NOS. 09-3388, 09-3389

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellant/Cross-Appellee

v.

VINCENT J. FUMO,
Appellee/Cross-Appellant

APPEALS FROM JUDGMENTS OF CONVICTION AND SENTENCE
IN CRIMINAL NO. 06-319-03 IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SECOND-STEP BRIEF OF APPELLEE/CROSS-APPELLANT VINCENT J. FUMO

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STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of Pennsylvania had subject matter jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291 (defendant's cross-appeal) and 18 U.S.C. § 3742(b) (Government's appeal). A final judgment was signed and entered on July 23, 2009. The Government filed a timely notice of appeal on August 12, 2009. Fumo filed a timely notice of cross-appeal on August 14, 2009.

STATEMENT OF THE ISSUES

Counter-Statement of Issues on Government's Appeal:

Did the district court commit significant procedural error in imposing sentence?

1. Was the determination of "loss," or that the offense involved neither "sophisticated means" nor "misrepresentation of charitable purpose," clearly erroneous?

2. Did the district court sufficiently state that its sentence was based on a departure from the Guidelines, rather than a "variance" under 18 U.S.C. § 3553(a)? Is the Government judicially estopped from reversing its position on appeal on this issue from that taken below?

a. Has the Government sufficiently raised a challenge to the departure determination?

b. If so,

(i) Was it lawful for the district court to grant a downward departure on the basis of the defendant's extraordinary good works?

(ii) Was the finding on "extraordinariness" clearly erroneous?

3. Did the district court commit significant procedural error by not expressly stating that its departure from level 32, with a low-end of 121 months, to a sentence of 55 months, amounted to a 66-month reduction?

4. Does the record show that the district court gave meaningful consideration to the Government's sentencing arguments under § 3553(a)?

Where in the Record Raised and Ruled Upon: To the extent these issues were preserved by the Government, the places preserved are as stated in the Government's opening brief. Where there is a question whether they were properly preserved, that matter is addressed in the body of the arguments which follow, in discussion of the standards of review.

Statement of Issues as Cross-Appellant:

1. Is a defendant denied his Constitutional right to a fair trial by an impartial jury when

a. juror learns through direct contact with third-parties that the defendant had been previously convicted of a similar offense but the conviction was subsequently overturned by the judge, evidence of which was explicitly excluded from trial;

b. a juror learns through direct contact with third-parties that the former president of an organization that the defendant was charged with defrauding and who was associated with the defendant at trial had been convicted himself for defrauding the organization and was imprisoned, evidence of which was explicitly excluded from trial;

c. a juror posts information about the status of deliberations on the Internet resulting in widespread media coverage of the jury's deliberations, which all of the jurors were exposed to; and

d. jurors disregard the court's instruction to report exposure to extrajudicial information and media coverage to the court?

Where in the Record Raised and Ruled Upon: Raised at App. 450-64, 599-645; DDE 656, at 7; DDE 658, at 15. Ruled upon at App. 581-98, 683-706, 4649-52.

2. Is evidence of criminal violations of state law conflict of interest provisions in a case where the defendant is not charged with honest services fraud more unfairly prejudicial, confusing, and misleading than probative of issues relevant to the charges of money or property fraud, and is it improper to present such evidence through expert testimony?

Where in the Record Raised and Ruled Upon: Raised at App. 2238-40, 2248-50, 4101-06, 4111-13; DDE 126, at 15-16; DDE 128, at 12; DDE 212, at 3; DDE 213, at 3-5; DDE 521 at 1-8. Ruled upon at App. 399-400, 430-37, 4119-20; DDE 178, at 1.

3. Was the inclusion of pre-judgment interest in the restitution judgment unauthorized by law and procedurally contrary to the governing statutory notice provision?

Where in the Record Raised and Ruled Upon: Raised at App. 1046. Ruled upon at App. 1652-53.

STATEMENT OF RELATED CASES AND PROCEEDINGS

The Superseding Indictment charged Fumo along with three co-defendants in Case No. 06-319 in the Eastern District of Pennsylvania. Co-defendants Leonard Luchko and Mark Eister pleaded guilty. Co-defendant Ruth Arnao was tried and convicted with Fumo. The Government has also filed a notice of appeal regarding the sentence of Arnao, 09-3390, who filed and then withdrew a cross-appeal, 09-3442.

STATEMENT OF THE CASE

A. The Course of Proceedings.

On June 27, 2006, Leonard Luchko and Mark Eister were indicted in the Eastern District of Pennsylvania on charges of conspiracy and obstruction of justice. DDE 11. The grand jury returned a superseding indictment on February 6, 2007, adding Vincent Fumo and Ruth Arnao as codefendants. Luchko and Eister subsequently pled guilty. DDE 241, 256 .

The superseding indictment charged Fumo in 139 counts consisting of two counts of conspiracy to commit mail and wire fraud, 18 U.S.C. § 371; 101 substantive counts of mail and wire fraud on a "money or property" theory, 18 U.S.C. §§ 1341, 1343; one count of conspiracy to defraud the United States, 18 U.S.C. § 371; two counts of aiding and assisting the filing of a false tax return, 26 U.S.C. § 7206(2); one count of conspiracy to obstruct justice, 18 U.S.C. § 371; and 32 counts of obstruction and aiding and abetting the obstruction of justice, 18 U.S.C. §§ 1512(b)(2)(B), 1512(c)(1), 1519, and 2. Two counts of wire fraud were later dismissed on Government motion. DDE 536, DDE 701. After a trial that lasted from October 22, 2008 to March 4, 2009, and six days of deliberations, the jury convicted Fumo of all remaining 137 counts on March 16, 2009.

Following the verdict, Fumo moved for a new trial based on newly discovered evidence of juror exposure to extraneous information, DDE 708, which

was opposed by the government, DDE 710, and denied by the district court. DDE 721.

After extensive sentencing proceedings including two days of hearings, Fumo was sentenced to 55 months of incarceration, which he began serving on August 31, 2009, as well as $2,765,539.46 in special assessments, fines, and restitution, which he has satisfied. The Government filed a timely notice of appeal from the entry of judgment, whereupon Fumo and Arnao filed cross-appeals from their convictions.[1]

B. Statement of Facts.

Fumo served as a Pennsylvania State Senator for thirty years, was a champion in Harrisburg and in Washington for his constituents and their neighborhoods, and was actively involved in a wide variety of community improvement efforts in both his role as a state Senator and through various non-profit organizations. Although he became one of the most powerful political figures in the Commonwealth of Pennsylvania, throughout his political career he remained focused on the needs of the people of Philadelphia.

Fumo was tried and convicted for his personal use of the resources of the Senate and of the non-profit organizations Citizens Alliance for Better

[1] Arnao has since voluntarily dismissed her cross-appeal.

Neighborhoods ("CABN") and the Independence Seaport Museum ("ISM"). Additional charges of conspiracy, aiding and abetting the filing of false tax returns, and obstruction of justice flowed from the primary accusation.

1. Senator Fumo's service in the Pennsylvania Senate.

Feeling a call to service after the assassination of President Kennedy, Fumo became actively involved in politics, volunteering for various campaigns and working for elected officials. App. 3961-62. He was first elected to public office as a state Senator in 1978, became Democratic Caucus Secretary during his first term, and several years later became Democratic Chairman of the Appropriations Committee, where he served for twenty-five years. *Id.* 3962-63.

The business of the Senate was always his priority, so much so that once during a medical test after suffering a heart attack he asked his doctor to stop the test and leave the room so that he could make an urgent phone call regarding a crisis with the Pennsylvania Higher Education Assistance Agency. *Id.* 3986. Such actions were consistent with his reputation for being tireless in his Senate work. *See infra* note 52.

Throughout his political career, Fumo was devoted to the needs of Philadelphians, both in and out of his district. As a freshman Senator, he was the first and only member to set up a 24-hour answering service, which would contact him by beeper if a constituent called with an urgent need, allowing him to serve his

constituents any time of day, *Id.* 3962, and he similarly told his employees that he expected them to always be available. *Id.* 3962. The range of constituent services that his Senate office provided was always expanding, addressing not only problems regarding state government, but any and all problems that were brought to him. For example, his Senate office developed a jobs bank, where they would solicit job openings from Philadelphia employers and match the openings with qualified candidates who were looking for work. *Id.* 3999. Actions such as these are indicative of his reputation for serving the people of Philadelphia. *See infra* note 52.

A forceful legislator, Fumo was never afraid to take unpopular positions, and often fought and voted for what he thought was right, even if it was not politically expedient. *See, e.g.*, App. 1079, 1207, 1319-20, 1422.

Governor Rendell wrote that Fumo:

> worked tirelessly to help and protect the poorest and most vulnerable citizens of Philadelphia—many of whom did not live in his district and therefore could not vote for him and almost all of whom did not have the wherewithal to contribute to his campaign or to any of his projects. He did it because this sometimes ruthless politician had and still has a deep sense of social responsibility and a strong caring for the plight of the most unfortunate members of our society. He genuinely cared for them. He fought fiercely for them and on many occasions was their only champion and only protector. In short, Vince Fumo did a tremendous amount of good for the very best of reasons.

Id. 1104-05.

2. The work of Citizens Alliance for Better Neighborhoods.

As a Senator, Fumo worked closely with community groups that often sought his assistance with neighborhood cleanup and revitalization efforts. *Id.* 4015. Realizing that the groups were engaged in providing services normally provided by municipal governments such as trash removal and street sweeping, Fumo helped arrange funding to provide these services through state grants. *Id.* 4015. One such project grew into CABN, which began purchasing street sweepers and other equipment to use in cleaning up South Philadelphia neighborhoods. *Id.* 4015-16. CABN was run out of Fumo's senate office as an extension of his network of constituent services, and its services became widely appreciated not only in his district but throughout Philadelphia. *Id.* 4016.

Later, in his private capacity as a ratepayer, Fumo instituted litigation against the Philadelphia Electric Company ("PECO") regarding utility rates, and as part of a settlement the company donated $17 million to CABN. *Id.* 4016-20. These private funds well exceeded those previously provided by public grants and allowed CABN to expand its mission from simply cleaning neighborhoods to revitalizing them. *Id.* 4020. Under Fumo's direction, although he was never an officer or director of CABN, the organization's expanded efforts included the development of a charter school, *Id.* 4020-22, the redevelopment of neighborhoods

such as Passyunk Avenue and its business district, *Id.* 4022-23, and the development of a high-tech zone as part of an effort to retain young entrepreneurs in the area, *Id.* 4023-24.

Fumo also served on the board of directors for a number of other local organizations, including the ISM. In that capacity, he helped the museum obtain public grants and raise private donations. *Id.* 4039.

3. The Investigation and Indictment.

The investigation of Fumo arose out of a series of articles written by reporters for the Philadelphia Inquirer in late 2003 questioning the source of CABN's funds. The FBI issued subpoenas to CABN in April, 2004 and January, 2005. In February, 2005, the FBI executed a search warrant at Fumo's South Philadelphia Senate office on Tasker Street. Nearly three years after the investigations began, Fumo was indicted in February, 2007. *Id.* 115.

Although the investigation had initially focused on the funding of CABN, the indictment rested instead on allegations that Fumo had improperly used the resources of the Senate, CABN, and ISM for his personal and political benefit, that he assisted co-defendant Arnao in filing information and corporate returns with the IRS that concealed improper political activity at CABN, and that, when the investigation became known, he caused the deletion of emails and computer files to conceal information from federal investigators. *Id.* 115-386. There were,

however, no allegations of honest services fraud, bribes or kickbacks in return for the corruption of his office, nor of extortion – the bread and butter of political prosecutions. Rather, the indictment proceeded on the theory that Fumo had defrauded the Senate, CABN and ISM of their money and property by using their resources for his personal and political needs. *Id.* 115-386.

4. The Trial.

The trial itself began on October 22, 2008, and lasted over four months. During that time, the Government called eighty-two witnesses, and the defense presented twenty-five.

This trial was not Fumo's first, and the Government sought to introduce evidence regarding the prosecution of Fumo decades earlier for allegedly placing "ghost" workers on the state payroll. DDE 340; App. 2545-46, 4049-55. Fumo was convicted by the jury in that case, but the district court granted a post-trial judgment of acquittal, which this Court affirmed. *See United States v. Camiel*, 689 F.2d 31 (3d Cir. 1982). The Government also sought to introduce evidence that John Carter, the President of the ISM who permitted Fumo to use the museum's yachts, had himself been convicted and was imprisoned for fraud. DDE 292. *Cf. United States v. Carter*, 319 Fed App'x 133 (3d Cir. 2009) (not precedential). The district court refused to allow presentation of this evidence to the jury. App 442, 2545-46, 4049-55.

Throughout the trial, there was extensive daily coverage by both professional and amateur journalists. *Id.* 3325. This included not only fact-based reporting, but also expressions of strong opinion by multiple columnists. In addition to the coverage in traditional print and broadcast media, there was widespread coverage by new media, including "live blogging" direct from the courtroom on the evidence and proceedings, which then appeared on various websites in real time. *Id.* 3188. The defense repeatedly voiced concerns that given the extensive coverage the jury might be exposed to information about the case, including the prior prosecution of Fumo and conviction of Carter, through the media or from third-parties. *Id.* 1925, 3323-25, 3187-89. The district court, however, infrequently instructed the jury regarding exposure to extraneous influences, and refused to question the jury about potential exposure to such influences. *Id.* 1925, 3068, 3260, 3567, 4306.

Jury deliberations began on March 4, 2009. On Sunday, March 15, the defense learned that juror Eric Wuest had been posting information on his publicly accessible Facebook page and Twitter feed about the trial and the status of the jury's deliberations, including an implication that a verdict would be issued the following day. *Id.* 450-454. The defense filed an emergency motion that evening to voir dire and disqualify Wuest. *Id.* 450. The following morning on March 16, Wuest was questioned by the district court. *Id.* 4639-53. Wuest admitted to

making the postings and that after hearing a television news story about his postings, *id*. 4642-43, he had immediately deleted them. *Id.* 4647-48. The district court held that although Wuest had made the postings and had been exposed to media coverage, there was no prejudice to Fumo. *Id.* 4651. It declined to question the remaining jurors and allowed Wuest to return to the jury which then returned its verdicts the same day. *Id.* 4652.

5. Fumo's Motion for A New Trial.

After trial it was discovered, as the defense had feared, that the jury had in fact been exposed to extrajudicial information about the case. A former member of the jury told Ralph Cipriano, a respected and experienced local journalist who had covered the trial, that co-workers spoke to her about the case during trial and told her about Fumo's prior prosecution and Carter's conviction. *Id.* 616-17. Another juror told Cipriano that the entire jury had also learned of Wuest's Internet postings through news reports the day before and the day it returned its verdict. *Id.* 616-17. Cipriano reported this information to defense counsel while seeking comment prior to publishing his findings in Philadelphia Magazine. The defense then filed a motion to voir dire the jury and, if the taint was confirmed, grant a new trial. *Id.* 599-646. The district court refused to conduct any inquiry and denied the motion outright. *Id.* 683-706.

6. Sentencing.

Commensurate with the trial, sentencing was a long and involved process. Following a series of meetings between the parties and the Probation Office, a 158-page preliminary Presentence Investigation Report was circulated on June 3, 2009. Defense counsel filed formal objections to this report on June 23, *id.* 707-26, and, on July 2, the Probation Officer submitted a 180-page revised Presentence Investigation Report ("PSR") to the district court.[2] Sealed App. 1-180. On July 6, the Government filed a 141-page memorandum on sentencing calculations, together with numerous exhibits, App. 727-903, to which defense counsel responded the following day. *Id.* 904-920.

On July 8, after reviewing the preceding materials, Judge Buckwalter held a daylong hearing on the parties' objections to the PSR. *Id.* 1498-1564. There, the parties engaged in an extended dialogue with the district court on issues related to the fraud loss calculation under U.S.S.G. § 2B1.1(b)(1) and possible enhancements to or departures from the Guidelines. Topics included: the impact on fraud loss calculations of Senate employee misclassification, Mitchell Rubin's Senate contract,[3] costs related to Fumo's district Senate office located on Tasker Street in

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[2] All references to the PSR in this Brief are to the final revised report.

[3] Rubin, who is co-appellee Arnao's husband, was hired to perform political and policy services for Senator Fumo and for the Senate itself.

South Philadelphia ("Tasker Street"), the commission for CABN of a painting and prints of the *Gazela*, a historic ship docked in Philadelphia, and purchases of tools and consumer goods with CABN funds; whether Fumo used sophisticated means and/or misrepresented his affiliation with CABN during the commission of his offenses; and Fumo's lifetime of public service and good works as a ground to depart downward from the Guidelines.

The following day, Judge Buckwalter issued a Memorandum Opinion correcting the PSR's § 2B1.1 loss calculation to $2,379,914.66 and upholding defense objections to sentence enhancements for sophisticated means and misrepresenting affiliation with a charitable organization. *Id.* 1565-66. He reserved judgment on whether Fumo qualified for a downward departure "based upon good works"[4] or whether the value of Rubin's Senate contract should count towards fraud loss.

On July 10, defense counsel and the Government filed lengthy sentencing memoranda, together with supporting exhibits. *Id.* 921-1041. The defense responded to the Government's memorandum two days later, *id.* 1042-50, and, on July 13, the defense filed a lengthy supplemental memorandum with numerous

[4] Other grounds for departure were overruled.

exhibits that documented Rubin's work for the state Senate under his contract. Supp. App. 156-359.

The sentencing hearing took place on July 14 and ran the entire day, App. 1567-1625, with Judge Buckwalter placing no limit on the length or breadth of arguments to be presented. *Id.* 1615 ("[T]his entire trial has been long. This entire procedure has been long. And I'm not shortcutting...this sentencing hearing for anything or anybody."). In preparation for the hearing, Judge Buckwalter reviewed not only the materials identified above, but also 264 letters from the community, 259 of which expressed support for Fumo. *Id.* 1057-1497.

Judge Buckwalter began the sentencing hearing by announcing his Guideline calculation: Fumo's total offense level was 32, which produced an advisory sentencing range of 121 to 151 months' imprisonment. *Id.* 1567. Responding to questions about fraud loss, Judge Buckwalter explained that the Senate's loss had been reduced from that proposed in the PSR because the Government had not met its burden to establish loss from misclassified employees and that, because he could not reach a determination on Rubin's contract, he would not rely on it at sentencing. *Id.* 1568. The CABN loss adjustment was "more complicated" and would have to be explained later because he did not have his notes at that moment. *Id.* Finally, Judge Buckwalter stated that he would reserve a ruling on a downward departure for good works until later during the hearing. *Id.*

The Government offered a single witness who addressed the ability of the Bureau of Prisons to treat Fumo's health problems.[5] Later, when the Government presented five upward variance arguments, Judge Buckwalter frequently interjected with comments and probing questions, *id.* 1585-89, and asked that the Government restate the grounds "to make sure I had them down here." *Id.* 1589. The Government then addressed the sentencing factors under 18 U.S.C. § 3553(a), *id.* 1590-1600, prompting several comments from the court, one of which sought a response to substantial evidence of Fumo's good works. *Id.* 1594.

The defense began its presentation by restating arguments for a downward departure or variance based on good works. *Id.* 1600-03. It then presented six witnesses, four of whom testified about Fumo's long history of good works (only one of whom the Government chose to cross-examine). *See* 1606-10. The presentation concluded with a final plea for a lower sentence based on Fumo's good works, *id.* 1612-18, and Fumo's allocution. *Id.* 1619-21.[6]

Judge Buckwalter began his pronouncement of sentence by acknowledging that although most in the courtroom "would just prefer if I just got to the bottom

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[5] This was in response to a defense request for a downward variance or departure based on Fumo's health and need for certain non-formulary medications.

[6] Just before the allocution, the Government interrupted to remind the court that a downward departure from the Guidelines for good works required a finding that "extraordinary works...were done." App. 1619.

line," he would first have to "make a reasoned consideration of the sentencing factors." *Id.* 1621. He then proceeded, one-by-one, to address how each of the § 3553(a) sentencing factors applied to this case. *Id.* 1621-24. When addressing Fumo's character under § 3553(a)(1), Judge Buckwalter observed that he had "worked extraordinarily hard" for the public, which was "exceptional," and that this warranted a "departure from the guidelines." *Id.* 1622-23. After examining the remaining § 3553(a) factors, Judge Buckwalter imposed a sentence of 55 months' imprisonment, to be followed by a period of supervised release, as well as a substantial fine and extensive restitution. *Id.* 1624. At the close of the proceeding, defense counsel raised several housekeeping issues including restitution. The Government responded in opposition and requested leave to further address sentencing objections in writing. *Id.* 1624-25. No post-pronouncement objections were lodged.

On July 20, the Government filed a memorandum on restitution. *Id.* 1642-51. On July 22, the defense filed a timely motion for correction of sentence under Federal Rule of Criminal Procedure 35(a), which asked the court to address several technical issues from the hearing, including the nature of its sentencing reduction given that it had been described as a "departure" (not a "variance") despite being announced when applying § 3553(a) factors. *Id.* 1626-32. This prompted an immediate response by the Government, which noted that "the Court repeatedly

stated that it decided to grant the departure motion based on public service[,]" a point that "the Court reiterated" when later sentencing Ruth Arnao. *Id.* 1635.

On July 23, Judge Buckwalter issued a Memorandum and Order and a formal Statement of Reasons. The Order settled restitution and addressed technical issues from the Rule 35(a) motion. *Id.* 1652-53. As to the below-Guidelines sentence, the district court explained: "The government correctly states that the court announced it was granting a downward departure." *Id.* 1653. The Statement of Reasons echoed this point, indicating a departure below the Guidelines for "Military Record, Charitable Service, Good Works" under U.S.S.G. § 5H1.11 (p.s.). Sealed App. 182. In a narrative addendum to the form, Judge Buckwalter explained how and why he reduced CABN loss (which he had been unable to do at sentencing), described the departure for "extraordinary good works by the defendant," and commented on his somewhat unorthodox procedure at sentencing, namely that he never articulated the departure in terms of "levels." *Id.* 184-86.

The depth of the sentencing process in this case cannot be overstated. Before announcing Fumo's sentence, Judge Buckwalter presided over two daylong hearings that produced nearly five-hundred pages of transcripts and reviewed nearly twelve-hundred pages of materials between the PSR, letters from the community, and numerous sentencing-related memoranda and exhibits.

SUMMARY OF ARGUMENT

On the Government's Appeal:

The district court committed no significant procedural error in the course of sentencing Fumo to serve 55 months' imprisonment, followed by three years of supervision, and to pay a fine of $411,000, as well as more than $2.3 million in restitution. Despite complaining at length that the sentence was too lenient, the Government does not claim this sentence was substantively unreasonable, or that the magnitude of the downward departure was excessive. Thus, it has waived any such argument. Findings relative to the "loss" calculation were not clearly erroneous; minor arithmetical mistakes made when computing the sun were harmless because they did not affect the advisory Guideline sentence. The district court was entitled under Fed.R.Crim.P. 32(i) to decline to make findings on such complex matters as the "Rubin contract loss," where it explicitly disclaimed reliance on the factor for the purposes of sentencing. Nor was there clear error in the findings that adjustments for "sophisticated means" and "misrepresentation of charitable purpose" did not apply. The former was rejected on purely factual grounds that the Government's evidence did not clearly overcome, and the latter on a similar failure of the Government to prove the defendant's required intent as of the appropriate time.

The sentence is not ambiguous as to whether the district court granted a departure or a variance. It was a departure based on "good works," as stated in open court and reaffirmed or clarified in the ruling on defendant's post-sentence motion and in the Statement of Reasons. The Government's argument to the contrary is barred by judicial estoppel in that it is the opposite of the position taken below. Arguments in the Government's brief that attack the legal and/or factual basis are not properly before this court because they are not set out in its Statement of Issues and the Government itself indirectly concedes that it has not appealed the departure decision in this action. Nevertheless, the departure is well supported by a sound factual basis, both in letters from knowledgeable individuals and in testimony reflected in the district court's unassailable findings that, even when compared to fellow lawmakers, Fumo demonstrated an "extraordinary" commitment and devotion to helping others throughout a lifetime of public service and, in this way, greatly exceeded any of the normal duties of his political office. By not challenging substantive reasonableness, the Government has waived any challenge focused the extent of the departure, and is limited to the general validity of the grounds invoked on the kind of evidence presented. On that basis, this Court could not find any abuse of discretion.

The district court committed no significant procedural error in failing to "recalculate" the Guidelines range after granting a departure. There is no such

requirement. A departure of the kind allowed in this case does not result in a new Guidelines range, but rather represents a below-Guideline or outside-the-Guidelines sentence. The applicable range never changed. The court fulfilled its lone duty in this regard, which was to ensure that the record demonstrated how the departure affected the Guidelines, *i.e.*, that the sentence was 66 months below the bottom of the range. Nothing more than simple arithmetic was required to fulfill that duty in this case. In any event, any technical error that may have occurred had no effect on the sentence imposed.

Finally, the district court gave attentive consideration to each and every suggested ground for an increased sentence under § 3553(a) that the Government cared to present below. That it did not find itself persuaded cannot be confused with "ignoring" these grounds, nor does it render the sentence procedurally unreasonable.

If the convictions are not reversed, the sentence must be affirmed.

On Cross-Appeal:

1. Fumo was denied his Constitutional right to trial by an impartial jury. The district court erred in refusing to hold an evidentiary hearing when it was presented with highly credible evidence that a member of the jury had discussed the case with third-parties who told her of Fumo's prior prosecution and ISM President Carter's conviction, and that the entire jury had been exposed to news

coverage on the morning of the day it returned its verdict of one juror's Internet postings about the status of deliberations.

The district court also erred in allowing the blogging juror to continue to participate in deliberations, and in refusing to question the remaining jurors, after it was discovered that this juror had not only posted information online about the status of deliberations indicating that a verdict would be announced on a specific day, but also that he had been exposed to television news coverage of his postings which caused him to delete them.

Given the extensive media coverage and public atmosphere surrounding the trial, the defense had repeatedly raised concerns that there was a substantial risk that incidents such as these could occur and that the jury would be exposed to extraneous influences through the media or third-parties. The district court, however, infrequently instructed the jury regarding exposure to extraneous influences, and refused the defendant's request that the jurors be questioned regarding such potential exposure during trial.

2. The district court also erred in admitting extensive and unfairly prejudicial evidence regarding the Pennsylvania Ethics Act. Fumo was not charged with honest services fraud, yet the Government was permitted to submit evidence of alleged violations of the conflict of interest provision of the Ethics Act, including its criminal penalties, prior enforcement in other cases, and its

applicability to the charged conduct. This evidence was not relevant for any proper purpose, and was substantially prejudicial. The submission of this evidence through improper expert testimony and the improper cross-examination of Fumo by the prosecutors amplified the prejudice to the defendant. The prejudice was further compounded when the argumentative and prolix superseding indictment, including portions of the Ethics Act, was submitted unredacted to the jury. Indeed, the district court itself recognized at the close of the trial that the admission of this evidence had been improper.

3. The district court erred in sustaining the government's request for the addition of more than $255,000 in pre-judgment interest to the $2 million in principal restitution. Interest on criminal penalties is allowed only when affirmatively authorized by law. The governing statute imposes post-judgment interest on restitution in a criminal case, but does not provide for the inclusion of pre-judgment interest. The cases which have allowed an award of lost interest as restitution involved the theft of interest-bearing securities. This case is not similar. In any event, the interest was added after sentencing. The addition of any restitution after the sentencing hearing is barred by statute unless the government gives ten days' prior notice of its inability to prove the restitution then. Such notice was not given here, and the defense objected. For both reasons, the interest portion of the restitution judgment must be stricken.

ARGUMENT

On the Government's Appeal:

This appeal is not about substantive reasonableness. That claim has been waived. Br. 72. The Government instead devotes its entire 219-page brief to narrow issues of procedural error. In it, the Government endorses a hyper-technical review of sentencing procedure while at the same time ignoring its own failure to properly preserve challenges to some of the very errors that it decries on appeal. Here, through the guise of procedural error, the Government attempts an assault on the well-reasoned exercise of judicial discretion, hoping to insert its own interpretation of the facts, Sentencing Guidelines, and 18 U.S.C. § 3553(a) factors in place of Judge Buckwalter's. The limitation of its argument to perceived procedural irregularities is a thinly veiled attempt to raise its substantive attack on what it claims was an "unduly lenient" and "indisputably unreasonable" sentence. Br. 60-61. The Government's focus on narrow procedural issues is at odds with Supreme Court precedent, which has repeatedly supported the exercise of well-reasoned judicial discretion based on the unique facts of each case over a rigid application of the Guidelines.

Absent from the Government's brief is any recognition that its tactical decision[7] to "withhold" a substantive reasonableness challenge implies an untenable, bifurcated sentencing regime. Accepting the Government's position contemplates a system where substantive reasonableness can be reached only *after* another panel has confirmed the absence of procedural error in a separate proceeding (or, alternatively, remanded to correct any significant error). By this standard, merits-based appeals should also be bifurcated, for this Court cannot reach sentencing issues if the underlying conviction is overturned. But this is not the prevailing standard; defendants and prosecutors routinely join allegations of procedural and substantive error in a single action.[8] *See, e.g.*, *United States v.*

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[7] Implicit in this decision is the fear that challenging substantive reasonableness in this appeal would undercut the force of claimed procedural errors insofar as it suggests that this Court might proceed to substantive reasonableness after finding no procedural error. To avoid the waiver problem bound up in this strategy, the Government invents out of whole cloth a standard requiring bifurcated sentencing appeals. But this gambit fails. *See infra* note 8.

[8] Challenges to the substantive reasonableness of Fumo's sentence are thus waived going forward. *See United States v. Pultrone*, 241 F.3d 306 (3d Cir. 2001). Furthermore, because substantive reasonableness is not before this Court, review of the extent of the good works downward departure or whether the district court should have varied on a particular ground is improper. The Government has also waived a challenge to the restitution award by failing to include it in the Statement of Issues and otherwise support it by legal argument in the body of the brief. *See* Br. 74 n.29.

King, 604 F.3d 125, 144 (3d Cir. 2010); *United States v. Levinson*, 543 F.3d 190, 194 (3d Cir. 2008); *United States v. Howe*, 543 F.3d 128, 133-37 (3d Cir. 2008).

Also missing is any meaningful explanation for the Government's failure to raise a number of its challenges in the proceedings below despite numerous opportunities to do so. The Government's newly minted claims are, at most,[9] subject to limited review for plain error. *See United States v. Dickerson*, 381 F.3d 251, 257-58 & n.5 (3d Cir. 2004).[10]

A final omission is any serious discussion of the variable nature of procedural error or how to interpret the record. Never does the Government

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[9] Federal Rule of Criminal Procedure 52(b) is phrased in permissive terms; it is therefore within this Court's discretion not to address claims that are not properly preserved below. *See United States v. Tann*, 577 F.3d 533, 535 (3d Cir. 2009).

[10] Circuits are divided on whether the Government can avail itself of plain error review. *Compare Dickerson*, 381 F.3d at 257-58 (allowing plain error review); *United States v. Gordon*, 291 F.3d 181 (2d Cir. 2002) (same); *United States v. Perkins*, 108 F.3d 512 (4th Cir. 1997) (same); *United States v. Barajas-Nuñez*, 91 F.3d 826 (6th Cir.1996) (same); *United States v. Zeigler*, 19 F.3d 486 (10th Cir. 1994) (same); *United States v. Edelin*, 996 F.2d 1238 (D.C. Cir. 1993) (same); *and United States v. Rodriguez*, 938 F.2d 319 (1st Cir. 1991) (same) *with United States v. Posters 'N' Things, Ltd.*, 969 F.2d 652, 663 (8th Cir.1992) (refusing plain error review); *and United States v. Garcia-Pillado*, 898 F.2d 36, 39 (5th Cir.1990) (same). Although this Court follows the majority position, the defendant maintains that this is in error. Under our Constitutional system of democratic Government, that is, in the political philosophy that inspired our Constitution, the Government itself—and thus the prosecution in a criminal case—has no "rights," only "power" and "authority." Rights belong to the people (including, in particular, "the accused" in a criminal case) and are what the Government, by its powers, cannot infringe. Thus, the Government cannot invoke the plain error doctrine because it has no "substantial *rights*" to be "denied."

advance beyond the superficial principle that procedural error is error. This ignores the crucial distinction that only "significant" procedural error triggers remand, *Gall v. United States*, 552 U.S. 38, 51 (2007) , that significance is examined under the rubric of harmless error, *United States v. Langford*, 516 F.3d 205, 218-19 (3d Cir. 2008), and that procedural error is harmless unless the sentence would have been different "but for" the error. *Williams v. United States*, 503 U.S. 193, 203 (1992). Likewise, by focusing on selected portions of the record to the exclusion of others, the Government offends the baseline requirement that a sentencing record must be viewed as a whole. *See United States v. Watson*, 482 F.3d 269, 276 (3d Cir. 2007). Seemingly unaware that this Court "will not elevate form over substance," *United States v. Dragon*, 471 F.3d 501, 506 (3d Cir. 2006), the Government here demands a "ritualistic" sentencing proceeding where the district court must "state the obvious" even when it is "implicit in the record." *United States v. Boggi*, 74 F.3d 470, 479 (3d Cir. 1996). But this is more than is required by the Federal Rules, 18 U.S.C. § 3553, the Supreme Court, or the law of this Circuit.

Here, the Government asks for nothing short of a "microscopic examination" of the massive record below. *United States v. Grober*, 624 F.3d 592, 595 (3d Cir. 2010). And, given the extent of the record, it is not surprising that some minor mistakes were made. These few errors do not, however, require remand for they

did not affect the sentence imposed and they create no doubt as to what the district court did or why it did it.

I. The district court's § 2B1.1. fraud loss calculation was reasonable and based on well-supported findings of fact; minor computational errors were inconsequential because they did not alter the applicable loss-adjustment and therefore did not alter the advisory Guideline sentencing range.

The Government spends nearly one quarter of its brief attacking the district court's fraud loss calculation under U.S.S.G. § 2B1.1(b)(1) in an attempt to show that the total Guidelines offense determination was off by *one* level. Judge Buckwalter computed fraud loss at $2,379,914.66. The Government argues that it should have exceeded $2,500,000, which would have placed Fumo into the next higher loss category so as to produce a total offense level of 33 instead of 32.[11] Apart from being "petty," App. 1586 (district court's words), the Government's argument is unpersuasive. Factual findings made in the course of determining loss were amply supported, and minor computational errors made as the court

[11] Accepting the Government's arguments as true would drive total fraud loss above $2.5 million, which, in this case, would result in an additional two-level adjustment. U.S.S.G. § 2B1.1(b)(1)(J). But the effect would be partially offset in this case because a one-level grouping adjustment would no longer apply. Under the district court's original Guidelines calculation, the fraud offense level was within eight levels of the tax offense level, prompting a one-level adjustment under § 3D1.4(b). Where fraud loss exceeds $2.5 million, however, the respective offense levels would be nine or more levels apart, negating the grouping adjustment. *Id.* § 3D1.4(c). Hence, a two-level loss enhancement would have raised the total offense level from 32 to 33, not 34. This fact was universally acknowledged below.

accounted for its fact-based adjustments were harmless because they had no effect on Fumo's ultimate loss category (*i.e.*, they did not artificially keep it below $2,500,000) and, as such, they did not alter the advisory Guideline sentencing range.

A. Standard of review.

Loss under U.S.S.G. § 2B1.1 "need not be determined with precision, but can be a reasonable estimate," *United States v. Nathan*, 188 F.3d 190, 209 (3d Cir. 1999), that is "based on the information available." *United States v. Antico*, 275 F.3d 245, 270 (3d Cir. 2001). It is the Government's burden to prove facts supporting the loss determination. *See United States v. Evans*, 155 F.3d 245, 253 (3d Cir. 1998). Where loss is "exceedingly difficult to calculate," this Court has permitted district courts additional leeway. *United States v. Wiseman*, 339 Fed. App'x 196, 200 (3d Cir. 2009) (not precedential). Errors in computing loss that do not affect the ultimate advisory Guideline sentencing range are harmless and therefore do not require remand. *United States v. Jimenez*, 513 F.3d 62, 87 (3d Cir. 2008) (citing *United States v. Lennon*, 372 F.3d 535, 541-42 (3d Cir. 2004)).

Factual findings, including amount of loss, are reviewed for clear error. *United States v. Sharma*, 190 F.3d 220, 229 (3d Cir. 1999). Appellate panels may only reverse factual findings on loss when, after reviewing the record, they are left "with the definite and firm conviction that a mistake has been committed." *United*

States v. Stewart, 452 F.3d 266, 273 (3d Cir. 2006) (quoting *United States v. Kikumura*, 918 F.2d 1084, 1090 (3d Cir. 1990)). "If the District Court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even...[if] it would have weighed the evidence differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).

Objections to the district court's accounting for loss relative to the Mitchell Rubin Senate contract and Tasker Street were not raised below and are subject to limited review for plain error. Fed. R. Crim. P. 52(b); *see also See United States v. Merlino*, 349 F.3d 144, 161 (3d Cir. 2003) (claim not made in district court is "not cognizable on review unless it constitutes plain error."). This requires the Government to show (1) error, (2) that is clear or obvious, and (3) which affected substantial rights (*i.e.*, reasonably believed to have affected sentence). *United States v. Marcus*, 560 U.S. __, 130 S.Ct. 2159, 2164 (2010) (citation omitted). Moreover, this Court will not reverse plain error unless it (4) "seriously affect[s] the fairness integrity or public reputation of judicial proceedings." *Id.*

B. Judge Buckwalter's reasonable estimate of loss is supported by factual findings that command great deference on appeal.

After studying extensive written submissions and hearing hours of testimony and argument, Judge Buckwalter determined a "loss" for Guidelines purposes of $2,379,914.66. A few calculations of particular difficulty were pretermitted on the

basis that they would not affect the ultimate sentencing determination. In this process, the district court below committed no "significant" procedural error.

i. Neither guilty verdicts nor statements made in an order denying the defendant's motion for acquittal barred the district court from excluding unreliable estimates of alleged overpayment to misclassified employees from the Senate loss calculation.

The Government argues that the district court erred by refusing its request to include alleged overpayments to misclassified Senate employees as loss. The district court accepted the defendant's objections to misclassified employee loss and excluded this sum from its final calculation. Sealed App. 185. In questioning the reliability of the Government's calculation, the defendant noted that the Chief Clerk of the Senate declined to endorse the Government's Senate loss estimate in his Victim Impact Statement, App. 879, and that "misclassified" employees still with the Senate have yet to be reclassified, some three years after their supposedly fraudulent misclassification had been exposed and long after Senator Fumo's departure from office. *Id.* 709. On these facts, it cannot be said that the district court's determination is without support.

The Government does not challenge the factual basis for this decision and instead attacks it on collateral grounds, arguing that it is precluded by the jury verdict and findings in an order denying the defendant's motion for acquittal. Br. 80, 86, 89. Neither of these contentions is well-taken.

Guilty verdicts say nothing of loss from misclassified employees. Count One (Senate conspiracy) alleged more than 80 overt acts, any one of which the jury may have relied upon to support the verdict. App. 180-93. Convictions on substantive counts are also unsupportive; they do not allege specific amounts of "overpayment," *id.* 197-205, and, even if they had, the jury was properly instructed that they could convict without finding that the "victim actually suffered any loss." *Id.* 4361; *see also United States v. Copple*, 24 F.3d 535, 544 (3d Cir. 1994) ("[T]he government does not have to show that the victims actually suffered a loss to satisfy the elements of the mail fraud statute."). Moreover, this Court has long held that even where a jury verdict does purport to include a finding that is, in law, the sentencing court's to make, the sentencing judge is not only not bound by that determination, it is *error* for the district court to rely on the jury's verdict to avoid making its own sentencing determination. *See United States v. Chapple*, 985 F.2d 729, 732 (3d Cir. 1993) (per Alito, J.), *abrogated, in part, on other grounds by United States v. Booker*, 543 U.S. 220 (2005). For all these reasons, the Government's claim that Judge Buckwalter's findings were erroneous because of the jury's verdicts has no merit.

Statements from the district court's order denying the defendant's motion for acquittal are similarly inapposite. At that stage of the proceedings, the district court viewed the evidence in the light most favorable to the Government and asked

if any rational trier of fact could convict. App. 473. A different standard—the judge's own assessment of the preponderance of reliable evidence—applies at sentencing. *See United States v. Grier*, 475 F.3d 556, 568 (3d Cir. 2007) (en banc).

At the hearing on objections to the PSR, Judge Buckwalter himself explicitly refused an invitation from the Government to use jury verdicts and statements from his denial of the motion for acquittal as proxies for loss:

> [T]he jury didn't decide any amounts here. There was no question put to them, no special interrogatories put to them about amounts. They did—I found in my opinion that there was enough evidence to support the convictions on each count; that's what I found. I didn't find any amounts; just found there was enough evidence to support the conviction on the counts. That's a different standard altogether.

App. 1541. That statement is entirely correct.

For these reasons, Judge Buckwalter's factual determination that the Government had not met its burden in establishing loss from misclassified employees was not clearly erroneous.

ii. Consistent with Federal Rule of Criminal Procedure 32, the district court formally disclaimed reliance on Mitchell Rubin's contract with the Senate for the purposes of sentencing; the Government's argument to the contrary is subject to limited review for plain error for want of having been raised below.

The Government argues that Mitchell Rubin's contract with the Senate should have counted towards loss. Whether there was in fact *any* "loss" attributable to this contract was hotly contested at sentencing. The Government argued it was a no-work contract that produced a pure loss. The defense responded that Rubin was a key adviser to the defendant who interacted with others on his behalf. To support this claim, the defense filed a lengthy memorandum and 181 pages of exhibits documenting Rubin's work for the defendant, including interviews with twenty-nine people[12] confirming Rubin's role and detailed summaries of his work with forty-four different groups[13] and issues[14] for the defendant. *See* Supp. App. 156-359.

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[12] Randy Albright, Rep. Bob Brady, Larry Brown, Joseph Cascerceri, Dominick Cippolini, Larry Cohen, Stephen Cozen, Chris Craig, Liz Craig, Carl Engelke, John Estey, Bob Gross, Melissa Heller, Sam Hopkins, James Kenny, Gregory Magarity, James Black, Maryann Quartullo, Thomas Leonard, Gary Secreto, Gerry Segal, Ken Snyder, Jamie Spagna, Hon. Michael Styles, Jeffrey Suzenski, James White, David Urban, Lynanne Westcott, and Eric Zoller.

[13] Christopher Columbus Charter School, Committee of Seventy, Delaware River Joint Toll Bridge Commission, Delaware River Port Authority of Pennsylvania, Drexel University, Fairmont Community Development Corporation, Governor Rendell Transition Team, Gridiron Dinner, Jefferson Square Community

(cont'd)

Unable to reach a decision on the Rubin loss issue, the district court announced that it would not consider the matter in sentencing the defendant. App. 1568 ("I decided not to make any determination on that...because it's somewhat complex, and I don't want to hold up anymore of these proceedings."); *see also* Sealed App. 184-85 ("[B]ecause of the complexity of the Rubin loss argument in light of the defense submissions, I felt that I could not properly resolve it before the sentencing. Rather than postpone the sentencing, I declined to rule on it."). This was consistent with Federal Rule of Criminal Procedure 32(i)(3)(B), which permits courts to decline resolving a factual dispute where they "will not consider the matter in sentencing..." *See also United States v. Electrodyne Sys. Corp.*, 147 F.3d 250, 255 (3d Cir. 1998) (requiring "[a] finding on a disputed fact *or a*

(cont'd from previous page)
Development Corporation, Magee Rehabilitation, Mayor Street Administration, Pennsylvania Intergovernmental Cooperation Authority, Pennsylvania Liquor Control Board, The Pennsylvania Society, Philadelphia Housing Authority, Philadelphia School Reform Commission, Philadelphia Trial Lawyers Association, Philly Pops, SEPTA, Spring Garden Community Development Corporation, St. Agnes Hospital, and Termini Bakery.

[14] Act 44 (Interstate 80), Bail/Prison Overcrowding Issues, Commonwealth Insurance, Constituent Services, Courtroom Security, Judicial Appointments, Mortgage Foreclosure Process, Governor Relations, Navy Yard, Nuisance Bar Program, Penn's Landing, Philadelphia Food Distribution Center, Philadelphia Stadium District, Philadelphia zoning, Ticket Scalping Legislation, and Washington Square Ceremony.

disclaimer of reliance...") (emphasis added); *United States v. Gricco*, 277 F.3d 339, 355 (3d Cir. 2002) (per Alito, J.; same).

The Government now challenges this determination despite failing to raise an objection at sentencing. Accordingly, as the Government concedes, this claim is subject to limited review for plain error, Br. 96 n.43.

The Government's argument relies upon a misreading of Rule 32 under which district courts must resolve factual disputes unless they determine that the outcome will not affect the sentence (by which the Government means not the sentence so much as the applicable Guidelines range). *See* Br. 95 ("[T]he refusal to resolve the Rubin loss issue directly impacted [sic] the sentencing calculation..."). This interpretation is inaccurate. In pertinent part, the Rule states that a sentencing court must "rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, *or because the court will not consider the matter in sentencing*..." Fed. R. Crim. P. 32(i)(3)(B) (emphasis added). The Government's reading ignores the final clause.

United States v. Cannistraro, 871 F.2d 1210 (3d Cir. 1989), demonstrates the effect of that language.[15] There, as here, the district court declined to resolve a

[15] *Cannistraro* was decided under an earlier version of the Rule but it remains a persuasive interpretation of the final clause. *See* Wright, King & Klein, Federal Practice and Procedure (Criminal) 3d § 524.1 n.15.

dispute related to loss, stating "[i]t's not necessary for me to make a decision this morning as to whether it was three and a half million or whether it was 400,000. The fact of the matter is that the potential [for loss] was enormous and the potential was there because you made it." *Id.* at 1215. On appeal, this Court found the district court's words sufficient to disclaim reliance under Rule 32 and affirmed the sentence. *Id.*

Here, Judge Buckwalter's language was even more precise than in *Cannistraro*, which renders it impossible to characterize as "plain" any error in the phrasing of the disclaimer. The record likewise establishes that any associated error did not affect "substantial rights" because consideration of the Rubin contract would not have altered the sentence imposed. First, despite acknowledging its potential impact on the fraud loss calculation and the ultimate offense level, the district court characterized the one-level[16] difference that the contract represented as "minimal," not "extremely important," and "petty." App. 1568, 1586. And second, review of the Rubin exhibits, *supra*, demonstrates that he earned at least a substantial portion of the money paid under the contract such that it should not count towards fraud loss.

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[16] As it was then formulated, the district court's fraud loss calculation would have exceeded the $2.5 million threshold had it included the full value from Rubin's $150,000 Senate contract. This would have raised the total offense level by one. *See supra* note 11.

As an alternative argument, the Government contends that the jury verdicts compelled inclusion of the Rubin contract as loss. Br. 91, 94. This line of argument is similarly unavailing because the jury verdicts were silent as to loss. *See supra* Section I.B.i.

iii. It was within the district court's sound discretion to reject the Government's estimate of loss attributable to fraudulent tool purchases because of serious concerns raised as to its reliability; the Government's reliance on guilty verdicts to dispute this finding is misplaced.

The Government alleged that Fumo caused loss to CABN by purchasing items for personal use with its funds. Two spreadsheets prepared by the Government attempted to document these purchases. Exhibit 1015, the "tool chart," claimed that the defendant was responsible for $93,409.52[17] in fraudulent tool purchases; Exhibit 1016, the "consumer goods chart," held the defendant responsible for $40,694.68 in fraudulent consumer good purchases. *See* App. 5284-5395, 5400-15.

The FBI Agent who created the charts testified (in the responsibility evading passive voice) that "mistakes were made" in their production and added: "this entire chart, let me just say, is an estimate." *Id.* 3667-68. This is for good reason.

[17] The tool chart estimates total loss of $115,230.75 but that number was later reduced to $93,409.52 in recognition of a computational error. *See* Br. 100 n.45; App. 4439-40.

While CABN concededly had no use for personal consumer items like a *Forrest Gump* DVD, *id.* 5400, the line between legitimate and illegitimate purchases was much less definite for things like ladders, primer, and spray paint. *Id.* 5286-88. Further complicating matters, CABN's formal Victim Impact Statement conceded that it could not verify the accuracy of the Government's loss estimates. *Id.* 895.

For his part, Fumo testified that the tool chart overestimated illicit purchases by $50,380.35, *id.* 4034-38, and defense counsel echoed this argument at the PSR hearing. *Id.* 1530. Ultimately, the district court adjusted tool loss by this amount. Sealed App. 185. Given the admitted uncertainty surrounding the tool chart's production and the district court's superior ability to judge the credibility of Fumo's testimony, its tool loss adjustment cannot be considered clearly erroneous.

The Government's primary challenge to this finding is that it is precluded by the jury's verdicts. Br. 104-05, 107, 110, 112. As before, however, this claim lacks merit. Count Sixty-Five (CABN conspiracy) is not dispositive because illicit tool purchases formed but a fraction of the 93 overt acts alleged by the Government. App. 263-82. Guilty verdicts on the substantive counts are similarly unhelpful because, as noted above, the jury was instructed that it could convict without finding that anyone suffered loss. *Id.* 4361. Hence, that materials described in Counts Seventy-Three, -Four, and -Five were among the $50,380.35 in goods removed from loss is of no import. Even if it were otherwise, any error

would be harmless because these materials accounted for only $1,661.50, which is insufficient to alter the ultimate fraud loss adjustment.[18] *See infra* Section I.C.

The Government's secondary argument is likewise unavailing. Although it is true that the defendant is responsible for goods taken by co-conspirators, the jury verdicts said nothing of who was responsible for misappropriating goods, much less how much loss (if any) resulted therefrom.

iv. There was considerable support for the district court's adjustment of loss attributable to the *Gazela* painting and prints; the Government may not attack this determination based on facts outside the record on appeal.

The Government alleged that the commission of a painting of the *Gazela* and accompanying prints for $150,000 represented a complete loss to CABN. But Philadelphia's distinguished Freeman's Auctioneers and Appraisers valued the subject painting and prints at the time of sentencing at a combined total of $222,500—$72,500 *more* than CABN paid for them. App. 902. Aside from conjecture by the prosecutors and anecdotal accounts of the current whereabouts of

[18] The Government also derides the adjustment as irrational because "[i]nexplicably, the court did not credit Fumo's identical assertion that he only received half of the goods listed on...the consumer goods chart." Br. 104. As the Government itself acknowledged at the PSR hearing, however, the defense did "not disput[e]" the consumer goods chart below. App. 1533. In any event, credibility determinations are for the district court to make, and these judgments cannot be challenged on the basis that the district court was discriminating in its findings—*falsus in uno, falsus in omnibus* is not a mandatory inference.

these objects, the Government offered no countervailing evidence to dispute the appraisal. Accordingly, the district court credited the Freeman's appraisal for the purposes of its loss calculation. Sealed App. 185. Given the evidence presented, it was well within the court's discretion to do so.

On appeal, the Government attacks the appraisal by reference to evidence that was never offered in district court. *See* Br. 125 n.56. But this is not permitted. *See In re Cmty. Bank of N. Va.*, 418 F.3d 277, 317 n.32 (3d Cir. 2005); *Fassett v. Delta Kappa Epsilon*, 807 F.2d 1150, 1165 (3d Cir. 1986). The Government also observes that the district court mistakenly thought the appraisal to be for $250,000 instead of $222,500.[19] Although true, the effect of this mistake was negated by a subsequent computational error, *see infra*, and the point becomes moot.[20]

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[19] This mistake was not without cause; defense counsel mistakenly referred to a $250,000 appraisal at the PSR hearing. *See* App. 1531, 1537.

[20] Implicit in the Government's argument is the notion that the district court erred by setting *Gazela* value ($222,500) against its corresponding cost ($150,000). *See* Br. 124. Not only is this claim unsupported by legal argument and thus waived, *Laborers' Int'l Union v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994), it is wrong. Accounting for actual loss under U.S.S.G. § 2B1.1 contemplates a full accounting that requires setting fair market value of property returned and services rendered (including gains) against corresponding losses. *See, e.g., United States v. Laurienti*, 611 F.3d 530, 557 (9th Cir. 2010). Because *Gazela* value exceeded its cost, the court was correct to set the difference against remaining CABN loss. *Id.*

v. Challenges to how the district court calculated loss relative to the appraised value of the Tasker Street property are untimely.

The Government alleged that Fumo was responsible for nearly $573,608.36 in losses from allegedly non-recoverable expenses tied to the Tasker Street office space and adjoining parking lots. An expert appraisal valued Tasker Street at $1,235,000. Evidence at trial established that CABN purchased the properties at the defendant's behest. On this record, the district court accepted the defense argument that this value should be credited against CABN loss. Sealed App. 185. This was not clear error.

That this determination had a sound factual basis is evident from the Government's own brief. It does not dispute the appraisal, nor does it contest the defendant's role in purchasing or upgrading the properties. The Government instead alleges that the district court erred by failing to set certain acquisition and improvement costs against the appraisal.[21] But this claim is waived for want of having been raised below, and, what is more, any purported error is harmless

[21] The Government states in passing that the defendant deserves no credit for Tasker Street because CABN could have purchased the property on its own. Br. 118. Neither its objections to the PSR, App. 768-69, nor its oral argument at the PSR hearing made this claim. *Id.* 1535-36. Moreover, it is unsupported by legal argument and is therefore not properly before this court. *See Laborers' Int'l Union*, 26 F.3d at 398.

because consideration of the additional costs does not alter the § 2B1.1(b)(1) loss adjustment.

How to handle the appraisal vis-à-vis loss was squarely before the district court. In objections to the PSR and comments at the PSR hearing, the defendant argued that Tasker Street's appraised value must be considered alongside loss. App. 711, 1531, 1541-42. The Government's response was to simply oppose credit for appraised value altogether. Neither its objections to the PSR nor its comments at the PSR hearing addressed what (if any) additional expenses the district court should consider if it included appraised value in its loss calculation. *Id.* 768-69, 1535-36. This silence was no doubt strategic.

Before the district court, the Government steadfastly endorsed a loss estimate of $573,608.36 that was limited to unrecoverable expenses. For the first time on appeal, it now claims that crediting the $1,235,000 appraisal necessitates including acquisition and improvement expenses as well, which total $1,314,418.78 when combined with the unrecoverable expenses.[22] Had the district

[22] The Government claims that consideration of additional costs produces $1,357,818.78 in total expenditures. Br. 120. This is incorrect; summing the numbers identified in its brief equals $1,307,818.78. The Government also incorrectly describes the parking lot expense from Exhibit 1092 as being $100,000 instead of $106,600. *Compare* Br. 120 *with* App. 5458. Correcting this mistake produces total expenditures of $1,314,418.78, the number above.

court employed this methodology, Tasker loss would have been $79,418.78.[23] Put in slightly different terms, the Government attempted to inflate Tasker loss by almost $500,000 by focusing on unrecoverable losses and refusing to address how the court should respond if it accepted the defendant's request for consideration of appraised value. This was a tactical decision that failed. The Government is not entitled to a second bite at the apple on appeal.

If the Government's present claim regarding the Tasker Street property is to be considered at all, it is only for plain error. The Government cannot succeed under this onerous standard.

The purported error was not "plain," in that it was neither "clear" nor "obvious." *Johnson v. United States*, 520 U.S. 461, 467 (1997). A contrary finding would mean that it was clearly incumbent upon the district court, without invitation, to locate Tasker-related expenses from multiple exhibits within a massive trial record, compare them to the PSR loss estimate, exclude expenses already accounted for, and then determine which remaining expenses should also be set against loss. The Government also cannot show that this purported error affected its "substantial rights" because applying the Government's preferred

[23] This equals the expenditures identified by the Government ($1,314,418.78) less appraised value ($1,235,000).

methodology does not alter the § 2B1.1(b)(1) loss adjustment and, in turn, does not affect the advisory sentencing range. *See infra*.

C. Minor computational errors made while estimating fraud loss were harmless and do not trigger remand because they did not affect the fraud loss adjustment under U.S.S.G. § 2B1.1(b)(1) and, in turn, did not alter the applicable advisory sentencing range.

Total loss, as determined by the district court, was $2,379,914.66.[24] App. 1565. This corresponded to a 16-level adjustment under U.S.S.G. § 2B1.1(b)(1) for fraud loss between $1 million and $2.5 million. Errors that do not drive loss past the $2.5 million threshold so as to trigger a greater loss adjustment would not affect the ultimate advisory sentencing level and are therefore harmless. *See Jimenez*, 513 F.3d at 87.

The district court determined loss by working backwards form the PSR's estimate. Sealed App. 52-53, 92-93, 102. Specifically, it adjusted Senate loss to $1,293,927.42, adjusted CABN loss to $958,080.36, and left ISM loss unchanged at $127,906.88. App. 1565. Senate loss was reduced from the PSR estimate by excluding alleged "loss" from misclassified employees and the Rubin contract. Although the Government disputes the exclusion of these losses, it does not

[24] The Statement of Reasons form mistakenly places loss at $2,366,539.66. Sealed App. 184. The memorandum opinion on loss set it at $2,379,914.66, App. 1565, and this was the number at play during sentencing. *See id.* 1586 ("Your Honor, right now, we're at a loss figure of about 2.379 million").

challenge the method by which it was done. *Id.* CABN loss was reduced by lowering tool loss by $50,380.35 and applying "credits" for the appraised values of the *Gazela* painting/prints and Tasker Street. Sealed App. 185.[25] It was in applying these credits that computational mistakes arose. None of those mistakes, however, entitles the Government to relief on its appeal.

Because losses from the *Gazela* and Tasker Street were already included in the PSR's CABN loss estimate, *see* Sealed App. 93, accounting for appraised values merely required subtracting them from total CABN loss. Neglecting this fact, the district court instead proceeded by subtracting the respective loss amount from the appraised value and then setting the remainder against total CABN loss. The effect was to inadvertently double-count Tasker and *Gazela* losses:

[25] The Statement of Reasons form states that tool loss was reduced by $50,380. Sealed App. 185. But the record shows that $50,380.35 was used instead. Evidence supporting the reduction claimed that the "tool chart" overstated loss by $50,380.35, *see supra* Section I.B.iii, and the district court's CABN loss calculation is consistent with the inclusion of the missing 35 cents (*i.e.*, loss was $958,080.36, not $958,080.71). App. 1565.

CABN LOSS (PSR)	
Tools	$93,409.52
Consumer Goods	$40,694.68
Vehicles	$364,825.19
Tasker Street	$573,608.36
Cell Phones	$11,770.24
Personal Use of Employees	$9,255.69
Farm Equipment	$71,813.65
Political Polling	$254,560.38
Jubelirer Lawsuit	$20,000.00
Ventnor Dunes Project	$67,664.64
Cuba Trips	$39,000.00
War Dog Memorial	$50,000.00
Marrone/Coyne Bar Review	$11,000.00
Gazela Painting/Prints	$150,000.00
Hoyne Exhibition	$10,000.00
Checks to Frank Wallace	$3,250.00
CABN Loss	$1,770,852.35

DOUBLE-COUNTING	
Tasker Value	$1,235,000.00
Tasker Loss	-$573,608.36
Tasker "Credit"	$661,391.64
Gazela Value	$250,000.00
Gazela Loss	-$150,000.00
Gazela "Credit"	$100,000.00
PSR CABN Loss	$1,770,852.35
Tasker "Credit"	-$661,391.64
Gazela "Credit"	-$100,000.00
Tools Credit	-$50,380.35
CABN Loss[26]	$958,080.36

A step-by-step account of the *Gazela* credit illustrates the problem. The district court (i) mistakenly valued the painting and prints at $250,000, (ii) reduced this value by its cost ($150,000) to produce a $100,000 credit, and (iii) subtracted the credit from a total CABN loss estimate that already included a $150,000 entry for *Gazela* cost. By twice accounting for the $150,000 cost, the court effectively turned a $150,000 loss into a $50,000 loss[27] instead of a $100,000 gain.[28] This

[26] This actually equals $959,080.36, but the Government does not take issue with this error. *See* Br. 98 n.44.

[27] $250,000 – (2 × $150,000) = –$50,000. The government ignores this obvious double-counting error and the $50,000 loss that results from it in an attempt to

(cont'd)

negated the harm of overstating by $27,500 the appraised value, which was only $222,500. Use of the proper appraisal without double-counting would have produced a $72,500 surplus to be set against other CABN loss. Hence, the district court's computational error actually *increased* the "loss" figure by $122,500.

Where the correct *Gazela* value is used and the double-counting errors are corrected, CABN loss is only $262,972[29] and total fraud loss is $1,684,806.30.[30] This total differs from the original estimate but is still comfortably within the $1 million to $2.5 million range, thus rendering any error harmless. The same holds true where the Government's challenges to the CABN loss calculation are put into practice.

The Government disputes the tool reduction because it excluded loss from tools identified in Counts Seventy-Three, -Four, and -Five. Br. 107-10. It disputes the manner in which the appraisals were handled because excess value over cost

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(cont'd from previous page)
impugn the reasonableness of Judge Buckwalter's calculation by making it seem as if he pulled numbers from thin air (instead of acknowledging a readily apparent computational error). *See* Br. 124.

[28] $250,000 – $150,000 = $100,000.

[29] $1,770,852.35 (PSR CABN loss) – $1,235,000 (Tasker) – $222,500 (*Gazela*) – $50,380.35 (tools) = $262,972.

[30] $1,293,927.42 (Senate) + $262,972 (CABN) + $127,906.88 (ISM) = $1,684,806.30.

was set against unrelated CABN loss. *Id.* 117. And, finally, it objects to inclusion of the Tasker appraisal without also accounting for certain costs of acquisition and improvement that were not included in the PSR's estimate of Tasker loss. *Id.* 120.

Excluding the three tool counts of conviction reduces the tool adjustment to $48,718.85.[31] Excluding excess credit where appraised value exceeds cost limits the *Gazela* adjustment to $150,000 (its cost) despite the district court's finding that it was worth $225,000. And, finally, including the new Tasker acquisition and improvement costs brings Tasker loss to $79,418.78.[32] When these numbers are applied, CABN loss is $1,077,943.92[33] and total fraud loss is $2,499,778.22.[34]

Such relatively minor computational errors did not affect the ultimate Guidelines calculation or the sentence imposed. Whether one adopts the defendant's position on the CABN fraud loss computation or the Government's,

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[31] Counts Seventy-Three, -Four, and -Five represent $1,661.50 in tools, which, when subtracted this from the original tool adjustment ($50,380.35) produces a new adjustment of $48,718.85.

[32] *See supra* notes 22 and 23 and accompanying text. $79,418.78 is $494,189.58 less than the Tasker loss included in the PSR's estimate of Tasker loss ($573,608.36). Therefore, accounting for a revised loss of $79,418.78 requires subtracting $494,189.58 from the PSR's CABN estimate.

[33] $1,770,852.35 (PSR CABN loss) – $494,189.58 (Tasker adjustment) – $150,000 (*Gazela*) – $48,718.85 (tools) = $1,077,943.92.

[34] $1,293,927.42 (Senate) + 1,077,943.92 (CABN) + $127,906.88 (ISM) = $2,499,778.22.

loss remains between $1 million and $2.5 million and triggers the identical 16-level fraud loss adjustment. It follows that any purported error is harmless and remand is not required.

II. The district court made a reasonable determination that the Government did not meet its burden in proving facts sufficient to trigger sentence enhancements for sophisticated means and misrepresenting affiliation with a charitable organization.

The Government challenges the district court's fact-bound decisions not to impose Guideline enhancements for sophisticated means and misrepresenting affiliation with a charitable organization. USSG § 2B1.1(8)(A), (9)(C). Conspicuously absent from its argument is any meaningful discussion of the burden of proof or standard of review—each of which strongly favors upholding the district court's determination.

A. Standard of review.

The Government bore the burden in the court below of proving the facts that justify an enhancement. *United States v. Cicirello*, 301 F.3d 135, 142 (3d Cir. 2002). Although review of the district court's interpretation of the sentencing Guidelines is plenary, review of factual findings made in applying the Guidelines is for clear error. *United States v. Zats*, 298 F.3d 182, 185 (3d Cir. 2002). Most important, the district court's application of the facts to the Guidelines must receive "due deference," 18 U.S.C. § 3742(e), within the overall context of review for reasonableness, that is, for abuse of discretion. *Gall*, 552 U.S. at 41.

B. The district court did not clearly err in rejecting the sophisticated means sentence enhancement.

A two-level sentence enhancement for sophisticated means applies where the defendant uses "especially complex or especially intricate" conduct in the course or concealment of an offense. U.S.S.G. § 2B1.1 cmt. 8(B). In making this determination, the sentencing judge must compare the offense conduct to the typical federal fraud case. The Government presented several grounds for this enhancement: creating separate entities (*e.g.*, Eastern Leasing) related to CABN, paying legal fees through a political consulting firm, filing employee reclassification requests with the Senate, and using CABN credit cards to make fraudulent purchases. App. 838-45.

Judge Buckwalter, applying his judgment and experience, was not persuaded by the Government. "[F]or reasons substantially based upon defense arguments[,]" he found that the sophisticated means enhancement was "improper."[35] Sealed App. 184; App. 1565. Despite this admittedly fact-based determination, the appellant now presents its case as if this Court should examine Judge Buckwalter's

[35] Claims that incorporating the defendant's arguments by reference was insufficient are unsupported. *See* Br. 127, 134. Nothing more was required of the district court. This Court does not require the "ritualistic exercise" of "stat[ing] the obvious for the record." *Boggi*, 74 F.3d at 479.

finding de novo. But de novo review is not available, and the Government's claim does not justify reversal.

Defense counsel opposed the prosecutors' arguments based on legal fees, reclassification requests, and credit card use on the ground that nothing "could be less sophisticated[.]" *Id.* 1554; *see also id.* 715 ("[T]here is simply nothing *especially* complex nor intricate about a political consultant paying legal bills on his client's behalf."). By contrast, objections to Eastern Leasing and related entities proceeded in terms of intent. No one disputed that creating a shell corporation in order to conceal illegitimate activity could trigger the enhancement; however, the operative question below was whether the defendant had such an intent when the subject entities were formed. As to Eastern Leasing, for example, defense counsel argued that the defendant's intent was merely "to provide a corporate shield for the charitable assets of Citizens Alliance in the event that one of the vehicles was in an accident—a legitimate and common business purpose." *Id.*; *see also id.* 1554 (enhancement turned on whether it was a "fraudulent entity designed to hide improper activities of Citizens' Alliance, or was it a for-profit separate entity of the kind that nonprofits typically set up to separate their [tax-exempt] 501(c)(3) activities from their nonqualified activities or for other proper purposes?").

Whether conduct related to legal fees, reclassification requests, and credit card use was "exceptionally" complex or intricate is a factual determination, incorporating a judgmental and comparative consideration, that is reviewable for clear error. *See, e.g.*, *United States v. Conner*, 537 F.3d 480, 492 (5th Cir. 2008). The Government cannot meet this standard. When describing the offense conduct, the district court observed that "[t]he scheme that the defendant adopted to secure the use of...Citizen's Alliance money was so simple that reporters on the staff of the Philadelphia Inquirer could discover it, presumably, without the use of sophisticated investigation techniques of law enforcement." App. 1621. This determination was entirely reasonable. Indeed, the Government itself explained that "there is nothing particularly complex about this case" when opposing a motion to continue sentencing. *See id.* 715.

Determinations about the defendant's intent in forming Eastern Leasing and related entities are likewise exclusively factual in nature and therefore reviewable for clear error. *See United States v. DeJesus*, 347 F.3d 500, 505 (3d Cir. 2003); *United States v. Geevers*, 226 F.3d 186, 193 (3d Cir. 2000); *United States v. Shaffer*, 35 F.3d 110, 113 n.4 (3d Cir. 1994). Again, the Government cannot meet this standard. Reference to the defendant's use of cars owned by Eastern Leasing is not dispositive on the question of intent. That the defendant misused property belonging to a CABN-related entity does not compel a finding that he created or

abused the entity shield for the purpose of concealing wrongdoing. Transfer of CABN funds to Eastern Leasing is similarly inconclusive; it points equally to the legitimate operation of an entity created to limit the liability of its tax-exempt partner. Given the weight of the opposing arguments, it was reasonable for the district court to determine that the Government had not carried its burden in proving that the defendant formed Eastern Leasing and related entities with the intent to commit or conceal fraudulent activity and on that basis to decline imposition of an additional two-level enhancement.[36]

C. The district court did not clearly err in refusing to add a charitable organization sentence enhancement.

The sentencing court neither misinterpreted the Guidelines nor committed any clear error in fact-finding when it rejected the Government's request for an additional two-level enhancement under USSG § 2B1.1(b)(8)(A). This adjustment applies where, in obtaining a benefit, a defendant misrepresents that he or she is acting on behalf of a charitable organization "when, in fact, the defendant intend[s] to divert all or part of that benefit" for personal gain. U.S.S.G. § 2B1.1 cmt. 7(B). The Government argued that the enhancement applied because of CABN state grant applications signed by Ruth Arnao that failed to disclose personal use of

[36] The Government also argues for this ground by reference to statements in the district court's order denying the motion for acquittal. Those findings were inapposite at the sentencing stage. *See supra* Section I.B.i.

charity funds and because of the defendant's role in securing a $17 million PECO donation to CABN when settling a civil lawsuit.[37] Judge Buckwalter acted reasonably in rejecting the suggestion that a two-level adjustment was warranted on these grounds.

Defense counsel objected to the grant application argument because there was no misuse of state grant money. Recalling trial testimony of Donna Buzby, a CPA specializing in non-profit organizations, counsel noted that CABN funds were segregated and that state grant money was properly accounted for "down to the penny." App. 1550. Counsel opposed the other ground because "there is no evidence" that, "when negotiating the settlement with PECO," the defendant "had an intent" to divert any money to himself. *Id.* 1552. Although it was undisputed that "some of the [PECO] money later went to him," the operative question, under the Guideline and its authoritative Application Note, was limited to the defendant's intent when negotiating with PECO, *id.*, a point on which the Government and district court both agreed. *See id.* 1551 ("What matters is that your intent is to divert some of those funds..."); *id.* 1552 ("That seems to be a correct statement.").

[37] Additional grounds for the enhancement were not actively pursued below and are presently unsupported by legal argument. *See* Br. 127 n.57. They are therefore waived on appeal. *Laborers' Int'l Union*, 26 F.3d at 398.

After considering the evidence, the district court refused the enhancement "for reasons substantially based on defense arguments." Sealed App. 184.

On appeal, the Government concedes that whether state grant money was misused was "hotly debated" below. Br. 131. Imposition of the enhancement on this ground centered on the credibility of Ms. Buzby's review of CABN records.[38] Inasmuch as the Government itself acknowledges the substantial factual dispute and defense counsel identified credible evidence that none of the subject benefits were diverted, it is impossible to label the district court's determination not to apply an enhancement on this ground as clearly erroneous.

Determinations about the defendant's intent while interacting with PECO are factual in nature and reviewable for clear error. *See DeJesus*, 347 F.3d at 505; *Geevers*, 226 F.3d at 193; *Shaffer*, 35 F.3d at 113 n.4. Nothing below conclusively established this point. Given the underwhelming factual record on the defendant's subjective intent and the general theme of the trial (*i.e.*, uncomplicated fraud predicated upon misguided belief of entitlement), the district court reasonably

[38] The Government disputes Ms. Buzby's analysis in a footnote and avers that the "truth was far different." Br. 132 n.59. But the "truth" was never established at trial (or at the sentencing hearings). As defense counsel noted below, mistakes in the government's analysis were documented at trial and no guilty verdicts "prove any misapplication of [state] grant money." App. 1550.

concluded that the Government had not met its burden of showing that the defendant intended to divert funds at the time he interacted with PECO.

III. The downward departure for Fumo's good works proceeded on legally permissible grounds and was fully supported by a well-developed factual record; the Government's challenge to the district court's departure determination is not only waived but also fails on the merits.

Consistent with its claim that substantive review of Fumo's sentence is impossible due to what it perceives as pervasive procedural error, the Government claims a failure by the district court to clarify whether its good works sentencing reduction was a variance or a departure and carefully withholds an attack on the departure determination itself. *See* Br. 150-51. No challenge to the departure determination itself appears in the Statement of Issues, and the heading of Section III addresses only an alleged failure to differentiate between departure and variance. *Id.* 3-4, 150.

The Government nonetheless proceeds to attack the legal and factual basis for a good works departure at some length. *Id.* 153-77. But the challenge to the departure determination implicit in this lengthy discussion is waived because of the Government's tactical decision to appeal only the alleged failure to distinguish between departure and variance. *See Nagle v. Alspach*, 8 F.3d 141, 143 (3d Cir. 1993) ("When an issue is either not set forth in the statement of issues presented or not pursued in the argument section of the brief, the appellant has abandoned and waived that issue on appeal."); *Indus. Network Sys., Inc. v. Armstrong World*

Indus., Inc., 54 F.3d 150, 152 n.3 (3d Cir. 1995) (citing *Nagle* and refusing to consider arguments in text of brief that are not set out in statement of issues).

Challenges to the good works sentencing reduction fail on all fronts. First, the record clearly establishes that the district court granted a departure and not a variance. Second, there was a sound legal basis for the departure. And third, evidence below amply supported the district court's factual determination that Fumo's good works qualified for such a departure.

A. Standard of review.

Whether the district court sufficiently clarified that it granted a departure from the Guidelines, and not a variance under 18 U.S.C. § 3553(a), is a procedural question subject to reasonableness review under the abuse-of-discretion standard. *Gall*, 552 U.S. at 41. The Government has not challenged the factual and/or legal basis for the departure; much to the contrary, the Government has affirmatively withheld that issue from the present action. *See* Br. 176 ("If the court granted such a departure, the government *could* appeal and seek reversal.") (emphasis added). Hence, this court lacks jurisdiction to reach the issue. *See Nagle*, 8 F.3d at 143 Insofar as the Court does engage in such an inquiry, review of the district court's interpretation of U.S.S.G. § 5H1.11 (p.s.) is plenary, and review of its factual determination about whether Fumo's conduct was extraordinary is for clear error. *Zats*, 298 F.3d at 185

B. The record below makes clear that the district court granted a downward departure for good works and not a variance.

At Point III of its brief, focusing on what the district court did *after* sentencing, not at or in sentencing, the Government claims that Judge Buckwalter committed a significant procedural error when he "refused to clarify" whether Fumo's sentence represented "a departure or a variance, or both." Br. 150. In its Statement of Issues, the Government contends that the district court failed—presumably ever—to "specify whether" Fumo's sentence represented "a departure or a variance." Br. 3-4. Both of these contentions are directly contrary to the record. The district court committed no error, much less any "significant" error, in its articulation of the rationale for Fumo's departure sentence. The Government's present effort to manufacture confusion where in fact there is none fails.

When announcing its sentence, the district court explicitly stated (four times, in fact), as required under 18 U.S.C. § 3553(c), that it was granting a departure from the Guidelines range. *Id.* 1622 ("You worked hard for the public and you worked extraordinarily hard and I'm therefore going to grant a departure from the guidelines."); *id*. ("I base that departure principally upon my consideration of the letters that I've read in your support."); *id*. 1623 ("So on that basis I'm going to grant a departure from the guidelines."); *id*. ("So I have considered what the

guidelines have said...but I've also added a finding that I'm going to depart from them.").[39]

Defense counsel filed a post-sentencing Rule 35(a) motion for clarification of the sentence. Because the district court had announced the downward departure while going through the § 3553(a) factors, defense counsel queried whether the court had intended to grant a variance rather than a departure and had simply misspoken. *Id.* 1629. The Government disagreed, writing that "the Court repeatedly stated that it decided to grant the departure motion based on public service." *Id.* 1635. In denying the motion, the district court wrote simply: "The government correctly states that the court announced it was granting a departure." *Id.* 1653.[40]

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[39] The Government's own brief concedes the clarity of this record. *See* Br. 144 ("[T]he court repeatedly stated that it granted a 'departure' from the range of 121-151 months it calculated, on the basis of Fumo's public service."); *id.* 145 ("The court never stated the term 'variance'...").

[40] The district court again reaffirmed the nature of Fumo's good works departure while sentencing co-defendant Ruth Arnao. There, it described the credit as "a guideline matter," *id.* 1818, before eventually granting Arnao a variance instead of a departure. *Id.* 1836 ("So the fact that you, Ms. Arnao, at least did something in your lifetime to help other people, to help other charities, it's not enough for me to depart from the guidelines, but it's certainly enough for me to consider to vary in some way from what the guidelines suggest here."). The Government conceded this point when responding to the Rule 35(a) motion. *Id.* 1635 ("At the sentencing hearing for Ruth Arnao on July 21, 2009, the Court reiterated that it had given a departure to Fumo...").

On the same date that it denied the defense Rule 35(a) motion, the district court filed its written Statement of Reasons form, as required for departure sentences by 18 U.S.C. § 3553(c)(2). Sealed App. 181-87. The Statement of Reasons further belies the Government's present claim—180 degrees opposed to the position it took in opposition to the defendant's Rule 35(a) motion[41]—that the nature of Fumo's sentence is somehow unclear.

Section IV of the form asks for the advisory guidelines sentencing determination. Here, the district court selected "C," indicating that it "departs from the advisory guideline range for reasons authorized by the sentencing guidelines manual." *Id.* 182. Box "D," applicable for variances, is unmarked. At Section V, the district court indicated that it departed "below the advisory guideline range" and listed § 5H1.11 (good works) as the "Reason(s) for Departure." *Id.* Not only do the entries on the official Statement of Reasons track the district court's oral statement upon sentencing Fumo, they contrast meaningfully with those made on

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[41] Indeed, the Government's entire Point III is barred for this reason by the doctrine of judicial estoppel. *See Zedner v. United States*, 547 U.S. 489, 503-05 (2006) (rejecting Government's particular invocation of judicial estoppel against defendant in criminal case); *In re Teleglobe Comm. Corp.*, 493 F.3d 345 (3d Cir. 2007) (explaining doctrine). Judicial estoppel bars a party from "playing fast and loose with the courts" by taking contradictory positions at different stages of a case for a perceived tactical advantage. *See also United States v. Yeaman*, 194 F.3d 442, 465 n.11 (3d Cir. 1999) (noting judicial estoppel exception to rule that Government may change position on appeal from that taken below).

Ms. Arnao's form. There, the district court selected "D"—"a sentence outside the advisory sentencing guideline system"—at Section IV and left Section V ("Reason(s) for Departure") entirely blank, *id.* 285, which is consistent with its earlier statement that she qualified for a variance but not a departure. App. 1836. There is simply no ambiguity about the record of this case in this regard.[42]

The Government's present allegations that the district court failed to distinguish between a departure and a variance focus upon discrete portions of the record taken out of context. *See* Br. 147.[43] This is not permitted. A sentencing transcript must be considered as a whole. *United States v. Vargas*, 477 F.3d 94,

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[42] At Section VI on Fumo's form, the district court marked boxes intended for use where a court grants a variance. Sealed App. 183. But reading this section alongside the sentencing transcripts and Ms. Arnao's form shows that the district court did so in an attempt to show that the sentence squared with the § 3553(a) factors and not that it varied on each and every one of those grounds. To wit, the variance box ("D") at Section IV is conspicuously blank on the defendant's form, and the court marked boxes for § 3553(a) factors that it found inapplicable at his sentencing hearing—most notably, it marked the box for § 3553(a)(2)(D) ("needed educational or vocational training, medical care, or other correctional treatment") despite rejecting the claim that the defendant's medical condition warranted a downward variance. App. 1623. Ms. Arnao's form reflects the same pattern. There, the court marked every § 3553(a) box despite stating that it granted a variance for good works only. Sealed App. 286; App. 1836. Among the boxes marked was § 3553(a)(2)(C) ("protect the public from further crimes"), which the district court dismissed as "not really much of a consideration" at her sentencing hearing. *Id.* 1837.

[43] Many arguments related to the departure or variance issue appear outside Section III of the Government's brief, which purports to address the issue but instead attacks at length the factual and legal authority for the departure. The citation above, for example, is from Section II.

103 (3d Cir. 2007), *abrogated, in part, on other grounds by Kimbrough v. United States*, 552 U.S. 85 (2007). To view potentially ambiguous statements in isolation is to "elevate form over substance." *United States v. Dragon*, 471 F.3d 501, 506 (3d Cir. 2006).

Throughout the sentencing proceedings, the probation officer, the prosecutors, defense counsel, and the district court each repeatedly acknowledged the difference between a downward departure for good works under U.S.S.G. § 5H1.11 (p.s.) and a below-range variance under 18 U.S.C. § 3553(a). The PSR itself noted that the defendant sought recognition for his good works either through a departure under § 5H1.11 (p.s.) and/or by means of a variance under § 3553(a). Sealed App. 155. Defense counsel repeated this point at the July 8 hearing on objections to the PSR. App. 1556. So too did prosecutors, who emphasized that differing standards apply to the two requests. *Id.* 1558 ("Whereas the departure requires exceptional activity outside the heartland, that is not true for a variance.").

Recognition of the two distinct forms of argument for mitigation continued at the final sentencing hearing. There, prosecutors disputed the defendant's evidence of good works by questioning "whether or not any of this justifies a downward departure or a downward variance based on good works." *Id.* 1594. Defense counsel then responded that its evidence could support either "a departure

under the Federal Sentencing Guidelines" or a "variance" under the terms of § 3553(a). *Id.* 1601.

This discussion did not fall upon deaf ears. Before announcing its sentencing decision, the district court twice acknowledged the differing grounds upon which it might credit good works. *See id.* 1594 ("I think the point that I'm concerned about here is the point—is to what extent do good deeds warrant either a variance or a downward departure?"); *id.* 1595 ("And we've talked about the fact that you don't believe that he's entitled to a downward departure for his good deeds, or even a variance, I take it?"). Accordingly, when sentencing the defendant, the district court made a point of stating that it was granting a guidelines departure.

The Government's entire argument to the contrary turns on an unwarranted misreading of a few words in a narrative addendum that Judge Buckwlater attached to the Statement of Reasons form. In pertinent part, he wrote:

> I next determined whether there should be a departure from the guidelines and announced at the sentencing hearing that there should be based on my finding extraordinary good works by the defendant. I did not announce what specific guideline level the offense fell into; that is to say, the precise number of levels by which I intended to depart because until I considered all other sentencing factors, I could not determine in precise months the extent that I would vary from the guidelines.
>
> Having advised counsel of the offense level that I found and my intent to depart downward, I then proceeded to hear from counsel

> their respective analyses of what an appropriate sentence should be.
>
> The procedure I followed was perhaps more akin to that associated with a variance than a downward departure because I never announced nor have I ever determined to what guideline level I had departed. Ultimately, the argument over which it was elevates form over substance.

Sealed App. 185-86.

Not only does this excerpt again confirm the grant of a departure, it demonstrates application of the correct standard—extraordinariness. *See United States v. Goff*, 501 F.3d 250, 261 n.16 (3d Cir. 2007). Against this backdrop, comments about waiting to announce the extent of the departure, not stating the guideline level to which it departed, and elevating form over substance are insufficient to raise the specter of ambiguity. Much to the contrary, they relieve it. The comments make clear that, idiosyncratic procedure aside, the district court simply granted a downward departure for extraordinary good works. The Government's entire argument on this point is at best hyper-technical and at worst a distortion of the record. The trial court's narrative addendum must be interpreted in the overall context of the clarity of his determination to invoke his departure authority. In the parallel Arnao sentencing, he not only demonstrated that he distinguished between a departure and a variance but clarified that he did so because of his view that while Fumo's good works were so extraordinary that they

qualified for a departure Arnao's did not meet that high standard but did qualify for a variance. *See supra* note 40.

Where a legitimate gap in the record precludes appellate review by making it impossible to determine whether a court departed under the guidelines or varied pursuant to § 3553(a) remand may be appropriate.[44] There is no such concern here. Judge Buckwalter's formal statements at the sentencing hearing and in the Statement of Reasons, corroborated by numerous comments from the order denying the Rule 35(a) motion, and the narrative addendum unanimously confirm that the district court granted a downward departure.

C. There was a sound legal basis for the good works departure.

Contrary to the Government's argument, the district court's conclusion that a good works departure was legally permissible is supported by applicable law. Br. 152-53. The United States Sentencing Guidelines "place essentially no limit on the number of potential factors that may warrant a departure." *United States v.*

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[44] *See, e.g.*, *United States v. Vazquez-Lebron*, 582 F.3d 443 (3d Cir. 2009) (remand where court granted downward departure but did not give required level of credit, creating uncertainty as to whether court unwittingly erred or gave required credit for departure and then varied upward); *United States v. Brown*, 578 F.3d 221 (3d Cir. 2009) (remand above-Guidelines sentence imposed after court referenced both upward departure Guideline consideration and upward variance argument, without distinguishing which (or both) applied); *United States v. Lofink*, 564 F.3d 232 (3d Cir. 2009) (remand where court refuses to distinguish between departure and variance and ultimately imposes below-Guideline sentence).

Abuhouran, 161 F.3d 206, 209 (3d Cir. 1998) (quoting *Koon v. United States*, 518 U.S. 81, 106 (1996)). And, in exceptional cases, the Guidelines specifically contemplate downward departures based on civic, charitable, or public service. *See* U.S.S.G. §§ 5H1.11 (p.s.), 5K2.0 cmt. n.3(C).[45] This standard applies equally where the defendant's occupation involves such work. *See United States v. Wright*, 363 F.3d 237, 248 (3d Cir. 2004). Thus, to the extent that this Court may treat the point as properly raised by the Government's appeal, it has no merit.

The Government asserts that, because the defendant was an elected official, "a downward departure based on [his] public service was impermissible…" Br. 153. Its argument to this end relies upon a strained reading of *United States v. Serafini*, 233 F.3d 758 (3d Cir. 2000). There, this court addressed the permissibility of good works departures for public servants:

> Conceptually, if a public servant performs civic and charitable work as part of his daily functions, these should not be considered in his sentencing because we expect such work from our public servants. While we might question whether our sentencing courts should consider such things as one's situation or opportunity, the methodology that requires us to determine "ordinary" versus "exceptional" and "laudable" versus "extraordinary" is a subjective one that involves comparing a defendant's conduct to the norm. Thus, to the extent [the record] does not evidence extraordinary community service under Guideline 5H1.11, but instead, reflects

[45] The title of § 5H1.11 (p.s.) includes the term "good works" and its text speaks of "public service." In explaining his departure from the Guidelines Judge Buckwalter used both phrases.

> merely the political duties ordinarily performed by public servants, we are of the view that they cannot form the basis of a departure.

Id. at 773.

The Government reads this passage (supported by a truncated quotation) as a hard-and-fast rule that public servants cannot receive credit for good works that relate to their occupation.[46] This misinterpretation of *Serafini* proceeds from its total disregard of the final sentence above, which clarifies that the limitation applies only to "political duties" that are "*ordinarily* performed by public servants." *Compare* Br. 155 (omitting critical language) *with Serafini*, 233 F.3d at 773 (emphasis added).

Read as a whole, *Serafini* merely confirms the well-established Guidelines departure principle that extraordinary conduct is a relative concept, which demands comparing a defendant's conduct to the norm. To deem someone "extraordinary" in the abstract is nonsensical: extraordinary as compared to *whom*? The inquiry instead requires holding a defendant up to his or her peers. *See United States v. Cooper*, 394 F.3d 172, 176 (3d Cir. 2005) (quality of good works must be considered relative to one's" wealth and status in life" because "[m]ore is

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[46] Not only is this interpretation dispelled by *Wright*, *infra*, it also tends to the erroneous conclusion that credit may not be given for extraordinary military service because we naturally "expect such work" from those in the armed forces. The Guidelines, of course, allow such departures. *See* U.S.S.G. § 5H1.11 (p.s.).

expected" from those with considerable wealth); *United States v. Ali*, 508 F.3d 136, 149 (3d Cir. 2007) (same). It thus comes as no surprise that, where the defendant is a public servant, things *ordinarily* done by public servants do not justify a departure for good works—rather, his or her service must be *extraordinary* when compared to other public servants.[47]

While still a member of this Court, Justice Samuel Alito confirmed the accuracy of this reading of *Serafini*:

> We do not understand the discussion in *Serafini* to mean that a person whose occupation involves charitable or civic work can never qualify for a downward departure based on extraordinary good works that relate to that occupation. Such a rule would lead to anomalous results. For example, a physician who earns a high income in private practice while also making extraordinary contributions in providing health care to the poor might qualify for a downward departure, while a physician who gives up the possibility of a career in private practice to work full time in a low paying job devoted to helping the poor would not. Rather than endorsing such a regime, the discussion in *Serafini* stands for the proposition that "the political duties ordinarily performed by public servants"—the sort of duties that are generally needed to stay in office—cannot qualify. It is, rather, only when an individual goes well beyond the call of duty and sacrifices for the community that a downward departure may be appropriate.

Wright, 363 F.3d at 249. Applying this rule to the case before it, the *Wright* court went on to explain that the "charitable and civic contributions" of the defendant

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[47] For this reason, the defendant public servant's record in *Serafini*, which was best described as that of an average local politician, did not warrant a departure. 233 F.3d at 773.

pastor were properly considered for departure purposes even though they were performed "in his capacity as a member of the clergy." *Id.* at 250.

The district court properly applied the *Serafini-Wright* standard to Fumo by determining that his good works were extraordinary as a state senator qua state senator:

> [I]n my opinion, you were a serious public servant. You worked hard for the public and you worked extraordinarily hard and I'm therefore going to grant a departure from the guidelines.... I base it on my overall assessment that most politicians just don't do as much as you do. They don't spend the time that you do and devote their entire life to politics that I think and found that you did.

App. 1622-23. Thus, Judge Buckwalter did not misapprehend the governing legal standard for the departure he granted and, accordingly, committed no procedural error in this regard.

D. The factual record amply supported the downward departure.

The Government's Statement of Issues and argument headings do not include any attack on the adequacy of factual support in the record for a good works departure. Nevertheless, the appellant's brief is full of such discussion. To the extent that the discussion could be construed as the advancement of an issue on appeal, no basis for reversal has been shown.

Whether good works are "extraordinary" is a factual finding reversible only for clear error. Appellate review in this regard is "quite deferential" and "limited to ensuring that the circumstances relied upon by the District Court are not so far

removed from those found exceptional in existing case law that the sentencing court may be said to be acting outside permissible limits." *Serafini*, 233 F.3d at 772 (internal quotations omitted); *see also Koon*, 518 U.S. at 98, 99 (a departure decision "will in most cases be due substantial deference, for it embodies the traditional exercise of discretion" and because district courts have "special competence" in assessing "the 'ordinariness' or 'unusualness' of a particular case"); *Ali*, 508 F.3d at 150 ("Regardless whether we agree with the sentencing Judge's assessment," court affirms departure if it is "within the bounds of reason").

Here, the district court departed because of the defendant's "extraordinary good works." Sealed App. 186. This was supported by its factual findings that the defendant "worked extraordinarily hard," did more than his peers, "spen[t] more time," and "devoted [his] entire life" to public service in a way that "most politician's just don't[.]" App. 1622-23. The Government repeatedly asserts that there was "no evidence" to support such a departure. *See* Br. 174-76. Not only is this inconsistent with an earlier concession that the "court conceivably could grant some variance based on Fumo's public service,"[48] *id*. 153, the claim is flatly contradicted by the factual record below.

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[48] Legal standards for good works departures and variances may differ, but the Government has admitted that the supporting evidence can be the same. *See* App. 1558 ("[G]rounds for departure" for good works "could also be the basis" for variance); *id*. 1618-19 (acknowledging evidentiary overlap at sentencing hearing).

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The district court based its factual findings upon a well-developed record that included letters from the community and live testimony from competent defense witnesses at the sentencing hearing. App. 1622. For its part, the Government presented little in rebuttal apart from hyperbolic speculation as to how the "eleven million people in Pennsylvania" felt. What is more, it failed to offer cogent responses to probing questions from the district court as to whether there was any "debate" as to whether the defendant "did more than the average legislator" and "was always working."[49] *Id.* 1593-94.

A total of 259 letters were submitted in support of the defendant.[50] According to the Government, however, the letters deserve no weight because they are "almost exclusively" concerned with his legislative accomplishments and are

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By not attacking the *extent* of the departure, the government has waived any argument that the evidence of record is only sufficient to support some lesser deviation from the Guidelines range.

[49] The district court itself marveled at the lack of Government evidence during the proceedings below. *See* App. 1542 ("I have never been in a case where the victim hasn't been right there and saying to me Judge, that guy took two million dollars from me.... The victims are always here..."); *id.* 1587 ("[T]he Senate hasn't even come here. Has anyone heard from the Senate to say how badly they feel about this?").

[50] Although numbers do not control the inquiry, it is worthwhile to note that this showing far exceeds those in other cases where good works departures were upheld on appeal. *See United States v. Tomko*, 562 F.3d 558, 562 (3d Cir. 2009) (en banc) (50 letters); *Cooper*, 394 F.3d at 174 (24 letters); *Serafini*, 233 F.3d at 773 (150 letters).

silent as to his personal "devotion" and "work habits." Br. 164, 166, 168. Reference to the letters themselves shows these claims to be false.[51]

No less than twenty-one letters speak directly to the defendant's remarkable devotion and work ethic.[52] Wherever he was, day or night, the Senator was always

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[51] Challenges to the defendant's work ethic are also unsupportable given the Government's own admission that, wherever he was, the defendant was "available to answer calls and emails" and spent "hours" every morning and night working remotely via computer. Br. 162. The district court echoed this sentiment at the sentencing hearing, commenting that "he was always working" and "even down on vacation [there] were people who said that he was on the telephone and making his calls and doing that stuff." App. 1594. Challenges to the defendant's work ethic that are premised on the amount of time that he was away from Harrisburg or Philadelphia are thus unavailing, especially when one considers that the Pennsylvania Senate is in session for only a small fraction of each year. In 2010, for example, the Senate was in session for a total of only 56 days. *See* Senate Session Days-2010, *The Pennsylvania State Senate*, http://www.pasen.gov/session.cfm (last visited Dec. 9, 2010).

[52] Letter from Andrew Cosenza, Jr., App. 1065 ("continually working, called away at dinner time, on the weekends, even on vacations."); Letter from Brian O'Neill, *Id.* 1098-99 ("worked tirelessly, seven days a week and around the clock to help us every step of the way."); Letter from Ricardo Dunston, *Id.* 1136 ("I was surprised to see him behind his desk so soon after his first, highly publicized, heart bypass surgery.... [T]hat moment symbolized...his legendary reputation as a tireless and tenacious worker."); Letter from Patricia Freeland, *Id*. 1141 ("I have never met a harder working individual. Whether it was day, night, weekends, he never stopped."); Letter from Col. Henry Reichner, Jr., *Id*. 1172 ("Whenever a worthy project was discussed with [Fumo], it was a question of 'how can I help'"); Letter from Michael Treacy, *Id*. 1184 ("[H]e throws himself into it, heart and soul. I don't think he ever rests, day, night, weekends—he is always planning, figuring out, emailing, how to make things better... [He] made incredible sacrifices of his own time..."); Letter from Charles Zappala, *Id*. 1189 ("He was one of the first people I had ever met who literally made himself available at any time. You could reach out to Vince on a Saturday or Sunday or at 10:00 pm on a weekday and be

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on duty and could be counted on to help those in need. A letter from Samuel Savitz provides a poignant example of this commitment. He describes leaving a desperate voicemail late one Friday night because his brother, who suffered from AIDS, was in jail and needed medical attention. App. 1393. Although Savitz had never met the defendant and was but a simple constituent, the defendant returned

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assured of a response within 24 hours. He was indefatigable..."); Letter from Harriet Lessy, *Id*. 1198 ("[H]e would respond night or day—often immediately...even over a weekend or while he was on vacation."); Letter from Annette Villari, *Id*. 1203 ("For close to 30 years, I watched him rush to Harrisburg on many early mornings and work constant late hours in his South Philadelphia office..."); Letter from Jan Carroll, *Id*. 1238 ("Vince will work until two or three in the morning most nights reading or writing notes or talking on the phone."); Letter from Fred DiBona, III, *Id*. 1249 ("constantly working" during vacations); Letter from John Garaguso, *Id*. 1257 ("[H]is focus on and commitment to his job was paramount, with a 24/7 priority."); Letter from Joseph Nuzzi, *Id*. 1271 (he personally responded to call "late one night just before Christmas" to help a woman avoid losing her house); Letter from Nick Serpentine, *Id*. 1291 ("[P]eople would call Vince all hours of the night and he would answer, no matter what"); Letter from Anna Verna, *Id*. 1332 ("Vince's work ethic [and] dedication...are legendary, but having worked closely with Vince over many years, I know that legend is well deserved."); Letter from Maria and Konstantine Sepsis, *Id*. 1362 (working throughout vacation); Letter from Samuel Savitz, *Id*. 1393 (immediately responding to constituent telephone call at 2 a.m. about jailed brother who needed medical attention); Letter from Gina Novelli, *Id*. 1437 ("I have always known him to work around the clock to make sure his constituents were served to the fullest"); Letter from Dr. Frederick Simone, *Id*. 1447 ("Because of his accessibility to his constituents, he was constantly on tap for request for help."); Letter from Jermaine Veasy, *Id*. 1449 ("Regularly taking a phone call or responding to an email during holidays, family meals, and vacations for work related matters were all frequent for Vince."); Letter from Carl Engelke, *Id*. 1477 ("His work ethic is unparalleled and I was continuously amazed by his ability to focus on so many different tasks at once.").

the call at 2 a.m. to personally assure him that his brother would receive treatment, which he did.

Other letters detail the defendant's extraordinary service to the City of Philadelphia and Pennsylvania as a whole. Praise is not offered in abstract terms; rather, the authors characterize the defendant's efforts as exceptional even when compared to his peers. Twelve such letters originate from current and former lawmakers and staffers, who are aptly situated to offer such comparisons.[53] Six

[53] Letter from Governor Edward Rendell, App. 1104-05 ("[H]e worked tirelessly to help and protect the poorest and most vulnerable citizens of Philadelphia—many of whom did not live in his district and therefore could not vote for him and almost all of whom did not have the wherewithal to contribute to his campaign or to any of his projects. He did it because...[he] has a deep sense of social responsibility and a strong caring for the plight of the most unfortunate members of our society. He genuinely cared for them. He fought fiercely for them and on many occasions was their only champion and only protector. In short, Vince Fumo did a tremendous amount of good for the very best of reasons."); Letter from Thomas Wrigley (former Congressional and Mayoral staffer), *Id*. 1115 ("Vince Fumo was the most effective legislator—for good—that I have ever met."); Elizabeth Craig (Senate Budget Analyst), *Id*. 1209 ("I have not known an elected official who worked so hard and helped so many."); Letter from Elliott Curson (campaigned against Fumo), *Id*. 1246 ("Vincent Fumo was a dedicated public servant who went above and beyond the call of duty to help the people in his district who elected him—as well as all Pennsylvanians."); Letter from Robert Borski (former Congressman), *Id*. 1308 ("He is one of the most effective public officials I have ever known.... I found him tireless in his goal to make government effectively represent the people."); Letter from David Cohen (former Chief of Staff for then-Mayor Rendell), *Id*. 1310-11 ("[H]e was the City's number one protector in Harrisburg, year after year..."); Letter from Nicholas DeBenedictis (member of Governor Thornburgh's cabinet), *Id*. 1312 ("I cannot think of one major civic activity in which I have been involved...that would have been possible without the support received from Senator Fumo."); Letter from John Estey (staffer for then-Mayor

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others come from lifelong Philadelphia residents who are likewise capable of holding the defendant up against the many politicians that come and go.[54] So exceptional was the defendant's service that even a bitter political "adversary" who campaigned against him described the defendant as "a dedicated public servant

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Rendell), *Id*. 1315 ("[T]he City of Philadelphia and its poorer citizens...have never had a more committed legislative champion than Mr. Fumo."); Letter from John White, *Id*. 1451-52 ("I have personally worked on financial recovery plans [around the country] and have never worked with a representative...who brought to those tasks what FumoFumo did on behalf of Philadelphia."); Letter from Edward Zemprelli (former State Senator), *Id*. 1454 ("If I were to think of the Senate of Pennsylvania as a forest, I would conclude without hesitation that Vince Fumo was the tallest tree in that forest."); Letter from Brian Abernathy (staffer for City Councilman), *Id*. 1455 ("Most politicians are good talkers.... Vince Fumo is different. He identifies a problem, determines a course of action and gets it done."); Letter from William Lincoln (former State Senator), *Id*. 1466 ("Vince Fumo's dedication to his constituents and to Philadelphia was unmatched in the legislature.").

[54] Letter from Joseph Marino, App. 1153 ("I personally find it exceptional that such an important government figure...would take the time and effort to help a fledgling civic group establish itself in this manner. This generosity was NOT the action of a traditional Philadelphia-area politico..."); Letter from Michael Treacy, *Id*. 1184 ("[T]here is no public official, or public employee, who has done more over the span of his career to improve the quality of life and economic well-being of the City of Philadelphia than Senator Fumo. He stands head and shoulders above everyone else..."); Letter from Charles Zappala, *Id*. 1189 ("[H]e worked aggressively with Ed Rendell and John Street to literally revive the City of Philadelphia."); Letter from Mark Lopez, *Id*. 1323 ("[H]e has not always taken the politically expedient course but has done what has been the right thing, not always the case in politics or government."); Letter from Lauri Kavulich, *Id*. 1426 ("There are not many times in a City's history that a legislator comes along like Vince, who is so effective in serving the Community."); Letter from Jeff Rush, *Id*. 1442 ("Senator Fumo's use of power was peerless.... [T]he results were incomparable.").

who went above and beyond the call of duty to help the people in his district who elected him—as well as all Pennsylvanians." *Id.* 1246.

Testimony of those who appeared at the sentencing hearing also supported the district court's factual determination. Just as above, though, the Government argues that this evidence deserves no credit—this despite failing to cross-examine three of the four central witnesses or otherwise rebut the evidence in the proceedings below. *See id.* 1606-10 (declining opportunity to cross-examine).

Malcom Lazin interacted with the defendant in various official and unofficial capacities over "roughly thirty five years" on issues related to the United States Attorney's Office, Pennsylvania Crime Commission, I-95, Ben Franklin Bridge, Society Hill Civic Association, and Gay rights. *Id.* 1604. Reflecting on their work together, Lazin described the defendant as "exceptional" and observed that "there was not one other elected official...that was more responsive to our community" and that, since 1969, "there had been few, if any, who have done more for Philadelphia..." *Id.* 1605. Nevertheless, the Government attacks the credibility of this testimony because Lazin was not a "social friend" and "thus plainly was not in any position to know" how much time the defendant spent working on these issues. Br. 167.

Sonny DiCrecchio, Executive Director of the Philadelphia Regional Produce Center (PRPC), testified about the defendant's seven-year effort to upgrade the

PRPC and keep it from relocating to New Jersey. After unsuccessful overtures to the Governor and Mayor, DiCrecchio approached the defendant who immediately adopted the issue. Years later, when success had finally been achieved, DiCrecchio noted that Governor Rendell went out of his way to praise the defendant's tireless efforts, telling PRPC officials that "your industry owes a debt of gratitude to Senator Fumo,...he was relentless" because "every meeting, every meeting, he was pushing, pushing, pushing" and "he got us [fellow public officials] to understand exactly how important you are." App. 1609-10. DiCrecchio also documented the defendant's work with the PRPC and the Produce Salvage Program, which increased donations to local food banks from 225,000 to over three million pounds per year.

Indirectly disputing the credibility of this testimony, the Government describes DiCrecchio as "a friend of Fumo," leaving it up to the reader to infer the worst. Br. 168. Not only is this description grossly misleading,[55] it exposes the absurdity of the Government's attacks: non-friends (Lazin) are unqualified to testify about the defendant's work because they are "not in any position to know"

[55] At the close of his testimony, the district court asked Mr. DiCrecchio whether he knew the defendant socially, to which he responded "[n]o," adding that he only got to know FumoFumo after the guilty verdict. App. 1610.

how much time he spent doing it, and friends (DiCrecchio) are not to be trusted. *See id.* 167-68.

State Senator Christine Tartaglione testified that the defendant "worked tirelessly" and "was always on the phone, always doing something" such that his former "colleagues...couldn't even touch Vince in a second because he worked so hard." App. 1606. As with Lazin's testimony, though, the appellant asserts that Senator Tartaglione's testimony is untrustworthy because she did not personally accompany the defendant throughout the day so as to observe his habits. Br. 167-68. Judge Eugene Maier credited the defendant's longtime involvement with helping to keep St. Joseph's Hospital afloat and establishing an affiliated nursing school, App. 1607-08, which the Government downplays as "arranging a state grant" and passing along "names of people to call." Br. 168.

On a general level, the Government disparages good works documented throughout the record by pointing out that the defendant had a staff and arguing that his work often consisted of a "meeting" or "phone call." *Id.* at 171-72. Arguments at this level do not give rise to an issue on appeal, whether under an abuse-of-discretion, clear error, or "reasonableness" standard.[56]

[56] Furthermore, that the defendant had a staff is irrelevant—so did all of his political peers, and yet he did considerably more. Similarly, that work consisted of meetings or phone calls is pure speculation and, even if true, makes it no less effective, time-consuming, or creditworthy than small scale contributions. Surely *(cont'd)*

Even if this Court credits some of the Government's attacks, given the wealth of supporting evidence, it cannot be said that the district court's determination falls outside "the bounds of reason," *Ali*, 508 F.3d at 150, because the service documented in the 259 letters and live testimony compares favorably to that upon which previous downward departures have been upheld.

In *Serafini*, this court upheld a departure because, *inter alia*, the defendant state representative helped provide a guarantee for an acquaintance's costly medical treatment, gave a widow $750 to prevent foreclosure, offered an injured man a job on his legislative staff and took him under his wing, and gave a staffer time off to visit a sick friend and arranged for a second opinion.[57] 233 F.3d at 773-74. Laudable though these actions may be, it is difficult to argue that they required more time or devotion than much of what the defendant did in this case (*e.g.*, a seven-year effort to save the PRPC).

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the Government does not contend that an hour spent meeting with community leaders in an attempt increase food donations to local shelters is less deserving of recognition than that an hour spent serving meals in a soup kitchen.

[57] Offering a job in his legislative office and giving extra time off to a staffer each drew from the public coffers, which pay state employee salaries. Still, this Court was heavily influenced by the conduct. *See Serafini*, 233 F.3d at 773-74. In turn, that some of the defendant's successes in this case involved the expenditure of public monies is of no particular consequence. *See* Br. 176 n.77.

In *Cooper*, this court upheld a departure because the defendant CEO organized two youth football teams (on which his son also played) and contributed high school and college tuition money for several players.[58] 394 F.3d at 177. So deferential was the review that the departure was upheld despite (i) the lack of evidence about "how much personal time [the defendant] actually spent involved in civic service," (ii) testimony from the defendant's son that the football teams were at least in part organized so that he could compete against inner city kids whom the father believed to be more "talented," and (iii) evidence that these activities boosted the publicity and goodwill of the company for which the defendant was then CEO. *Id.* at 181 (Sloviter, C.J., dissenting). Here, there is considerable evidence about the depth of Fumo's personal commitment, *see supra* note 52, and any fears that his actions were influenced by a desire to improve public image were likewise present in *Cooper* and *Serafini*.

Finally, in *Ali*, this court spoke approvingly[59] of a departure where the defendant organized fundraising banquets, lent various forms of personal

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[58] The Government's brief in *Cooper* noted that the defendant paid a total of $40,000 in tuition during a period in which he earned over $4,500,000 as a CEO. *United States v. Cooper*, 2003 WL 24302905, at *15-16 (3d Cir. 2005).

[59] Discussion of the downward departure determination was dicta because the court had earlier ordered remand for failure to properly calculate the advisory Guidelines range. *Ali*, 508 F.3d at 145 n.13.

assistance, counseled a parent overcoming drug addiction, and became legal guardian to two nieces. 508 F.3d at 150 n.19. If this is sufficiently "extraordinary" to warrant a departure, the district court's decision to affix the same label to the defendant's conduct in this case cannot be deemed outside the "bounds of reason." *Id.* at 150.

The record on appeal is filled with accounts of Senator Fumo's extraordinary devotion to public service and his employment of his position to aid innumerable individuals, institutions, and communities. They come from former peers within the Government, community activists, constituents, and political rivals alike. Against this backdrop, and considering the grounds upon which previous good works departure have been upheld, a finding that the defendant went "beyond the call of duty" in his service for the public cannot be considered clear error. *Wright*, 363 F.3d at 249. Thus, to the extent that the Government properly advances any argument on appeal in this respect other than the alleged failure of the sentencing judge to clarify whether the below-range sentence was a "departure" or a "variance," *supra*, the argument does not demonstrate any lack of reasonableness.

IV. There was no need for the district court to recalculate an advisory Guidelines sentencing range post-departure and select a sentence from within that recalculated range; it was sufficient for the district court to depart downward to a specific sentence.

The Government alleges that the district court erred by not recalculating an advisory Guidelines sentencing range after granting the downward departure—a

claim that it makes for the first time on appeal and is, in any event, legally baseless. No objection was voiced at the sentencing hearing, and the Government did not avail itself of an opportunity to correct the sentence by motion under Rule 35(a), if indeed any technical error of this sort had occurred.[60]

A. Standard of review.

The Government's claim is subject to limited review for plain error because the appellant failed to object below despite the readily apparent nature of the purported error and having numerous opportunities to challenge the procedure.

B. The district court's procedure was not erroneous.

The Government cites no authority for the proposition that "the district court was required to define the final [post-departure] guideline range." Br. 149. This is for good reason. Rules governing sentencing procedure are silent on this issue. *See* Fed. R. Crim. P. 32(i); 18 U.S.C. § 3553(a). So too are Guidelines policy statements on appropriate sentencing procedure and the Supreme Court's most

[60] The Government's only request at the close of the sentencing hearing was for a formal determination on prejudgment interest vis-à-vis restitution (an issue on which it filed extensive post-sentencing pleadings). App. 1624-25. Shortly after the hearing, the defendant filed a Rule 35(a) motion seeking correction of several technical errors. *Id.* 1626-32. Despite filing a lengthy response, the Government failed to raise the purported error above despite acknowledging that Rule 35 could be used as a vehicle to attack "technical" errors that might otherwise require remand. *Id.* 1635-36; *see also United States v. Higgs*, 504 F.3d 456, 459 n.2 (3d Cir. 2007) (noting that Rule 35 motions may correct errors in the "sentencing *process*") (emphasis in original) (citing Wright, King & Klein, Federal Practice and Procedure (Criminal) 3d § 585).

recent iteration of the proper sentencing framework. *See* U.S.S.G. § 6A1.1 (p.s.), *et seq.*; *Gall*, 552 U.S. at 49-50. The Government's argument betrays a fundamental confusion of federal sentencing vocabulary and procedure. The final Guideline range was established before any departure or variance was applied, and the departure that the district court granted (like any other) was a deviation *from* the applicable Guideline range, not a determination leading to a different range.

Under the Government's formulation, departures from the Guidelines are no different from run-of-the-mill offense/offender adjustments that apply in every case and, together with criminal history, form the advisory Guidelines sentencing range. By this standard a defendant that receives a downward departure under § 5H1.11 (p.s.) for extraordinary good works or an upward departure under § 5K2.8 (p.s.) for unusually heinous conduct receives a *within*-Guidelines sentence inasmuch as the Guidelines are merely recalculated and a sentence is selected from within the new range. This, of course, is not so—we say that these defendants received *above*- and *below*-Guidelines sentences, respectively. That this is the proper formulation is confirmed by the official Statement of Reasons form that is the subject of so much controversy in this case; it speaks of sentences "below the advisory guideline range" and "depart[ing] *from* the advisory guideline range for reasons authorized by the sentencing guidelines manual." Sealed App. 182 (emphasis added); *see also* U.S.S.G. Ch. Five, Part H, Intro Cmt. (2009 ed.) ("The

following policy statements address the relevance of certain offender characteristics to the determination of whether a sentence should be *outside the applicable guideline range*...") (emphasis added).

Reference to 18 U.S.C. § 3553(a) supports also this view. It mandates consideration of the "the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines" at § 3553(a)(4) and separate consideration of "any pertinent policy statement" at § 3553(a)(5). Departures are described in policy statements. Lest the latter subsection be deemed superfluous, statutory construction tends to the conclusion that these factors are distinct. Here, the district court's initial determination of a sentencing range proceeded from an application of the *Guidelines* and its good works departure proceeded from consideration of U.S.S.G. § 5H1.11, a *policy statement*. This procedure plainly squared with the overriding statutory requirements.

United States v. Gunter, 462 F.3d 237 (3d Cir. 2006), instructs district courts to "state on the record whether they are granting a departure and how that departure affects the Guidelines calculation..." *Id.* at 247 (internal quotation omitted). This required no more than a statement that the court was departing *above* or *below* the advisory Guidelines sentencing range, and by how much. District courts are sometimes required to make additional findings or calculations when departing. *See, e.g.*, *United States v. Hickman*, 991 F.2d 1110, 1114 (3d Cir.

1993) (when departing under § 4A1.3 (p.s.) for inadequate criminal history, court must determine which offender category "best represents" prior criminal history and then base departure on "corresponding sentencing range"); *United States v. Torres*, 251 F.3d 138, 147 (3d Cir. 2001) (when departing under § 5K1.1 (p.s.) for substantial assistance, court must examine section's five enumerated factors before determining extent of departure). But no provision required anything of the district court in this case beyond stating the nature of the departure (*i.e.*, upward or downward), its extent, and the reasons for it. *See* 18 U.S.C. § 3553(c)(2).[61]

In *Torres*, this Court held that judges need not articulate the extent of a departure in terms of levels ("neither the Sentencing Reform Act nor the Guidelines contain such a requirement") and that they may instead phrase it in months. 251 F.3d at 151. This renders the Government's proffered methodology

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[61] Dicta in a nonprecedential opinion stated that a district court "abuses its discretion" by granting a departure without also recalculating the applicable range. *United States v. Swift*, 357 Fed. App'x 489, 493 (3d Cir. 2009) (not precedential). But this case has yet to be cited (much less relied upon for the truth of the quoted proposition) and is factually distinguishable. Following a substantial assistance motion under § 5K1.1, the Government urged a five-level downward departure and the defendant urged an eight-level departure. Without explaining its rationale, the district court imposed a sentence below the original Guidelines range but *above* the ranges recommended by the defendant and the Government "without clearly stating whether it was exercising its departure authority...or its discretion to vary below the Guidelines range under § 3553(a)..." *Id.* at 493. In particular, the sentencing "Court initially stated that it would 'grant the government's motion for downward departure,' but later explained that it would 'vary[] from the otherwise advisory guideline range...'" *Id.* There is no such uncertainty here.

impracticable and therefore erroneous. An example illustrates the problem. Assume Judge Buckwalter announced that which is implicit in the record: he was departing downward from the Guidelines by 66 months. Applying the Government's argument, he must then recalculate the Guidelines based on this finding. But this is impossible because all successive sentencing ranges *overlap*. For example, the 66-month departure here would have put Fumo into levels 23 *and* 24. Which level's advisory sentencing range should Judge Buckwalter refer to under § 3553(a)(4)? The answer is neither. Asking him to choose a level is the functional equivalent of making him conceptualize the departure in levels in the first place, which flies in the face of *Torres*.

The above makes clear that, at *most*, Judge Buckwalter should have phrased his departure in terms of months. In this respect, the purported error boils down to the failure to perform elementary-school math on the record insofar as he did not clarify for the Government that the departure equaled the low-end of the Guideline range less the ultimate sentence. This is the epitome of "stat[ing] the obvious" and therefore is not error. *See Boggi*, 74 F.3d at 479.

C. The absence of any rule or precedent that affirmatively compels what, in this case, amounted to a superfluous intermediary calculation precludes a finding that any error in this regard was plain or obvious.

To the extent that the district court could be said to have erred in failing to specifically articulate its departure in terms of levels and then recalculate an

advisory sentencing range based on this determination, the error was not plain in that it was not obvious. As outlined above, there is no statutory, Sentencing Commission, procedural, case law or other authority that establishes a need to perform what would, in a case like this, amount to a meaningless step.

Here, the district court granted a single downward departure and explicitly refused to impose any variances. The extent of the departure is thus implicit in the record in the form of the difference (66 months) between the low-end of the calculated original Guidelines range (121 months) and the ultimate sentence (55 months). In that light, the district court can be forgiven for thinking that the *Gunter* framework—which requires an initial Guidelines calculation, a determination on departure motions, and consideration of § 3553(a) factors—had been satisfied.

D. No evidence suggests that the sentence ultimately imposed would have been any different had the district court articulated its departure determination in terms of levels and then selected a sentence after recalculating an advisory Guidelines range instead of departing directly to a specific sentence.

Substantial rights are unaffected unless there is a reasonable probability that the sentence would have been different but for the alleged error. This represents an impossible showing for the Government, and the appellant's brief does not try to satisfy it. There is no reason to believe (nor does the Government allege one) that

the sentence would have been different had the district court performed the seemingly superfluous step described above.

During the sentencing proceeding below, the district granted a downward departure in recognition of the defendant's good works and then selected, in the context of a full consideration of all the required statutory factors, a sentence that adequately accounted for this finding—55 months' imprisonment coupled with a substantial fine and extensive restitution. Nothing suggests that the sentence would have been different had the court instead conceptualized the departure in terms of levels (8) and then selected a sentence from within the corresponding range (51 to 63 months) at the § 3553(a) stage.

Controlling precedent demonstrates this point. This Court reserves remand for those cases where errors at sentencing create genuine uncertainty as to the nature of the sentence imposed or the reasons for it. *See supra* note 44. No such concerns are implicated in this case. The record clearly demonstrates what the district court did (depart downward), why it did it (extraordinary good works by defendant), and the extent of the departure (66 months).[62] As such, any technical errors that may be identified in the process cannot be said to seriously affect the "fairness, integrity, or public reputation of judicial proceedings." *Jones v. United*

[62] Strictly speaking, the ability to determine the extent of the departure is irrelevant in this case because the Government does not argue substantive reasonableness.

States, 527 U.S. 373, 389 (1999)). On this fact alone, remand for correction of any plain error is inappropriate. *Id.*

V. Judge Buckwalter duly considered the advisory sentencing Guideline range, the prohibition of unwarranted sentencing disparity, and each of the Government's sentencing-related arguments when he examined the sentencing factors under 18 U.S.C. § 3553(a).

The Government alleges that the district court erred when applying the § 3553(a) sentencing factors because it did not consider the advisory Guideline sentencing range, the prohibition against unwarranted sentencing disparity, and several Government arguments for a lengthy sentence.[63] Examination of the record belies these claims; before imposing a sentence, Judge Buckwalter carefully explained how each of the § 3553(a) factors applied in this case and, in so doing, adequately addressed the Guidelines, disparity, and sentencing-related arguments. App. 1621-24. Thus, regardless of the standard of review imposed, *infra*, the Government's claims must fail for the simple reason that they are not supported by the record.

A. Standard of review.

The Government did not object to the district court's application of the § 3553(a) factors below. Although some other Courts of Appeals would review its

[63] The Government's brief also seems to allege that consideration of these arguments at the § 3553 stage *should* have resulted in a greater sentence. This, of course, sounds in substantive error, which is not before the Court. *See* Br. 72.

claims for plain error, this Court does not require an express objection to preserve error under these circumstances and instead reviews such claims for "meaningful consideration of the relevant statutory factors and the exercise of independent judgment, based on a weighing of the relevant factors, in arriving at a final sentence." *United States v. Grier*, 475 F.3d 556, 571-72 & n.11 (3d Cir. 2007) (en banc). Despite acknowledging the Third Circuit standard, the Government voluntarily submits its claims to plain error because they were not raised below and, when the roles are reversed, it is DOJ policy to urge plain error review in such cases. *See* Br. 180. Although the defendant maintains that he prevails under either standard, he submits that, in keeping with its concession, the Government's claims should be reviewed for plain error.

B. Judge Buckwalter acknowledged the Guideline recommendation.

Consistent with the requirement of § 3553(a)(4), the district court explicitly considered the advisory sentencing Guideline range in the course of settling upon appropriate sentence. *See* App. 1623 ("I must consider...the kinds of sentences and the sentencing range established in the sentencing guidelines... . I have considered what the guidelines have said and I did make a finding as to what the guidelines are, but I've also added a finding that I'm going to depart from them."). The Government's claim to the contrary is plainly unfounded.

C. Judge Buckwalter addressed the need to avoid unwarranted sentencing disparity.

Arguments that the district court failed to address sentencing disparity under § 3553(a)(6) are unsupported by the record. *See id.* 1624 ("The next consideration is another very important one, and that is the need to avoid unwarranted sentencing disparities... . I have considered some of the other people who were mentioned by the government and some that I brought up, the sentences they've got. But you're differently situated than they are...").

Insofar as the Government suggests that something more than this was required, its reliance on *United States v. Merced*, 603 F.3d 203 (3d Cir. 2010), is misplaced. *See* Br. 205. That case considered a *complete* failure to address disparity when varying 128 months below the Guideline range for a run-of-the-mill drug offender. *Merced*, 603 F.3d at 223 ("Nothing in this record, however, indicates that the District Court considered § 3553(a)(6) at all..."). There was no such failure in this case. Challenges to the district court's depth of treatment and/or ultimate determination about disparity relate to matters of judicial discretion and are not cognizable as procedural error.

D. The record demonstrates that Judge Buckwalter gave aggravating factor and upward variance arguments due consideration.

The Government raised several grounds for an increased sentence in the proceedings below. It cited the defendant's perceived lack of remorse as an

aggravating factor and listed five arguments for an upward variance: (1) under-estimation of Senate loss under the Guidelines, (2) damage to the integrity of elected office, (3) institutional harm to CABN and ISM, (4) alleged perjury at trial, and (5) gravity of obstruction offenses.

Senate loss, the integrity of elected office, and obstruction were explicitly addressed during the district court's discussion of the "nature" of the offense under § 3553(a)(1). In pertinent part, Judge Buckwalter reasoned:

> [T]he defendant developed a sense of entitlement that led to a flagrant misuse of taxpayer's money for his private and political purposes. He did the same thing with regard to Citizens' Alliance and Independence Seaport Museum. And then like so many other politicians who get caught with his hand in the proverbial cookie jar, began the cover-up.... [This was an] intentional effort to obstruct justice, and the jury so found.

App. 1622. He then added that this "conduct demeans the professional [sic] of public service and increases the public's perception of untrustworthiness to an underserved level." *Id.* These direct quotations impossible to conclude that Judge Buckwalter ignored these factors at sentencing.

Judge Buckwalter did not formally reject the remaining arguments. But this does not mean that they were not duly considered. Not all sentencing arguments must be addressed on the record. *Rita v. United States*, 551 U.S. 338, 357-58 (2007). Frivolous or insubstantial arguments may be ignored altogether, and

explicit discussion of non-frivolous arguments is unnecessary where the record evidences that they were heard and considered. *Id.*

In *Rita*, the Supreme Court excused the failure to explicitly address variance arguments based on military service, poor health, and fear of retribution because "[t]he record makes clear that the sentencing judge listened to each argument" and "considered the supporting evidence." *Id.* at 358. There, the "record" was a terse statement at the conclusion of the parties' sentencing arguments that a sentence at the low end of the Guidelines range was "appropriate." *Id.* at 345. Although explicit discussion of the arguments might was preferable, it was not required:

> [T]he judge might have said more. He might have added explicitly that he had heard and considered the evidence and argument...[and that they] were simply not different enough to warrant a different sentence. But context and the record make clear that this, or similar reasoning, underlies the judge's conclusion.

Id. at 359. Here, Judge Buckwalter cannot be faulted for not saying enough; his close attention to and consideration of every argument made to him cries out from this record.

The outcome here should be no different than in *Rita*. Judge Buckwalter not only "listened to each argument" and "considered the supporting evidence," *id.* 358, he interrupted throughout with probing questions and comments, App. 1585-89, and, at the close of the presentation, he instructed the prosecutors to briefly "state [the arguments] again" to "make sure I ha[ve] them down here." *Id.* 1589.

His § 3553(a) analysis was similarly thorough; one-by-one, Judge Buckwalter carefully applied each sentencing factor to the unique facts of this case. *Id.* 1621-24. Although the words "I deny the Government's request for an upward variance based on intangible harm" or "alleged perjury at trial" do not appear at this point in the transcript, *Rita* makes clear that this is not required.

United States v. Quiles, 618 F.3d 383 (3d Cir. 2010), which was decided after the Government filed its opening brief, further confirms this point. There, this Court excused a failure to specifically address or reject variance arguments based on age, lack of criminal history, military service, and a lifetime of public employment because the district court was "involved closely at every stage of the trial and sentencing," "heard sentencing arguments" from both parties, and "explained at some length" why it chose the sentence imposed.[64] *Id.* at 396-97. The factual record here is no different. Judge Buckwalter spent an entire day hearing objections to the PSR, App. 1498-1564; reviewed nearly twelve-hundred pages of sentencing-related filings, exhibits, and letters, *id.* 707-1497, Supp. App. 156-359, Sealed App. 1-180; and presided over a daylong sentencing hearing, at

[64] This Court is similarly forgiving where a district court omits an express ruling on a departure motion. *See United States v. Jones*, 566 F.3d 353, 366 (3d Cir. 2009) ("Although the Court did not explicitly deny [the] motion, it was fully informed on the issue and did not grant his requested departure."); *United States v. Jackson*, 467 F.3d 834, 839 (3d Cir. 2006) (inferring denial of departure based on context).

the end of which he painstakingly reviewed the § 3553(a) factors one-by-one, App. 1567-1625. Against this backdrop, that alleged perjury, intangible harm, and lack of remorse did not explicitly factor into his § 3553(a) analysis shows only that Judge Buckwalter was unpersuaded by the arguments

The Government does not address *Rita*, much less explain how it should not control the outcome of this case. Its brief instead relies upon *United States v. Sevilla*, 541 F.3d 226 (3d Cir. 2007), and *United States v. Ausburn*, 502 F.3d 313 (3d Cir. 2007), in arguing that it is error not to explicitly address a properly raised variance argument. But these cases are readily distinguishable. *Sevilla* and *Ausburn* each address verbal boilerplate, that is, a rote statement before imposing a sentence that the court has considered the § 3553(a) factors. *See Sevilla*, 541 F.3d at 229; *Ausburn*, 502 F.3d at 320-21.[65] Not surprisingly, such a mindless statement does not suffice where a colorable variance argument has been made.

By contrast, where there has been careful examination of § 3553(a) factors—especially those to which proposed variance arguments relate—reviewing the record in context permits an inference of implicit rejection through silence. *See*

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[65] In *Sevilla*, the district court said only that it had "considered all of the 3553(a) factors." 541 F.3d at 229. The district court in *Ausburn* went further in that it cited some factors by name. 502 F.3d at 320-21. This was nonetheless insufficient because, apart from noting that the defendant's status as a police officer increased the severity of the case, it did not *apply* the factors to the unique facts of the case.

Rita, 551 U.S. at 357-58; *Quiles*, 618 F.3d at 396-97. This is because, where a district court is otherwise actively involved at sentencing and thoroughly considers the statutory sentencing factors, the decision to exclude certain arguments shows only that they were unpersuasive. Given Judge Buckwalter's meticulousness throughout the sentencing process below and, in particular, his conduct at the sentencing hearing, it strains credulity to find (as the Government implies) that he somehow *forgot* about its arguments. There was no error in Judge Buckwalter's rejection of the Government's proposed grounds for an increased sentence.

On Cross Appeal:

VI. Fumo was denied his Constitutional right to trial by an impartial jury.

The right to an impartial jury lies at the heart of the Constitutional protections provided criminal defendants. With the adoption of the Constitution in 1787, one of the few enumerated guarantees of individual rights was that all criminal defendants shall be tried by jury. U.S. Const. art. III § 2. And with the adoption of the Bill of Rights in 1791, the Sixth Amendment made explicit the right to trial "by an impartial jury." U.S. Const. amend. VI. Indeed, the right to an impartial jury had already been recognized in many of the state constitutions,[66] and

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[66] Constitution of Virginia (May 27, 1776) *reprinted in Sources of Our Liberties* at 301 (Richard L. Perry ed., 1972); Constitution of Pennsylvania (Aug. 6, 1776), *reprinted in Sources of Our Liberties* at 328 (Richard L. Perry ed., 1972); Delaware Declaration of Rights (Sept. 11, 1776), *reprinted in Sources of Our*

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this right of a criminal defendant to a jury trial is the only guarantee to appear in both the original body of the Constitution and the Bill of Rights. Identifying the jury trial as "the most priceless" safeguard of individual liberty, the Supreme Court has explained that "[i]n essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). *See also Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting) (trial by jury is "the spinal column of American democracy").

An impartial jury satisfying this Constitutional guarantee is a jury that decides whether a defendant has been proven guilty based solely on the evidence presented in court. The Supreme Court recognized more than one hundred years ago, "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). The district court failed to ensure that the jury in Fumo's case satisfied this high but essential standard.

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Liberties at 338 (Richard L. Perry ed., 1972); Constitution of Maryland (Nov. 3, 1776), *reprinted in Sources of Our Liberties* at 346 (Richard L. Perry ed., 1972); Constitution of Vermont (July 8, 1776), *reprinted in Sources of Our Liberties* at 362 (Richard L. Perry ed., 1972).

A. Standard of review

This Court reviews a district court's investigation into extraneous influences on a jury and decision regarding whether to grant a new trial for abuse of discretion. *See United States v. Console*, 13 F.3d 641, 665-66 (3d Cir. 1993); *United States v. Lloyd*, 269 F.3d 228, 237 (3d Cir. 2001). Where an error violates the defendant's right to trial by an impartial jury, it is not subject to review for harmless error. *See Rose v. Clark*, 478 U.S. 570, 578 (1986) (violation of the right to an impartial jury is structural error); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (structural errors not subject to review for harmless error).

B. The jury was exposed to extraneous influences.

i. The media coverage of the trial was extensive and included prejudicial information excluded from evidence.

The investigation and trial of Mr. Fumo spawned intensive media coverage. App. 3325. The coverage included information about Fumo's previous conviction,[67] as well as the fraud conviction and subsequent imprisonment of ISM president John Carter. The Government had repeatedly requested that the district court allow presentation of this evidence to the jury, but these requests were denied. *Id*. 442, 2545-46, 4049-55; DDE 292; DDE 340. While this evidence was

[67] The media also included coverage of previous charges against Fumo for voter fraud that were later dropped.

excluded from consideration by the jury, it was frequently referenced by the media. *See* Rubin, *Team Fumo, public servant,* Philadelphia Inquirer, Oct. 23, 2008 (Fumo "twice before has beaten criminal charges."); Jill Porter, *Once again, is Fumo's fate linked with that of the Phillies?*, Philadelphia Daily News, Oct. 31, 2008 ("In 1980, he was charged with putting ghost employees on the state payroll . . ."); Tom Namako, *Fumogation*, Philadelphia CityPaper, (Sept. 8, 2008) http://citypaper.net/blogs/clog/2008/09/08/introducing-fumogation-cps-vince-fumo-trial-blog/ ("Fumo has beaten two other federal indictments in his lifetime.")[68]

[68] *See also* Lounsberry, *Prosecutors win ruling on questioning ex-Fumo lawyer*, Philadelphia Inquirer, Oct. 9, 2008 ("Buckwalter also ruled that the government cannot tell the jury about two previous criminal cases against Fumo from many years ago. One of those cases ended with a federal judge's throwing out a jury verdict that found Fumo guilty in a scheme to have ghost workers on the state payroll. The other ended when city prosecutors decided to drop charges."); Lounsberry, *New judge appointed, Fumo trial to resume Oct. 20*, Philadelphia Inquirer, Oct. 3, 2008 ("In one filing, federal prosecutors asked Buckwalter to allow them to tell the jury that former Independence Seaport Museum president John S. Carter will not testify as a government witness because he is away - serving a prison sentence....Carter, the former museum president, is serving a 15-year term for bilking the institution of more than $1.5 million and using the money to pay for his lavish lifestyle....The prosecutors said the jury might wonder why Carter was not called as a government witness, and they want to explain that he was prosecuted for defrauding the museum and is incarcerated."); Hinkelman, *Some of the key players in Fumo corruption trial*, Philadelphia Daily News, Oct. 20, 2008 ("The trial is [Fumo's] third brush with the law. He was cleared of corruption charges in 1974 and 1981....[AUSA Pease] won a conviction last year against former Independence Seaport Museum president John S. Carter on fraud and tax charges. Carter is serving a 15-year prison term."); McCoy and

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Lounsberry, *As trial opens, prosecutors paint harsh portrait of Fumo*, Philadelphia Inquirer, Oct. 23, 2008 ("Twice before, Fumo has beaten criminal charges in his long political career. But he now faces his most severe test.") ("'There's no fraud here,' said Cogan, who said that all the trips were approved by the head of the museum, John S. Carter. Unmentioned, however, was the fact that Carter is now serving a 15-year sentence for defrauding the museum, a crime unrelated to the Fumo case."); Lounsberry, *Fumo prosecutor's want to reveal '82 "ghost employees" case*, Philadelphia Inquirer, Nov. 10, 2008 (Fumo "was found guilty in 1980 of taking part in a scheme to put local Democratic operatives on the state payroll as "ghost employees," but U.S. District Judge Clifford Scott Green later threw out the verdict, saying it had been based on a flawed legal theory."); Lounsberry and McCoy, *Prosecution alleges fraud schemes in Fumo case*, Philadelphia Inquirer, Dec. 12, 2008 ("Carter is now serving a 15-year prison term for his conviction of stealing from his own museum."); Hinkelman, *Captains: No Fumo biz on yachts*, Philadelphia Inquirer, Dec. 12, 2008 ("The defense suggested that Carter, who is serving a 15-year sentence in federal prison for defrauding the museum of $1.5 million in an unrelated case, was trying to cover his behind."); McCoy, *Fumo's free yacht use debated at trial*, Philadelphia Inquirer, Dec. 18, 2008 ("In a sense, Carter is the elephant in the courtroom. He is serving a 15-year federal prison sentence on charges that he stole $1.5 million from the museum, which he led for 17 years."); Hinkelman, *Museum yachts sail to forefront of Fumo trial*, Philadelphia Daily News, Dec. 18, 2008 ("Carter is serving a 15-year sentence in federal prison for defrauding the museum in an unrelated case."); McCoy and Lounsberry, *Once his solace, sea stings Fumo*, Philadelphia Inquirer, Dec. 21, 2008 ("Carter is serving a 15-year federal prison for looting his institution of $1.5 million."); McCoy, Lounsberry and Cattabiani, *It's a no-power struggle for Fumo as trial takes toll*, Philadelphia Inquirer, Jan. 18, 2009 ("This is the third time that Fumo has been in the dock. He was charged with vote fraud in 1973, but the charges were dropped. In 1980, he was convicted on federal charges of placing "no-show" workers on the state payroll, but a judge later tossed out the verdict."); Lounsberry and McCoy, *What to expect from Fumo's defense*, Philadelphia Inquirer, Jan. 26, 2009 ("Carter is serving a 15-year federal sentence after pleading guilty in 2007 to looting the museum of $1.5 million."); Lounsberry and McCoy, *Rendell's testimony could cap Fumo trial*, Philadelphia Inquirer, Feb. 8, 2009 ("Fumo has testified before in a federal criminal case. In 1980, he was tried on charges that he took part in a scheme to put local Democratic operatives on the state payroll as 'ghost employees.' Fumo took the stand, but the jury found him

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The defense voiced its concern to the district court that there was a significant risk that given the breadth and nature of the media coverage jurors would be exposed to prejudicial information about the case outside the courtroom, App. 3187-89, 3323-25, including information regarding the excluded evidence of Fumo's prior prosecution.[69] Defense counsel repeatedly requested that the district court instruct the jury not to speak about the case with others or to listen to news coverage,[70] and requested an instruction that jurors report any exposure to media coverage or outside influences about the case to the clerk. *Id*. 3068. Despite this high risk of juror exposure to extraneous influences, the district court instructed the jury not to listen to media coverage or to discuss the case with others only six times during the lengthy trial. Potential jurors were given an initial instruction at the beginning of voir dire on September 8, 2008. Supp. App. 2-3, 7-8. The jury

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guilty. Ultimately, U.S. District Judge Clifford Scott Green threw out the verdict, saying it had been based on a flawed legal theory."); Robert Moran, *Fumo Live Blog*, Philly.com, www.philly.com/philly/blogs/inq-breaking/Fumo_Live_Blog_-_Tuesday_Feb_10.html (last visited Dec. 2, 2010) ("Fumo was convicted by a jury in a 1980 corruption case involving Senate employees doing political work on state time, but the trial judge vacated the conviction and the judge's ruling was upheld on appeal.").

[69] App. 1925 ("the Inquirer carried us through today, just keep emphasizing the fact that he's been through this place and beat it").

[70] App. 1925, 3187-89, 3260, 3323-25; Supp App. 23-24.

was not, however, given such an instruction on the opening day of trial, with the first such instruction coming at the prompting of defense counsel on the second day of trial, October 23, 2008. App. 1925. The district court indicated its reluctance to provide such an instruction, *id*. 1925, and it was not given again until December 4, 2008, *id*. 3068, and December 18, 2008, *id*. 3260, both at the prompting of defense counsel. Supp. App. 23-24; App. 3260. The instruction was then given a month later on January 15, 2009, *id*. 3567, and once again the following month on February 19, 2009. *Id*. 4306.

Defense counsel also asked the district court to consider inquiring into whether members of the jury had been exposed to any media coverage or other outside influences, voicing concerns that the jurors could receive information not only through the media but also through contact with third parties. *Id*. 3187-89, 3323-25. In an effort to demonstrate to the court the need for inquiry into the juror's potential exposure to outside influences, the defense ultimately filed over 75 news articles with the court, and indicated that as of December 28, 2008 (just halfway through the trial) there were 347 articles, columns and editorials available on Philly.com, in addition to the real time trial blog on Philly.com, which had 219 entries as of December 28, 2008. *Id*. 3323-25; DDE 708-2. This submission demonstrated the overwhelming amount of coverage and the potential for extrajudicial information to reach the jurors through the media or through third-

parties, however the district court continued to refuse to make any inquiry of the jury.

ii. A juror posted information about the trial and jury deliberations on the internet, resulting in widespread media coverage.

During the jury's deliberations, on Sunday, March 15, 2009, the defense discovered that the Internet coverage of the trial was coming not only from media outlets and the general public, but from within the jury itself. One of the jurors, Eric Wuest, had posted information about the status of deliberations on his publicly accessible Facebook page and on Twitter. These postings included one from Friday, March 13, at shortly after noon stating "This is it...no looking back now!" and one at 10:46 p.m. telling "followers" to "Stay tuned for a big announcement on Monday everyone!" DDE 676, at 140 (punctuation in original including ellipses). Upon learning of this information, the defense immediately filed a motion requesting that the district court halt deliberations and voir dire the jury. App. 450. By Monday morning March 16, there was widespread media coverage of the incident. *Id.* 698. The court questioned Wuest, but rejected the defense request to interview all of the jurors. Wuest testified that he made each of the posts, and admitted to learning of the media coverage of his own posts on Sunday evening, claiming that he was watching another television program which was followed by news coverage of his Internet postings. *Id.* 4643. His reaction was to immediately

delete all evidence of the posts online. *Id.* 4647-48. He also testified that, in addition to posting on Facebook and Twitter, one of his primary interests was "blogging" and that he himself had created several blogs. *Id.* 4646. Wuest also asserted that he had not blogged about his jury service, although in fact he had stated on one of his blogs that he was serving on a jury. *Id.* 4650.

At the end of jurorr Wuest's voir dire it was clear that he had been speaking about the case on the Internet, that there was widespread media coverage about the status of the jury's deliberations as a result of these postings, and that he had been exposed to this media coverage, causing him to panic and immediately delete his postings. Defense counsel requested that the district court proceed cautiously and inquire further into Wuest's activities, voir dire the remaining members of the jury, and at a minimum dismiss Wuest and proceed with eleven jurors or an alternate. Instead, the court simply sent him back to the jury, refused to make any inquiry of the other jurors, and permitted the jury to continue its deliberations. *Id.* 4652. As publicly predicted by Wuest, the jury returned a verdict later that day.

iii. The jury was exposed to extrajudicial information through direct contact with third parties.

Aware of defense concerns over the potential exposure of jurors to extraneous influences given the extensive media coverage of the trial, and the realized potential for such exposure evidenced by the incident with juror Wuest, the district court was presented post trial with evidence of a far more serious

compromise of the jury's impartiality. Prior to sentencing, the defense presented credible evidence that during trial a juror had discussed the case with third-parties who told her about Fumo's prior prosecution and Carter's conviction and imprisonment. *Id*. 616-17. These facts were uncovered by Ralph Cipriano, an experienced Philadelphia journalist who interviewed jurors following the verdict for an article he was writing about the trial. *Id.* The juror told Cipriano that she had learned this extrajudicial information from co-workers while on the job during the one day each week when the court was not in session. *Id.* In addition, another juror told Cipriano that on the morning of March, 16 – the day the jury returned its verdict – the entire jury had learned through newscasts that juror Wuest had posted information about their deliberations online. *Id.* Cipriano reported this information to the defense, which then filed a motion for new trial, requesting that the district court recall and question the jury and order a new trial. *Id.* 599. The defense argued that Fumo was entitled to a hearing based on this information revealing the jury's exposure to extraneous information that had been explicitly excluded from evidence, yet in response to this newly discovered evidence, the district court declined to make any inquiry and denied the motion. *Id.* 683.

C. The district court's refusal to hold an evidentiary hearing regarding jury taint violated Fumo's Constitutional right to an impartial jury.

The right to an impartial jury includes the right to take reasonable steps to ensure that the jury is impartial. *Smith v. Phillips*, 455 U.S. 209, 216 (1982) ("Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.") (quoting *Dennis v. United States*, 339 U.S. 162, 171-72 (1950)). Therefore, a trial court must hold a post-verdict hearing "when reasonable grounds for investigation exist." *United States v. Console*, 13 F.3d 641, 669 n.34 (3d Cir. 1993) (quoting *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983)). Reasonable grounds are present when there is "clear, strong, substantial and incontrovertible evidence...that a specific, non-speculative impropriety has occurred." *United States v. Anwo*, 97 Fed. App'x 383, 387 (3d Cir. 2004) (not precedential) (quoting *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989)). The requirement that a defendant show "reasonable grounds," however, "do[es] not demand that the allegations be irrebuttable; if the allegations were conclusive, there would be no need for a hearing." *Ianniello*, 866 F.2d at 543. While a hearing is not required to allow defendants to conduct a fishing expedition, a hearing must be held whenever allegations of impropriety are based on more than mere speculation. *See Gov't of the Virgin Islands v. Weatherwax*, 20 F.3d 572, 579 (3d Cir. 1994) (remanding for post-verdict hearings where

allegations were "non-frivolous"); *United States v. Davis*, 15 F.3d 1393, 1412 (7th Cir. 1994) (a court should make an inquiry when "the defendant comes forward with a colorable allegation of taint"); *United States v. Barshov*, 733 F.2d 842, 851 (11th Cir. 1984) ("there must be something more than mere speculation"). Indeed, whenever a trial court has "reason to believe that jurors had been exposed to prejudicial information" it is "obliged to investigate the effect of that exposure on the outcome of trial." *Console*, 13 F.3d at 669 (quoting *United States v. Vento*, 533 F.2d 838, 869-70 (3d Cir. 1976)).

Such questioning of jurors post-verdict regarding exposure to extraneous influences is explicitly contemplated by Federal Rule of Evidence 606(b): "a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, [and] (2) whether any outside influence was improperly brought to bear upon any juror . . ." The Rule precludes juror testimony about the internal content of the jury's deliberations and their mental processes, while allowing jurors to testify about external influences post-verdict because "simply putting verdicts beyond effective reach can only promote irregularity and injustice." *Advisory Comm. Notes* to Fed. R. Evid. 606(b).

As the Supreme Court explained in *Smith v. Phillips*, "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the

effect of such occurrences when they happen. *Such determinations may properly be made at a hearing like that ordered in* Remmer *and held in this case*." 455 U.S. 209 at 217 (emphasis added). In *Phillips* the Court made clear that a hearing was required and it was only *because that hearing was held at which the facts were fully explored* that the court was able to properly conclude that the defendant's rights were not violated. *Id*. at 221. *See Remmer v. United States*, 347 U.S. 227 (1954) (remanded for a post-verdict hearing into allegations of juror tampering); *United States v. Lloyd*, 269 F.3d 228 (3d Cir. 2001) (post-verdict hearing held).

Without a hearing, courts are also cautious to reject as speculative allegations of compromises of juror impartiality in the face of any credible information. *See Ianniello*, 866 F.2d at 543-44 (remanded for post-verdict hearing even though district court found that the proffered affidavits were facially inconsistent and indicated unreliability) ("Although the district judge expressed the view in her opinion that there seem to be certain indicia of unreliability on the face of the affidavits, the basic allegations in the affidavits are indeed serious and warrant further inquiry"); *United States v. Moon*, 718 F.2d 1210, 1233 (2d Cir. 1983) (post-verdict hearing held where allegations came from a person four-steps removed from a conversation with a juror that indicated "the jury might have been exposed to extraneous prejudicial information and improper outside influences."); *United States v. Williams-Davis*, 90 F.3d 490 (D.C. Cir. 1996) (post-verdict

hearing held into allegations of ex-parte contacts with juror's husband and alternate juror).

In *Console,* 13 F.3d at 665, the defendant learned post verdict that during deliberations a juror had spoken with her lawyer sister-in-law about the definition of "RICO." The district court then held hearings, questioning each juror individually, to determine the nature of the communication and whether it had prejudiced the jury. *Id.* at 667. During that inquiry, the juror who had been accused of misconduct asserted that other jurors had read newspaper accounts of the case. *Id.* at 669. The district court refused to conduct a second inquiry into these allegations because it did not find the juror's allegations credible, and even if true the articles themselves were not sufficiently aggravated. *Id.* at 669-70. This Court agreed that an inquiry into the initial allegations of juror misconduct was necessary, but that a second inquiry was not because reasonable grounds for investigation did not exist. *Id.* at 670.

While there are cases that have rejected motions for post-verdict inquiry, "[e]ach of these cases merely stands for the unexceptional proposition that a convicted defendant should not be allowed to waste the time of a district judge or inconvenience jurors merely to conduct a fishing expedition. None is inconsistent with our view that where reasonable grounds for investigation exist, the matter should be explored." *United States v.Moten*, 582 F.2d 654, 667 (2d. Cir. 1978)

(listing cases). Indeed, courts have denied requests for post-verdict evidentiary hearings only where the allegations were much more speculative than those at issue here, or it was clear that even if the allegations were true there was no risk of prejudice. *See, e.g.*, *Anwo*, 97 Fed. App'x at 387 (not precedential) (hearing not required where jurors had been seen leaving the courthouse with courtroom observer; concern that observer could have told jurors about matters addressed outside the presence of the jury was based solely on speculation and it was also unlikely observer would have been present for any discussions that could have prejudiced the jury); *Williams-Davis*, 90 F.3d at 495 (hearing not required where newspaper articles jurors allegedly exposed to were cumulative of evidence presented at trial); *United States v. Moses*, 15 F.3d 774, 779 (8th Cir. 1994) (hearing not required where juror alleged post-trial in "rambling...confused and often nearly hysterical" letter that food may have been tampered with when juror had voiced no concerns previously).

The district court here denied a hearing primarily in reliance on *United States v. Gilsenan*, 949 F.2d 90, 94 (3d Cir. 1991), where this Court upheld the denial of a request for a post-verdict hearing because the extrajudicial information at issue "did not even have the potential for prejudice." In *Gilsenan*, the defense discovered post-trial that members of the jury had discussed a plea deal that had been rejected by the judge. The thrust of the media coverage surrounding the

rejected plea deal was that "the government's case was weak" and the plea was a "surprise government proposal" made in an attempt "to quietly dispose of the case" as a "desperate effort to save face." *Id.* at 92. Here, quite unlike the facts in *Gilsenan*, allegations relating to a defendant's prior prosecution for a similar offense and the conviction of a person related to the facts at issue clearly have the potential for prejudice. Indeed, as discussed below, direct third-party contact with jurors regarding a defendant's prior prosecution constitutes perhaps the most prejudicial type of taint. Yet the district court pointed to *Gilsenan* and held that "a hearing is simply unnecessary" because "even taking as true all of the allegations...Defendant cannot prove prejudice." App. 693.

The district court also relied on its belief that there is a "general reluctance to conduct[] post-verdict hearings." *Id*. 687. Courts voicing this reluctance have pointed to the Supreme Court's statement in *McDonald v. Pless*, 238 US 264, 267-68 (1915), that verdicts should seldom be set aside based on the testimony of jurors. However, as the Supreme Court later explained, this concern is related to the *intra-jury* deliberative process, protected by the restrictions in Rule 606(b). *See Tanner v. United States*, 483 U.S. 107, 120 (1987). Contrary to the district court's reasoning, while the jury system could not survive scrutiny of *internal* factors, it is appropriate, and indeed necessary, for jurors to testify regarding *extraneous* prejudicial information and outside influences. *Id.* (holding that it was

improper to inquire under Rule 606(b) into allegations of alcohol use by jurors because such use was "internal" to the jury). The Supreme Court held that *"requiring an evidentiary hearing where extrinsic influence or relationships have tainted the deliberations do not detract from, but rather harmonize with, the weighty government interest in insulating the jury's deliberative process." Id.* (emphasis added).

Although it was clear that the defense here did not seek in any way to inquire into the confidential deliberative process or state of mind of the jurors, the district court nevertheless relied on concerns that a hearing would "open[] the door to jury harassment, undermine the finality of the jury verdict, inhibit the frankness of jury deliberation, and ultimately create uncertainty in the entire jury process." App. 692. While the public does have an interest in the finality of verdicts, that interest does not trump a defendant's Constitutional right to an impartial jury.

> In a world of limited resources, no system of adjudication can function unless proceedings in a case eventually are brought to a close. But justice cannot be achieved if finality is the only concern. Finality competes with the interests of accuracy and fairness....For example, where a jury considers evidence or other matters that have not been heard in open court and have not been subject to adversarial challenge, concern for accuracy and fairness outweighs the value of finality.

Wright and Gold, Fed. Practice and Procedure: Evidence § 6075, 518-19 (2d ed. 2007) (citing *Gov't Virgin Islands v. Gereau,* 523 F.2d 140, 149-151 (3d Cir.

1975); *Farese v. United States,* 428 F.2d 178, 180 (5th Cir. 1970)). A hearing also, of course, would not have "inhibited the frankness of jury deliberation" as the district court feared because under Rule 606(b) the hearing would have been limited to testimony about extraneous information and outside influence, and there would have been no inquiry into the jury's deliberations.

Similarly, concerns that post-verdict inquiries may open the door for harassment of jurors do not outweigh a defendant's right to an impartial jury. Courts were "early aware that any flat prohibition against receiving such testimony contravened another public policy: that of 'redressing the injury of the private litigant' where a verdict was reached by a jury not impartial." *Gov't of the Virgin Islands v. Gereau,* 523 F.2d at 148 (quoting *McDonald,* 238 U.S. 264, 267 (1915)). In the present case, the defendant also sought to avoid any concerns regarding juror harassment by requesting that the court itself make the inquiry, as opposed to requesting permission to interview the jurors, which would have resulted in both defense and government counsel contacting jurors outside the supervision of the court. App. 608 ("voir dire is the appropriate method for inquiry into possible prejudice or bias on the part of jurors…") (quoting *United States v. Bertoli*, 40 F.3d 1384, 1393 (3d Cir. 1994)). A court supervised hearing would have provided the greatest amount of protection for the jurors, allowed the court to limit the scope of questioning to that allowed under Rule 606(b), and

provided the court with the opportunity to evaluate the credibility of the jurors' testimony when they were first questioned. As the Second Circuit stated in *Moten*,

> It is well established in this Circuit that in order to insure that jurors are protected from harassment, a district judge has the power, and sometimes the duty, to order that all post-trial investigation of jurors shall be under his supervision....

582 F.2d at 665-667 (internal citations omitted).

The district court also reasoned that a hearing was not required because the evidence of taint presented to the court was insufficient, reasoning that "had defense counsel truly believed that there was some truth to Cipriano's reports, they could have sought leave to directly interview the jurors for the purpose of filing the motion for new trial." App. 691. But the defense requested that the court make the initial inquiry not for fear that the allegations were unfounded, but because it was the most cautious and prudent course. Furthermore, at the time the court issued its ruling the jurors' statements had been independently fact checked and published by a respected periodical supporting the truth of the allegations. *Id*. 703-04.

The Supreme Court recently vacated and remanded a case where an evidentiary hearing was not held on post-verdict allegations of misconduct. *Wellons v. Hall*, 558 U.S. __, 130 S. Ct. 727 (2010) (per curiam). The Eleventh Circuit held that Wellons had not made a sufficient showing to warrant questioning of the jurors because the defendant's claims of juror misconduct were grounded in

"speculation" and "surmise." *Id.* at 730. The Supreme Court reversed, noting that "had there been discovery or an evidentiary hearing, Wellons may have been able to present more than 'speculation' and 'surmise.'" *Id.* The Court went on to state that in these post-verdict circumstances it "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has an opportunity to prove actual bias." *Id.* at 731 (quoting *Smith v. Phillips*, 455 U.S. 209, 215 (1982)). The Eleventh Circuit has since reversed and remanded to the district court for discovery and an evidentiary hearing. *Wellons v. Hall*, 603 F.3d 1236 (11th Cir. 2010).

Contrary to the district court's holding, the facts of this case present the exact type of scenario in which a post-verdict hearing is required. The defense was not on a "fishing expedition" but instead presented reliable evidence of jury taint, and requested that the court inquire into these specific, concrete, and narrow allegations. By treating defense counsel's affidavit, based solely on Cipriano's journalistic inquiries, as if it were the defendant's entire showing, and on that basis dismissing the motion rather than convening a hearing, the district court made precisely the same error that led the Supreme Court to reverse in *Wellons.* At a minimum, the district court should have questioned the juror who told Cipriano that she had contact with third-parties who disclosed information regarding Fumo's prior prosecution and Carter's conviction. Furthermore, in light of the breadth and

nature of the media coverage during the case and the evidence that on the morning of the verdict all of the jurors had been exposed to media coverage regarding Wuest's misconduct, and that not one of the jurors had reported that exposure to the court, the district court should also have inquired into the jury's exposure to media coverage during the case and specifically the media coverage of Wuest's Internet postings.

D. The district court's refusal to grant a new trial once it assumed as true that there was jury taint violated Fumo's Constitutional right to an impartial jury.

After refusing to conduct a hearing, the district court denied Fumo's motion for a new trial, holding that even if it accepted the evidence of jury taint as true there was no possibility of prejudice. This holding is at odds with the facts, contrary to the standard applied in this Circuit, and irreconcilable with defendant's Constitutional right to an impartial jury. Where jurors have been exposed to extrajudicial evidence explicitly excluded by the court through direct contact with third parties, there is a presumption of prejudice. Furthermore, even if prejudice is not presumed, the probable effect of the extrajudicial information on a hypothetical average juror is prejudicial. Finally, under the Supreme Court's evolved jurisprudence regarding Sixth Amendment structural rights, prejudice need not even be shown. Thus, the district court's refusal to grant a new trial based on speculation that there could be no prejudice requires reversal.

i. The facts give rise to a presumption of prejudice.

The Supreme Court held more than a century ago that "private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least until their harmlessness is made to appear." *Mattox v. United States*, 146 U.S. 140, 150 (1892). The presumptive nature of prejudice arising from extrajudicial communications was affirmed in *Remmer*:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial...The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

347 U.S. 227, 229 (1954). Post *Remmer*, in *Smith v. Phillips*, the Supreme Court held that where a juror submitted an employment application to the district attorney's office, it was not necessary to "imply bias." 455 U.S. 209, 220. The majority in *Phillips* found that an implied-bias rule was not appropriate under the circumstances because a post-trial evidentiary hearing was held where the judge expressly found that the juror's conduct did not prejudice the defendant. *Id.* Concurring in the judgment, Justice O'Connor noted that "it is important for the Court to retain the doctrine of implied bias to preserve Sixth Amendment rights." *Id.* at 222. In *United States v. Olano*, 507 U.S. 725 (1993), the Supreme Court

continued to cite *Remmer* favorably and held that the mere presence of alternate jurors in the deliberation room did not give rise to a presumption of prejudice because they were not an outside influence. 507 U.S. 725 (1993). The lower court's decision in that case was reviewed for plain error because the defendant "never requested a hearing, and thus the record before us contains no direct evidence that the alternate jurors influenced the verdict." *Id.* at 740.

Since the Supreme Court's decisions in *Phillips* and *Olano*, the Third Circuit has narrowed the scope of when the *Remmer* presumption of prejudice applies. It is clear, however, that the presumption remains where, as here, jurors have direct contact with third-parties who disclose prejudicial information explicitly excluded from evidence. *See Gov't of the Virgin Islands v. Dowling*, 814 F.2d 134, 138 (3d Cir. 1987) ("The likelihood of substantial prejudice turns on all of the surrounding circumstances, the most important being the nature of the information learned by the jurors and the manner in which it was conveyed."). Indeed, the facts here, which the district court assumed to be true, constitute perhaps the most prejudicial type of taint, which should always give rise to a presumption of prejudice.

First, the jury was exposed to information through direct contact with third parties: co-workers at a place of employment. Exposure to such "extra jury influences 'pose a far more serious threat to the defendant's right to be tried by an impartial jury' than intra-jury communications." *Console*, 13 F.3d at 665 (quoting

United States v. Resko, 3 F.3d 684,690 (3d Cir. 1993)). In *Console*, the district court held that there was a presumption of prejudice, and this Court affirmed, distinguishing *Phillips* and *Gilsenan* where the courts did not find a presumption of prejudice, stating that those cases did not involve direct communication between a juror and a third party. *Id.* at 666. While the Court found a presumption of prejudice, it held that the district court did not abuse its discretion in denying defendant's motion for a new trial because the district court conducted a voir dire of each juror and on the basis of that voir dire concluded that the government had rebutted the presumption. *Id.* at 667. *See also United States v. Urban*, 404 F.3d 754, 777 (3d Cir. 2005) ("we tend to apply the presumption of prejudice where a juror is directly contacted by third-parties"); *United States v. Lloyd*, 269 F.3d 228, 238 (3d Cir. 2001) ("[t]his court has applied the presumption of prejudice only when the extraneous information is of a considerably serious nature. In particular, we have tended to apply the presumption of prejudice when a juror is directly contacted by third-parties.") (internal citations omitted); *United States v. Bertoli*, 40 F.3d 1384, 1394 (3d Cir 1994) ("Because extra-jury influences are far more serious than intra-jury influences, certain extra-jury influences create a presumption of prejudice that must be rebutted by the government for the court to uphold the conviction").

Second, the nature of the information provided by the third-parties to the jury was prejudicial. "Information about prior criminal convictions or activities is the kind of information that carries great potential for prejudicing the jury." *Dowling*, 814 F.2d at 138 (citing cases where new trial was required even despite cautionary instruction). Evidence of a prior prosecution is equally prejudicial, even if the defendant is ultimately not convicted. In *United States v. Williams*, a jury was exposed to newscasts disclosing that a previous jury found defendant guilty on the same charges, but that a new trial had been ordered. 569 F.2d 464 (5th Cir. 1978). Although the present case is somewhat distinguishable in that Fumo was tried on charges different than those on which he was previously prosecuted, the question is still "whether information about a defendant's conviction in a former trial is as damaging as information about a defendant's prior criminal acts" and the conclusion remains "that it is perhaps even more damaging." *Id.* at 470. This is especially so here where both prosecutions of Fumo were at bottom charges of political corruption. *See also Gilsenan*, 949 F.2d at 97 n.12 ("As in *Greene*, the extra-record information in *Dowling* was far more serious than here as it involved, in addition to the conviction, information that the defendant had been charged with attempted armed robbery and murder but acquitted").

The district court itself recognized that a presumption of prejudice is applied "when the extraneous information is of a considerably serious nature" and that

"[t]he court has tended to apply the presumption of prejudice when a juror is directly contacted by third-parties," but failed to apply this standard. App. 695 (citing *Lloyd*, 269 F.3d at 238 and *Console*, 13 F.3d at 666).

A presumption of prejudice should also have been applied to the jury's exposure to media coverage of Wuest's misconduct. *See Lloyd*, 269 F.3d at 239 ("in some cases the publicity that occurs is so fundamentally prejudicial that actual prejudice is presumed as a matter of law") (quoting *Waldorf v. Shuta*, 3 F.3d 705, 710 n.6). *See also Urban*, 404 F.3d at 777 n.9 ("in the case of media exposure, we will apply the presumption of prejudice where 'the publicity that occurs is fundamentally prejudicial") (quoting *Waldorf*, 3 F.3d at 710 n.6). The information presented in support of the motion, which the district court assumed to be true, demonstrated that the jury was exposed to widespread scrutiny of the jury itself and the status of its deliberative process on the very day that it returned its verdict. It is fundamentally prejudicial for a jury to deliberate under a cloud of intense and widespread media coverage and a public expectation that a verdict is imminent. *See infra* Section VI.G.

ii. The probable effect on a hypothetical average juror is prejudicial.

If a presumption of prejudice does not apply, a court must then determine whether there was prejudice by conducting "an objective analysis by considering the probable effect of the allegedly prejudicial information on a hypothetical

average juror." *Gilsenan*, 949 F.2d at 95. In doing so, the court should "review the entire record, analyze the substance of the extrinsic evidence, and compare it to that information of which the jurors were properly aware." *Lloyd*, 269 F.3d 228, 239 (quoting *United States v. Weiss*, 752 F.2d 777, 783 (2d Cir. 1985)). It is clear that the probable effect on a hypothetical average juror of learning of a defendant's prior conviction by a jury for a similar offense and a related person's conviction and imprisonment for fraud would be substantially prejudicial. *See supra* Section VI.D.i. Remarkably, the district court reasoned that the probable effect could actually have been favorable to Fumo, speculating that "a hypothetical reasonable juror could have easily surmised from this information that, as before, the mere fact of prosecution did not require that Fumo be convicted of any crime" and that when provided with evidence of Carter's conviction "a hypothetical juror could have concluded that Carter – a convicted felon and, by inference, a dishonest individual – actually misled Fumo into believing that he had authority to permit Fumo's use of the yachts." App. 700-01. The district court, however, was required to evaluate the *probable* effect on a hypothetical average juror, not speculate as to any possible effect that would not be prejudicial to the defendant.[71]

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[71] The Government had also argued that "any informed citizen would know or surmise" that "Fumo was not previously convicted, but rather was acquitted by the judge" given that Fumo "was permitted to remain in the legislature for 30 years," making "any prejudice even more ephemeral." App. 664-64. But the Government *(cont'd)*

Regarding the prior exclusion of this evidence, the district court observed that "although this evidence was excluded as irrelevant and superfluous to issues in the case, the Court does not find that its admission at trial would have been clearly and unduly prejudicial to Defendant's case, such that a new trial would have been required." *Id*. 700. This conflicts with the district court's own prior statements that evidence of Fumo's prior prosecution and Carter's conviction was prejudicial. *Id*. 2545, 4051; Supp. App. 16. This reasoning also ignores the fact that when evidence is presented during trial it is subject to the protections of judicial process – including the right to confrontation and to rely on counsel to rebut or explain the evidence to the jury, as well as limiting instructions by the court – but when information reaches jurors through third-parties, it poses a much greater risk of prejudice. *Marshall v. United States*, 360 U.S. 310, 312-13 (1959) ("We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury

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took a different position as sentencing, stating that Fumo "went to trial in this courthouse and was convicted in 1980 for conduct, some of which is nearly identical to the kind of conduct that he is convicted of here." *Id*. 1592.

through news accounts as when it is a part of the prosecution's evidence. It may indeed be greater for it is then not tempered by protective procedures.")

The district court went on to reason that exposure to information regarding Fumo's prior prosecution and Carter's conviction "was merely a small part of the entire trial" and that "even absent the extraneous information, a finding of guilt on all counts was both possible and reasonable." App. 702. But a "verdict must be based upon the evidence developed at trial. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender, or the station in life which he occupies." *Irvin v. Dowd*, 366 U.S. at 722. *See also Tumey v. Ohio*, 273 U.S. 510, 535 (1927) ("It is finally argued that the evidence shows clearly that the defendant was guilty...and therefore that he can not complain of a lack of due process, either in his conviction or in the amount of the judgment. The plea was not guilty and he was convicted. No matter what the evidence was against him, he had the right to have an impartial judge.") The Constitutionally mandated insulation of jurors from extrajudicial information cannot be disregarded based on the overall weight of the evidence against a defendant, as such judicial measuring of the probable weight given by a jury to the evidence denies a defendant his right to trial by jury. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (When a "reviewing court can only engage in pure speculation – its view of what a

reasonable jury would have done....'the wrong entity judges the defendant guilty.'") (quoting *Rose v. Clark*, 478 U.S. 570, 578 (1986)).

The district court also reasoned that any prejudice was mitigated by its instruction to decide the case based only on the evidence in the courtroom. App. 702. But even when jury taint is discovered mid-trial and a limiting instruction tailored to the specific situation is given, the instruction may be insufficient to address the resulting prejudice. *Dowling*, 814 F.2d at 138 (citing cases where new trial was required despite cautionary instruction). Indeed, if an instruction alone were sufficient to cure the error, then a jury's exposure to every type of extraneous influence would be permissible given that jurors are always given such an instruction.

The district court also reasoned that it can "[b]y inference...discern that none of the other jurors were privy to information regarding Fumo's former prosecution or Carter's conviction" and that this "mitigates any prejudice that may have resulted." App. 701. As an initial matter, "[w]here a verdict must be unanimous, it seems obvious that prejudice may follow from exposing even just one juror to extraneous information or outside influence." Wright and Gold, Fed. Practice and Procedure: Evidence, § 6075, 566 n.102 (2d ed. 2007). Indeed, "[i]f a single juror is improperly influenced the verdict is as unfair as if all were." *Krause v. Rhodes*, 570 F.2d 563, 569 (6th Cir. 1977) (quoting *Stone v. United States*, 113 F.2d 70, 77

(6th Cir. 1940)). Regardless, it is uncertain whether the other jurors were aware of the extrajudicial information *because the court did not conduct the required evidentiary hearing*. In *Ianniello*, the Second Circuit remanded for a hearing stating that the district court should determine whether ex parte statements were made to the jury, what was said, the factual circumstances surrounding any ex parte contacts, and whether the jurors who heard the statements communicated the content of those statement to the other jurors. 866 F.2d 540, 544. The Circuit *did not*, as the district court did here, refuse to grant a new trial because the defendant had not already established this information. Doing so would allow a court to insulate a jury verdict simply by refusing to hold a hearing and then finding there is not prejudice warranting a new trial due to absence of information. *See Waldorf*, 3 F.3d at 706 ("Because the trial court did not conduct an adequate voir dire, and because we cannot know what the jurors' responses would have been to a searching inquiry based on objective criteria, we will vacate the judgment entered on the jury verdict and remand for a new trial"); *Dowling*, 814 F.2d at 141 ("We hold that the trial judge erred when he failed to develop a record sufficient to permit evaluation of the potential prejudice to the defendant…"); *Greene v. New Jersey*, 519 F.2d 1356, 1357 (3d Cir. 1975) ("Because the trial court did not conduct a voir dire, and because we cannot speculate what the jurors' responses

would have been to an appropriate inquiry, we conclude that the appellee must be afforded a new trial.").

The district court also found that the jury's exposure to media coverage of Wuest's postings was not prejudicial. Relying on its previous decision not to dismiss Wuest because his online comments were "innocuous" and "were nothing more than harmless ramblings," App. 697, the district court overlooked the fact that the prejudice results not only from the jury being exposed to the content of Wuest's postings, but also from exposure to the widespread scrutiny of the jury itself. The district court entirely failed to analyze what prejudicial impact could result from a jury deliberating under a cloud of intense and widespread media coverage of one its own member's actions and a public announcement that a verdict was imminent. *See infra* Section VI.G.

iii. The right to an impartial jury implicated here is a structural right and no showing of prejudice was required.

In even considering the existence of prejudice, the district court failed to consider the structural nature of the right to an impartial jury. Certain rights are so fundamental to Constitutional protections that any violation of those rights is structural error.[72] The Supreme Court has described structural errors as those that

[72] Structural errors include denial of right to counsel *Gideon v. Wainwright*, 372 U.S. 335 (1963); exclusion of members of the defendant's race from a grand jury *Vasquez v. Hillery*, 474 U.S. 254 (1986); trial conducted by a judge with financial *(cont'd)*

"contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. Such errors infect the entire trial process and necessarily render a trial fundamentally unfair. Put another way, these errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal punishment may be regarded as fundamentally fair." *Neder v. United States*, 527 U.S. 1, 8-9 (1999) (internal quotations omitted). Such errors defy analysis by harmless error standards because they affect the reliability of the entire adjudicatory process and are accompanied by an increased difficulty in assessing the effect of the error. *See Puckett v. United States*, 129 S. Ct. 1423, 1432 (2009). Structural errors, therefore, are not subject to review for harmless error. *See e.g. United States v. Gonzalez-Lopez*, 548 U.S. 140, 157 (2006).

A violation of the right to an impartial jury is structural error. The Supreme Court has explained that harmless error analysis itself "presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury." *Rose v. Clark*, 478 U.S. 570, 578 (1986) (also

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interest in outcome *Tumey v. Ohio*, 273 U.S. 510 (1927); denial of public trial *Waller v. Georgia*, 467 U.S. 39 (1984); denial of right to self-representation *McKaskle v.Wiggins*, 465 U.S. 168 (1984); erroneous reasonable doubt instruction *Sullivan v. Louisiana*, 508 U.S. 275 (1993); and denial of right to counsel of choice *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

stating that "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis.") Since *Rose v. Clark*, the Supreme Court has recognized that:

> Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly [a structural error], the jury guarantee being a basic protection whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. The right to trial by jury reflects, we have said, a profound judgment about the way in which law should be enforced and justice administered. The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.

Sullivan, 508 U.S. at 281-82 (internal citations omitted). Furthermore, where the impartiality of a judge or jury has been called into question, it is not necessary to show actual bias to establish structural error. In *Tumey v. Ohio*, 273 U.S. 510, the Supreme Court held that harmless error analysis was inappropriate and the defendant was entitled to a new trial where the judge had a financial interest in the outcome of the case, despite the lack of any indication that bias influenced his decisions. For "[f]airness of course requires an absence of actual bias in the trial of cases, but our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchinson*, 349 U.S. 133, 136 (1975). The Supreme Court later explained:

> When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired. Similarly, when a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained. Like these fundamental flaws, which never have been thought harmless, discrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review.

Vasquez v. *Hillery*, 474 U.S. 254, 263-64 (1986) (internal citations omitted) (statement joined by four Justices).

This Court has agreed with this conclusion, emphasizing that denial of the right to an impartial jury constitutes denial of due process that is more significant than other inadequate procedures. *United States v. Cross*, 128 F.3d 145, 148 (3d Cir. 1997) ("We defined the basic elements of due process not simply as notice and the opportunity to be heard, but to be heard *by a fair and impartial tribunal*.") (emphasis in original) (internal citations omitted).

Over the last decade, the Supreme Court has been active in ensuring that Sixth Amendment enumerated rights are given the fullest protection under the Constitution. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that previously permitted exceptions to hearsay violated a defendant's right to

confrontation under the Sixth Amendment. The following term in *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the Sixth Amendment right to trial by jury requires that facts necessary to support a sentence must be determined by a jury beyond a reasonable doubt. Reversing previously accepted practices for hearsay exceptions and sentencing enhancements, *Crawford* and *Booker* made clear that these enumerated Sixth Amendment rights are not subject to compromise.

While it is clear that a defendant's right to an impartial jury must be viewed as a structural right, jurisprudence addressing the exposure of jurors to prejudicial information explicitly excluded from trial has not yet incorporated the Supreme Court's evolving protections for structural rights. Relevant jurisprudence has explored the right to an impartial jury at times as an element of a fair trial under the framework of due process in the Fifth and Fourteenth Amendments, at times under the Sixth Amendment, and at times under both. While the right to an impartial jury in federal cases is protected by both the Fifth and Sixth Amendments, the Supreme Court recently made clear that the elevation of a Constitutional guarantee to a structural right comes from the explicit guarantee in the Sixth Amendment. *Gonzalez-Lopez*, 548 U.S. at 146 ("'The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel

Clause.' In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation 'complete.'") (quoting *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984)).

The Supreme Court's decisions addressing whether a post-trial hearing should be held and whether a new trial should result from jury taint preceded *Gonzalez-Lopez* and hence have not yet incorporated the Court's evolved jurisprudence of structural rights under the Sixth Amendment. Indeed, each of the three leading Supreme Court cases relevant to the factual issues here analyzes the appropriate remedy for jury taint or misconduct on grounds *other than* the Sixth Amendment. *Remmer*, 347 U.S. 227 (examining the effect of jury taint on the defendant's "right to a fair trial"); *Phillips*, 455 U.S. 209 (examining whether there was jury bias that violated the defendant's due process rights under the 14th Amendment); *Olano*, 507 U.S. 725 (determining whether the presence of alternates during jury deliberations affected defendant's substantial rights under plain error review). Although these cases do not address the denial of the right to an impartial jury as structural error, each requires that under the circumstances in the present case an evidentiary hearing be held and ultimately that a new trial be granted. Examining the Supreme Court's holdings in *Remmer*, *Phillips*, and *Olano* in light

of the Court's more recent development of structural rights under the Sixth Amendment simply emphasizes the necessity of reversal in the present case.

Under existing Supreme Court precedent and the standard in this Circuit, a post-verdict hearing into allegations of jury taint is required whenever, as here, reasonable grounds for investigation exist. Third Circuit precedent then requires a new trial if it is determined that the defendant was substantially prejudiced by the taint. This Circuit, however, has also yet to consider the import of the protections articulated by the Supreme Court for structural rights on these standards. If this Court determines that a new trial is not warranted under existing Circuit precedent, it must determine whether the protections for structural rights require reversal. Under such an analysis, whether reasonable grounds exist to hold a post-verdict hearing and ultimately whether a new trial is required cannot be dependent on a requirement that the defendant show prejudice.

E. Fumo's Constitutional rights to confrontation and counsel were also violated.

The exposure of the jury to evidence regarding Fumo's prior prosecution and Carter's conviction violated not only Fumo's Sixth Amendment right to an impartial jury but also his rights to confrontation and to counsel. The Sixth Amendment's confrontation clause guarantees that "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." U.S. Const. amend. VI. When a person provides a juror with evidence excluded

from trial, that person acts as an unsworn witness and the defendant is denied his Constitutional right to confront that witness. *See Jeffries v. Wood*, 114 F.3d 1484, 1490 (9th Cir. 1997). Similarly, the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. *See also United States v. Vonn*, 535 U.S. 55, 59 (2002). Where evidence is presented to a juror outside the court room, a defendant is denied his Sixth Amendment right to have counsel present during that presentation of evidence.

> That Amendment guarantees, *inter alia*, an impartial jury, the right to confront witnesses, and the assistance of counsel at every critical stage of the trial. Where jurors communicate with outsiders about the merits of the case they are deciding, their impartiality may be compromised unless the communication is tempered by known rules of the court and the instructions and directions of the court made during the trial. And where jurors consider evidence, in the form of either fact or opinion, which has not been introduced in court, the confrontation and counsel rights of an accused are obviated as regards the particular evidence received.

Gov't of the Virgin Islands v. Gereau, 523 F.2d at 150 ("exposure of the jury to news items about the matter pending before the jury; consideration by the jury of extra-record facts about the case; [and] communications between third parties and jurors where relevant to the case to be decided...render a criminal verdict vulnerable because they are *prima facie* incompatible with the Sixth Amendment.") (internal citations omitted). That the exposure of jurors to

extrajudicial information in the present case compromised Fumo's Sixth Amendment rights to confrontation and to counsel, in addition to his right to an impartial jury, highlights the violation of his Constitutional rights and the necessity of a new trial.

F. The district court failed to take appropriate cautionary measures to protect the impartiality of the jury.

The district court repeatedly refused to take precautionary measures necessary to preserve the impartiality of the jury. Throughout trial, there was substantial media coverage of both Fumo's prior prosecution and Carter's conviction. *See supra* note 68. The defense requested that in light of this substantial media coverage, the district court question jurors regarding any potential media exposure, but the district court refused. App. 3187-89, 3323-25.

There is a three-step procedure in this Circuit for addressing publicity during trial. "First a court determines whether the news coverage is prejudicial. Second, if it is, the court determines whether any jurors were exposed to the coverage. Third, if exposure did occur, the court examines the exposed jurors to determine if this exposure compromised their impartiality." *Waldorf*, 3 F.3d at 709-10 (citing *United States v. Jackson*, 649 F.2d 967, 976 (3d Cir. 1981)). *See also United States v. Urban*, 404 F.3d 754, 776-77 (3d Cir. 2005); *Greene v. New Jersey*, 519 F.2d 1356, 1357 (3d Cir. 1975) ("In light of the widespread dissemination of prejudicial information, at the very least, the state court should have conducted an

immediate *voir dire* inquiry to determine if the jurors had read the offensive articles and, if they had, whether they could nonetheless render a fair and true verdict....Because the trial court did not conduct a *voir dire*, and because we cannot speculate what the jurors' responses would have been to an appropriate inquiry, we conclude that the appellee must be afforded a new trial.").

The district court here disregarded the three-step procedure in *Waldorf*. Once it was determined that there was widespread prejudicial media coverage, the district court was required to determine whether any jurors had been exposed to the coverage, yet the district court refused to do so despite the requests of counsel. App. 3187-89, 3323-25. This error was further compounded by the district court's infrequent instructions to the jurors that they not expose themselves to any media coverage or speak to anyone about the case. Due process "means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Phillips*, 455 U.S. at 217. The district court failed to satisfy this standard of due process by refusing to take the measures necessary to protect and ensure the impartiality of the jury.

G. The district court's response to juror Wuest's misconduct was inadequate.

The district court also erred in refusing to both remove Wuest from the jury and to voir dire the remaining jurors in response to Wuest's misconduct. Wuest

violated the sanctity of the jury and his oath by posting comments about the status of the jury's deliberations on publicly accessible websites. He was then exposed to media coverage about his conduct causing him to immediately delete his postings. Called in for questioning by the district court, he asserted that he was not actually communicating with anyone through his postings, although one of his posts showed an exchange with another individual, that his exposure to the media coverage about his own misconduct was purely accidental, and that he had not discussed his jury service on any of his other blogs, when in fact he had referenced his jury service. App. 4641-49. The district court's decision to allow Wuest to return to the jury – which returned a verdict the same day – violated Fumo's right to an impartial jury both because Wuest had shown himself unfit to serve, and because of the potential impact of Wuest's conduct on the rest of the jury.[73]

A juror who has publicly broadcast the status of the jury's deliberations is unfit to serve. In denying Fumo's request to dismiss Wuest, the district court

[73] The district court also failed to fully develop the record regarding Wuest's misconduct. He had already deleted public evidence of his postings, but stated he would be willing to allow counsel and the court to examine portions of his Internet accounts that were not publicly available, but the district court declined to do so. App. 4648. By failing to make this inquiry, there is no record of whether he may have been privately communicating with others through the Internet regarding the case.

focused on whether Wuest had been unduly influenced through contact with others, and failed to consider the significance of this juror publicly broadcasting that the jury had reached a decision, stating the specific day the decision would be announced, even though the jury was returning for further deliberations. Wuest's announcement demonstrated that he had determined deliberations were over, failing to keep an open mind although a verdict had not been returned. Had he called a reporter at the Philadelphia Inquirer and stated that the jury had reached a decision and that it would be announced Monday, he would certainly not be fit to continue his service as a juror. This situation is no different. The tone of Wuest's postings also demonstrated that he was unfit to continue serving as a juror. The duty of a juror in a criminal case is a grave and serious duty. Jurors who consider guilty verdicts as something to be excited about – that lead them to post comments on the Internet about "big announcements!" – have shown themselves unfit to serve. *See United States v. Biaggi*, 853 F.2d 89, 96 (2d Cir. 1988) (a "flippant demeanor" that shows a person is "insufficiently serious about jury duty" is a legitimate reason for striking potential jurors). The tone of his comments demonstrates that he had not taken his duty seriously, but rather saw his position in the highly publicized trial as a source of entertainment for others.

Wuest's actions also improperly impacted the remaining jurors by subjecting the jury itself to significant media scrutiny.[74] A jury cannot be expected to function properly when one of its own has broadcast information regarding its deliberations, subjecting the jury to public scrutiny. Wuest's comments placed significant pressure on the jury by prematurely notifying the public that a verdict would be announced on a specific day. In its denial of Fumo's motion for a new trial, the district court dismissed the timing of the incident stating that the "unusually-rampant news flashes" were taking place "during a period when the jurors – having already reached but not announced a verdict – may have already taken a more relaxed stance." App. 698. But the district court's assumption that the jury had already reached a verdict is based on Wuest's own inappropriate Internet postings. While we cannot inquire into the jury's deliberations, it is just as

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[74] App. 698 ("unusually-rampant news flashes); Lounsberry and McCoy, *Fumo lawyers target juror, deliberations*, Philadelphia Inquirer, Mar. 16, 2009; Caparella, *Crying Foul Over Facebook*, Philadelphia Daily News, Mar. 16, 2009 ("The posting by Juror No. 5 - Eric Wuest of suburban Collegeville - raised questions: Is a verdict imminent? Did Wuest have third-party discussions about the trial as a result of his postings on Facebook and Twitter social networking Internet accounts during the 15-week trial and the ensuing deliberations?"); Cipriano, *Power: Fumo, After the Fall*, Philadelphia Magazine (July 6, 2009), http://www.phillymag.com/articles/power_vince_fumo_after_the_fall/ (Juror "White was driving in from Bethlehem on the Schuylkill Expressway that morning, 'listening to traffic reports on KYW, and they kept blasting that' - the story about the tweeting juror. When she got to the courthouse, the word was out. 'We [jurors] all knew. Some of them heard it on KYW, or the night before, on the news. This was the lead story in the Philadelphia area.'").

possible that the jury was in the process of carefully considering and reconsidering any consensus that had been tentatively reached the previous week before returning the verdict. Had any juror developed questions or doubts regarding any count over the weekend, that juror may have been persuaded to disregard such concerns in effort to "get it over with" in light of the public's expectation for a verdict that day, and the scrutiny of the jury itself. A defendant's interest in a unanimous verdict requires that any undue influence on holdout jurors be protected. While it cannot be known when the jury's unanimity was formed, Wuest's public announcement could have placed pressure on any holdout jurors to promptly conclude deliberations. Courts have made clear that where a jury is exposed to extraneous information "both the night before and the very same day that it reached a verdict . . .a more critical moment would have been difficult to find." *Lloyd*, 269 F.3d at 240 (3d Cir. 2001) (quoting *Waldorf*, 3 F.3d at 713).

In addition to placing undue pressure and scrutiny on the jury, Wuest's presence was also likely a significant distraction to the remaining jurors. This Court recently upheld the dismissal of a juror on the grounds that the presence of the juror could be a distraction to the other members of the jury. *United States v. Berry*, 132 Fed. App'x 957 (3d Cir. 2005) (not precedential). The juror had been contacted by a third party, and although the district court determined that the juror remained impartial, the court reasoned that "[t]he continued presence, and presence

alone, of the contacted juror in the jury room during deliberations, in my judgment, constitutes a living reminder of the out-of-court contact." *Id.* at 964 (quoting district court). The district court questioned "[w]hat will the jurors believe, what will the jurors think when juror number one participates in deliberations?...[T]he presence of juror number one impairs and distracts from the entitlement to these parties to have 12 fully deliberating jurors." *Id.* Agreeing with the district court, this Court stated "her presence posed a threat to the fairness of the deliberations and to the ability of the jury to focus only on the evidence and on the law as the Judge had given it to them." *Id.* at 965. Even if Wuest remained impartial, his participation in deliberations was sure to be a distraction to other members of the jury. Yet the district court refused to question the other jurors as the defense requested, App. 463, to determine whether they were aware of Wuest's misconduct or to evaluate what effect this headline incident may have had on them. Indeed, the district court did not address the jurors regarding the incident at all. Instead, the jury was expected to continue deliberations despite the distraction that one of its own jurors had already announced that they would be returning a verdict that day. In light of all of these factors, the district court abused its discretion in refusing to dismiss Wuest and voir dire the jury.

These errors both individually and cumulatively denied Mr. Fumo his Constitutional right to trial by an impartial jury. His conviction, therefore, must be reversed and remanded for a new trial.

VII. The trial was rendered fundamentally unfair by the introduction of highly prejudicial evidence of uncharged criminal violations of the State Ethics Act.

A. Standard of review.

This Court's review of a district court's admission of evidence based on an interpretation of the Federal Rules of Evidence is plenary. *See United States v. Shabazz*, 564 F.3d 289, 287 (3d Cir. 2009). Where a district court does not provide an explanation for its admission of evidence challenged under the Federal Rules of Evidence, its decision is not entitled to deference by this Court. *See United States v. Murray*, 103 F.3d 310, 318 (3d Cir. 1997); *United States v. Himelwright*, 42 F.3d 777, 785 (3d Cir. 1994); *Gov't of the Virgin Islands v. Pinney*, 967 F.2d 912, 918 (3d Cir. 1992).

B. Pre-trial the court accepted the Government's position that the Ethics Act was relevant only for a limited purpose.

The Government was permitted at trial to introduce expansive evidence that it argued established Fumo's criminal violation of the conflict of interest provisions of the Pennsylvania Public Official and Employee Ethics Act, 65 Pa. Cons.Stat. § 1103(a), ("Ethics Act"). Undisclosed conflicts of interest prohibited by the Ethics Act historically have been addressed as violations of the intangible

right to honest services under 18 U.S.C. § 1346. *See e.g. United States v. Panarella*, 277 F.3d 678 (3d Cir. 2002). Although the Government did not charge Fumo with honest services fraud, it was permitted, over vigorous defense objection, to submit evidence of alleged violations of the conflict of interest provision of the Ethics Act in pursuit of other theories of money or property fraud. This evidence was highly prejudicial and of minimal or no relevancy. It should have been excluded under Federal Rules of Evidence 403 and 702, and the result was an unfair trial on all counts.

After the verdict in this case, the Supreme Court held that honest services fraud under 18 U.S.C. § 1346 is unconstitutionally vague unless limited to bribes and kickbacks and specifically cannot encompass undisclosed conflicts of interest. *United States v. Skilling*, 561 U.S. __, 130 S.Ct. 2896, 2905 (2010). In the present case, where honest services fraud was not even charged, evidence regarding violations of state law conflict of interest provisions was at best of marginal relevancy to the Constitutionally permissible charges of money and property fraud, and had such an overwhelming potential for prejudice that it should never have been submitted to the jury.

The defense argued in pre-trial motions that the indictment's reliance on the conflict of interest provision of the Ethics Act was improper because Fumo was not charged with honest services fraud. DDE 126, at 15-16; DDE 128, at 12-14. The

Government responded that evidence of violations of the Ethics Act was relevant to its money-or-property-fraud theory only because "proof of violation of the Ethics Act is necessary and relevant to establish that Fumo deprived the Senate of money and property in a manner of which it did not approve, and to prove Fumo's fraudulent intent." DDE 136, at 26; *see also* DDE 133, at 41. The district court denied the defendant's Motion to Dismiss, adopting the Government's position that the Ethics Act was relevant to show that "the Senate does not approve of this type of conduct." App. 400. The district court also denied Fumo's motion to strike references to the Ethics Act from the Indictment as surplusage but reserved until trial objections to the admissibility of this evidence and any decision to redact references to the Ethics Act from the indictment if submitted to the jury. DDE 178, at 1.

Closer to trial, the Government disclosed that it would present John Contino as an expert regarding the Ethics Act. DDE 213-1. The defense moved to exclude portions of Contino's testimony, arguing that the proffered testimony would not "assist the trier of fact to understand the evidence or to determine a fact in issue" as required by Federal Rule of Evidence 702 and that the testimony "would be more confusing to the jury and substantially more unfairly prejudicial to the defendant than it would be relevant to the reliable determination of any fact genuinely in issue" in violation of Federal Rule of Evidence 403. DDE 213, at 4. The

Government again responded that testimony about the Ethics Act, including Contino's testimony, would address "only whether the Senate had a property right in the use of its resources and employees, and whether Fumo could have known this." DDE 217, at 11. At a hearing on the motion, the Government further narrowed the scope of Contino's testimony, requiring that he not testify regarding criminal violations, and that he not be asked hypothetically whether conduct described in the indictment violated the Ethics Act unless the Government alerted the district court in advance that it intended to ask such questions. App. 434, 436-37, 440. The district court ultimately held that Contino could testify regarding the Ethics Act, but that it would address objections to the testimony under Rule 403 at trial, particularly in regards to testimony about specific decisions of the Ethics Commission interpreting the Act. *Id*. 436.

In ruling on these pre-trial motions, Judge Yohn recognized the narrow relevancy of this evidence, choosing to leave for trial the final determination of admissibility. *Id*. 436. We do not pursue here any question as to whether even those initial rulings may have been overly indulgent to the Government. Judge Buckwalter, who ultimately presided over the trial, then permitted, over defense objection, a much broader introduction of evidence, only to recognize towards the close of trial that the evidence introduced had gone too far. *Id*. 4322. The result was an unfair trial, requiring reversal of the convictions.

C. At trial the Government introduced improper evidence regarding conflicts of interest under the Ethics Act.

At trial the Government introduced evidence regarding the Ethics Act well beyond the narrow limits set pre-trial. During Contino's testimony on November 4, 2008, he testified about the Ethics Act's criminal penalties and that a violation of the conflict of interest provision is a felony. *Id*. 2233. The Government then solicited testimony regarding numerous state Ethics Commission decisions that found that public employees violated the Ethics Act by using state property for personal and political purposes. *Id*. 2237. The district court interrupted the testimony, voicing its frustration with the Government's emphasis on this line of questioning, *id*. 2237, and the defense objected that the testimony was far more confusing and unfairly prejudicial than probative under Rule 403, that it was improper expert testimony under Rule 702, and that the Government had gone well beyond the narrow scope of admissible testimony permitted by Judge Yohn's pretrial rulings. *Id*. 2238-40. The district court seemed to agree that this testimony "gets so off into an area that's more confusing than enlightening," *id*. 2239, yet allowed the Government to continue eliciting testimony regarding specific Ethics Commission decisions. Contino then testified that in a case where a state representative had used his staff to run his election campaign, it was such an "egregious" violation of the Ethics Act that criminal prosecution was recommended. *Id*. 2241. And despite the Government's pre-trial pledge that it

would not ask Contino's opinion regarding whether conduct described in the indictment violated the Ethics Act, *id*. 436-37, it went through a series of allegations in the indictment asking Contino whether each of the actions were proper under the Ethics Act. *Id*. 2242, 2257-58.

The following morning, the defense moved to strike Contino's testimony as improper under Rules 403 and 702, *id*. 2248, emphasizing that the charged scheme to defraud the Senate of its money or property "is so different from these ethics questions that our fundamental position is no cautionary instruction is ever going to make this clear to a jury." *Id*. 2250. The district court denied the motion to strike, and despite the defense protestation that no instruction could cure the prejudice, provided a limiting instruction to the jury regarding the purposes for which the Ethics Act could be considered. The instruction read in part:

> John Contino was presented as an expert regarding the meaning and application of the Ethics Act of the State of Pennsylvania. Please be aware that no violation of this Pennsylvania law or any other state law is charged in this case.
>
> Further, I instruct you that no violations of any state rules or regulations should be considered by you as amounting to violations of a federal criminal law. You may not convict the defendant, Fumo, of any counts alleging a fraud on the Senate on the basis that he may have violated the Ethics Act. However, you may consider evidence of any knowing violation of the Ethics Act as you would any other evidence in determining whether the government has proven beyond a reasonable doubt that the defendant Fumo devised and executed a scheme to defraud the Senate of its money or property.

> And whether he acted with intent to defraud as I will further define those terms at the conclusion of the case.

Id. 2253.

During its subsequent cross-examination of Fumo, the Government focused on the Ethics Act – ranging far afield from the Senate's property right in the use of its resources and employees – and Fumo's knowledge of its limitations. The lengthy cross-examination included repeated references to the criminal penalties for Ethics Act violations,[75] and although Fumo testified he had never seen the Ethics Commission decisions, the Government read into the record numerous

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[75] App. 4100. (Q: The Ethics Act says "Any person who violates the provisions of Section 1103-A, B, and C relating to restricted activities, commits a felony and shall, upon conviction, be sentenced to pay [a] fine of not more than 10,000 dollars or imprisonment for not more than five years or both. Do you see that? A: I do. Q: Did I read that correctly? A. Yes, you did. Q: In other words, you can be prosecuted criminally for violating the State Ethics Law, can't you, sir? A: Yes."); *id*. 4110. ("And in fact, as we discussed, there are criminal penalties if you violate the Ethics Act in Pennsylvania, aren't there?"); *id*. ("And in addition there have been criminal prosecutions of public officials elected to the General Assembly for violating the Pennsylvania Ethics Act as well, isn't that true?"); *id*. ("And you need to be aware of the types of conduct that public officials can get prosecuted for when they run afoul of the Ethics Act, you don't agree with that?"); *id*. 4111. ("It says here the Ethics Commission found that given the egregious nature of the violations by the analysts for the PUC, this matter will be referred to appropriate law enforcement authority with the commission's recommendation for the institution of a criminal prosecution, do you see that?") *id.* 4111. ("Are you aware that public officials get prosecuted for violations of the Ethics Act criminally?")

summaries of these decisions. *See, e.g.*, *id.* 4107-11; 4114; 4116; 4118.[76] The defense vigorously objected to this questioning on grounds that it was not relevant as Fumo had not been charged with violations of the Ethics Act and that the testimony was grossly prejudicial under Rule 403, *Id*. 4101-06, 4111-13, yet the improper questioning continued.

The following morning, the defense moved for a mistrial, or in the alternative to strike the improper cross-examination or for a limiting instruction, arguing that "it is never admissible, and never fair, to present evidence that someone else, who supposedly did some of the same things as the defendant on trial, was prosecuted and convicted under the same or a different law in another proceeding....Evidence more clearly inadmissible under Fed.R.Evid. 403 on the grounds of unfair prejudice as well as of confusion of the issues can hardly be imagined." DDE 521, at 2-3. The district court denied the request for a mistrial

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[76] App. 4108 (Q: "In the Davidio case, according to the digest, Mr. Fumo, a township supervisor ran afoul of the Ethics Act when he directed a township employee during township working hours to replace the gasoline tank and repair the steel brake line in his personal vehicle. And if we look down at the last paragraph, as a result of that, he was ordered to make payment of $426.47 to the township. I take it you weren't aware of that? A: No I was not."); *id*. 4116. ("This is an Ethics Commission order finding violations of state law in connection with an allegation that Mr. Friend, as a member of the Pennsylvania House of Representatives 166th District, violated the state Ethics Act...including but not limited to office space, telephone, utilities, supplies and postage for the purpose of conducting his reelection campaigns and in aid of your private practice of law, do you see that? Did I read that correctly?").

and to strike, but granted the request for a limiting instruction, to be given at the close of trial. App. 4119. Although the defense had already argued that no limiting instruction could cure the defects caused by this testimony, it participated in the crafting of the language of the instruction in order to mitigate the prejudice to the extent possible.

Later, during the charging conference, the district court acknowledged that "the reason I'm really sensitive about this is because I don't like the way the cross examination went on this issue. I'm not happy with my ruling on it in the sense that you read – he said 'I didn't see them,' and then you read all these things out. I'm not happy with that ruling." *Id*. 4322. By then, however, the damage was done.

D. The presentation of evidence regarding alleged violations of the Ethics Act deprived Fumo of his right to a fair trial.

The evidence regarding the Ethics Act, its criminal penalties, prior enforcement, and applicability to the charged conduct of Fumo was more unfairly prejudicial, confusing, misleading, and cumulative than probative of any relevant issue.[77] Fed.R.Evid. 403. Evidence is unfairly prejudicial if it would have an

[77] Indicating the true irrelevance of this evidence, the Government, who stated the Ethics Act was so crucial to its case as trial, does not even mention the Ethics Act in its Statement of Facts regarding fraud on the Senate, or anywhere else in its opening brief.

undue tendency to lead the jury to convict on an improper basis or provokes the jury's "instinct to punish." *United States v. Gatto*, 995 F.2d 449, 456 (3d Cir. 1993) (quoting earlier cases). The evidence regarding the Ethics Act gave rise to the risk that the jury would improperly convict Fumo based on evidence of uncharged state crimes or regulatory violations rather than the crimes charged in the indictment, and at a minimum invoked the jury's instinct to punish given evidence of numerous decisions of the Ethics Commission finding other persons in violation of the Ethics Act for similar conduct and their referral for criminal prosecution. The prosecutors' repeated, systematic and clearly deliberate use of this unfair questioning, particularly after being warned by the trial court to limit its use of the evidence, contributes significantly to the need for reversal under Rule 403. *See United States v. Morena*, 547 F.3d 191, 193-96 (3d Cir. 2008) (per Aldisert, J.; reversing for analogous emphasis on uncharged drug involvement in gun possession case).

The district court allowed the admission of the evidence but never articulated its reasoning under Rule 403 regarding why the probative value of the evidence was not substantially outweighed by unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence. At times the district court's own statements even indicated that it viewed the evidence as more confusing than probative. App. 2239 ("This gets so off into an area that's

more confusing than enlightening"). Where a district court does not provide an adequate explanation on the record for its ruling under Rule 403, its decision is not entitled to deference and this Court may examine the record and determine itself whether admission of the evidence was appropriate. *See United States v. Murray*, 103 F.3d 310, 318 (3d Cir. 1997) (per Alito, J.); *United States v. Himelwright*, 42 F.3d 777, 785 (3d Cir. 1994); *Gov't of the Virgin Islands v. Pinney*, 967 F.2d 912, 918 (3d Cir. 1992).

There was no probative value to the repeated introduction of evidence regarding criminal sanctions for violations of the Ethics Act. It was not relevant to show the Senate's money or property interest, or to establish Fumo's intent. The only purpose of this evidence, combined with the testimony that specific conduct alleged in the indictment violated the Ethics Act, was to improperly lead the jury to the conclusion that Fumo must be guilty of a criminal violation of the Ethics Act. As the First Circuit has recognized,

> an overemphasis on what state law forbids may lead the jury to believe that state rather than federal law defines the crime...Wire and mail fraud are *federal* offenses; and while state violations may play a role, the jury should not be allowed to slip into the misunderstanding that any violation of proliferating state laws and regulations controlling this area automatically amounts to a federal crime....The district court has ample authority under Federal Rule of Evidence 403 to limit evidence concerning state law requirements where that evidence is substantially more prejudicial than probative.

United States v. Sawyer, 85 F.3d 713, 731-32 (1st Cir. 1996) (emphasis in original).

Similarly, evidence regarding specific decisions of the Ethics Commission in unrelated cases lacked any probative value and was highly prejudicial. Purportedly to show notice to Fumo to establish intent, summaries of these decisions were introduced first through Contino, and then through the cross-examination of Fumo. Introduction of evidence that another person was prosecuted and convicted under a different set of laws in a different type of proceedings, of which defendant was not even aware, is void of any probative value and is highly prejudicial. *See United States v. Werme*, 939 F.2d 108, 116 (3d Cir. 1991) ("the rule that a defendant is entitled to have the question of his guilt determined upon the evidence against him, not on whether someone else has been convicted of the same charge, is founded upon the notion that another person's guilty plea or conviction with respect to similar or identical charges has only slight probative value on the question of the defendant's guilt, but is extremely prejudicial").

Such evidence was particularly prejudicial in the present case where the jury was presented with evidence that other persons charged with similar conduct were found by a special commission to have violated the Ethics Act, leading to the clear implication that they must find that the defendant did so here as well. This purpose was evident when the Government referenced Contino's testimony during

summation, stating "you could see Mr. Contino's reaction when he was being asked the questions, the man from the Ethics Commission. He's being asked, 'Can you do this sort of thing?' He didn't say it, but I'm sure that no one has seen a case like this in which there's such pervasive fraud that's going on, on a daily basis." App. 4372. Again referencing specific Ethics Commission decisions in closing, the Government referred to one by stating "the gentleman...did a fraction of what is charged in this case and was taken out and prosecuted by the Ethics Commission." *Id.* 4376.

The Government's cross-examination of Fumo regarding the Ethics Commission decisions after Fumo testified that he had never seen them was also improper. Unless Fumo's recollection could be refreshed that he had seen the Ethics Commission decisions, all remaining questions were improper. The prosecution's strategy of introducing these decisions by reading them into the record and then asking "did I read that correctly?" was improper, and the probative value of any response is nonexistent. It is black letter law that answers, and not questions, are proper evidence for the jury to consider. *Sims v. Greene*, 161 F.2d 87, 88 (3d Cir. 1947) ("Questions asked by counsel are not evidence").

The introduction of evidence regarding the Ethics Act through Contino was particularly offensive, as expert testimony poses an even greater risk of prejudice. *United States v. Rutland*, 372 F.3d 543, 545 (3d Cir. 2004) ("Expert evidence can

be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.") (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993)).

Contino's expert testimony was also improper under Federal Rule of Evidence 702, as his testimony did not assist the trier of fact in understanding the evidence or determining any fact in issue. Contino could not testify to Fumo's intent, and his testimony was not helpful in determining the Senate's money or property interest, as Contino is not a representative of the Senate. Indeed, the Chief Clerk of the Senate William Faber had already testified regarding the scope of the Senate's property interest, App. 1842-74, rendering Contino's testimony needlessly cumulative and highlighting the prejudice to Fumo of the admission of highly prejudicial and unnecessary testimony. *See Goldblum v. Klem*, 510 F.3d 204, 221 (3d Cir. 2007) ("it would have been completely appropriate for the court to have explained its discretion in precluding cumulative expert testimony on the basis that it would not have been helpful to it in understanding the evidence or determining a fact in issue") (discussing PA. R. Evid 403 and 702, parallel to the federal rules); *Sanchez v. Echo, Inc.*, No. 06-787, 2008 U.S. Dist LEXIS 61539 at

*2 (E.D. Pa. Jan. 8, 2008) (expert "will not be permitted to provide any cumulative testimony").

Contino's testimony that specific conduct alleged in the indictment violated the Ethics Act was also improper. Indeed, although the Government had stated during the pre-trial hearing regarding expert testimony that it would not ask Contino his opinion regarding whether instances of conduct described in the indictment violated the Ethics Act, App. 436-37, it did just that. *Id.* 2242, 2257-58. Additionally, to the extent that any portion of the Ethics Act was relevant, it is the judge's role to explain the relevant law to the jury, not an expert's. *Casper v. SMG*, 389 F.Supp.2d 618, 621 (D. N.J. 2005) ("The district court must limit expert testimony so as to not allow experts to opine on 'what the law required' or 'testify as to the governing law.'") (quoting *United States v. Leo*, 941 F.2d 181, 196-97 (3d Cir. 1991).

This broad reliance on the Ethics Act by the Government throughout trial was compounded when the argumentative, unredacted indictment, including citations to the Ethics Act, was submitted to the jury. Judge Yohn had denied the defendant's pre-trial motion to strike references to the Ethics Act from the indictment without prejudice to redact the indictment before submission to the jury, yet the defendant's proposed redacted indictment, Supp. App. 25-155, was later rejected by Judge Buckwalter, and the indictment including references to the

Ethics Act was submitted to the jury. This 272-page narrative indictment – more like a second closing argument that the jury could consult during its deliberations – was in direct contradiction of Federal Rule of Criminal Procedure 7(c), which requires that an indictment be a plain and concise statement of the essential facts. Moreover, its inflammatory narrative, including references to the Ethics Act, amplified the prejudice to the defendant. *See United States v. Hedgepeth*, 434 F.3d 609, 612 (3d Cir. 2006) (court may strike irrelevant and prejudicial material from the indictment).

Finally, the instructions given by the district court in attempt to address the error, App. 2253, 4363, were insufficient to cure the resulting prejudice to Fumo. *See Morena*, 547 F.3d at 197 (limiting instruction held not to cure Rule 403 violation). Introduction of evidence regarding the Ethics Act was not relevant for any proper purpose, and even if it were relevant for the limited purposes of whether the Senate had a property right in the use of its resources and employees, and whether Fumo knew this, given the broad use of the Ethics Act in the Government's presentation of its case, the jury could not be expected to compartmentalize the evidence and consider it only for these limited purposes. *See United States v. Sampson*, 980 F.2d 883, 889 (3d Cir. 1992) ("This instruction does not cure the error. Where the government has not clearly articulated reasons why the evidence is relevant to any legitimate purpose, there is no realistic basis to

believe that the jury will cull the proper inferences and material facts from the evidence."); *Himelwright*, 42 F.3d at 787 ("although this instruction reflects the district court's apparent understanding of the potential for undue prejudice to [defendant], it does not cure the error in the first instance in not conducting the balancing of interests which Rule 403 requires and which should have lead to the exclusion of [the evidence].") No juror could disregard the repeated assertion that Fumo's conduct violated state law, would be deemed "unethical", and amounted to a felony.

Where Rule 403 has been violated, unless it is "'highly probable that the evidence did not contribute to the jury's judgment of conviction'" the conviction must be reversed. *Murray*, 103 F.3d at 319-20 (quoting *Gov't of Virgin Islands v. Archibald*, 987 F.2d 180, 187 (3d Cir. 1993)). *See also Himelwright*, 42 F.3d 777 (reversing conviction where evidence violated Rule 403); *Pinney*, 967 F.2d 912 (same). Here, it is highly probable that the improper evidence did contribute to the conviction, as even the Government acknowledged after trial that the Ethics Act was of "critical importance" to its case, DDE 676, at 101, and stated at sentencing that "[o]ne of the issues, as the Court's aware in the Senate fraud was whether or not Fumo engaged in violations of the Ethics Act when he had conflicts of interest using state money for personal benefit and also for campaign workers." App. 1592.

Without charging Fumo with honest services fraud, the Government was permitted to introduce evidence of alleged violations of criminalized conflict of interest provisions that were highly prejudicial, confusing, misleading, needlessly cumulative, and not sufficiently probative of any relevant issue under the money or property fraud charged in the indictment. This error deprived Fumo of his right to a fair trial, requiring that the judgment be reversed.

VIII. The sentencing court erred in adding pre-judgment interest to the restitution amount.

Fumo's sentence included an order to pay $2,084,979.28 in restitution to CABN, ISM and the Senate. *Id.* 1624. Although the court on July 9, 2009, announced the amounts of restitution it intended to impose, *id.* 1565, it allowed the government, over Fumo's objection, a few days following sentencing to justify its request for pre-judgment interest on the restitution. The Government never gave the ten days' pre-sentence notice of its inability to go forward, as required by 18 U.S.C. § 3664(d)(5). On July 20, the government filed a memorandum elaborating its request. *Id.* 1642-51. Again over objection, DDE 741, the court below sustained the government's position, adding $255,860.18 in pre-judgment interest to the principal restitution amount, for a total of $2,340,839.46. For the following reasons, the addition of pre-judgment interest must be reversed.

A. Standard of review.

This Court exercises plenary review of a district court's determination of whether restitution is lawful. *See United States v. Myer*, 2003 U.S. App. LEXIS 12433 (3d Cir. Apr. 17, 2003) (not precedential).

B. Pre-judgment interest on restitution is not authorized by law.

Federal sentencing law makes no provision for pre-judgment interest on restitution. Unless otherwise provided by statute, "[i]t is, of course, well established that criminal penalties do not bear interest." *Gov't of Virgin Is. v. Davis*, 43 F.3d 41, 47 (3d Cir. 1994). This proposition is fundamental and well-established. In *Davis*, this Court cited *United States v. Sleight*, 808 F.2d 1012, 1020 (3d Cir. 1987) (neither post-judgment nor pre-judgment interest is authorized on restitution ordered under Federal Probation Act), which in turn relies on *Rodgers v. United States*, 332 U.S. 371, 376 (1947) (government not entitled to addition of pre-judgment interest on civil penalties assessed under Agricultural Adjustment Act of 1938), and *Pierce v. United States*, 255 U.S. 398, 405-06 (1921) (absent statutory authority, criminal fine accrues neither post-indictment nor post-judgment interest, until unpaid fine amount is lodged against defendant as a civil judgment). Federal sentencing law expressly authorizes post-judgment but not pre-judgment interest on awards of restitution. *See* 18 U.S.C. § 3612(f). Coupled with the general rule just discussed, the doctrine of *expressio unius* would seem to settle

the question in favor of the defendant's position. *See United States v. Cole*, 567 F.3d 110, 113-15 (3d Cir. 2009).[78] Nevertheless, in *Davis*, a panel of this Court approved an award of restitution which included pre-judgment interest in a case where the property taken by the defendant consisted of interest-bearing certificates of deposit. In such a case, where the property taken was an investment instrument (the principal of which was returned intact), the victim's lost interest may indeed be the proper measure of "loss" under 18 U.S.C. § 3663A(b)(1). The facts of Fumo's case, however, are in no way similar. Moreover, *Davis* itself requires that any "sweeping" reading of the restitution law must be rejected, and that only reimbursement based on "the plain and unambiguous language of" the statute can be allowed. 43 F.3d at 46; *accord United States v. Akande*, 200 F.3d 136 (3d Cir. 1999). *See also Hughey v. United States*, 495 U.S. 411, 422 (1990) (rule of lenity applies to criminal restitution law, as a penal provision, despite any remedial aspect). The addition of interest in this case is thus unsupported by precedent or statute.

There is reason to think, as well, that *Davis* is no longer good law. The panel's justification in *Davis* for allowing restitution consisting of pre-judgment

[78] "Expressio unius est exclusio alterius." *See Leatherman v. Tarant County Narcotics Intell. & Coord. Unit*, 507 U.S. 163, 168 (1993); *see also Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (applying doctrine to construction of criminal penalty statute) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

interest was predicated on a characterization of restitution as "compensatory" in nature and therefore not a "criminal penalty." *Id.* 47. (In this way, the Court sought to distinguish the precedent discussed above concerning probation conditions, fines, and civil "penalties." *Id.*) The *Davis* panel's view of restitution as essentially compensatory and thus subject to civil rather than criminal rules regarding non-statutory interest was rejected more recently by this Court, sitting *en banc*, in *United States v. Leahy*, 438 F.3d 328, 333-35 (3d Cir. 2006) ("restitution ordered as part of a criminal sentence is criminal rather than civil in nature," *id.* 335).[79] Accordingly, *Davis* should be viewed as overruled, or at least it must be narrowly read and limited to its unusual facts – a case where the property taken by the defendant from the victim was itself an interest-bearing financial instrument.

In fact, this is how another panel more recently explained the *Davis* precedent. *See United States v. Jimenez*, 513 F.3d 62, 87 (3d Cir. 2008) (victim's loss, for purposes of restitution, "includes bargained[-]for interest and finance charges," citing *Davis*). Surely, if *Davis* stood for a broader, more general proposition, it would be regularly invoked, consistently followed, and routinely applied for the last 15 years in all restitution cases in this Circuit. But the experience of undersigned counsel is otherwise, and we suspect that this Court's

[79] Notably, in citing pertinent and important panel precedent on the nature of restitution from 1985-2002, *see* 43 F.3d at 333, the *en banc* Court in *Leahy* (2006) does not even mention *Davis* (1994).

experience (and the prosecutors') is the same. If pre-judgment interest can ever be awarded, it is only in an exceptional class of cases; it is not the rule. The present case does not fall into that class.

The district court did not explain its reasoning. The only authority on which the Government relied is readily distinguishable. *Davis* is not consistent with prior Supreme Court precedent or subsequent *en banc* authority unless narrowly read and limited to its unusual facts (as this Court treated it in *Jimenez*). Fumo's case does not involve the taking of any interest-bearing investment vehicle or the loss to any victim of any "bargained-for interest." Accordingly, the judgment of sentence must be corrected to reduce the total interest amount by $255,860.18.[80]

C. The request for pre-judgment interest came too late.

Regardless of the merits, the district court should not have entertained the request to increase the restitution with pre-judgment interest, because the government failed to comply with a statutory deadline. *See* 18 U.S.C. § 3664(d)(5).[81] In his Reply to the government's sentencing memorandum,

[80] This total consists of $119,891.63 added to the restitution payable to the State Senate, $116,282.44 added to the restitution payable to CABN, and $19,686.11 added to the restitution payable to ISM.

[81] "If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing."

defendant Fumo objected to the prosecutors' suggestion that interest could be settled and determined after the date of sentencing. App. 1046. The Government never "inform[ed] the court," *id.*, that it did not and would not have sufficient information to make an interest calculation by the date of sentencing. Since the statute does not allow restitution to be determined after sentencing unless the Government gives such notice at least ten days in advance, *id.*, and the defense objected on this basis, the district court erred when it acted on this matter after the sentencing date.

A criminal sentence cannot be increased after it has been pronounced in the defendant's presence, unless clearly authorized by statute (and even then, only to the extent not barred by constitutional Double Jeopardy and Due Process protections). *See United States v. DiFrancesco*, 449 U.S. 117 (1980) (no Double Jeopardy bar to resentencing after statutorily-authorized government appeal of sentence); *Bozza v. United States*, 330 U.S. 160 (1947) (no Double Jeopardy violation when sentence was corrected in defendant's presence, within hours of its imposition, before defendant had been transported from Marshal's custody to prison, by adding minimum mandatory $100 fine); *In re Bradley*, 318 U.S. 50 (1943) (defendant, held in criminal contempt, was illegally sentenced to both fine and imprisonment; when he paid fine two days after commencing confinement,

court attempted to rescind fine order, remit payment, and enforce imprisonment; violation found).[82]

The restitution statute provides that the final amount of restitution can be determined after sentencing *only if* the government certifies, at least 10 days prior to sentencing, that it needs more time to ascertain the amount of loss. 18 U.S.C. § 3664(d)(5). The government's position was that pre-judgment interest is an element of that "loss." Yet no such notice was given here.[83] The defendant therefore enjoyed, as of the conclusion of the sentencing hearing, "a legitimate expectation of finality" which implicated Double Jeopardy. *Jones v. Thomas*, 491 U.S. 376, 394 (1989) (Scalia, J., dissenting [for four Justices], and not questioned by the majority, explaining *DiFrancesco*). Since any increase in the restitution figures after the in-person sentencing hearing, including the addition of pre-judgment interest as a component of "loss," would violate the limitations imposed

[82] In *Bradley*, while defending the district court's attempted change in the defendant's sentence, the Solicitor General nevertheless confessed that the change could not be made outside the presence of the defendant. *See* 318 U.S. at 53 (Stone, C.J., dissenting).

[83] In the same statute, a 90-day deadline is imposed for judicial action even when such notice is given. In *Dolan v. United States*, 560 U.S. —, 130 S.Ct. 2533 (2010), the Supreme Court ruled that the 90-day *judicial* deadline is not enforceable to bar the imposition of restitution, at least absent objection from the defendant and any prejudicial surprise. The *prosecutorial notice* rule, on the other hand, is a "claims processing rule" which must be enforced if timely objection is made. *See id.* at 2538.

by the restitution statute, the constitutional issue need not be reached. But the statute must be enforced.

The district court's addition of $255,860.18 in pre-judgment interest to the restitution figures, in addition to being unauthorized by law and thus substantively invalid, was based on an untimely request by the government. To that extent, the judgment must be reversed.

CONCLUSION

For the reasons set forth above, the conviction must be vacated and remanded for a new trial, or absent that relief, the judgment of sentence must be affirmed, except that the order to pay pre-judgment interest on restitution must be reversed.

CERTIFICATIONS

A. Bar Membership. I certify that the attorneys whose names and signatures appear on this brief are members of the Bar of this Court.

B. Type-Volume. I certify that based on the word-counting function of my word processing system (Microsoft Office Word 2003), this brief contains 41,940 words, exclusive of the Table of Contents, Table of Authorities, and Certifications, consistent with Appellee/Cross-Appellant's Unopposed Motion for Leave to File a Second-Step Brief up to 42,500 words (filed December 7, 2010).

C. Electronic Filing. I certify that the electronically filed version of this brief is identical to the text of the paper copies of the brief filed with the Clerk. The anti-virus program Malwarebytes Anti Malware has been run against the electronic version of this brief before submitting it to this Court's CM/ECF system, and no virus was detected.

/s/ Samuel J. Buffone
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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2010, I served a copy of the foregoing brief on counsel for the appellant/cross-appellee, the United States, via this Court's CM/ECF system:

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Having previously hand-delivered four copies of the appellee/cross-appellant's supplemental appendix to the office of the Clerk of the Court, I caused ten copies of this brief to be mailed by first-class mail to the Clerk of the Court.

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