2003 Manual (which was in effect at the time of his violation of Count One, but before his commission of Counts Two and Three), which entailed a lower offense level for bribery offenses and would have yielded a lower advisory guideline range. In this respect, he challenges the court's application of the "one book" rule adopted in U.S.S.G. § 1B1.11, which the court selected because the defendant committed the last of the charged criminal acts

in January 2005 – after the bribery guidelines were increased.

Secondarily, the defendant claims that the district court improperly enhanced his offense level by two points for obstruction of justice pursuant to U.S.S.G. § 3C1.1. Specifically, the defendant argues that his undisputed efforts to persuade Warren Godbolt ("Godbolt"), a bribe-payor, to lie to federal law enforcement authorities about the nature and circumstances of a $5,000 bribe, and the defendant's subsequent filing with the State of Connecticut during the early stages of the criminal investigation of a document falsely stating that he received $5,000 in salary payments from Godbolt, fall outside the scope of that enhancement.

For the reasons that follow, the defendant's claims are meritless, and this Court should affirm the defendant's sentence.

Statement of the Case

On September 20, 2005, the defendant waived indictment and pleaded guilty to a three-count information. (AA 4.) Count One alleged that, from May through September 2004, the defendant demanded, solicited, agreed to accept, and accepted a bribe of $5,000 from Gobolt, the Executive Director of Progress Training Associates, Inc. ("Progressive Training"), a Bridgeport non-profit agency, in exchange for using his official position and influence to assist Progressive Training in securing $100,000 in State of Connecticut Bond Commission funds in violation of 18 U.S.C.

§ 666(a)(1)(B). (AA 9-15.) Count Two alleged that, from January 2004 through January 2005, the defendant devised a scheme to defraud "Newton for Senate 2004," a campaign committee established to promote his re-election to the State Senate, and to defraud contributors to that committee, in violation of 18 U.S.C. § 1341. (AA 15-22.) Count Three alleged that on April 12, 2002, the defendant willfully attempted to evade the payment of income taxes in 2001, in violation of 26 U.S.C. § 7201. (AA 22-23.)

On February 2, 2006, after a lengthy sentencing hearing, the district court found that the 2005 Guidelines Manual applied and that the defendant's advisory Guidelines range was 70-87 months. The court then imposed a non-Guidelines sentence of concurrent 60-month terms of imprisonment on each count. (AA 7.) It also imposed a three-year term of supervised release, a total special assessment of $300, and restitution of $13,862. (AA 7, 294.)

On February 6, 2006, the Government filed a motion requesting that the district court clarify whether it would have imposed the same non-Guidelines sentence of 60 months if it had applied the 2003 Guidelines Manual to calculate the defendant's advisory range, as the defendant had requested at sentencing. (AA 7, 291-93.)

On February 6, 2006, the defendant filed a notice of appeal. (AA 7, 297.)

On February 10, 2006, the district court entered an order granting the Government's motion for clarification

and stating that it would have imposed the same non-Guidelines sentence even if it had used the November 2003 Sentencing Guidelines Manual and found that the relevant advisory range was 33-41 months. (AA 7.)

On February 13, 2006, the written judgment of conviction was both filed and entered. (AA 7, 294-95.) On that same date, by operation of Fed. R. App. P. 4(b), the defendant's earlier-filed notice of appeal became effective.

On February 17, 2006, the defendant filed a second notice of appeal from the district court's order granting the Government's motion for clarification. (AA 7.)

The defendant is now serving his federal sentence.

Statement of Facts

During the investigation of corruption within the administration of now-former Mayor Joseph Ganim of Bridgeport, the Federal Bureau of Investigation ("FBI") received information that the defendant had used his influence and power as a state legislator to obtain a "no-show" job with a public utility in Bridgeport. (*See* Government Appendix ("GA") 3-6.) On May 14, 2004, after an extensive covert investigation involving confidential informants, consensually monitored recordings of conversations, and document analysis, the Government sought and obtained judicial authority to intercept communications occurring over the defendant's cellular telephone. The Government intercepted those

conversations from May 19, 2004, until December 9, 2004. (GA 6.)

On January 26, 2005, the Government executed search warrants at several locations in Connecticut and one location in Massachusetts and interviewed numerous people, including Godbolt. In addition, Godbolt consensually recorded three conversations with the defendant that day. Those conversations are discussed *infra* in Point II.A.

A. The Presentence Report

In anticipation of sentencing, the United States Probation Office prepared a Presentence Report ("PSR") (AA 45-148.) The first disclosure took place on November 14, 2005. (AA 46.) The second disclosure took place on December 28, 2005. (AA 150.) The PSR used the November 1, 2005, version of the U.S. Sentencing Commission's Guidelines Manual, which was in effect at the time of the defendant's sentencing, to calculate the defendant's advisory Guidelines range. (AA 53.)[1] Applying that manual, the PSR ultimately calculated that the defendant's total offense level was 33 and that the defendant fell within Criminal History Category I. (AA

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[1] Because the defendant's last criminal act occurred in January 2005, it was covered by the Guidelines Manual in effect on November 2004. There were no material differences between that version and the 2005 Manual in effect at the time of sentencing, so the parties have referred to the 2005 rather than the 2004 Manual. *See* U.S.S.G. § 1B1.11(a).

165.) The PSR concluded that the defendant's advisory Sentencing Guideline range was 135 to 168 months of imprisonment. (AA 172.)

In calculating that range, the PSR grouped Count One separately from Counts Two and Three, which it grouped together. (AA 163.)

As to Group One (Count One - bribery), the PSR calculated the adjusted offense level to be 36. (AA 163-164.) The adjusted offense level for Group Two (Count Two - mail fraud, and Count Three - tax evasion) was 16. (AA 164).

Performing the multiple-group analysis of U.S.S.G. § 3D1.4, the PSR assigned one unit to Group One (bribery), which had the highest adjusted offense level. Because the adjusted offense level of Group Two was 9 or more levels less serious than Group One, it was disregarded for purposes of determining the combined offense level. (AA 164.) Because there was only one unit involved, no levels were added to the highest adjusted offense level. Accordingly, the PSR concluded that the combined offense level was 36. (AA 164.) The PSR then reduced the combined offense level three points for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1 and concluded that the total offense level was 33. (AA 165.)

The PSR also concluded that the defendant did not possess any criminal history points, corresponding to Criminal History Category I. (AA 165.) Accordingly, the

advisory range was 135 to 168 months of imprisonment. (AA 172.)

B. The Sentencing Hearing

At the sentencing hearing on February 2, 2006, the defendant did not object to the factual content of the PSR as amended, but did object to the PSR's calculation of the advisory sentencing range. (AA 178.) Because Count One drove the calculation of the advisory range, the parties' comments focused principally on Guidelines issues relating to the calculation of that sentencing range.

The defendant argued the following: (1) the PSR should calculate the advisory range based on the November 1, 2003, Sentencing Guideline Manual and the failure to do so was a violation of the *Ex Post Facto* Clause (AA 179-90); (2) the PSR improperly applied U.S.S.G. § 2C1.1(b)(3) to increase the defendant's adjusted offense level (AA 208-17); and (3) that the PSR improperly applied U.S.S.G. § 3C1.1 (obstruction of justice) to enhance the defendant's adjusted offense level. (AA 218-22.)

The defendant also argued that the PSR had miscalculated the value of the benefit intended as $539,000. (AA 193-207.) The PSR had reached that dollar amount by adding together the value of the benefits received or intended to be received as a result of several different bribe payments: (a) $100,000 that the defendant agreed to secure for Progressive Training from the State Bond Commission in exchange for a $5,000 bribe, (b) a

per diem rate increase valued at $279,000 that the defendant agreed to secure from the State of Connecticut Department of Children and Families on behalf of the owner of a residential facility for young male adults known as the University Residential Facility, Inc., in exchange for a $1,750 payment, (c) $90,000 in grant money that the defendant agreed to obtain on behalf of a relative's business in exchange for a $5,000 payment, and (d) $70,000 in State of Connecticut grants that the defendant obtained from the Department of Economic and Community Development in exchange for approximately $2,500. (AA 163.) On this point, the Government stated at the hearing that, although it believed that the PSR correctly calculated the value of the benefit intended pursuant to U.S.S.G. § 2C1.1(b)(2) as $539,000, it also believed that the figure over-represented the seriousness of the offense. (AA 178, 198.) It thus requested that the district court use the amount of $100,000, which represented the money awarded by the State Bond Commission to Progressive Training as a result of the bribe of the defendant as the value of the benefit intended pursuant to § 2C1.1(b)(2). (AA 198-99.)

The district court overruled each of the defendant's objections, except that it partially reduced the value of the benefit intended from $539,000 to $100,000. (AA 207-08.) Accordingly, the district court decided that only an 8-level increase was warranted under § 2C1.1, rather than a 14-level increase as recommended in the PSR. (AA 208.)

On appeal, the defendant challenges only the district court's use of the November 2005 Manual and its

imposition of a two-level increase in his adjusted offense level pursuant to § 3C1.1. Accordingly, the Government will describe the district court's rulings only on those issues.

1. The District Court's Selection of the November 2005 Manual

In selecting the November 2005 Manual to calculate the advisory Sentencing Guideline range, the district court recited U.S.S.G. §§ 1B1.11(a) and 1B1.11(b)(1) and the commentary to those provisions. (AA 190-91.) In particular, the court quoted Application Note 2 to § 1B1.11, which states that "[t]he last date of the offense of conviction is the controlling date for ex post facto purposes." (AA 191.) The court reviewed the dates on which the defendant committed the three charged offenses. Although it recognized that the defendant's bribery offense concluded in September 2004, it also noted that Count Two (campaign mail fraud) concluded in January 2005. (AA 191.) Accordingly, the court found that the "controlling date for ex post facto purposes, for the instant offense, is January 2005." (AA 191.) The court then relied on § 1B1.11(b)(3), which provides that "[i]f the defendant is convicted of two offenses, the first committed before, and the second after a revised edition of the guidelines manual becomes effective, the revised edition of the guidelines manual is to be applied to both offenses." (AA 192.) Accordingly, the district court held that it would use the November 2005 Manual to calculate the Guidelines range. (AA 192) (citing *United States v. Santopietro*, 166 F.3d 88, 95 (2d Cir. 1999)).

2. The Obstruction of Justice Enhancement

The district court's application of § 3C1.1 increased the defendant's adjusted offense level by two levels, as discussed in greater detail in Point II *infra*.

3. The District Court's Calculation of the Advisory Sentencing Guideline Range

Applying the November 2005 Manual, the district court calculated the defendant's adjusted offense level for Group One as follows:

Base offense level
U.S.S.G. § 2C1.1(a)(1) 14

More than One Bribe
U.S.S.G.§ 2C1.1(b)(1) . . . . . +2

Value of Benefit Intended: $100,000
U.S.S.G. §§ 2C1.1(b)(2); 2B1.1(b)(1)(H) . . . . +8

High-Level Decision-Making Position
U.S.S.G. § 2C1.1(b)(3) . . . . . +4

Obstruction of Justice
U.S.S.G. § 3C1.1 . . . . . +2

Adjusted Offense Level 30

The court adopted the PSR's calculation of the adjusted offense level for Group Two and its combined total offense level analysis. The district court found that the combined offense level was 27, that the defendant fell within Criminal History Category I, and that the advisory Sentencing Guideline range was therefore 70-87 months of imprisonment. (AA 224.)

4. The District Court's Imposition of Sentence

After calculating the advisory Sentencing Guideline range, the district court entertained additional remarks concerning the appropriate sentence to be imposed. After listening to defense counsel, several individuals speaking on the defendant's behalf, and Government counsel, the Court imposed a non-Guidelines sentence of 60 months of imprisonment, three years of supervised release, a $300 special assessment, and restitution of $13,682. (AA 277-280.)

In imposing that sentence, the district court focused on several concepts outlined in 18 U.S.C. § 3553: the defendant's offense, his personal characteristics and history, just punishment, specific deterrence, and general deterrence. (AA 277.)

In addressing the defendant's criminal conduct, the district court stated that:

> It is inconceivable to me that anyone who serves in the General Assembly would make a

> business out of it and that's what you did. You made a business out of your service in the General Assembly . . . . You didn't make mistakes. What you were doing was deliberate and pervasive, and it certainly wasn't unintentional. You knew exactly what you were doing, and you had goals that you wanted to achieve, money. You wanted to make money. You turned your service in the General Assembly into a business, and when constituents came to you on matters of interest to them, you didn't serve them, they bought you. You were for sale.

(AA 274.)

The district court also noted the defendant's association with organized crime figures, terming the defendant's behavior "appalling." (AA 276.)

The district court recognized, however, that the defendant had spent a large period of his life in public service and served some people without seeking payment. (AA 276.) It also believed that the defendant posed a low risk of recidivism. (AA 278.)

In addition to punishing the defendant for his criminal conduct, the district court believed it important to send a message that public corruption in Connecticut would not be tolerated and that participating in corrupt activities had severe potential consequences, including significant imprisonment. (AA 277-78.)

The district court concluded:

> A non-Guideline sentence is imposed based upon the specific circumstances of this case and the history and characteristics of the defendant. A sentence of sixty months imprisonment will reflect the need for the sentence to reflect the seriousness of the offense, and will serve as a general deterrent by sending a message to the public, that political corruption will not be tolerated. Additionally, given Mr. Newton's rehabilitation from substance abuse, it does appear that he has the potential to rehabilitate himself from his current circumstances, and therefore, I believe he poses a low . . . low risk of recidivism and, therefore, I find that a sentence of 60 months is a reasonable sentence based on all of these factors.

(AA 278.)

C. The District Court's Clarification Order

On February 6, 2006, the Government filed a motion asking the district court to clarify whether it would have imposed the same non-Guidelines sentence regardless of whether the defendant had been subject to an advisory range of 70-87 months or an advisory range of 33-41 months. Each of those ranges contained an obstruction of justice enhancement. (AA 291-93.) On that same date, the defendant filed a notice of appeal. (AA 7, 297-98.) The written judgment of conviction had not yet been filed or entered. On February 7, 2006, the defendant filed a

written objection to the Government's motion. (AA 7, GA 98-101.)

On February 10, 2006, the district court filed and entered an order stating that it would have imposed the same non-Guidelines sentence even if it had used the November 2003 Guidelines Manual and found that the relevant advisory Guidelines range was 33 to 41 months. (AA 7.)

On February 13, 2006, the written judgment of conviction was both filed and entered. (AA 7, 294-95.) On this same date, by operation of Fed. R. App. 4(b)(2), the defendant's earlier-filed notice of appeal became effective.

On February 17, 2006, the defendant filed a second notice of appeal from the district court's order granting the Government's motion for clarification. (AA 7.)

SUMMARY OF ARGUMENT

1. This Court need not determine whether application of the 2005 Guidelines Manual would violate the *Ex Post Facto* Clause in this case. Judge Nevas expressly stated that he would have imposed the same non-Guidelines 60-month sentence regardless of whether the advisory range was 70-87 months or 33-41 months. Consistent with this Court's statement in *United States v. Crosby*, the district court carefully considered the parties' arguments regarding which Guidelines Manual applied, together with the other factors outlined in 18 U.S.C. § 3553(a), in imposing a 60-

month sentence. Judge Nevas also properly sought to facilitate appellate review when he supplemented his reasoning in a written order that clarified his intent to impose the same sentence regardless of which of two competing advisory ranges applied. Because that order was issued at a time when the district court retained jurisdiction over the case and, in any event, did not alter the defendant's sentence in any way, it was well within the district court's jurisdiction.

If this Court decides that it nevertheless must reach the *ex post facto* issue, it must confront two separate constitutional questions, both of which are issues of first impression in this Circuit. First, the Court should conclude that the *Ex Post Facto* Clause continues to apply to the United States Sentencing Guidelines in the wake of *United States v. Booker*. Although the Guidelines are now advisory rather than binding, they remain an essential starting point for any sentencing decision, and an increase in the Guidelines applicable to any particular offense will have the practical effect of substantially disadvantaging a defendant within the meaning of *Miller v. Florida*, 482 F.3d 423 (1987).

Second, the Court should conclude that application of the 2005 Manual pursuant to the "one book" rule set forth in U.S.S.G. § 1B1.11 does not run afoul of the *Ex Post Facto* Clause in the present case. The defendant committed a portion of the criminal conduct charged in Count Two (mail fraud) in January 2005, which was after the Sentencing Guidelines were amended to provide for enhanced bribery penalties. The defendant was on clear

notice that his ongoing criminal activity – the mail fraud – would subject him to enhanced penalties under the revised Guidelines, which would take account of previously committed relevant conduct, including his bribery and tax offenses. Accordingly, there was no *ex post facto* violation in the present case.

2. The district court properly enhanced the defendant's offense level by two points for obstructing justice under U.S.S.G §. 3C1.1. The defendant does not dispute that he willfully attempted to obstruct or impede the administration of justice during the investigation of his receipt of a $5,000 bribe. Rather, he claims that Application Note 4(g) to § 3C1.1 makes an enhancement proper only if his attempt to persuade a cooperating witness to lie "significantly obstructed or impeded" the investigation. This argument is flawed for several reasons. First, Note 4(g) is simply one entry in a "non-exhaustive" list of conduct that qualifies for an obstruction enhancement. The defendant's conduct constituted both an attempt to unlawfully influence a potential co-defendant or witness, as well as witness tampering in violation of 18 U.S.C. § 1512 – both of which are types of conduct that are expressly covered by other application notes to § 3C1.1. Second, Note 4(g) is inapplicable here because it covers only statements made to law enforcement officers. Here, the statements were made to a private party who, unbeknownst to the defendant, was cooperating with authorities. Thus, the district court acted properly in adding two levels for obstruction of justice.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE NOVEMBER 2005 SENTENCING GUIDELINES MANUAL APPLIED HERE

A. Relevant Facts

The relevant facts are set forth in the Statement of the Facts above.

B. Governing Law and Standard of Review

The Guidelines Manual provides that, in general, a sentencing court must apply the Guidelines in effect at the time of sentencing, *see* U.S.S.G. § 1B1.11(a), p.s.,[2] unless such application would violate the *Ex Post Facto* Clause of the U.S. Constitution. *See* U.S.S.G. § 1B1.11(b)(1), p.s.; *see also United States v. Gonzalez,* 281 F.3d 38, 45 (2d Cir. 2002). The *Ex Post Facto* Clause is violated if the court applies a guideline to an event occurring before its enactment, and the application of that guideline disadvantages the defendant "by altering the definition of criminal conduct or increasing the punishment for the crime. " *Lynce v. Mathis*, 519 U.S. 433, 441 (1997); s*ee*

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[2] The provisions of U.S.S.G. § 1B1.11 were last amended effective November 1, 1993. Thus, the version quoted throughout this brief was in effect in both the 2003 and 2005 Manuals.

also Gonzalez, 281 F.3d at 45.

The Sentencing Commission has also adopted the "one book" rule:

> The Guidelines Manual in effect on a particular date shall be applied in its entirety. The Court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual.

U.S.S.G. § 1B1.11(b)(2). This Court has consistently followed that rule. *See, e.g., United States v. Stephenson*, 921 F.2d 438 (2d Cir. 1990) (Sentencing Commission and Congress intended that single manual be applied as "cohesive and integrated whole" rather than in piecemeal fashion).

The "one book" rule applies to situations involving multiple counts of conviction, as here. "If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses." U.S.S.G. § 1B1.11(b)(3). The commentary to that provision states that:

> [W]here the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines

> Manual is to be applied to both offenses, even if the revised edition results in an increased penalty for the first offense. Because the defendant completed the second offense after the amendment to the Guidelines took effect, the ex post facto clause does not prevent determining the sentence for that count based on the amended guidelines . . . . Moreover, the approach set forth in subsection (b)(3) should be followed regardless of whether the offenses of conviction are the type in which the conduct is grouped under § 3D1.2(d). The ex post facto clause does not distinguish between groupable and nongroupable offenses, and unless that clause would be violated, Congress's directive to apply the sentencing guidelines in effect at the time of sentencing must be followed. Under the guideline sentencing system, a single sentencing range is determined based on the defendant's overall conduct, even if there are multiple counts of conviction. . . .

Id. 1B1.11(b)(3) cmt. Background.

"[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States,* 508 U.S. 36, 38 (1993).

Alleged violations of the *Ex Post Facto* Clause raise questions of law which are reviewed *de novo*. *See United States v. Quinones*, 313 F.3d 49, 60 (2d Cir. 2002)

("Questions of constitutional interpretation are reviewed de novo."), *cert. denied*, 540 U.S. 1051 (2003).

C. Discussion

1. This Court Need Not Decide Whether Application of the 2005 Manual Violated the *Ex Post Facto* Clause Because the District Court Would Have Sentenced the Defendant to 60 Months Even If the 2003 Manual Applied

Although sentencing courts are required to determine the Guidelines range applicable to a particular defendant in order to satisfy their duty to "consider" the Guidelines under 18 U.S.C. § 3553(a), this Court has explained that a district court need not always resolve every Guidelines question definitively. Because "the duty to apply the applicable Guidelines range is not mandatory, situations may arise where either of two Guidelines ranges, whether or not adjacent, is applicable, but the sentencing judge, having complied with section 3553(a), makes a decision to impose a non-Guidelines sentence, regardless of which of the two ranges applies." *United States v. Crosby*, 397 F.3d 103, 112 (2d Cir. 2005). In the pre-*Booker* era, this Court followed a similar rule, permitting district courts to avoid resolving disputed issues to determine which of two Guidelines ranges applied if the district court imposed a sentence of imprisonment falling within the overlap of two adjacent ranges and stated that the sentence would have been the same regardless of which range actually applied.

See, e.g., United States v. Bermingham, 855 F.2d 925, 930-32 (2d Cir. 1988). Similarly, this Court held pre-*Booker* that a district court was not required to determine which of two Guidelines ranges applied if the district court decided to make a permissible departure regardless of which range was applicable. *See, e.g., United States v. Borrego*, 388 F.3d 66, 68-70 (2d Cir. 2004).

Judge Nevas did precisely what *Crosby* said was appropriate – he stated that he would have imposed the same sentence regardless of whether the 2003 or 2005 Guidelines Manual was applicable. He did this only after carefully considering the parties' arguments regarding which manual and which advisory Guidelines range was applicable, evaluating the § 3553(a) factors he believed relevant to sentencing the defendant, and stating his reasons in open court for imposing a 60-month sentence. Although Judge Nevas held that the 2005 Manual was applicable, he also made clear in his subsequent written order that he would have imposed the same sentence regardless of whether the advisory range was 33-41 months (by applying the 2003 Guidelines Manual), or 70-87 months (by applying the 2005 Guidelines Manual). The order memorialized Judge Nevas's considered views concerning the appropriate sentence – regardless of the Guidelines range chosen – in precisely the manner that the *Crosby* court suggested would facilitate appellate review. *See Crosby*, 397 F.3d at 116 ("District judges will, of course, appreciate that whatever they say or write in explaining their reasons for electing to impose a Guidelines sentence or for deciding to impose a non-Guidelines sentence will significantly aid this Court in

performing its duty to review a sentence for reasonableness.") Indeed, in *Bermingham* – the precursor to this portion of *Crosby* – this Court remanded to the district court so that it could clarify whether it would have imposed the same sentence. To remand here would be a meaningless formality since Judge Nevas has already answered that question. *Cf. Borrego*, 388 F.3d at 70 (declining to remand).

The fact that the district court's statement came in a separate written order does not lessen its value for appellate review. First, although not included in the judgment of conviction, the court's amplification of its sentencing rationale was still made in writing, in a publicly filed order, and was made before entry of the judgment of conviction. Accordingly, it is the functional equivalent of the statement of reasons in the judgment of conviction required by 18 U.S.C. § 3553(c)(2) and the statement of reasons made in open court required by Federal Rule of Criminal Procedure 32(k)(1).

Second, the district court's order did not violate Federal Rules of Criminal Procedure 35 or 36, which limit a court's authority to alter or amend a sentencing decision. Simply put, the district court did not change the defendant's sentence in any way. Rather, the court simply placed on the record a fuller explanation of a previous decision. Indeed, at the sentencing hearing, the district court had expressly set forth the specific § 3553(a) factors that guided its selection of a 60-month term of imprisonment. The court believed that a non-Guidelines term of imprisonment of 60 months, which was less than

the advisory range calculated, was "reasonable" given the defendant's criminal conduct, his pattern of corrupt activities, his personal characteristics and history, and the need to send a strong deterrent message to those tempted to emulate his corrupt activities.

Moreover, the court's order did not violate Rules 32 (governing sentencing) or 43 (requiring the defendant's presence at critical stages of the proceedings). The district court fully complied with Rule 32(k)(1) by articulating in open court its reasons for imposing a non-Guidelines sentence. The subsequent order neither added nor subtracted from those reasons. Instead, it simply answered the supplemental question that this Court has often posed in remand after remand, particularly after *Crosby*: Whether the district court would have imposed the same sentence, had it been aware of some specified error in its sentencing calculus. As this Court held in *Crosby*, a district court has discretion to conduct such limited proceedings on the papers, without the need for a live hearing or the presence of the defendant. *See Crosby*, 397 F.3d at 120. Moreover, the district court's order did not rely on any legal arguments as to which the defendant had been denied an opportunity to be heard. The parties had exhaustively litigated the question of which manual applied, and the court had considered detailed briefs and oral argument during a lengthy sentencing hearing. (AA 226-34, 263-65.) In short, if a district court is permitted to supplement its reasoning in a written order on remand, it should likewise be permitted to do so between the sentencing hearing and the entry of judgment.

Finally, the filing of a notice of appeal on February 6 did not deprive the district court of jurisdiction to enter its clarification order on February 10. Under Fed. R. Crim. P. 4(b)(2), the notice of appeal became effective only *after* the court entered the written judgment of conviction on February 13, 2006 – three days after the clarification order was filed. *See* Fed. R. Crim. P. 4(b)(2) ("A notice of appeal filed after the court announces a decision, sentence, or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry.").

Further, this Court has recognized that a district court retains limited jurisdiction in a criminal case, even after the filing of a timely and effective notice of appeal, to enter supplemental findings on decisions that were previously made. For example, in *United States v. Nichols*, 56 F.3d 403, 410-11 (2d Cir. 1995), a district court had ruled that a defendant was competent to stand trial and be sentenced, and stated in its decision that the burden of proving incompetency fell upon the defendant. Six days later, the defendant filed a notice of appeal. Nearly two months after the notice was filed, the district court filed a "supplemental finding" which "clarified that its competency ruling did not depend on whether the government or the defendant bore the burden of proof." *Id.* at 410. The defendant "challenge[d] the supplemental finding on the ground that it was issued after the entry of the notice of appeal," but this Court disagreed. *Id.* at 410-11. The Court held that a district court retains the power to act in "'aid of the appeal'" even in the wake of an effective notice of appeal, where its order does not "'modify a judgment substantively.'" *Id.* at 411 (quoting

United States v. Ransom, 866 F.2d 574, 575-76 (2d Cir. 1989) (per curiam)).

> Here, the district court simply clarified that its finding of competency did not depend on the allocation of the burden of proof, thereby aiding this court in avoiding unnecessary construction of a statute and a possible remand, the outcome of which would have been a foregone conclusion. While it would have been better for the district court to have bypassed the burden of proof issue in its ruling since it had no effect on the outcome, the supplemental finding was a permissible act in aid of this appeal.

Nichols, 56 F.3d at 411; *see also United States v. Jacobson*, 15 F.3d 19, 21-22 (2d Cir. 1994) (recognizing that district court retains the power to supplement the record while a case is on appeal, "without a formal remand"; entering order "requesting [the district court] to supplement the record within twenty-one days regarding his reasons for [the defendant's] sentence"); *accord United States v. Bennett*, 161 F.3d 171, 186 (3d Cir. 1998) (accepting sentencing memorandum entered by district court after appellate briefing was complete); *United States v. Pelullo*, 14 F.3d 881, 907 (3d Cir. 1994) (holding that district court had jurisdiction to issue opinion "three months after it entered final judgment, one month after [the defendant] filed his opening brief before this court, and eight days after the government filed its answering brief," because district court "made no new ruling, and its

memorandum merely stated the factual and legal bases for its previous decision").

The order entered by Judge Nevas in this case, stating that he would have imposed the same sentence under the 2003 or 2005 Guidelines Manuals, closely parallels the order approved by this Court in *Nichols*. In both instances, the district court issued an order that "clarified" an earlier ruling without modifying it in any way. *See United States v. Salameh*, 84 F.3d 47, 51, 52 n.2 (2d Cir. 1996) (noting that district court may not grant relief that alters the judgment while appeal is proceeding); *see also United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984) (court retains post-appeal jurisdiction to deny, not to grant, new trial motion); *United States v. Camacho*, 302 F.3d 35, 36-37 (2d Cir. 2002) (applying same rule to reconsideration of Rule 33 orders, "in the belief that it was 'calculated to be most economical of the effort of courts and parties.'") (quoting *Ryan v. United States Lines Co.*, 303 F.2d 430, 434 (2d Cir. 1962)).

Likewise, both orders were designed to "aid this court in avoiding unnecessary" legal issues – the allocation of proof burdens in *Nichols*, and the applicability of the *Ex Post Facto* Clause in the present case. *See United States v. Katsougrakis*, 715 F.2d 769, 776 n.7 (2d Cir. 1983) (noting that district court "is not . . . barred from . . . acting to aid the appeal" notwithstanding the filing of a "timely and effective notice of appeal"). As noted above, of course, Judge Nevas's order was filed before the judgment of conviction was entered, and thus at a time when he still had jurisdiction over the case. If it was proper for the

district court in *Nichols* to file a supplemental memorandum after yielding jurisdiction to this Court, *a fortiori* it was appropriate for Judge Nevas to file his clarification order while he retained jurisdiction. *See Pelullo*, 14 F.3d at 907 ("the preferred practice is for the district court to file any memorandum opinion *before or concurrent with its final judgment*") (emphasis added).

In conclusion, this Court need not determine whether the district court erred in stating that the 2005 Guidelines Manual applied, as any error in that regard did not affect the sentence imposed. Consequently, there is no need to remand this case so that the district court can repeat a finding it has already made. *See, e.g., Williams v. United States*, 503 U.S. 193, 203 (1992) (holding that even where a district court misapplies the Guidelines a remand is unnecessary if "the reviewing court concludes on the record as a whole that the error was harmless, *i.e.*, that the error did not affect the district court's selection of the sentence imposed").

Assuming *arguendo* that the Court disagrees with the foregoing and believes that it must reach the *ex post facto* issue notwithstanding Judge Nevas's supplemental finding, the Court must confront two separate constitutional issues. The first question is whether the *Ex Post Facto* Clause continues to apply to the U.S. Sentencing Guidelines in the wake of *Booker*. If so, then the second question is whether application of the "one book" rule set forth in U.S.S.G. § 1B1.11 to the present case violates the *Ex Post Facto* Clause.

2. The *Ex Post Facto* Clause Continues to Apply to Amendments to the U.S. Sentencing Guidelines

As a preliminary matter, the Government notes its agreement with the defendant that, in principle, retroactive application of an amended Guidelines Manual may implicate the *Ex Post Facto* Clause. This remains true even though the Guidelines are now advisory in light of *United States v. Booker*, 543 U.S. 220 (2005).

The *Ex Post Facto* Clause, U.S. Const., Art. I, § 9, Cl. 3, "bars application of a law 'that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.'" *Johnson v. United States*, 529 U.S. 694, 699 (2000) (quoting *Calder v. Bull*, 3 Dall. 386, 390 (1798)). Before the Supreme Court's decision in *Booker*, this Court had held that the *Ex Post Facto* Clause applies to amendments to the Sentencing Guidelines that provide for a more severe sentence than was authorized by the Guidelines in effect at the time the crime was committed. *See, e.g., United States v. Paccione*, 949 F.2d 1183, 1204 (2d Cir. 1991).

In concluding that the *Ex Post Facto* Clause applied to Guidelines amendments, this Court has consistently relied on *Miller v. Florida*, 482 U.S. 423 (1987), in which the Supreme Court held that changes in the method of scoring offenses under Florida's sentencing guidelines that increased the defendant's presumptive sentencing range violated the *ex post facto* restriction applicable to the states, U.S. Const., Art. I, § 10, Cl. 1. *See, e.g., Gonzalez*,

281 F.3d at 45 (applying *Miller*'s reasoning to amendments to federal Sentencing Guidelines). Application of the *Miller* test leads to the same conclusion here.

In *Miller*, the Court noted that an *ex post facto* law must both operate retrospectively and "disadvantage the offender," 482 U.S. at 430 (internal quotation marks omitted), and concluded that the revisions to Florida's guidelines passed both prongs of the test. The Court explained that increases in Florida's guidelines had the "purpose and effect" of increasing the length of the sentences, *id*. at 431, because departures from the presumptive sentencing range would require the judge to provide "clear and convincing reasons" based on "facts proved beyond a reasonable doubt," and the decision would be subject to appellate review. *Id*. at 432. In contrast, a sentence within the range did not require supporting reasons and was not reviewable on appeal. *Id*. at 432-33. Those features of the Florida system meant that a defendant was "substantially disadvantaged" by a severity-enhancing change in the Florida sentencing laws. *Id*.

The Supreme Court rejected the state's effort to analogize the Florida guidelines to the United States Parole Commission's guidelines, which had been found by the courts of appeals not to be subject to the *Ex Post Facto* Clause. *Id*. at 434; *see, e.g.*, *DiNapoli v. Northeast Regional Parole Comm'n*, 764 F.2d 143 (2d Cir. 1985); *cf. also Barna v. Travis*, 239 F.3d 169, 171-72 (2d Cir. 2001) (per curiam) (holding that New York state parole

commission guidelines are not "laws" covered by the *Ex Post Facto* Clause). The Court noted that the Parole Commission's guidelines may have provided only "flexible guideposts for use in the exercise of discretion," *id*. at 435 (internal quotation marks omitted), but that the Florida guidelines "create a high hurdle" before discretion can be exercised at all, *id*. The hurdle existed, the Court reiterated, because of the requirement that an outside-the-range sentence must be justified by credible reasons based on facts not weighed in the presumptive sentence. *Id*. The Court also cited legislative history indicating that the Parole Commission had "unfettered discretion" under its guidelines system, which a Florida sentencing court clearly did not. *Id*. (quoting S. Rep. No. 225, 98th Cong., 2d. Sess. 38 (1983)).

In *United States* v. *Booker*, 543 U.S. 220 (2005), the Supreme Court held that the Sixth Amendment right to a jury trial, as construed in *Blakely v. Washington*, 542 U.S. 296 (2004), is violated by increases in a federal criminal sentence based on judicial factfinding under a mandatory Sentencing Guidelines regime. 543 U.S. at 243-44. As a remedy for that constitutional flaw, the Court severed provisions of the Sentencing Reform Act that treated the Guidelines as mandatory, thereby producing a regime in which the Guidelines are advisory, but must be considered as one of the factors in sentencing under 18 U.S.C. § 3553(a). *Id*. at 245-46; *see* 18 U.S.C. § 3553(a)(4). The Court also severed a provision of the Act that provided standards of appellate review in a manner that reinforced the mandatory character of the Guidelines. *Id*. at 259 (excising 18 U.S.C. § 3742(e)). In its place, the Court

inferred a standard of appellate review of "unreasonableness." *Id*. at 261-62.

Since *Booker*, no court of appeals has directly ruled on the continued applicability of the *Ex Post Facto* Clause to changes in the advisory Guidelines that call for a harsher sentence. In *United States v. Roche*, 415 F.3d 614 (7th Cir.), *cert. denied*, 126 S. Ct. 671 (2005), the Seventh Circuit stated in dictum that "[i]t is doubtful that the ex post facto clause plays any role after *Booker*," because "by severing those provisions that made the Guidelines mandatory the Court in *Booker* demoted the Guidelines from rules to advice." *Id*. at 619. The Court concluded, however, that it "need not finally resolve this subject." *Id*.

While district courts do, of course, have increased discretion under *Booker* to impose sentences outside the advisory Guidelines, several factors make clear that the Guidelines are not mere "advice," but instead have strong legal relevance to federal sentences, such that a defendant is "substantially disadvantaged" by the application of an increased Guidelines range. Therefore, *Miller v. Florida* continues to preclude retrospective application of a Guidelines amendment that increases the severity of the Guidelines range beyond what it was when the crime was committed.[3]

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[3] The constitutional standard for determining whether the *Ex Post Facto* Clause is implicated is not the same as the test for determining whether the Sixth Amendment jury trial right is implicated under *Blakely* and *Booker*. The *Ex Post Facto* (continued...)

First, *Booker*'s own description of the advisory Guidelines system supports the conclusion that the Guidelines are intended to play a significant role in directing the discretion of district courts. The Court made clear that in every case the sentencing court must "consult" the Guidelines sentencing ranges and "take them into account when sentencing." 543 U.S. at 264. The Court also emphasized that review by the courts of appeals for unreasonableness would "tend to iron out sentencing differences," *id*. at 263, which is likely to occur only if reviewing courts treat the Guidelines as starting points in defining the range of reasonable sentences. And, the Supreme Court repeatedly emphasized that the Sentencing Commission would continue "writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly," 543 U.S. at 264, so as to "encourag[e] what it finds to be better sentencing practices" and "thereby promote uniformity in the sentencing process." *Id*. at 263. The Court could conclude that the Commission's continued modification and improvement of the Guidelines would "promote uniformity" only if it expected that changes in the Guidelines would translate into changes in actual

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[3] (...continued)
Clause applies if a defendant is substantially disadvantaged by an increase in the advisory Guidelines range. *Miller*, 482 U.S. at 432. The Sixth Amendment applies if judicially determined facts (other than a prior conviction) result in a sentence greater than that authorized by the jury verdict or the admissions of the defendant. *Booker*, 543 U.S. at 232-34.

sentences. *See United States v. Mykytiuk*, 415 F.3d 606, 607 (7th Cir. 2005).

Second, this Court and the other courts of appeals have made clear that under *Booker*'s advisory Guidelines system, it would be a mistake to regard them as "a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." *Crosby*, 397 F.3d at 113. "An error in determining the applicable Guideline range . . . would be the type of procedural error that could render a sentence unreasonable under *Booker*." *United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005); *Crosby*, 397 F.3d at 115; *cf. United States v. Rubenstein*, 403 F.3d 93, 98-99 (2d Cir. 2005) (declining to express opinion on whether an incorrectly calculated Guidelines sentence could nonetheless be reasonable). Although this Court has declined to adopt a formal presumption that a within-Guidelines sentence is reasonable, it has "recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006); *see also United States v. Rattobelli*, No. 05-1562-cr, mem. op. at 14 (2d Cir. June 15, 2006) ("In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.").[4]

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[4] Six other circuits have adopted a presumption that within-Guidelines sentences are reasonable. *See United States* (continued...)

These features of the advisory Guidelines system are inconsistent with the suggestion that the Guidelines are mere "advice," *Roche*, 415 F.3d at 619, or that district courts are left with the "unfettered discretion" that characterized the Parole Commission's consideration of its guidelines. *Miller*, 482 U.S. at 435; *see Crosby*, 397 F.3d at 113 ("[I]t would be a mistake to think that, after *Booker*[], district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum."). It follows that an amendment to the Guidelines that increases the severity of a sentencing range has distinct legal consequences: it must be considered by the sentencing court; it will make a longer sentence in the "overwhelming majority of cases" reasonable on appeal, *Fernandez*, 443 F.3d at 27; and it will increase the burden on the district court to explain the reasonableness of a lower sentence that falls outside the range.

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[4] (...continued)
v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006); *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006); *United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006); *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006); *United States v. Vasquez*, 433 F.3d 666, 670 (8th Cir. 2006); *United States v. Mykytiuk*, 415 F.3d 606, 607 (7th Cir. 2005). Two have not, *see United States v. Cooper*, 437 F.3d 324, 332 (3d Cir. 2006); *United States v. Jimenez-Beltre,* 440 F.3d 514, 518 (1st Cir. 2006) (en banc), but both of those courts have recognized the continued importance of the Guidelines in sentencing.

Third, the Supreme Court's application of the *Ex Post Facto* Clause indicates that the practical implementation of a regime by a body exercising discretion can inform whether a retroactive rule change creates a "significant risk" of increasing the punishment. *See Garner v. Jones*, 529 U.S. 244, 255 (2000) (considering, in evaluating whether change in the frequency of inmates' parole hearings would increase their punishment for ex post facto purposes, whether "evidence drawn from the rule's practical implementation by the agency charged with exercising discretion" shows a "significant risk" that retroactive application will produce a longer period of imprisonment than the earlier rule). Here, consistent with the *Booker* Court's expectation that the Commission would continue to observe the Guidelines in operation and to make modifications, the Commission continues to propose amendments to the Guidelines. Not infrequently, these amendments will increase the severity of punishment, sometimes at the direction of Congress to "consider providing for increased penalties" for particular offenses. *See, e.g.*, Proposed Amendments to the Sentencing Guidelines 1 (Jan. 25, 2006). Both Congress and the Commission plainly expect that those changes in policy will be taken seriously and will translate into longer sentences for particular defendants.[5]

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[5] This Court has correctly held that retroactive application of the advisory Guidelines system produced by *Booker* does not violate *ex post facto* principles, even though a defendant may be exposed to a longer sentence than he would have been under the mandatory Guidelines regime. *See United*

(continued...)

In short, the *Ex Post Facto* Clause continues to apply to amendments to the Sentencing Guidelines Manual. Nevertheless, for the reasons set forth below, application of the "one book" rule to select the 2005 Manual in the present case does not violate *ex post facto* principles.

3. Application of the 2005 Manual Pursuant to the "One Book" Rule Does Not Violate the *Ex Post Facto* Clause

Seven of the nine circuit courts to consider the issue have held that the application of a revised Sentencing Guidelines Manual in cases where part of the charged criminal conduct occurred before, and part occurred after, the revision does not violate the *Ex Post Facto* Clause. *See, e.g., United States v. Butler*, 429 F.3d 140, 153-54 (5th Cir. 2005) (citing *United States v. Kimler*, 167 F.3d 889, 895 (5th Cir. 1999)), *cert. denied*, 126 S. Ct. 2049 (2006); *United States v. York*, 428 F.3d 1325, 1337 (11th Cir. 2005); *United States v. Sullivan*, 255 F.3d 1256, 1258-

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[5] (...continued)
States v. Fairclough, 439 F.3d 76 (2d Cir. 2006); *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005). *Ex post facto* principles applicable to judicial decisionmaking differ from those that apply to legislation, and focus primarily on the principle of fair warning, especially in "'attaching criminal penalties to what previously had been innocent conduct.'" *Vaughn*, 430 F.3d at 524 (quoting *Rogers*, 532 U.S. at 459). As noted in the text, the distinct issue under the *Ex Post Facto* Clause is whether the use of more severe Guidelines creates a significant risk of harsher punishment.

63 (10th Cir. 2001); *United States v. Lewis*, 235 F.3d 215, 217-18 (4th Cir. 2000); *United States v. Vivit*, 214 F.3d 908, 919 (7th Cir. 2000); *United States v. Bailey*, 123 F.3d 1381, 1404-05 (11th Cir. 1997); *United States v. Cooper*, 63 F.3d 761, 762 (8th Cir. 1995) (rejecting *ex post facto* challenge and reinstating opinion in *United States v. Cooper*, 35 F.3d 1248 (8th Cir. 1995); *United States v. Regan*, 989 F.2d 44, 48-49 (1st Cir. 1993). *But see United States v. Ortland*, 109 F.3d 539, 545-46 (9th Cir. 1997) (holding U.S.S.G. § 1B1.11(b)(3) unconstitutional and applying different Sentencing Guidelines Manuals to different counts of conviction); *United States v. Bertoli*, 40 F.3d 1384, 1403 (3d Cir. 1994) (holding that district court's grouping of counts charging criminal conduct on different dates and treating grouped counts as one course of conduct violated Constitution); *United States v. Johnson*, 1999 WL 395381, at *10-11 (N.D.N.Y. June 4, 1999) (following *Ortland*), *aff'd, United States v. Johnson*, 221 F.3d 83 (2d Cir. 2000).

In *Regan*, for example, the First Circuit affirmed a 40-month sentence imposed on a bank employee who had been convicted of 55 counts of embezzlement. The sentencing guideline applicable to embezzlement was made more severe in an amendment effective November 1, 1989, after some of the charged embezzlements had been completed but before other embezzlements had begun. *See Regan,* 989 F.2d at 48. The district court applied the "one book" rule of U.S.S.G. § 1B1.11(b) and, based on the date of the latest charged act of embezzlement, employed the revised version of the Manual to calculate the defendant's guidelines range.

On appeal, the First Circuit rejected an *ex post facto* challenge to use of the revised Manual. The Court reasoned that even assuming no increased penalty would have been permitted for "convictions that occurred before the guideline increase," the fact remained that the defendant was also being sentenced for counts that occurred afterward. For purposes of calculating the guidelines on those later counts, the court was clearly permitted to take into consideration all "relevant conduct," including any prior acts of embezzlement. *Id.* at 48 (citing U.S.S.G. § 1B1.3(a)(2)). The court pointed out that a defendant is on notice "at the time he commits his later acts that the prior ones may or will be used in determining his sentence for the latter ones." *Id.* at 48. Accordingly, there could be no *ex post facto* violation where the Manual employed was keyed to the date of the latest-occurring charged act. *Id.* And while the court noted that "[i]t may be that some of the defendant's earlier 40 months sentences could not be supported, . . . they are to be served concurrently, and as defendant has not suggested prejudice we do not pursue the matter." *Id.* at 48-49.

The logic set forth in *Regan* applies with equal force here. Defendant Newton was charged with three counts, including the mail fraud count (Count Two) which took place through January 2005, and which arose from his unlawfully and fraudulently siphoning funds out of his campaign chest. At the time of that last charged act, the defendant was lawfully subject to every provision of the Guidelines Manual then in place, including the relevant-conduct provisions. Thus, at the time the defendant committed the last criminal act charged in his mail fraud

offense, he was on notice that his Guidelines for that act would be calculated not solely by reference to the mail fraud guideline, but also by reference to the bribery and tax guidelines – that is, for those other offenses stemming from abuse of his official position as a State Senator. Put differently, application of the 2005 Guidelines Manual in this case cannot be said to be "retrospective," when all of the provisions at issue were in force at the time he committed Count Two. As the Fourth Circuit has explained, "it was not § 1B1.11(b)(3) that disadvantaged [the defendant], but rather [his] decision to commit further [crimes] after the effective date of the [revised] guidelines." *Lewis*, 235 F.3d at 218.

Some of the courts upholding application of the "one book" rule have involved multiple counts that were grouped together under § 3D1.2, but the essential analysis remains the same for any set of interrelated offenses. For example, in *United States v. Kimler*, 167 F.3d 889 (5th Cir. 1999), the Fifth Circuit noted that adoption of the "one book" rule and the grouping rules put criminals on notice that "the version of the sentencing guidelines in effect at the time he committed the last of a series of grouped offenses will apply to the entire group." *Id.* at 895. The Eleventh Circuit has similarly observed that "the one book rule, together with the Guidelines grouping rules and relevant conduct" put a defendant on notice that "when he continues to commit related crimes, . . . he risks sentencing for all of his offenses under the latest, amended Sentencing Guidelines Manual." *Bailey*, 123 F.3d 1381, 1404-05 (11th Cir. 1997); *see also Vivit*, 214 F.3d at 919 (holding that there is no *ex post facto* violation when district court

applies revised Manual to ongoing offense conduct which involves the same type of harm and therefore may be grouped). At least two courts have had occasion to apply this rule in cases involving two separate groups of offenses. *See Butler*, 429 F.3d at 153; *York*, 428 F.3d at 1337-38 (approving district court's selection of Sentencing Guidelines edition governing 2000 financial crimes convictions as governing defendant's sentencing even through 1993 sex crime convictions, which drove Sentencing Guideline range, were committed in 1993 and thus governed by 1993 Sentencing Guidelines Manual); U.S.S.G. § 1B1.11, background cmt. ("Moreover, the approach set forth in subsection (b)(3) should be followed regardless of whether the offenses of conviction are the type in which the conduct is grouped under § 3D1.2(d). The *ex post facto* clause does not distinguish between groupable and nongroupable offenses . . . .").

In concluding that the "one book" rule may constitutionally apply where some of the offense conduct post-dates the revised Guidelines Manual, courts have generally been

> persuaded by the Commission's recognition of the anomaly that could result if we applied the pre-amendment guidelines to all of [a defendant's] counts of conviction: he "could be subject to a lower sentence if convicted of multiple offenses spanning a revision of the Sentencing Guidelines, than if convicted of the singular last offense after the revision of the Sentencing Guidelines."

Sullivan, 255 F.3d at 1263 (quoting *Cooper*, 35 F.3d at 1252). Such a sentencing windfall would make no sense. Because the Sentencing Guidelines put a defendant on notice, at the time he commits his latest offense, of the consequences that will attach to his latest act, there is no reason to interpret the *Ex Post Facto* Clause in a way that would confer such a strange benefit on a repeat offender.

Contrary to the defendant's suggestion, this Court should reject the opposite view adopted by a minority of courts, as set forth in *Ortland* and *Bertoli*. Neither case is persuasive.

In *Ortland*, upon which the defendant relies, the Ninth Circuit held that the application of § 1B1.11(b)(3) to a defendant convicted of multiple counts that straddled Guidelines amendments violated the *Ex Post Facto* Clause. *See Ortland*, 109 F.3d at 545-46. It thus directed courts to apply an earlier manual to certain counts, and a later manual to another count. *See id.* at 546-47. Yet the *Ortland* court's constitutional and textual analysis is flawed and – perhaps more critically here – Newton fails to appreciate that it is singularly unhelpful to him in practice.

First, as discussed above and as the majority of circuits have held, the defendant's subsequent commission of criminal acts triggers the heightened penalties contained in revised Guidelines Manuals. Viewed in light of the defendant's later conduct, application of the 2005 Manual (which, like every version of the Guidelines Manual, contains backward- and forward-looking "relevant

conduct" provisions) cannot be viewed as "retrospective" here.

Second, the *Ortland* Court's holding explicitly violates this Court's clear endorsement of the "one book" rule. This Court has explained that "applying various provisions taken from different versions of the Guidelines would upset the coherency and balance the Commission achieved in promolgating the Guidelines. Such an application would also contravene the express legislative objective of seeking uniformity in sentencing." *Stephenson*, 921 F.2d at 441. *Ortland* also directly conflicts with this Court's reasoning in *United States v. Broderson*, 67 F.3d 452, 455-56 (2d Cir. 1995), where this Court looked to the last date of the offenses alleged in a multiple-count indictment to determine the controlling date for *ex post facto* concerns, as the district court did here.

Third, defendant Newton does not seem to realize that application of the *Ortland* remedy would be only a Pyrrhic victory for him. In *Ortland*, the Court of Appeals did not direct the sentencing court (as Newton seems to think) to mix and match two Guidelines Manuals – for example, by pulling a base offense level for certain counts from one book, and base offense levels for others from a different book. Instead, the district court was directed to apply one book to four counts, and another book to the fifth count. In essence, the court had to conduct two parallel sentencings. As to the fifth (and later) count, the Ninth Circuit freely acknowledged that "[t]he harm caused by the earlier offenses *can* be counted in sentencing the later one." 109 F.3d at 547 (emphasis in original). The court's

concern was simply that, if the fifth count were to someday fall, the concurrent sentences on the other four (earlier) counts should already be shorter. *Id.* Thus, even if the defendant were to convince this Court to adopt *Ortland*'s holding, the best he could hope for would be a remand *only on Counts One and Three*, since even in the Ninth Circuit it would have been entirely proper to apply the 2005 Guidelines (including all relevant conduct, such as the bribery and tax scheme) in calculating the advisory range for Count Two. (And even then, as noted in Point I.C.1 above, such a remand would simply ask Judge Nevas the question he has already answered: Would he still impose a 60-month sentence if the 2003 Manual governed?)

Bertoli is no more persuasive. In that case, the Third Circuit reached a similar result as *Ortland* in a case involving multiple counts spanning Guidelines amendments. It held that the district court erred by grouping counts together without independently analyzing each count of conviction to determine whether a different manual should be applied to a count of conviction even if that offense of conviction is grouped for Guidelines purposes. With due respect, *Bertoli* did not offer any substantive analysis explaining why there was an *ex post facto* violation, and limited itself to the simple observation that "[t]he fact that various counts of an indictment are grouped cannot override *ex post facto* concerns." 40 F.3d 1404.

Although this Court discussed these various approaches at some length in *United States v. Santopietro*, 166 F.3d

88, 95-97 (2d Cir. 1999), it pointedly declined to express any views on what might be the proper approach. Thus, the Court observed that, where a defendant is convicted of multiple counts that straddle a severity-enhancing Guidelines amendment, a sentencing court could theoretically take any of three approaches: (1) calculating the aggregate sentence for all counts under both versions of the Guidelines and appyling the version yielding the lower range (citing *United States v. Keller*, 58 F.3d 884, 890 (2d Cir. 1995); (2) doing the same, but choosing the more severe version (citing *Broderson*); or (3) apply the early version to the early counts, and later version to the later counts (citing *Ortland*). *Santopietro,* 166 F.3d at 96. As the Court recognized, the few cases from this circuit – even when they appeared to express approval of one approach or another – could be regarded as limited to the particular situation (say, a one-count case, or a series of similar counts) at issue there. In short, *Santopietro* simply flagged the issue and remained studiously agnostic as to the correct approach.[6] It is only on this final principle – the avoidance of unnecessary adjudication of complex constitutional issues – that *Santopietro* represents both binding and persuasive precedent. Because, as explained

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[6] The defendant's reliance on the district court opinion in *United States v. Johnson* is misplaced. First, the *Johnson* court failed to address the "one book" rule and simply engaged in the sort of mixing-and-matching of guideline provisions that this Court rejected in *Stephenson*. Although a panel of this Court affirmed the defendant's sentence in *Johnson*, it did not expressly address the district court's § 1B1.11(b)(3) ruling other than to recount it. *See United States v. Johnson*, 221 F.3d 83, 92 (2d Cir. 2000).

above in Point I.C.1, Judge Nevas would have imposed the same sentence regardless of whether the 2003 or 2005 Guidelines applied, there is no need for this Court to resolve the defendant's *Ex Post Facto* claim.

If the Court does reach the question, it should hold that Judge Nevas properly applied the Guidelines Manual that was in effect at the time of the last criminal act charged in the indictment. "Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Weaver v. Graham*, 450 U.S. 24, 30 (1981). The use of the 2005 Guidelines Manual here did not contravene those purposes. In January 2005, the last date the defendant engaged in conduct designed to defraud his 2004 campaign committee, he possessed fair warning that a revised Sentencing Guideline Manual applied to his criminal activities and that the manual's multiple count rules could increase the punishment he received for prior criminal conduct such as the bribery offense. To paraphrase the *Cooper* court, the 2004 amendments to the Sentencing Guidelines did not disadvantage the defendant, his decision to continue to commit criminal activity after the effective date of those amendments did. *See Cooper*, 35 F.3d at 1250.

II. THE DISTRICT COURT PROPERLY APPLIED U.S.S.G. § 3C1.1 IN CALCULATING THE DEFENDANT'S ADVISORY SENTENCING GUIDELINE RANGE

A. Relevant Facts

During the court-authorized interception of communications occurring over the defendant's cellular telephone, the FBI intercepted the defendant and Godbolt discussing the payment of a $5,000 bribe to the defendant in exchange for the defendant's assistance in securing $100,000 in State of Connecticut Bond Commission funds for Progressive Training. (GA 7-21.)

On January 26, 2005, the FBI interviewed Godbolt at his residence and then executed a search warrant there. (GA 21.) During the interview, Godbolt told the FBI about his payments to Newton, including a payment of $1,800 in May 2001 which, Godbolt reported, he made to engender goodwill with Newton. (GA 21.)Godbolt also agreed to record conversations with Newton under FBI supervision. (GA 21-33.) Godbolt spoke to Newton three times. During those conversations, Newton attempted to convince Godbolt to mislead the FBI about the nature of the payments. As discussed below, the defendant does not dispute the content of these calls, or the district court's finding that he was trying to induce Godbolt to provide a false story to authorities. Details of these conversations can be found in the Government's Appendix, at GA 8-15, 17-32, and 35-37.

Several months later, Newton executed on April 29, 2005 and subsequently filed with the State of Connecticut Ethics Commission a handwritten statement reflecting that he received $5,000 in wages in 2004 from "Progressive Training/Upholstery/Carpentry Div." (GA 91.)

1. The Sentencing Hearing

At sentencing, the defendant objected to the PSR's inclusion of a two-level increase in his adjusted offense level pursuant to U.S.S.G. § 3C1.1. (AA 218.) He argued that Godbolt was acting under the supervision of the FBI at the time the defendant attempted to persuade Godbolt to lie and that his conduct was tantamount to making a false or misleading statement to a law enforcement officer. (AA 218.) Consequently, according to the defendant, the Government was required to prove that his obstructive conduct significantly obstructed or impeded the investigation pursuant to Application Note 4(g) of § 3C1.1. (AA 218, 221.) The defendant further argued that, because the FBI previously recorded the bribe-related conversations during the Title III intercept and Godbolt was acting under FBI supervision on January 26, 2005, his efforts to obstruct justice had no chance of success and thus could not be deemed to have "significantly obstructed or impeded" the investigation. (AA 221.)

The defendant did not challenge the transcriptions of the telephone conversations, the district court's interpretation of the defendant's comments as indicating that the defendant was attempting to persuade Gobolt to lie to or mislead the federal agents about the $5,000 bribe, whether the defendant lacked the required specific intent to obstruct

justice during the conversations, or whether his obstructive conduct was related to the bribery offense.

The Government argued that the defendant's conduct fell within the type of conduct illustrated in Application Notes 4(a) and 4(i). (AA 218-22.) Discussing Application Note 4(a), the Government noted that attempts to influence a potential co-defendant or witness qualify as obstructive conduct regardless of the likelihood of success. (AA 219.) Referring to its sentencing memorandum, the Government also pointed out that the defendant's conduct fell within the example outlined in Note 4(i), which refers to conduct prohibited by the obstruction of justice provisions found in Title 18. (AA 221.) Finally, the Government informed the district court that it was required to make a specific finding that the defendant acted with the intent to obstruct justice and argued that the defendant's comments during the recorded conversations reflected a specific intent to persuade Godbolt to lie to the FBI. (AA 221-22.)

2. The District Court's Ruling

After considering counsels' arguments, the district court overruled the defendant's objection. It indicated that it had read the transcripts of the conversations and, referring to the defendant, stated:

> [C]learly, he was asking Mr. Godbolt to lie to the FBI agents, and then he attempted to extricate himself by telling Mr. Godbolt to give him a W-2 suggesting that he's an employee of Mr. Godbolt, which he wasn't, and then he has the gall to then

> send paperwork to the State Ethics Commission, saying that he was a consultant and that he received $5,000 in consulting fees, when it was clearly a bribe. If that isn't an obstruction of justice, I don't know what is.

(AA 220-21.)

It further noted that note 4(a) of section 3C1.1 provides:

> [A] non-exhaustive list of examples of conduct to which the obstruction of justice enhancement applies, including unlawfully threatening, intimidating or otherwise unlawfully influencing a codefendant, witness, or juror, directly or indirectly, or attempting to do so – comment note 4(c). . . . As I indicated previously, there was clearly an effort on the behalf of Mr. Newton to persuade Mr. Godbolt to lie to the FBI agents, and to tell them that Newton was his employee, and that he give him a W-2, and then he went on to file paperwork with the State Ethics Commission showing that he was a consultant, and that he received this $5,000 payment as a consultant fee, when clearly it was a bribe. So, the Court finds that that enhancement is appropriate.

(AA 222-23.)

B. Governing Law and Standard of Review

Section 3C1.1 applies where a defendant

> (A) willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution or sentencing of the instant offense of conviction and (B) the obstructive conduct related to (I) the defendant's offense of conviction and any relevant conduct. . . .

U.S.S.G. § 3C1.1.

Section 3C1.1 requires that a district court find that the defendant acted with the "specific intent to obstruct justice; *i.e.*, . . . the defendant consciously acted with the purpose of obstructing justice." *United States v. Woodward*, 239 F.3d 159, 162-63 (2d Cir. 2001) (internal quotation marks and citations omitted).

The Court "reviews the district court's legal interpretation of section 3C1.1 *de novo* and the district court's factual findings for clear error." *See United States v. Peterson*, 385 F.3d 127, 140 (2d Cir. 2004) (affirming district court's obstruction enhancement based on defendant's mailing letters to potential co-defendants and witnesses seeking to influence testimony) (internal citations omitted). The standard of review remains unchanged in the wake of *Booker*. "In reviewing a challenge to a district court's application of § 3C1.1, we examine its findings of fact only for clear error, and whether those facts constitute obstruction of justice is a question of law that we review *de*

novo." *United States v. Canova*, 412 F.3d 331, 356 (2d Cir. 2005). Because the defendant has not put "the relevant facts . . . in dispute" on appeal, this Court should accordingly review *de novo* "only whether they constitute obstruction mandating a two-point offense level increase." *United States v. Ayers*, 416 F.3d 131, 133 (2d Cir. 2005) (per curiam).

Section 3C1.1 applies to attempts to obstruct justice during the course of an investigation. *See United States v. Feliz*, 286 F.3d 118, 120 (2d Cir. 2002) (affirming enhancement). It applies not only to making false statements to law enforcement officers that significantly obstruct or impede an investigation or prosecution, *see* U.S.S.G. § 3C1.1 cmt. appl. n. 4(g), as the defendant correctly notes, but also to "unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so." *Id.* appl. n. 4(a). To that end, Note 4(a) encompasses "conduct aimed at influencing a *potential* co-defendant, witness, or juror . . . ." *Feliz*, 286 at 120 (emphasis in original); *see also United States v. Sanchez*, 35 F.3d 673, 679-80 (2d Cir. 1994) (affirming enhancement); *see also Peterson*, 385 F.3d at 139-44 (affirming enhancement based on letters informing potential co-defendant or witness about accounts that other witnesses gave to law enforcement, and advising witness to exercise her right to remain silent and to refrain from speaking to others). Note 4(a) also encompasses obstructive conduct having little or no effect on a criminal investigation and occurring before formal criminal proceedings have been initiated. *See Felix*, 286 F.3d at 121 (affirming enhancement where defendant asked friends to

provide false alibi before his arrest and then, after arrest, asked police to contact friends in attempt to support his false alibi); *United States v. White*, 240 F.3d 127, 138 (2d Cir. 2001) (affirming enhancement where defendant asked girlfriend in Spanish during arrest to lie about ownership of drugs, not knowing police officer standing nearby understood Spanish); *United States v. Lanzotti*, 205 F.3d 951, 957 (7th Cir. 2000) (affirming enhancement where defendant created false documents to conceal true nature of gambling operations and encouraged various witnesses to lie about payment arrangements and noting that "improperly attempting to influence a witness (including by counseling a potential witness to make false statements to investigating authorities) indeed qualifies as obstruction of justice under U.S.S.G. § 3C1.1") (citation omitted).

C. Discussion

The defendant does not dispute that he willfully attempted to obstruct or impede the administration of justice during the investigation of his receipt of a $5,000 bribe from Godbolt. Nor does he dispute that his conduct related to his offense of conviction. Rather, he claims that the district court was required to look only to Application Note 4(g) to determine whether he provided "a materially false statement to a law enforcement officer that *significantly obstructed or impeded* the official investigation or prosecution" of the bribe offense. Def. Br. at 27 (emphasis added). He offers no authority for that proposition – which is understandable, given that Application Note 4 lists a number of *other* acts that would justify an obstruction enhancement, and that the note cautions that it is only a *"non-exhaustive* list of examples

of the types of conduct to which the adjustment applies." U.S.S.G. § 3C1.1, app. note 4 (emphasis added). In fact, Application Note 3 resolves any doubt: "Application Note 4 sets forth *examples* of the types of conduct to which this adjustment is intended to apply." U.S.S.G. § 3C1.1 app. note 3 (emphasis added).

The commentary to § 3C1.1 makes it clear that witness tampering, on its own, justifies an obstruction enhancement. Application Note 4 includes at least two examples which subsume witness tampering. Application Note 4(a), for example, explains that an enhancement is appropriate for "threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so." Application Note 4(*i*) similarly provides that an enhancement under § 3C1.1 is appropriate for "other conduct prohibited by the obstruction of justice provisions under Title 18, United States Code (*e.g.*, 18 U.S.C. §§ 1510, 1511)." One of the most familiar obstruction provisions can be found in 18 U.S.C. § 1512(b), which prohibits a person from "corruptly persuading another person, or attempting to do so, or engaging in misleading conduct toward another person with the intent to . . . influence, delay, or prevent testimony of any person in an official proceeding . . . cause or induce any person to . . . withhold testimony . . . [or] hinder, delay, or prevent communication to a law enforcement officer of information relating to the commission or possible commission of Federal offenses."[7]

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[7] The defendant relies on two decisions of this Court, (continued...)

Based on the uncontroverted facts presented in the PSR and expressly found by Judge Nevas, the defendant attempted to unlawfully influence a witness in connection with the investigation of his bribery scheme. The defendant was aware that Godbolt, with whom he engaged in criminal conduct, was at least a potential witness against him as of January 26, 2005, and he attempted to persuade that potential witness to lie to the FBI and to provide him with false documents (a Form W-2) to support that lie. After reviewing the transcripts of these recordings, the district

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[7] (...continued)
Def. Br. at 30, but neither case advances his position. In *United States v. Williams*, 79 F.3d 334, 337 (2d Cir. 1996), the Court found that false statements made by the defendant directly to law enforcement officers did not merit an obstruction enhancement, and its decision turned on the "significantly impedes" language now found in Application Note 4(g) was applicable. As explained above, however, Godbolt was not a "law enforcement officer," and so the defendant's conduct here is governed by Application Notes 4(a) and (*i*). Likewise, this Court's decision in *United States v. Mafanya*, 24 F.3d 412, 415 (2d Cir. 1994), did not involve witness tampering and Application Notes 4(a) and (*i*). Instead, it involved a defendant's false statement concerning his identity to law enforcement officers and a federal magistrate judge. The Court affirmed the enhancement under what is now designated Application Note 4(f), which applies to making materially false statements to judicial officers. The defendant's statements to the police were ultimately immaterial to the holding in *Mafanya*. 24 F.3d at 415.

court found that the defendant "clearly" acted with the purpose of obstructing justice by attempting to persuade Godbolt to lie to or mislead the FBI during its investigation about the nature and circumstances of the $5,000 bribe payment. (AA 222-23.) Further, although not expressly articulated by the district court, it impliedly found that defendant's conduct related to the bribery scheme charged in Count One. Those facts, which the defendant does not contest, are sufficient to support the application of the enhancement under both Application Notes 4(a) and 4(*i*). *See also United States v. Phillips*, 367 F.3d 846, 859 (9th Cir.) ("[T]he significant obstruction and materiality requirements of application note 4, subsection (g), do not apply to a defendant's *attempt to influence* a witness."), *cert. denied*, 543 U.S. 980 (2004).

Another flaw in the defendant's exclusive reliance on Application Note 4(g) is that a false statement made to an individual who is acting under law enforcement supervision cannot be equated with a false statement to a "law enforcement officer." Again, the defendant cites no authority for this proposition. It contravenes the common-sense reading of the term "law enforcement officer." *See, e.g.*, 1 U.S.C. § 4 (defining term as "any person authorized by law to perform the duties of the officer"); 18 U.S.C. § 2510(7) ("any officer of the United State or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter"); Black's Law Dictionary 885 (6th ed. 1990) ("a person whose duty is to enforce the laws and preserve the peace"). This reading is particularly sensible here, where the defendant does not claim that he

was aware of Godbolt's cooperation at the time of the false statements. It would make no sense to view Newton as any less culpable because of the fortuity that Godbolt was secretly cooperating with the FBI, any more than it would make sense for a defendant to be excused for attempting to engage in witness tampering as long as the witness ultimately resisted his unlawful entreaties.

Finally, although the defendant complains that his efforts to obstruct could not have succeeded – given the existing evidence against him and, at least as of January 26, 2005, Godbolt's apparent decision to cooperate with the Government – the success of his endeavor is irrelevant. Section 3C1.1 expressly encompasses *attempts* to unlawfully influence a potential co-defendant or witness. *See* U.S.S.G. § 3C1.1 ("If the defendant . . . attempted to obstruct or impede . . . ."); *id.* app. note 4(a) ("unlawfully influencing a co-defendant [or] witness . . . or attempting to do so"); *Felix*, 286 F.3d at 121. Indeed, it is well established that factual impossibility is no defense to a charge of obstructing justice. *Osborn v. United States*, 385 U.S. 323, 332-33 (1966) (discussing 18 U.S.C. § 1503). As the Supreme Court has explained, one need not succeed in obstructing justice to be convicted: "an 'endeavor' suffices." *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (discussing 18 U.S.C. § 1503); *see also, e.g., United States v. Balzano*, 916 F.3d 1273, 1291 (7th Cir. 1990) (same, with respect to § 1512(b) witness tampering); *United States v. Wilson*, 796 F.3d 55, 57 (4th Cir. 1986) (same). And because Application Note 4(*i*) makes it clear that a violation of § 1512 suffices to justify an obstruction enhancement under § 3C1.1, the success of the endeavor is

likewise immaterial for purposes of imposing that enhancement.

In sum, the district court correctly found that the defendant attempted to unlawfully influence a potential co-defendant or witness and thus properly applied the obstruction of justice enhancement.

CONCLUSION

For each of the foregoing reasons, the Court should affirm the defendant's sentence in all respects.

Dated: June 19, 2006

Respectfully submitted,

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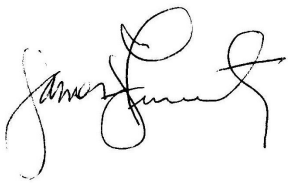

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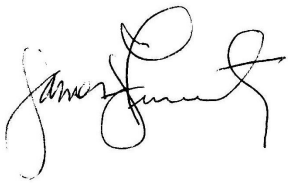
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,975 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



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Addendum

U.S.S.G. §1B1.11
Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

(a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.

(b)(1) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

(2) The Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual. However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes.

(3) If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses.

COMMENTARY
Application Notes

1. Subsection (b)(2) provides that if an earlier edition of the Guidelines Manual is used, it is to be used in its entirety, except that subsequent clarifying amendments are to be considered.

Example: A defendant is convicted of an antitrust offense committed in November 1989. He is to be sentenced in December 1992. Effective November 1, 1991, the Commission raised the base offense level for antitrust offenses. Effective November 1, 1992, the Commission lowered the guideline range in the Sentencing Table for cases with an offense level of 8 and criminal history category of I from 2-8 months to 0-6 months. Under the 1992 edition of the Guidelines Manual (effective November 1, 1992), the defendant has a guideline range of 4-10 months (final offense level of 9, criminal history category of I). Under the 1989 edition of the Guidelines Manual (effective November 1, 1989), the defendant has a guideline range of 2-8 months (final offense level of 8, criminal history category of I). If the court determines that application of the 1992 edition of the Guidelines Manual would violate the ex post facto clause of the United States Constitution, it shall apply the 1989 edition of the Guidelines Manual in its entirety. It shall not apply, for example, the offense level of 8 and criminal history category of I from the 1989 edition of the Guidelines Manual in conjunction with the amended guideline range of 0-6 months for this offense level and criminal history category from the 1992 edition of the Guidelines Manual.

2. Under subsection (b)(1), the last date of the offense of conviction is the controlling date for ex post facto purposes. For example, if the offense of conviction (i.e., the conduct charged in the count of the indictment or information of which the defendant was convicted) was determined by the court to have been committed between October 15, 1991 and October 28, 1991, the date of October 28, 1991 is the controlling date for ex post facto purposes. This is true even if the defendant's conduct relevant to the determination of the guideline range under § 1B1.3 (Relevant Conduct) included an act that occurred on November 2, 1991 (after a revised Guideline Manual took effect).

Background: Subsections (a) and (b)(1) provide that the court should apply the Guidelines Manual in effect on the date the defendant is sentenced unless the court determines that doing so would violate the ex post facto clause in Article I, § 9 of the United States Constitution. Under 18 U.S.C. § 3553, the court is to apply the guidelines and policy statements in effect at the time of sentencing. Although aware of possible ex post facto clause challenges to application of the guidelines in effect at the time of sentencing, Congress did not believe that the ex post facto clause would apply to amended sentencing guidelines. S.Rep. No. 225, 98th Cong., 1st Sess. 77-78 (1983). While the Commission concurs in the policy expressed by Congress, courts to date generally have held that the ex post facto clause does apply to sentencing guideline amendments that subject the defendant to increased punishment.

Subsection (b)(2) provides that the Guidelines Manual in effect on a particular date shall be applied in its entirety.

Subsection (b)(3) provides that where the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses, even if the revised edition results in an increased penalty for the first offense. Because the defendant completed the second offense after the amendment to the guidelines took effect, the ex post facto clause does not prevent determining the sentence for that count based on the amended guidelines. For example, if a defendant pleads guilty to a single count of embezzlement that occurred after the most recent edition of the Guidelines Manual became effective, the guideline range applicable in sentencing will encompass any relevant conduct e.g., related embezzlement offenses that may have occurred prior to the effective date of the guideline amendments) for the offense of conviction. The same would be true for a defendant convicted of two counts of embezzlement, one committed before the amendments were enacted, and the second after. In this example, the ex post facto clause would not bar application of the amended guideline to the first conviction; a contrary conclusion would mean that such defendant was subject to a lower guideline range than if convicted only of the second offense. Decisions from several appellate courts addressing the analogous situation of the constitutionality of counting pre-guidelines criminal activity as relevant conduct for a guidelines sentence support this approach. *See United States v. Ykema*, 887 F.2d 697 (6th Cir.1989) (upholding

inclusion of pre-November 1, 1987, drug quantities as relevant conduct for the count of conviction, noting that habitual offender statutes routinely augment punishment for an offense of conviction based on acts committed before a law is passed), *cert. denied*, 493 U.S. 1062 (1990); *United States v. Allen*, 886 F.2d 143 (8th Cir.1989) (similar); *see also United States v. Cusack*, 901 F.2d 29 (4th Cir.1990) (similar).Moreover, the approach set forth in subsection (b)(3) should be followed regardless of whether the offenses of conviction are the type in which the conduct is grouped under §3D1.2(d). The ex post facto clause does not distinguish between groupable and nongroupable offenses, and unless that clause would be violated, Congress' directive to apply the sentencing guidelines in effect at the time of sentencing must be followed. Under the guideline sentencing system, a single sentencing range is determined based on the defendant's overall conduct, even if there are multiple counts of conviction (see §§ 3D1.1-3D1.5, 5G1.2). Thus, if a defendant is sentenced in January 1992 for a bank robbery committed in October 1988 and one committed in November 1991, the November 1991 Guidelines Manual should be used to determine a combined guideline range for both counts. See generally *United States v. Stephenson*, 921 F.2d 438 (2d Cir.1990) (holding that the Sentencing Commission and Congress intended that the applicable version of the guidelines be applied as a "cohesive and integrated whole" rather than in a piecemeal fashion).

Consequently, even in a complex case involving multiple counts that occurred under several different versions of the Guidelines Manual, it will not be necessary to compare more than two manuals to determine the applicable

guideline range--the manual in effect at the time the last offense of conviction was completed and the manual in effect at the time of sentencing.

U.S.S.G. § 3C1.1.
Obstructing or Impeding the Administration of Justice

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

COMMENTARY

Application Notes:

1. This adjustment applies if the defendant's obstructive conduct (A) occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) an otherwise closely related case, such as that of a co-defendant.

2. This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty

memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.

3. Obstructive conduct can vary widely in nature, degree of planning, and seriousness. Application Note 4 sets forth examples of the types of conduct to which this enhancement is intended to apply. Application Note 5 sets forth examples of less serious forms of conduct to which this enhancement is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the conduct to which this enhancement applies is not subject to precise definition, comparison of the examples set forth in Application Notes 4 and 5 should assist the court in determining whether application of this enhancement is warranted in a particular case.

4. The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:

(a) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;

(b) committing, suborning, or attempting to suborn perjury;

(c) producing or attempting to produce a false, altered, or counterfeit document or record during

an official investigation or judicial proceeding;

(d) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it results in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;

(e) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;

(f) providing materially false information to a judge or magistrate;

(g) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;

(h) providing materially false information to a probation officer in respect to a presentence or other investigation for the court;

(i) other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§ 1510, 1511);

(j) failing to comply with a restraining order or injunction issued pursuant to 21 U.S.C. 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. 853(p).

This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.

5. Some types of conduct ordinarily do not warrant application of this adjustment, but may warrant a greater sentence within the otherwise applicable guideline range or affect the determination of whether other guideline adjustments apply (e.g., § 3E1.1 (Acceptance of Responsibility)). However, if the defendant is convicted of a separate count for such conduct, this adjustment will apply and increase the offense level for the underlying offense (i.e., the offense with respect to which the obstructive conduct occurred). See Application Note 8, below.

The following is a non-exhaustive list of examples of the types of conduct to which this application note applies:

(a) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;

(b) making false statements, not under oath, to law enforcement officers, unless Application Note 4(g) above applies;

(c) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;

(d) avoiding or fleeing from arrest (see, however, § 3C1.2) (Reckless Endangerment During Flight);

(e) lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under § 3E1.1 (Acceptance of Responsibility).

6. "Material" evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination.

7. If the defendant is convicted for an offense covered by § 2J1.1 (contempt), § 2J1.2 (Obstruction of Justice), § 2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), § 2J1.5 (Failure to Appear by Material Witness), § 2J1.6 (Failure to Appear by Defendant), § 2J1.9 (Payment to Witness), § 2X3.1 (Accessory After the Fact), or § 2X4.1 (Misprision of Felony), this adjustment is not to be applied to the offense level for that offense except if a significant further obstruction occurred during the investigation prosecution, or sentencing of the obstruction offense itself (e.g., if the defendant threatened a witness during the course of the prosecution for the obstruction offense).

8. If the defendant is convicted both of an obstruction offense (e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1621 (Perjury generally)) and an underlying offense (the offense with respect to which the obstructive conduct occurred), the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of § 3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.

9. Under this section, the defendant is accountable for his own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Newton

Docket Number: 06-0714-cr

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 6/19/2006) and found to be VIRUS FREE.

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Dated: June 19, 2006