12-4282

To Be Argued By:
CHRISTOPHER M. MATTEI

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-4282

UNITED STATES OF AMERICA,
Appellee,

-vs-

ROBERT GENERALI,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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Table of Contents

Table of Authorities

Pursuant to "Blue Book" rule 10.7, the Government's citation of cases does not include "certiorari denied" dispositions that are more than two years old.

Cases

Statutes

Rules

Guidelines

Statement of Jurisdiction

The United States District Court for the District of Connecticut (Vanessa L. Bryant, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on October 11, 2012. Appendix ("A")7. On October 23, 2012, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A7. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review

I. Whether the district court clearly erred by refusing to grant a reduction for acceptance of responsibility where it concluded that the defendant was not truly remorseful and had taken positions in advance of and at sentencing that were inconsistent with his acceptance of responsibility.

II. Whether the sentence was substantively unreasonable where the district court thoroughly evaluated each of the section 3535(a) factors and determined that the defendant's theft of $423,908 from the Boys & Girls Club of Greater Waterbury, the harm caused by that theft, the strong need for specific and general deterrence and the defendant's lack of contrition, when considered along with the other factors, warranted a guideline sentence of 57 months' imprisonment.

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Preliminary Statement

From 2006 to 2011, Robert Generali ("Generali") was the Executive Director of the Boys & Girls Club of Greater Waterbury (the "Club"), a non-profit organization providing mentoring and recreational opportunities to underprivileged youth. As Executive Director, Generali stole approximately $423,908 from the Club, converted those funds to his own personal use and failed to pay taxes on the ill-gotten income.

On September 20, 2011, a grand jury returned a 20-count Indictment against Generali, charging him with 16 counts of wire fraud and four counts of theft from a program receiving federal funds. He pled guilty to one count of wire fraud, one count of theft from a program receiving federal funds and a one-count Information charging him with filing a false tax return.

At sentencing, the district court determined that Generali had not accepted responsibility for his conduct. In particular, the district court concluded that, by (1) wrongly claiming that he had used some theft proceeds to pay Club employees, when, in fact, he had kept that money for himself, (2) citing the death of a young girl as a precipitating cause of his offense, (3) wrongly claiming that he had authority to open the credit card that he used to defraud the Club, and (4) dissipating assets in anticipation of the prosecution and then denying that fact to the Court, he had taken positions that were inconsistent with acceptance of responsibility. Therefore, the district court declined to grant a two-level reduction under U.S.S.G. § 3E1.1, calculated the guideline range to be 46 to 57 months' imprisonment and imposed a sentence of 57 months after considering all of the section 3553(a) factors. Notwithstanding its guideline calculation, the district court explicitly stated that it would have im-

posed the same sentence had a different guideline range applied.

In this appeal, Generali contends that the district court clearly erred in refusing to reduce his offense level under § 3E1.1. He also claims that the district court's sentence was substantively unreasonable, and seeks a remand to different district judge.

For the reasons set forth below, these claims lack merit, and the judgment of the district court should be affirmed.

Statement of the Case

On September 20, 2011, a federal grand jury returned an Indictment charging Generali, in Counts One through Four, with theft from a program receiving federal funds, in violation of 18 U.S.C. § 666, and, in Counts Five through Twenty, with wire fraud, in violation of 18 U.S.C. § 1343. A8-15. On February 27, 2012, Generali pleaded guilty to Counts One and Twenty of the Indictment and a one-count Information, charging him with filing a false tax return, in violation of 26 U.S.C. § 7206(1). A18. On October 5, 2012, the district court (Vanessa L. Bryant, J.) sentenced Generali principally to 57 months of imprisonment. A6.

Judgment entered on October 11, 2012. On October 23, 2012, Generali filed a timely notice of appeal. A7.

He is currently serving his term of incarceration.

Statement of Facts and Proceedings Relevant to this Appeal

A. The offense conduct

1. The theft and wire fraud

From 2006 through May 2011, Generali was employed as the Executive Director of the Club. During that period, Generali embezzled approximately $423,908 from the Club to pay for personal expenses. *See* Pre-Sentence Report ("PSR") ¶ 7. Generali carried out his scheme in several ways. First, in 2006, Generali opened a Bank of America credit card in the Club's name, and listed himself as the sole authorized signatory. Generali had no authority to open such an account. *See* PSR ¶ 7. From January 2007 through May 2011, Generali charged personal items and cash advances to the credit card. *See* PSR ¶ 7. The items that he purchased, *e.g.*, expensive meals, trips to the Bahamas, Florida and Boston, tickets to a Madonna concert, suits, accessories, and pornography, served no legitimate Club purpose. *See* PSR ¶ 7; Government's Appendix ("GA")7, 48, 51-52. Generali then paid off the Bank of America credit card by authorizing

monthly wire transfers of $1,000 to $3,000 from the Club's Operating Account to Bank of America. *See* PSR¶ 7.

Second, in January 2007, Generali opened a CD account with Webster Bank. *See* PSR ¶ 8. He funded the CD Account with $30,000 drawn from the Club's Operating Account. *See* PSR ¶ 8. Generali had no authority to do this. *See* PSR ¶ 8. The CD Account accrued interest until January 2010, at which time Generali closed the CD Account, and used the closing balance of $32,426.87 to fund an "off-the-books" Webster Bank checking account that he opened in the Club's name, listing himself as the sole authorized signatory. *See* PSR ¶ 8. Generali used the off-the-books account to issue checks to himself and to two "phantom" employees - John Moss and Alan Butler. *See* PSR ¶ 8. With respect to the checks issued to Moss and Butler, Generali forged their endorsement signatures and then negotiated the checks for his own personal use. *See* PSR ¶ 8. Although Moss and Butler occasionally provided maintenance services to the Club, they never received or signed the checks that Generali issued in their names from the off-the-books account. *See* PSR ¶ 8. As of May 2011, the balance in this "off the books" account was $0. *See* PSR ¶ 8.

Third, Generali issued checks directly from the Club's Operating Account to pay for personal

expenses (expensive meals, vacation travel, concert tickets, clothing and pornography) that served no legitimate Club purpose. *See* PSR ¶¶ 7, 9; GA7, 48, 51-52. Generali also used the Operating Account to issue checks to Moss and Butler, which checks he then negotiated for his own personal use. *See* PSR ¶ 9.

2. The false tax returns

Generali failed to pay federal income tax on the $423,908 he stole from the Club. *See* PSR ¶ 12. Further, in 2007, Generali won a raffle prize of $40,000, which he did not report as income and on which he failed to pay federal income tax. *See* PSR ¶ 12. Likewise, in 2008, Generali won $100,000 as part of a Super Bowl betting pool. He failed to pay federal income tax on those gambling winnings. *See* PSR ¶ 12. As a result of Generali's failure pay taxes on his theft proceeds and his raffle and gambling winnings, the IRS has calculated the loss to the United States Treasury of $165,285, including penalties and interest. *See* PSR ¶ 12.

B. The guilty plea

On February 27, 2012, Generali pleaded guilty to Count One of the Indictment, charging him with theft from a program receiving federal funds, in violation of 18 U.S.C. § 666, and Count Twenty of the Indictment, charging him with wire fraud, in violation of 18 U.S.C. § 1343. A4,

19-20. Generali also waived indictment, and pleaded guilty to a one-count Information, charging him with filing a false tax return, in violation of 18 U.S.C. § 7206(1). A4, 20.

Although Generali entered his plea pursuant to a written plea agreement, the parties did not enter a stipulation regarding the guideline range or his eligibility for a reduction to his offense level under U.S.S.G. § 3E1.1. A23. In this regard, the Government advised Generali and the district court as follows:

> There is no provision in the plea agreement with respect to acceptance of responsibility and the Government will wait until the time of sentencing to determine whether or not Mr. Generali has acted in a manner consistent with acceptance of responsibility.

A66.

C. The sentencing

1. The pre-sentence report

On July 9, 2012, the United States Probation Office issued the final PSR. A5. The PSR found that, after grouping the offenses under Chapter Three of the Sentencing Guidelines, the applicable base offense level, under U.S.S.G. § 2T4.1, was 20. PSR ¶ 20. The PSR added two levels, under § 2T1.1(b)(1), because Generali failed to

report the source of income exceeding $10,000 from criminal activity. PSR ¶ 21. Next the PSR added two levels because Generali abused a position of trust, resulting in an adjusted offense level of 24. PSR ¶¶ 22, 25.

The PSR then presented two alternative calculations of the total offense level. The PSR posited that, if Generali qualified for a three-level reduction under § 3E1.1, the total offense level would be 21 and the resulting guideline range of imprisonment would be 37 to 46 months. PSR ¶¶ 27, 42. If, however, Generali did not qualify for that reduction, his total offense level would remain 24, resulting in a guideline range of imprisonment of 51 to 63 months. PSR ¶¶ 28, 42.

The PSR also included a summary of the probation officer's interview of the defendant. PSR ¶¶ 16-19. As a result of that interview, the United States Probation Office assessed the extent to which Generali had accepted responsibility for his conduct as follows:

> It is the assessment of the U.S. Probation Office that Mr. Generali displayed a sense of entitlement which is somewhat contradictory to accepting responsibility for his criminal behavior. The U.S. Probation Office does not see Mr. Generali as fully remorseful for his actions, but more ashamed and saddened. Further, an assessment of his finances indicates that if

> Mr. Generali was truly remorseful for the money he used illegally, he would have made attempts to put money together for what he knew would be a substantial restitution order, but instead he spent all his money on frivolous items that were mostly for his own enjoyment.

PSR ¶ 58.

2. The parties' sentencing memoranda

On August 20, 2012, Generali filed his memorandum in aid of sentencing. He urged the district court to depart downward based on his history of civic and community activities and his contention that the applicable enhancements compounded his sentencing exposure by serially penalizing the same conduct. GA3-8. He also argued for a non-guideline sentence based principally on his history and characteristics.[1] GA8-17.

On September 24, 2012, Generali filed a supplemental memorandum in aid of sentencing. GA20. In his supplemental memorandum, he disputed certain expenses that the Government claimed were fraudulent. GA20. He conceded,

[1] In his memorandum, Generali assumed that he would get full credit for acceptance of responsibility, and, therefore, calculated the sentencing range to be 37 to 46 months imprisonment.

however, that, even if the contested expenses were not included in the loss calculation, the total loss would still exceed $400,000, resulting in a base offense level of 20 as calculated by the PSR. GA20. Having conceded the base offense level, he then argued that the district court should impose a non-guideline sentence because the guidelines' loss-driven analysis was irrational. GA23.

On September 24, 2012, the Government filed its memorandum in aid of sentencing. GA28. With respect to the guideline range, the Government acknowledged Generali's concession that the total loss exceeded $400,000. GA31. In light of that concession, the Government assumed for purposes of the memorandum that Generali would qualify for a three-level reduction under § 3E1.1 and would face a guideline range of 37 to 46 months. GA31. The Government stated, "Provided that the defendant does not take any position at sentencing that is inconsistent with acceptance of responsibility, it appears that he is eligible for a three-level reduction under § 3E1.1, resulting in a total offense level of 21." GA31. Having calculated the guideline range, the Government then argued that "a non-guideline sentence above the advisory guideline range is warranted in this case and properly reflects due consideration of the sen-

tencing factors set forth at 18 U.S.C. § 3553(a)." GA34-39.

On September 27, 2012, Generali filed a reply memorandum. GA41. In his reply, he made several representations that were inconsistent with his acceptance of responsibility. He stated that he was authorized to open the credit card in the Club's name, that the Club was aware he had done so, and that he initially intended to use it for authorized expenses only; he claimed that his expenditure of approximately $180,000 between June 2011 and September 2011 was not due to an expectation that he might be prosecuted and subject to restitution; and he claimed that he endorsed and cashed most of the checks that he wrote to John Moss and Alan Butler so that he could pay those men in cash for maintenance work they performed. GA41-44.

On October 1, 2012, the Government filed a response to the reply memorandum and contested these statements. As to Generali's authority to open and use the credit card, the Government stated:

> According to the President of the Club's Board of Directors, the defendant did not have authority to accrue credit card debt in the Club's name without express authority from the Board of Directors. Further, in direct contradiction to the defendant's purported recollection, the

> Board of Directors was not aware until 2011 that the defendant had improperly opened a credit card in the Club's name. The defendant seeks to soften the wrongfulness of his conduct by suggesting that he "secured [the card] initially, to facilitate [his] making authorized expenses on behalf of the Club." *The defendant is not being forthright with the Court.* The defendant opened the secret credit card in March 2006. Within a month of opening the credit card, the defendant was using it to make personal purchases. On April 22, 2006, the defendant used the credit card to purchase tickets to a Madonna concert for $1,495.80, and a few days later he spent $1,200 at Tony's Men's Shop in Waterbury, Connecticut. The defendant's suggestion that he opened the secret credit card with lawful intentions is belied by the fact that in the first month he used the card he ran up thousands of dollars in personal charges.

GA47-48 (emphasis added).

With respect to Generali's claim that he had not dissipated assets in anticipation of a criminal prosecution, the Government set forth the chronology of his dissipation of assets and concluded, "In light of this chronology, the Government submits that the preponderance of the evi-

dence supports the conclusion that, from June 2011 through September 2011, the defendant drained $180,000 from an investment account because he anticipated that criminal proceedings would be brought against him." GA49.

Finally, the Government addressed the claim that the checks Generali forged were negotiated to cash in order to pay John Moss and Alan Butler for maintenance work they purportedly performed for the Club:

> From 2007 through 2011, the defendant wrote checks from the Club's operating account and the slush fund to two men who performed maintenance work at the Club on an as needed basis. The defendant states that, "It is the defendant's recollection that most of the negotiated funds were used to pay the Club's maintenance employees in cash." The defendant's statement is disingenuous. It is, of course, true that the defendant paid these employees for the maintenance work they performed. It is also true that he occasionally paid them in cash. However, it is absolutely untrue, as the defendant suggests, that the total value of the forged checks roughly equates to the amount he paid the employees in cash. Indeed, from 2007 to 2011, the total value of the forged checks totaled well over

$100,000, and most were in amounts of $1,000 to $5,000. The defendant negotiated these checks by forging the employees' signatures, and then deposited the checks into his personal checking account. Aside from an occasional Christmas bonus of no more than $600 and a single payment of $1,200 which was split among four employees, neither of these part-time maintenance employees ever received any payments remotely approaching the value of the checks that the defendant was forging. Indeed, as of 2009, one of the employees received a weekly paycheck of $150, so the defendant's contention that he was forging checks in the amount of $1,000 to $5,000 to pay that employee in cash is ludicrous. The other employee, who worked only once every couple of months, received $8 to $10 an hour and the largest payment he ever received was $1,200, which he split with three other employees. If the defendant persists in his claim that he forged and negotiated these to checks to pay these employees in cash rather than to enrich himself, the Government will be prepared to present evidence at sentencing to rebut that claim. Moreover, *the defendant's suggestion that he did not personally benefit from forging these checks*

> *and depositing them into his personal bank account, calls into question whether the defendant should receive a reduction to his offense level under U.S.S.G. § 3E1.1.*

GA49-50 (emphasis added).

3. The sentencing hearing

On October 5, 2012, the parties appeared for sentencing. At the outset, the district court confirmed that the parties had reached an agreement as to the total loss in the case, namely, that Generali had stolen $423,908.82 from the Club and had caused a loss to the United States Treasury of $168,285.88 by failing to pay taxes on his ill-gotten gains and other income. A80-81.

The district court then entertained remarks from the Government. The Government discussed its view of (1) the nature and circumstances of the offense; (2) the history and characteristics of the defendant; (3) the need for the sentence to promote specific and general deterrence; (4) the impact of the offense on the victim; and (5) the guideline range. A83-87. With respect to the guideline range and, particularly, whether Generali was entitled to a three-level reduction under § 3E1.1, the Government and the district court engaged in the following exchange:

AUSA: I want to talk briefly about the calculation of Mr. Generali's Guideline range. The Plea Agreement did not include any provision relating to Section 3E1.1 of the Guidelines, and the PSR withheld judgment on whether Mr. Generali should receive credit for acceptance of responsibility, and the Government withheld judgment, as well, on that.

Once Mr. Generali indicated, through counsel, that he was not going to be contesting the loss amount, the Government came to a preliminary conclusion that it would recommend a three-point reduction for acceptance of responsibility for Mr. Generali, because he entered his plea promptly and because he was acknowledging the loss amount, that he was acknowledging the full scope of his conduct.

He then indicated, in his response to the Government's sentencing memo, that the two employees who he purportedly wrote checks to, and whose signatures he forged, and then deposited into his own account, he suggested that those employees actually received that money, but in the form of cash, and that he only had forged their signatures and negotiated those checks so that he could pay them in cash.

It's my understanding that Mr. Generali is not advancing that position here today. If he were to advance that position, as I have advised counsel and I advised the Court in my reply, that would call into serious question whether or not he had accepted responsibility because, in the Government's view, he would be denying relevant conduct.

COURT: Wouldn't that be obstruction of justice, --

AUSA: Well, --

COURT: -- after signing the Plea Agreement? He made a misrepresentation as to the purpose of writing those checks, how those checks were negotiated, and who received the proceeds of those checks?

AUSA: Well, Your Honor, I think the way to view that would be – it could be –

COURT: Or impeding the administration of justice? It's certainly not an affirmative acceptance of personal responsibility, nor is it a disclosure of all the facts and circumstances surrounding the commission of the offense to the Probation Office, as required to get the two-level reduction for acceptance of responsibility, is it?

AUSA: I'm not sure that it would be a case of obstruction of justice. I think if Mr. Generali had represented to the Probation Office, in connection with its investigation of his conduct, that that was the case, that that could be a real problem for him.

It's my understanding that he's not taking that position, that he has decided not to take that position today, and so, in view of that, assuming that once he gets up here and makes his presentation, that he doesn't say anything or do anything that's inconsistent with acceptance of responsibility, the Government's prepared to make that recommendation.

COURT: For a two-level reduction for acceptance of responsibility, despite his made these – having made these misrepresentations, and all the time and energy that people have spent based upon these misrepresentations? These people were supposedly employees of The Boys and Girls Club?

AUSA: Your Honor, these two employees were part-time maintenance workers at the Club.

. . .

The point – My point, Your Honor, is that Mr. Generali's custom was to write checks to these men in the amount -- he'd write them himself. He wouldn't give them to them. He'd write them. He would then – for a thousand dollars to five thousand dollars. Bear in mind, these were employees who would occasionally work for the Club, and then – as far as the Government is aware, never made more than a couple hundred dollars at a time, except on one occasion where one employee received $1200, which was distributed among four others. So, that was the most these guys ever earned.

The checks that Mr. Generali was writing were for one thousand and five thousand dollars. He would forge their signatures on the endorsement, and then cross-endorse it with his own signature, and deposit it in his own personal checking account. It's just one of the ways he stole from the Club, Your Honor.

COURT: And he tried to convince the Government that those checks were written as compensation for work performed by those two individuals?

AUSA: That was the argument he made in his reply to the Government's sentencing memo, Your Honor or, at least, that

was – I think the way he termed it was it was his recollection that what he did was convert those checks to cash, and then provided the employees, over a period of time, with roughly that same amount as compensation for work that they performed at the Club. It's not accurate. I don't think he's taking that position here today at sentencing, and – but I'll leave that to him.

And as I indicated in my reply to his response, the Government is going to wait for Mr. Generali's sentencing presentation to determine whether to recommend acceptance or not. I want to say this, Your Honor, --

COURT: Yes?

AUSA: -- in some ways it's immaterial because the Government is requesting a non-Guideline sentence above the range in any event. But for purposes of the Guideline calculation, the Government will determine, after Mr. Generali's sentencing presentation, whether to recommend it.

COURT: Uh-huh.

AUSA: The other issue bearing on acceptance, I don't know if it bears on acceptance, but it relates to his explanation

for his offense, and I address this in my memo, is Mr. Generali's chronology about when his offense escalated.

His position in the sentencing memo, is that his offense escalated in 2008 with the tragic death of a child at the Club which, according to Mr. Generali, sent him into an alcohol-fueled spiral affecting his judgment, and leading him to steal additional monies from the Club.

For the reasons I stated in my sentencing memo, this explanation is not true, and offensive, and the Court has the benefit of a letter submitted by that child's mother, which I think states more effectively than I could, why that is so absurd.

COURT: And the Court does note that the Defendant has indicated that he did not express any condolences to the family because he had been advised not to say anything that would suggest culpability on the part of the Club, but the Court notes that certainly a person is capable of expressing condolences without assuming responsibility, or saying anything that would make the Club culpable.

AUSA: So, Your Honor, for all these reasons, in the Government's view, this is a

> case that really calls for a sentence above the sentencing range.
>
> I believe the range, if Mr. Generali qualifies for acceptance, is 37 to 46 months, and the Government has left it to the Court's discretion, if it agrees with the Government that an above-Guideline sentence is called for, what that sentence should be.
>
> COURT: The Government is going to make a recommendation for a one-level reduction for prompt notification of his intent to pled guilty?
>
> AUSA: Your Honor, I think the Government will wait to hear from Mr. Generali.

A87-94.

The district court then heard from defense counsel and from Generali himself. First, defense counsel asked the district court to consider the good works Generali performed as the Executive Director of the Club. Next, defense counsel contended that Generali "ha[d] always admitted his culpability." A98. Defense counsel continued:

> It's never been a question about whether he stole, and to the extent that Mr. Generali had some recollections, vague recollections, clouded recollections, indeed, a

> memory substantially, I think, impaired by his alcohol consumption, he had recollections about how things were handled, which, in the end, thanks to Mr. Mattei and the agents looking into this at our request, parts of what he recollected were confirmed. Yeah, he - - some of these employees received cash. Parts of what Mr. Generali's recollections were not confirmed. He didn't pay all of it out. He pocketed large quantities of that cash, and it has been a process of evolution for Mr. Generali to come to grips with what he did to himself, to his family, and to the kids at the Boys and Girls Club, and indeed to that institution.

A98-99.

Next, defense counsel argued that there was no further need for specific deterrence, and that the goal of general deterrence could be satisfied by a sentence below the guideline range. A99-100.

Following defense counsel's remarks, Generali stated, in part:

> As my attorney had mentioned, it's a pretty hard day for me and my family. I want to say to everybody, that I'm very sorry to the Boys Club, the Waterbury community, my friends and family, and

most of all the thousands of kids who looked up to me. I'm sorry with all my heart, for the hurt and pain I've caused with my deceit and selfishness over the past five years.

The Boys and Girls Club are more than just an organization to me, it was a second home, second family, Your Honor, in my life, since I was five years old.

I spent at the Club, over the last 50 years, just about every day. I ruined all this with my selfishness. I ruined it all by stealing and deceiving the organization and the community that I loved.

My father handed down his dream job to me, and I destroyed the end of my deal by stealing from The Boys Club, the organization we both loved. Your Honor, it was like stealing from my family, and I (phonetic) here before you accept (phonetic) the punishment for my unworthy actions and thoughtlessness. I have done some bad things to the organization and the community, and especially the young kids that I loved.

I understand I hurt countless number of people, most important, those children who looked up to me as a role model and who need the programs that the Club

provides. I'm deeply sorry for letting these children down, deeply sorry.

I've had one year since my arrest, to ponder my bad choices and decisions, and I have no excuses but myself to blame. I was called "Big Rob" and I was Big Rob on the outside, but inside I wasn't Big Rob.

And I couldn't deal with the life issues that were put – presented to me, like other people could do. Instead of seeking help, I dug a hold bigger and bigger, and turned to booze, gambling, and high-end lifestyle.

I have made terrible choices, have only myself to blame for these choices. I miss The Boys Club. I dream about The Boys Club every night. I've hurt these people. I've embarrassed my family. I've embarrassed my wife and daughter, and I deeply regret the things I've done.

I want to thank the Court and Officer Lopez for getting me the treatment program that I need to make myself better. Excuse me. I hope someday to be back as a role model and a productive citizen again.

A102-104.

Following Generali's presentation, the district court inquired whether the Government would be "recommending any reductions." A110. The Government responded:

> Your Honor, in light of Mr. Hernandez's and Mr. Generali's presentation it appears . . . to the Government that he has satisfied the requirements under Section 3E1.1, for acceptance of responsibility. He hasn't falsely denied relevant conduct that the Government is aware of here today.
>
> He's withdrawn his previous arguments, which called his eligibility into question, and so the Government would move that the Court reduce his offense level by one level, and recommend that it reduce it by two levels, which will arrive at a sentencing range of 37 to 46 months.
>
> And the Governments asks the Court to impose a non-guideline sentence, above that range, in light of the sentencing factors.

A111.

The district court then commenced its analysis of the section 3553(a) factors. First, in assessing the nature and circumstances of the offense, the court recounted the manner in which Generali perpetrated his fraud. The court noted

that Generali was "very, very well compensated," and, yet, stole money to support "[a] lavish lifestyle, expensive meals, wine, alcohol, vacations, gambling, jewelry, limousine services, and pornography." A112. Beyond the financial impact of the crime, the court commented on the human toll of the crime, stating:

> [I]t's not just the money. As we've heard today, the children looked up to Mr. Generali. Those vulnerable children who saw the Boys and Girls Club as a refuge, as an anchor, as the antithesis of what they saw in the communities in which they lived; a place where they could get away from drugs, from guns, from lying, from cheating, from stealing . . . And they are the real victims of this crime, not in a monetary sense, but in a moral sense.

A112-113. In short, the court concluded, "[T]his is a very serious offense." A118.

With respect to Generali's history and characteristics, the court observed that those characteristics "provide absolutely no justification, excuse or mitigation." A119.

The court also considered the need for the sentence to protect the public from additional crimes committed by Generali. The court registered its disagreement with defense counsel that Generali would not re-offend, stating:

> He is a person of persuasive skill. He is a person who has the ability to move to another community, and if he chooses not to disclose his history, he could very easily find himself in another position of trust. Very, very easily he could do that.
>
> A person with the proclivities that he has demonstrated, the lack of remorse, the lack of responsibility or accountability or willingness to make amends, is certainly a risk of re-offense, in this Court's opinion.

A119.

The court also emphasized the need for its sentence to promote general deterrence, as follows:

> How many people are out there right now today embezzling money from vulnerable organizations undetected? Many. And it is important on the rare occasion when it is found, note Mr. Generali engaged in this conduct for nearly five years right under the nose of its Board, right under the nose of what he professes to be their independent auditors, and they didn't detect it. So, seizing upon the opportunity to impose a stiff penalty when it is detected, it is very important to ensure general deterrence.

A119-120.

The court also considered the need to provide the defendant with "educational, vocational training, medical care and, in this instance, corrective treatment." A120. In this regard, the court concluded that "Mr. Generali's denial is palpable, and he needs a substantial period of time of reflection and self-correction, as well as the corrective services available at the Bureau of Prisons." A120.

And, of course, the court considered the Sentencing Guidelines, noting that though "they are neither mandatory, nor are they presumed to be reasonable[,] . . . the Court must calculate them and consider them, but impose a sentence which the Court deems to be reasonable in light of all of the facts and circumstances present." A120.

In calculating the guideline range, the court addressed Generali's request for a downward departure based on his civic and charitable work and rejected the argument, finding that Generali was "paid handily for that job." A113. The court was not persuaded that it was appropriate to give Generali a lower sentence for helping the same organization from which he stole. A113-114. The court also rejected Generali's argument that the sentencing enhancements double counted conduct that was already encompassed by the base offense level. A114. In that regard, the court explained that the enhancements for

failing to report criminally derived income and abusing a position of trust "do not overlap. . . . The enhancements in this case are not predicated upon the same facts, they are separate and distinct, and do not overstate, in any sense, the appropriate sentence to be imposed upon Mr. Generali." A116.

The court then considered the issue of acceptance of responsibility, conducting a detailed and lengthy analysis. In finding that Generali did not qualify for an acceptance reduction under § 3E1.1, the court reasoned:

> Over the course of this case, . . . Mr. Generali issues first a financial statement that was laughable. Laughable. After pleading before me, and my specifically telling him that his failure to fully and timely disclose full and complete financial information with supporting documentation would result in my being unlikely to accept any recommendation for a two-level reduction for acceptance of responsibility, and after being given months and months and months to come clean, his final request for the Government to prove that he didn't embezzle money from the checks that he wrote out to others and forged their signatures on, cashed and deposited into his own account.

Mr. Generali takes no responsibility, minimizes his role, minimizes the impact of what he has done.

. . .

Up until today, up until hours before sentencing, Mr. Generali still refused to accept responsibility, full and complete, responsibility for his conduct, refusing to accept responsibility for the checks that he wrote out in the names of others, forged and deposited into his own account, and based upon what? A vague recollection?

. . .

At every turn, Mr. Generali has sought to minimize his responsibility, and to blame or reposit responsibility on others.

. . .

Mr. Generali has conducted himself in a way that would suggest that he would avoid any effort whatsoever, to identify resources to be used to make restitution to his victims.

Accordingly, the Court rejects the Government's recommendation for a two-level reduction for acceptance of responsibility, as the Defendant has not fully disclosed all the facts and circumstances

> surrounding his commission of the offense. He minimizes his conduct and continued, essentially to the day of sentencing, to avoid and evade responsibility for his conduct.

A114-117, 121.

The district court calculated the final guideline range and imposed sentence as follows:

> [T]he defendant being in Criminal History Category I, but having a total offense level of 23. The Guidelines recommend a sentence of 46 to 57 months in prison; a two to three-year period of supervised release; a fine of $7,500 to $75,000; and restitution in the amount stated earlier on the record.
>
> Accordingly, the Court imposes the following sentence. . . .[Y]ou are hereby committed to the care and custody of the Bureau of Prisons for a period of 57 months, to be followed by a period of supervised release of 3 years.

A121-22.

In its written statement of reasons, the district summarized its analysis as follows:

> The Sentencing Guidelines are neither mandatory or presumptively reasonable and the sentencing factors outlined in 18

> U.S.C. 3553 warrant a sentence of 57 months. This multifaceted offense involved the obtaining and misusing of a credit card in the name of the Boys and Girls Club, a non-profit organization, the depositing of the Club's funds into a personal bank account, the use of operating funds for the purchase of personal expenses, and the failure to pay taxes on additional funds received. All of these monies were used for personal gain and motivated by greed as the defendant was already well compensated for his position of authority with the Club. In this offense, the children were the real victims, and therefore such vulnerable victims need to be protected. The history and characteristics of this defendant provide no excuse for mitigation. A stiff penalty is necessary in this case to ensure general deterrence and to punish an individual who has no conscience when it comes to shattering the hopes and dreams of children. Therefore, a sentence of 57 months and 3 years supervised release is sufficient but not greater than necessary considering all of the sentencing factors in this case.

Government's Sealed Appendix ("GSA") 4.

Summary of Argument

I. The district court did not clearly err in denying a two-level downward adjustment under § 3E1.1. Prior to sentencing, Generali falsely claimed that he had made legitimate payments to two employees when, in fact, he had forged their signatures to cash checks and kept the money for himself. Likewise, prior to sentencing, Generali claimed that he had been authorized to open a credit card on behalf of the Club and that he had done so with lawful intentions when, in fact, he had no authorization from the club to open a credit card for his own personal purchases and had indeed obtained the card for the express and singular purpose of making unauthorized personal purchases with it.

However, even if the district court erred in calculating the guideline range, the error was harmless because the court properly assessed the sentencing factors set forth at 18 U.S.C. § 3553(a), stated that it would have imposed the same 57-month sentence even if Generali had been in a different guideline range.

II. The district court's 57-month guideline sentence was substantively reasonable. Generali engaged in a five-year, uninterrupted theft from the Club which wrought incalculable harm on the Waterbury community, particularly the disadvantaged children in that city who relied on the Club's programs and services. As the Execu-

tive Director, he had sole responsibility for the management of the Club's day-to-day finances. Armed with that authority, he employed a variety of crass methods to commit his crimes. He opened a secret credit card in the Club's name, charged cash advances and personal purchases to it, and then paid off the card by wiring payments from the Club's operating account. He took $30,000 in Club monies, set up a slush fund and used that money to pay for personal expenses. He wrote checks from the Club's operating account to two part-time employees, but never gave them the checks and instead endorsed them by forging their signatures and then using the monies for his own personal expenses.

His theft deprived the Club and those who need its services of $450,377.24, money that could have funded educational programs, mentoring programs, athletic activities and desperately needed capital improvements, but was used to pay for, among other things, expensive meals, wine and liquor, personal vacations, gambling, pornographic material, sunglasses, jewelry and other superfluous accessories. The 57-month sentence reflected, *inter alia*, the seriousness of the offense conduct, the court's concerns about Generali's risk of re-offending, and the goals of both general and specific deterrence.

Argument

I. The district court did not err in concluding that no acceptance-of-responsibility reduction was warranted, any error in calculating the guideline range was harmless, and the 57-month guideline sentence was substantively reasonable and reflected an appropriate balancing of the section 3553(a) factors.

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing law and standard of review

1. 18 U.S.C. § 3553(a)

After *United States v. Booker*, 543 U.S. 220 (2005), at sentencing, a district court must begin by calculating the applicable Guidelines range. *See United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). After giving both parties an opportunity to be heard, the district court should then consider all of the factors under 18 U.S.C. § 3553(a). The requirement that the district court consider the section 3553(a) factors, however, does not require the judge to precisely identify the factors on the record or address specific arguments about how the factors should be

implemented. *See Rita v. United States*, 551 U.S. 338, 356-59 (2007). And although the judge must state in open court the reasons behind the given sentence, 18 U.S.C. § 3553(c), "robotic incantations" are not required. *Id.*; *see also United States v. Goffi*, 446 F.3d 319, 321 (2d Cir. 2006).

On appeal, a district court's sentencing decision is reviewed for reasonableness. *See Booker*, 543 U.S. at 260-62. This reasonableness review consists of two components: procedural and substantive review. *Cavera*, 550 F.3d at 189.

"A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory." *Cavera*, 550 F.3d at 190 (citations omitted). A district court also commits procedural error "if it does not consider the § 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact." *Id.* Finally, a district court "errs if it fails adequately to explain its chosen sentence," including, "'an explanation for any deviation from the Guidelines range.'" *Id.* (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)).

With respect to substantive reasonableness, this Court has recognized that "[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of

discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge 'exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.'" *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006) (citations omitted). A sentence is substantively unreasonable only in the "rare case" where the sentence would "damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009).

2. U.S.S.G. § 3E1.1

Section 3E1.1 of the Sentencing Guidelines provides as follows:

> (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
>
> (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of

> his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

U.S.S.G. § 3E1.1; *see United States v. Volpe*, 224 F.3d 72, 75 (2d Cir. 2000) (to qualify for a reduction under § 3E1.1(a), defendant must "clearly demonstrate[s] acceptance of responsibility for his offense").

In order to qualify for a one-level reduction under § 3E1.1(b), the defendant must receive the two-level reduction under § 3E1.1(a) for clearly demonstrating acceptance of responsibility. *See* U.S.S.G. § 3E1.1(b) (conditioning one-level reduction on full two point reduction under subsection (a)); U.S.S.G. § 3E1.1, comment. (n.6).

"The Guidelines make clear that a guilty plea does not entitle the defendant to an acceptance reduction and that the defendant must prove to the court that he or she has accepted responsibility." *United States v. Giwah*, 84 F.3d 109, 113 (2d Cir. 1996); *see United States v. Hirsch*, 239 F.3d 221, 226 (2d Cir. 2001). "Merely pleading guilty to an offense does not ensure the application of the reduction." *United States v. Savoca*, 596 F.3d 154, 159 (2d Cir. 2010); *see* U.S.S.G. §

3E1.1, comment (n.3) ("A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right."). Moreover, a district court may deny credit for acceptance of responsibility if, for example, the defendant "has engaged in continued criminal conduct that bespeaks 'a lack of sincere remorse.'" *United States v. Defeo*, 36 F.3d 272, 277 (2d Cir. 1994) (quoting *United States v. Cooper*, 912 F.2d 344, 346 (9th Cir. 1990)).

There are many factors that a court may consider in deciding whether to grant a reduction for acceptance of responsibility. For example, the commentary to U.S.S.G. § 3E1.1 identifies several non-exclusive factors that a court may consider, including, as relevant here, whether the defendant "[t]ruthfully admit[ted] the conduct comprising the offense(s) of conviction." U.S.S.G. § 3E1.1, comment (n.1(a)). Further, under the guidelines, a district court may properly deny an adjustment where a defendant "falsely denies, or frivolously contests, relevant conduct that the court determines to be true." U.S.S.G. § 3E1.1, comment (n.1(a)).

The burden is on the defendant to establish that he deserves a reduction under this provision. *See generally United States v. Smith*, 174 F.3d 52, 55-56 (2d Cir. 1999) (holding, in the context of the safety valve reduction, that the party who seeks to take advantage of an adjust-

ment in the guidelines bears the burden of proof).

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

C. Discussion

1. The district court's refusal to award Generali credit for acceptance of responsibility under U.S.S.G. § 3E1.1(a) was well-founded.

The district court properly declined to reduce the Generali's offense level under § 3E1.1(a). After an extensive analysis, the district court concluded that Generali had not met his burden of showing that he had truly accepted responsibility. Foremost among these factors was Generali's contention up until the day of sentencing that, though he had forged and cashed checks that he had written to Alan Butler and John Moss, he had actually used the cash to pay them for work they performed. The Government presented the court with information that these purported employees had never been paid in the manner described by Generali. A87-88. On the day of sentencing and in response to the Government's evidence, Generali abandoned that position, but the district court was troubled by the fact that he had made inaccurate representations concerning the disposition of the cash. The court properly concluded that such representations were inconsistent with acceptance of responsibility.

Commenting on Generali's day of sentencing reversal, the court stated, "[U]p until hours be-

fore sentencing, Mr. Generali still refused to accept responsibility, full and complete responsibility for his conduct, refusing to accept responsibility for the checks that he wrote out in the names of others, forged and deposited into his own account[.]" A116. Generali's forgery and negotiation of checks for his own use was a central part of his offense. As this Court has recognized, a defendant's denial of certain offense conduct up until the day of sentencing is inconsistent with acceptance of responsibility. *See United States v. Kumar*, 617 F.3d 612, 636 (2d Cir. 2010) (defendant's "carefully worded plea allocution," which "muted the gravity of his complicity" and his withdrawal of objections to the PSR on the day of a *Fatico* hearing justified denial of downward adjustment for acceptance of responsibility.); *Hirsch*, 239 F.3d at 226 (district court properly denied a reduction under § 3E1.1, in part, due to "apparent difficulty in accepting responsibility for his crimes," which "protracted" his plea allocution.")

The court also commented on Generali's bizarre claim that his offense was fueled, in part, by his inability to cope with the swimming death of a young girl that occurred at the Club. A93. The Government presented the court with a chronology demonstrating that much of Generali's criminal conduct pre-dated the girl's death. Moreover, Generali had acted in a man-

ner totally inconsistent with someone who was distraught, taking a trip to the Bahamas two weeks following the death and never once expressing any condolence to the girl's family. In assessing this issue, the district court noted, "[A] person is capable of expressing condolences without assuming responsibility, or saying anything that would make the Club culpable." A93. The court was referring to Generali's use of the girl's tragic death to mitigate his offense when it stated, "At every turn, Mr. Generali has sought to minimize his responsibility, and to blame or reposit responsibility on others." A117.

The district court also discredited GeneralI's claim that his expenditure of $180,000 during the three months following his resignation from the Club was "to survive and pay his lawyer." PSR ¶ 40. The court concluded that Generali had dissipated those assets in anticipation of litigation, observing:

> [W]hat's most telling is that what Mr. Generali did when he knew the dogs were at his heels, when he knew that his fraud had been detected . . . he went on a spending spree[.]

A114.

And the court also noted its disapproval of Generali's failure to submit a complete and sufficient financial disclosure to the Probation Of-

fice. The court described the financial disclosure as "laughable." A114. *See United States v. Case*, 180 F.3d 464, 466 (2d Cir. 1999) (affirming district court's denial of two-level reduction under § 3E1.1 where defendant submitted inconsistent and overdue financial disclosures to the probation office).

Finally, the district court's adoption of the PSR, standing alone, is sufficient to justify its denial of the acceptance reduction. A126. The PSR echoed the court's concerns by concluding that Generali had "displayed a sense of entitlement which is somewhat contradictory to accepting responsibility for his criminal behavior. The U.S. Probation Office does not see Mr. Generali as fully remorseful for his actions[.]" PSR ¶ 58.

In light of the foregoing, the district court's conclusion that Generali lacked candor and contrition was well founded. *See United States v. Rivera*, 96 F.3d 41, 43 (2d Cir.1996) (upholding denial of § 3E1.1 reduction where defendant had not shown "contrition and candor"). As Generali notes, however, having properly denied the two-level reduction under § 3E1.1(a), the court erred by apparently awarding a one-level decrease under § 3E1.1(b).[2] Any such error was harmless

[2] It is not entirely clear from the record whether district court wrongly awarded a one-level reduction under § 3E1.1(b) or simply miscalculated the offense

because the correct offense level of 24 would have resulted in an even higher sentencing range of 51 to 63 months imprisonment. That is, if the district court erred in its guideline analysis, the error benefited Generali because it gave him a one-level downward adjustment to which he was not entitled. But any error was harmless because the court conducted an exhaustive analysis of the § 3553(a) sentencing factors, imposed an incarceration term that fell within both guideline ranges and explicitly stated that, regardless of the guideline range, it would have imposed a 57-month sentence to accomplish the objectives of a criminal sentence under section 3553(a). *See United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009) ("Where we identify procedural error in a sentence, but the record indicates clearly that 'the district court would have imposed the same sentence' in any event, the error may be deemed harmless, avoiding the need to vacate the sentence and to remand the case for resentencing.").

In fact, the same can be said regarding the district court's decision to withhold the two-level reduction for acceptance of responsibility. As

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level, though it does appear that the court granted the Government's motion for a reduction under 3E1.1(b). *See* A110-11, 121. Either way, Generali does not make any claim of error on appeal as a result of this one-level discrepancy.

stated above, the court made quite clear in imposing sentence that it would have reached the same conclusion as to the 57-month sentence without regard to the guideline range and based on a proper balancing of the section 3553(a) factors. Moreover, in its Statement of Reasons, GSA4, the court did not even identify Generali's failure to accept responsibility as a factor in its imposition the sentence. Thus, any error in declining to reduce the offense level under § 3E1.1 was harmless where all the section 3553(a) other factors weighed sufficiently in favor of a 57 month sentence.

Generali misapprehends the district court's rationale in denying him credit for acceptance of responsibility. According to him, the court denied him credit for acceptance of responsibility because he contested the total loss amount. *See* Def.'s Br. at 20 ("the District Court's rationale. . . was that he contested, and put the government to the trouble of providing documents to establish, the amount embezzled from the Club"). He is incorrect.

The court focused specifically on Generali's insistence up until the day of sentencing that most, if not all, the cash he received from forging and negotiating checks to Alan Butler and John Moss was used to pay those men for work they performed. During the Government's remarks, the court interjected when the Government

commented on Generali's pre-sentencing contention that he had not converted the funds from the cashed checks to his own use. The court even suggested that, by taking that position, Generali might have subjected himself to an obstruction of justice enhancement, A88, and confirmed that Generali had "tried to convince the Government that those checks were written as compensation for work performed by those two individuals." A91. Then, when the court specifically addressed the issue of acceptance, it focused sharply on Generali's "refus[al] to accept responsibility for the checks that he wrote out in the names of others, forged and deposited in his own account[.]" A116. The court even noted that, if Generali's contention was true that he had paid the employees with the proceeds from the checks he had cashed, he could have presented the court with records of such payments. A116-117. In essence, the court did not credit representations that Generali made in his reply memorandum, and withheld the acceptance reduction largely on that basis.

Contrary to his claim on appeal, the district court did not penalize him for requiring the Government to prove the loss amount. Rather, the court was concerned with Generali's affirmative misrepresentations concerning whether he had stolen certain money at all. That is, Generali did not simply fail to disclose "all the facts and

circumstances surrounding the commission of his offense" as he suggests, *see* Def.'s Br. at 22, he denied, right up until the day of sentencing, a central aspect of his offense conduct. When the court considered this fact, along with (1) Generali's discredited claim that the death of a young girl precipitated his offense; (2) his denial that he dissipated assets in anticipation of litigation; (3) his failure to submit a timely and complete financial disclosure; and (4) the PSR's assessment that he had failed to accept responsibility and show true remorse, it was more than justified in denying an adjustment under § 3E1.1.

2. The district court imposed a substantively reasonable sentence after due consideration of the § 3553(a) factors.

The district court explicitly stated that its sentence must account for the "factors set forth at 18, United States Code, Section 3553(a)." A118. The court then conducted a thorough analysis of the section 3553(a) factors in determining the appropriate sentence, including (1) the nature and circumstances of the offense, A111-114, (2) the history and characteristics of the defendant, A117-118, (3) the need for the sentence to provide just punishment, A119, (4) the need to protect the public, A119, (5) the need for the sentence to promoted specific deterrence

and general deterrence, A119-120, (6) the need for the sentence to afford educational and vocational training, medical care and corrective treatment, A120, (7) the United States Sentencing Guidelines; and (8) restitution, A121. The court explained its analysis of the sentencing factors and the extent to which those factors militated in favor of a significant term of imprisonment. Having identified the guideline range, treated the guidelines as advisory and considered the section 3553(a) factors, the district court did not abuse its discretion in imposing a term of imprisonment of 57 months.

Generali's theft was carefully calculated, prolonged and devastating. He was the Executive Director of the Club. Beginning in 2006, he devised a plan to supplement his $84,361 salary by stealing from the Club's operating account. Without authority, he opened a credit card in the Club's name and made himself the sole signatory on the account. For the next five years, he charged all manner of personal expenses to that credit card, including personal trips to Florida and Boston, gambling weekends at Saratoga and shopping trips to Burberry's in New York and other high end stores. And, each month, he wired thousands of dollars from the Club's operating account to Bank of America to pay down a portion of the balance. Even after he resigned from the Club, he continued to charge personal

items to the credit card, leaving the Club in June 2011 with an unpaid credit card balance of $10,843.65.

In January 2007, he created a slush fund for his own use by siphoning $30,000 from the Club's operating account and opening a CD account. He allowed the money to accrue interest for three years, at which he time he funneled the money into an off-the-books checking account, which only he could access. From January 2010 through May 2011, he wrote checks from that account to himself. Occasionally, he would write checks to two part-time employees, in an apparent attempt to disguise the true nature of the account. He then negotiated the checks for his own use by forging the employees' signatures and depositing the money in his personal checking account.

And he used the Club's operating account as his own personal checking account. He often wrote checks from the Club's operating account to pay for expensive meals, limousine service and jewelry. When he was not purchasing personal items with the Club's operating account, he was writing checks to himself without any authorization. In total, he stole $450,374.24 from the Club and its patrons, money that could have funded educational programs, mentoring programs, athletic activities and desperately needed capital improvements. Instead, this

money went to pay for, among other things, the Generali's expensive meals, wine and liquor, personal vacations, gambling, pornographic material, sunglasses, jewelry and other superfluous accessories.

The impact of this theft has been devastating. While the Club is the official victim in this case, Generali has also victimized hundreds of children and families who rely on the Club's programs and services. Although the guidelines do not recognize them as such, these children, many of whom come from disadvantaged backgrounds, were vulnerable victims. By stealing from the Club and, by extension, its patrons, Generali deprived them of resources year after year that could have made a real and positive difference in their lives. The multiplying effect of this crime on the people who depend on the Club's services was the principal reason the Government sought a sentence above of the guideline range it calculated.

Generali complains that the district court failed to entertain the possibility that a shorter prison term would have adequately sanctioned his conduct and sufficed to prevent him from "engaging in future misconduct." Def.'s Br. at 25-26. In fact, the court did consider these issues. In arguing for a non-guideline sentence above the advisory sentencing range, the Government remarked that specific deterrence was necessary

because (1) Generali's offense occurred over a "prolonged period of time," (2) "he took significant steps to conceal his offense;" (3) he failed to terminate his criminal conduct despite multiple opportunities; and (4) his dissipated $180,000 in assets in anticipation of litigation. A85. The court agreed with the Government and concluded that there was "certainly a risk of re-offense," particularly given Generali's personal characteristics that were revealed by his offense. A119. The fact that Generali disagrees with the court's assessment of his risk of recidivism does not render the court's sentence unreasonable.

Ultimately, the district court recognized that it was required "to impose a sentence which the Court deem[ed] reasonable in light of all the facts and circumstances present." A120; GSA 4. Following its consideration of all the section 3553(a) factors, the district court discharged its sentencing duties and imposed a reasonable term of imprisonment of 57 months.

3. If remand is ordered, reassignment to a different judge is not warranted.

A remand is not warranted and, therefore, in the Government's view, the issue of reassignment is moot. Still, assuming *arguendo*, that the Court orders a remand, there is absolutely no support for the contention that the case should be assigned to a different district judge. Gen-

erali offers little analysis in support of his request other than the conclusory assertion that the original sentencing judge would be unlikely to set aside its "harshly negative" views of him at any resentencing. Def.'s Br. at 27 n.31.

In *United States v. Robin*, 553 F.2d 8 (2d. Cir. 1977), this Court identified the following three factors that it considers when evaluating whether reassignment to a different judge is appropriate:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Id. at 10.

In his cursory argument, Generali focuses principally on the first factor, contending that the district court holds harshly negative views of him that it would be unable to set aside on remand. But the focus of the inquiry is not whether the sentencing judge

would be able to set aside previously expressed views that are unfavorable to a defendant, but whether it could do so with respect to "previously expressed views or findings *determined to be clearly erroneous or based on evidence that must be rejected*." *Id.* (emphasis added). That is, on remand, the district court is not required to set aside the views it formed at sentencing, but only those views or findings that were clearly erroneous. The only issue raised in this appeal is whether the district court erred in denying Generali credit for acceptance of responsibility and then imposed an unreasonable sentence. If this Court determines that the district court imposed an unreasonable sentence, there is absolutely no evidence in the record that the sentencing judge will refuse to re-calculate the guideline range in accordance with this Court's instructions and impose a sentence within the parameters set by this Court. *Cf. United States v. Griffin*, 510 F.3d 354, 367 (2d. Cir 2007), *abrogated on other grounds* (remand to a different judge appropriate where government breached the plea agreement and exposed sentencing judge to prejudicial information).

Generali also asserts, without analysis, that reassignment to a different district judge is necessary "to preserve the appear-

ance of justice." Def.'s Br. at 27. The Government presumes that this assertion stems from what Generali characterizes as the sentencing judge's "harshly negative" views of him. It is, of course, true that the district court made certain determinations based on the record before it. Those determinations, however, were of the type that all district judges are called upon to make, *i.e.*, an assessment of the nature of the offense and the history and characteristics of the defendant, along with a consideration of the other section 3553(a) factors. There is nothing in the record that would create the appearance of injustice should this case be remanded to the same district judge with whatever guidance this Court deems proper.

Conclusion

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

Dated: July 12, 2013

Respectfully submitted,

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Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,080 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

CHRISTOPHER M. MATTEI
ASSISTANT U.S. ATTORNEY

Addendum

U.S.S.G. § 3E1.1.
Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

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

. . .

COMMENTARY

Application Notes:

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

(A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional

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

(B) voluntary termination or withdrawal from criminal conduct or associations;

(C) voluntary payment of restitution prior to adjudication of guilt;

(D) voluntary surrender to authorities promptly after commission of the offense;

(E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

(F) voluntary resignation from the office or position held during the commission of the offense;

(G) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and

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

. . .

3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under § 1B1.3 (Relevant Conduct) (see Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

. . .

5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.

6. Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for

a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b) will occur particularly early in the case. For example, to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.

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

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