03-1448-cr

To Be Argued By:
SANDRA S. GLOVER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-1448-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

JOSEPH P. GANIM,
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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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

STATEMENT OF JURISDICTION

The district court (Janet B. Arterton, J.) had subject matter jurisdiction over this federal criminal case under 18 U.S.C. § 3231. The district court entered judgment on July 3, 2003, and amended judgments on July 7 and July 14, 2003. Special Appendix ("SA") 1-4. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), Appendix for Appellant ("A") 628, and this Court has appellate jurisdiction over the defendant's challenge to his conviction and sentence under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

On April 26, 2005, this Court remanded this case to the district court for proceedings under *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). On May 5, 2006, the district court issued its decision denying the defendant's request for resentencing. The defendant notified this Court of the district court's decision, thus restoring jurisdiction in this Court.

ISSUES PRESENTED FOR REVIEW

I. Where the indictment alleged and the district court instructed the jury that they were required to find that the defendant corruptly accepted benefits in return for official acts, did the court properly refuse to instruct the jury that it had to find a direct link between each benefit given to the defendant and a specific official act for which it was performed?

II. Did isolated remarks during the prosecution's summation, none of which were objected to by opposing counsel, constitute a flagrant abuse of the defendant's right to receive a fair trial?

III. Did the district court commit plain error by failing, *sua sponte*, to recess jury deliberations after a juror lost her job, where the juror confirmed that she was willing and able to continue deliberating?

IV. Should this Court reconsider its decision in *United States v. Crosby*?

V. Is the defendant's guidelines sentence reasonable when the district court properly considered all evidence and arguments presented by the defendant?

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Between 1995 and 2000, the defendant, Joseph P. Ganim, the five-term Mayor of Bridgeport, Connecticut, corruptly exploited the powers of his office by engaging in a systematic contracts-for-kickbacks scheme. The defendant accepted hundreds of thousands of dollars in cash and personal benefits in return for steering lucrative city contracts to his closest friends and political supporters. The defendant also fraudulently circumvented municipal purchasing procedures to secretly buy a one-

million-dollar variable life insurance policy for himself at the taxpayers' expense. Following a three-month trial, during which the defendant testified on his own behalf, he was convicted of sixteen counts of racketeering, bribery, extortion, and tax fraud. Describing the defendant's betrayal of the public's trust as a "terrible crime" and "the stuff that cynicism is made of," United States District Judge Janet B. Arterton sentenced him to nine years of imprisonment, and imposed a fine of $150,000, the maximum penalties available to the court within the defendant's applicable guidelines range. On remand pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), Judge Arterton denied the defendant's request for resentencing.

The defendant now challenges his conviction on the grounds that the district court erred in instructing the jury on the *quid pro quo* element of the extortion and bribery charges, that the prosecutor's closing argument denied him a fair trial, and that the district court erred in failing to temporarily recess jury deliberations after being informed by a juror that she had lost her job. The defendant also challenges his sentence, claiming that the *Crosby* remand procedure was illegal, and that his sentence was unreasonable. For the reasons that follow, this Court should affirm the conviction and sentence in all respects.

Statement of the Case

Between 1997 and 2001, the Federal Bureau of Investigation and the Internal Revenue Service conducted an investigation, dubbed "Operation Hardball," of municipal corruption in the City of Bridgeport, Connecticut. On October 31, 2001, a federal grand jury in Connecticut returned a twenty-four count indictment charging the defendant, Bridgeport Mayor Joseph P. Ganim, with racketeering in violation of 18 U.S.C. § 1962(c), racketeering conspiracy in violation of 18 U.S.C. § 1962(d), extortion in violation of 18 U.S.C. § 1951, mail fraud in violation of 18 U.S.C. § 1341, bribery involving programs receiving federal funds in violation of 18 U.S.C. § 666(a)(1)(B), conspiracy in violation of 18 U.S.C. § 371, filing false federal income tax returns in violation of 26 U.S.C. § 7206(1) and criminal forfeiture in violation of 18 U.S.C. § 1963. The case was assigned to United States District Judge Janet B. Arterton. The grand jury returned a superseding indictment on March 27, 2002, containing the same charges against the defendant. A27-84.

The defendant moved to dismiss certain counts of the indictment on the grounds, *inter alia*, that he lacked notice that his receipt of cash, merchandise and other personal benefits violated federal law. The defendant also claimed, in a request for a bill of particulars, that the indictment failed to allege with sufficient particularity the nexus between his receipt of those benefits and the exercise of his official duties as mayor.

On September 12, 2002, the district court denied the defendant's motion to dismiss the indictment, concluding that "[w]ithout doubt, an elected official is on notice that demanding, seeking, receiving or agreeing to receive something of value either with the specific intent to be influenced in the performance of an official act . . . is unlawful and is criminalized by numerous statutes." *United States v. Ganim*, 225 F.Supp.2d 145, 154 (D. Conn. 2002). A104. The district court also found that the defendant was entitled to receive a "limited" bill of particulars. A105. The government filed a bill of particulars on September 27, 2002, A112-16, and a supplemental bill of particulars on December 4, 2002, A123-29.

A jury was selected on January 6, 2003. Trial commenced on January 8, 2003, and lasted ten weeks. Following the conclusion of evidence in the case, the defendant moved for a judgment of acquittal as to Counts 18 and 21 of the superseding indictment. The government did not object to the dismissal of those counts. The jury deliberated for eight days, and on March 19, 2003, found the defendant guilty of sixteen counts of the superseding indictment, including racketeering, racketeering conspiracy, extortion, mail fraud, bribery, conspiracy, and filing false income tax returns. The district court declared a mistrial on the five counts for which the jury was unable to return a unanimous verdict.

On July 1, 2003, the district court sentenced the defendant to nine years in prison, to be followed by a three-year term of supervised release. The court also imposed a fine of $150,000 and ordered that the defendant

pay restitution in the amount of $148,617. SA1-4. In addition, the court ordered that the defendant forfeit $175,000 in proceeds derived from the racketeering enterprise. SA5-6.

The district court entered a final amended judgment on July 14, 2003, SA1-4, and the defendant filed a timely notice of appeal on July 17, 2003, A628.

During briefing of the defendant's appeal, the Supreme Court decided *United States v. Booker*, 543 U.S. 220 (2005), and this Court issued its decision in *Crosby*. In light of these decisions, on April 26, 2005, this Court granted the government's motion for a limited remand under *Crosby*. After full briefing, on May 5, 2006, the district court denied the defendant's request for resentencing. SA13. On May 22, 2006, the defendant notified this Court of the district court's decision, thereby reinstating jurisdiction in this Court.

The defendant is presently incarcerated at the Federal Correctional Institute in Fort Dix, New Jersey.

STATEMENT OF FACTS

A. The Racketeering Enterprise

This prosecution arose out of an FBI and IRS investigation of fraud and political corruption in the City of Bridgeport. The primary focus of the investigation was the corrupt enterprise formed by the defendant, Joseph P. Ganim, the city's five-term mayor, together with his closest friends and advisors Leonard J. Grimaldi and Paul

J. Pinto. Trial Transcript ("T") 416-21; 2361-62; 3087-88; 4265; 5983; 6428-29. During the years in question, Grimaldi served as the defendant's campaign manager and was also the president of a public relations company known as Harbor Communications, T399-400; 417-18, while Pinto, the defendant's admitted "bagman," T4869-70, was the owner of a Bridgeport architecture and engineering firm known as the Kasper Group, T4275. Grimaldi and Pinto each pleaded guilty to racketeering conspiracy and subsequently testified against the defendant at trial. T403-06; 4248-52.

Viewed in the light most favorable to the jury's verdict, Grimaldi's and Pinto's testimony, along with the testimony of forty-eight other witnesses who testified during the government's case-in-chief, established that, between the years 1995 and 2000, the defendant engaged in a systematic and pervasive scheme of corruption. Throughout that time, the defendant corruptly solicited, accepted, and agreed to accept hundreds of thousands of dollars worth of cash, meals and entertainment, merchandise, home furnishings, professional services and other things of value from Grimaldi and Pinto. As Pinto stated at trial, his "job" was to "take care of Joe" by "spend[ing] money on, win[ing], din[ing], tak[ing] out to dinner, buy[ing] merchandise, clothing, whatever needs [Ganim] had." T4273. The evidence conclusively demonstrated that, in return, the defendant misused his position as mayor to steer lucrative city contracts to Harbor Communications and the Kasper Group.

The evidence introduced at trial established that the nature, value and frequency of the benefits accepted by the

defendant from Grimaldi and Pinto went far beyond the ordinary receipt of gifts from friends. The evidence showed that the defendant accepted those items with the specific intent to be influenced in his performance of official mayoral acts. T456; 4290; 4607-09. Nor were Grimaldi and Pinto acting as lobbyists. As Grimaldi explained at trial: "[A] lobbyist . . . is someone who's an advocate on behalf of a client who hopes to get something for that client with no specific expectation in return. . . . My relationship with Joe, there was a clear expectation Joe was going to get paid, would be paid in cash or receive benefits in exchange for steering work to my clients." T1300. Similarly, Pinto testified: "I tried to make the appearance that I was a lobbyist, but I can't consider I was a real lobbyist, no. . . . What a lobbyist does is legal. What I was doing was not legal." T4869.

B. Background to the Enterprise

The defendant was first elected as the mayor of Bridgeport in 1991. He was reelected in 1993, 1995, and 1997, and 1999. T417; 6869; 6901; 6915. As mayor, the defendant was the city's chief executive officer, and was responsible for the overall operation of municipal government. T254-55. He presided over the city council, served *ex officio* on a number of municipal agencies, including the Water Pollution Control Authority, and appointed department heads who served at his pleasure. T256-58; 273; 300. As mayor, the defendant also had the authority to award city contracts. T314-24.

Throughout the mid to late 1990's, the defendant experienced frequent financial difficulties. T440; 457.

During that time, the defendant was keenly aware and envious of the wealth that Grimaldi and Pinto were accumulating as a direct result of their relationship with him. T709; 4288-89; 4351. In 1995, the defendant requested that Grimaldi hire his family's law firm, with which the defendant was at the time professionally associated, and pay a $1,500 monthly retainer, as a way of assisting the defendant with making his monthly mortgage payments. T440-46. Grimaldi also provided cash to the defendant and the defendant's wife, Jennifer, in response to his frequent entreaties: "L[e]nnie, you are making all of this money because of me, and you cannot make it because of me." T451; 454; 621-29. Pinto also routinely "wined and dined" the defendant, and gave him cash and other personal benefits during that time. T4273; 4289; 4552; 4586.

C. The Extortion of PSG in Connection With the City's Privatization of Its Wastewater Treatment Facilities

In 1995 and 1996, the defendant spearheaded the privatization of the city's wastewater treatment plants. T467-71; 6450. At the defendant's suggestion, Grimaldi became affiliated with the Professional Services Group ("PSG"), a Houston, Texas-based firm that specialized in operating facilities of this type. T467-72; 1530-31. According to Sandra Sullivan, PSG's Regional Vice President for Business Development, Grimaldi was hired as a consultant because of his access to Ganim. T1535. Grimaldi was originally given a contract by PSG that would pay him a total of $35,000 if the company was selected to operate the city's wastewater treatment

facilities. T468. In February 1996, the city issued a request for proposals. T472. PSG responded to the city's request, as did U.S. Water, another national firm with which Pinto and United Properties, a Bridgeport real estate development firm and a significant political benefactor of the defendant, were associated. T472-73; 4310.

Prior to publicly announcing the awarding of the contract, the defendant informed Pinto of his intention to select PSG. T475; 4324-25. The defendant instructed Pinto to have PSG put Pinto and United Properties "on the same team" so that the defendant would not have to pick between two of his principal supporters. T4325. The defendant informed Pinto: "if they want the deal, they'll do it." T4325. At the defendant's request, Pinto told Grimaldi that, unless PSG "takes care of [us]," they aren't going to get the deal. T4326-27. Grimaldi subsequently complained to the defendant about Pinto's "stick up," but was told by the defendant to "[s]top being a Boy Scout. Go work it out. I'm helping you, you help me." T478-79. Grimaldi advised Sandra Sullivan that "this is what [the mayor] wants done." T479. Given the defendant's stance, Sullivan concluded that PSG "had no real choice" but to make Pinto and United Properties "part of the PSG team." T1564; 1572. PSG agreed to pay Pinto $70,000 per year for the life of the five-year contract. T1574-75. To this end, PSG amended its consulting agreement with Grimaldi who, in turn, agreed to pass the additional fees through to Pinto. T482; 1578; 4329. One month later, the defendant approved the selection of PSG to operate and manage its wastewater treatment facilities. T1581-82.

Between May 1997 and April 1999, PSG paid Grimaldi approximately $311,396 in consulting fees, of which amount, Grimaldi paid Pinto approximately $194,000. T1587-88. Grimaldi and Pinto each used a portion of their fees to "take care of" the defendant. T1083-84; 4331.

D. The Defendant's 50/50 Fee Sharing Arrangement With Grimaldi and Pinto

Following the selection of PSG, in December 1996, the defendant traveled with Grimaldi and Pinto to Tucson, Arizona. T528-531; 4342-43. While in Tucson, the three men discussed how it had been counterproductive for Grimaldi and Pinto to have been allied with opposing firms during the privatization process. Consequently, the defendant encouraged Grimaldi and Pinto to "join forces," and split any future consulting fees they earned in their future dealings with the city. The defendant also requested that Grimaldi and Pinto each use an unspecified portion of their fees for his benefit. T4343-44.

In early February 1997, the defendant, Grimaldi and Pinto met at the defendant's family law firm to consummate their illicit fee sharing arrangement. T529-30; 4346-48. Grimaldi described the deal as follows:

> It was January or February of 1997. I was called to a meeting in Joe's law office with Paul Pinto. It was myself, Paul Pinto and Joe, and during the course of the conversation, Pinto said that, "You know, Lennie, we are making a lot of money off of Joe and it's time that we share on a larger scale,"

> and Pinto proceeded to explain that we should have -- that Pinto and I should share all of the fees on a 50/50 basis that comes into Harbor Communications. If he brings in money and I bring in money to Harbor, that money should be split evenly between me and Pinto, and that a portion of that money would be to take care of Joe. If he needed cash, we would take care of him. If he needed suits, we'd take care of him. If he needed shirts, we'd take care of him. Any needs that he required, off of that 50/50 arrangement, we would take care of Joe.
>
> In exchange for that, Joe would make sure that all of our clients would get work from the city if they wanted it, that he would steer city contracts and jobs to our clients . . . .

T530-31. Pinto testified that, under the 50/50 fee sharing arrangement, "Joe would get the deals for us, and in return we would be taking care of him and his expenses and needs." T4344.

Grimaldi's and Pinto's 50/50 fee sharing arrangement with the defendant lasted from approximately February 1997 until April 1999. T539; 4351. During that time, Grimaldi and Pinto provided the defendant with cash, meals at expensive restaurants, fitness equipment, designer clothing for the defendant and his wife, cases of investment quality wine, jewelry, and other personal benefits. T597-611; 613-23; 1350; 1387; 3296-97; 4290-4300; 4415-20; 4422-28; 4434-38; 4552. According to both Grimaldi and Pinto, the series of benefits given to the

defendant were part of "the agreement that [they] had in exchange for Joe taking care of [their] clients." T623; 4308.

As consideration for Grimaldi's and Pinto's largess, the defendant was available to Grimaldi and Pinto "whenever [they] needed something . . . when [they] needed a meeting . . . needed to get a result, a decision, get chosen for a client, [they] would talk to [the defendant] regularly about it." T4350; 4374. In return, the defendant selected or caused subordinates within city government to select Grimaldi, Pinto and their clients for lucrative city contracts. For example, the defendant steered design and construction contracts for a baseball stadium and hockey arena to the Kasper Group and to C.R. Klewin, one of Grimaldi's clients. T690; 3960-64; 3984-85; 4627.[1] Pinto testified that there was not "any contract or any issue which I needed in order to make some money, something I really wanted that I did not get during that period of time." T4880.

Moreover, in the summer of 1998, the defendant directed Patrick Coyne, a college friend whom he had appointed to be the Director of the Office of Mayoral Initiatives, to select Grimaldi to oversee a municipal marketing campaign, and to choose Pinto to oversee the demolition of dozens of blighted properties in the city. T6015-18. Both projects were funded by a one-million-

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[1] The awarding of city contracts by the defendant in connection with the baseball stadium and hockey arena were the subject of Counts 9-12 of the superseding indictment. The jury was unable to return a unanimous verdict on those Counts.

dollar contribution to the city's "Clean and Green" program by one of Grimaldi's clients, Bridgeport Energy. T564-69; 6015-16. Pursuant to their fee-sharing arrangement, Grimaldi and Pinto each continued to use a portion of their respective consulting fees for the benefit of the defendant. T571-72; 4393-94.

E. The PSG Kickback Scheme

In late 1998, PSG was interested in obtaining a long-term extension of its contract to operate the city's wastewater treatment facilities. T630-35; 1593-94. The defendant met with Grimaldi, who by then had signed a new consulting agreement with PSG under the terms of which he was to be paid $50,000/year for twenty years, T541-44; 668-69, and Pinto to discuss an extension of PSG's contract with the city, T642; 4554-59. During the meeting, the defendant expressly agreed to support PSG's contract extension. In exchange, the defendant required that Grimaldi agree to renegotiate his contract with PSG, and "front load" the payment of his consulting fees. The defendant also demanded that Grimaldi divide his fees equally with the defendant and Pinto. T642-47; 671-72; 4554-59. The defendant directed Grimaldi to pay his one-third share of the fees to Pinto who would serve as his de-facto banker. T679-80; 4567; 4576-82. The defendant, Grimaldi and Pinto agreed that this 1/3-1/3-1/3-kickback agreement would apply to all of Grimaldi's and Pinto's future deals with the city. T645-47; 680-81; 4625.

Thereafter, Grimaldi renegotiated his consulting deal with PSG. Under the terms of Grimaldi's revised contract, PSG agreed to pay him $495,000 within ten days of the

company signing an extension of its contract with the city. T673. On April 12, 1999, the defendant met with Grimaldi and Pinto at a local restaurant, the Bridge Café, to consummate the deal. T673-77; 4559-66. The defendant reviewed the compensation provisions of Grimaldi's revised consulting agreement with PSG and then announced to Grimaldi and Pinto: "You have a partner." T677.

On May 27, 1999, the defendant unilaterally awarded PSG an extension of its contract with the city. T681-82; 1649-50; 4568. On June 4, 1999, PSG paid Harbor Communications $495,000. T682-83. Between June 12, 1999, and July 7, 1999, Grimaldi paid Pinto $313,000, half of which represented the defendant's share. T684-85. In order to avoid detection, Pinto co-mingled the defendant's funds with his own. With the defendant's blessing, Pinto deposited the majority of the money he received from Grimaldi into an account that he maintained at Fleet Bank. Pinto kept the savings passbook for the account in the glove compartment of his car. On one occasion, while the defendant and Pinto were together in Pinto's car, the defendant inquired: "[Do I] have any reason to be happy?" Pinto responded by showing the defendant the passbook, and pointing out his recent deposit of $151,000 that he had received from Grimaldi. T4575-81; 4589-91.

F. The Falling Out

In the summer of 1999, the defendant met regularly with Grimaldi and Pinto to discuss other pending deals to which their kickback scheme applied, and the fees Grimaldi expected to earn from those transactions. T689-

707; 4581-82. During that time, Grimaldi and Pinto continued to provide the defendant and his wife with cash and personal benefits. T714-21; 4621-24. Pinto also purchased over $16,000 worth of wine for the defendant. T4615-17. In addition, Pinto used cash to purchase kitchen cabinets, appliances, a stone patio, and an underground sprinkler system, T4600-02; 4006, for a new home the defendant was constructing in the exclusive Black Rock section of Bridgeport. Pinto also paid approximately $8,000 to the general contractor who was overseeing the construction of the defendant's new home, T1913-15; 1927-32; 4592-96, and approved the Kasper Group's preparation of topographical surveys, site plans and blueprints for the defendant's personal residence and other properties that he owned, all at little or no charge to the defendant, T3872-80; 3901-03; 4485-91; 4667-72. At trial, Pinto explained that "the money that I was paying for those items was [the defendant's] money, so it wasn't necessarily that he was asking me. We had an agreement. I was holding his money. When he needed the money, I'd give it to him or use it the way he directed me to, and that's what I was doing. I was upholding my end of the deal and the agreement we had." T4607-08.

In late September of 1999, the defendant and Grimaldi had a "falling out" due, in part, to the defendant's belief that Grimaldi was "reneging" on the deal, and in part because of Grimaldi's belief that he would never be able to satisfy the defendant's incessant financial demands. T723-727; 4631-35. The break-down in the relationship culminated in a conversation between Grimaldi and Pinto in which Pinto stated: "Joe is going to bite your head off because he thinks you are holding back on Jennifer's

payments and other payments." Grimaldi responded: "Do you know, Paul, I'm sick and tired of this relationship. I'm tired of the pressure I'm getting from you, I'm tired of the pressure I'm getting from Joe, I'm tired of the shakedowns and the kickbacks and all of this stuff that is going on. This is the stuff grand juries are made of, and I'm out of this relationship. I'm not doing it anymore." Pinto replied: "You are not walking away from us," to which Grimaldi answered: "Watch me." T726-27. From that point on, the defendant "iced" Grimaldi's ability to obtain additional city work for his clients. T749-51; 4642-43.

G. The Defendant's Secret Purchase of a $1 Million Variable Life Insurance Policy

In addition to his corrupt dealings with Grimaldi and Pinto, in early 1999, the defendant secretly used city funds to purchase a personal one-million-dollar variable life insurance policy. Recognizing that under the Bridgeport city charter he lacked authority to unilaterally increase his own compensation, T271, the defendant approved the purchase of life insurance policies for several members of his cabinet in order to "cover" the fact that he was seeking a comparable policy for himself, T4700-01. The defendant asked Frank Sullivan, a boyhood friend who was then an inexperienced stock broker at Paine Webber, to serve as his broker for the deal. T4695-99. Due to the controversial nature of the policies, the defendant told Sullivan to "keep it quiet." T4699.

In April 1999, the defendant approved the city's purchase of the life insurance policies without the required consideration or approval of the Bridgeport City Council.

T4702-03. The city issued a check to The Hartford Life Insurance Company, which included at least $192,294 in pre-paid premiums for the first five years of the defendant's policy. T2373-85. Shortly thereafter, the defendant learned that the purchase of the policies had been "leaked" to the council. On June 17, 1999, the defendant wrote a letter to The Hartford in which he claimed that his policy had been issued as "an oversight" and requested that the policy be terminated. T2408-09. The defendant wrote the letter as "cover," T4705, knowing that it would not be adequate to cancel his policy. The defendant purposefully failed to complete the necessary cancellation forms that had been provided to him, and instead "buried" the forms in his desk drawer.[2] T4704.

The defendant falsely informed John Fabrizi, the president of the Bridgeport City Council, that he "wasn't going to take a policy" for himself, T2961, and misrepresented to other policy recipients that he had cancelled his own policy, T3091-93. On June 21, 1999, well after the policy had been purchased, the defendant directed Robert Kochiss, the Director of the Bridgeport Office of Policy and Management, to secretly insert funding for his policy in a year-end budget reconciliation package entitled "Harbormaster Budget Transfer." T2879-86. The defendant did not inform the council that the reconciliation package included funding for his policy. T2885-89; 2957-61; 2973-75.

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[2] The defendant cancelled the policy only upon learning that a federal grand jury subpoena had been served upon the city for records relating to his policy. T3092-93.

Frank Sullivan received a $17,500 commission for serving as the broker for the defendant's life insurance policy. T4710. Acting at the defendant's behest, Pinto advised Sullivan that "Joe wants some money back," T4711, and that if Sullivan "wanted to do more business, future business, with the city of Bridgeport, then [he] had to pay [a kickback] in order to do it." T2399. Sullivan subsequently paid $5,000 in cash for the defendant and Pinto to share. T2400-01.[3]

H. The Pension Plan Conspiracy

In the fall of 1999, Frank Sullivan sought to become the broker of record for two municipal pension plans, the "Plan A" pension and the "Plan B" pension, that had been established for the benefit of Bridgeport's retired police and firefighters. T2423-24; 2418-19. As broker for the pension plans, Sullivan stood to earn tens of thousands of dollars in commissions and fees. T2427. At the defendant's behest, Pinto informed Sullivan that if he wanted to be appointed as broker for the Plan A and B pensions, he would have to kick back fifty percent of his commissions to the defendant and Pinto. T2430-31.

The defendant lobbied members of the Police and Fire Commission on Sullivan's behalf. In September 1999, Sullivan was installed as the broker of record for the Plan B pensions. T2452-57; 4728-35. The defendant also

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[3] The defendant's extortion of a $5,000 kickback from Sullivan's commission was the subject of Count 15 of the superseding indictment. The jury was unable to reach a verdict on that count.

instructed Jerome Baron, the Director of Finance for the City of Bridgeport, to write a series of letters to the Police and Fire Commissions supporting Sullivan's appointment as broker for the Plan B pensions. T3103-06.

With respect to the Plan A pension, the defendant's plan was to "insert [Sullivan] into the deal . . . right from the very beginning." T4721. With the defendant's support, Jerome Baron retained Sullivan's new employer, Salomon Smith Barney, to assist the city in underwriting the sale of $350 million of municipal bonds to fund the Plan A pension. Baron selected Sullivan for the position because he "knew the mayor wanted Frank Sullivan." T3130; 3135-36. On August 16, 2000, the city selected Salomon Smith Barney as broker for the Plan A pension. T3160-61. Under the terms of its agreement with the city, Salomon Smith Barney was paid approximately $400,000 for the first year of its five-year contract, and approximately $325,000 for each of the ensuing four years. T2519; 3162-63. In September 2000, Sullivan received the first installment of his brokerage commission, $38,000, which he intended to split with the defendant and Pinto. T2521. The defendant and Pinto ultimately did not request a kickback from Sullivan due to their concerns about pending federal investigations about which they had become aware. T4765.

I. The Juvenile Detention Facility Scheme

In January 1999, Pinto was retained by Kenneth Burns, the president of B.C. Sand & Gravel, a gravel and recycling business located in Bridgeport. At the time, the State of Connecticut had announced a plan, endorsed by

the defendant, to locate a juvenile court and detention facility on Burns's property. Burns testified that he hired Pinto to "take care of the mayor." T6236. Burns agreed to pay Pinto a $100,000 "success fee" if Pinto was able to relocate the facility to a different site. T4771-76. After learning about Pinto's contract, the defendant expressly agreed to assert his influence to thwart the planned construction of the juvenile detention facility on the B.C. Sand & Gravel site. In return, the defendant agreed to accept a fifty percent share of Pinto's success fee. T4777-79.

The defendant and Pinto devised a "game plan" which included orchestrating a public outcry over the proposed condemnation of Burns's business, thereby enabling the defendant to publicly switch his position and oppose the plan. The defendant subsequently withdrew his support for building the proposed facility on the Burns site. T4778-81. When the state continued to show interest in using Burns's property, the defendant advocated the use of an alternative site. T4784-86. Terry Supple, a project manager for the Connecticut Department of Public Works, testified that, due in large measure to the defendant's recommendation, the state abandoned its plan to condemn the Burns site. T6624-25. Pinto was paid $100,000 by Burns, $50,000 of which he held in trust for the defendant. T4779; 4787-88.

J. The Dollar-a-Square-Foot Conspiracy

In 1998 and 1999, Alfred Lenoci, Sr. and his son, Alfred Lenoci, Jr., the principals of United Properties, were seeking to become the preferred developers for

several vacant tracts of land located in Bridgeport, including the Father Panik site, a parcel of land upon which they intended to construct a large light industrial park. T4789-90. The Lenocis were also seeking to develop Steel Point, a fifty-acre parcel located along the city's waterfront upon which they intended to build a half-million-square-foot commercial, retail, and entertainment complex. The defendant had previously awarded the rights for Steel Point to another developer. T4822.

The Lenocis contrived a plan to pay the defendant to support United Properties' future development projects in the city. T4797. As Pinto described the deal, the Lenocis proposed to pay $1 per square foot for "everything that they constructed and built in the city of Bridgeport," and that Pinto would "take care of any expenses of the Mayor," and any "donations for the Mayor" out of that dollar per square foot. T4797-99; *see also* T4814-18.

In return for the promised $1/sq. ft. payments, the defendant agreed to officially support the Lenocis' development of the Father Panik site. On August 11, 1999, he wrote a letter to the Bridgeport Housing Authority in support of the Lenocis' request for a 99-year lease. T4800-02. The defendant also successfully lobbied the U.S. Department of Housing and Urban Development for its approval of the proposed lease. T4803-04.

Regarding the Steel Point project, in January 2000, the developer was experiencing financial difficulty in connection with his attempt to develop the site. After the original developer's deal with the city expired, the Steel Point project was put out to bid. The defendant conveyed,

through Pinto, his intent to select the Lenocis for the deal. T4834-36. The defendant's illicit agreement with the Lenocis was cemented during a luncheon meeting in November of 2000. T4837-41. During the meeting, the Lenocis offered to raise $500,000 for the defendant's anticipated gubernatorial campaign, in return for which the defendant committed to selecting the Lenocis as the developer for Steel Point. T4838-42. Based upon the defendant's assurances, the Lenocis intended to respond to the city's request for proposals for the Steel Point project, but refrained from doing so after federal search warrants were executed at United Properties in December 2000. T4842-43. According to Pinto, had the Lenocis been successful in developing Father Panik and Steel Point, the defendant and Pinto stood to make hundreds of thousands of dollars in consulting fees. T4832-33.

K. The Coverup

On August 12, 2000, shortly after becoming aware of the existence of the federal investigation in Bridgeport, the defendant met with Pinto at a local luncheonette. T4871. The defendant was concerned that Pinto had "paid for a lot of stuff," and was looking for way in which he could "cover himself." T4873. The defendant informed Pinto that he intended to send checks to "people he thought he needed to . . . increase payment to." T4873. The defendant subsequently issued checks to several contractors, each of whom had been paid in cash by Pinto to render services for the defendant. T4874-76.

L. The Defendant's False Income Tax Returns

IRS Special Agent Ted Wethje testified that the defendant failed to report the cash and benefits provided by Grimaldi and Pinto as income on his 1998 and 1999 federal income tax returns. Wethje calculated the defendant's additional unreported income for those years to be $47,996 and $265,733, respectively. T6768.

M. The Defendant's Testimony

The defendant testified on his own behalf at trial. He acknowledged that Grimaldi and Pinto provided him with free meals, entertainment, clothing, wine, and many other "gifts," but claimed that they did so as his friends and/or as lobbyists. T6872-77. The defendant claimed that he personally paid for a number of items using his own money, and that he regularly kept between seven and ten thousand dollars in cash in an underwear drawer in his bedroom which he used to pay for those items. T7071-72; 7110-14.

The defendant acknowledged that his wife, Jennifer, had worked for Grimaldi between 1997 and 1999, but claimed that they had inadvertently failed to report the wages on their joint income tax returns. T7179-83. The defendant also admitted that he acquired a life insurance policy, but denied that he purchased the policy secretly or without the approval of the Bridgeport City Council. T7233-39.

The defendant denied that there was a link between the personal benefits he accepted from Grimaldi and Pinto and any official acts that he performed as mayor. T6910-12; 7134-36; 7156. The defendant claimed to lack any knowledge of "the . . . deals [Grimaldi and Pinto] were cutting," T7301, and insisted that he acted solely "in the best interest of the city," T7302. To the extent that the testimony of other witnesses differed from his own, the defendant contended that those individuals were either mistaken or lying. T7225; 7236; 7240; 7258-59; 7263; 7287; 7303; 7311-14; 7321-22; 7334; 7339-40.

N. The Verdict

The jury began its deliberations on March 10, 2003. After deliberating for eight days, during which the jury requested the rereading of testimony from several key witnesses, the jury returned its verdict, convicting the defendant of sixteen counts of racketeering (Count 1), racketeering conspiracy (Count 2), extortion (Count 3), mail fraud (Counts 4-6, 8, 13-14, 17, and 19), bribery (Count 7), conspiracy (Counts 16 and 20), and filing false income tax returns (Counts 22 and 23). The jury was unable to reach a unanimous verdict as to the other five counts of the indictment (Counts 9-12 and 15).[4] A577-81.

O. The Sentencing

On July 1, 2003, the district court conducted a sentencing hearing. Based upon an adjusted offense level

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[4] Counts 18 and 21 were dismissed before the case was submitted to the jury.

of 29 and a criminal history category of I, the court computed the defendant's applicable sentencing range to be 87-108 months. A586. The court sentenced the defendant to a term of imprisonment of nine years, the top of his applicable sentencing range. A621.

P. The *Crosby* Remand

The defendant filed a timely notice of appeal. Before briefing was complete, however, the Supreme Court decided *Booker* and this Court remanded this case to the district court under *Crosby*. After full briefing, the district court rejected the defendant's request for resentencing. According to the court, it would not have imposed a materially different sentence if it had sentenced the defendant under an advisory guidelines regime. SA13.

SUMMARY OF ARGUMENT

I. The district court properly rejected the defendant's argument that for the bribery-related offenses the government had to prove a direct link between each benefit received by the defendant and the *specific* official act for which it was performed. As a preliminary matter, even if this were the law -- and it is not -- most of the counts in the indictment met that standard. For most counts of conviction, the indictment alleged a direct link between benefits and acts, and the jury instructions for those Counts directed the jury to consider the specific benefit-for-act exchanges in their deliberations. Moreover, with respect to 18 U.S.C. § 666, the district court's instructions conformed to the standard the defendant advocates here.

In any event, the district court properly rejected the defendant's argument because it is wrong as a matter of law. The indictment properly alleged, and the district court properly instructed the jury, that for the honest services mail fraud, extortion under color of official right, and federal programs bribery charges, the government must prove a *quid pro quo*. The law does not require, however, that in cases such as this one, involving an ongoing corruption scheme, that the government establish direct links between specific benefits and specific acts. The Supreme Court's decision in *United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999), is not to the contrary.

II. During closing argument, the prosecutors properly marshaled the evidence that was introduced at trial,

suggested reasonable inferences to be drawn from the evidence, and rebutted arguments raised by the defense during its closing statement. The prosecutor's reference during the rebuttal summation to P.T. Barnum and other isolated remarks constituted permissible argument that was well within the bounds of accepted prosecutorial advocacy. In addition, many of the remarks now challenged by the defense were invited by, and were legitimate rejoinders to, arguments raised by the defense during its closing statement. In the context of the trial as a whole, the significance of the prosecutor's closing remarks was minimal, and does not justify a reversal of the defendant's convictions.

III. The district court did not err, let alone commit plain error, by refusing, *sua sponte*, to adjourn the jury's deliberations upon learning that one of the jurors had been dismissed from her job. The court promptly met with the juror in chambers and evaluated her ability and willingness to continue deliberating. The court determined that the juror was able to proceed with deliberations, and directed her to do so. Given that the juror did not request to be excused, either temporarily or permanently, from further service, and in the absence of a contemporaneous objection by the defense, the court's decision to proceed with deliberations was an appropriate and informed exercise of its discretion.

IV. This Court should reject the defendant's challenge to *Crosby*, presented in this Court merely to preserve the issue for further review.

V. The defendant's sentence is reasonable. During the original sentencing proceeding and again during the *Crosby* remand proceeding, the district court properly and fully considered all mitigating evidence about the defendant, including evidence about his achievements as mayor. Furthermore, the district court properly rejected the defendant's arguments on sentencing disparities as irrelevant and unhelpful.

ARGUMENT

I. THE INDICTMENT ALLEGED, AND THE JURY INSTRUCTIONS ON THE RELEVANT COUNTS REQUIRED THE JURY TO FIND, THAT THE DEFENDANT RECEIVED BENEFITS IN EXCHANGE FOR OFFICIAL ACTS

A. Relevant Facts

On March 27, 2002, a federal grand jury returned a twenty-four count superseding indictment charging the defendant with racketeering, racketeering conspiracy, extortion, mail fraud, federal program bribery, and tax fraud. A27-84. The defendant moved to dismiss certain counts of the indictment and for a bill of particulars detailing the benefits he was alleged to have received in return for official acts.

On September 12, 2002, the district court denied the defendant's motion to dismiss, finding that the defendant, as an elected official, was on notice that his alleged conduct was unlawful. A104. In the same decision, the district court found that the defendant was entitled to

receive a "limited" bill of particulars. A105. The government submitted the requested information on September 27, 2002, A112-16, and subsequently supplemented that response on December 4, 2002, A123-29.

Following a pre-trial hearing on January 6, 2003, the district court requested briefing on the applicability of *Evans v. United States*, 504 U.S. 255 (1992), and *United States v. Coyne*, 4 F.3d 100 (2d Cir. 1993), to the jury charge to be delivered by the court. In response, the defendant claimed that for the bribery-related offenses, the court should instruct the jury that the government was required to demonstrate a direct link between the benefits he allegedly received and specific official acts. In other words, according to the defendant, the government was required to establish a nexus between each alleged benefit (whether dinner, cash, or other benefit) and a specific official act. The government disagreed. The court ultimately agreed with the government and refused to give the defendant's requested charge. *See* A196, 213.

Thus, for the bribery-related offenses (extortion under color of official right in violation of 18 U.S.C. § 1951, honest services mail fraud in violation of 18 U.S.C. §§ 1341, 1346, bribery in violation of Conn. Gen. Stat. § 53a-148, and federal-programs bribery in violation of 18 U.S.C. § 666), the court instructed the jury that to find a violation of the law, the jury had to find a *quid pro quo*, i.e., that the defendant received a benefit in exchange for an official act:

> [T]he government must prove the defendant obtained a payment to which he was not entitled by use of his office, knowing that the payment was made in return for official acts rather than being given voluntarily or unrelated to the defendant's official position. The defendant need not have initiated the payments, but he must have known that the payment was made in exchange for a specific exercise of defendant's official powers.

A458 (extortion under color of official right). *See also* A480 (honest services mail fraud) ("The term 'bribe' means a corrupt payment that a public official accepted or agreed to accept with the intent to be influenced in the performance of his or her public duties. A bribe requires some specific *quid pro quo*, a Latin phrase meaning this for that or these for those, that is, a specific official action in return for the payment or benefit."); A503 (state law bribery) ("[The government must prove] that the defendant solicited, accepted or agreed to accept the benefit as consideration for his decision . . ., meaning that the benefit was understood by the defendant to be in exchange for his decision. . . . [B]ribery requires the intent to effectuate an exchange of money or some other thing of value in return for the performance of a specific official action or a specific type of official action."); A528-29 (federal program bribery) ("A 'corrupt intent' means the intent to engage in some specific *quid pro quo* . . . . 'Corruptly' means having an improper motive or purpose. Put another way, a public official acts corruptly if he solicits, accepts or agrees to accept a personal benefit, at least in part, with the intent to be improperly influenced or rewarded in connection with the performance of an official act.").

In addition, with respect to the extortion under color of official right, honest services mail fraud, and state law bribery charges, using language taken from *Coyne*, the district court explained to the jury that the *quid pro quo* need not be explicit:

> The government does not have to prove an explicit promise to perform a particular act made at the time of payment. It is sufficient if the defendant understood he was expected as a result of the payment to exercise particular kinds of influence, that is, on behalf of the payor, as specific opportunities arose.

A458 (extortion under color of official right). *See also* A480 (honest services mail fraud) (substantially similar); A505 (state law bribery) (substantially similar).

B. Governing Law and Standard of Review

1. Indictment

This Court reviews *de novo* the sufficiency of an indictment. *United States v. Pirro*, 212 F.3d 86, 92 (2d Cir. 2000). An indictment is sufficient "'if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *United States v. La Spina*, 299 F.3d 165, 177 (2d Cir. 2002) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)); *see also* Fed. R. Crim. P. 7(c)(1). In addition, "where the indictment has been found even

minimally sufficient, a court may look to the record as a whole in determining whether the defendant is protected from double jeopardy in a subsequent prosecution and whether the defendant has had an adequate opportunity to prepare his defense." *United States v. Walsh*, 194 F.3d 37, 45 (2d Cir. 1999).

2. Jury Instructions

When challenging jury instructions on appeal, a defendant must show that he was prejudiced by a charge that misstated the law. *See United States v. Goldstein*, 442 F.3d 777, 781 (2d Cir. 2006); *United States v. Thompson*, 76 F.3d 442, 454 (2d Cir. 1996). No particular form of words is required, so long as "taken as a whole" the instructions correctly convey the required legal principles. *See Victor v. Nebraska*, 511 U.S. 1, 5 (1994); *Holland v. United States*, 348 U.S. 121, 140 (1954).

Accordingly, when evaluating the adequacy of the charge, a single jury instruction "may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973); *see also United States v. Ford*, 435 F.3d 204, 210 (2d Cir. 2006). This Court does not "review portions of the instructions in isolation, but rather consider[s] them in their entirety to determine whether, on the whole, they provided the jury with an intelligible and accurate portrayal of the applicable law." *United States v. Weintraub*, 273 F.3d 139, 151 (2d Cir. 2001); *see also United States v. Clark*, 765 F.2d 297, 303 (2d Cir. 1985). Thus, even if a particular instruction, or portion thereof, is deficient, the reviewing court must "examine the entire

charge to see if the instructions as a whole correctly comported with the law." *United States v. Jones*, 30 F.3d 276, 283 (2d Cir. 1994).

This Court reviews the propriety of jury instructions *de novo*. *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir.), *cert. denied*, 543 U.S. 908 (2004).

Even assuming error in a jury instruction, this Court "will vacate a criminal conviction 'only if the error was prejudicial and not simply harmless.'" *United States v. Pimentel*, 346 F.3d 285, 301-02 (2d Cir. 2003) (quoting *United States v. George*, 266 F.3d 52, 58 (2d Cir. 2001)), *cert. denied*, 543 U.S. 955 (2004). "Such error is harmless only if 'it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error."'" *Id.* (quoting *George*, 266 F.3d at 61 (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)). It is the appellant who "bears the burden of showing that a requested instruction accurately represented the law and that, in light of the entire charge actually given, the appellant was prejudiced by the failure to give the instruction." *United States v. Vaughn*, 430 F.3d 518, 522 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1665 (2006).

C. Discussion

The defendant contests the sufficiency of the indictment and the adequacy of the jury instructions pertaining to the "bribery-related counts," focusing his challenge on the *quid pro quo* elements of those offenses. Specifically, the defendant claims that for bribery offenses, the indictment must allege, and the jury must be

instructed to find, a direct link between each benefit received by the public official and a *specific* official act undertaken in exchange for that benefit. According to the defendant, because the government did not meet this standard in this case, *all* of his convictions must be reversed. Defendant's Br. at 25, 44.

A careful review of the indictment and jury instructions demonstrates, however, that *none* of the defendant's sixteen counts of conviction should be reversed. As a preliminary matter, the defendant's argument about the adequacy of the *quid pro quo* allegations and instructions has *no* impact on his convictions for filing false tax returns or on his convictions for mail fraud in connection with his secret purchase of the $1-million life insurance policy. On Counts 22 and 23, the jury convicted the defendant for failing to report his full income on his tax returns; the accuracy of the defendant's tax returns did not turn on the legality of the income he received but failed to report. Counts 13 and 14 were tried to the jury not as "honest services" mail fraud counts but rather as "traditional" mail fraud counts alleging that the defendant engaged in a scheme to obtain money and property.[5] A485-95; 523-24. As such, the court did not instruct the jury on the need to find a *quid pro quo*.

Furthermore, even if the defendant were correct that for bribery-related offenses, the law requires a direct link between each benefit provided and the specific official act

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[5] Racketeering Act 5 alleged two sub-counts of mail fraud that tracked Counts 13 and 14, and thus it is similarly undisturbed by the defendant's argument.

performed -- and he is not -- the government's case, for the most part, met that standard. Part 1, *infra*. Moreover, the instructions for the counts alleging a violation of 18 U.S.C. § 666 were consistent with the standard advocated by the defendant. Part 2, *infra*. Finally, the defendant misunderstands the law. To sustain a conviction for the bribery-related offenses at issue here, the government must plead and prove a *quid pro quo*, but there is no requirement that the government tie every benefit to a particular official act. The jury was properly instructed on these principles, and the defendant's requested jury charge to the contrary was without merit. Part 3, *infra*.

1. For Most Counts of Conviction, the Indictment and Jury Instructions Tied Specific Benefits to Specific Official Acts

The defendant's argument that the indictment and jury instructions failed to link specific benefits to specific official acts is largely misplaced. For most counts of conviction, the indictment and jury instructions expressly linked specific benefits to specific official acts.

Counts 3-6 and Racketeering Acts 1A-D: In these counts, the indictment alleged that the defendant awarded PSG the contract for operation of the city's wastewater treatment facilities in exchange for payment from PSG. A33-36; 69-71. In instructing the jury, the court read these allegations of the indictment -- allegations that linked one benefit (payment from PSG) to one official act (the award of the contract to PSG) -- and directed the jury to consider whether the government had proved that these allegations

constituted extortion under color of official right or mail fraud. A514-15; 517-19; 445-48; 461-62.

Counts 7-8 and Racketeering Acts 2A-B: The *quid pro quo* charged in these counts also involved an alleged benefit (money from PSG) for a specific official act (the extension of PSG's contract). A71-72; 36-40. And again, the instructions directed the jury to consider whether this specific exchange violated the federal-programs bribery statute, A525-26, the mail fraud statute, A519; 462-63, or Conn. Gen. Stat. § 53a-148, A496-97.

Count 16 and Racketeering Acts 7A-E: In these counts, the defendant was charged and convicted for his role in selecting Frank Sullivan as a financial advisor for two Bridgeport pension funds in exchange for a portion of the fees and commissions Sullivan would receive in this position. The indictment and instructions focused specifically on these facts, asking the jury to consider whether this agreement to a selection-for-portion-of-commissions exchange violated statutory prohibitions against conspiracy, A532-34, bribery, A496-97, and mail fraud, A471-73.

Count 19 and Racketeering Act 9: These counts alleged that the defendant committed honest services mail fraud in connection with his receipt of $50,000 in exchange for his opposition to the construction of a juvenile court and detention facility on B.C. Sand & Gravel's property. A34-36; 79. Likewise, the jury instructions on these counts focused on this specific exchange. A474-77; 522-23.

Count 20 and Racketeering Act 10A: In these counts, the indictment alleged that the defendant agreed to accept $1 per square foot for commercial projects constructed by the Lenocis in exchange for his official support for those projects. A62-64; 79-81. The instructions directed the jury to consider whether this specific *quid pro quo* constituted bribery, A502-03, or conspiracy to commit bribery, A534-36.

In sum, the indictment and jury instructions on most counts of conviction linked specific benefits to specific official acts.

2. The Instructions on 18 U.S.C. § 666 Were Consistent with the Standard Advocated by the Defendant Here

The defendant contends that the district court's instructions invited the jury to convict him without finding a direct nexus between benefits and official acts, taking particular aim at the language in the jury charge providing that "[i]t is sufficient if the defendant understood he was expected as a result of the payment to exercise particular kinds of influence . . . as specific opportunities arose." A458. This language, however, while included in the instructions for the extortion under color of official right, A458, honest services mail fraud, A480, and state law bribery charges, A505, is absent from the charge to the jury on 18 U.S.C. § 666. *See* A527-31. Thus, even assuming *arguendo* that he is correct on the law, the

instructions on these counts (Counts 7, 16, and 20) could not have misled the jury.[6]

Moreover, the instructions on 18 U.S.C. § 666 specifically charged the jury on the position advocated by the defendant. In the context of defining the term "corruptly," the instructions provided that "a public official acts corruptly if he solicits, accepts or agrees to accept a personal benefit, at least in part, with the intent to be improperly influenced or rewarded in connection with the performance of *an* official act." A528-29 (emphasis added). Thus, while the defendant might have preferred different wording in the instructions, the instructions given by the court were legally accurate -- even under the defendant's standard -- and should be upheld. *See United States v. Imran*, 964 F.2d 1313, 1317 (2d Cir. 1992) (while a defendant is "entitled to a jury charge that accurately reflects the applicable law," he "does not have the right to dictate the precise language of a jury instruction").

Finally, the defendant's challenge to the use of the word "rewarded" in the § 666 instructions is misplaced. Section 666 prohibits an agent of an organization receiving federal funds from "corruptly" agreeing to accept "anything of value . . . intending to be influenced *or rewarded* in connection with any business . . . of such organization." 18 U.S.C. § 666 (emphasis added). Although "rewards" are often considered gratuities, as this

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[6] The defendant also argues that the use of the phrase "series of transactions" in the § 666 instructions was improper, but this phrase is from the statute itself, so can hardly be said to have misled the jury on the law.

Court made clear in *Ford*, the distinguishing feature between bribes and gratuities is not whether the "thing of value" is called a "reward," but rather the intent element: a bribe requires a *quid pro quo*, while a gratuity does not. 435 F.3d at 210 (quoting *Sun-Diamond*, 526 U.S. at 404-05). Thus, while the district court used the statutory language "rewarded" in its instructions, taken as a whole, the instructions fully informed the jury that the government must prove a quid pro quo to convict. *See* A528 ("A 'corrupt intent' means the intent to engage in some specific quid pro quo . . . ."). In context, then, the court's instructions properly informed the jury on the law.

3. The Government Does Not Need to Plead or Prove a Direct Link Between Each Benefit Received and a Specific Official Act

As described above in Part 1, the defendant's argument is irrelevant to most counts of conviction because the instructions for those counts linked specific benefits to specific official acts. On some counts, however, the indictment and evidence demonstrated that the defendant received a steady stream of benefits in exchange for several official acts. On those counts, and for all of the bribery instructions more generally, the jury was properly instructed on the *quid pro quo* elements of the offense. While the law requires the government to prove a *quid pro quo*, it does not require the government to prove a direct link between specific benefits and specific official acts.

The district court properly instructed the jury that the *sine qua non* of bribery is a corrupt payment that a public

official accepts, or agrees to accept, at least in part, with the intent to be influenced in the performance of an official act. *See United States v. Sun-Diamond Growers*, 526 U.S. 398, 404-05 (1999); *United States v. Alfisi*, 308 F.3d 144, 149 (2d. Cir. 2002); *United States v. Myers*, 692 F.2d 823, 841 (2d Cir. 1982). The court explained that bribery occurs only where a public official accepts a payment with "corrupt intent," which it defined as the intent to engage in some "specific *quid pro quo*" or the intent "to give some advantage inconsistent with official duty and the rights of others." *See Alfisi*, 308 F.3d at 149; *United States v. Bonito*, 57 F.3d 167, 171 (2d Cir. 1995).

The district court also properly instructed the jury that the gravamen of extortion under color of official right is a public official's wrongful use of his office to obtain property or services to which he was not entitled. *Evans*, 504 U.S. at 268; *United States v. Middlemiss*, 217 F.3d 112, 117 (2d Cir. 2000); *United States v. Delano*, 55 F.3d 720, 731 (2d Cir. 1995); *United States v. Garcia*, 992 F.2d 409, 415 (2d Cir. 1993). The court further instructed the jury that, in order to be guilty of extortion under color of official right, the defendant must know that the payments were made in return for official acts, but that the government was not required to prove that an explicit promise or agreement to perform a particular act was made at the time of payment. *Evans*, 504 U.S. at 258; *Middlemiss*, 217 F.3d at 117; *Coyne*, 4 F.3d at 113; *Garcia*, 992 F.2d at 415.

Similarly, with respect to the instructions on the federal-programs bribery charges, 18 U.S.C. § 666, the court properly informed the jury that to convict, it must

find that the defendant accepted payments or benefits with the intent to be influenced in the performance of his official duties. *Ford*, 435 F.3d at 210.

As noted above, the defendant contends that the court's instructions were flawed because they did not require the jury to find a direct link between the particular benefits he received and the specific official acts for which they were given. This "direct link" requirement is fundamentally at odds with the principles set forth by the Supreme Court and this Court and should be rejected.

Outside the context of campaign contributions,[7] the Supreme Court has never held that, in prosecutions for bribery and extortion under color of official right, the government must demonstrate an explicit link between a public official's acceptance of particular benefits and his performance of specific official acts. On the contrary, in *Evans*, the Supreme Court stated: "We hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." 504 U.S. at 268. The defendant in *Evans* was an elected

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[7] In *McCormick v. United States*, 500 U.S. 257 (1991), the Supreme Court considered a decision by the Fourth Circuit that had held that a *quid pro quo* was *not* required for a conviction under the Hobbs Act when an official receives a campaign contribution. The Supreme Court reversed this decision, recognizing that, in the unique context of financing public campaigns, a *quid pro quo* is required in order to prove a violation of the Hobbs Act. The Court defined the requisite *quid pro quo* as a payment "made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." *Id.* at 273. Through this language, the Court emphasized that, standing alone, temporal proximity between an official act and a campaign contribution is insufficient to support an extortion conviction. This "explicit" link requirement has never been extended outside the context of campaign contribution cases. Moreover, neither *McCormick* nor its progeny had occasion to consider, let alone find, the additional requirement at issue here. Specifically, the Court has never found that the government must prove, with the degree of particularity sought by the defendant here, a direct link between each benefit and the official act for which it was performed.

member of a county board of commissioners who had accepted $8,000 in cash and campaign contributions from an undercover FBI agent who was posing as a real estate developer. When accepting the payoff, the defendant did not specifically agree to perform any particular official act or acts favorable to his benefactor. Rather, as the *Evans* Court observed, the defendant's acceptance of cash constituted "an *implicit promise* to use his official position to serve the interests of the bribe giver." *Id.* at 257 (emphasis added).

In construing *Evans*, this Court has repeatedly held that, in prosecutions for bribery and extortion under color of official right, the government is not required to prove the existence of an express or explicit agreement by a public official to perform specific official acts. *Middlemiss*, 217 F.3d at 117; *Delano*, 55 F.3d at 731; *Coyne*, 4 F.3d at 114; *Garcia*, 992 F.2d at 415. Rather, this Court has determined that the government need only show that the "public official understands that he or she is expected as a result of the payment to exercise particular kinds of influence -- i.e., on behalf of the payor -- as specific opportunities arise." *Coyne*, 4 F.3d at 114.

Several other courts of appeals have joined with this Court in construing the *quid pro quo* requirements of the bribery and extortion under color of official right statutes to encompass corrupt payments made to public officials with the intent of securing specific types of services favorable to the payor as opportunities present themselves. *See United States v. Giles*, 246 F.3d 966, 972 (7th Cir. 2001); *United States v. Bradley*, 173 F.3d 225, 231-32 (3d Cir. 1999); *United States v. Jennings*, 160 F.3d 1006, 1014

(4th Cir. 1998); *United States v. Tucker*, 133 F.3d 1208, 1215 (9th Cir. 1998).

The reasoning behind these cases is a matter of simple common sense: corrupt public officials and those who corruptly provide them with things of value do not carry out their business in an open and explicit way. On the contrary, as these cases clearly illustrate, the heartland of corruption involves illicit "I'll scratch your back if you scratch mine" types of arrangements, which are negotiated with "winks and nods," and in which the services of corrupt public officials are retained on an ongoing basis to provide preferential treatment for those from whom they have accepted bribes. *See, e.g.*, *Evans*, 504 U.S. at 274 (Kennedy, J., concurring in part and concurring in judgment) ("The official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods."); *see also United States v. Cianci*, 378 F.3d 71 (1st Cir. 2004) (affirming conviction of mayor for racketeering conspiracy where defendant corruptly exercised control over city departments in return for bribes and kickbacks); *United States v. Woodward*, 149 F.3d 46, 57-62 (1st Cir. 1988) (affirming conviction of state legislator for corruptly accepting numerous gifts, meals, entertainment and other benefits over a long period in return for performing legislative acts favorable to the payor); *United States v. Paradies*, 98 F.3d 1266 (11th Cir. 1996) (affirming conviction of city councilman for corruptly exercising influence on behalf of airport concessionaire in return for hidden interest in company that operated airport gift shops); *Garcia*, 992 F.2d at 410-12 (New York Congressman was paid $86,000 in monthly "retainers" in

return for assisting defense contractor in obtaining contract with U.S. Postal Service).

It is equally clear from the case law that the *quid pro quo* requirement may be satisfied by evidence of a course of conduct or favors flowing to a public official in exchange for an official act or for a pattern of official actions favorable to the donor. *See, e.g., Evans*, 504 U.S. at 274 (observing that a *quid pro quo* with the attendant corrupt motive can be inferred from an ongoing course of conduct). As the Supreme Court observed with respect to an interpretation of § 666, "bribed officials are untrustworthy stewards of federal funds . . . and officials are not any the less threatening to the objects behind federal spending just because they may accept general retainers." *Sabri v. United States*, 541 U.S. 600, 606 (2004). Contrary to the defendant's assertion, there is no "direct link" requirement. *See, e.g., Giles*, 246 F.3d at 972-73 (affirming extortion conviction Chicago alderman for corruptly accepting a series of payments where the jury could reasonably infer that the payments were made in return for the defendant's implicit agreement to perform official acts favorable to the payor); *Bradley*, 173 F.3d at 231-32 (affirming extortion conviction of mayoral aide where jury could infer that assistance provided to constituent in obtaining municipal contracts was in return for a series of corrupt payments); *Woodward*, 149 F.3d at 57-62) (finding that government was not required to link state legislator's receipt of particular gifts, meals, entertainment and other personal benefit to specific official acts); *Coyne*, 4 F. 3d at 111 (jury free to infer that defendant accepted payments knowing they were related to the use of his official influence on the payor's behalf as

specific opportunities arose). A "direct link" requirement would effectively create a safe harbor for the most corrupt public officials, those engaged in an ongoing course of corrupt conduct.

The Fourth Circuit elaborated on this principle in *United States v. Jennings*. Jennings was a construction contractor who made five cash payments to the local official responsible for administering a federally funded program that allocated funds for the renovation of vacant housing units in Baltimore. In return, the administrator placed Jennings's company on the "approved contractor" list and approved more than $650,000 worth of contracts for the company. The Fourth Circuit upheld Jennings' conviction for bribery under § 666 noting that "[e]ven if the evidence did not necessarily link each of Jennings's payments to a specific official act by [the administrator], a reasonable juror could still conclude that Jennings paid bribes. Over a fairly short period [the administrator] approved over $650,000 worth of contracts for Jennings's companies, and Jennings paid [him] over $7,000 in cash." 160 F.3d at 1018. As the Fourth Circuit explained, this evidence was sufficient to support Jennings's conviction because the government does not have to correlate "each payment . . . with a specific official act. . . . [T]he intended exchange in bribery can be 'this for these' or 'these for these,' not just 'this for that.' . . . The quid pro quo requirement is satisfied so long as the evidence shows a course of conduct of favors and gifts flowing to a public official *in exchange for* a pattern of official actions favorable to the donor." *Id.* at 1014 (internal quotations omitted).

The Supreme Court's decision in *Sun-Diamond* is not to the contrary. The issue in *Sun-Diamond* was whether a trade association violated the federal gratuities statute, 18 U.S.C. § 201(c)(1)(A), when it gave benefits to the Secretary of Agriculture simply because he was the Secretary of Agriculture. Although the trade association had a general financial interest in matters currently pending before the agency, the government argued that it did not need to prove *any* connection between the benefits given and any official acts. *Sun-Diamond*, 526 U.S. at 405-06. The Supreme Court rejected this argument, concluding that the statute required "a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." *Id.* at 406.

The *Sun-Diamond* Court's interpretation of the gratuities statute, which focused on the language of the statute ("for or because of any official act") sheds no light on the scope or proper interpretation of the *quid pro quo* element for an honest services mail fraud, extortion under color of official right, or federal programs bribery charge because none of the relevant statutes include the same language. As this Court explained, "*Sun Diamond* . . . says nothing about bribery, especially with regard to how the term 'corruptly' should be interpreted." *Alfisi*, 308 F.3d at 151 n.4; *see also United States v. Sawyer*, 239 F.3d 31, 40 n.8 (1st Cir. 2001) (finding *Sun-Diamond*'s interpretation of the federal gratuities statute to be inapplicable to bribery prosecution under federal mail fraud statute).

Furthermore, the *Sun-Diamond* Court's stated holding -- requiring a link between benefits and a "specific" official act -- merely reflected the question presented to the Court in that case, namely, whether an official act is required *at all* to sustain a conviction under the gratuities statute. The Court had no occasion to consider whether, in a case involving a series of payments and multiple official acts, and where the jury is instructed that it must find a *quid pro quo*, the jury must also be instructed to connect each payment to a specific official act. Here, there is no dispute that the government proved the existence of multiple official acts and tied those acts to various benefits. The only dispute is whether the government was further required to link specific official acts to specific benefits. On that question, *Sun-Diamond* is silent.

Finally, the defendant argues that the district court's instructions (specifically the "as specific opportunities arose" language) were improper because they conflicted with the court's instruction describing legal lobbying. According to the defendant, a lobbyist who purchases a meal for an elected official, intending to curry favor and influence decisionmaking, would be improperly convicted of bribery under the court's instructions. Defendant's Br. at 37-38. The defendant's argument fails because he reads the court's instructions in isolation. *Ford*, 435 F.3d at 210 (instructions must be read in entirety). A lobbyist (or public official) would not be convicted on his hypothetical facts because reading the court's entire charge, a gift or benefit to a public official is not criminal unless it is given corruptly, *i.e.*, with an intent to engage in a *quid pro quo*. *See supra* at 29-30 (describing instructions on *quid pro quo* elements).

The district court's jury instructions on extortion under color of official right, honest services mail fraud, and federal program bribery, considered in their entirety, correctly informed the jury of the *quid pro quo* requirements for those offenses. The court appropriately rejected the defendant's proposed instruction which would have required the jury to find a direct link between benefits and official acts in order to return a guilty verdict. For all of these reasons, the defendant's challenge to the jury charge delivered by the district court, and his request that this Court vacate his convictions and grant him a new trial, should be denied.

II. THE PROSECUTOR'S REMARKS DURING SUMMATION, NONE OF WHICH WERE OBJECTED TO BY OPPOSING COUNSEL, DID NOT CONSTITUTE A FLAGRANT ABUSE OF THE DEFENDANT'S RIGHT TO RECEIVE A FAIR TRIAL

A. Relevant Facts

During his three-hour closing argument, the defendant's attorney argued that the government had failed to prove that the defendant had corrupted the Office of the Mayor. Counsel acknowledged that the defendant had accepted gifts and meals from Grimaldi and Pinto, but explained away those actions as the "generosity of friends," A285, and as contributions by "legitimate lobbyists," A295-96. Counsel characterized as "ludicrous" and not "mak[ing] any sense" the government's claim that the defendant had corruptly accepted bribes and kickbacks or that he operated a racketeering enterprise from city hall.

A264; 315; 339. Counsel acknowledged that the defendant retained his life insurance policy after informing others it had been cancelled, and that his wife omitted income she received from Grimaldi on their income tax returns, but characterized those actions as "inadvertent" and "mistake[s]." A333-34; 347.

Picking up on the themes he had emphasized during his opening argument, counsel asserted that the government's case was based upon the unsubstantiated "lies" of Grimaldi and Pinto. He relentlessly attacked the credibility of Grimaldi, A316; 328, and Pinto, A243; 246. Counsel disparaged Grimaldi's and Pinto's claim that they ever had "a three-way split" with the defendant, A326, or that Pinto held money for the defendant's benefit, A304; 309-10; 326. Counsel argued that Grimaldi and Pinto manipulated their relationship with the defendant for their own personal benefit, A321, that they were the ones who "scammed" the city, A319; 354, and that their cooperation with the government was part of a deceitful "exit strategy" pursuant to which they would falsely accuse the defendant of corruption in order to obtain a more lenient sentence, A248; 303; 320.

In contrast, counsel described the defendant as one of the most prominent and recognizable elected officials in Connecticut, A263-64, who had planned to run for statewide office, A257; 263. Counsel depicted the defendant as a "good mayor," A297, and lauded his success in bringing the City of Bridgeport back from bankruptcy and in attracting tourists to the city, A354. Counsel claimed that all of the deals approved by the defendant had been fully "vetted out by committees"

through "layers of review," and that the defendant's conduct as mayor was motivated solely by what was "in the best interest" of the city. A294. Counsel also vouched for the defendant's truthfulness, A301, and honesty, A347, and encouraged the jury to accept "everything else he's saying here," A347. Counsel concluded his argument to the jury by stating, "What you do in that room is final. It is final for you, it is final for Joe Ganim. You cannot come back here and change that vote . . . ." A355.

The government's hour-long rebuttal argument, which raised no objections from the defense, squarely addressed the claims raised by the defense in its closing argument. At the outset of his argument, the prosecutor recited the famous P.T. Barnum quote "a sucker is born every minute," stating: "The defendant apparently believes this to be true, and he's counting on your willingness to play that role." A356. The prosecutor then challenged the defendant's claims that all of the cash, merchandise and other benefits he obtained from Grimaldi and Pinto were simply acts of friendship, that his receipt of those items was completely unrelated to the city contracts he awarded to Harbor Communications and the Kasper Group, and that he was completely unaware that a corrupt racketeering enterprise was being run out of Bridgeport city hall. The prosecutor characterized the defendant's positions as "absurd" and "insulting to your intelligence," and "just not true." A356-58. The prosecutor later suggested that the jury should not be fooled by the defendant's "sl[e]ight of hand." A397.

The prosecutor argued that the payments received by the defendant from Grimaldi and Pinto were bribes,

stating: "[T]his is the real world. This is not the world of movies or make believe. This is the world in which shady politicians like the defendant and clever bag men like Paul Pinto don't talk that way. They act with winks and nods. They don't speak about their corrupt deals on the phone and they don't memorialize their crooked deals in writing." A359. The prosecutor marshaled the evidence introduced at trial, and argued that it proved the defendant had accepted benefits from Grimaldi and Pinto with the specific intent to steer lucrative city contracts to his accomplices in return. A367-70; 372-76.

The prosecutor encouraged the jury to be skeptical of its primary witness, Paul Pinto, but at the same time to evaluate his testimony in conjunction with the testimony of other witnesses. A383-86. The prosecutor reviewed the terms of Pinto's plea agreement with the government, and urged the jury to consider the potential consequences to Pinto under his agreement with the government if he perjured himself at trial. A382. The prosecutor also took issue with the defendant's notion of Pinto's supposed "grand exit strategy," stating:

> Some strategy, ladies and gentlemen. If you believe that, you believe that Paul Pinto pled guilty to taking money from Lennie Grimaldi and the mayor is not involved in any of those transactions. Where is the crime, one consultant paying another consultant, exercising municipal lobbying activities, as the defense would have you believe. As counsel said, no crime in that.

> So, part of this grand exit strategy of Mr. Pinto is that he's going to plead guilty to racketeering, mail fraud, tax fraud, expose himself to 28 years in prison, pay 400,000 in forfeited money, another $300,000 in taxes that are due, restitution yet to be imposed, place a lien on his house, all so he could implicate Joe Ganim?

A385-86.

The prosecutor challenged the defendant's honesty and trustworthiness by pointing out the myriad instances in which he had improperly used the powers of his office to "feather[] his own nest," A370-71, and by referring to evidence of acts of dishonesty established at trial. In particular, the prosecutor reminded the jury that the defendant had admitted he falsified his tax returns, had provided false information to banks, and had deceived members of his own administration about the cancellation of his life insurance policy and then "lied" to the city council and press about it. A388-89. The prosecutor then stated:

> And those matters, ladies and gentlemen, pale in comparison to what is a stake in this case. And if he wasn't truthful then, do you really believe he was being straight with you the other day. This is a politician, a man who speaks with a forked tongue for a living. He hires pol[l]sters to figure out what the public wants to hear and then hires the spin doctors to craft the words that he's to say to

> the public. And he's asking you to trust, to have confidence in what he has to say.

A389-90.

The prosecutor also described the cost of doing business in Bridgeport as the "Ganim tax," stating: "It's the price that the citizens of Bridgeport paid for the defendant's greedy, graft-ridden, grab-what-you-can-grab-while-you-can-grab-it betrayal of his duties as mayor, a city in which you have to pay to play, and where the chosen people get chosen, a city where the fix is in and where Ganim and Pinto and Grimaldi laugh all the way to the bank." A398-99.

The prosecutor urged the jury to scrutinize the defendant's testimony for bias and self-interest, and to question the defendant's assertion that genuine friendship and legitimate lobbying practices justified his actions. A370-71; 388-90. The prosecutor characterized the defendant's testimony as "evasive," "self-serving," and at times "incredible." A390. He concluded his argument by stating:

> Now some would say you can't fight city hall. PT Barnum knew better. He once said the public is wiser than many imagine. You, the jury, represent the public in this case. You represent the little people. It's your sworn duty to act impartially and without bias to consider the evidence and return a true verdict. We all know you will exercise those duties conscientiously, and when you do, you will find that the evidence has established beyond a

> reasonable doubt that the defendant, Joseph Ganim, is guilty as charged.
>
> . . .
>
> I would ask you to convict Joseph Ganim . . . and I submit when you do, ladies and gentlemen, you will sleep well knowing that you have done the right thing.

A399-400.

B. Governing Law and Standard of Review

A prosecutor enjoys wide latitude in giving his closing argument so long as he does not misstate the evidence. *United States v. Edwards*, 342 F.3d 168, 181 (2d Cir. 2003); *United States v. Tocco*, 135 F.3d 116, 130 (2d Cir. 1998); *United States v. Myerson*, 18 F.3d 153, 163 (2d Cir. 1994). "[A] prosecutor is not precluded from vigorous advocacy, or the use of colorful adjectives, in summation." *United States v. Jaswal*, 47 F.3d 539, 544 (2d Cir. 1995) (quoting *United States v. Rivera*, 971 F.2d 876, 884 (2d Cir. 1992)). The prosecutor is also given broad range regarding the inferences he may suggest to the jury during his summation. *Edwards*, 342 F.3d at 181; *United States v. Nersesian*, 824 F.2d 1294, 1327 (2d Cir. 1987).

In addition, when a defendant testifies at trial, and thus places his credibility in issue, the prosecutor is permitted to give a fair appraisal of the defendant's testimony and demeanor. *Edwards*, 342 F.3d at 181. Moreover, a prosecutor may also make temperate use of forms of the

word "lie" to highlight evidence directly conflicting with the defendant's testimony. *See United States v. Thomas*, 377 F.3d 232, 244 (2d Cir. 2004); *United States v. Coriaty*, 300 F.3d 244, 255-56 (2d Cir. 2002); *United States v. Shareef*, 190 F.3d 71, 79 (2d Cir. 1999).

Although nothing requires the government to disarm unilaterally when entering rhetorical battles with defense counsel, there are limits to the latitude given a prosecutor in summation. A prosecutor is generally prohibited in closing argument from offering his personal beliefs or opinions to the jury, *United States v. Rivera*, 22 F.3d 430, 437 (2d Cir. 1994); *Nersesian*, 824 F.2d at 1327-28, or from making excessive use of the personal pronoun "I," *United States v. Modica*, 663 F. 2d 1173, 1181 (2d Cir. 1981), although these forms of expression are permissible if they "clearly communicate[] nothing more than a comment on the evidence," *Jaswal*, 47 F.3d at 544. A prosecutor is also prohibited from vouching for the credibility of the government's witnesses. *United States v. Newton*, 369 F.3d 659, 681 (2d Cir.), *cert. denied*, 543 U.S. 947 (2004); *Modica*, 663 F.2d at 1178-79. Finally, a prosecutor is prohibited from offering comments that are calculated solely to inflame the passions or prejudices of the jury. *Shareef*, 190 F.3d at 79; *United States v. Marrale*, 695 F.2d 658, 667 (2d Cir. 1982); *Modica*, 663 F.2d at 1180.

These limitations on the prosecution's summation are in turn tempered by the "fair response" doctrine. "Under the invited or fair response doctrine, the defense summation may open the door to an otherwise inadmissible prosecution rebuttal. In particular, where the

defense summation makes arguments and allegations against the government, the prosecutor may respond to them in rebuttal." *Tocco*, 135 F.3d at 130 (citations omitted); *Rivera*, 971 F.2d at 883; *see also United States v. Carr*, 424 F.3d 213, 227 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1447 (2006).

An inappropriate comment by the prosecutor, standing alone, will not ordinarily justify the reversal of a criminal conviction in an otherwise fair proceeding. *United States v. Young*, 470 U.S. 1, 11-12 (1985). The prosecutor's remarks must be examined within the context of the entire trial to determine whether the behavior amounted to prejudicial error. *Id.*; *Thomas*, 377 F.3d at 244; *Nersesian*, 824 F.2d at 1327. To warrant reversal, the challenged statements must cause the defendant "substantial prejudice" by so infecting the trial with unfairness that the resulting conviction is a denial of due process. *Thomas*, 377 F.3d at 244; *Shareef*, 190 F.3d at 78.

Where, as here, the defense failed to make a timely objection to the prosecutor's summation, the statement will not be deemed a ground for reversal unless it amounted to "flagrant abuse." *Carr*, 424 F.3d at 227; *Coriaty*, 300 F.3d at 255; *Rivera*, 22 F.3d 437. In deciding whether the challenged comments meet this test, this Court considers "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the certainty of conviction absent the improper statements." *Thomas*, 377 F.3d at 245; *Shareef*, 190 F.3d at 78. "The 'severity of the misconduct is mitigated if the misconduct is an aberration in an otherwise fair proceeding.'"

Thomas, 377 F.3d at 245 (quoting *United States v. Elias*, 285 F.3d 183, 191 (2d Cir. 2002)).

C. Discussion

The prosecutors' remarks during closing argument did not amount to a "flagrant abuse" of the defendant's rights, let alone deprive him of a fair trial. The prosecutors properly marshaled the evidence that was introduced at trial, suggested reasonable inferences which the jury could find from the evidence, and rebutted claims made by the defense in its closing argument, all in advancing the government's claim that the defendant was guilty of the charges set forth in the indictment. The prosecutors' arguments, while zealous, were both fair and proper.

Although defense counsel did not object at the time, the defendant now questions the propriety of certain isolated comments made by the prosecutors during closing argument. The defendant objects to a single sentence in the government's two hour initial summation. He also objects to approximately ten remarks made by the prosecutor during the rebuttal summation. The prosecutors' ostensibly improper remarks were thus limited to a relatively small portion of the government's overall summation. When viewed in the context of the entire three-month trial -- about which there are no claims of impropriety -- the prosecutors' isolated comments are even more inconsequential. *See Thomas*, 377 F.3d at 245 (challenge to comments in summation must be considered in context of entire trial); *Carr*, 424 F.3d at 230 (considering prosecutor's comments "in the context of the trial as a whole").

The defendant initially takes issue with the prosecutor's recitation of the famous P.T. Barnum quote: there is "a sucker . . . born every minute." A356. The prosecutor used this rhetorical device at the outset of the rebuttal argument to engage the jury, who by that time had been listening to the arguments of counsel for more than five hours. The prosecutor's reference to Barnum, himself a former mayor of Bridgeport and one of America's most notorious salesmen, was merely intended to alert the jury of the need to guard against being too easily beguiled by the equally well-spoken sitting mayor of Bridgeport. There was nothing untoward or improper about the prosecutor's remark. *See Marrale*, 695 F.2d at 667 (finding no error in the prosecutor's repeated warnings to the jury that they not be "fooled" by the defense tactics).

The defendant also challenges the prosecutor's characterizations of his case as "absurd" and a "sl[e]ight of hand." A358; 397. However, each of those remarks constituted permissible expressions of vigorous advocacy by the government. *Jaswal*, 47 F.3d at 544 (finding no error in prosecutor's characterization of the defendant's case as a "fairy tale"); *Rivera*, 971 F.2d at 884 (finding no error in prosecutor's references to defendant's case as "smoke screens" and "game playing"). Likewise, the defendant objects to the prosecutor's statement that the defense was "insulting to [the jury's] intelligence." A358. Although this Court has criticized a prosecutor's employment of a similar phrase, *see United States v. Gonzalez*, 488 F.2d 833, 836 (2d Cir. 1973), its use in closing argument does not constitute *per se* grounds for reversal where, as here, in the context of the entire trial, the prejudicial impact of the remark, if any, was negligible

in view of the overwhelming evidence of the defendant's guilt, *United States v. Bivona*, 487 F.2d 443, 445-47 (2d Cir. 1973) (affirming conviction despite disapproval of prosecutor's assertion of his personal belief in the defendant's guilt given the defense's "barrage" against the credibility of the government's witnesses, and the fact that, in the overall context of the trial, the prosecutor's remarks did not substantially prejudice the defendant).

The defendant further objects to the prosecutor's description of his testimony as "incredible." A390. However, where as here, the defendant testified at trial, and thereby placed his credibility at issue, the prosecutor was free to comment about his veracity and demeanor. *Edwards*, 342 F.3d at 181; *Coriaty*, 300 F.3d at 255. Nor was it improper for the prosecutor to highlight for the jury evidence that the defendant had misled members of his administration and the city council about the cancellation of his life insurance policy. The prosecutor's singular use of the word "lied" to describe the defendant's testimony, A389, was neither excessive nor inflammatory. *See Thomas*, 377 F.3d at 245 (noting that a prosecutor's use of any form of the word "lie" in closing argument is not misconduct, especially when witness credibility is at issue); *Shareef*, 190 F.3d at 79 (finding that "it is not ordinarily improper for the prosecution to make temperate use of forms of the word 'lie' . . . 'to characterize disputed testimony' where credibility was clearly an issue") (quoting *United States v. Peterson*, 808 F.2d 969, 977 (2d Cir. 1987)).

The defendant also challenges as prejudicial the prosecutor's description of him as a "shady politician[]"

and as a "man who speaks with a forked tongue." A359; 389. These remarks, however, were fully proper responses to defense arguments. One of the central tenets of the defense was that the defendant was a "good mayor" and an "honest" man who would not jeopardize his reputation by engaging in corruption, A297; 347. Against this backdrop, there was nothing inappropriate about the prosecutor's attempt to cast him in a more critical light. *See United States v. Russo*, 302 F.3d 37, 47 (2d Cir. 2002) (finding no error where prosecutor referred to defendants as "powerful gangsters," "mafioso," and "mob bosses"); *United States v. Millar*, 79 F.3d 338, 343 (2d Cir. 1996) (finding that prosecutor's reference to defendant's status as a priest was not inflammatory where statements were a legitimate rejoinder to defendant's efforts to portray himself as "a holy and pious man of good works"); *United States v. Zackson*, 12 F.3d 1178, 1183 (2d Cir. 1993) (finding no error where prosecutor repeatedly called the defendant an "experienced drug dealer").

In addition, the prosecutor's "forked tongue" comment was a clear and permissible reference to the defendant's own testimony in which he admitted using pollsters and public relations consultants to assist him with his trial strategy. T7077-82. The prosecutor's statement was also an appropriate response to the defense attorney's repeated references to Grimaldi as an "artful spin doctor." A328. *See Rivera*, 971 F.2d at 883 (finding that challenged statements were appropriate under the invited response doctrine where the prosecutor was attempting to focus the jury's attention upon the evidence and away from defense counsel's claims).

The defendant also challenges the propriety of the prosecutor's remark that "Ganim and Pinto and Grimaldi laugh[ed] all the way to the bank." A398-99. However, the use of this figure of speech was entirely appropriate since the statement was rooted in evidence introduced at trial that Pinto had repeatedly made trips to the bank to obtain bank checks and money orders for the defendant. T4621-24; 4630-31. The prosecutor's comment was no more likely to incite the jury's emotions than the defense's equally innocuous reference to Pinto as the "First National Bank of Paul Pinto." A304.

The defendant also criticizes several of the prosecutor's statements about Paul Pinto. For example, the defendant criticizes the prosecutor's statement that, "If you believe that, you believe that Paul Pinto pled guilty to taking money from Lennie Grimaldi and the mayor [was] not involved in any of those transactions." A385. This statement, when placed in context, was offered by the prosecutor in response to the defense counsel's repeated assertion that Pinto and Grimaldi pleaded guilty as part of an "exit strategy." A284; 303; 320. In order to highlight the implausibility of the defendant's claim, the prosecutor queried aloud: "Where is the crime, one consultant paying another consultant, exercising municipal lobbying activities, as the defense would have you believe. As counsel said, no crime in that." A385. The prosecutor also discussed the terms of Pinto's plea agreement, including the fact that he could be prosecuted for perjury if he testified falsely at trial, as part of his critique of the defendant's "exit strategy" argument. A382; 385-86. The prosecutor did not offer Pinto's guilty plea as substantive evidence of the defendant's guilt. Both the prosecutor's

reference to Pinto's plea, *see United States v. Louis*, 814 F.2d 852, 855 (2d Cir. 1987) (prosecutor is permitted to place evidence of the conviction of a co-conspirator before the jury for the purpose of disclosing matters damaging to the credibility of the witness), and his overall response to the defendant's "exit strategy" argument were proper, *Tocco*, 135 F.3d at 130 (finding no error where prosecutor's ostensibly improper comments were fair responses to the defense summation); *Rivera*, 971 F.2d at 883 (same). *See also Carr*, 424 F.3d at 227-29 (prosecutor's remarks emphasizing that its witnesses had cooperation agreements requiring them to tell the truth were proper as response to defense attacks on the witnesses' credibility).

Finally, the defendant takes issue with certain of the prosecutor's concluding remarks to the jury. The defendant contends that those comments provoked the jury, and caused the jurors to view themselves as victims of the charged offenses. However, none of the prosecutor's statements was improper. The prosecutor's remark that "some would say you can't fight city hall," A399, was a direct reference to Bridgeport City Hall from which the defendant was accused of operating a racketeering enterprise. *See* A29-30. The prosecutor's statement that "[y]ou [the jury] represent the little people" was intended to remind the jurors that they represented the public, and was no different than comparable advice offered by the defense attorney to the jury during his summation. *See* A222 ("You sit here as the conscience of the community."). The prosecutor followed this remark by further reminding the jury of their "sworn duty to act impartially and without bias to consider the evidence and

return a true verdict." A399. Lastly, the prosecutor's statement that the jury "will sleep well knowing that you have done the right thing,"A400, was a comment on the strength of the government's case against the defendant, and was offered in response to counsel's suggestion that the jury would be burdened with second thoughts if they returned guilty verdicts against the defendant, A355.

Each of the prosecutors' challenged remarks was proper and well within the bounds of acceptable prosecutorial advocacy. Even if any of the prosecutors' remarks exceeded those limits, none was so flagrant or egregious as to warrant the reversal of the defendant's conviction. Any prejudice that arguably resulted from the prosecutors' comments was substantially mitigated by the fact that the district court advised the jury that the arguments of counsel were not evidence. A410. *See United States v. Elias*, 285 F.3d 183, 190 (2d Cir. 2002) (court's instruction that statements of attorneys were not evidence was sufficient to cure potential prejudicial impact of prosecutor's improper remarks in closing argument).

In addition, it is evident from the length of the deliberations, and from the jury's repeated requests to rehear critical testimony given by the defendant and others, that the jurors methodically considered the evidence introduced during the three months of trial. The fact that the jury deliberated for eight days, and returned a verdict in which they found the defendant guilty of only sixteen of the twenty-one charges against him, further gives rise to the conclusion that the defendant was convicted on the basis of the evidence offered against him at trial, and not because of any arguably improper remarks

made by the prosecutors during their rebuttal summation. *See Young*, 470 U.S. at 18, n.15; *Nersesian*, 824 F.2d at 1328.

Moreover, given the strength of the government's proof at trial, any possible prejudice attributable to the prosecutors' closing remarks was insignificant. *Thomas*, 377 F.3d at 245-46 (affirming conviction despite allegations that the prosecutor made inappropriate comments during his closing argument where proof of the defendant's guilt was strong); *Elias*, 285 F.3d at 192 (same); *Modica*, 663 F.2d at 1181-82 (same). Given the overwhelming evidence of the defendant's guilt in this case, there is simply no basis to vacate the defendant's conviction or grant him a new trial.

In response, the defendant relies on two decisions of this Court, *Gonzalez*, 488 F.2d 833, and *United States v. Drummond*, 481 F.2d 62 (2d Cir. 1973), but this reliance is misplaced. In both *Gonzalez* and *Drummond*, this Court reversed convictions because of "repeated" and "consistent" "pattern[s] of misconduct" by a prosecutor (the same prosecutor in both cases)[8] which gave rise to "grave doubts about the fairness of the proceedings below." *Gonzalez*, 488 F.2d at 836; *see also Drummond*, 481 F.2d at 62. In *Gonzalez*, for example, over the contemporaneous objections of the defense and with no provocation, the prosecutor in summation misrepresented facts in evidence, repeatedly called the defendant a liar, used inflammatory language, and made derogatory

[8] The same prosecutor had been reprimanded by this Court on two prior occasions. *See Gonzalez*, 488 F.2d at 836.

comments about defense counsel's successful objections to evidence. 488 F.2d at 836. Similarly, in *Drummond*, despite repeated warnings from the trial judge about his conduct, the prosecutor expressed his personal beliefs about the guilt of the defendant, attempted to use the prestige of his office to vouch for government witnesses, and misstated testimony. 481 F.2d at 62. In sharp contrast, even if any of the prosecutors' isolated remarks in the instant case were improper, none was so egregious as to infect the entire trial with unfairness or render the defendant's conviction a denial of due process.

In sum, the prosecutors' remarks during the summation did not constitute a flagrant abuse of the defendant's right to receive a fair trial. Nor has the defendant shown that, but for the prosecutors' ostensibly improper remarks, he would not have been convicted at trial. Accordingly, the defendant's request for a new trial should be denied.

III. THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR BY FAILING, *SUA SPONTE,* TO RECESS JURY DELIBERATIONS AFTER MEETING WITH A JUROR WHO HAD LOST HER JOB

A. Relevant Facts

The jury deliberated for eight days. On March 19, 2003, the jury's eighth day of deliberations, one of the jurors notified the judge that she was being laid off from her job. The judge met with the juror in chambers, and the following colloquy ensued:

Court: All right, this is [Ms. C.], and she has advised the Court through the foreperson that she was notified she's being laid off, and you say that you have reason to believe this may have something to do with your absence while serving as a juror.

Juror: Yes, ma'am.

Court: I wanted to give you a copy of the federal statute that tells you what your rights and procedures are if you believe that to be the case.

Juror: Okay.

Court: And you may make application to the district court and the court shall, upon a finding of probable merit in your claim, appoint you counsel to represent you, and counsel is compensated and necessary expenses repaid under another federal statute.

Juror: Okay.

Court: So, I'm going to give you a copy of this [federal statute] because that tells you how to go about -- that gives you a remedy that you may have.

Juror: Okay.

Court: The second is you say you are extremely upset about this, and so I must inquire whether or not, now that I have told you what your remedy is, you can continue to deliberate on this case as you have in the past.

Juror: Yes, but I'm -- I just need a little time. Like, I didn't sleep last night at all because when I left here I went directly -- went over to human resources, and that's when they told me. So, I'm a little fogged today, I mean my mind, but other than that, I mean, yes.

Court: So that if you're fogged you can tell people to slow down and go more slowly; is that correct?

Juror: Right. Yes, ma'am.

Court: And you have no shyness about doing that?

Juror: I already have.

Court: All right then. So is there anything further that I can do or provide for you that will make you able to continue with your deliberations in a fully functioning fashion?

Juror: Patience. I think today is the hardest day, is the first day knowing. So after that it will set in. I guess I just have a lot of bad luck. I know I'm not answering your question.

Court: No, what I want to make sure is if you are not able to continue to deliberate, that we not have you continue to deliberate.

Juror: Right. I don't think that's the case. I think I will be all right. Just I'm still in a little shock. I've been here so long and I just -- I'm speechless. But I'm going to be okay.

Court: You're capable of compartmentalizing?

Juror: Yes.

Court: Okay. Well, take a copy of that statute, and that will allow you to take what further steps you think are necessary.

Juror: Okay.

Court: All right?

Juror: Yes ma'am.

Court: Thank you very much.

A639-41.

B. Governing Law and Standard of Review

District courts retain broad discretion to manage issues with jurors that arise during deliberations. *See United States v. Paulino*, 445 F.3d 211, 226 (2d Cir. 2006). Indeed, under Rule 23(b) of the Federal Rules of Criminal Procedure, a court may, in its discretion, excuse a juror for "good cause" "[a]fter the jury has retired to deliberate," and accept a verdict from the remaining eleven jurors. Fed. R. Crim. P. 23(b)(3). This Court has read the "good cause" standard of the rule to embrace "all kinds of problems -- temporary as well as those of long duration -- that may befall a juror during deliberations."[9] *United States v. Reese*, 33 F.3d 166, 173 (2d Cir. 1994); *United States v. Stratton*, 779 F.2d 820, 830-32 (2d Cir. 1985).

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[9] In 2002, Rule 23(b) was amended to replace the phrase "just cause" with the current "good cause" language. This language change was part of a general "restyling" of the Criminal Rules and was not intended to change the substance of the standard. Fed. R. Crim. P. 23(b) Note. *See United States v. Ginyard*, 444 F.3d 648, 653 (D.C. Cir. 2006) (linguistic changes were not intended to reflect change in substance); *Paulino*, 445 F.3d at 225-26 (applying "good cause" standard in reliance on cases decided under prior "just cause" standard).

It is well settled that a district court has substantial discretion in exercising its responsibilities under Rule 23(b) to determine whether a juror's abilities to perform her duties have become impaired. *United States v. Baker*, 262 F.3d 124, 129 (2d Cir. 2001); *United States v. Walsh*, 75 F.3d 1, 5 (1st Cir. 1996). The determination of "[w]hether and to what extent a juror should be questioned regarding the circumstances of a need to be excused is also within the trial judge's sound discretion." *Reese*, 33 F.3d at 173; *United States v. Mulder*, 273 F.3d 91, 108 (2d Cir. 2001). "All that is needed to satisfy a prudent exercise of discretion is to be certain the trial court had sufficient information to make an informed decision." *Paulino*, 445 F.3d at 226 (quoting *Reese*, 33 F.3d at 173).

Ordinarily, a district court's decision whether or not good cause exists to dismiss a juror after jury deliberations have begun is reviewed for abuse of discretion. *Paulino*, 45 F.3d at 225; *Mulder*, 273 F.3d at 108. However, where counsel does not contemporaneously object, the court's decision on how to handle a juror issue arising after deliberations begin is reviewed for plain error. Fed. R. Crim. P. 52(b); *Walsh*, 75 F.3d at 5.

A trilogy of decisions by the Supreme Court interpreting Fed. R. Crim. P. 52(b) has established a four-part plain error standard. *See United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Olano*, 507 U.S. 725, 732 (1993). Under plain error review, before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that was "plain" (which is "synonymous with 'clear' or equivalently 'obvious'"), and

(3) that affected the defendant's substantial rights. *Olano*, 507 U.S. at 734. "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467 (internal citations and quotations omitted).

C. Discussion

The defendant contends that, upon learning that one of the jurors had lost her job, the district court erred by failing, *sua sponte*, to stop the jury's deliberations for the day. The defendant argues that the court's failure to do so amounted to plain error warranting a reversal of his conviction or a new trial. The defendant's claim is wholly without merit.

There was no error in this case, much less plain error, because the district court properly exercised its discretion. Immediately upon learning that the juror had lost her job, the court brought the juror into chambers and provided her with a copy of the applicable statute which explained her rights as a juror under federal law. A639. The court then questioned the juror at length regarding her ability to continue deliberating in the case. The court specifically advised the juror that "what I want to make sure is if you are not able to continue to deliberate, that we not have you continue to deliberate," to which the juror replied: "Right. I don't think that's the case. I think I will be all right." A640-41. Although the juror indicated that she was a "little fogged," A640, she clearly stated in response to the court's inquiry that she was both able and willing to

continue deliberating, and, if necessary, that she would not hesitate in asking her fellow jurors to proceed more slowly with their discussions. A640-41. In response to the court's questioning, the juror also indicated that she could "compartmentaliz[e]" her duties as a juror from her concerns about the loss of her job. A641. The juror did not request to be excused, either temporarily or permanently, from the panel. Nor did defense counsel, who were fully apprised of the situation, contemporaneously object to or express any reservations about the court's decision to proceed with deliberations.

The defendant now argues that the district court abused its discretion because its decision to proceed with deliberations was "directly contrary to the information it had gained" in its inquiry of the juror.[10] Defendant's Br. at 59. The defendant's argument misreads the record. The court conducted a thorough inquiry and specifically inquired whether the juror felt she was unable to continue deliberations. The juror answered, "Right. I don't think that's the case." A640-41. At the conclusion of the colloquy, the juror never asked to be excused (either permanently or temporarily), and never objected to the judge's direction to continue deliberations that day. On this record, the court's decision was fully consistent with the information it gleaned through its inquiries with the juror.

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[10] The defendant suggests that the court's decision was an attempt to accommodate the vacation schedule of another juror. The district court *never* linked the two issues, and thus any suggestion to the contrary is pure speculation.

In sum, in this case, the district court properly discharged its duty to make an informed decision about the juror's ability to continue deliberating in the case. The court personally met with the juror and immediately addressed her concerns about her job. The court then questioned her about her condition, observed her demeanor, and determined that she was able to continue deliberating. In the absence of any objection from defense counsel, the court's decision to proceed, rather than to adjourn deliberations for the day or excuse the juror from further service, was an appropriate exercise of the court's discretion. *See Mulder*, 273 F.3d at 108-109 (upholding district court's refusal to excuse juror who claimed her employer would not pay her while she was on trial where the trial judge addressed the juror's financial concerns, the juror did not protest the court's decision, and defense counsel did not renew a request to excuse the juror). Because the district court did not err, let alone commit plain error, by requiring the juror to proceed with deliberations, the defendant's request for reversal or a new trial should be denied.

IV. THIS COURT SHOULD REJECT THE DEFENDANT'S REQUEST TO RECONSIDER *CROSBY*

On July 1, 2003, the district court held a sentencing hearing. Applying prevailing law, the court calculated the defendant's sentence using the 1998 Sentencing Guidelines. Under the guidelines, the court determined that the defendant's base offense level was 29. With a Criminal History Category of I, this translated into a guidelines range of 87 to 108 months. After considering

arguments of counsel, the district court sentenced the defendant to the top of his guidelines range, 108 months.

After judgment entered, the defendant filed a timely notice of appeal. While the appeal was pending, the Supreme Court decided *Booker*, and this Court remanded this case to the district court under *Crosby*. On May 5, 2006, the district court issued an opinion rejecting the defendant's request for resentencing. According to the district court, it would not have imposed a materially different sentence if it had sentenced the defendant under an advisory guidelines regime. SA13.

In this Court, the defendant raises some unspecified challenge to *Crosby* to preserve the issue for review "at another level." Defendant's Br. at 62. Because this Court is bound by *Crosby* unless and until it is overruled by the Supreme Court or this Court sitting *en banc*, *see United States v. Santiago*, 268 F.3d 151, 154 (2d Cir. 2001), this Court should reject the defendant's vague attack on that decision.

V. THE DEFENDANT'S NINE-YEAR SENTENCE, A SENTENCE WITHIN THE GUIDELINES RANGE, IS REASONABLE

A. Relevant Facts

1. The Sentencing Hearing

At the defendant's sentencing hearing, the district court calculated the defendant's total adjusted offense level under the Sentencing Guidelines to be 29, and placed him in Criminal History Category I. These calculations resulted in a sentencing range under the guidelines of 87-108 months. A586.

Before choosing a point within that range for sentencing, the district court heard and considered the arguments of counsel. Counsel for the defendant argued, in his sentencing memorandum and in his arguments to the court, that the defendant should be sentenced at the low end of the guidelines range based upon his good works for Bridgeport. In support of this request, the defendant had submitted more than 100 letters from individuals who described the defendant's contributions to the quality of life in Bridgeport during his tenure as mayor.

The district court rejected this request, choosing instead to sentence the defendant to a term at the top of the guidelines range, 108 months. The court explained that while the record showed that the defendant had significant "energy, charisma, vision, communication and leadership skills" that he used for the good of Bridgeport, he also

used those same talents to "enrich[] himself." A616. The court continued as follows:

> I have read the letters and I have considered this, as I have considered what the sentence in this case should be, and why, and I've concluded that what Joseph Ganim did for the good of Bridgeport really is not to be considered as a factor in the sentencing of a corruption case because that's what a good mayor does. . . .
>
> So, it seems to me in consideration of what is the appropriate punishment for this pervasive and long scheme of corruption, not to consider and weigh and balance the achievements of the defendant as mayor: The simple reason is that we don't have a sliding scale for punishing corruption. There is no excuse for corruption from elected public officials. There is no exception for corruption for the good mayors. . . .

A616-17.

2. The *Crosby* Remand Proceedings

The defendant appealed, but before briefing was complete, the Supreme Court issued its decision in *Booker*. On the government's motion, this Court ordered a limited remand pursuant to *Crosby*.

On May 5, 2006, the district court issued its ruling rejecting the defendant's request for resentencing. In sum, the court found that resentencing was unnecessary

because "[the court] would not have imposed a materially different sentence on [the defendant] had it sentenced him with the understanding that the Guidelines were advisory." SA13.

As relevant here, the court found no basis for the defendant's argument that it had failed to consider his good works as mayor during the original sentencing process. The court explained that "[a]t sentencing, this Court considered [the defendant's] evidence and argument, including numerous letters from members of the community extolling his success in public office." SA9. These achievements, however, did not outweigh the need for the defendant's sentence to reflect the seriousness of his offense. SA9-10.

Furthermore, the court specifically found that nothing in the new, post-*Booker* sentencing regime changed this conclusion:

> The Court recognizes its duty under 18 U.S.C. § 3553(a)(1) to consider the defendant's history and characteristics, including his accomplishments as mayor, and already has considered this information, but remains persuaded that it should be given a lesser weight in the context of a top elected municipal official who criminally and shamelessly flouts his lawful authority and the public trust. [The defendant] was convicted of corrupting the very public office he used for the good works for which he now claims credit. While he may take credit for at least a portion of Bridgeport's economic turnaround while he was its

> chief executive, even more money and opportunity potentially would have been available for the public's benefit had the defendant not been getting kickbacks from city contractors and had he not awarded the contracts to and through his co-conspirators rather than permitting a genuine competitive bidding process. [The defendant] used his power as mayor both for city improvements and for racketeering, extortion and fraud, and positive results do not counterbalance his crimes. As the Court stated at the sentencing hearing, "we cannot have a sliding scale that punishes those who are good but corrupt less than those that are not as successful and equally corrupt." [citation omitted]. Indeed, under Section 3553(a)(2)(A)'s requirement to consider the "seriousness of the criminal offense," the nature of [the defendant's] corruption of his public office stands out.

SA10.

The district court also rejected the defendant's argument, based on statistics showing national average sentences for specific crimes, that resentencing was necessary to avoid unwarranted sentencing disparities. The district court noted first that while the evidence submitted by the defendant showed that the mean sentence for a bribery conviction in 2003 was 9.7 months, this same evidence showed that the mean sentence for racketeering/extortion -- a crime for which the defendant was convicted -- was six years. SA12. More significantly, however, the statistics provided no information to suggest that the crimes behind the statistics involved defendants

who were *similarly situated* to the defendant. Thus, the court concluded, "[t]he statistics do not provide a basis for comparing defendant with similarly-situated defendants." *Id.*

B. Governing Law and Standard of Review

The sentencing guidelines are no longer mandatory, but rather represent one factor a district court must consider in imposing a reasonable sentence in accordance with § 3553(a). *See Booker*, 543 U.S. at 259-60; *see also Crosby*, 397 F.3d at 111-14. Section 3553(a) provides that the sentencing "court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection," and then sets forth seven specific considerations. As relevant here, those considerations include "the nature and circumstances of the offense and the history and characteristics of the defendant," and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. §§ 3553(a)(1), (6).

In *Crosby*, this Court explained that, in light of *Booker*, district courts should now engage in a three-step sentencing procedure. First, the district court must determine the applicable guidelines range. *Crosby*, 397 F.3d at 112. Second, the district court should consider whether a departure from that guidelines range is appropriate. *Id.* Third, the court must consider the guidelines range, "along with all of the factors listed in section 3553(a)," and determine the sentence to impose. *Id.* at 112-13. The fact that the sentencing guidelines are

no longer mandatory does not reduce them to "a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." *Id.* at 113. A failure to consider the guidelines range and to instead simply select a sentence without such consideration is error. *Id.* at 115.

In *Booker*, the Supreme Court ruled that courts of appeals should review post-*Booker* sentences for reasonableness. *See Booker*, 543 U.S. at 261. There are two dimensions to this reasonableness review. First, the Court will assess procedural reasonableness -- whether the sentencing court complied with *Booker* by (1) treating the guidelines as advisory, (2) considering "the applicable Guidelines range (or arguably applicable ranges)" based on the facts found by the court, and (3) considering "the other factors listed in section 3553(a)." *Crosby*, 397 F.3d at 115. Second, the Court will review sentences for their substantive reasonableness -- that is, whether the length of the sentence is reasonable in light of the applicable guidelines range and the other factors set forth in § 3553(a). *Id.* at 114.

As this Court has held, "'reasonableness' is inherently a concept of flexible meaning, generally lacking precise boundaries." *Id.* at 115. The "brevity or length of a sentence can exceed the bounds of 'reasonableness,'" although this Court has observed that it "anticipate[s] encountering such circumstances infrequently." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005). An evaluation of whether the length of the sentence is reasonable will necessarily "focus . . . on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." *United States*

v. Canova, 412 F.3d 331, 350 (2d Cir. 2005); *see Booker*, 543 U.S. at 261 (holding that factors in § 3553(a) serve as guides for appellate courts in determining if a sentence is unreasonable).

This Court has declined to adopt a formal presumption that a within-guidelines sentence is reasonable, but 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), *pet'n for cert. filed* (No. 06-21, June 30, 2006); *see also United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006) ("In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.").

The Court has recognized that "[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge 'exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.'" *Fernandez*, 443 F.3d at 27 (citations omitted). In assessing the reasonableness of a particular sentence imposed, this Court has cautioned that "[a] reviewing court should exhibit restraint, not micromanagement." *United States v. Fairclough*, 439

F.3d 76, 79 (2d Cir.) (per curiam), *cert. denied*, 126 S. Ct. 2915 (2006).

C. Discussion

The defendant argues that his sentence is unreasonable because the district court (1) failed to consider his good works as mayor, and (2) on remand, refused to allow a hearing to consider his claim that his original sentence reflected an unwarranted sentencing disparity. Both of these arguments are without merit.

1. The District Court Fully Considered Evidence About the Defendant's Good Works as Mayor When Imposing Sentence

The defendant contends that the district court erred by refusing to balance his "good works" and achievements as mayor in the selection of his sentence. This argument is based on a misreading of the record, and on a misunderstanding of the *Crosby* remand process.

The record in this case reflects that the district court carefully considered the evidence and arguments concerning the defendant's background, character and conduct prior to imposing sentence in this case. During the sentencing hearing, the court indicated that it had considered the Pre-Sentence Report and the defendant's sentencing memorandum, both of which describe the defendant's personal and professional background in great detail. July 1, 2003 Sentencing Transcript ("Tr.") 1-6; 101; PSR at ¶¶ 62-83. In addition, the district court

indicated that it had read the many letters from community leaders, constituents and political supporters who had written to the court urging leniency on the defendant's behalf. Tr. 101. Finally, the district court also stated that it had taken into account the defendant's "energy, charisma, vision, communication and leadership skills," skills that he used "to move Bridgeport from the brink of bankruptcy into a forward motion," in fashioning an appropriate sentence. *Id.*

The district court ultimately decided -- in a proper exercise of its discretion -- not to give the defendant's achievements significant weight when fashioning the sentence in this case. *See id.* at 101-06. That the district court elected not to adjust the defendant's sentence to reflect his positive achievements as mayor is not error; it is merely the proper exercise of discretion by a sentencing judge. *See Fernandez*, 443 F.3d at 32 ("The weight to be afforded any given argument made pursuant to one of the § 3553(a) factors is a matter firmly committed to the discretion of the sentencing judge and is beyond our review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented.").

Even if there were any doubt about whether the district court considered the defendant's good works as mayor in the original sentencing process, that doubt evaporated when the district court announced that it had, in fact, considered the defendant's achievements as mayor at sentencing. In its decision on *Crosby* remand, the district court stated unequivocally that "[a]t sentencing, this Court considered [the defendant's] evidence and argument, including numerous letters from members of the

community extolling his success in public office." SA9. *See also id.* at 10. The defendant offers no reason for this Court to reject these statements by the sentencing judge.

Finally, even assuming *arguendo* that the district court erred by failing to consider the defendant's achievements as mayor during the original sentencing process, the *Crosby* remand process demonstrates that this error had no material impact on the defendant's sentence. As envisioned by this Court, a *Crosby* remand provides the district court with the opportunity to consider evidence and arguments that it did not consider during the initial sentencing and to determine whether this new evidence, considered under the new sentencing regime, would have resulted in a materially different sentence. *Crosby*, 397 F.3d at 117-18. In this case, the court considered the evidence of the defendant's good works as mayor and concluded that it would not have resulted in a materially different sentence. *See* SA9-10. Thus, the defendant's positive achievements as mayor were fully incorporated and weighed, as deemed appropriate by the district court, in the selection of his sentence.

2. The District Court Properly and Fully Considered the Evidence Proffered by the Defendant to Show Unwarranted Sentencing Disparities

The defendant claims that the district court failed to properly consider his evidence on sentencing disparities, and that the court should have held a hearing to allow him to present additional evidence on the topic. These arguments are unfounded.

In the defendant's submissions to the district court on *Crosby* remand, he argued, *inter alia*, that resentencing was necessary to avoid unwarranted sentencing disparities. In support of this argument, he submitted statistics showing national average sentences for different crimes, emphasizing the numbers showing that the national average sentence for bribery was under one year. The district court properly rejected this comparison, noting that the defendant had also been convicted of racketeering/extortion and that sentences for this crime were approximately six years. SA12.

The defendant now claims that it is "unfair" to characterize this case as a racketeering case when it is -- according to the defendant -- a bribery case, but this argument is nothing more than a disagreement with the district court's evaluation of the case. That the defendant disagrees with how the judge interprets and weighs the evidence does not render the sentence unreasonable or the sentencing process unfair.

Furthermore, the district court offered another proper reason for rejecting the defendant's statistics-based argument on sentencing disparities: the statistics provided no information to suggest that they applied to similarly situated defendants. Under § 3553(a)(6), the only sentencing disparities that are relevant are those "among defendants with similar records who have been found guilty of similar conduct." *See also Fernandez*, 443 F.3d at 31-32.

The defendant now claims that he offered the statistics only as a "preview" of his argument and that the district

court should have held a hearing to allow a more complete presentation of his argument. It was the defendant, however, who chose to present a less-than-complete version of his argument to the district court. The district court gave the defendant the opportunity to present his views in writing, and in those submissions, the defendant demonstrated that he understood the scope and nature of the *Crosby* remand process. *See* Reply Memorandum in Support of Re-Sentencing at 3 (noting that *Crosby* remand "requires that the court engage in the same analysis, albeit hypothetically, required for any sentence imposed post-*Booker* . . . ."). Although the defendant understood the purpose and scope of a *Crosby* remand, he chose not to present his full argument to the court. The fact that he now regrets that decision does not require this Court to rescue him from his mistake.

Finally, the district court properly rejected the defendant's argument based on the court's recognition of the key role that the sentencing guidelines play in minimizing unwarranted sentencing disparities. As the district court stated, "[t]he Guidelines, although no longer mandatory, if followed in appropriate cases will aid courts in creating uniform sentences for similar crimes." SA13. This conclusion was reasonable and thus the district court's decision should be upheld. *See Rattoballi*, 452 F.3d at 133 (noting that guidelines "are the only integration of the multiple factors and, with important exceptions, their calculations were based upon the actual sentences of many judges") (quotation omitted).

In sum, the district court appropriately considered all mitigating evidence and all evidence on sentencing

disparities presented by the defendant. Because the defendant raises no other challenges to the reasonableness of his sentence, he has waived any other arguments, *McCarthy v. SEC*, 406 F.3d 179, 186-87 (2d Cir. 2005) (holding that arguments not raised in opening brief are waived), and his sentence should be upheld.

CONCLUSION

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

Dated: September 25, 2006

Respectfully submitted,

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

This is to certify that the foregoing brief is calculated by the word processing program to contain approximately 21,538 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification. Because this brief responds to a lengthy brief raising numerous issues, the United States has submitted a motion for permission to exceed the 14,000-word limit.

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ADDENDUM

18 U.S.C. 666. Theft or bribery concerning programs receiving Federal funds [Relevant portions]

(a) Whoever, if the circumstances described in subsection (b) of this section exists --

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof --

. . .

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more;

. . .

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 U.S.C. § 1341. Frauds and swindles

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

18 U.S.C. § 1346. Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1951. Interference with commerce by threats or violence [Relevant portions]

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section --

. . .

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. § 3553. Imposition of a sentence [Relevant portions]

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

shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the [sentencing guidelines];

(5) [Sentencing Commission policy statements];

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

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

Federal Rule of Criminal Procedure 23(b) [Relevant portions]

(3) Court Order for a Jury of 11. After the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror.

Federal Rule of Criminal Procedure 52(b).

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

Conn. Gen. Stat. § 53a-148. Bribe receiving: Class C felony.

(a) A public servant or a person selected to be a public servant is guilty of bribe receiving if he solicits, accepts or agrees to accept from another person any benefit for, because of, or as consideration for his decision, opinion, recommendation or vote.

(b) Bribe receiving is a class C felony.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Ganim

Docket Number: 03-1448-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 9/25/2006) and found to be VIRUS FREE.

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Record Press, Inc.

Dated: September 25, 2006