

## **STATEMENT OF JURISDICTION PURSUANT TO F.R.A.P. 28(a)(2)**

1. This appeal is taken from a Judgment of Conviction entered against the Defendant-Appellant, Sean Southland, in the United States District Court for the Northern District of New York, by the Hon. Norman A. Mordue, United States District Court Judge, on May 17, 2005.

2. The District Court had subject matter jurisdiction, pursuant to 18 U.S.C. § 3231, because this was a criminal case alleging violations 21 U.S.C. § 846.

3. Jurisdiction in this appeal is invoked in this Court pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

4. A Notice of Appeal was timely filed on May 23, 2005, pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure.

## STATEMENT THE ISSUE

1. Whether the district court erred in calculating Mr. Southland's offense level by applying a 2 level enhancement for obstruction of justice pursuant to U.S.S.G. § 3C1.1, thereby making the sentence unreasonable.

## **STATEMENT OF THE CASE**

On July 1, 2004, Mr. Southland was charged by Indictment with conspiring to distribute and possess with intent to distribute approximately three kilograms of cocaine, in violation of 21 U.S.C. §§ 841 and 846. (A8). Mr. Southland pled guilty to the Indictment without a plea agreement on November 29, 2004. (A4). The district court sentenced him on May 13, 2005 to 71 months imprisonment and 5 years of supervised release. (A27). Mr. Southland timely filed a Notice of Appeal on May 23, 2005. (A39).

## STATEMENT OF THE FACTS

### I. The Offense Conduct.

On May 1, 2004, at approximately 12:30 PM, Immigration and Customs Enforcement (ICE) agents, received information from the Royal Canadian Mounted Police about a planned cocaine shipment from the United States going into Canada near the Alexandria Port of Entry. (PSR<sup>1</sup> II, ¶ 4). ICE Agents conducted surveillance at Wellesley Island State Park Marina, just north of Alexandria Bay in the United States. (PSR II, ¶ 4). Canadian Officials conducted surveillance at the River Rat Marina on the Canadian side of the border of the United States near the Alexandria Port of Entry. (PSR II, ¶ 4).

Donald Sauer and Peter Hopper, Canadian citizens, were observed departing in a boat from the River Rat Marina in Canada. (PSR II, ¶ 4). They were later observed preparing to dock the boat at the Wellesley Island State Park Marina. (PSR II, ¶ 4). Sean Southland and his Canadian girlfriend, Sarah Corey, were parked 50 yards from the location of the boat in a Ford Escape. (PSR II, ¶ 4). Mr. Southland removed a cooler from the vehicle and delivered it to Donald Sauer

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<sup>1</sup> “PSR” refers to the Presentence Investigation Report. The Presentence Investigation Report, dated February 14, 2005 (referred to as PSR I), and the revised Presentence Investigation Report (referred to as PSR II), dated March 23, 2005, are included as sealed under separate cover. References are to the paragraph contained in the originals.

and Peter Hopper. (PSR II, ¶ 4). The Agents approached the boat, inspected the cooler and found approximately 3 kilograms of cocaine. All four individuals were arrested. (PSR II, ¶ 4).

## **II. Cooperation of Co-Defendants.**

Donald Sauer, Peter Hopper, and Sarah Corey, cooperated with authorities following their arrest. (PSR II, ¶¶ 5,6,8,9,10). Donald Sauer told the authorities that Peter Hopper was not involved in the drug activity and Hopper was released within hours of his arrest. (PSR II, ¶ 5).

On May 3, 2004, a Criminal Complaint was filed against Sean Southland, Sarah Corey, and Donald Sauer, that charged the defendants with conspiring to possess with intent to distribute and to smuggle from inside the United States to Canada, Cocaine, a Schedule II controlled substance, in violation of 21 U.S.C. §§ 846, 841 and 967. (A2). Their initial appearance was held on the same date and all three defendants were remanded to the custody of the United States Marshal. (A2-3). Sarah Corey and Sean Southland were incarcerated at separate facilities.

Sarah Corey was interviewed by agents numerous times following her arrest and on May 27, 2004, the Complaint against Sarah Corey was dismissed pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure based on her cooperation with the Government. (A11, PSR II, ¶¶ 5,6,8,9,10).

Thereafter, a one count Indictment was filed against Sean Southland and Donald Sauer on July 1, 2004. (A8). The Indictment charged, from April 2004 until May 1, 2004, in Jefferson and Onondaga Counties in the Northern District of New York, Sean Southland and Donald Sauer conspired to distribute and possess with intent to distribute approximately three kilograms of cocaine, and with aiding and abetting each other in doing the same, in violation of 21 U.S.C. §§ 841 and 846, and 18 U.S.C. § 2.<sup>2</sup> (A8-10).

### **III. Adjustment for Obstruction of Justice.**

A Presentence Investigation Report was prepared on February 14, 2005. The PSR estimated the amount of cocaine involved in the offense to be 3 kilograms. That amount resulted in a base offense level of 28. (PSR I, ¶ 27). Since Mr. Southland met the criteria set forth in the safety valve provision of U.S.S.G. § 5C1.2 (1)-(5), two levels were subtracted pursuant to U.S.S.G. § 2D1.1(b)(7). (PSR I, ¶ 28). The grant of relief pursuant to § 5C1.2 would allow the court at sentencing to depart from the 5 year statutory mandatory minimum sentence. See 21 U.S.C. § 841 (b)(1)(B)(iii). Based upon Mr. Southland's acceptance of responsibility and the fact that he timely notified authorities of his

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<sup>2</sup> The Indictment contained a forfeiture allegation, requiring the defendant to forfeit to the United States, pursuant to 21 U.S.C. § 853, a 2002 Mercedes Benz. (A9-10).

intention to enter a plea of guilty, three levels were subtracted pursuant to U.S.S.G. § 3E1.1(a) and (b). (PSR I, ¶¶ 33 & 34). Mr. Southland's total offense level was 23. (PSR I, ¶ 37). His Criminal History Category was I (PSR I, ¶ 41), thereby setting his advisory United States Sentencing Guideline range of imprisonment at 46 to 57 months. (PSR I, ¶ 73).

The PSR contained a short summary of letters<sup>3</sup> Mr. Southland sent to Sarah Corey while both were incarcerated in early May of 2004. (PSR I, ¶¶ 13-20). The Probation Officer did not believe these letters called for an adjustment for obstruction of justice and added the following explanation:

After his arrest, Southland sent several letters to Sarah Corey asking her not to cooperate with government officials investigating the offense. The probation officer believes this obstructive conduct does not rise to the level which would trigger a two-level increase under U.S.S.G. § 3C1.1 as it is not clear if the defendant asked or instructed Corey to provide false information. Additionally, there is no evidence his communications with Corey resulted in a significant impediment to the investigation of the offense. As reflected in Application Note 3 of U.S.S.G. § 3C1.1, obstructive conduct can vary widely in nature, degree of planning, and seriousness. Application Note 4 sets forth examples of the types of conduct to which this adjustment is intended to apply and Application Note 5 sets forth examples of less serious forms of conduct that ordinarily can be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. It is the probation office's opinion that the defendant's conduct falls within this less serious

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<sup>3</sup> Also enclosed with the Presentence Investigation Reports are copies of the letters Mr. Southland sent to Sarah Corey that are the subject of the obstruction of justice enhancement.

form of obstructive conduct. (PSR I, ¶ 24).

Defense counsel filed a Sentencing Memorandum on March 16, 2005 seeking a sentence of time served on the basis of Mr. Southland's background and extraordinary post-rehabilitative efforts. (A5). Mr. Southland had been incarcerated for nearly a year. During his incarceration at the Onondaga County Justice Center, Mr. Southland volunteered for the "Project Re-Connect Mentor Program." The program was developed to assist incarcerated minors in making decisions to change their direction in life. Mr. Southland shared his life experiences and the negative consequences of his actions with the minors in the program. Mr. Southland also was involved in the "Clean and Sober Living Program." In addition to this work, Mr. Southland saved an inmate's life by clearing his air passage as he choked on his own blood.

The Government objected to the probation officer's failure to apply an aggravating role adjustment and an adjustment for obstruction of justice. As a result, the PSR was revised on March 23, 2005 to add a two level enhancement for obstruction of justice pursuant to U.S.S.G. § 3C1.1, increasing Mr. Southland's advisory guideline range of imprisonment to 57 to 71 months. (PSR II, ¶¶ 13, 47,83).

The revised PSR contained the same summary of the letters contained in

the original PSR. (PSR I, ¶¶ 13-20, PSR II, ¶¶ 13-20). With respect to the obstruction of justice enhancement, the Probation Officer stated:

Based on a summary of those letters which was prepared by the case agent, the probation officer initially determined the obstructive conduct did not rise to the level which would trigger a two-level increase under U.S.S.G. § 3C1.1. Nevertheless, copies of the letters were subsequently furnished to the probation officer and, after a view of the contents of those letters, it appears the defendant did attempt to obstruct or impede the administration of justice by attempting to unlawfully influence Sarah Corey. (PSR II, ¶ 24).

The Probation Officer then included “selected quotations” from the letters which the Probation Officer believed were the “best examples” to support the adjustment.

(PSR II, ¶¶ 25-33). Relying on United States v. Peterson, 238 F.3d 127 (2d Cir. 2004), the Probation Officer concluded that Mr. Southland “attempted to delay the investigation, exculpate himself or, at the very least, minimize his criminal responsibility by urging Sarah Corey to not cooperate with investigators and by suggesting she should maintain a false version of events.” (PSR II, ¶ 34).

According to the Probation Officer, the contents of the letters from May of 2004, did not coincide with Mr. Southland’s position in his Sentencing Memorandum, filed on March 21, 2005, wherein he admitted his involvement in the offense.

(PSR II, ¶ 34). The revised PSR did not take away Mr. Southland’s adjustment for acceptance of responsibility. (PSR II, ¶ 35).

#### **IV. The Sentence.**

Mr. Southland was sentenced on May 13, 2005. The district court adopted the guideline calculations in the revised PSR and applied the obstruction of justice enhancement. On this issue, the district court stated:

“...I’ve reviewed the cases that were submitted and considered the letters, I read all 12 letters that were sent during May of 2004 and there’s no question in my mind that the letters when read in totality and in separate in several parts they overwhelmingly support that the defendant did attempt to have Sarah Corey provide false information to the Government that would aid in his defense...” (A12-13).

With respect to Mr. Southland’s post-rehabilitative efforts, the court found that “his heart was there to help himself” and not others. (A16-17). Mr. Southland addressed the court and admitted that when he was first incarcerated he had a lot of pride and believed he was better than everyone else. (A17-18). He acknowledged that he had a bad attitude, but that his incarceration caused him to “wake up.” (A18). His involvement in the mentor program helped him to take a hard look at himself and the path he had taken that resulted in his incarceration. (A18-21).

The district court sentenced Mr. Southland to 71 months imprisonment, to be followed by 5 years of supervised release. (A27).

## SUMMARY OF THE ARGUMENT

Following the Supreme Court's decision in United States v. Booker, 125 S.Ct. 738 (2005), sentences of federal criminal defendants are reviewed for reasonableness. This review involves two components: review for procedural compliance, and review of the length of the sentence in light of the factors set forth in 18 U.S.C. § 3553(a) that the district court must consider.

Mr. Southland's sentence of 71 months imprisonment is unreasonable and violates the Sixth Amendment because the district court erroneously enhanced Mr. Southland's offense level for obstruction of justice. The district court relied upon letters that Mr. Southland sent to his girlfriend, Sarah Corey, who was also a co-defendant in the case. These letters were written within the first two weeks of Mr. Southland's arrest and prior to the filing of the Indictment. Ms. Corey was cooperating with authorities and was dismissed from the case.

The letters clearly show that Mr. Southland did not attempt to impede the investigation of the case. Mr. Southland was legally entitled to confer with a co-defendant in his case. Mr. Southland shared with Ms. Corey legal advice he had received. This conduct was lawful and constitutionally protected. Therefore, Mr. Southland's sentence must be vacated and the case remanded for resentencing.

## **POINT I**

### **MR. SOUTHLAND’S SENTENCE IS UNREASONABLE AND VIOLATES THE SIXTH AMENDMENT BECAUSE THE DISTRICT COURT IMPROPERLY APPLIED A TWO LEVEL ENHANCEMENT TO MR. SOUTHLAND’S OFFENSE LEVEL FOR OBSTRUCTION OF JUSTICE.**

Mr. Southland’s sentence should be vacated and the case remanded for resentencing because the district court improperly increased Mr. Southland’s offense level by two levels pursuant to U.S.S.G. § 3C1.1 for obstruction of justice. The district court relied on letters Mr. Southland sent to Sarah Corey to apply this enhancement. The letters in question failed to show that Mr. Southland willfully obstructed, or attempted to obstruct, the administration of justice. Consequently, the sentence the district court imposed upon Mr. Southland is unreasonable.

#### **A. Standard Of Review**

Following the Supreme Court’s decision in United States v. Booker, 125 S.Ct. 738 (2005), sentences imposed upon federal criminal defendants are reviewed for “reasonableness.” Id. at 765.

##### **1. The Booker decision.**

Booker reaffirmed the constitutional mandate first announced in Apprendi v. New Jersey, 530 U.S. 466 (2000), that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed

statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi, 530 U.S. at 490. In order to comply with the Sixth Amendment right to a jury trial, the “statutory maximum” is the maximum sentence a judge may impose solely on the basis of facts found by a jury or admitted by the defendant. Blakely v. Washington, 124 S.Ct. 2531, 2537 (2004).

Booker held that the mandatory nature of the United States Sentencing Guidelines violates the Sixth Amendment. As a result of this conclusion, the Supreme Court excised those provisions of the Federal Sentencing Reform Act of 1984 that make the Guidelines mandatory. These are 18 U.S.C. § 3553(b)(1), mandating use of the Guidelines, and 18 U.S.C. § 3742(e), which “sets forth standards of review on appeal.” Booker, 125 S.Ct. at 756-757. Instead of being bound by the Sentencing Guidelines, a sentencing court is now required to consider the Guideline ranges along with the statutory factors set forth in 18 U.S.C. § 3553(a).

## **2. The reasonableness standard.**

This Circuit noted several important aspects of Booker that concern the selection of sentences:

- (1) the Guidelines are no longer mandatory;
- (2) the sentencing judge must consider the Guidelines and all of the other

factors listed in 18 U.S.C. § 3553(a)<sup>4</sup>;

(3) consideration of the Guidelines will normally require determination of the applicable Guideline range;

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<sup>4</sup> 18 U.S.C. § 3553(a) provides: (A) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider ----

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

(2) the need for the sentence imposed—

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

(B) to afford adequate deterrence to criminal conduct;

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

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

(3) the kinds of sentence available and the sentencing range established for —

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines —

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

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

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

(4) the sentencing judge should decide, after considering the Guidelines and the § 3553(a) factors whether (i) to impose the sentence that would have been imposed under the Guidelines, i.e., a sentence within the applicable Guidelines range or within permissible departure authority; or (ii) to impose a non-Guideline sentence;

(5) the sentencing judge is entitled to find all the facts appropriate for determining either a Guideline sentence or a non-Guideline sentence.

United States v. Crosby, 397 F.3d 103, 113 (2d Cir. 2005).

Process, as well as substance, factor into the reasonableness of the sentence imposed by the district court. Id. at 114. If a sentencing judge commits any of the following procedural errors, the sentence will be considered unreasonable:

(1) making factual findings and mandatorily enhancing a sentence above the range applicable to facts found by a jury or admitted by a defendant;

(2) mandatorily applying the applicable Guideline range that was based solely on facts found by a jury or admitted by a defendant;

(3) failing to consider the applicable Guideline range as well as the factors listed in § 3553(a), and instead simply selecting what the judge deems an appropriate sentence; and

(4) limiting consideration of the applicable Guideline range to the facts found by the jury or admitted by the defendant, instead of considering the applicable Guideline range, as required by § 3553(a)(4), based on the facts found by the court. Id. at 114-115.

An error that occurs in calculating the advisory Guideline range that

“appreciabl[y] influence[s]” the sentencing decision could render the final

sentence unreasonable. United States v. Rubenstein, 403 F.3d 93, 98 (2d Cir. 2005); see also United States v. Skoczen, 405 F.3d 537,549 (7<sup>th</sup> Cir. 2005)(stating that “[e]ven under the advisory regime, if a district court makes a mistake in calculations under the Guidelines, its judgment about a reasonable sentence would presumably be affected by that error”).

**B. The District Court Made A Mistake In Calculating Mr. Southland’s Advisory Guideline Range By Applying A 2 Level Enhancement For Obstruction Of Justice Pursuant To U.S.S.G. § 3C1.1.**

U.S.S.G. § 3C1.1 provides for a two level increase in the offense level

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

U.S.S.G. § 3C1.1.

Section 3C1.1 has a mens rea requirement. See United States v. Cassiliano, 137 F.3d 742,747 (2d Cir. 1998); United States v. Stroud, 893 F.2d 504, 507 (2d Cir. 1990). The enhancement can only be imposed if Mr. Southland “willfully” obstructed, or attempted to obstruct, justice. Cassiliano 137 F.3d at 747. Willfully requires a finding that the defendant consciously act with the purpose of obstructing justice. Stroud 893 F.2d at 507.

The PSR set forth short summaries of the letters and selected quotations that the Probation Officer believed were the best examples to support the enhancement. Set forth below, is a more detailed summary of the letters that clearly demonstrate that Mr. Southland did not consciously act with the purpose of obstructing justice.

May 6, 2004: Mr. Southland tells Ms. Corey how much he misses her and apologizes to her that she is “mixed up in this situation.” He states, “I hope you can forgive me. I have no idea if you hate me or what.” He asks her to write back but says he understands if she no longer wants to have anything to do with him. He provides her with his parents’ number to call if she needs anything. He goes on to state how much he misses her. He asks her what she plans on doing if she is released from jail and says, “I don’t want to lose you. You have to be able to live your life and obviously I really messed that up. I don’t think I deserve you anyway.” In a P.S., he tells her that his parents are sending some money.

May 8, 2004: Mr. Southland writes that he has not received a letter from Ms. Corey and he does not know what is going on with her. He provides his parents’ phone number and tells her to call them and let them know where she is. He asks her how she spends her day and he tells her how he spends his. He then says, “You have to tell me what you want to do. You shouldn’t have any part in my problems. They are just trying to press you for info that will incriminate you or me. You should not let your attorney work a deal no matter what he says. If your parents need to visit me then tell them too. I love you and I don’t want to lose you.” He tells her how much he misses her and thinks about her. He tells her this is the last letter he will write since he has not heard from her and ends with, “You make sure your attorney knows you intended to go to med school in Phoenix at Midwestern University.”

May 12, 2004: He tells her that he learned she called his mother. He asks her to keep in touch with his mother so he will be know how she is doing. He talks to her about his work out and calorie intake and tells her how much he misses her. He tells her that his parents are trying to get her an attorney and are trying to get her back to Canada. He says, "they are using your detention against me to cooperate because I have said nothing which makes the case hard to prove. They used everything you said against you. I hope you are getting an idea of how this works. Don't let time in make you impatient and do something stupid." He tells her he is willing to speak with her attorney. He tells her he was set up and advises, "But you won't go down with me if you don't incriminate yourself. Even though you had nothing to do with this they will try and involve you as much as possible." He tells her he does not know what he is going to do yet, that his parents are taking care of their bills and says, "I don't know if you even want me to still try and look out for you or not. This is the third letter and still I haven't received anything from you." He goes on to talk about his father taking care of his business ventures and that he plans on retaining a private attorney. He says, "If I just cop a plea to get you out and settle this I may just do that." He wants her to finish school in Arizona and go to medical school. He again asks her to write to let him know how she is doing, he wants to know what programs she is in, what she is eating, and how her days go.

May 13, 2004: He mentions that he finally received a letter from her and finally knows that she is OK. He tells her to contact his parents if she needs anything. He asks her about her attorney and asks if she is happy with his advice. He tells her how much he misses her, that he will write her everyday, and that she will have money in her commissary account. With respect to the case, he states, "I will be talking to people next week to try and work things out so I will keep you posted. Don't make any moves without talking to me. Please I don't want to lose you if you make a decision that could take you away from me I will be very unhappy. I have always been honest with you and kept you involved in my life and maybe it wasn't so good because look what has happened." He says he understands if she does not want to wait for him.

May 14, 2004: He tells her that his parents will be visiting her, that he is “trying to work things out with the Feds but I don’t know if that’s the right decision. My parents will explain and you can tell no one about it. Can I still trust you” Or should I not share stuff with you? Its your call. You know how I feel about betrayal?” He tells her that he wants to be with her forever. He apologizes for bringing her into this situation and says, “I was suppose to protect you and I feel like a total failure on that part.” He says, “I don’t really care how this ends as long as I know you will be with me in the end.” He tells her he wants her to have his children and he wants to share her life. He informs her that he just spoke with his father and they sent her money and a package. With respect to the case, he advises, “I am trying to work a deal with the Feds to get my life back and I need you to not do anything until I try and work something out...Please trust me when I say I am trying to work something out. They want me and I am the only one who has said nothing which make there case difficult. You know the rest.” With respect to his plan, he asks, “I need to know if you want to be with me no matter what it takes. I know this is a lot but I need to know before I proceed. You are dear to my heart and I respect your thoughts and wishes. You know I have always done everything with your safety in mind. This situation was a big mistake.”

May 15, 2004: He talks about his love for her and how he will be with her no matter what. He advises her on eating and working out. He asks her about her bills and furniture they purchased, he does not want her credit to be ruined. He talks to her about his kids and their living arrangements. He writes that he has been reading, doing crossword puzzles, and working out.

May 16, 2004: He tells her how much he loves her and that he cannot live without her. He talks to her about working out, his Sea Castle Resort business venture, his health, and the other inmates. He tells her that he has spoken with three different attorneys, and states, “One of them said he thinks he can get me off the others didn’t. One of them says you’re the key so he will be coming to see you. Listen to what he has to say and let me know what you think. I want you to be

able to be in AZ if you will...The attorney will explain everything. Baby I know this is selfish but I need to know if you are willing to dedicate yourself to me or not just because I have to make major decisions about our futures right now.”

May 16, 2004: He tells her how much he misses her and loves her. He apologizes for pushing his emotions on her. He tells her if she decides to leave him, that he will always love and cherish her. With respect to the case, he says, “Do not be pushed around manipulated or scared. There is nothing we can do to improve our situation by cooperating at this point. They will only manipulate us and go for the throat. You must believe me when I say this. I keep reading the[i]r complaint and get so angry when I listen to what they say you said. I can’t believe its true.” He then says, “No more about that suff” and tells her he loves her.

May 17, 2004: The letter starts half-way down the page. Mr Southland asks Ms. Corey to listen to the attorney and to tell him what she thinks. He tells her that the attorney can relay information to him and says, “if you don’t agree with what was in the complaint let him know. My thought is that the Feds embellished your statements. But you let me know.” He ends the letter telling her how much he misses her and thinks about her.

May 17, 2004: He tells her he has not received a letter from her and he does not know what to think. He tells her that the case is “an excellent opportunity for us to evaluate our compatibility...You have to be honest with yourself and me.” He tells her, “If you know you have not or cannot be loyal to me then please tell me and lets be honest about where we stand.”

May 17-18, 2004: He tells her he cannot stop thinking about her and that he will always love and cherish her. He tells her about a dream where her family rejected him. He asks her, “Do I just stay in here and plea do my time and start from scratch and alone when I get out.” He tells her about an attorney visit, and says, “I just got back from a visit with my attorney and she says they want to talk to me. I don’t

know if I should or not. They will use it against me like they did you. So I am thinking that I need more time. My attorney requested a Rule 16 which is discovery. They need you to get me etc. If they have you they will get me. It's a catch 22." He tells her that he is sending her a hand delivered letter and asks her to please address it and let him know what she thinks. "I want to do what is right for our futures and you must help me decide." He has another visit with his attorney that he shares with her, and says, "I just talked to my attorney and she said they want to talk to me but that they want me to give them the Mercedes. They said that you already admitted it was involved. I have no idea what is going on now because that car had nothing to do with anything regarding this situation. I am so angry right now I can't stand it. Baby I wish you would have just listened to me. They just make up shit as they go."

May 18, 2004: Mr. Southland starts the letter by apologizing for the negative letters he previously sent to her. He then talks to her about the case: "I miss you so much and when I hear what is going on with the case and I'm not receiving letters I get so angry and emotional. If I hurt your feelings I am sorry. I have been so depressed. I just found out that they said that you said we were there several different times and I now they are thinking I have been doing this for months and used the car. Honey you wrote me a letter saying that you are being honest and telling them everything well apparently they are using that to insinuate all kinds of crazy things. Also you are letting your parents handle the case. Well just so you know what happens to you and the way you cooperate affects me severely. They are using your cooperation against me. This is driving me crazy, we didn't do anything." He tells her he just received two letters from her, he loves her, he can't stop thinking about her, and he wants to be with her. With respect to the case, he says, "You know you will get off because I will plea to get you off if necessary. That part I will handle. Can you still be with me if I am in prison for 5 years? Would you marry me? Could we have kids? What are your thoughts?" He tells her he is considering cooperating but is not sure, "I just want to give you back your life and opportunities."

Undated letter<sup>5</sup>: “I have been talking to several attorneys as you know to try and resolve this matter. Mr. Schultz has recognized the same thing that I thought. They have to have two or more people for a conspiracy. They have been using you as the link to establish this conspiracy. Mr. Schultz will explain it more. He feels you can walk away from this clean as I always knew. But only you can hurt yourself by talking...Please tell Mr. Schultz everything you have told everyone so that he can see if he can help. This will in turn help my case. Also I want him to be able to get it so there are no negative repercussions on your record so you can enter the U.S. at will. This is to protect your rights and of course I am still looking into a deal with the Feds.” He tells her he has made no statements, and then sets forth a statement he will provide if he chooses to speak with the Feds. (This statement is set forth in paragraph 33 of the Revised PSR).

The Probation Officer and the Government, upon urging the district court to apply the enhancement, relied upon Application Note 4(a), which calls for the adjustment if a defendant “threaten[s], intimidat[es], or otherwise unlawfully influenc[es] a co-defendant, witness, or juror, directly or indirectly, or attempt[s] to do so.” U.S.S.G. § 3C1.1, comment., n. 4(a). The district court erroneously concluded that the letters “overwhelmingly support that the defendant did attempt to have Sarah Corey provide false information to the Government that would aid in his defense.” (A12-13).

The letters do not show that Mr. Southland had a corrupt motive. Instead,

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<sup>5</sup> The undated letter was not sent by Mr. Southland to Ms. Corey in the mail. The PSR states, without explanation, that Mr. Southland attempted to have the letter hand delivered to Sarah Corey. The letter was found in the possession of Donald Sauer. (PSR II, ¶ 24).

Mr. Southland's primary focus in the letters is to maintain his romantic relationship with Ms. Corey. The tenor of the letters display that Mr. Southland was worried about Sarah Corey and he did not want her future to be ruined. He felt responsible for her being involved in the case and he was trying to find a way to protect her. He advised her not to speak with the authorities because he was concerned that she might wrongfully incriminate herself. In fact, Mr. Southland told Ms. Corey that he would plead guilty if that would result in the dismissal of the charges against her.

Mr. Southland was writing these letters within the first two weeks of his arrest, he was apprehensive about how to proceed legally. Mr. Southland himself was considering cooperating with the authorities. He simply wanted to obtain legal advice and determine his options before he proceeded. He requested that Ms. Corey not take any action during this process. Numerous times, he tells her if she no longer wants to be with him, he will understand.

Even conceding that Mr. Southland was attempting to influence Ms. Corey's actions, that influence had to be unlawful. Application of the enhancement in this case raises serious constitutional questions, as illustrated by In re Winship, 397 U.S. 358 (1970):

The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. Id. at 361.

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence- - that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law.’ Id. at 364.

These principles are embedded in our system of criminal jurisprudence. Mr. Southland was presumed innocent at the time of his arrest. It was the Government’s burden, not Mr. Southland’s, to establish each and every element of the crime charged. Mr. Southland had no obligation to assist in his own prosecution. He was constitutionally permitted to obtain the assistance of counsel and defend himself against the charges. Mr. Southland learned from his attorneys the elements of conspiracy that the Government had to prove beyond a reasonable doubt and he began preparing his defense. He shared this information with his co-defendant. That conduct is lawful.

To apply the enhancement to the facts of this case would be fundamentally unfair. In essence, the Government is permitted to meet their burden of proof by influencing co-defendants, or co-conspirators into cooperating with the Government. Alternatively, if the defendant prepares to defend himself against the

charges by asking his co-defendants not to cooperate with the Government, then he is punished by receiving a longer prison sentence. By allowing the law to operate in this manner, the accused is presumed guilty upon the filing of a criminal charge. This is not how our system of criminal jurisprudence was intended to operate.

As the Probation Officer correctly noted in the original PSR, the letters did not show that Mr. Southland asked or instructed Ms. Corey to provide false information to the authorities. (PSR I, ¶ 24). Nor did the letters result in a significant impediment to the investigation. (PSR I, ¶ 24). In fact, Ms. Corey was cooperating with the authorities during the time that Mr. Southland was writing to her. Mr. Southland's sentence must be vacated and the case remanded to the district court with instructions to remove the two level enhancement for obstruction of justice, thereby setting Mr. Southland's advisory Guideline range of imprisonment at 46 to 57. (PSR I, ¶ 73).

## CONCLUSION

For the reasons advanced above, Mr. Southland's sentence must be vacated and remanded to the District Court for re-sentencing.

DATED: August 22, 2005

Respectfully submitted,

ALEXANDER BUNIN  
Federal Public Defender

By: \_\_\_\_\_

\_\_\_\_\_  
Lisa A. Peebles, Esq.  
Assistant Federal Public Defender  
Bar Roll No.: 507041

*As to Brief:* Melissa A. Tuohey, Esq.  
Research & Writing Attorney  
Bar Roll No.: 510807  
4 Clinton Square, 3<sup>rd</sup> Floor  
Syracuse, New York 13202  
(315) 701-0080  
(315) 701-0081 (*fax*)

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

Docket No.: 05-2530

V.

SEAN SOUTHLAND,

Defendant-Appellant.

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**CERTIFICATE OF SERVICE**

I, Valarie Bruni, the Legal Secretary for the Federal Public Defender's Office, do hereby state under penalty of perjury that on August 22, 2005, I served a copy of the Brief on Appeal and Appendix of the Defendant-Appellant, Sean Southland, on the following:

Elizabeth S. Riker, Esq., AUSA, James M. Hanley Federal Building, 100 South Clinton Street, 9<sup>th</sup> Floor, Syracuse, NY 13261 (*Via Hand Delivery*)

Sean Southland, Reg. # 12711-052, (*Via First Class Mail*)

USP LOMPOC, US Penitentiary, 3901 Klein Blvd., Lompoc, CA 93436

DATED: August 22, 2005

ALEXANDER BUNIN

Federal Public Defender

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Valarie Bruni, Legal Secretary  
Office of the Federal Public Defender  
4 Clinton Square, 3<sup>rd</sup> Floor  
Syracuse, New York 13202  
(315) 701-0080