No. 21-

IN THE

Supreme Court of the United States

SASSINE RAZZOUK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Mandatory Victims Restitution Act (MVRA), courts must order the defendant to make restitution upon conviction for "an offense against property" 18 U.S.C. § 3663A(c)(1)(A)(ii). In the decision below, the Second Circuit, adopting the approach of three other courts of appeals that generally applied a broader standard of review, declined to apply the categorical approach when determining if an offense was "an offense against property" pursuant to 18 U.S.C. § 3663A(c)(1)(A)(ii). Notably, the circuit cases relied upon by the Second Circuit preceded this Court's decision in *Lagos v. United States*, 138 S. Ct. 1684 (2018).[1]

In reaching this conclusion, the Second Circuit recognized that that "[a]lthough these [statutory] signals are subtle, they suggest that a court may look to the manner in which a particular crime was committed to determine if it is an 'offense against property' such as would trigger a restitution obligation under the MVRA." *United States v. Razzouk*, 984 F.3d 181, 188 (2d Cir. 2020). In doing so, the Second Circuit ignored other statutory signals that were not subtle at all. Including the clear signal that congress intended to limit the MVRA to certain specified offenses. Moreover, the Second Circuit's decision ignored this Court's warning that *"to interpret the statute broadly is to invite controversy*." *Lagos* 138 S. Ct. at 1689 (emphasis added).

The question presented is:

Whether courts should apply the categorical approach in determining if an offense is an "offense against property" under the MVRA?

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[1] See *United States v. Ritchie* , 858 F.3d 201, 210 (4th Cir. 2017); *United States v. Collins* , 854 F.3d 1324, 1334 (11th Cir. 2017); *United States v. Sawyer*, 825 F.3d 287, 292–93 (6th Cir. 2016).

DIRECTLY RELATED PROCEEDINGS

This petition is directly related to:

- United States v. Razzouk, Docket No. 11 Cr. 430 (ARR), United States District Court for the Eastern District of New York. Judgment entered April 3, 2018, amended judgment entered April 15, 2021.

- United States v. Razzouk, Docket No. 18-1395, United States Court of Appeals for the Second Circuit. Judgment entered October 2, 2020, amended Judgement entered on January 4, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Sassine Razzouk respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The initial judgment of the court of appeals (App. C, *infra*), *United States v. Razzouk*, 984 F.3d 181 (2d Cir. 2020), was entered on October 2, 2020. In its decision, the Second Circuit affirmed the defendant's conviction but vacated and remanded the award for investigative costs based on the Supreme Court's decision in *Lagos v. United States,* 138 S. Ct. 1684 (2018). However, on October 14, 2020, the government filed a motion to amend the judgment. The motion was granted and on January 4, 2021, the judgment was entered remanding the case to the district court (App. A, *infra*). Following briefing, the district court issued an order resolving issues remanded by the Second Circuit in Petitioner's favor but not addressing the remaining issue that is raised herein. The judgment of the district court was entered on April 15, 2021 (App. B, *infra*); the Government did not appeal that order.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition is being filed directly to this Court within 90 days of the District Court's April 15, 2021, final judgment (App. B, *infra*). A petition for certiorari could not have been filed after the January 4, 2021, remand order because it did not become final until no additional appeal was taken from the district court's judgment on April 15, 2021.

STATUTORY PROVISION INVOLVED

The Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A, § 204(a), 110 Stat. 1227, codified at 18 U.S.C. § 3663A (App. F, *infra*).

INTRODUCTION

This case presents a clear and significant question of federal criminal law that has vexed the lower courts and has created uncertainty among litigants. Under 18 U.S.C. § 3663A, courts must order restitution to the victims of specified crimes. In addition to these enumerated offenses, the MVRA mandated restitution for identifiable victims of "an offense against property" pursuant to 18 U.S.C. § 3663A(c)(1)(A)(ii). This constitutionally vague phrase was not anywhere defined in the MVRA.

In the decision below, the Second Circuit expressly declined to apply the categorical approach to the determination of whether a given offense was "an offense against property." Instead, the Second Circuit held that courts were authorized to look to the underlying facts to make this determination.

This case checks off several traditional criteria for granting review and involves an important and recurring question of federal statutory interpretation. Indeed, this question is potentially implicated every time a defendant is accused of a federal offense. And this case is an optimal vehicle for resolving the issue: the facts are clean and undisputed, there are no alternative grounds for affirmance, and the question presented dictated the result below.

As it now stands, punishment for the same federal crime varies with the

location of the convicting court. And a majority of jurisdictions—including the court below—are following a standard that is squarely at odds with Section 3663A(c)(1)(A)(ii)'s plain text, structure, purpose, and history—and doing so in a manner that is difficult to administer and unnecessarily challenging for district courts. Further review is plainly warranted.

STATEMENT

The MVRA was enacted in 1996 to require restitution for "victim[s]" of a wide subset of federal crimes, including certain violent crimes, property offenses, and fraud. See 18 U.S.C. § 3663A(a)(1)(c). The Act defines "victim" as "a person directly and proximately harmed as a result of the commission" of any *specified* offense. 18 U.S.C. § 3663A(a)(2). It "appl[ies] in all sentencing proceedings" for "any" *covered* crime. 18 U.S.C. § 3663A(c)(1).

The MVRA makes restitution mandatory where it applies: "Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate." 18 U.S.C. § 3663A(a)(1). While the order is mandatory, restitution is limited to offenses "described in subsections c" and to four categories of eligible expenses (1) the value of lost property (or the return of that property, if possible); (2) medical and related expenses in cases of bodily injury; (3) "the cost of necessary funeral and related services" in cases of death; and (4) "lost

income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. § 3663A(b)(1)-(4).

The MVRA is only part of the statutory landscape governing restitution. Congress enacted the MVRA against the backdrop of other laws, which also provide restitution in defined circumstances. The first substantive legislation was the Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, § 5, 96 Stat. 1248, which authorizes discretionary restitution for a large set of crimes not covered by the MVRA. See 18 U.S.C. § 3663(a)(1)(A) (listing offenses "other than an offense described in section 3663A(c)").

In addition to targeting a different set of crimes, the VWPA also enumerates different categories of relief. It includes the same first three categories of eligible expenses as the MVRA (18 U.S.C. § 3663(b)(1)-(3)), but extends relief in two areas. The first involves the VWPA's fourth category, similar to the MVRA: "lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. § 3663(b)(4).

A 2008 amendment of the VWPA provided additional relief to victims of identity theft: "the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense." 18 U.S.C. § 3663(b)(6). That language covers additional expenses including "the costs of an internal investigation," but, again, applies "only to victims of identity theft," not

the crimes covered by the MVRA. *United States* v. *Papagno*, 639 F.3d 1093, 1097 (D.C. Cir. 2011).

The Proceedings Below

Petitioner entered a guilty plea to one count of an Information charging him with bribery in violation of 18 U.S.C. § 666(a)(1)(B). Congress described the offense, in relevant part, as follows:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists –
>
> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof –
>
> (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more.[2]

Petitioner was a long-time employee of Consolidated Edison ("Con Ed"). Con Ed is billion-dollar company and one of the largest investor-owned energy companies in the United States.[3]

In late 2010, the government began an investigation into the activities of certain employees of Con Ed after an auditing department employee suggested that there were "irregularities" regarding contracts awarded by Con Ed to Rudell Engineering ("Rudell"), a company owned by Rodolfo Quiambao, a business associate and friend of Petitioner. The investigation centered on the questionable theory that

[2] Petitioner also pled guilty to several tax counts not relevant here.
[3] See: https://www.coned.com/en/about-us/company-information

Rudell had been awarded Con Ed contracts as a result of underbidding for projects, despite the fact that Con Ed's approval process made it incredibly difficult if not impossible to perpetrate such a scheme. Moreover, despite the suspected "irregularities" in the manner in which the contracts were awarded, there was no suggestion that Rudell had ever performed work for Con Ed in a manner that was not efficient, professional, and reasonably priced. And as Petitioner rose to a management position at Con Ed, he also worked with Quiambao on a number of high-level electrical-design projects in the Mid-East and traveled with him to propose those projects in Dubai and Saudi Arabia.

The Offenses

The government alleged that Quiambao made illicit payments to Petitioner in exchange for the steering of Con Ed projects to him, claiming that he instructed Quiambao to bid low on projects to ensure that they would be awarded to him. The government further alleged, somewhat inconsistently, that Petitioner helped Quiambao inflate the costs of various Con Ed projects, causing Con Ed to sustain financial losses as a result. In addition, the government alleged that Petitioner failed to pay income taxes on income totaling over $5 million for the calendar years 2007 through 2009.

Soon after his arrest in January 2011, Petitioner began cooperating with the government and executed a cooperation agreement on June 10, 2011. In that agreement, the government promised that if Petitioner provided substantial assistance, a motion would be filed pursuant to U.S.S.G. § 5K1.1, setting forth the

nature and extent of his cooperation. However, the information he provided did not always square with the government's theory that he had assisted Quiambao in the submission of low bids for Con Ed projects. Nevertheless, with the encouragement of government officials, Petitioner provided substantial assistance regarding illicit activities in which the subjects of the investigation had engaged.

On June 10, 2011, Petitioner appeared before United States District Judge Mauskopf and, pursuant to a plea agreement, pled guilty to an Information charging him with one count of bribery and three counts of tax evasion. In the course of a plea allocution, he acknowledged that private contractors were awarded contracts with Con Ed to perform various electrical projects; that Rudell "was one of the contractors who performed work for Con Ed"; that during the time period in question, he "accepted United States currency from Rudel & Associate. I received these payments in part with the intent to influence with respect to awarding jobs to Rudel in excess of $5,000" and that the benefits he provided included assisting Rudell "with bids and approving payment to Rudel & Associates in contracts with Con Edison for things I was not entitled to". He also acknowledged that on his income tax returns for calendar years 2007, 2008 and 2009, he did not include all of the income he earned "in an effort to evade [payment] of income tax" (A20-A59).

Petitioner continued to cooperate with the government after his guilty pleas were entered. However, his discussions with the government and his own attorney became contentious when it became apparent to Petitioner that the government's theory of the case was inaccurate in certain respects. His attempts to explain to his

attorney the true nature of his relationship with Quiambao fell on deaf ears, as did his attempts to explain that relationship to the government. Eventually, Petitioner met with Quiambao at a hotel in Atlantic City in December 2015 and explained his frustration to him. That meeting prompted the government to conclude that Petitioner had violated the conditions of his cooperation agreement and to determine that the promises it made in that agreement were no longer binding.

Petitioner appeared for sentencing on April 3, 2018. At the outset of that proceeding the district court denied the motion to direct specific performance of the plea agreement as well as the motion to withdraw the guilty plea. In addition, the district court rejected the argument that Con Ed had not sustained any monetary loss as a result of Petitioner's conduct (A183-A192).

Prior to the imposition of sentence, Petitioner testified to his personal and professional relationship with Quiambao whom he had known for 20 years and whom his children called "Uncle Rudy". Petitioner described Quiambao as a virtual member of his family who looked after his children and comforted him after the death of his first wife. He also described the professional ventures, which had no connection to Con Ed, in which he and Quiambao had engaged and the generous compensation he had received from Quiambao for his tireless work in those ventures (A193-A222).

After hearing from Petitioner, the district court determined that his base offense level for the bribery count was 12; that 18 additional levels for loss were warranted; that a 2-level increase for obstruction of justice was warranted; that a 2-level offense characteristic enhancement was warranted, and that a reduction for

acceptance of responsibility was not warranted. These computations yielded a total offense level of 34. As to the tax evasion counts, the district court determined that his adjusted offense level was 24. Accordingly, the district court determined that the Guidelines range was 151-188 months' imprisonment (A223-A233).

The district court sentenced Petitioner to a term of imprisonment of 78 months for the bribery count and concurrent terms of imprisonment of 60 months for the tax evasion counts, to be followed by three years' supervised release. The district court also ordered restitution in the amount of $6,867,350, later increased to $8,849,588.85, and directed compliance with a forfeiture money judgment in the amount of $6,515,809 which was previously satisfied (A233-A258).

On October 2, 2020, the Second Circuit issued a summary order affirming the defendant's convictions. (*United States v. Razzouk*, 828 Fed. Appx. 773 (2d Cir. 2020)). By separate opinion, the Second Circuit affirmed holding that Con Ed was entitled to restitution under the MVRA because the bribery scheme in which the defendant participated was an "offense against property" within the meaning of the statute. *United States v. Razzouk*, 984 F.3d 181, 186-190 (2d Cir. 2020).

The Second Circuit separately vacated that part of the district court's order that had included investigative fees, finding that Lagos called that part of the order into question. *Razzouk*, 984 F.3d at 190. According to the Second Circuit, this Court in *Lagos* had curtailed the availability of certain expenses for restitution to only those pertaining to participation in, or attendance at, "government investigations and criminal proceedings." Id. (quoting *Lagos*, 138 S.Ct. at 1688). The Second Circuit

observed that *Lagos* had not decided whether the MVRA would require payment of investigative costs incurred by a victim "during a private investigation that was pursued at the government's invitation or request." Id. (quoting *Lagos*, 138 S.Ct. at 1690). The court of appeals found that the district court had not considered whether the government had invited the investigation that caused Con Ed to incur the KPMG fees or, even if it did, whether the MVRA should apply to such expenses after *Lagos*. Accordingly, the Second Circuit remanded that portion of the restitution order so that the district court could address in the first instance "whether, and if so, how the limitations articulated in *Lagos* apply to [the] restitution order." Id. On remand, the district court declined to order investigative costs.

REASONS FOR GRANTING THE PETITION

This case readily satisfies the Court's traditional criteria for review. The Second Circuit broad interpretation of Section 3663A(c)(1)(A)(ii) ignores the concerns expressed by this Court that "to interpret the statute broadly is to invite controversy." *Lagos* 138 S. Ct. at 1689 (2018). Until this Court intervenes, inconsistencies will persist, and federal punishments will vary based on the happenstance of where defendants are sentenced. The categorical approach will provide the lower courts, counsel and litigants with much needed clarity when faced with the question of whether a given offense is a crime "against property." The petition for a writ of certiorari should be granted.

The Proper Construction Of Section 3663A(c)(1)(A)(ii) Is A Recurring Question Of Great Importance

This case presents a clear and important question of statutory construction

that repeatedly arises in criminal cases nationwide. It will continue to generate uncertainty and confusion until it is resolved by this Court. Further review is plainly warranted.

This question arises all the time in ordinary criminal prosecutions across the country, as reflected by the substantial body of circuit law on the issue. Restitution is mandatory under Section 3663A(a)(1), These questions will arise every time an individual is charged with an offense that is not specifically enumerated in the MVRA. The decision to plead guilty or go to trial may well turn on counsel's assessment of whether an offense is a crime "against property." The law should be clear whether an offense against property should be determined categorically or whether courts are free to consider the underlying facts.

The question is undeniably important. Uniformity is critical in the criminal context. Basic notions of fairness mean that punishments should not differ based solely on a court's assessment of whether an offense is "against property." And the real-world differences here are substantial. Restitution orders often involve significant sums that affect defendants and victims in material ways. Here, for example, the restitution order included millions more than had been previously forfeited from the Petitioner. And other cases no doubt involve similarly meaningful sums. The outcome has a real impact on all parties, and it likewise colors plea negotiations—where the vast majority of criminal cases are now resolved. E.g., *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) ("[n]inety-seven percent of federal convictions" result from guilty pleas).

Prosecutors, defendants, and courts all benefit from clarity about the possible consequences of a plea. Cf., e.g., *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) ("informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea- bargaining process"). The resultant uncertainties about the proper scope of a restitution order frustrates the criminal justice process.

It is also critical that rules and standards in the criminal context are administrable. The broad view of Section 3663A(c)(1)(A)(ii) requires district courts to undertake a number of difficult analyses. A rule that requires challenging restitution calculations is directly at odds with the MVRA's concerns about "complicating or prolonging the sentencing process." 18 U.S.C. § 3663A(c)(3)(B); cf. S. Rep. 104-179, 104th Cong., 1st Sess. 18 (1995) ("guaranteeing that the sentencing phase of criminal trials do not become fora for the determination of facts and issues better suited to civil proceedings").

Nor is this question any less important because the scant courts of appeals, notably only the Second Circuit, post *Lagos*, have rejected the categorical approach. This Court routinely grants review in criminal cases involving nominal splits. See, e.g., *Voisine v. United States*, 136 S. Ct. 2272 (2016) (9-1 split); *Lockhart v. United States*, 136 S. Ct. 958 (2016) (5-1 split); *Honeycutt v. United* States, 137 S. Ct. 1626 (2017) (5-1 split). *Lagos*, infra, (7-1 split).

In *Lagos v. United States*, this Court was called upon to resolve a circuit split regarding the scope of the MVRA. Before the Lagos decision, the First, Second, Fifth,

Sixth, Seventh, Eighth, and Ninth Circuits generally adopted a broader interpretation of the MVRA [See, e.g., *United States v. Janosko*, 642 F.3d 40, 42 (1st Cir. 2011); *United States v. Amato*, 540 F.3d 153, 159–60 (2d Cir. 2008); *United States v. Lagos*, 864 F.3d 320, 321–22 (5th Cir. 2017); *United States v. Elson*, 577 F.3d 713, 727–28 (6th Cir. 2009); *United States v. Hosking*, 567 F.3d 329, 332 (7th Cir. 2009); *United States v. Stennis-Williams*, 557 F.3d 927, 930 (8th Cir. 2009); *United States v. Nosal*, 844 F.3d 1024, 1046–47 (9th Cir. 2016), while the D.C. Circuit maintained a minority and more narrow interpretation of the MVRA, *United States v. Papagno*, 639 F.3d 1093 (D.C. Cir. 2011).

While the Court was asked to interpret a different section of the MVRA than the one in this case, the similarities between *Lagos* and *Razzouk* are irresistible. In *Lagos* the MVRA section in despite was one which requires restitution for "expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense," 18 U.S.C. § 3663A(b)(4). In his petition, Lagos argued that the Court should reject the broader interpretation of this section of the MVRA that had been the majority rule.

In a unanimous opinion, this Court reversed the Fifth Circuit and adopted Lagos' position. In doing so, the Court embraced the D.C. Circuit's minority and more narrow interpretation of the MVRA, reasoning that "to interpret the statute broadly is to invite controversy," *Lagos* 138 S. Ct. at 1689. The Court also pointed out that "this interpretation does not leave a victim . . . totally without remedy" because the victims could bring a civil lawsuit to recover the costs of such internal investigations.

Lagos 138 S. Ct. at 1690. That is precisely what has happened in Petitioner's case. Con Edison is seeking millions of dollars from Razzouk and his Wife, Grace Razzouk.[4]

Despite this Court's clear admonition that courts generally should avoid interpreting the MVRA broadly, the Second Circuit relied on "subtle" statutory "signals" to once again broadly interpret another section of the MVRA. *Razzouk*, 984 F.3d at 188.

Besides the not-so-subtle clue to avoid broad interpretations of the MVRA that this Court issued in *Lagos,* the Second Circuit ignored other clues that should have dictated the result. For example, as set forth above, the relevant subsection of the MVRA provides as follows:

> (ii) an offense against property under this title, or under section 416 (a) of the Controlled Substances Act (21 U.S.C. 856 (a)), including any offense committed by fraud or deceit.

Title 21 U.S.C., Section 856(a) provides, in pertinent part, as follows:

> (a) Unlawful acts
>
> Except as authorized by this subchapter, it shall be unlawful to-
>
> (1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance;
>
> (b) Criminal penalties
>
> Any person who violates subsection (a) of this section shall be sentenced to a term of imprisonment of not more than 20 years or a fine of not more than $500,000, or both, or a

[4] See: 0653191/2012, *National Union Fire vs. Sassine Razzouk*, New York County Supreme Court. https://iapps.courts.state.ny.us/webcivil/FCASSearch

> fine of $2,000,000 for a person other than an individual.
>
> **(c) Violation as offense against property**
>
> *A violation of subsection (a) shall be considered an offense against property for purposes of section 3663A(c)(1)(A)(ii) of title 18.*

21 U.S.C. § 856 (emphasis added).

Clearly, congress understood the need to specify when it had designated a particular crime to be "an offense against property." The plain language of this statue, therefore, does not support the Second Circuit's interpretation of the "subtle" statutory "clues" it relied upon in rejecting the categorical approach. Nor is this the only expression of congressional intent. The copyright restitution statute adopts Sections 3663A and 3664 by cross reference with no additional features other than the offenses that trigger the mandatory restitution requirement ("When a person is convicted of an offense under §506 of Title 17 or §2318, 2319, 2319A, 2319B, or 2320, or chapter 90 of this title, the court, pursuant to §§3556, 3663A, and 3664 of this title, shall order the person to pay restitution to any victim of the offense as an *offense against property* referred to in §3663A(c)(1)(A)(ii) of this title"). 18 U.S.C. § 2323 (emphasis added).

Not surprisingly, the district courts have existed in the legal world that this Court warned against in *Lagos*. Where unduly broad interpretations of the MVRA have become the tail that wagged the dog. See *United States v. OZ Africa Mgmt. GP*, 16-CR-515 (NGG) (E.D.N.Y. Aug. 28, 2019) ("[t]he MVRA states that offenses against property include "offense[s] committed by fraud or deceit." 18 U.S.C. § 3663A(c)(1)).

Courts have disagreed as to whether committed by fraud or deceit' refers to 'the manner in which the defendant commits the offense,' . . . or instead requires the [c]ourt to look to 'the elements of the offense' to determine whether an offense of conviction was 'committed by fraud or deceit.'". *United States v. Finazzo*, No. 10-CR-457 (RRM), 2014 WL 3818628, at *11 (E.D.N.Y. Aug. 1, 2014), aff'd in part, 682 F. App'x 6 (2d Cir. 2017), vacated on other grounds, 850 F.3d 94 (2d Cir. 2017) (citations omitted) (collecting cases and noting that the Second Circuit has not resolved this question).

Other courts have extended the definition of "and offense against property to order restitution under the MVRA for crimes not commonly considered to be "against property: See *United States v. Ritchie*, 858 F.3d 201, 209-11 (4th Cir. 2017) (making false statements in violation of 18 U.S.C. § 1001 was "offense against property " within scope of MVRA because false statement deprived another of property); *United States v. Liu*, 200 F. App'x 39, 40 (2d Cir. 2006) (summary order) (treating bribery-related offense as crime against property because it was committed through corruption or deceit); *Finazzo*, 2014 WL 3818628, at *10-14 (same); but see *United States v. Adomo*, 950 F. Supp. 2d 426, 429 (E.D.N.Y. 2013) (denying New York City's request for restitution for a portion of the salary it paid a defendant, a city employee who had accepted bribes, because the evidence did not support the city's honest-services-fraud theory, and noting that "[w]here the offense of conviction is limited … to bribery, it is not clear that the MVRA applies").

This Case Is An Optimal Vehicle For Deciding The Question Presented

This case is the ideal vehicle to resolve the question presented. The facts are clear and directly implicate the core issue – whether the categorical approach dictates the result – or whether it is constitutionally permissible for the lower courts to legislate.

The outcome turned directly on the scope of Section 3663A(c)(1)(A)(ii), and it is undisputed (and indisputable) that petitioner would have prevailed in the Second Circuit had the categorical approach been applied. Nor are there any alternative grounds for affirmance. The entire dispute turns on a pure question of statutory construction, and the Second Circuit's answer provided the sole basis for its disposition. This is a perfect vehicle for resolving this exceptionally important question.

The Decision Below Is Incorrect

Review is also warranted because the decision below is wrong. Further review is warranted to correct the court of appeals' incorrect interpretation of this important criminal law provision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 2021

APPENDIX A

984 F.3d 181
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
Sassine RAZZOUK, Defendant-Appellant.

Docket No. 18-1395
|
August Term, 2019
|
Argued: October 1, 2019
|
Decided: October 2, 2020
|
Amended: January 4, 2021

Synopsis

Background: Defendant entered a guilty plea, in the United States District Court for the Eastern District of New York, Allyne R. Ross, Senior District Judge, to accepting bribes in connection with an organization receiving federal funds and three counts of tax evasion, relating to a bribery scheme perpetrated while defendant was employee of public utility, and defendant was sentenced to 78 months in prison and was ordered to pay $6,867,350.51 in restitution to utility and $1,982,238.34 in restitution to Internal Revenue Service (IRS). Defendant appealed.

Holdings: The Court of Appeals, Carney, Circuit Judge, held that:

[1] as a matter of first impression, a court may look to the facts and circumstances, to determine if an offense of conviction is an "offense against property" under the Mandatory Victims Restitution Act (MVRA), and

[2] defendant's bribery offense was an "offense against property" under the MVRA.

Vacated and remanded.

West Headnotes (8)

[1] Criminal Law Restitution

The Court of Appeals reviews a restitution order deferentially, and will reverse only for abuse of discretion.

[2] Criminal Law Discretion of Lower Court

To identify an abuse of discretion, the Court of Appeals must conclude that a challenged ruling rests on an error of law, a clearly erroneous finding of fact, or otherwise cannot be located within the range of permissible decisions.

[3] Sentencing and Punishment Measure of valuation

With regard to loss amounts, the Mandatory Victims Restitution Act (MVRA) requires only a reasonable approximation of losses supported by a sound methodology. 18 U.S.C.A. § 3663A.

[4] Sentencing and Punishment Compensable Losses

When determining whether the Mandatory Victims Restitution Act (MVRA) offense-against-property provision applies to a conviction, courts may consider the facts and circumstances of the crime that was committed to determine if it is an "offense against property" within the meaning of the MVRA, and if those facts and circumstances implicate a crime against property, the MVRA requires the court to enter a related order of restitution. 18 U.S.C.A. § 3663A(c)(1)(A)(ii).

[5] **Criminal Law** Construction and Operation in General

A criminal statute's use of the word "committed" suggests a focus on the manner of commission and stands in contrast to a reference to a conviction for a "generic" crime, which requires instead a focus on the crime's elements.

[6] **Sentencing and Punishment** Purpose

The Mandatory Victims Restitution Act (MVRA) has the broad remedial purposes of making victims of crime whole, fully compensating victims for their losses, and restoring victims to their original state of well-being. 18 U.S.C.A. § 3663A.

[7] **Sentencing and Punishment** Compensable Losses

Under the facts and circumstances of defendant's case, defendant's conviction, for accepting bribes in connection with an organization receiving federal funds, was an offense against property, within meaning of Mandatory Victims Restitution Act (MVRA), which required restitution to be made by a defendant convicted of an offense against property in which an identifiable victim or victims had suffered a physical injury or pecuniary loss; defendant, an employee of a public utility, deprived utility of a property interest in money, by three counts of tax evasion and causing utility to make payments, for phantom work, to a contractor that was run by defendant's friend. 18 U.S.C.A. §§ 666(a)(1)(B), 3663A(c)(1)(A)(ii), (c)(1)(B).

[8] **Sentencing and Punishment** Effect of plea bargain or other agreement

Federal government did not waive its right, under cooperation agreement in prosecution for tax evasion, to seek restitution for unpaid income taxes, though about six years before sentencing the government had not objected when it had received notice that defendant had filed amended income tax returns, where cooperation agreement stated that restitution would be determined at sentencing, thereby implying that restitution would be sought at sentencing.

West Codenotes

Recognized as Unconstitutional
18 U.S.C.A. § 16(b)

Attorneys and Law Firms

***183** Frank Turner Buford (David C. James, Claire S. Kedeshian, on the brief), for Seth DuCharme, United States Attorney for the Eastern District of New York, Brooklyn, NY, for Appellee United States of America.

Steve Zissou, Esq., Bayside, NY, for Defendant-Appellant Sassine Razzouk.

Before: Walker and Carney, Circuit Judges, and Koeltl, District Judge.[1]

[1] Judge John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

Opinion

Carney, Circuit Judge:

Defendant-Appellant Sassine Razzouk appeals from an April 25, 2018 judgment of conviction and sentence. In 2011, Razzouk pleaded guilty to one count of accepting bribes, in violation of 18 U.S.C. § 666(a)(1)(B), and three counts of tax evasion, in violation of 26 U.S.C. § 7201, in

connection with a bribery scheme that he and others perpetrated while he was an employee of Consolidated Edison Company of New York, Inc. ("Con Edison"). As part of the sentence it imposed in 2018, the district court ordered Razzouk to pay $6,867,350.51 in restitution to Con Edison and $1,982,238.34 to the Internal Revenue Service ("IRS"). On appeal, Razzouk argues that the district court erred in its restitution order by (1) incorrectly determining that his bribery conduct was "an offense against property" under the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A(c)(1)(A)(ii), and (2) incorrectly calculating the loss to Con Edison caused by the scheme. The government, in turn, advocates a remand of the restitution order in light of *Lagos v. United States*, —— U.S. ——, 138 S. Ct. 1684, 201 L.Ed.2d 1 (2018), to allow the district court to reconsider its inclusion of certain investigatory costs incurred by Con Edison in the restitution order total. After review, we reject Razzouk's argument that the MVRA does not support the restitution order to Con Edison. As urged by the government, however, we vacate the order and remand to the district court to allow that court to address the effect of *Lagos* on its calculation of the restitution amount. In a summary order filed concurrently with the Opinion, we decide the other issues raised by Razzouk in his appeal.

The district court's order of restitution is VACATED and the cause is REMANDED for further proceedings consistent with this Opinion.

BACKGROUND

I. Offense Conduct

According to admissions made during his 2011 plea allocution, between approximately ***184** 2007 and 2011 Razzouk worked for Con Edison as a manager in its electrical design engineering department. During that period, and in his role as manager there, Razzouk manipulated Con Edison's contractor bidding systems to benefit a company named Rudell & Associates ("Rudell"), which was run by his friend Rodolfo Quiambao. In his allocution, Razzouk described how he "provided [Rudell] with additional Con Edison work, assist[ed] [Rudell] with bids[,] and approv[ed] payment[s] to [Rudell] in contracts with Con Edison for things [he] was not entitled to [approve]." App'x 51. The two forensic accounting firms hired by Con Edison and its insurer to calculate the resulting losses each estimated that the scheme cost Con Edison approximately six million dollars in the form of overpayments made to Rudell.

With regard to income tax evasion, Razzouk admitted in 2011 that he failed to report the bribery payments as part of his taxable income in the relevant years: he said he was "aware that [he] owed more federal income tax for the calendar [years] 2007, 2008, and 2009 than [he] declared on [his] tax return[s]," App'x 52-53, and confessed that he "intentionally did not file the proper amount of taxes that [he] owed ... in an effort to evade income tax[es]." *Id.*

II. Procedural History

In January 2011, the government filed a criminal complaint against Razzouk. In June of that year, pursuant to a cooperation agreement (the "Cooperation Agreement" or "Agreement"), Razzouk waived indictment and pleaded guilty to one count of accepting bribes in connection with an organization receiving federal funds, in violation of 18 U.S.C. § 666(a)(1)(B),[2] and three counts of tax evasion, in violation of 26 U.S.C. § 7201.[3] Under the Cooperation Agreement, Razzouk undertook (among other things) to cooperate with the government's further investigations, in return for (among other things) the government's conditional promise to file a U.S.S.G. § 5K1.1 letter informing the sentencing court of Razzouk's substantial assistance and to recommend a downward departure from his Guidelines sentence.

[2] Section 666(a)(1)(B) of title 18 provides in relevant part that anyone who "corruptly ... accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency [receiving federal funds] ... shall be fined under this title, imprisoned not more than 10 years, or both."

[3] Section 7201 of title 26 provides that "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ... or imprisoned not more than 5 years, or both, together with the costs of prosecution."

After a period of cooperation resulting in additional indictments of persons—including Quiambao—involved with the scheme, in 2015 Razzouk had a change of heart (as the government later learned). Breaching his obligations under the Agreement, Razzouk revealed to

Quiambao details about his cooperation with the government and offered to testify falsely at Quiambao's upcoming criminal trial. (As described in the accompanying summary order, Razzouk's revelations to Quiambao had implications for aspects of his sentencing and bear on aspects of his appeal that are not directly relevant here but are discussed in the Order.)

Three years later, in 2018—on the eve of his sentencing—Razzouk moved to withdraw his guilty plea, arguing that his factual allocution to bribery at the 2011 ***185** change-of-plea hearing did not provide a sufficient factual basis for his plea and therefore ran afoul of Fed. R. Crim. P. 11(b)(3). As a result of this and other developments, the government did not file a § 5K1.1 letter in connection with Razzouk's sentencing.

The district court denied Razzouk's motion and sentenced him primarily to a 78-month term of incarceration, also ordering him to pay a total of $6,867,350.51 in restitution to Con Edison and its insurer, and $1,982,238.34 to the IRS. The court's restitution order directing payment to Con Edison rested on its determination that Razzouk's conviction was for a "crime against property" within the meaning of the MVRA, making the payment order mandatory.

The court calculated the restitution that Razzouk owed Con Edison as follows:

> $5,902,661.00 for losses attributable to the defendant's bribery scheme; $193,668.01 for losses attributable to the defendant's faithless work; $771,021.50 for Con Edison's investigation costs; and [p]rejudgment interests on all of the above losses.

App'x 180.[4] The restitution that Razzouk owed to the IRS was comprised of back taxes due for tax years 2007, 2008, and 2009, as well as interest accrued on those amounts from their due dates through October 2012, when Razzouk filed amended returns.

[4] Under an agreement between Con Edison's and its insurer, National Union Insurance Co., $5,652,661 of the restitution payment was directed to the insurer as reimbursement for its earlier coverage of Con Edison's losses.

In this Opinion, we address the validity of various aspects of the district court's restitution order. We consider Razzouk's other challenges to his conviction and sentence in a summary order filed concurrently with this Opinion.

DISCUSSION

On appeal, Razzouk makes two types of attack on the restitution order. First, he contends that the district court erred as a matter of law by applying the MVRA to his bribery offense, urging that the MVRA does not support a restitution order to Con Edison. Second, he assails the district court's calculation of restitution owed to Con Edison.

Separately, the government supports vacatur of the restitution order and a remand in light of the Supreme Court's 2018 decision in *Lagos* to permit the district court to reconsider its inclusion of investigative costs incurred by Con Edison in the restitution order that addressed the utility's losses. Razzouk does not oppose.

I. Standard of Review

[1] [2] [3]We review a restitution order "deferentially, and we will reverse only for abuse of discretion." *United States v. Boccagna*, 450 F.3d 107, 113 (2d Cir. 2006).[5] To identify an abuse of discretion, "we must conclude that a challenged ruling rests on an error of law, a clearly erroneous finding of fact, or otherwise cannot be located within the range of permissible decisions." *United States v. Pearson*, 570 F.3d 480, 486 (2d Cir. 2009) (per curiam). With regard to loss amounts, "the MVRA requires only a reasonable approximation of losses supported by a sound methodology." *United States v. Gushlak*, 728 F.3d 184, 196 (2d Cir. 2013).

[5] Unless otherwise noted, our Opinion omits all alterations, citations, footnotes, and internal quotation marks in quoted text.

II. The Mandatory Victims Restitution Act

Razzouk first contends the district court erred when it determined that the MVRA ***186** applies to his conviction for bribery under 18 U.S.C. § 666(a)(1)(B). The MVRA requires that restitution be made by a defendant convicted of certain categories of crimes "in which an identifiable victim or victims has suffered a physical injury or pecuniary loss." 18 U.S.C. § 3663A(c)(1)(B). As relevant here, the statute reads as follows:

> This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges

> for, any offense--
>
> (A) that is--
>
> (i) a crime of violence, as defined in section 16;
>
> (ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;
>
> ...
>
> (B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

18 U.S.C. § 3663A(c)(1). As set forth above, subsection (ii) provides that one category of crime to which the MVRA applies is "offense[s] against property under this title [*i.e.*, title 18] ... including any offense committed by fraud or deceit." *Id.* § 3663A(c)(1)(A)(ii) (the "offense-against-property provision"). The MVRA does not define the phrase "offense against property."

A. *"Offenses against property" under the MVRA*

Razzouk observes that the text of § 666(a)(1)(B) does not include the term "property" and submits that the elements of bribery under § 666(a)(1)(B) do not necessarily implicate "property." He cites a district court opinion for the proposition (adopted by that court) that the "elements of the offense of bribery concerning programs receiving Federal funds, under 18 U.S.C. § 666(a)(1)(B), do not make it an offense against property, including one committed by fraud or deceit." *United States v. Adorno*, 950 F. Supp. 2d 426, 429 (E.D.N.Y. 2013). It follows, he reasons, that the MVRA does not apply to his bribery conviction and does not authorize the court to order restitution to the crime's victims.

[4]We now reject that argument. When determining whether the MVRA offense-against-property provision applies to a conviction, courts may consider the facts and circumstances of the crime that was committed to determine if it is an "offense against property" within the meaning of the MVRA. If those facts and circumstances implicate a crime against property, the MVRA requires the court to enter a related order of restitution. In Razzouk's case, consideration of those facts and circumstances leads to the conclusion that, as the district court determined, Razzouk's crime is covered by the MVRA's offense-against-property provision and he may be ordered to make restitution to the crime's victims.

At the threshold, we note that our Court has in the past assumed without deciding that courts may consider the facts of the crime of conviction in determining whether to apply the MVRA. *See, e.g.*, *United States v. Pescatore*, 637 F.3d 128, 139 (2d Cir. 2011) (reviewing facts of defendant's conduct rather than elements of offense of operating vehicle "chop shops" in violation of 18 U.S.C. § 2322 to determine if it is an "offense against property" that was "committed by fraud or deceit"); *United States v. Bengis*, 631 F.3d 33, 40 (2d Cir. 2011) (analyzing whether crimes of smuggling under 18 U.S.C. § 371 and violations of the Lacey Act, 16 U.S.C. § 3372(a)(2)(A), are ***187** offenses against property and concluding that "[t]he defendants' *conduct* in depriving South Africa of that revenue is, therefore, an offense against property." (emphasis added)). We have not answered the related "open question of whether the language 'committed by fraud or deceit' " in § 3663A(c)(1)(A)(ii) of the MVRA "refers to the elements of an offense or the manner in which the defendant commits the offense." *United States v. Battista*, 575 F.3d 226, 230–31 (2d Cir. 2009).

[5]But in assessing Razzouk's position we look first, of course, to the text of the MVRA. The offense-against-property provision refers to the way in which some offenses "against property" are "committed": thus, the statute's description of the category specifies that a crime against property "include[s] any offense committed by fraud or deceit." 18 U.S.C. § 3663A(c)(1)(A)(ii). The plain text of the statute thus suggests that the way the crime is carried out is relevant to its application. In *Taylor v. United States*, the Supreme Court long ago emphasized that a statute's use of the word "committed" suggests a focus on the manner of commission and stands in contrast to a reference to a conviction for a "generic" crime, which requires instead a focus on the crime's elements. 495 U.S. 575, 599–600, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990).[6] In light of this language, it followed in *Taylor* that the "the facts of each defendant's conduct" were irrelevant to the application of that statute. *Id.* at 601, 110 S.Ct. 2143.

[6] Thus, in *Taylor*, the Court stressed that the crime relevant there and defined by 18 U.S.C. § 924(e)(1), which provides more severe punishment for certain repeat offenders, "refers to 'a person who ... has three previous *convictions' for*—not a person *who has committed*—three previous violent felonies or drug offenses." *Id.* at 600, 110 S.Ct. 2143 (emphasis added).

In addition to using the past participle "committed" and referring to fraud and deceit as possible means of commission, the MVRA's description of "offenses against property" makes no mention of the elements of any generic crime and provides no other signal that examination of

such elements serves its purpose. The statute's approach to offenses against property thus differs markedly from its definition and treatment of another category of crime for which it requires restitution: that is, "crime[s] of violence, as defined in [18 U.S.C. §] 16." 18 U.S.C. § 3663A(c)(1)(A)(i). Section 16(a) of title 18, in turn, unmistakably uses an "elements" formulation, defining a "crime of violence" as one that has as "an *element* the use, attempted use, or threatened use of physical force against the person or property of another." *Id.* § 16(a) (emphasis added).[7] The contrast in ***188** these neighboring statutory sections, enacted in a single bill, thus highlights that Congress could have used such an "elements" formulation when it described an "offense against property"; that it did not suggests that we should treat the difference as intentional and significant. Although these signals are subtle, they suggest that a court may look to the manner in which a particular crime was committed to determine if it is an "offense against property" such as would trigger a restitution obligation under the MVRA.

7 In subsection (b), § 16 also provides that the phrase "crime of violence" includes "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b). Although no court appears to have considered § 16(b)'s constitutionality as incorporated into the MVRA, the Supreme Court held in *Sessions v. Dimaya*, —— U.S. ——, 138 S. Ct. 1204, 1215–16, 200 L.Ed.2d 549 (2018), that § 16(b) was unconstitutionally vague as incorporated into the definition of "aggravated felony" provided in the Immigration and Nationality Act. But, regardless of its constitutionality (which is not relevant here), this provision too—in effect when the MVRA was passed—uses language that contrasts markedly with the MVRA's offense-against-property phrase. It is language that in the past we interpreted to require application of the categorical approach: "Under the language of the statute, a § 16(b) 'crime of violence' is analyzed 'by its nature.' We believe that this language compels an analysis that is focused on the intrinsic nature of the offense rather than on the factual circumstances surrounding any particular violation." *Dalton v. Ashcroft*, 257 F.3d 200, 204 (2d Cir. 2001). In our view, the framing of § 16(b), too, thus highlights its difference from the construction we ascribe to the MVRA phrase "offense against property."

[6]This approach is in keeping, too, with the broad remedial purposes of the MVRA. As we have explained in the past, the statute is designed "to make victims of crime whole, to fully compensate these victims for their losses and to restore these victims to their original state of well-being." *United States v. Maynard*, 743 F.3d 374, 377–78 (2d Cir. 2014); *see also* S. Rep. No. 104-179, at 12–14 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924, 925–27 (describing MVRA's primary goal as "to ensure that the loss to crime victims is recognized, and that they receive the restitution that they are due."). To carry out such a sweeping directive and to ensure that victims are compensated for losses to their property, Congress could reasonably have intended that courts look to whether the crime in fact caused damage to a victim's interests in personal or other property so that the loss or damage could be estimated and payment of restitution ordered.[8] We see no reason to limit arbitrarily victims' compensation for property loss to those crimes—Hobbs Act robbery, for example—in which some action involving "property" is ordinarily referred to as an element.[9]

8 The statute lays out how restitution should be accomplished for "offense[s] resulting in damage to or loss or destruction of property of a victim of the offense," 18 U.S.C. § 3663A(b)(1), including return of the property or payment for the value of property lost.

9 The statutory definition of Hobbs Act robbery uses the term "property." 18 U.S.C. § 1951(b)(1) ("The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will ....").

In holding that the court may look to the facts and circumstances of the offense of conviction to determine if the MVRA authorizes a restitution order, we are in accord with those of our sister circuits that have addressed the question. *See United States v. Ritchie*, 858 F.3d 201, 210 (4th Cir. 2017) ("Congress could not have intended to exclude from the broad, mandatory reach of the MVRA those unfortunate victims who suffer property loss as a result of an offense that doesn't contain as an element a reference to 'property.' "); *United States v. Collins*, 854 F.3d 1324, 1334 (11th Cir. 2017) (declining to "apply the categorical approach" that would limit courts to looking at the elements of a crime); *see also United States v. Sawyer*, 825 F.3d 287, 292–93 (6th Cir. 2016) (analyzing, without discussion of the larger question, the manner in which the crime was committed).

Accordingly, in determining whether the MVRA requires Razzouk to make restitution for losses caused by his bribery offense under § 666(a)(1)(B), we look to the manner in which Razzouk committed the crime and the facts and circumstances of the crime.

B. *The facts and circumstances of Razzouk's bribery crime*

[7]In his plea colloquy, Razzouk admitted that his actions deprived Con Edison of a property interest—a pecuniary ***189** interest—in the form of payments that it made to Rudell for which Con Edison received no consideration. We have already determined that such a deprivation qualifies as one "against property": In *Bengis*, we held that a rock lobster smuggling scheme constituted an "offense against property" under the MVRA and supported a restitution order because "defendants' conduct deprived [the victim] of proceeds from the sale of the [smuggled goods], *i.e.*, money to which it was entitled by law." 631 F.3d at 40. Analogously, Razzouk deprived Con Edison of a property interest in its funds through his facilitation of its payments to Rudell for phantom work. On *de novo* review of this question of law and clear error review of the relevant factual determinations, we conclude that the district court made no error in determining that the MVRA applies to Razzouk's bribery crime against Con Edison and in awarding Con Edison restitution for its loss.[10]

[10] Razzouk's citation to *Adorno*, 950 F. Supp. 2d 426, which ruled that an offense under § 666(a)(1)(B) was not an "offense against property," as mentioned above, does not persuade us otherwise. In *Adorno*, the court determined on the record before it that "the extent to which [the defendant] was influenced [by the illegal payment], and the impact of such influence on [the victim], cannot be determined." *Id.* at 430. The *Adorno* court therefore declined to require restitution to the victim. In this case, in contrast, the harm to a Con Edison's property interest was all too well documented.

III. Calculation of Loss to Con Edison

Razzouk's second argument presents solely an issue of fact: whether the forensic auditors engaged by Con Edison and its insurer accurately calculated the loss to the utility that was caused by Razzouk's criminal conduct.

The accounting firm KPMG provided forensic auditing services to Con Edison in this matter, investigating eleven contracts performed by Rudell for Con Edison during the relevant period. Under those eleven contracts, KPMG determined, Con Edison paid Rudell close to $32 million. In its review, KPMG identified charges for work that was not performed; charges for duplicate work; and overcharges of various kinds. In these three categories, Rudell's improper charges totaled slightly over $6 million, according to KPMG's study.

Forensic accounting expert Grassi & Co. ("Grassi"), retained by Con Edison's insurer, National Insurance Co., also conducted a loss calculation. Grassi returned the figure ultimately relied on by the district court as representing the relevant loss: approximately $5.9 million, similar to but slightly below KPMG's estimate.

Razzouk offers no persuasive argument for the position that the district court clearly erred by adopting the Grassi calculation. Razzouk cites three instances of calculations, totaling approximately $189,000, as illustrative of fatal errors in the two forensic accounting analyses. The district court considered and rejected Razzouk's assertion of error, as do we, and for the same reasons: Razzouk's pleas that he had no control over certain payments or that the payments were accidentally made are persuasively rebutted by the record evidence.[11]

[11] For example, Razzouk complains that an approximately $38,000 payment was included in the restitution total even though he had no control over that project. The government showed that those with the requisite control reported to Razzouk, however, and the government also offered an email that showed that Rudell never performed the work for which it was paid $38,000.

Razzouk identifies no systematic errors in KPMG and Grassi's analyses, which almost ***190** perfectly overlap. We view the district court's estimate of Con Edison's losses, based on the Grassi analysis and generally consonant with KPMG's conclusion, to be a "reasonable approximation of losses supported by a sound methodology," *Gushlak*, 728 F.3d at 196. Apart from the question of investigative costs, discussed below, we identify no clear error in the district court's determination of the loss suffered by Con Edison as a basis for its restitution order.

IV. Investigative Costs

The government does not oppose a limited remand to allow the district court to analyze whether, under the Supreme Court's 2018 decision in *Lagos*, the district court's inclusion in the restitution order of $771,021.50 to cover costs incurred by Con Edison to investigate the crime was lawful. Appellee's Br. at 50. Razzouk makes no arguments regarding *Lagos*'s applicability. We agree with the government that a remand is appropriate.

The district court included $771,021.50 in investigative costs in the restitution total, ruling that "Con Edison is entitled to restitution ... for the costs that it incurred in

investigating the wrongdoing of Razzouk." App'x 178. In addition to restitution for losses caused by the crime, the MVRA requires "reimburse[ment]" to "the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. § 3663A(b)(4). In *Lagos*, the Supreme Court clarified the meaning of "investigations" and "proceedings" in this provision as pertaining only to "*government* investigations and criminal proceedings." *Lagos*, 138 S. Ct. at 1688 (emphasis added). It declined to decide whether the MVRA would require payment of investigative costs incurred by a victim "during a private investigation that was pursued at a government's invitation or request." *Id.* at 1690. The district court did not consider whether the government had invited the investigation or if the MVRA should apply to such an investigation.

[8]Accordingly, we vacate the district court's restitution order insofar as it covers investigative costs incurred by Con Edison, and we remand to the district court to consider in the first instance whether, and if so, how the limitations articulated in *Lagos* apply to this restitution order.[12]

[12] Razzouk makes two challenges to the district court's order that he make restitution to the IRS. Neither has merit. Razzouk argues first that he lawfully paid no tax on the bribe income reported in the amended returns that he filed in 2012 because, under 21 U.S.C. § 853(c), title to the money he received from Rudell vested immediately in the United States upon his ultimate forfeiture of the funds, relating back to the moment of his first receipt of those moneys. But, as the district court reasoned from the provision's terms and context, § 853(c) does not apply to Razzouk's restitution order because no relevant third party has or had an interest in the assets that were forfeited. App'x 253-54. It is such third-party interests, which are potentially superior to those of the government, that § 853(c) addresses. *See* 21 U.S.C. § 853(c) (entitled "Third party transfers" and establishing procedure to adjudicate rights regarding "property ... transferred to a person other than the defendant").
Razzouk also asserts that the government received notice in 2012 that he filed amended returns and, since it failed to object then, the government should be deemed to have waived its right under the Cooperation Agreement to seek restitution for previously unpaid taxes. But the Agreement provides that restitution related to the tax evasion charges will be "determined by the Court at sentencing." Gov. App'x 2. Since the provision specifies that restitution will be calculated—and, by implication, sought—at sentencing, we conclude that the district court correctly rejected Razzouk's waiver argument.

*191 CONCLUSION

For the foregoing reasons, the order of restitution is VACATED and the cause is REMANDED for further proceedings consistent with this Opinion.

All Citations

984 F.3d 181

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APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	11-CR-430 (ARR)
-against-	:	**OPINION & ORDER**
SASSINE RAZZOUK,	:	
Defendant.	:	

ROSS, United States District Judge:

In this bribery action, the Second Circuit has remanded my April 3, 2018 restitution order with instructions to reexamine awarding $771,021.50 in investigative costs to Consolidated Edison Company of New York, Inc. ("ConEd") in light of the Supreme Court's decision in *Lagos v. United States*, 138 S. Ct. 1684 (2018). Mandate 15–16, ECF No. 148; Restitution Order 17–19, ECF No. 84. The government argues that ConEd is still entitled to restitution for investigative costs after *Lagos*, Gov't's Br. 6–8, ECF No. 150, but defendant, Sassine Razzouk, disagrees, Def.'s Br. 3–6, ECF No. 152. For the following reasons, I decline to grant any restitution for ConEd's investigative costs.

BACKGROUND

On June 10, 2011, defendant, Sassine Razzouk, pleaded guilty to all counts of a four-count information charging him with accepting bribes, in violation of 18 U.S.C. § 666 (Count One), and tax evasion, in violation of 26 U.S.C. § 7201 (Counts Two through Four). Information, ECF No. 16; Minute Entry, ECF No. 18. His convictions stem from a bribery scheme to defraud his employer, ConEd. Restitution Order 1. As part of the scheme, Rodolfo Quiambao, the President

and CEO of Rudell & Associates Inc. ("Rudell"), an engineering and design firm, paid Mr. Razzouk $8,178,184.86 in bribes between January 2006 and January 2010 to obtain contracts with ConEd. *Id.* at 3. Mr. Quiambao recouped the costs of the bribes paid by overcharging ConEd for the work his firm performed. *Id.*

On April 3, 2018, I sentenced Mr. Razzouk to seventy-eight months' imprisonment[1] and ordered him to pay $6,867,350.51 in restitution to ConEd (and ConEd's insurer, the National Union Insurance Company ("National Union")), plus prejudgment interest. *Id.* at 1, 23; Crim. J. 3, ECF No. 86. This amount included $771,021.50 for ConEd's "investigation costs." Restitution Order 21. These costs relate to ConEd's hiring of the law firm Davis Polk & Wardwell LLP, which in turn retained the auditing firm of KPMG LLP, to conduct a forensic audit of work performed and invoices submitted by Rudell throughout the bribery scheme. *Id.* at 6. This internal investigation began after the announcement of Mr. Razzouk's arrest. *Id.* The KPMG audit was not the only one that reviewed ConEd's losses from the bribery scheme: National Union also commissioned an audit performed by Grassi & Co. *Id.* at 7–8.

I awarded restitution for ConEd's investigative costs under 18 U.S.C. § 3663A(b)(4), a provision of the Mandatory Victims Restitution Act ("MVRA"), which requires "reimburse[ment]" to "the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." In doing so, I relied on *United States v. Amato*, in which the Second Circuit affirmed restitution under this provision "for attorney's fees and

[1] On April 19, 2020, I granted Mr. Razzouk's motion for compassionate release. *See* Compassionate Release Order 11, ECF No. 136. I modified Mr. Razzouk's remaining sentence to thirty-six months' home confinement, followed by an additional twelve-month period of supervised release. *Id.* at 11–13.

accounting costs incurred by an internal investigation that uncovered fraud." Restitution Order 18 (citing 540 F.3d 153, 159 (2d Cir. 2008)).

ConEd originally had sought $3,060,360.09 relating to KPMG's audit, an amount that encompassed not only the cost of investigating Mr. Razzouk's wrongdoing but also that of investigating Mr. Quiambao's misconduct after Mr. Razzouk pleaded guilty. *Id*. I declined to include the costs of investigating Mr. Quiambao, finding that those expenses "were not necessary to investigating or prosecuting [Mr. Razzouk's] offenses of conviction" under the MVRA. *Id.* I also limited the costs of investigating Mr. Razzouk to those incurred before he pleaded guilty on June 10, 2011, finding that only those expenses could have been "necessary to investigating or prosecuting [Mr. Razzouk's] offenses of conviction"—as opposed to those of other defendants in related criminal cases. *Id.* at 18–19.

Mr. Razzouk later appealed several aspects of his convictions and sentence, including the restitution award to ConEd. Notice of Appeal, ECF No. 90. Meanwhile, nearly two months after I issued my restitution order, the Supreme Court decided *Lagos v. United States*, 138 S. Ct. 1684 (2018). There, the Supreme Court determined that when 18 U.S.C. § 3663A(b)(4) refers to "necessary" expenses "incurred during participation in the investigation or prosecution of the offense," "investigation" means only a government investigation, not a private one. *Lagos*, 138 S. Ct. at 1688. The Court left open the question of whether the statute "would cover [investigative] expenses incurred during a private investigation that was pursued at a government's invitation or request." *Id.* at 1690. Nevertheless, *Lagos* abrogated *Amato* to the extent that it affirmed restitution for private investigative costs without considering whether the government invited that investigation—the original basis for awarding ConEd investigative costs. *Id.* at 1687; Restitution Order 18. In response, the Second Circuit vacated Mr. Razzouk's restitution order insofar as it

awarded investigative costs to ConEd and remanded the issue in light of *Lagos*.[2] Mandate 16. Noting that I "did not consider whether the government had invited the investigation or if the MVRA should apply to such an investigation," the Second Circuit specifically instructed me to decide "whether, and if so, how the limitations articulated in *Lagos* apply to this restitution order." *Id.*

DISCUSSION

The government presents two arguments for why ConEd remains entitled to $771,021.50 for investigative costs under the MVRA after *Lagos*: (1) regardless of whether the government invited the KPMG audit, it became the "core evidence" grounding ConEd's restitution request and in that way was a "'necessary . . . expense[] incurred during participation in the investigation or prosecution'" of Mr. Razzouk; and in the alternative, (2) the investigative costs ConEd seeks were incurred "to provide assistance to the government in response to an invitation for help with [Mr. Razzouk's] active criminal prosecution." Gov't's Br. 6–8 (quoting 18 U.S.C. § 3663A(b)(4)).

In opposition, defendant argues that regardless of whether the government invited the KPMG audit, investigative costs no longer qualify as "other expenses incurred during participation in the investigation or prosecution of the offense" under 18 U.S.C. § 3663A(b)(4) after *Lagos*. Def.'s Br. 3–6. And even if they did, "there is no evidence that the expenses were incurred at the government's invitation or request." *Id.* at 3 (citation and quotation marks omitted).

I. "Other Expenses" Still Include Attorneys' Fees and Accounting Costs.

I turn first to defendant's threshold argument that investigative costs no longer qualify as "other expenses" recoverable under the MVRA after *Lagos*. As noted above, 18 U.S.C. §

[2] Given *Lagos*, I already had stayed my order granting restitution for ConEd's investigative costs pending Mr. Razzouk's appeal. *See United States v. Razzouk*, No. 11-CR-430 (ARR), 2018 WL 3574868, at *2 (E.D.N.Y. July 25, 2018).

3663A(b)(4) requires "reimburse[ment]" to "the victim for lost income and necessary child care, transportation, and *other expenses* incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." (emphasis added). In *Lagos*, the Supreme Court observed that § 3663A(b)(4) "says nothing about the kinds of expenses a victim would often incur when private investigations . . . are at issue, namely, the costs of hiring private investigators, attorneys, or accountants." 138 S. Ct. at 1688. Rather, the types of expenses enumerated in the statute—"lost income," "child care," and "transportation"—are "the kind of expenses that a victim would be likely to incur when he or she . . . misses work and travels to talk to government investigators, to participate in a government criminal investigation, or to testify before a grand jury or attend a criminal trial." *Id.*

Defendant claims these observations support defining "other expenses" in § 3663A(b)(4) to exclude the types of costs incurred in private investigations, such as attorneys' fees and accounting costs. Def.'s Br. 4–6. But before *Lagos*, the Second Circuit held that "other expenses" may encompass "attorney fees and accounting costs." *Amato*, 540 F.3d at 159; *see also United States v. Bahel*, 662 F.3d 610, 647 (2d Cir. 2011) ("Attorneys' fees are 'other expenses' that are properly included within a restitution award." (citing *Amato*, 540 F.3d at 159–60)). The Second Circuit reached this conclusion by analyzing "the plain language of the statute." *Amato*, 540 F.3d at 160. It found that the MVRA "gives the district courts broad authority to determine which of the victim's expenses may be appropriately included in a restitution order" and only limits that authority by requiring those expenses to be "necessary," "incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense," and "incurred by a 'victim.'" *Id.* (quoting 18 U.S.C. § 3663A(b)(4)). After setting out its plain-meaning reasoning, the Second Circuit rejected the defendant's argument that the *ejusdem generis*

canon of statutory interpretation compelled limiting the definition of "other expenses" to those resembling "lost income," "child care," and "transportation." *Id.* at 160–61. "Under this canon, general terms that follow specific ones are interpreted to embrace only objects of the same kind or class as the specific ones." *Id.* at 160. But the canon does not apply "when the specific terms preceding the general one do not themselves have a common attribute from which a 'kind or class' may be defined." *Id.* The Second Circuit found that "no relevant common attribute link[s] lost income, child care expenses, and transportation expenses," and thus the *ejusdem generis* canon could not guide its interpretation of § 3663A(b)(4). *Id.* at 160–61.

Lagos does not explicitly invalidate the Second Circuit's plain-meaning analysis. The Supreme Court did not interpret the scope of "other expenses" in *Lagos* but only interpreted the scope of "investigation." 138 S. Ct. at 1687–88. Indeed, the Court left open the question of whether a victim could recover costs "incurred during a private investigation that was pursued at a government's invitation or request," *id.* at 1690, implying that *Lagos* does not foreclose victims from *ever* recovering the types of expenses associated with private investigations under § 3663A(b)(4). Further, at least two district courts in this circuit to address restitution for attorneys' fees after *Lagos* awarded such costs. *See United States v. Afriyie*, No. 16-CR-377 (PAE), 2020 WL 634425, at *1–2 (S.D.N.Y. Feb. 11, 2020); *United States v. Napout*, No. 15-CR-252 (PKC), 2018 WL 6106702, at *4 (E.D.N.Y. Nov. 20, 2018). Thus, *Lagos* does not abrogate *Amato*'s interpretation of "other expenses," and that interpretation remains binding on me.

Defendant's only support for his position, *United States v. Koutsostamatis*, 956 F.3d 301 (5th Cir. 2020), is unpersuasive. There, the Fifth Circuit relied on *Lagos* to hold that "other expenses" does not include "a company's own expenses for investigative services," even if they were incurred as "part of participation in a government investigation." *Id.* at 307. Relying in part

on the *ejusdem generis* canon, the Fifth Circuit reasoned that "other expenses" must be limited to "the kind of expenses that a victim would be likely to incur when he or she . . . misses work"—the unifying theme the *Lagos* Court identified among the enumerated covered expenses in the MVRA. *Id.* at 305 (quoting *Lagos*, 138 S. Ct. at 168). It then concluded that the requested expenses for a "digital security team and outside contractors are not remotely similar to lost income, child care, or transportation," and thus fall outside the scope of § 3663A(b)(4). *Id.* at 308.

The Fifth Circuit's reasoning, however, does not persuade me that *Amato*'s interpretation of "other expenses" no longer is good law in this circuit. Although *Koutsostamatis* determined that *Lagos* supports applying *ejusdem generis* to § 3663A(b)(4), *Amato*'s interpretation of "other expenses" did not turn on the Second Circuit's rejection of *ejusdem generis* but on the court's plain-meaning analysis, which remains undisturbed. *See supra*. Even if *Lagos* invalidated the Second Circuit's reasoning for not applying *ejusdem generis*, that canon "is simply a helpful guide to legislative intent, not a dispositive one." *Amato*, 540 F.3d at 160. Therefore, *Koutsostamatis* does not support disregarding *Amato*'s interpretation of "other expenses" to include attorneys' fees and accounting costs, and I reject defendant's contrary interpretation.

II. The KPMG Audit Was Not a "Necessary . . . Expense[] Incurred During" ConEd's "Participation" in Restitution Proceedings.

The government claims ConEd's investigative costs remain recoverable under § 3663A(b)(4) because, as the "core evidence" of the company's losses, the KMPG audit was a "necessary . . . expense[] incurred during" ConEd's "participation" in restitution proceedings. Gov't's Br. 6–7. In support, the government invokes two post-*Lagos* cases in which district courts in this circuit held that "the fees and expenses a victim incurs to participate in the process of setting restitution textually qualify as 'expenses incurred during participation in the investigation or prosecution of the offense.'" *Afriyie*, 2020 WL 634425, at *3 (quoting 18 U.S.C. § 3663A(b)(4));

Napout, 2018 WL 6106702, at *4 ("[L]egal fees incurred by [the victim] to prepare its restitution request were necessary to its attend[ance] [at] th[e] post-verdict restitution proceeding (for which the Court permitted briefing and ordered certain disclosures of billing records) . . . ." (citation and quotation marks omitted)).

Contrary to the government's arguments, however, these cases do not support awarding restitution for ConEd's investigative costs here. First, the costs covered in *Afriyie* and *Napout* were incurred during the months preceding a restitution hearing for the specific purpose of preparing for those proceedings. *See Afriyie*, 2020 WL 634425, at *2–3; *Napout*, 2018 WL 6106702, at *4. By contrast, ConEd incurred the requested expenses relating to the KPMG audit between January 2011 and April 2012—six years before it participated in restitution proceedings. Restitution Order 6, 19. Just because these expenses later became relevant to restitution proceedings does not mean they were incurred *during* participation in those proceedings. Second, the costs covered in *Afriyie* and *Napout* were only those incurred "at the government's request." *Napout*, 2018 WL 6106702, at *4; *Afriyie*, 2020 WL 634425, at *2. In *Napout*, the victim was compensated for attorneys' fees relating to preparing a witness the government called to testify at the restitution hearing and compiling its restitution request "for which the Court permitted briefing and ordered certain disclosures of billing records." 2018 WL 6106702, at *2, *4 (citation omitted). Similarly, in *Afriyie*, the victim was compensated for "representing [the victim] in connection with post-verdict restitution proceedings," for which the government invited the victim's submissions. 2020 WL 634425, at *1, *2; Letter on Behalf of MSD Regarding Restitution, *id.* (No. 16-CR-377 (PAE)), ECF No. 183-2. These limitations align with *Lagos*'s holding that § 3663A(b)(4) "does not cover the costs of a private investigation that the victim chooses on its own to conduct." 138 S. Ct. at 1690. While the Court reached this conclusion only through interpreting the scope of the term

"investigation" in § 3663A(b)(4), it is reasonable to extend the same constraint to the scope of "prosecution." Just as a victim cannot recover expenses incurred during participation in "a private investigation that [it] chooses on its own to conduct," *Lagos*, 138 S. Ct. at 1690, even if that investigation ultimately helps the government's, it should not be able to recover other expenses it "chooses on its own" to incur, *id.*, even if they later become part of its participation in the prosecution. Here, as discussed in the next section, there is no evidence that the government invited or requested the KPMG audit, so ConEd cannot recover these costs as incurred during its participation in the prosecution.

Even if I credited that ConEd's investigative costs were incurred during the company's participation in restitution proceedings, the government has not shown that the KMPG audit was a "necessary" expense. The Second Circuit "takes a broad view of what expenses are 'necessary'" under § 3663A(b)(4). *United States v. Maynard*, 743 F.3d 374, 381 (2d Cir. 2014) (quoting *United States v. Papagno*, 639 F.3d 1093, 1101 (D.C. Cir. 2011)). It has defined such expenses as those "the victim was required to incur to advance the investigation or prosecution of the offense." *Id.* The government claims the KPMG audit was necessary to ConEd's participation in restitution proceedings because it was "the core evidence of the losses suffered by ConEd" and "the core evidence justifying the $5,902,661 restitution award to ConEd." Gov't's Br. 6. But the government does not explain why that evidence was *required* to advance restitution proceedings. *Maynard*, 743 F.3d at 381. ConEd made an independent choice to commission the KPMG audit upon Mr. Razzouk's arrest, long before restitution proceedings commenced. Restitution Order 6. It could have based its restitution request on the Grassi & Co. audit, commissioned by National Union, which the government admits "largely confirmed KPMG's conclusions." Def.'s Br. 6. And I could have relied on that audit as the core evidence to calculate ConEd's losses with little difference in

the outcome.[3]

Finally, accepting the government's argument would saddle district courts with the "significant administrative burdens" the Supreme Court sought to avoid in *Lagos* when it limited the definition of "investigation." 138 S. Ct. at 1689. By the government's reading of § 3663A(b)(4), "in cases involving multimillion dollar investigation expenses for teams of lawyers and accountants," district courts still would have to determine "whether each witness interview and each set of documents reviewed was really 'necessary'"—just for restitution proceedings instead of for a private investigation. *Id.* It is doubtful that "Congress intended, in making this restitution mandatory, to require courts to resolve these potentially time-consuming controversies as part of criminal sentencing—particularly once one realizes that few victims are likely to benefit because more than 90% of criminal restitution is never collected." *Id.*

For these reasons, I cannot award ConEd investigative costs as necessary to its participation in restitution proceedings.

III. KMPG's Audit Was Not Invited or Requested by the Government.

Lastly, the government claims ConEd's investigative costs were sufficiently tied to its own investigation to remain recoverable after *Lagos*. Gov't's Br. 7–8. As noted above, *Lagos* left open the question of whether § 3663A(b)(4) mandates restitution for costs incurred in private investigations requested by the government. 138 S. Ct. at 1690. After *Lagos*, district courts in this circuit have interpreted the statute to require restitution for "investigatory activities that the government expressly and specifically 'invited or requested.'" *Napout*, 2018 WL 6106702, at *4; *Afriyie*, 2020 WL 634425, at *2.

[3] Further, the fact that the KPMG audit helped ConEd "learn how much it overpaid [the defendant's co-conspirator]," Gov't's Br. 7, does not show that it was required to calculate *Mr. Razzouk's* restitution.

Here, I had limited ConEd's investigative costs only to those incurred between Mr. Razzouk's arrest and his guilty plea. Restitution Order 18–19. The government claims these costs are still covered post-*Lagos* because they were "incurred during a time period in which the government had invited assistance from the victim and, by extension, the victim's forensic accounting firm to further an investigation of a defendant who had been arrested, but not yet indicted." Gov't's Br. 8. But generally "invit[ing]" ConEd's "assistance," *id.*, does not show that the government "expressly and specifically invited or requested" the KPMG audit.[4] *Napout*, 2018 WL 6106702, at *4. Nor does the fact that the KMPG audit occurred "during a time period" in which the government had sought ConEd's general assistance. Gov't's Br. 8. While the government has offered to provide "additional, more specific information regarding the interactions between the government and ConEd and KPMG," *id.* at 8 n.5, if the government could demonstrate that it "expressly and specifically" requested the KPMG audit, *Napout*, 2018 WL 6106702, at *4, it would have done so by now.

Indeed, ConEd's original brief reveals that the company commissioned the KPMG audit on its own. ConEd stated that "[a]fter Razzouk's arrest, Con Edison turned to KPMG to continue its investigation by conducting a forensic audit . . . . That forensic audit helped the Government and Con Edison to learn how Rudell carried out its criminal scheme. That knowledge contributed to the Government's successful prosecution of Razzouk." ConEd Br. 20, ECF No. 53-1. Helping and contributing to the government's investigation are not enough to trigger mandatory restitution under § 3663A(b)(4). *See Lagos*, 138 S. Ct. at 1690 (holding that a victim's "shar[ing] with the Government the information that its private investigation uncovered" was insufficient to render

[4] Defendant asserts that ConEd commissioned the KPMG audit because of "National Union's prosecution of a civil suit against the defendant, his family and Rudell & Associates." Def.'s Br. 3.

investigative costs recoverable under the MVRA). Without more, ConEd's investigative costs are not recoverable.

CONCLUSION

For the foregoing reasons, I decline to award investigative costs to ConEd under the MVRA. An amended judgment will follow.

SO ORDERED.

/s/
Allyne R. Ross
United States District Judge

Dated: April 15, 2021
Brooklyn, New York

APPENDIX C

18-1395
United States v. Razzouk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of October, two thousand twenty.

PRESENT:

JOHN M. WALKER, JR.,
SUSAN L. CARNEY,
Circuit Judges,
JOHN G. KOELTL,
District Judge.[*]

UNITED STATES OF AMERICA,

Appellee,

v. No. 18-1395

SASSINE RAZZOUK,

Defendant - Appellant.

FOR DEFENDANT-APPELLANT: STEVE ZISSOU, ESQ., Bayside, NY.

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[*] Judge John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

FOR APPELLEE: FRANK TURNER BUFORD (David C. James, Claire S. Kedeshian, *on the brief*), *for* Richard P. Donoghue, United States Attorney for the Eastern District of New York, Brooklyn, NY.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Ross, *J.*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on April 25, 2018, is **AFFIRMED** except insofar as it orders restitution; the restitution order is vacated and the cause remanded pursuant to an Opinion filed concurrently with this Order.

In 2011, acting pursuant to his agreement with the government (the "Cooperation Agreement"), Defendant-Appellant Sassine Razzouk entered a plea of guilty to one count of bribery in violation of 18 U.S.C. § 666(a)(1)(B) and three counts of tax evasion in violation of 26 U.S.C. § 7201. The prosecution and plea stemmed from a scheme that Razzouk (as he admitted) engaged in from 2007 until 2011: as a manager at Consolidated Edison ("Con Edison"), Razzouk accepted payments from Rodolfo Quiambao in return for facilitating Con Edison's direction of work and overpayments to Quiambao's contracting firm, Rudell & Associates, Inc. ("Rudell").

In 2015, while still subject to the Cooperation Agreement and before his sentencing, Razzouk met with Quiambao, disclosed his cooperation with the government, and proposed that he (Razzouk) testify falsely at Quiambao's upcoming trial on related bribery charges. Razzouk's plan was that he would swear that Quiambao's payments to Razzouk were for overseas consulting work and not bribes related to his manipulations of Con Edison's contracting process. Unbeknownst to Razzouk, the conversation was recorded by Quiambao, who then provided the recording to the government. Thereafter, the government declined to recommend to the district court that Razzouk receive a three-point reduction for "acceptance of responsibility" under the U.S. Sentencing Guidelines § 3E1.1 or to submit a letter under Guideline § 5K1.1 in which it would recommend that Razzouk receive a

sentence below his Guidelines sentence, contrary to the contingent understanding set forth in the Cooperation Agreement.

On March 30, 2018, just four days before his sentencing proceedings and nearly seven years after entering his guilty plea, Razzouk unsuccessfully sought the district court's leave to withdraw his plea. In April 2018, the district court entered a judgment convicting Razzouk of the charged counts of bribery and tax evasion, and sentencing him primarily to 78 months' incarceration and ordering him to make two restitution payments: first, of approximately $6.9 million, to Con Edison, for losses calculated by the court to have been incurred by the company as a result of Razzouk's crime, and second, approximately $2 million to the Internal Revenue Service ("IRS") in unpaid taxes and interest. Razzouk timely appealed.

On appeal, Razzouk challenges the following rulings of the district court: (1) its denial of his motion to withdraw his plea; (2) its decision not to require the government to comply with sentencing-related obligations stated in the Cooperation Agreement; (3) its decision at sentencing not to conduct a full evidentiary hearing on certain matters; (4) its factual findings that he accepted payments from Quiambao and Rudell in excess of $3.5 million and that he did not accept responsibility for his crimes; (5) its order that he pay restitution to Con Edison; and (6) its order that he pay restitution to the IRS. We address issues (1)–(4) here, and address the remaining two issues in an Opinion published concurrently with this Order. We assume the parties' familiarity with the underlying facts, procedural history, and arguments on appeal, to which we refer only as necessary to explain our decision to affirm.

1. *Motion to Withdraw Guilty Plea*

The Federal Rules of Criminal Procedure allow a defendant to "withdraw a plea of guilty . . . after the court accepts the plea, but before it imposes sentence[,] if . . . the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d). Razzouk argues that the district court erred by denying his motion to withdraw his guilty plea to the bribery charge. He asserts that he showed a "fair and just reason" for his request because, in his view, his 2011 plea allocution provided an inadequate factual basis for

his plea. *See* Fed. R. Crim. P. 11(b)(3) (requiring district court to "determine that there is a factual basis" for a guilty plea before accepting plea). We "review for an abuse of discretion [the] district court's decision that a defendant's factual admissions support conviction on the charge to which he has pleaded guilty." *United States v. Adams*, 448 F.3d 492, 498 (2d Cir. 2006).[1]

To support a conviction under the bribery statute, the record must establish that the defendant

> corruptly solicit[ed] or demand[ed] for the benefit of any person, or accept[ed] or agree[ed] to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more.

18 U.S.C. § 666(a)(1)(B). Razzouk argues that the record inadequately supports the statute's corrupt intent element.

We disagree. In his plea allocution, Razzouk stated that he "accepted United State[s] currency from Rudel[l] & Associate[s]" and that he received "payments." App'x 51. He further acknowledged that he "received these payments in part with the intent to influence with respect to awarding jobs [sic] to Rudel[l] in excess of $5,000." *Id.* He further described his quid pro quo arrangement, stating that he "provided benefit" to Rudell including, "among other things," "additional Con Edison work, assisting them with bids and approving payment to Rudel[l] & Associates in contracts with Con Edison for things I was not entitled to."[2] *Id.* On abuse of discretion review, we identify no error in the district court's ruling that

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[1] Unless otherwise noted, our Summary Order omits all alterations, citations, footnotes, and internal quotation marks in quoted text.

[2] Razzouk maintains that a phrase he used in the allocution—"for things I was not entitled to"—is too vague to provide a basis for determining that he accepted "anything of value," as required by § 666(a)(1)(B). We are not persuaded: his statements regarding his receipt of "United State[s] currency" and "payments" were sufficient to meet the "anything of value" element set forth in that statutory provision.

this allocution provided an adequate basis for the requisite finding of corrupt intent. Razzouk therefore gave no "fair and just reason" for withdrawing his guilty plea.

2. *Alleged Government Breach of Cooperation Agreement*

Razzouk next submits that, at sentencing, the government breached the Cooperation Agreement by opposing a three-level downward adjustment of his offense level in recognition of his acceptance of responsibility. He urges that, as a result, he is entitled to resentencing. In response, the government maintains that its obligations under the Cooperation Agreement were extinguished in 2015 when Razzouk proposed to Quiambao that he provide false testimony in Quiambao's prosecution, and when by his actions he revealed to Quiambao his prior cooperation with the government, a revelation that contravened the Cooperation Agreement.

The district court adopted the government's view, describing Razzouk's actions as a "determination to commit and suborn perjury." App'x 231. We review the interpretation of a plea agreement "de novo and in accordance with principles of contract law." *United States v. Riera*, 298 F.3d 128, 133 (2d Cir. 2002).

Paragraph 3(c) of the Cooperation Agreement obligates Razzouk "not to reveal his cooperation, or any information derived therefrom, to any third party without prior consent of the Office." Gov't App'x 4. Paragraph 8 then provides in relevant part:

> Should it be judged by the Office that the defendant has failed to cooperate fully, has intentionally given false, misleading or incomplete information or testimony, has committed or attempted to commit any further crimes, or has otherwise violated any provision of this agreement, *the defendant will not be released from his plea of guilty but this Office will be released from its obligations under this agreement, including (a) not to oppose a downward adjustment of three levels for acceptance of responsibility* . . . .

Id. at 7 (emphasis added).

We conclude that Razzouk breached the Cooperation Agreement by "reveal[ing] his cooperation or any information derived therefrom" to Quiambao without prior consent of the Office, and thereby altered his relationship with the government as described in paragraph 8. *Id.* at 4, 7. In their 2015 recorded conversation, for example, Razzouk told

Quiambao, "I already met with them over maybe ten times, okay? What do they want? They want to me say something that was—bring you down." Gov. App'x 27. Quiambao reasonably could have inferred Razzouk's cooperation from this statement. Razzouk also indicated that he was cooperating with the government to testify at Quiambao's trial by stating, for example, "[the prosecutor is] back and since the trial is going to be in March, so [the prosecutors are] going to call me in January so I can go and prep for the trial." *Id.* at 34. Indeed, it is difficult to interpret these statements other than as revealing to Quiambao Razzouk's ongoing cooperation with the government and thus contravening paragraph 3(c). In accordance with the Cooperation Agreement's paragraph 8, then, these acts released the government from its obligation not to oppose a three-level downward adjustment for acceptance of responsibility.[3]

Razzouk argues further that, setting aside the Cooperation Agreement's written terms, the government improperly reneged on an oral promise made to him after the 2015 meeting that, notwithstanding his breach, the government would not oppose the three-level adjustment. He urges that the government thus revived the Cooperation Agreement in this regard.

Razzouk cites no authority in support of this position and we are aware of none. Without a "specific agreement, the decision by the prosecutor to forego [sic] a downward departure motion in a particular case is not subject to judicial review at all." *United States v. Rexach*, 896 F.2d 710, 713 (2d Cir. 1990). We conclude therefore that the government was

[3] Additionally, the district court could have found by a preponderance of the evidence that Razzouk breached the Cooperation Agreement on a different ground: Razzouk's actions could easily be deemed a "fail[ure] to cooperate fully" under paragraph 8 of the Cooperation Agreement. Gov. App'x 7. Even if Razzouk's statements could be seen as falling short of a complete revelation that he was cooperating, the failure "to cooperate fully" provides an adequate basis for finding a breach by Razzouk that relieved the government of its undertaking. Moreover, as the district court concluded, Razzouk attempted to suborn perjury by Quiambao, which violated the provision of the Cooperation Agreement that prohibited Razzouk from attempting to commit any further crimes.

relieved of its obligations regarding Razzouk's sentencing adjustments by operation of paragraph 8 of the Cooperation Agreement. Resentencing is not required.[4]

3. *Denial of Request for Evidentiary Hearing*

Razzouk next advances the theory that the district court erred by declining to hold a full evidentiary hearing regarding Razzouk's alleged breach of the Cooperation Agreement. On that ground, he seeks a remand. In response, the government correctly notes that, during the sentencing proceedings, Razzouk never requested a hearing regarding his alleged breach of the Cooperation Agreement. Instead, on the day of sentencing, Razzouk sought a hearing that would enable him to present evidence of his close relationship with Quiambao and about their work together abroad. App'x 192-95. The district court allowed Razzouk to testify in that regard.

District courts have "broad discretion as to what types of procedure are needed at a sentencing proceeding for determination of relevant disputed facts. The discretion of a sentencing court is similarly broad either as to the kind of information it may consider, or the source from which it may come. We review such determinations for an abuse of discretion." *United States v. Duverge Perez*, 295 F.3d 249, 254 (2d Cir. 2002).

We discern no abuse of discretion here. His request was framed other than as Razzouk presents it on appeal: not a "full evidentiary hearing," but a request—which was granted—to present his testimony about his relationship with Quiambao and their work abroad. (Indeed, having heard this testimony, the court later found it not credible.) Razzouk did not request the hearing that he now argues he should have had. We therefore reject his argument.

[4] We need not address Razzouk's allegations of the government's bad faith, as they were raised for the first time in his reply brief. *Bolmer v. Oliveira*, 594 F.3d 134, 145 (2d Cir. 2010) ("We decline to consider this argument as it was raised for the first time in Oliveira's reply brief."). We note, however, that in light of his own actions Razzouk is ill-placed to argue bad faith, and in any event the record lends little credence to his charges against the government.

4. *Sentencing for Bribery*

Also with regard to his sentencing, Razzouk contests (1) the district court's calculation that the value of the payments made to him exceeded $3.5 million, resulting in an 18-level increase to his offense level under Guidelines §§ 2B1.1 and 2C1.1(b)(2), and (2) the court's rejection (regardless of the government's position) of any downward adjustment for acceptance of responsibility under Guideline § 3E1.1.

a. *18-Level Enhancement.* The Court reviews *de novo* a district court's application of the Guidelines to the facts. *United States v. Lewis*, 93 F.3d 1075, 1079 (2d Cir. 1996). Razzouk challenges the 18-level enhancement, purporting to identify error in the district court's finding that the loss to Con Edison exceeded $3.5 million based on two accounting firms' calculations. This argument is based on a misunderstanding, however, about the operation of the Guidelines. The Guidelines allow any of the following to be used as the basis for the sentencing calculation for bribery: the "value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest." U.S.S.G. § 2C1.1(b)(2). The district court based the 18-level enhancement on the total of "Quiambao's bribery payments to Razzouk," App'x 227—*i.e.*, the "value of the payment[s]"—and not on the estimate of loss to Con Edison on which restitution was based. Therefore, Razzouk's arguments regarding loss amount have no purchase here.

b. *Three-Level Downward Adjustment.* As to a three-level downward adjustment under U.S.S.G. § 3E1.1 for accepting responsibility, "[w]hether or not a defendant has accepted responsibility for a crime is a factual question. A district court's determination in this regard should not be disturbed unless it is without foundation." *United States v. Irabor*, 894 F.2d 554, 557 (2d Cir. 1990). Razzouk insists that he earned the adjustment and the district court committed clear error by rejecting it.

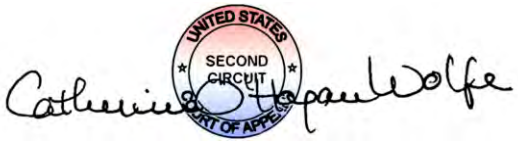
We are not persuaded. At sentencing, and in his objections to the presentence report, Razzouk made claims that were inconsistent with his guilty plea and with his statements at

proffer sessions with the government. The district court had an ample foundation for finding that Razzouk did not merit a reduction for acceptance of responsibility. It committed no clear error in its denial.

* * *

We have considered Razzouk's remaining arguments and conclude that they are without merit. The judgment of the district court is affirmed except insofar as it orders restitution; the restitution order is vacated and the cause remanded pursuant to an Opinion filed concurrently with this Order.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	: 11-CR-00430(ARR)
	:
	:
-against-	: United States Courthouse
	: Brooklyn, New York
	:
	:
	: Tuesday, April 3, 2018
SASSINE RAZZOUK,	: 11:00 a.m.
	:
Defendant.	:
	:

- - - - - - - - - - - - - - - - X

TRANSCRIPT OF CRIMINAL CAUSE FOR SENTENCING
BEFORE THE HONORABLE ALLYNE R. ROSS
UNITED STATES SENIOR DISTRICT JUDGE

A P P E A R A N C E S:

For the Government: RICHARD DONOGHUE, ESQ.
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BY: STEVE ZISSOU, ESQ.

Court Reporter: Stacy A. Mace, RMR, CRR
Official Court Reporter
E-mail: SMaceRPR@gmail.com

Proceedings recorded by computerized stenography. Transcript produced by Computer-aided Transcription.

(In open court.)

THE COURTROOM DEPUTY: United States of America against Razzouk, docket number is 11-430.

Counsel, please state your name for the record.

MR. TUCHMANN: Paul Tuchmann for the United States. Good morning, Your Honor.

THE COURT: Good morning.

MR. TUCHMANN: With me --

MS. KEDESHIAN: Claire Kedeshian.

MR. TUCHMANN: -- Claire Kedeshian also from our office, and Jaime Turton from the Probation Department is at counsel table as well.

MR. ZISSOU: Mr. Razzouk is present, and the counsel Steve Zissou. Good morning.

I am joined by our third-year law student who has been working on this case. Her name is Sydney Spinner. With your permission she is going to assist us this morning.

THE COURT: That's fine.

MR. ZISSOU: Judge, I beg your pardon. Before we begin I just wanted to give our condolences for the loss of your colleague over the weekend, Judge Wexler, who was a great man.

THE COURT: Before we proceed to sentencing, I want to address defense counsel's motions for specific performance of defendant's plea agreement and to vacate defendant's guilty

plea to Count One of the Information.

The history of this prosecution is a bizarre and tortured one. Defendant, a long time section manager at Con Edison's Electrical Control Systems Design Section, pled guilty to acceptance of bribes in violation of 18 United States Code Section 666(a)(1)(B) and three counts of tax evasion in violation of 26 United States Code Section 7201, pursuant to a cooperation agreement. As part of his cooperation, Razzouk agreed to be debriefed and testify truthfully concerning bribes that he received from Rodolfo Quiambao, the president and CEO of Rudell and Associates, Inc., an engineering and design firm that contracted work from Con Edison. Only months before the commence of Quiambao's trial, however, Razzouk breached his cooperation agreement by both proposing in a conversation recorded by Quiambao that he would testify falsely at Quiambao's trial and in the same conversation by importuning Quiambao to testify to the same falsehood. As a result, the Government elected to withhold any 5K letter from Razzouk, and with respect to Razzouk's advisory sentencing guidelines urges that an obstruction of justice enhancement be imposed and that all points for acceptance of responsibility be withheld.

Defense counsel asks that I order specific performance of the plea agreement or, in the alternative, issue an order vacating the defendant's guilty plea on the

ground that the Government breached the plea agreement. I will do neither because the Government did not breach the plea agreement, the defendant did. The defendant breached his cooperation agreement when he met with Quiambao and offered to perjure himself at Quiambao's trial by violating the terms of the cooperation agreement. Razzouk, not the Government, caused the breach, thereby freeing the Government from its contingent obligations under the plea agreement.

Regardless, and contrary to defendant's assertions, the Government has communicated to me the magnitude of defendant's cooperation and I am fully aware that his cooperation to some extent contributed to the successful prosecution of others. I view that cooperation as only marginally mitigating, however, given defendant's subsequent acts that eviscerated the value to the Government of the bulk of his cooperation.

With regard to defendant's argument that the Government breached its promise not to oppose a three-level reduction for acceptance of responsibility, the Government was not obligated to advocate for a reduction once the defendant breached the agreement. That's Exhibit F, page 7.

In addition, I agree with the Government that it is incomprehensible that the defendant insists on entitlement to reduction for acceptance for responsibility when in his objections to the pre-sentence report and his subsequent

submissions he denies responsibility for the very crimes to which he pled guilty. Defendant's motion for the specific performance of the plea agreement is, therefore, denied.

Finally, as recently as two business days ago Razzouk proffered yet another rationale to avoid responsibility for his conduct. Specifically, he now urges that his guilty plea allocution before Judge Mauskopf to Count One of the Information, the bribery count, lacked factual basis and that his conviction of that count must, therefore, be vacated. The argument is spurious. Under Title 18 United States Code Section 666(a)(1)(B) bribery in violation of the statute is the acceptance of money as a quid pro quo with the attempt to be influenced in connection with the business of Con Edison. At his guilty plea allocution Razzouk attested that during the period Rudell acted as a contractor for Con Ed. Razzouk, who oversaw the competitive bidding system by which Con Ed awarded certain contracts "accepted United States currency from Rudell" and "received these payments with the intent to influence the awarding of jobs to Rudell."

That Razzouk may have attempted to mitigate the degree to which his actions were criminal by qualifying his expressed intent with the phrase "in part" does not undermine his acknowledgement that he accepted money with corrupt intent to favor Rudell in its business with Con Ed in violation of the statute.

Specifically, Razzouk explained he "provided benefits to Rudell by, among other things, providing them with additional Con Edison work, assisting them with bids, and approving payment to Rudell for things he was not entitled to approve. Placed in context, it is plain that his use of the word things refers to aspects of work done by Rudell that Razzouk was not entitled to approve. It does not refer to things Razzouk received in exchange for benefits he provided Rudell. It is also clear from his allocution that Razzouk acknowledged acting with the requisite mens rea in violation of the statute.

I, therefore, reject Razzouk's challenge to the sufficiency of his guilty plea.

Turning to the sentence, I have received, obviously, the pre-sentence report; a September 25th, 2017 letter from you, Mr. Zissou; an October 11, 2017 letter from the Government; a December 6th, 2017 letter from you, with attachments; a February 20th, 2018 letter from the Government with attachments; a March 5th, 2018 letter from you; a March 8th, 2018 letter from the Government with attachments; a March 13th, 2018 letter from the Government; and a March 30th, 2018 letter from you, as well as, and I am just going to talk about some of the letters here because the exhibits were too voluminous to go through with you, but all of the exhibits I have; a December 1st, 2017 letter from the Government, this is

pertaining to restitution; a memorandum of law in support of Con Edison's request for restitution from Sassine Razzouk; defendant's memorandum of law in connection with restitution; a January 16, 2018 reply from the Government; a reply memorandum of law in further support of Con Edison's request for restitution from Sassine Razzouk; and a letter dated November 30, 2017 from National Union. And, of course, everything else that came along with that.

Mr. Zissou, I am sure you have had ample opportunity to review all of that with your client?

MR. ZISSOU: I have, Your Honor.

THE COURT: Mr. Razzouk, are you satisfied you have had plenty of time to go over with Mr. Zissou the documents to which I have referred and everything else that you believe relates to your sentence?

THE DEFENDANT: (No response.)

THE COURT: Did you not understand me? Do you want me to repeat that?

THE DEFENDANT: Would you, please?

THE COURT: Okay. I want to make sure that you have had an opportunity to review with your lawyer the documents that I just listed and everything else that you believe is pertinent to your sentence here.

MR. ZISSOU: Well, I should answer that, Judge. He's had an opportunity to review everything you've just

described, but insofar as pertinent to his sentencing, as Your Honor knows we've long made a demand for the job folders from Con Edison and that that request has not been complied with.

So I think if Mr. Razzouk were standing here he would be saying to you, Look, we really need those job folders to be able to analyze --

THE COURT: Apart from the job folders, have you had a full opportunity?

THE DEFENDANT: Not really.

THE COURT: I'm sorry?

THE DEFENDANT: Not really, no.

THE COURT: No?

THE DEFENDANT: No.

THE COURT: You have not had time --

MR. ZISSOU: He said no, he doesn't need -- I'm sorry. What were you saying? What did you say?

THE DEFENDANT: Not really.

MR. ZISSOU: Not really what?

THE DEFENDANT: I didn't have time.

MR. ZISSOU: The job folders?

THE DEFENDANT: Yes.

THE COURT: I think she said aside from the job folders.

THE DEFENDANT: No, aside from the job folder, I discussed everything with my lawyer.

THE COURT: I have to assume, because I have received so much on this subject that the letters have covered everybody's arguments on the advisory guidelines. Is that right?

MR. TUCHMANN: Yes, Your Honor.

MR. ZISSOU: Yes, I think that would be so. I mean I have some ideas, insofar as loss issues, as obviously that's a --

THE COURT: And they are part of the advisory guidelines --

MR. ZISSOU: I beg your pardon?

THE COURT: Are you referring to restitution payments or are you referring to loss for purposes of the guidelines?

MR. ZISSOU: Loss for purposes of the guidelines. It's all --

THE COURT: You haven't covered that in your papers, Mr. Zissou?

MR. ZISSOU: No, they have all been covered, but insofar as where we are with it, there is certainly more I have to say about it. And I am happy to do that any time Your Honor gets to loss. I know you are going through --

THE COURT: I am going to get to the advisory guidelines, period. I would have assumed that over the last year everybody would have had an opportunity to address, at

least, the advisory guidelines, but if you feel there is more you want to say, please, go right ahead.

MR. ZISSOU: Well, I guess the question is loss proven by the Government. Again, you're right, I have said this in our moving papers that the Government simply has not proved a loss. And the fundamental issue here is, as the Government has conceded to the pre-sentence report, it's in one of Mr. Tuchmann's letter, Mr. Razzouk did work for Mr. Quiambao. They established, among other things, a company in a foreign country. It's registered. We all know it. I mean we have the -- it's part of disclosure. And he did substantial work for him over the years for which he was paid.

The Government has never made a distinction between what he earned and what he did not. I have, in my objection letter and our memorandum I made it clear that I thought the loss, if you will, was in the hundreds of thousands, as opposed to the millions. The Government has never, other than conceding that he did work for him -- again, it's something one cannot deny, the evidence of it.

I am prepared to call live witnesses today if Your Honor has any doubt about it. I'm prepared to introduce evidence of trips that they made overseas, of video presentations made, of billion-dollar contracts that Mr. Quiambao --

THE COURT: I'm sorry. I understand that you made

those arguments in your papers. You never proffered any evidence. You never said I want to call a certain witness to testify.

MR. ZISSOU: Well, sure, I did. In a number of the memoranda I said: We are prepared to prove this. We can introduce evidence of that. Again, this is no surprise. The Government has copies of it. They've had it since 2011 when Mr. --

THE COURT: I'm sorry, there is one point in your papers where you made reference to a Fatico hearing, but you never told me you wanted to call your client, you wanted to call witnesses, you had evidence to adduce. You never gave me any affidavits.

MR. ZISSOU: I beg your pardon, Judge. I am prepared to do that, and blame me if I miscommunicated to the Court, but we are prepared to do that. I have Mr. Razzouk's entire family in the courtroom. His daughters can testify to the relationship with Uncle Rudy --

THE COURT: I do not care about his relationship with Quiambao, and I will explain that to you. I do not think it's relevant.

MR. ZISSOU: I am not sure what the Court is concerned about.

THE COURT: Well, what do you propose? Give me a proffer of what you want to put on.

MR. ZISSOU: I will call Mr. Razzouk. I can call his wife, as well, to establish the extraordinary efforts that he made on Mr. Rudell's behalf. Again, no secret here. There is audio, video.

THE COURT: I don't think anybody has disputed the fact that your client traveled to far-off places on several occasions in connection with work that he was doing with Quiambao.

MR. ZISSOU: It's hardly just that he traveled to far-off locations. The effort that went into presentations, preparation of proposals, people that --

THE COURT: I just do not want our time wasted. If you have something specific that you want to put on, I am going to hear it right now.

MR. ZISSOU: Okay, I'm ready.

THE COURT: Go.

MR. ZISSOU: Do you want it through a witness or should we just put it on the audio and it can describe itself?

I am entirely at your hands, Judge. I am happy to call Mr. Razzouk and he will explain them to you, and I am not --

THE COURT: I am actually quite flabbergasted that you did not before indicate that you wanted to call Mr. Razzouk. I do not really think I want to see a video. I cannot test a video. If you want to call your client, that's

fine.

MR. ZISSOU: I'm not sure. You are declining to hear the or view the evidence that we are going to submit?

THE COURT: But I do not know that your video is evidence. Your video is argument. In the past when I have received videos, I have gotten them long in advance of sentence. They are pictorial arguments.

MR. ZISSOU: Right.

THE COURT: They are not testimony. They cannot be cross-examined. If you want to call a witness, you can. If you want to call several witnesses, you can.

MR. ZISSOU: Okay. Okay, I'm ready.

Defense calls Sassine Razzouk.

(Defendant takes the stand.)

MR. TUCHMANN: Your Honor, if I might have the case agents that are in the gallery come up.

THE COURT: Yes, have them come to the table.

THE COURTROOM DEPUTY: Please raise your right hand.

(Defendant sworn by the Courtroom Deputy.)

THE COURTROOM DEPUTY: Please state your name for the record.

THE DEFENDANT: Sassine Razzouk.

THE COURT: You have to keep your voice up. Have a seat and speak into the microphone, please.

MR. TUCHMANN: Your Honor, just for the record, I

have Pete Maino, M-A-I-N-O, of Port Authority Inspector General; and Madeline Gorra, G-O-R-R-A, of the IRS Criminal Investigations at counsel table with me.

THE COURT: Thank you.

S A S S I N E R A Z Z O U K,

called as a witness by the Defense, having been first duly sworn/affirmed, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ZISSOU:

Q Mr. Razzouk, are you ready?

A Yes.

Q Just pull the microphone closer to you. You don't have to lean forward.

Now, Mr. Razzouk, I am going to get to the point and move this along, if I will. Do you know a person named Rudy Quiambao?

A Yes.

Q About what year did you first meet, approximately?

A Late '80s or early '90s.

Q Okay. Did you become friends over the years?

A Yes.

Q And about when did your friendship blossom, if you will?

A After my wife passed away.

Q And what year did your wife pass away?

A 1999.
Q Do you also have two children?
A Yes, sir.
Q What are their names?
A Monique and Danielle.
Q How old are they today?
A 26 and 28.
Q Are they in the courtroom today?
A Yes.
Q After your first wife died, did you subsequently remarry?
A Yes.
Q And are you currently married to Grace Razzouk?
A Yes.
Q Is she also in the courtroom?
A Yes.
Q Now, there came a point in time after your wife died that you told us that your friendship with Mr. Razzouk blossomed, if you will.

Did there come a point in time when you and Mr. Quiambao established a company in a foreign country?
A Two of them.
Q Right. And looking at --

THE COURT: I'm sorry, I didn't hear. What did you say?

THE DEFENDANT: Two different companies.

THE COURT: Two different companies.

THE WITNESS: One in Saudi Arabia and one in Abu Dhabi.

BY MR. ZISSOU:

Q And looking at the monitor in front of you at --

MR. ZISSOU: Just move it up so we can see the Bates number.

Q Looking at what's marked as Bates numbers ending 347, do you see that in front of you?

(Exhibit published.)

A I don't have anything in front of me.

THE COURTROOM DEPUTY: Can you see that up there?

THE DEFENDANT: No, I can't.

THE COURTROOM DEPUTY: It is not showing up on there.

THE COURT: You can continue. Can you move mine as far as you can?

THE COURTROOM DEPUTY: I will try to. You can stand up.

THE DEFENDANT: It is going to be very hard. I can't see that.

THE COURTROOM DEPUTY: Stand up.

THE DEFENDANT: Yes.

BY MR. ZISSOU:

Q Mr. Razzouk, do you recognize the document?

MR. ZISSOU: Just move it up a little bit so I can see the Bates Number.

A Yes, I see.

Q And the Bates Number is as we've discussed ending 347. What is that, can you tell the judge what that is?

A This is the company that was registered --

Q You have to speak a little bit louder because you are not by the mic.

A This is the -- this is the company that was registered in Saudi Arabia.

Q All right. And do you see the line marked directors?

A Yes.

Q Who were the directors of this company?

A Rudell Quiambao, Sassine Razzouk.

Q Is that you, Sassine Razzouk?

A Yes.

Q Who are the others?

A Yong Rhee is a Korean who was living in Saudi Arabia, and Mohammad Sabri ben Abdel-Aziz Ben Sultan Mahmoud, who was a sponsor.

Q Who was that?

A Who is a sponsor. You need a sponsor in Saudi Arabia in order for you to operate.

Q You can sit down now and pull the microphone close.

THE COURTROOM DEPUTY: I got it.

BY MR. ZISSOU:
Q When you say you needed a sponsor to establish a company, what do you mean, to the best of your recollection?
A We had a prince that we had to deal with, in which -- in which he sponsors the business, be part of the business, otherwise you cannot operate in Saudi Arabia just as a foreign company.
Q And what was the point of the establishment of this company, Mr. Razzouk?
A There were a lot of war going on at that time in the Middle East whether it's Saudi Arabia or Dubai and Abu Dhabi, and there were multi-billion-dollar projects which Rudy thought it is an opportunity to actually expand the business and do these multi-billion-dollar projects instead of a thousand or a hundred-thousand projects that we doing in the states.
Q And when you say Rudy, you mean Rudy Quiambao?
A Yes.
Q When did this idea, when did you and Mr. Quiambao start discussing this idea, what year was it?
A It was 2006.
Q And when did you actually start to travel overseas to advance this enterprise?
A Actually, I was sent by Con Edison to go overseas to -- as an exchange. So I went to look --

Q What year was that?
A 2006.
Q What happened overseas?
A To just learn about the system in, let's say, Paris, London. We traveled to Switzerland. And we got to know the systems, the electrical systems, their reliability, how they operate, the equipment they use, and we tried to improve on our system, maybe by getting ideas from overseas and implementing it.

Another -- another group was sent to Tokyo, Japan to do the same thing. And then we came back and we actually suggested ideas that Con Edison can implement as part of what we called a third generation electrical system.

Q And how did this idea get communicated to Mr. Quiambao?
A Mr. Quiambao knew I was -- I was traveling in -- in Europe and he knew about the whole thing. As a matter of fact, he visit my family when I was actually in Europe to make sure my family is okay. He came in to see my wife a couple times and I communicated with him even when I was in Europe, too.

And he sent me some work to do when I went there, and I did actually work for him when I came in one weekend on my birthday from Europe. I flew from London over here in May. I was still participating in the Con Edison exchange program. I was still over there, technically speaking. I paid for my

own ticket and I came back home and he came over and he had a job for me to do. And he expected me to take it back with me and then to Fed Ex it to him. I was able to finish it before I left on Sunday. I left it with my wife and she actually delivered that.

Q How did this experience get transferred to your effort overseas and we have the commencement of this company, how does that connect?

A So for him one day after I came back, one day he approached me and he told me that he met that Korean individual, which we just went through his name, Mr. Rhee, at one of these, you know, like affairs, fundraising in Manhattan or something similar to that. And he said this -- this individual has been in Saudi Arabia for over 30 years. He is a residence of Saudi Arabia. He have a lot of connection over there and he was talking to him about the opportunity, it is the same thing. When I came back from Europe I told him, you know, this is like incredible. All these big projects, like we have electrical project for 4 or $5 billion.

So, obviously, Rudy after speaking with the Korean guy came in and he said, You know, now I have a contact over there. We have a contact, maybe I want to really see what opportunity we could have over there. And everything started after that, like in the end --

Q So let's cut to the chase a little.

What did Mr. Quiambao need you for, I mean why were you an important factor?
A I didn't hear you. Could you repeat that?
Q In other words, why did Mr. Quiambao bring this to you? What was your influence? What would you do? Why did he need you is my question?
A Because I have the technical expertise and he always thought I had the brain as far as technical work and stuff. And he looked up high on me because from all the project he used to give me, I used to give to him very fast. And I was able to deliver to him a perfect project, quality project.
Q And so what role did he anticipate you to play in this overseas venture?
A I was his main -- the main consultant. However, he gave me a business card saying I'm a senior VP in his company.
MR. ZISSOU: Can we put the card up, Ms. Spinner?
(Exhibit published.)
BY MR. ZISSOU:
Q All right, do you see this, this item? It's been part of our submissions, but is this a business card that has your name on it?
A Yes.
Q You can sit down, Mr. Razzouk, so you can speak into the microphone.
How did you come to receive this card?

A This was probably the third type of card he gave me. It is -- Rudy printed these card and gave them to me prior to our trip together to overseas, Saudi Arabia or Dubai.
Q And did he list your title on this card?
A Yes.
Q And what was that?
A Senior vice president.
Q I notice there is an e-mail address there. Who created that e-mail address?
A This was at Rudell's office. This is Rudy gave me that e-mail in which people communicated through his office, then he will actually make hard copies and give them to me to -- to review.
Q So with this as a background, did you and Mr. Quiambao then embark on this overseas venture?
A Yes.
Q And tell us how, what you did to prepare for it and what happened?
A We actually created an actual brochure to -- to try to, let's say, sell the company, about their capability and their expertise in the different areas, especially substation and generations. We created -- we created a brochure. We worked on it for maybe a couple of month, and then he have printed these brochure and finalized them to take them with us. As

well as I embarked on putting together presentations and seminars that we actually engaged in for a whole week or so. Sometime I -- I traveled for ten days, that including weekends.

MR. ZISSOU: All right, let's see if we can dig up the brochure. Do we have it?

MS. SPINNER: We have company profile.

MR. ZISSOU: Okay.

(Exhibit published.)

BY MR. ZISSOU:

Q Now, can you see that? It may be bigger on the screen in front of you. Can you see that?

You've got to speak up when you are away from the microphone. Do you see that?

A It does not show on here. I don't see it on my --

Q Look on the big screen, it is pretty easy to see.

A Oh, okay. Yes.

Q Have you ever seen that before?

A Of course.

Q What is it?

A I said this is the brochure we put together as given the indication of what Rudell's capabilities are, the expertise, the different projects that they worked on, their personnel. And we actually took these with us when we traveled overseas and at the presentation or the seminar we distribute them to

the individual who were present.
Q And about how long did this venture last, from 2006 to when?
A Well, we start working in 2006 putting the stuff together. The first trip, it was 2007.
Q Hold the microphone close to you.
A The first trip was 2007, and then the last trip was 2010, and around June of 2010 this is when the -- Rudy Quiambao kind of made a decision to cease the operations overseas because we were not getting jobs from overseas.
Q So despite all of the efforts that you made, the venture was a failure, if you will, is that right?
A We -- we did put a proposal for a lot of jobs. We bid on a lot of job, but none of them really materialized.
Q To your knowledge, did Mr. Quiambao invest a lot of money in this project?
A Yes, he did.
Q How much do you think he invested in the project?
A Well, I can tell you, and I provided a spreadsheet, he was paying, you know, Korean guy over $30,000 a month.
Q Right.
A And he was just a contact for us, that's all what it was, what he was.
Q And, obviously, he also compensated you for your efforts, is that right?

A Absolutely.
Q Did you, during this time period, 2006 to 2010, also work for Con Edison, obviously?
A Yes, I did.
Q Did you -- withdrawn.
There came a point in time when you were arrested in this case, is that right?
MR. ZISSOU: Oh, there we are. So this is --
A The one before that, the one before. The Staten Island, New York. This was really working as satellite office, what meant Staten Island, New York. I was his satellite office in Staten Island.
Q Right.
A I am the individual that did the work from and that is the presentation we gave overseas.
Q And this is an organizational chart, I take it?
A Yes.
Q And while you were in -- I'm sorry, let me come back a second. While you were in these foreign countries, did you meet with people?
A Absolutely.
Q Did you give presentations?
A Every day.
Q Did you take photographs, for example, of yourself and Mr. Quiambao when you were there?

A Mr. Quiambao took picture of me. I never took picture of myself.

MR. ZISSOU: Can we have a couple of those?

(Exhibit published.)

MR. ZISSOU: Let's see if we can bring that up.

BY MR. ZISSOU:

Q What is this a photograph of, Mr. Razzouk?

(Exhibit published.)

A This was --

Q Who is in this photograph?

A This was in Abu Dhabi. I finish giving a presentation, the individual in the middle he was in charge of the -- this is a government representative for the electricals [sic] -- you know, he's in charge. He's like, maybe, a minister of, I don't know what you call him exactly, what's his title, but he was in like in a higher government position. As a matter of fact, this is the actual individual who offered me $330,000 a month salary that if I actually go and sign up a contract with him to do some work over there that was going at the time.

Q Are you in this photo as well?

A Excuse me?

Q Are you in the picture as well?

A Yes, I am.

Q Is Mr. Quiambao in the photo?

A Yes, right on the other side of the -- the individual.

Q And who are the folks?
A And that Korean guy is --
Q Mr. Rhee?
A -- Mr. Rhee. And this is what they call, he's like a doctor at a university. He used to be like one of the people we dealt with when we went to Saudi Arabia and stuff.
Q All right. Now, did Mr. Quiambao also establish a relationship with people in your family?
A He was -- I consider him a family member.
Q And did he attend family events with you?
A Yes, sir.
Q Did he meet your children?
A Absolutely.
Q Did your children have a name for him?
A Uncle --
Q What did they call him?
A -- Rudy.
Q Did they meet Uncle Rudy's wife?
A Absolutely.
Q Did they visit him at his place in the Poconos, for example?
A He visited our place and we visited his place.
Q And this relationship went on for almost a decade, am I right?
A Over a decade.

Q Did you ever threaten or promise to hurt him in any way?
A No.
Q Did you, in fact, make him the executor of your estate?
A Yes.
MR. ZISSOU: Can we have the will up, please?
(Exhibit published.)
BY MR. ZISSOU:
Q And is this your Last Will and Testament?
A Yes.
Q And how did you come to make him the executor of your estate?
A I said I consider he's the only person I really called my best friend. He was a family to me since I didn't have a family around. He treated my family very well. We always -- you know, my kids had a great time. They used to look forward when it is their birthday so they can actually sing with the dog. His dog used to sing happy birthday to them and they can enjoy that very much, especially my youngest. And when we were traveling to Saudi Arabia I felt very uncomfortable. At the hotel we used to go to, there is like tanks outside, there is Army, it's like protected, and and I didn't have a comfortable feeling every time I traveled.
And after our first trip, we discussed, I said, You know, I feel very uncomfortable inside. And in Dubai it was okay, it was fine, except Saudi Arabia I felt very

uncomfortable.
Q Unsafe?
A So he actually said, Do you have a will yet. I said, No. And I said, you know, I want you, of course, to take or look after my family if in the event anything happen to me. So he's the person who arranged. He knew the lawyer. I didn't know any lawyers or anything. I never did any legal papers.
Q So he referred you to the lawyer?
A He actually was with me. He went with me. He met me there. He gave me the address, whatever it is, and he actually met me at the lawyer's office, and we did that.
MR. ZISSOU: Can we have the photos, the family photos from this point?
(Exhibit published.)
A This is my daughter's maybe Sweet 16.
Q That is a photo of your daughter's Sweet 16 you said. And who is --
A I'm not sure if it's Sweet 16 or something, one of the affairs. I'm not -- I mean he was in all the affairs, so I don't know which.
Q And is that --
A They would probably know more than I do.
Q Is that Uncle Rudy in the photograph?
A This is Uncle Rudy and his wife Connie.
Q And who were they sitting next to?

A This is my daughter Danielle.

MR. ZISSOU: Let's have another photo.

(Exhibit published.)

BY MR. ZISSOU:

Q And who is in this photo may I ask?

A This is in my house, and this is the house I live in right now. This is like in our family room and this is my daughter Monique and his dog, Peachy, and Rudy Quiambao.

MR. ZISSOU: Next.

(Exhibit published.)

Q And who are these folks?

A This is -- we were in the house in the Poconos. This is the au pair.

Q Rudy's au pair or your au pair?

A No, this is originally the au pair I tried to get take care of my kids. This is Monique, my daughter, and again this is Peachy.

Q That is Uncle Rudy's dog?

A Mr. Quiambao's dog.

(Exhibit published.)

Q This is you and your daughter, right?

A Yes.

(Exhibit published.)

Q And who are these folks?

A This is in the house in the Poconos: Mr. Quiambao, his

wife Connie, and Monique and Danielle.
Q And would it be fair to say that, Mr. Razzouk, you have many of these photos and many of them you have given to the attorney for the Government some years ago?
A Yes.
MR. ZISSOU: I have no other questions.
MR. TUCHMANN: Thank you, Your Honor.
CROSS-EXAMINATION
BY MR. TUCHMANN:
Q Hello, Mr. Razzouk. My name is Paul Tuchmann. I am a federal prosecutor.
You and I have never met before, correct?
A Correct.
Q So you just testified under oath about work that you did for Mr. Quiambao, correct?
A Yes.
Q Yourself just said that none of that work led to any contracts or income for Mr. Quiambao's company, correct?
A That's what I know.
Q You don't have any employment agreement with Mr. Quiambao's company for that work, do you?
A No.
Q And you never sent him any invoices for work that you did for that?
A No.

Q And you never got anything like a 1099 from his company for that money?
A No.
Q So you testified that you first went overseas, I think you said in 2006?
A Correct.
Q And that the work started a little more in earnest around 2007, is that right?
A Yes, but 2006 I did not start work for Rudell, it was as I said, I was sent by Con Edison.
Q Correct, and so you started doing this work overseas for Rudell in 2007 or was it later?
A No, we start putting the brochures in 2006, like September 2006 and we traveled --
Q Right.
A -- in 2007.
Q You have this company MDM Capital, correct?
A That's correct.
Q You were receiving checks from Mr. Quiambao's companies into MDM Capital since the year 2000, correct?
A Maybe 1999, too.
Q Right. And so that was long before you began even thinking about doing work overseas with Mr. Quiambao in 2006, correct?
A Yes.

Q And I think you just testified that you -- that Mr. Quiambao kind of, I guess, pulled the plug, to use a phrase, on this work overseas in June of 2010, correct?
A Yes.
Q And you were arrested in January 2011, right?
A Yes.
Q Okay. But you continued to receive checks from Mr. Quiambao's companies into MDM Capital between June of 2010 and your arrest in January of 2011, correct?
A I was doing work.
Q I'm sorry?
A I was doing work for him.
Q You were doing it. So even though he had pulled the plug on the overseas work, you were doing other work for him?
A We were preparing to go to the Philippine and we started to actually do some work and he gave me the layout or -- or the design criteria for whatever the Filipino electrical system looked like. And he wanted me to start now because the Aquino son of the late Mr. Aquino became a president of the Philippine and this is why really he pulled the plug from the Middle East because he thought now in the Philippine he knows the Aquino and he will have -- definitely have an opportunity, it is like almost a guarantee, that he will get work there.
Q Okay.
A So yes, I was working for him still.

Q So do you know those checks, the ones that you received in the second half of 2010 into 2011, those had memo notations that were associated with Con Ed jobs, correct?
A I didn't know that.
Q You didn't know that. You thought those notations were for something related to something else?
A I didn't see the notations.
Q Well, did you have the checks? Did you see them before you deposited them?
A Well, I used to, as I told the prosecutor before, I used to get an envelope and go home, turn the check around, sign them, give them either to my -- to my wife or to my son and they will actually deposit them.
Q And so you were receiving these checks with these notations for over four years and you never actually looked at them, is that your testimony?
A Exactly.
Q Okay. So you received approximately between, I think you said, starting in 1999 going until January of 2011, approximately $13 million into the MDM business from Mr. Quiambao's companies, correct?
A I don't know the amount.
Q Does approximately 13 million sound fair to you?
A (No response.)
Q Just call it 12 million, how about that?

A Whatever, okay.
Q And so all of that money you got for other work for Mr. Quiambao, is that what you're saying?
A Yes, sir.
Q And you say that -- well, sir, do you remember when you pleaded guilty before Judge Mauskopf on June 10th, 2011?
A Yes.
Q Do you recall that you were sworn in and placed under oath at that time? Do you recall that?
A Most likely I did, but I don't remember anything. Most likely.
Q You don't remember anything that day?
A Most likely I was sworn in, yes.
Q Okay. And you had an attorney there with you at that time, correct, who was representing you?
A Yes.
Q And you told the judge that you were satisfied with that attorney's representation, correct?
A I don't think it was asked.
Q You don't think it was asked.

So if the Court said, Judge Mauskopf said: Have you been satisfied with the efforts of Mr. Morvillo, that's your attorney then, correct?

A Yes.
Q On the efforts that Mr. Morvillo has made on your behalf

to this point; and you said, Yes, I am.

Do you remember that?

A You're reading it, so I must have said it.

Q Well, and the Court said: Do you feel you need any more time to discuss with him the waiver of indictment or guilty plea; and you said, No; and that was all under oath too, right?

A Yes.

Q Okay. And you were told multiple times during that plea hearing by the judge that you were charged in Count One with bribery, correct, she used the word bribery a number of times?

For example on page 19 it says Count One charges you with bribery. Do you recall generally the judge --

A Yes.

Q -- talking to you, telling you that you were pleading guilty to bribery?

A To my understanding of bribery, yes.

Q And you said during your plea allocution that during this period, I mean the period charged in the Information of 2006 through 2011, during this period I accepted United States currency from Rudell and Associates. I received these payments, in part, with the intent to influence with respect to awarding jobs to Rudell in excess of $5,000.

You said that under oath, right?

A Yes.

Q Now, at that time when you said that, you knew all these things that you know now about what you're claiming now about why you received this money from Mr. Quiambao, correct?

MR. ZISSOU: Objection.

BY MR. TUCHMANN:

Q Or have you learned it since then?

MR. ZISSOU: I object to the form of the question.

THE DEFENDANT: Excuse me.

THE COURT: Overruled. Go ahead.

Do you understand the question?

A Could you repeat it?

Q At the time that you pleaded guilty in January of 2011 --

A That's correct.

Q -- you knew that you had traveled to the Middle East --

A Of course.

Q -- for Mr. Quiambao --

A Yes.

Q -- in 2007, 2008?

A Yes.

Q Right. But you didn't say anything about that at the time you pleaded guilty under oath, correct, in January 2011?

A I don't remember, no. I don't know.

Q Do you think you might have said something to the Court during the plea allocution about the fact that this money was for --

A No, I --
Q -- the --
A No.
Q You didn't say that?
A No.
Q Mr. Razzouk, before you pleaded guilty you had a number of meetings with prosecutors and federal agents, correct?
A Yes.
Q And during those meetings you said that you had instructed Mr. Quiambao to bid low on jobs to guarantee that Rudell would be awarded the project?
A No.
Q You never said that to the agents?
A That could not happen.
Q Well, that is not my question.

My question is did you say to the agents that you had instructed Quiambao to bid low on jobs to guarantee that Rudell would be awarded a project?

A No.
Q You never said that to the agents?
A No, sir.
Q And so if that is in multiple reports of the meetings with the agents, it still didn't happen?

MR. ZISSOU: Object to the form of the question, speculative, if it's.

THE COURT: Overruled. Go ahead, you can answer the question.

THE DEFENDANT: Could you repeat that question?

MR. TUCHMANN: Sure.

BY MR. TUCHMANN:

Q If there are reports that the agents made of those meetings they had with you before you pleaded guilty, and those reports said that you stated on multiple occasions that you had instructed Quiambao to bid low on jobs to guarantee that Rudell would be awarded a project, it didn't happen even though it's in the reports, correct, is that what your testimony is?

A Yes.

MR. TUCHMANN: Nothing further, Your Honor.

REDIRECT EXAMINATION

BY MR. ZISSOU:

Q Mr. Razzouk, did you tell when you were proffering to the Government, did you tell them that you did work for Mr. Quiambao that had nothing to do with Con Ed?

A All the time.

Q Did you tell them that you did lots of work for him overseas on this venture you told the judge about?

A Yes, sir.

Q Is this what you told them literally from the beginning when you started talking to them?

A From day one.
Q Did you also explain that the process at Con Edison made it virtually impossible for the scam the Government alleged happened here to work the way they say it did?
A It could not happen.
Q Correct. Did you tell them that?
A Yes.
MR. ZISSOU: I have no other questions.
MR. TUCHMANN: Just one moment, Your Honor.
THE COURT: Thank you.
(Pause.)
MR. TUCHMANN: Nothing further.
THE COURT: Okay.
THE COURT: Thank you very much. You are excused.
(Witness steps down.)
MR. ZISSOU: May I just have one moment, Judge?
THE COURT: Yes.
(Pause.)
MR. ZISSOU: Judge --
THE COURT: I'm sorry, go ahead.
MR. ZISSOU: Judge, what I proffer through Grace Razzouk is that during all of the time that she knew and observed the relationship between Mr. Razzouk and Mr. Quiambao, and I think she met them sometime around 2001, that she never heard a dispute, she never heard any arguments,

she never heard anything other than two individuals working on a joint venture and working together.

Happy to call her for that, to establish that.

THE COURT: No need. No need I am sure.

MR. ZISSOU: And, again, the kids would basically be the same. They would talk about the dog and Uncle Rudy. That is the proffer, but I understand I think Your Honor has accepted that.

THE COURT: Let me next turn just to the advisory guidelines.

As to the advisory guidelines, it is apparent from defense counsel's objections to the pre-sentence report that virtually every aspect of defendant's guidelines calculation is now disputed. More specifically, counsel contests the base offense level of the crime of conviction characterizing his client's plea as one to receipt of gratuities rather than receipt of bribes. He also disputes the loss enhancement directed by Section 2C1.1 of the guidelines, which is determined by the value of the benefits his client received in the bribery scheme.

Moreover, by omitting the enhancement from his own calculations, counsel objects to the propriety of imposing on his client an obstruction enhancement. Similarly, by including the deduction in his calculation he disputes the propriety of withholding from his client an acceptance of

responsibility deduction.

Turning first to the base offense level. It is indisputable, both from the charge in the Information to which the defendant pled guilty and the defendant's plea allocution as corroborated by statements the defendant made in his various proffers to the Government, that defendant entered a guilty plea to acceptance of bribes in violation of 18 U.S.C. Section 666(a)(1)(B), not acceptance of mere gratuities.

For example, at his allocution when Judge Mauskopf asked him what conduct he engaged in that established his guilt of "the bribery charge under Count One," Razzouk attested that in his managerial job at Con Ed, which involved overseeing the design of the electrical control systems in New York City and Westchester for Con Ed, he oversaw competitive bidding system by which Con Edison, essentially, awarded contracts to private contractors. In that capacity he allocuted he "accepted United States currency from Rudell and Associates, in part, with the intent to influence the awarding of jobs to Rudell." Moreover, he averred that he "specifically provided to Rudell" by, among other things, "providing Rudell with additional Con Edison work, assisting Rudell with bids, and approving payment to Rudell on contracts with Con Edison for things he was not entitled to approve.

During his proffers Razzouk further elaborated that he "agreed to take part in a kickback scheme with Quiambao" in

which, among other things he "invited Rudell to make more bids" than any other contractors, "which increased Rudell's chances of getting more work" from Con Ed; that he reviewed and edited Con Ed's bids prior to their formal submission and "warned Quiambao when there was a problem" to enable Rudell "to straighten it out before it was too late," presumably ensuring that Quiambao not lose the contract; that he would give Quiambao advance information about projects, further advantaging Rudell's opportunity to be awarded Con Ed work; that he coached Quiambao "to bid jobs low to guarantee that Rudell would secure the project" assuring Quiambao that his group would take steps "to make up for the low bid" to ensure that Rudell would make profit from the job.

That is Exhibit B pages 5 to 8.

In fact, although Razzouk claimed not to have initially noticed the notations in the memo section of the checks Quiambao paid him, he acknowledged during his 2011 proffers that he "now knows that the memo section did list Con Ed jobs that he had helped Rudell on." Exhibit B, page 7.

In a subsequent proffer section, Exhibit C, Razzouk similarly stated that he assisted Quiambao to secure more Con Ed contracts by inviting Quiambao to bid on every job; that he also assisted Rudell by adding more work onto existing contracts for which Rudell would be paid at an increased rate. That's Exhibit C, page 3. In this proffer session Razzouk

admitted unambiguously that he did these favors for Quiambao "because Quiambao was giving him a lot of money" and because he "knew the more extras he gave to Rudell, the more money Quiambao would give him." That's Exhibit C, page 3.

This record of evidence consisting of Razzouk's own admissions, both under oath at his guilty plea and in proffers to the Government, amply proves by a preponderance that Razzouk accepted money from Quiambao as a quid pro quo with the intent to be influenced in connection with the business of Con Ed. Moreover, it is well settled that bribery "can be accomplished through an ongoing course of conduct, so long as evidence shows that the favor and gifts flowing to a public official are in exchange for a pattern of official actions favorable to the donor. That is United States versus Bahel, B-A-H-E-L, 662 Fed. 3d 610 at 635 to 36, Second Circuit 2011. Accordingly, the guideline determining the base offense level for Count One is Section 2C1.2, fixing the base offense level at 12.

Turning to the only enhancement with respect to which there is no dispute, defense counsel, although inaccurately characterizing each payment to Razzouk as a gratuity in lieu of a bribe, acknowledges that there was more than one payment to his client resulting in a two-level offense characteristic enhancement. The enhancement based on the value of payment under Section 2C1.1(e)(2) is, by

contrast, hotly contested. Without record citation or reasoning, defense counsel simply asserts in his objections to the pre-sentence report that the amount Quiambao paid his client "was more than $95,000, but not more than $150,000." An assertion that under guideline 2B1.1(b)(1) calls for an eight -level enhancement. Nothing in the present record, however, supports such a conclusion or assertion. On the contrary, the existing evidence establishes by a preponderance that an extremely conservative estimate of Quiambao's bribery payments to Razzouk substantially exceeds $3-1.2 million requiring an enhancement of at least 18 levels. Powerful support for this loss amount is found not only in the statements Razzouk made in his proffers to the Government, referring now to Exhibits B and C, but also in statements and estimates Quiambao made to the Government, Exhibit H.

Quiambao's pre-arrest statements and Razzouk's post-arrest admissions corroborate each other concerning the general magnitude of the payments, that is many millions of dollars; the duration of time over which the payments were made, that is over many years; and the purpose of the payments, that is bribes to induce increased business from Con Ed.

More conclusively, however, voluminous documentary evidence of the payments, the checks by which the payments were made, identify with specificity the amount paid and the

purpose for which they were made. These checks record that a total of, at least, $8 million in checks from Quiambao's entities to Razzouk's company MDM Capital compensated Razzouk for his assistance to Rudell in connection with specific identifiable Con Edison jobs on which Rudell was the contractor. For example, Rudell issued a check to MDM Capital on April 30, 2007 for $40,075 with the phrase "various projects asterisk" in the memo line of the check. According to Con Ed's business records, the defendant oversaw a project which requires "review of shop and GE drawings at Astor." That's at page 3 of the Government's supplemental submission. Rudell issued a check to MDM Capital on June 29, 2007 for $45,000 with the phrase "subcontractor Cherry and E 13 Street" written in the memo line. According to Con Ed's records, the defendant oversaw a project which required "removal of transformer 3 at Cherry Street" page 4.

On February 28, 2008 Rudell issued a number of checks to MDM Capital for various amounts, including one for $7,740; another for $19,435; and another for $11,000. All of these checks had descriptions in their respective memo lines that corresponded to projects the defendant awarded to Rudell and that Con Ed had similarly described in their internal records.

The same is true for the checks issued by Quiambao's shell corporation Rudicon to MDM after 2009 when, as both

parties acknowledge, there was a crackdown on corruption at Con Edison. On November 28th, 2009 Rudicon issued a check to MDM for $53,000 that had the phrase "subcontractors' fee-PST Manhattan" in the memo line. In its internal records Con Ed has a record of a project Razzouk oversaw at that time that was awarded to Rudell, which Con Ed described as "provide engineering and design drafting services to scan, print and prepare PST redline markup drawings packages Manhattan substation." And the list goes on. There are hundreds of checks, some for as little as $4,700 and others for over a hundred-thousand dollars. Not all of the checks reference specific projects, but there are an overwhelming number that do. The pattern is clear, it simply strains credulity that these checks were not bribes for projects that Con Ed ultimately awarded Rudell and that the defendant either worked on or oversaw.

I give no credence to defense counsel's most recent argument that Quiambao referenced Con Ed projects in the memo lines of the checks he wrote to MDM to set Razzouk up in the future, nor do I find credible the defendant's testimony before me today that the money he received from Quiambao was entirely or even to any significant extent as a result of legitimate work he did for Quiambao's companies.

Defense counsel's extremely low estimation of the amount of money his client accepted in bribes is also belied

by the defendant's consent to a forfeiture money judgment in the amount of $6,515,809, money that his plea agreement described as "property, real or personal, constituting or derived from proceeds traceable to a violation of 18 U.S.C. Section 666(a)(1)(B). That's Exhibit F, paragraph 13. Defendant's willingness to forfeit over $6 million strongly corroborates the conclusion that he unlawfully received at least that amount.

Given the abundance of evidence that Razzouk received over $3.5 million in bribes during the period of time covered by his conviction, I conclude that the offense level should be increased by 18 levels.

A two-level enhancement for obstruction of justice under guideline 3C1.1 is also well supported by a preponderance of the evidence in the record. On December 17, 2015 after he pled guilty, the defendant arranged to meet with Quiambao in Atlantic City. Unbeknownst to the defendant, Quiambao was wearing a recording device. In the conversation that ensued, Razzouk assured Quiambao that he would lie at Quiambao's trial evincing his intent to give perjured testimony, and tried to persuade Quiambao to testify perjuriously in the same matter. Much as defendant does now, Razzouk sought in that conversation to persuade Quiambao to confirm his story that all of the money Quiambao paid Razzouk was for legitimate overseas work, not for unlawful influence.

Each time Quiambao protested "that's not true," Razzouk implored Quiambao to make sure their stories were consistent with the aim, as identified by Razzouk, to "destroy" the Government's case. Razzouk's willful breach of his cooperation agreement with the Government by his determination to commit and suborn perjury at Quiambao's trial warrants an obstruction of justice enhancement under 3C1.1. Under that guideline, the obstructive conduct related to the defendant's own offense of conviction, in that had he succeeded in committing the suborning perjury, the perjury intended as falsehoods would have been relevant to his own sentencing. See United States versus Cassiliano, C-A-S-S-I-L-I-A-N-O, 137 Fed. 3d 742 at 746 to 47, Second Circuit 1998. Finding that an obstruction of justice enhancement was warranted where defendant's conduct not only impeded another person's case, but could have affected the Government's investigation into her own.

The obstructive conduct also related to a "closely-related offense" within the meaning of the guideline, in that Quiambao and Razzouk were, in effect, co-conspirators in the same bribery scheme. See United States versus McKay, 183 Fed. 3d 89 at 95 to 96 (Second Circuit 1999) explaining that the Sentencing Commission's November 1, 1998 amendment to 3C1.1 "instructs that the instruction must relate either to the defendant's offense of conviction, including any relevant

conduct, or to a closely-related case." Moreover, Razzouk's conduct eviscerated the Government's case against Quiambao. The Government could not proceed to trial against Quiambao on the counts for which Razzouk was the necessary witness, which involved the bulk of the bribes that Quiambao made. For the same reasons, I find that defendant does not deserve a two-point downward adjustment for acceptance of responsibility. Although Razzouk pled guilty, he subsequently engaged in obstructive conduct that rendered his cooperation, in large measure, valueless and undermined the Government's prosecution of Quiambao.

His prior acceptance of responsibility is further undercut by the positions he has taken at sentencing that are wholly inconsistent with his representations of his guilt at proffer sessions with the Government and under oath at his guilty plea allocution. By denying without explanation all of the criminal conduct that he previously admitted, which has also been overwhelmingly established by the evidence in the record, defendant has demonstrated that far from being remorseful for his criminal actions, he has repudiated any prior expression of acceptance of responsibility. As is well within its discretion, the Government has determined that a potential third point downward adjustment for acceptance of responsibility should not be awarded.

Given these determinations, I calculate defendant's

advisory guidelines as follows:

As to Count One, the base offense level is 12. The existence of more than one bribe adds two levels. The loss enhancement corresponds with 18 levels, and there is a two-level enhancement for obstruction of justice. The offense level is, therefore, 34.

As to the three tax evasion counts, Counts Two through Four, defendant and the Government agree that the adjusted offense level is 24.

Given the application of the grouping guidelines, I conclude that defendant's advisory guidelines imprisonment range is 151 to 188 months.

Finally, let me simply conclude that is my finding with respect to the advisory guidelines, and I am sure you have a great deal more to say. Go ahead.

MR. ZISSOU: Well, Judge, just a couple things, if I might. I am not sure it's appropriate. It might be within your discretion to credit the agents' notes of proffer statements without an opportunity to cross-examine. I think we made it --

THE COURT: You did not ask for the agents' testimony. I can consider at sentencing pretty much anything and I can make up my own mind as to the probative value.

MR. ZISSOU: I am sure you can, but earlier you remarked about documents, submissions not being sufficient

without --

THE COURT: No, what I was remarking was that I did not want to see a video that was purely an argument. I do understand that the agents' notes are not under oath, but for purposes of sentencing not everything I consider has to be under oath. I do not consider it argument. I considered your video argument.

MR. ZISSOU: Well, nor were the notes ever shown to Mr. Razzouk to confirm or not they are the agents' recollections of what happened. Much of the information is not included. I mean Mr. Razzouk has repeatedly --

THE COURT: You know what, your exception is noted. Go on.

MR. ZISSOU: All right. Well, that's all I'll add in so far as the advisory guidelines.

THE COURT: No, no, I assume you want to make a statement as to the statutory sentencing guideline.

MR. ZISSOU: Yes, I do.

Well, look, I think we put this in our sentencing memorandum too, but the man sitting before you is not simply the person who was engaged in the conduct that Your Honor has found to be whatever it is you found it to be. He has been through an extraordinary amount in his life. His background, his upbringing, he's overcome a lot. Much of that has been provided to you. Your Honor knows that there are mental

health issues here that I am not going to elaborate. I know that they were directed by the Court and Pretrial recommended them. I am not going to discuss them in the courtroom. He has gone through some events in his lifetime with the loss of his first wife. He is a man who often sees the world differently from the way others see it. He is the kind of man, I've noticed myself that he makes strong attachments to certain individuals, and that was the case with Mr. Quiambao. Mr. Razzouk, his belief in the strength of their relationship, best friends Mr. Razzouk called him his best friend, his only best friend, does in many ways cause him to sometimes fail to see things that other people might find obvious. That relationship that they shared, his extraordinary commitment to him, the part, the manner in which Mr. Quiambao made himself a part of Mr. Razzouk's family really did affect the way Mr. Razzouk sees and saw the world.

What other person has a -- what else can be said about making the executor of your estate in whose trust you place the lives of your family, your children? It really to me reflects the fact that some folks see things one way and ten other people may see them a different way. And Mr. Razzouk's extraordinary commitment to Mr. Quiambao can only been explained in this way. . He was in every way, and I know Your Honor has heard this before, but he was every way a part of their family. And Mr. Razzouk on many levels felt a

level of friendship and connection that he never felt in his life. This was at a time when, of course, as you know, his first wife, the mother of his children, died at a very young age after what turned out to be a brief illness, dying in his arms. His family members when he was younger, saw them killed as he grew up under circumstances that the rest of us growing up in the United States for the most part can't even contemplate in the middle of a civil war.

Look, I have to tell you he is a caring, generous, committed person, even to the point where, frankly, he looked forward to our weekly meetings. He would come to my office and we would spend Saturday together and his wife Grace would be there. He'd buy lunch for everybody and talk about things that happened in a way that -- well, let's just say, logically one might see differently. Numbers on checks, that has always been from the beginning what the Government's view of this case was, numbers on checks meant everything. Nothing ever changed after that. Whatever Mr. Razzouk said, whatever he -- whatever recollection he had, it wasn't what theirs was.

Now, look, I don't know. I wasn't there. I don't know what went on between these two men. I don't know why they traveled so often together. I do know that they planned great things, and even Mr. Razzouk will tell you that. And if he was asked I guess he would tell you that Mr. Quiambao was too generous, paid him too much, but he did an extraordinary

amount of work.

As I said, his wife would testify as to all the conversations they had of Mr. Razzouk constantly doing work for Mr. Quiambao. This is not a man who went about an effort to undermine his employer. His recollection of what happened was, despite the relationship that he had with Mr. Quiambao, he always made sure to protect his employer. He gave more -- I thought I put this in my objection letter, I acknowledged it, that what he did was he allowed, because of their relationship, because of their friendship, he allowed Mr. Rudell [sic] more opportunities to bid. But in his mind, the actual quid pre quo was Con Ed was properly served. They didn't lose money. Mr. Quiambao did the work. And we've gone on and on about this insofar as the restitution submissions, I know you are not to that yet, but that's what it looks like. It looks abundantly clear that Con Ed suffered no loss. And that's because, again, as we submitted and Mr. Razzouk has said from the beginning, he made sure that that was so.

And while it's true, and Your Honor has found that Mr. Quiambao improperly paid Mr. Razzouk in whole or in part, that's really entirely up to the Court, Con Ed didn't suffer a loss. They just didn't. And they have, despite their efforts, not proven any loss in my view, and that's in large part because Mr. Quiambao did the work. And Mr. Razzouk, among other people at Con Ed, favored Mr. Quiambao because of

the work that he did.

And so in Mr. Razzouk's mind, whatever intent he formed or did not form, he was able to keep the relationship separate by ensuring that his employer was protected.

Was it inappropriate for him to betray his employer? Absolutely.

Was it something he should have communicated to them that he was having this relationship with Mr. Quiambao? No question about it.

But in his mind, he genuinely believes that is how this played out. He is not, as Your Honor might otherwise conclude without this understanding of him, of the kind of man that he really is, Your Honor might otherwise conclude that this was just an act of greed, and it was not. Simple as that. And that's why I've said in the submission from the beginning that the loss to Con Ed is a fundamental sentencing factor. It's fundamental 3553(a) factor, which is why we spent so much time on that focus alone because, obviously, I understand that reasonable people may differ about the interpretation of notations on the check, and I understood the difficulty of proving how much was legitimately earned and how much was not, if anything.

The guidelines here are wildly overstated. He's a first-time non-violent offender. He is 62 years old. And the likelihood of recidivating at his age is non-existent

according to the numbers that the Sentencing Commission keeps. A lengthy jail sentence is hardly necessary in this case. Although I understand Your Honor has to consider all of the factors set forth in 3553(a), I do not think a lengthy jail sentence is appropriate here. Indeed, I think a period of probation with a long period of house arrest would be appropriate. He has never seen the inside of a jail. He has been through an extraordinary amount. The acts that form the basis of this Indictment, you know, I know you might look at me in this, but I am only responsible for the last eighteen months. The first five or six years or seven years was all on the Government. The tax events were '7, '8 and '9, it's 2018. The arrest was in January of 2011. We are talking about almost a decade since the acts that gave rise to the charges in this case have occurred. Clearly, absent more, the imposition of a lengthy jail sentence under those circumstances seems to me resulting in a sentence greater than necessary and would violate Section 3553(a) of Title 18.

So for all of those reasons, Judge, notwithstanding the rather litigious circumstances of this case and, frankly, it's not like I wanted to be in this position. When I first took over this case it was August of 2016 or so, the first thing I did was try to, okay, let's see if we can fix this. And along the way, you know, there were discussions about, well, you know, he really did provide substantial assistance

and that's how the sentencing memorandum is going to read and we are not going to object to acceptance of responsibility. But things changed, whether it was my fault or Mr. Tuchmann's fault that we ended up litigating, and it got out of hand. But it's not as if I wanted to end up where we are now, nor did Mr. Razzouk. There could have been an opportunity to resolve this without the extensive litigation, but frankly, Judge, no one on that side was ever inclined, after Mr. Tuchmann's predecessor, to do so. No one ever -- no one ever suggested after she left that there were issues that we could resolve. And, of course, Your Honor knows that along the way I was trying to get status conferences so I could get a sense of how could we resolve some of these issues, rather than having to preserve every single legal issue that I could imagine. And it was only, frankly, as you know, recently when based on a third-party request that the Government even suggested that they -- that the Asset Forfeiture Unit might be willing go along with the rescission. It's something I've been suggesting for years, and no one listened. As soon as the third-party application made just last week, and now they're willing to be open-minded. That was always a no. So there is a reason we got to this position.

THE COURT: The application was actually made a long time ago, many, many years ago, long before I became associated with the case.

MR. ZISSOU: I beg your pardon, Judge?

THE COURT: Many years ago, many years before I became associated with the case. It was over five years ago that the application was made. I just wanted you to understand it did not just happen.

MR. ZISSOU: Oh, and I wasn't in there. I can only tell you --

THE COURT: It was on the docket.

MR. ZISSOU: Oh, yes, I understand, the request for the ancillary proceeding. But the willingness of the Government to consider it, that's a new event as far as I am concerned and it was only -- it was only based on Mr. Tuchmann's letter filed last week that the folks at the DOJ are willing to give it some consideration before Your Honor makes whatever rulings are appropriate in this case. So it's not as if we weren't there. It's not as if we've purposely got into the weeds and tried to litigate every conceivable issue. We did this because in the end there really was nothing in the way of alternative. And notwithstanding anything, and even if Your Honor does not take into consideration that as a 3553(a) factor, there is more than enough here to justify or I should say there is simply not enough here to justify a lengthy custodial sentence, given the circumstances; his age, lack of prior criminal history, and the matters that I discussed and I would urge Your Honor

not to impose such a sentence.

THE COURT: Thank you.

Mr. Razzouk, is there anything that you would like to say?

THE DEFENDANT: No, Your Honor.

MR. ZISSOU: He said no, Your Honor.

THE COURT: Mr. Tuchmann.

MR. TUCHMANN: Thank you, Your Honor.

Where to begin in this case? Well, may I stay seated?

THE COURT: Certainly.

MR. TUCHMANN: Thank you, Your Honor.

Before we even kind of get to the sentencing, just one note with respect to the sealing of submissions. I think there were a couple of submissions that were filed under seal by the defense. While the Government has no objection to redacting them to --

THE COURT: That's fine.

MR. TUCHMANN: -- keep personal information out.

THE COURT: That is something I forgot to address, but those should be unsealed. If there is something particular that you want redacted --

MR. ZISSOU: I will take care of it.

THE COURT: -- let me know.

MR. TUCHMANN: I would just like to respond to a

couple of points that were just made by counsel.

The idea that this is somehow on the Government because the defendant can't tell the truth and that, therefore, he has to litigate everything, it's absurd. It is absolutely absurd. The defendant is in this position because he is taking positions that are contrary to the truth and to the evidence. There is no one else responsible for the litigious nature of how this process has gone than him. He submitted objections to the PSR in which he denied that he committed the crime that he allocuted to so clearly under oath, and then has the nerve to complain that he is not getting acceptance points after he's now denying that he committed that crime. It boggles the mind, really. That's why we are here and in this position. Once the defendant took those positions, of course the Government is going to respond with the truth as corroborated by the evidence of which, as Your Honor noted, it's not just the numbers on the checks, notations on the checks. Obviously, devastating evidence that they are, there is a lot more evidence than that. I won't go through it, Your Honor already has done that, but I just wanted to make those points to begin.

With respect to the sentence, I guess the first thing is I want to make sure I don't need to, I feel the Court is obviously aware in considering it, before we get to the sort of post-plea conduct, the underlying offense conduct is

egregious: $13 million in bribes over the course of a decade as part of the relevant conduct, over a decade. It is an enormous amount of money, a long-standing scheme. It harmed Con Ed and its rate payers and stakeholders. It's a very serious crime. So, obviously, we can't lose, shouldn't lose site of that, but also what makes this case so uniquely egregious is the nature of the obstructive conduct.

I have been here for ten years in the office and never heard of anything quite like it in its -- and just so damaging. The Government's process of using cooperating witnesses to make important cases. We talk about general deterrence. It's important for there to be general deterrence with respect to the underlying criminal conduct, but it's as important, if not more, in this case that there would be general deterrence considered for this sentence and considering what the defendant did in connection with his cooperation and his obstruction.

The Government indicted someone on serious felony charges because of his information and because of what he did by going behind the Government's back to try and suborn perjury, to propose perjury, to propose obstructing Quiambao's case, the level of interference and obstruction of the criminal justice process is just hard to overstate what he attempted to do, and then lie about it to the Government when he first came back after the meeting at the hotel and to tell

the Government that this meeting was not his idea, that it was Quiambao's idea. It was only because, only because Mr. Quiambao recorded the conversation that the Government is able to truly understand what happened. The breach of trust is so egregious it needs to be punished and it needs to be deterred.

The other thing which is so egregious about this case is the willful denial of responsibility in the face of such overwhelming evidence. After a guilty plea it's unheard of in my experience and it just, again, demonstrates a disrespect for the whole process. He just perjured himself again today before Your Honor. It cannot be countless. It cannot. You know, Mr. Zissou just talked about how there wouldn't be recidivism. I mean I think we know that those studies are really about kinds of violent crime, mostly that's what most of those studies are about. Mr. Razzouk was already a middle-aged person when he was committing these crimes. It's not like he can't commit them again in the sense that he's out and doing things, but when a person comes in and lies at his own sentencing hearing about having not committed the crime, who knows what he's capable of in terms of what other kinds of frauds and deceptions he will work afterwards if he has the opportunity.

It's astounding, and for those reasons and the extraordinary circumstances of this defendant's conduct the

Government submits that a very severe guidelines sentence is appropriate in this case.

Your Honor, I would just note that there are representatives of the victims here if Your Honor wishes to give them opportunities to speak at some point.

THE COURT: They may be entitled to.

MR. TUCHMANN: I'm sorry, I meant when Your Honor wishes to give them an opportunity.

THE COURT: Yes, now would be appropriate.

MR. TUCHMANN: I am not sure if they wish to.

THE COURT: I know.

MR. McINERNEY: Judge, Dennis McInerney for Con Edison. I think we've fully submitted our costs.

THE COURT: There have been enormous compendiums of submissions, and I think you can tell that I have reviewed them very closely, but if anyone has anything to add.

MR. McINERNEY: No, Your Honor, we totally see that and we rest on our papers at this point. Certainly if you have any questions, we are happy to answer them.

THE COURT: Is that it? Okay.

Well, as indicated, I have calculated and considered the advisory sentencing guideline range.

Turning to the remaining statutory factors, the crimes that Razzouk committed are undoubtedly of an extremely serious nature warranting a severe punishment. Razzouk

engaged in a bribery scheme of staggering proportions over a lengthy period of time, likely depriving his employer Con Edison and, ultimately, taxpayers of a substantial amount of money. In this regard there is evidence that Quiambao paid Razzouk in excess of $13 million over a period of more than ten years. More to the point, it has been amply established in the record of this sentencing proceeding that within the six-year timeframe of the bribery charged, Quiambao and his companies paid Razzouk over $8 million in exchange for Razzouk's corrupt assistance to Quiambao in securing for Rudell profitable contracts from Con Edison.

Further, as charged in the tax evasion counts to which Razzouk also entered guilty pleas, he failed to report income in an amount exceeding the $5 million over a three-year period, depriving the Government of approximately $1.7 million in taxes owed over those years, not including interest and penalties.

Defense counsel asserts, and I have absolutely no reason to doubt, that there existed a lengthy and complicated personal relationship between Razzouk and Quiambao. Whatever the nature and reasons for their unusual power dynamic, however, I view the two actors as mutually dependent upon one another. Of particular relevance to the illegal elements of their relationship, both participants reaped substantial financial benefit from their elicit venture and neither

repudiated or in any way sought to limit, much less terminate, their lucrative scheme. Whatever the other aspects of their relationship, therefore, I do not consider the association between Razzouk and Quiambao as a factor that either aggravates or mitigates the seriousness of Razzouk's offenses.

Given the nature and seriousness of defendant's crimes, the statutory sentencing goals of just punishment, and the need for general deterrence, require a sentence of considerable severity. As to general deterrence, it is true as the Government has argued that crimes of this nature do not often come to light and that because of the likely victims, the taxpayers are often unaware of any misconduct, these cases are difficult to prosecute. Moreover, while the the defendant may have faced difficulties during his life, the extraordinary extent to which the bribery scheme escalated is plainly attributable to greed. In such a case it is important to impose a sentence that sends a clear message deterring others in a position to be subject to similar temptations.

Turning to the history and characteristics of the defendants, a number of facts may be viewed as somewhat mitigating. These include the following: Razzouk is now 60 years old and has had no prior involvement in the criminal justice system. Born in Lebanon, he resided there with his family during the civil war when, as described in detail in the pre-sentence report and defense counsel's sentencing

submission, he and his family experienced immense suffering and the defendant witnessed many atrocities first-hand.

In 1976 the defendant emigrated to the United States and subsequently became a naturalized citizen. He married in 1987 and became a father of two children. Tragically, the defendant's wife developed cancer and died at a young age, leaving the defendant to raise his two daughters by himself. He has since remarried in 2004, and in 2011 he retired from Con Edison after approximately 34 years of employment there. It is in connection with that employment that he committed the instant crimes.

The defendant suffers from various medical ailments, including GERD, a bleeding ulcer, herniated disks and other severe arthritic degenerative changes in his neck and back, rheumatoid arthritis and enlarged prostate. He has been diagnosed with adjustment disorder with mixed anxiety and depressed mood.

There are two other matters that the Probation Department has identified as mitigating. The first is the relationship between defendant and Quiambao, and the second is the defendant's initial cooperation with the Government.

As indicated, I am unpersuaded that either matter is of any significant value in mitigating the seriousness of defendant's crimes. To reiterate, whether or not Razzouk was initially vulnerable to accepting money from Quiambao, it is

clear that there came a time when Razzouk accepted Quiambao's bribes on the understanding that they were given to secure his assistance in the awarding of Con Ed contracts. From that time on, Razzouk was a willing and full-fledged participant in the bribery scheme, which reaped him at least $8 million in bribes.

As to Razzouk's initial cooperation with the Government, much of its value to the Government evaporated when Razzouk advised Quiambao that he intended to lie at Quiambao's trial by testifying that all of the money Quiambao had given him was for services unrelated to the business of Con Ed and importuned Quiambao to testify falsely to the same untruths. As previously indicated, however, I have considered as mitigating Razzouk's cooperation against two other defendants.

Balancing the various pertinent sentencing factors enumerated in the sentencing statute at Section 3553(a), I conclude that an incarceratory sentence of 78 months, together with the other aspects of his sentence to impose is sufficient, but not unduly severe, to accomplish the goals of sentencing. Six-and-a-half years imprisonment is undeniably a severe sentence, that in my view both reflects the seriousness of defendant's offenses and serves the goal of general deterrence. At the same time I believe it accommodates the mitigating factors noted above.

Accordingly, I sentence the defendant on Count One to the custody of the Attorney General for a period of 78 months; and on Counts Two through Four to the custody of the Attorney General for the period of 60 months. The sentences on each count to run concurrently.

I also sentence Mr. Razzouk to a three-year period of supervised release, with the following special conditions:

That he make restitution to Con Ed and National Union in an amount of $6,867,350.51 plus prejudgment interest. The rationale for which is set forth in the Statement of Reasons that I will supply in a moment; that he comply with the $6,515,809 forfeiture money judgment, which I gather he has already done; that he cooperate with the IRS in the assessment and payment of all tax owed, subject to my ruling on the outstanding dispute, which I will address in a moment; that he make full financial disclosure to the Probation Department to the extent that he has not yet done so. In that regard, the defendant shall provide the U.S. Probation Department with full disclosure of his financial records, including comingled income, expenses, assets and liabilities, to include yearly income tax returns.

The defendant is prohibited from maintaining and/or opening any individual and/or joint checking, savings or other financial accounts for either personal or business purposes without the knowledge and approval of the United States

Probation Department. The defendant shall cooperate with the probation officer in the investigation of his financial dealings and should provide truthful monthly statements of his income and expenses. The defendant shall cooperate in the signing of any necessary authorization to release information forms permitting the Probation Department access to his financial information and records.

And I prohibit possession of a firearm, ammunition or other destructive device.

Given the forfeiture and restitution orders, I find that defendant is unable to pay a fine, but will impose the mandatory $400 special assessment.

Finally, I will address the issue of the defendant's restitution beginning with what he owes to the Internal Revenue Service. As part of his plea agreement, Razzouk was obligated to recalculate the federal income tax owed for the years 2006 to 2010 and to prepare and file accurate amended returns for those years. The amended returns he subsequently proffered, however, adopted a strategy of characterizing as loans the entire $6.5 million he was required to forfeit by his cooperation agreement and deducting that amount from taxable income as if it constituted legitimate business expenses. By this manipulation, he sought to avoid paying taxes on his criminal forfeiture obligation.

As the Government correctly asserts, however, the

Internal Revenue Code and regulations expressly forbid the defendant from using a "fine or similar penalty" to reduce his taxable income. 26 United States Code Section 162(f), 26 CFR Section 1.162-21(b)(1). As the Government also correctly urges, caselaw construing the quoted provision of the code and regulations holds that criminal forfeiture payments identical in nature to those at issue in this case fall squarely within that provision and, thus, cannot be deducted from income taxes. See, for example, United States versus Nacchio, N-A-C-C-H-I-O, 824 Fed. 3d 1370, Federal Circuit 2016. Put another way, because Razzouk, in fact, acquired monies constituting ill-gotten gains over multiple tax years, he remained liable for payment of taxes on those monies. Nothing justified nonpayment of the taxes.

In a subsequent letter, defense counsel retreats from his characterization of defendant's criminal forfeiture as a loan, urging instead that the proposed unorthodox tax treatment of his client's criminal forfeiture arises via operation of Title 21 United States Code Section 853(c). Invoking this section he reasons that because pursuant to that provision titled to forfeited assets covered by the provision vest in the United States "at the time of the criminal act giving rise to the forfeiture," the assets that his client forfeited by his cooperation agreement was income that never actually vested in Razzouk. As a result, he concludes the

subsequent deduction of the forfeited funds from taxable income was proper.

The flaw in counsel's argument is that it is predicated on a statutory provision that he has ripped from its limited, unambiguous context and is, therefore, wholly in apposite. Section 853(c), which references Section 853(n), addressing issues of title to forfeited assets solely in the context of the interests of potential third-parties. That is, it concerns those forfeitures where a third-party may have an interest in forfeited assets that may be superior to that of the Government. No such third-party issues are present in this case. Defendant's forfeiture obligation runs solely to the Government and 853(c) provides no basis to eliminate it.

As a final justification for eliminating his client's restitution obligation, counsel asserts that a prior prosecutor, who is no longer associated with the United States Attorney's office, sanctioned the tax manipulations that accomplished that end. As a result, defense counsel contends the Government's current "belated objection" constitutes "a waiver of the argument it now advances." The contention is meritless. An initial flaw in counsel's argument is that it is based on counsel's mere hearsay assertion and is, therefore, of no probative value in this proceeding. More importantly, it is undercut by the explicit language of defendant's cooperation agreement. Paragraph 19 of that

agreement states that: "The defendant agrees that the forfeiture of the above sum of money is not to be considered payment on any income taxes that may be due."

As the Government aptly notes, "This provision makes clear that the defendant understood that his forfeiture payment was neither the kind of expense that is deductible from his income tax liability, nor a payment towards his income tax liability." That is at the Government's response, ECF number 71 at page 2. Rendering hollow any subsequent claim by the defendant of unfair surprise. Pertinent, too, was the provision of the agreement that: "Apart from stated written proffer agreements, no promises, agreements or conditions have been entered into other than those set forth this agreement, and none will be entered into unless memorialized in writing and signed by all parties." That is from the plea agreement at paragraph 21.

Thus, the language of the agreement explicitly barred reliance on oral understandings such as the one defense counsel advances here. In addition, the fact that the defendant may have told a former prosecutor that he was filing amended returns claiming unsupportable deductions does not mean that the IRS accepted the amended returns. As the Government explains, the IRS can acknowledge receipt of the amended returns without agreeing to the defense counsel's calculation of the taxes set forth therein.

Given that the defendant pled guilty to a tax crime, it was completely appropriate of the IRS to await the conclusion of defendant's criminal case to reject the calculations defendant made in the amended returns he filed.

More importantly, even assuming the defendant was misled by an oral statement purportedly made by the prior prosecutor after execution of the cooperation agreement and that some five years passed before defendant was disabused of the misconception, there is simply no prejudice to the defendant warranting blank waiver of the IRS's right to restitution. Certainly, the Government did not knowingly relinquish a known right to restitution on behalf of the IRS explicitly established by the cooperation agreement. At worst, defendant was prejudiced by incurring interest and late fees from the date in 2012 when he filed the inaccurate amended returns. Since the Government has withdrawn any request that restitution include penalties for late payment of the defendant's tax obligations, that's at the Government's tax response at Note 1 on page 3, and because I intend to limit the interest that accrued on the restitution owed, any possible prejudice to the defendant will be wholly ameliorated.

As to interest, the Government has requested that I include in defendant's tax restitution the interest accrued on the restitution owed to the IRS between the time he filed his

amended returns on October 2, 2012 to December 1, 2017. In the alternative, the Government asks that I order that he pay restitution in the amount of tax and interest owed as of October 2, 2012, the date the defendant filed his amended returns. That is in the same document at page 3, Note 2.

Over five years has passed since the defendant filed his amended returns, and until his meeting with Quiambao on December 18 of 2015 he was acting as a cooperator for the Government. In response to the Government's request to hold the PSR in abeyance, see ECF number 18, neither Judge Mauskopf nor I proceeded to sentence the defendant or calculate the amount of tax restitution he owed. Given the delays in sentencing, some occasioned by the defendant, and others beyond the defendant's control, I exercised my discretion, see United States v. Qurashi, Q-U-R-A-S-H-I, 634 Fed. 3d, 699 at 704, Second Circuit 2011, to order that the defendant pay restitution to the IRS in the total amount of $1,982,238.34, which reflects the amount of tax and interest owed as of October 2, 2012, the date defendant filed his amended returns.

As I indicated as to restitution to Con Ed and National Union, I award $6,867,350.51, plus pre-judgment interest as further explained in the written opinion that I am now giving you.

(Pause.)

THE COURT: Mr. Razzouk, as you know there are

circumstances in which you may appeal the sentence. You can discuss that with your lawyer. If you choose to appeal, a notice of appeal must be filed within 14 days. If you could not afford counsel, a lawyer would be appointed to represent you.

Is there any particular requested designation?

MR. ZISSOU: Judge, would you kindly recommend northeast region, Otisville actually I think it would be?

THE COURT: I will recommend Otisville.

MR. ZISSOU: And would you give time until he's designated to surrender?

THE COURT: Yes.

MR. TUCHMANN: I'm sorry, when you say time, is there a time for a report date?

THE COURT: Dennis is calculating the date right now.

MR. TUCHMANN: I see. Thank you, Your Honor.

THE COURTROOM DEPUTY: May 21st at 12 noon.

(Matter concluded.)

oooOooo

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Stacy A. Mace — April 3, 2018

STACY A. MACE — DATE

APPENDIX E

18 U.S.C. § 3663A

Section 3663A - Mandatory restitution to victims of certain crimes

(a)

(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant-

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense-

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to-

(i) the greater of-

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim-

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)

(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense-

(A) that is-

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 3 of the Rodchenkov Anti-Doping Act of 2019;

(iv) an offense described in section 1365 (relating to tampering with consumer products); or

(v) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) or (iii) if the court finds, from facts on the record, that-

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

18 U.S.C. § 3663A

Added Pub. L. 104-132, title II, §204(a), Apr. 24, 1996, 110 Stat. 1227; amended Pub. L. 106-310, div. B, title XXXVI, §3613(d), Oct. 17, 2000, 114 Stat. 1230; Pub. L. 112-186, §6, Oct. 5, 2012, 126 Stat. 1430; Pub. L. 116-206, §5, Dec. 4, 2020, 134 Stat. 1000.

EDITORIAL NOTES

REFERENCES IN TEXT*Section 3 of the Rodchenkov Anti-Doping Act of 2019, referred to in subsec. (c)(1)(A)(iii), is classified to section 2402 of Title 21, Food and Drugs.*

AMENDMENTS2020*-Subsec. (c)(1)(A)(iii) to (v). Pub. L. 116-206, §5(1), added cl. (iii) and redesignated former cls. (iii) and (iv) as (iv) and (v), respectively. Subsec. (c)(3). Pub. L. 116-206, §5(2), inserted "or (iii)" after "paragraph (1)(A)(ii)" in introductory provisions.****2012****-Subsec. (c)(1)(A)(iv). Pub. L. 112-186 added cl. (iv).* ***2000****-Subsec. (c)(1)(A)(ii). Pub. L. 106-310 inserted "or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a))," after "under this title,".*

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE*Section to be effective, to extent constitutionally permissible, for sentencing proceedings in cases in which defendant is convicted on or after Apr. 24, 1996, see section 211 of Pub. L. 104-132 set out as an Effective Date of 1996 Amendment note under section 2248 of this title.*